



## Inside this issue:

1st Circuit	1
2nd Circuit	4
3rd Circuit	5
4th Circuit	6
5th Circuit	8
6th Circuit	12
7th Circuit	16
8th Circuit	21
9th Circuit	27
10th Circuit	29
11th Circuit	33
D.C. Circuit	34

# Labor & Employment Law Section Monthly Update

## First Circuit Cases

**The First Circuit granted the National Labor Relations Board's petition to enforce an order requiring the employer to bargain with a union and denied the employer's cross-petition for review.**

*N.L.R.B. v. NSTAR Elec. Co.*, 2015 WL 4881089 (1st Cir. Aug. 17, 2015).

The National Labor Relations Board (NLRB) petitioned to enforce its order that requires an electric and gas company to bargain with a union that the majority of the company's dispatch-center workers voted to join.

The company cross-petitioned for review contended, however, that the company had no obligation to bargain with the union on behalf of those workers. The company argued that these workers' responsibilities made them either supervisors under the Act, thus the Act did not provide them a right to have a union represent them. Conse-

quently, the employer argued it had no duty to bargain with the union. Even though the employees were highly skilled and charged with critical tasks, they did not meet any of the criteria established in Section 2(11) of the Act. Since the evidence on record did not show that the workers had supervisory authority as defined



Submitted By:  
José R. González-Noguerras,  
Esq., and Ms. Kathleen  
Fernández Vidal

Jiménez, Graffam &  
Lausell

jgonzalez@jgl.com  
P. O. Box 366104  
San Juan, Puerto Rico  
00936-6104

José González is a partner with the firm of Jiménez, Graffam & Lausell in Puerto Rico. His practice focuses on Labor & Employment Law and Civil Litigation.

by the Act, the First Circuit granted the Board's application for enforcement, and denied NSTAR's cross-petition for review.

The First Circuit granted the National Labor Relations Board's petition to enforce an order requiring the employer to bargain with a union and denied the employer's cross-petition for review of the Board's order because substantial evidence supported the Board's finding that the workers at issue were not supervisors under the Act.

## The Court of Appeals held that states –including Puerto Rico- are not constitutionally required to provide jury trial in civil cases.

***Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 2015 WL 4881092 (1st Cir. Aug. 17, 2015).**

An employee sued several employers alleging violations of the Age Discrimination in Employment Act, and retaliation and various Puerto Rico statutes. After complaint was served in Puerto Rico and in the Puerto Rico's Office of the Courts Administration per court order, the United States District Court for the District of Puerto Rico dismissed the action based on valid forum

selection clause, but entered declaratory judgment holding that the Commonwealth of Puerto Rico had to afford civil litigants the Seventh Amendment right to jury trial. The Commonwealth and Office of the Courts Administration appealed the declaratory judgment ruling. The Court of Appeals held that states –including Puerto Rico- are not constitutionally required to provide jury trial in civil cases, following the Supreme Court's consistent decisions.

In an employment dispute brought by an employee alleging violations of the Age Discrimination, the district court's dismissal of the dispute on the basis of a valid forum selection clause and simultaneous issuance of a declaratory judgment holding that the Seventh Amendment requires Puerto Rico to provide civil litigants with a jury trial was vacated as to the declaratory judgment because it conflicted with the binding precedent of the United States Supreme Court.



**Unpaid volunteers who performed work at Major League Baseball's FanFest in 2013 are exempt from the FLSA's minimum wage provisions.**

*Clukey v. Town of Camden*, 2015 WL 4719304 (1st Cir. Aug. 10, 2015).

Laid-off police dispatcher brought an action against the town of Camden, alleging that the town deprived him of a constitutionally protected property interest in his right to be recalled to employment without due process of law. After the dismissal of the complaint was vacated on appeal, the United States District Court for the District of Maine, granted summary judgment in favor of town and the

employee appealed. On appeal, the First Circuit considered whether the collective bargaining agreement provision requiring the employee to submit his address and phone number to the town of Camden after his layoff in order to assert his recall rights was ambiguous. The First Circuit held that the provision was ambiguous and thus concluded that there was a genuine issue of material fact as to whether the recall provision in the collective bar-

gaining agreement created condition precedent requiring laid-off town employees to submit address and phone number to the town in order to acquire right to be recalled. Consequently, the First Circuit vacated the summary judgment and remanded for further proceedings.

The First Circuit vacated summary judgment in favor of defendant based on ambiguity of the pertinent provision of the collective bargaining agreement.



Submitted by :

Stephen Bergstein  
steve@tbulaw.com

## Second Circuit Cases

### **Unpaid volunteers who performed work at Major League Baseball's FanFest in 2013 are exempt from the FLSA's minimum wage provisions.**

***Chen v. Major League Baseball Properties*, \_\_\_ F.3d \_\_\_, 2015 U.S. App. LEXIS 14275 (2d Cir. Aug. 14, 2015) .**

The Fair Labor Standards Act exempts certain volunteers from its minimum wage requirements. Under the FLSA, "the minimum wage provisions "shall not apply with respect to ... any employee employed by an establishment which is an amusement or recreational establishment ... if it does not operate for more than seven months in any calendar year." Plaintiffs in 2013 volunteered at Major League Baseball's FanFest, which coincided with the

All Star Game in New York City and was described as "the largest interactive baseball theme park in the world." To prevail, MLB must establish that FanFest is (1) seasonal and (2) a recreational or amusement establishment under the statute. FanFest meets the seasonality requirement. It is also a recreational or amusement establishment. "'Establishment' for purposes of the exemption ... mean[s] a distinct, physical place of business as opposed to an integrated multiunit business or enterprise. Under the regulations, this definition is not limited to retail endeavors. While Chen "argues that

although he physically worked at FanFest, he was an employee of Defendants Major League Baseball and the Office of the Commissioner of Baseball, who planned and controlled all aspects of FanFest's operations," "This physical separation is determinative in deciding whether these business units constitute a single establishment or multiple ones. Where such business units are not located at the same premises, overlap in operations and personnel is immaterial to determining whether they are separate establishments."

## Third Circuit Cases

**No Cases to Report**





Submitted by:  
Paul Sun  
Emily Erixson  
ELLIS & WINTERS LLP  
Paul.sun@elliswinters.com  
Post Office Box 33550  
Raleigh, North Carolina  
27636  
Telephone: 919.865-7000  
www.elliswinters.com

Paul Sun's practice focuses primarily on business litigation and appeals. Mr. Sun has experience in the areas of trade secrets and unfair competition, business and health care fraud (civil and criminal), employment, consumer claims, premises and product liability, and contract disputes. He has tried cases in areas as varied as health care fraud, product liability/wrongful death, and First Amendment. Mr. Sun also regularly handles civil and criminal appeals in the North Carolina and federal appellate courts. He has served as the Rules Editor for the American Bar Association's *Appellate Practice Journal*.

## Fourth Circuit Cases

### **Fourth Circuit reverses dismissal of Title VII retaliation claim where counselor had reported and advocated for an employee's discrimination claim.**

***DeMasters v. Carilion Clinic*, No. 14-144, 2015 WL 4717873 (4th Cir. Aug 10, 2015).**

John Doe, a Carilion employee, reported to an employee assistance program ("EAP") counselor that his manager had been harassing him for several months. The EAP counselor opined that Doe was a victim of sexual harassment and reported Doe's complaint to human resources. After an investigation, the harasser was fired and barred from the premises. However, a few days later, the EAP counselor received a distressed call from Doe indicating that the harasser had been allowed temporarily to return. Doe further relayed that he was facing

hostility from co-workers who aligned with the harasser.

The EAP counselor reached out to human resources to report Doe's ongoing complaints and offered to assist in resolving the matter. Human resources declined the EAP counselor's assistance. Several days later, Doe reported that the hostility had increased and he feared violent retribution from the harasser. The EAP counselor told both Doe and a human resources manager that he believed Carilion was mishandling Doe's complaint.

Doe later filed a Title VII complaint against Carilion. Following settlement of that matter, the EAP counselor met with

several managers and corporate counsel. During the meeting, the EAP counselor reported that he had told Doe that he believed Doe was a victim of sexual harassment and that his complaints were being mishandled. Two days later, the EAP counselor was fired on the grounds that he had made statements that could reasonably have led Doe to conclude he should file a lawsuit against Carilion, and had acted contrary to the best interest of the company.

The EAP counselor filed a complaint against Carilion under Title VII's Opposition Clause, which forbids retaliation against an employee who opposes a practice made unlawful by the statute. The district court granted Carilion's



motion to dismiss and the EAP counselor appealed. The Fourth Circuit reversed.

To establish a prima facie Title VII retaliation claim, a plaintiff must show (1) that he engaged in a protected activity, (2) that his employer took an adverse employment action, and (3) that there was a causal link between the two events.

According to the Fourth Circuit, the district court erred when it concluded that the EAP counselor had not engaged in protected activity because the court had analyzed each of the counselor's communications with Carilion separately, rather than as a continuous course of oppositional conduct. The Fourth Circuit stated that when an employee communicates to his employer a belief that the employer has engaged in employment discrimination, the communications virtually always constitute the employee's opposition to the activity. The touchstone is whether the plaintiff's

course of conduct *as a whole* (1) communicates to her employer a belief that the employer has engaged in a form of employment discrimination; and (2) concerns a subject matter that is actually unlawful under Title VII or that the employee reasonably believes to be unlawful.

Taking the allegations as true, the Fourth Circuit found that the EAP counselor sufficiently alleged that he believed Carilion's handling of Doe's complaints was responsible for the retaliatory hostile work environment, and he sufficiently communicated those beliefs to Carilion. The Fourth Circuit further found that the allegations were sufficient to show a causal connection between the EAP's counselor's communications and his termination, where that adverse action followed immediately after a meeting with management, and Carilion's written communications confirmed management's dissatisfaction with what the Fourth Circuit found was oppositional conduct.

The Fourth Circuit also held that the district court erred by employing the so-called "manager rule" to bar the EAP counselor's claims. The district court held that under the manager rule, an employee whose job responsibilities include reporting discrimination claims is prevented from seeking protection under Title VII's anti-retaliation provision. The Fourth Circuit joined the Sixth Circuit in ruling that the manager rule has "no place in Title VII enforcement."



Submitted by,

Donna Phillips Currault  
Gordon, Arata, McCollam  
Duplantis & Eagan, LLC  
201 St. Charles Ave. 40th  
Floor  
New Orleans, Louisiana  
70170-4000  
Direct: (504) 569-1862  
E: dcurrault@gordonarata.com

Donna Currault's practice centers on complex litigation including class action defense in state and federal courts. A significant portion of her practice is also devoted to handling cases and advising clients on employment matters such as employment agreements with non-competition and non-solicitation provisions, federal and state anti-discrimination statutes, employment policies and procedures and employee handbooks.

## Fifth Circuit Cases

**Joining other Circuits, the Fifth Circuit recognizes that a joint employment relationship does not create liability in the co-employer for actions taken by the other employer, and the joint employer must bear some responsibility for the discriminatory act to be liable under the ADA.**

***Burton v. Freescale Semiconductor, Inc.*, \_\_\_ F.3d \_\_\_, 2015 WL 4742174 (5th Cir. Aug. 10, 2015).**

Burton, an employee of Manpower of Texas, LP assigned to work as Freescale Semiconductor, Inc., sued both entities as joint employers for discriminatory termination in violation of the Americans with Disabilities Act. She was assigned to Freescale in 2009 and initially received had neutral to positive performance reviews. In January 2011, she broke a platform where microchips are seated during construction, for which she was counseled and reprimanded. Then in March, she inhaled chemical fumes while at work. Several weeks later, she went to the company's Medical Department complaining of chest pains, and visited a hospital emergency room a few weeks later. In mid-June, she became concerned that the chemical exposure was causing her chest pains, and she reported here suspicion to Freescale and later to Manpower.

Two weeks later, Freescale decided to terminate her employment based

on "poor performance." The termination was not carried out until a month later, in late July. When the time to terminate approached, Manpower requested supporting documentation. Freescale "began generating retrospective 'documentation'" and meticulously catalogued Burton's shortcomings. Manpower recommended against termination due to paltry documentation, but Freescale insisted. Manpower personnel then conducted a conference call with Freescale personnel to discuss the termination and establish a "communication plan." Manpower then terminated Burton based on four discrete incidents, two of which occurred after Freescale had already made the decision to terminate her.

Applying the hybrid economic realities/common law control test, the Fifth Circuit found that Freescale was Burton's employer under the ADA. Agreeing with co-employer Manpower's position that it could not be liable under the ADA simply based on its status as co-employer, the court noted that it could be liable if it either participated in the



discrimination or knew of it and failed to take corrective measures within its control. Noting that Manpower carried out the termination after professing a belief that it was legally dubious and that it participated in the “communication plan” the court found sufficient evidence to support the inference that Manpower gave both Burton and the EEOC false information regarding the termination. The court likewise rejected Manpower’s argument that it was contractually required to carry out the termination at Freescale’s request because Manpower had an independent duty to comply with the ADA.

The Court then addressed whether there was sufficient evidence of pretext. Recognizing that poor work performance is an adequate legitimate, non-discriminatory reason when coupled with specific examples, the court refused to consider post-decision examples of poor performance because those could not have motivated the decision since they had not yet occurred. The court then considered whether Burton rebutted each specific example of poor performance proffered by Freescale. The Court concluded its analysis by finding that a reasonable jury could find evidence of pretext based on erroneous statements in the EEOC position paper, new examples of poor performance after original examples are proven illegitimate, lack of contemporaneous documentation of poor performance when required by company policies, and shift in rationale for termination. Accordingly, the court reversed the district court’s summary judgment in favor of the employers.

### **Fifth Circuit agrees that cat’s paw analysis applies to retaliation claims.**

***Zamora v. City of Houston*, \_\_\_ F.3d \_\_\_, 2015 WL 4939633 (5th Cir. Aug. 19, 2015).**

Houston police officer Christopher Zamora sued the City of Houston for unlawful retaliation under Title VII. Zamora claimed that he was subjected to retaliation after his father filed a race discrimination and retaliation suit. Specifically, he al-

leged that the Houston Police Department removed him from a prestigious Unit and later suspended him as a result of his father’s suit. Although Zamora’s claim was initially dismissed on the basis that he could not complain of retaliation for his father’s protected activity, the Fifth Circuit reversed after *Thompson v. North American Stainless LP.*, 562 U.S. 170 (2011) (holding that a plaintiff

could base a retaliation claim on the protected activity of a close family member).

After a jury returned a verdict in plaintiff’s favor, the City of Houston appealed. The Fifth Circuit first addressed whether Zamora’s reliance on the cat’s paw theory, which was endorsed in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), was



viable after the Supreme Court’s decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) (retaliation claimant subject to higher “but for” standard of causation whereas discrimination claimant need only show that discriminatory motive was a “motivating factor” for the adverse employment action). The Court stated that *Nassar* and *Staub* read together make clear that the cat’s paw analysis remained viable in the but-for causation context. It reasoned that standard of causation is relevant only to the latter portion of the *Staub* test – instead of being a proximate cause, the supervisor’s act must be the but-for cause of the ultimate employment action.

## **Fifth Circuit reverses trial court’s denial of motion for judgment as a matter of law to set aside plaintiff’s jury verdict on religious discrimination claim.**

***Nobach v. Woodland Village Nursing Center, Inc.*, \_\_\_ F.3d \_\_\_, 2015 WL 4978749 (Aug. 20, 2015).**

Woodland Village Nursing Center terminated a nursing activities aide after she refused to perform a scheduled activity with a resident, specifically reading the Rosary. When an assistant asked plaintiff to perform the task, the aide said, “I can’t do the Rosary with [the resident]. I’m not Catholic, and it’s against my religion.” She did not explain her religious beliefs at that time. Not until after her termination did she explain that she is a former Jehovah’s Witness who had been disfel-

lowshipped (expelled) from the church, but that she still held the beliefs and followed the tenets.

Woodland Village moved for judgment as a matter of law on the basis that Plaintiff failed to present any evidence, direct or circumstantial, that it was motivated by her religion or religious beliefs before it discharged her. The trial court denied the motion, and the Fifth Circuit reversed. Citing *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2803 (2015), the Fifth Circuit noted that, in evaluating causation under Title VII, the question is not what the employer knew about an employee’s religious beliefs nor whether the employer

knew there would be a conflict between the employee’s religious beliefs and some job duty. Rather, the critical question is what motivated the employer’s employment decision. Although plaintiff told the assistant that she could not pray the Rosary because of her religion, there was no evidence that either plaintiff or the assistant ever told anyone involved in the termination decision of that fact. Accordingly, because the employer decided to terminate plaintiff before becoming aware of her religious belief, her Title VII claim failed.



**In the first direct appeal of a Merit System Protection Board adjudication, the Fifth affirms the dismissal of a former IRS agent's claim under the Whistleblower Protection Enhancement Act.**

*Aviles v. Merit System Protection Board*, \_\_\_ F.3d \_\_\_, 2015 WL 5010031 (5th Cir. Aug. 24, 2015).

An IRS agent was terminated after being removed from his position for being absent without leave, failing to follow managerial directive to report to work, and providing misleading statements in matters of official interest. Previously, the agent had filed a complaint with the Office of Special Counsel in which he alleged that a private entity had engaged in misconduct that IRS management helped to cover up, and he reported to IRS officials that the private entity had committed income tax fraud. After the termination, the agent filed suit under the Whistleblower Protection Act alleging that he was retaliated against for disclosing evidence of a violation of law. See 5 U.S.C. 2302(b) (8)

The Administrative law Judge dismissed the case on the basis that the Whistleblower Protection Act precludes retaliation for the disclosure of governmental wrongdoing, and the former agent alleged only private wrongdoing, and the vague and speculative assertion that IRS officials allowed or facilitated the conduct does not constitute a nonfrivolous allegation of whistleblowing activity. The Merit System Protection Board affirmed that decision.

On appeal, the former employee argued that the 2012 Whistleblower Protection Enhancement Act (“WPEA”) legislatively overruled prior jurisprudence to now cover disclosures of wrongdoing by private entities made by federal employees in the normal course of job duties fell. The Fifth Circuit rejected that argument, holding that Congress did not

intent to protect disclosures of purely private wrongdoing when it enacted the WPEA. “The text indicates that the focus of the statute is government wrongdoing. . . . Nothing in the text of the WEPA purports to extend subsection (b)(8) to extra categories of disclosure; the language simply clarifies that otherwise-covered disclosures are not excluded merely because they are made during an employee’s normal duties.” *Id.* at \*6 (emphasis in original). The court likewise found that the former employee’s vague assertions of cover-up were insufficient to state a nonfrivolous claim, noting that he failed to take advantage of numerous opportunities to amend his complaint to cure the deficiencies and even on appeal, failed to explain the necessary “who, what, when, where and how” of the government involvement in the alleged cover up.



Submitted by:

Scott R. Eldridge, Esq.  
Miller, Canfield, Paddock &  
Stone, P.L.C.  
One Michigan Ave., Suite 900  
Lansing, Michigan 48933  
eldridge@millercanfield.com  
[http://  
www.millercanfield.com/  
ScottEldridge](http://www.millercanfield.com/ScottEldridge)

Scott Eldridge focuses his practice on management-side labor and employment law, governmental litigation, and commercial litigation. He represents colleges and universities, municipalities, non-profits, public bodies, government contractors, and commercial enterprises in state court, federal court, and administrative tribunals. Scott also routinely represents his clients in the Michigan Court of Appeals and the Michigan Supreme Court.

## Sixth Circuit Cases

**The accommodation provisions of the Patient Protection Affordable Care Act, which permit a religious-based, non-profit employer to object to the Act’s contraceptive mandate and seek an accommodation, do not substantially burden the employer’s religious freedoms or otherwise violate the Religious Freedom Restoration Act, because, under the accommodation, the obligation to provide contraceptive coverage – whether under a fully-insured or self-insured plan – shifts to either the insurer or the third-party administrator, relieving the objecting employer from having to pay for contraceptive coverage.**

*Michigan Catholic Conference and Catholic Family Services, et al. v. Sylvia Mathews Burwell*, \_\_\_ F.3d \_\_ (6th Cir. 2015).

In Michigan Catholic Conference, the Plaintiffs – a group of religious employers – challenged certain aspects of the Patient Protection Affordable Care Act’s (“ACA”) “contraceptive mandate,” which permits non-profit

entities and closely-held corporations who object to the mandate on religious grounds to seek an accommodation. The accommodation, according to the Court, “effectively insulates these entities from the contraception-provision process: they no longer have to pay for contraceptive coverage, and all individuals under their plans are notified of the

entity’s religious objections. The insurance issuers and third party administrators for these entities, however, must continue to provide coverage for contraceptives to individuals insured under these plans.”

Plaintiffs initially challenged the exemption and accommodation process, arguing that both violated their rights under the Religious Freedom Restoration Act (“RFRA”). The



Sixth Circuit rejected those claims. The U.S. Supreme Court granted the Plaintiffs' petition for certiorari to review their challenges to the accommodation process only, vacated the Sixth Circuit's decision, and remanded it for further consideration in light of its decision in *Burwell v. Hobby Lobby Stores, Inc.*, where the Supreme Court held that closely-held, for-profit companies with sincerely held religious beliefs could not be compelled to provide contraceptive coverage to their employees.

On remand, the Sixth Circuit "adhere[d] to [its] original disposition," explaining that "the [Supreme] Court discussed the accommodation favorably, noting for instance that the accommodation served the government's interests in providing access to contraception while at the same time not impinging on the religious beliefs of objecting non-profits." In short, the Sixth Circuit held that the accommodation provision of the ACA

does not violate the RFRA, and "that nothing in Hobby Lobby changes this conclusion."

More specifically, the Court explained that of the six Plaintiffs that fall within the accommodation provision, one offered a self-insured plan. The others offered fully-insured group health plans. According to the Court, for each there are "different implications for the contraceptive mandate." But the end result under the accommodation provisions of the ACA is the same – that is, the objecting employer is not obligated to make payments for contraceptives. For fully-insured plans, the obligation to provide contraceptive coverage shifts to the insurer. And for self-insured plans, the obligation shifts to the third-party administrator. After examining Hobby Lobby, the Sixth Circuit concluded that non-profits eligible for an accommodation may "refrain from paying for contraception," but opting out "does not negate

the underlying federal requirement that some entity must provide contraceptive coverage." (emphasis original). And by forcing a religious-employer to affirmatively object and opt-out of the payment mandate, and shift the coverage burden to an insurer or TPA, the RFRA does not, according to the Court, substantially burden the Plaintiffs' religious freedoms.



**The FDA’s repeated warnings and notices of potential enforcement actions if regulatory violations were not corrected, precluded a pharmaceutical company from relying on the “unforeseeable business circumstances” exception to the WARN Act’s 60-day notice requirement when it conducted a mass layoff after the FDA finally initiated enforcement action and executed a mass seizure of products.**

***Calloway v. Caraco Pharmaceutical Laboratories, LTD*, \_\_ F.3d \_\_ (6th Cir. 2015).**

In *Caraco Pharmaceutical Laboratories*, the district court concluded, after a bench trial, that the defendant violated the Worker Adjustment and Retraining Notification Act (“WARN”) by failing to comply with its notification provision after closing its drug manufacturing operation. “The sole issue before [the Court] is whether the United States Food and Drug Administration’s (‘FDA’) mass seizure of Caraco products was an unforeseeable business circumstances that would ex-

cuse Caraco from complying with the WARN Act’s requirement to notify employees at least 60 days prior to a mass layoff.” The Sixth Circuit concluded that it was not, affirming the district court’s judgment against Caraco.

Caraco, a Michigan drug manufacturer, laid off employees in the representative class in its Detroit-area facilities in June 2009 after the FDA initiated enforcement proceedings against it. As a drug manufacturer, the defendant was subject to the regulatory authority of the FDA, including periodic inspections. The FDA issued two warning letters (one in

2000 and one in 2002) to the defendant after an inspection, notifying it of “violations of regulatory significance.” Both letters stated that the company’s failure to correct the violations could promptly result in enforcement action by the FDA without further notice. The FDA issued another notice of violation in 2005. Caraco wrote numerous times to the FDA explaining that it was taking corrective actions. After another inspection in 2007, the FDA issued another notice of violations. Caraco, in response issued a recall of certain drugs. The FDA issued additional notices of violations in 2008.



Caraco then hired a consulting firm to conduct an independent audit. The consulting firm stated in an email to Caraco that “[i]t is our opinion that the company faces the real possibility of FDA enforcement action,” and “conceivably may be a ‘mass seizure’.” The FDA sent another notice of violations in late 2008, stating specifically that “failure to promptly correct these violations may result in legal action without further notice, including without limitation, seizure and injunction.” In early 2009, Caraco filed its form 10-Q with the U.S. Securities and Exchange Commission acknowledging the most recent FDA warning letter. In March and April 2009, Caraco issued nationwide Class I and Class II recalls of certain drugs out of concern over manufacturing defects. On June 24, 2009, the FDA filed a complaint for the forfeiture of drugs and seized various products manufactured by Caraco. On June 26, 2009, Caraco began a mass

layoff, but granted no notice to any of the employees until the layoffs began. It eventually issued WARN Act notices on July 6, 2009, 11 days after the layoff started. The notices stated that they were tardy because the company did not “reasonably foresee that the FDA would take the action that it did.”

The plaintiffs sued alleging violations of the WARN Act. The district court granted judgment for the plaintiffs, finding that it was reasonably foreseeable in April 2009 that the FDA would execute a large-scale enforcement action against Caraco. The Sixth Circuit affirmed, rejecting Caraco’s argument that the unforeseeable business circumstances exception to the 60-day notice requirement under WARN applied. Although the applicable federal regulations provide that a government-ordered closing of an employment site that occurs without prior notice may be an unforeseeable business circumstance, accord-

ing to the Court, the test focuses on the employer’s business judgment. The Court rejected Caraco’s argument that the tenor of the boilerplate warning letters did not suggest probable, imminent action by the FDA. According to the Court, “Caraco...knew that enforcement action could result from product deficiencies and its consultants had told them such action was likely. Moreover, Caraco had already publicly acknowledged the 2008 warning letter...” Furthermore, the Court noted, Caraco “also received increasingly critical” warnings from the FDA and its consultants. Finally, the Court rejected Caraco’s argument that the FDA’s actions were not foreseeable because the FDA failed to provide an exact date in its warning as to when the enforcement action would commence.



Submitted By:  
Cate Lindemann,  
Associate  
D:312.795.3283  
F: 312.277.7679 fax  
E: CLindemann@littler.com  
321 North Clark Street,  
Suite 1000 | Chicago, IL 60654

Cate Lindemann advises and represents employers in a broad range of matters, with a focus on collective, class, and hybrid actions brought under the federal Fair Labor Standards Act and state wage and hour laws. She has successfully defeated conditional certification, Rule 23 class certification, and obtained summary judgment in discrimination, retaliation, and wage and hour cases.

## Seventh Circuit Cases

**Seventh Circuit limits application of the Supreme Court's decision in *Dukes v. Wal-Mart*, 131 S. Ct. 2541 (2011) with respect to localized decisions precluding certification.**

*Chicago Teachers Union, Local No. 1, American Federation of Teachers, AFL-CIO v. Board of Education of the City of Chicago*, No. 14-2843 (7th Cir. Aug. 7, 2015).

Three individual teachers and the Chicago Teachers Union brought a class action suit for racial discrimination in connection with the closing of a selection of schools in the City of Chicago, saying that the closings disproportionately affected African Americans and seeking a halt on any further closings. The district court denied their bid for class certification.

Reversing the district court and determining

the class could be certified under both Rule 23(b)(2) and 23(b)(3), the Seventh Circuit followed its precedent in *McReynolds v. Merrill Lynch*, 672 F.3d 482 (2012) to hold that “a company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local managers with discretion – at least where the class at issue is affected in a common manner.” While there was no written policy guiding how the schools were selected, the Board had used a three-step process to identify schools affected, and the first two steps were objective, such that “an early discrimina-

tory process can taint the entire process” to provide the glue that binds the claims together. Moreover, the third step involved a small group of decision-makers sitting in a room together, “of one-mind, using one process,” and the “concept of a uniform criteria and single-decision maker merge.” The plaintiffs therefore could satisfy both commonality and predominance. This case shows the Seventh Circuit limiting application of the Supreme Court’s decision in *Dukes v. Wal-Mart*, 131 S. Ct. 2541 (2011) with respect to localized decisions precluding certification.

Further, the Seventh Circuit held that the district court misunderstood the nature of the relief sought under the proposed Rule 23(b)(2) class, because the plaintiffs sought the same declaratory and injunctive relief for everyone in the class – a moratorium on further school closings – without any need for individual equitable or monetary determinations. And even if individual determinations were necessary, the question of liability – whether the process was discriminatory – could be determined on a class wide basis.

**The Seventh Circuit upheld certification, despite the bank's efforts to compensate them in response to complaints, because the question remained whether there was an unwritten policy against paying overtime, and whether some employees remained underpaid.**

***Bell v. PNC Bank, N.A.*,  
No. 14-3018 (7th Cir.  
Aug. 31, 2015).**

The plaintiff worked as a senior banker at a Chicago branch of PNC Bank. She brought suit under the Fair Labor Standards Act, Illinois Minimum Wage Law, and Illinois Wage Payment and Collection Act for the claim that she was not paid for time she spent to bring in new accounts, work she had to do outside regular work hours due to understaffing at the bank. She

purportedly brought these claims on behalf of a class, alleging the failure to pay her overtime for this work was part of a policy or practice by the bank not to pay this overtime, despite the bank having a written policy prohibiting off-the-clock work. The district court certified a class, and the Seventh Circuit affirmed.

After the plaintiff had complained about overtime compensation, the bank conducted an investigation. The plaintiff

resigned seven months after the investigation, and at that time, the bank paid her an additional amount to compensate her for unpaid overtime hours. The plaintiff disagreed that this was enough compensation. The bank's investigation reports showed that other employees at the same bank branch had complained about unpaid overtime, and the branch manager responsible for the failure to pay overtime was terminated. In discovery, the bank also produced internal investigation reports of unpaid



Submitted By:  
David K. Haase  
Shareholder  
Chicago, IL  
dhaase@littler.com  
(312) 795-3286

David K. Haase has extensive experience representing employers in all aspects of labor and employment law. He has particular expertise in litigating wage and hour class/collective actions, unfair competition claims, such as noncompetition agreements and trade secrets, and employee benefits litigation. David has litigated the full panoply of employment-related matters before the federal and state courts. David is the chair of Littler's Pro Bono Committee.



overtime, showing that 90% of Illinois branches had no complaints of unpaid overtime, but including a handful of examples of branches with such complaints.

The district court relied on these records to certify a class of employees from 26 bank branches, concluding that the question of whether there was an unofficial policy or practice requiring off-the-clock work was a common question, and that individualized issues did not predominate. The Seventh Circuit upheld certification, despite the bank's efforts to compensate them in response to complaints, because the question remained whether there was an unwritten policy against paying overtime, and whether some employees remained underpaid.

In its ruling, the Seventh Circuit provided some guidance in how it understands the Supreme Court's language from *Dukes v. Wal-Mart*, 131 S. Ct. 2541 (2011) with respect to the pleading standard and certification decisions. Namely, the court of appeals noted that "a court weighing class certification must walk a balance between evaluating evidence to determine whether a common question exists and predominates, without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits." Moreover, the bank's efforts to cure any unpaid overtime complaints did not resolve the questions remaining of why such violations occurred and if they were fully resolved, such as whether they included statutory penalties. Finally, the Seventh Circuit concluded that even if certain class members were not harmed by an unofficial policy not to pay overtime (e.g., if they did not work over 40 hours a week), they could be excluded during a later determination on the merits.



**Employer failed to present “ironclad” evidence that the plaintiff’s work could not have been manipulated to the extent she claimed and thus, her claims had to be heard by a jury.**

***Miller v. Polaris Laboratories, LLC*, No. 14-2621, 2015 WL 4772664 (7th Cir. Aug. 13, 2015).**

A sample processing technician will have the opportunity to present her claims of racial discrimination to a jury after the Seventh Circuit reversed the district court’s grant of summary judgment, based on a cat’s paw theory of liability. Plaintiff was terminated for poor performance after she failed to log enough samples per hour

on a daily basis. She presented evidence that several other employees had used racial slurs to refer to her, the only black employee in her area. She also claimed that these employees had tampered with her assignments to hurt her performance, which ultimately led to her termination. The Seventh Circuit found it to be a close call, but employer failed to present “ironclad” evidence that the plaintiff’s work could not have been manipulated to the extent she

claimed and thus, her claims had to be heard by a jury to decide whether the incidents were part of a larger pattern or were impossible to impute onto the employer. The court of appeals also determined that where the plaintiff had complained about racially charged statements, which were followed by alleged manipulation of her work, there was a sufficient inference that she was retaliated against for her complaints, a claim that must also be resolved by a trier of fact.



## **The district court granted summary judgment to the employer, but the Seventh Circuit reversed with respect to the plaintiff's FMLA interference and retaliation claims.**

***Preddie v. Bartholomew Consolidated School Corp.*, No. 14-3125, 2015 WL 5005203 (7th Cir. Aug. 24, 2015).**

Plaintiff was an elementary school teacher suffering from diabetes, with a son suffering from sickle cell anemia, conditions which caused him to have 23 total absences in a school year. Plaintiff brought suit against the school district under the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA") and Title VII of the Civil Rights Act, after his teaching contract was not renewed following these absences. The district court granted summary judgment to the employer, but the Seventh Circuit reversed with respect to the plaintiff's FMLA interference and

retaliation claims.

The court of appeals affirmed judgment on the plaintiff's ADA claims, as he had never requested an accommodation, and he was not a qualified individual with a disability, because it was reasonable to conclude that 23 absences prevented him from performing the essential functions of his teaching position. Likewise, his ADA retaliation claim failed because he did not assert any rights under the ADA. The plaintiff also could not revive his Title VII and Section 1981 claims, where he did not show any similarly situated employees were treated differently or that he was meeting his employer's legitimate expectations.

In finding sufficient evidence on the FMLA claims, however, the court

of appeals found that plaintiff provided school officials with sufficient notice to make them aware of his need for statutory leave for both his son and himself. Though the plaintiff never specifically requested time off under the FMLA, because he informed his employer that his absences were medically related, the school was sufficiently put on notice. He also established a dispute of material fact with respect to his FMLA retaliation claim, specifically whether school officials used his leave as a "negative factor" in the decision to not renew his contract, including when they discouraged him from incurring additional absences related to caring for his son.

## Eighth Circuit Cases



Submitted by:  
 Phillip Kitzer, Attorney  
 Teske, Micko, Katz, Kitzer  
 & Rochel  
 kitzer@teskemicko.com  
 www.teskemicko.com  
 222 South 9th Street, Ste  
 4050  
 Minneapolis, MN 55402  
 Phone: 612-746-1558

Phillip Kitzer's practice consists solely of representing employees in employment-related disputes. He represents clients in matters involving whistleblower retaliation, employment discrimination.

### **Summary judgment in favor of employee affirmed on FMLA entitlement claim because uncontroverted evidence existed that Plaintiff was qualified for FMLA. Employee's motion to amend judgment reversed because employer had a right for a jury to determine damages.**

***Wages v. Stuart Mgmt. Corp.*, \_\_\_ F.3d\_\_\_, 2015 U.S. App. LEXIS 13942 (8th Cir. Aug. 10, 2015).**

Wages began working for Defendant StuartCo on November 17, 2008 as a caretaker. In the summer of 2009, Wages learned she was pregnant, and that her pregnancy was high risk due to a previous health issues. Stuart sought information about FMLA, but did not receive a response from the human resources director. In October and November, Wages began experiencing complications with her pregnancy and was placed on work restrictions limit-

ing her to no more that 20 hours per week. Wages provided a doctor's note on November 13. Wages' supervisor, Robin Fulton, testified that Wages was "getting by" with her restrictions, but claimed that the reduction in Wages' hours prevented her from completing "the essential functions of her job." On November 16, 2009, Wages was presented with a letter stating that StuartCo was "unable to accommodate the work restrictions provided by your physician," and was fired.

Wages sued StuartCo alleging violations of the FMLA, Title VII, the

Minnesota Parenting Leave Act, and the Minnesota Human Rights Act. In January 2014, Wages filed a motion for partial summary judgment on here FMLA entitlement claim, and StuartCo filed a motion for summary judgment, requesting dismissal of all claims. The district court granted summary judgment in favor of Wages on her FMLA entitlement claim, and granted summary judgment sua sponte on Wages' FMLA retaliation claim. The district court granted summary judgment in favor of StuartCo on Wage's Title VII,



MPLA, and MHRA claims. StuartCo filed a letter requesting permission to file a motion to reconsider, and included an affidavit in support of its letter. The court rejected StuartCo's request. The parties then filed cross motions to alter or amend the judgment. StuartCo argued that the court erred by granting summary judgment, and Wages sought damages. The court rejected StuartCo's argument and awarded backpay, interest, and liquidated damages. StuartCo filed a motion to vacate the damages award, and the district court denied its motion. StuartCo appealed.

The 8th Circuit first affirmed the summary judgment decision on plaintiff's FMLA entitlement claim. In response to StuartCo's argument that Wages was not a qualified individual because it terminated her the day before her one-year anniversary, the court held that because Wages worked on November 16, she had completed the 12-month requirement and was an eligible employee as defined by the FMLA. With respect to StuartCo's argument that Wages' doctor's note was insufficient notice of the need for FMLA, the Court held that the doctor's note referencing Wage's pregnancy and need for leave was sufficient notice of Wages' need for FMLA leave.

Second, the 8th Circuit affirmed summary judgment on Wages' retaliation claim. StuartCo argued that there was no causal connection between Wages' request for FMLA and her termination, but the court noted that StuartCo provided no evidence that her termination was related to anything other than her need for a reduced schedule, which is protected under the FMLA.

Finally, the 8th Circuit reversed and remanded the district court's award of damages. The Court found that factual disputes existed, such as Wages' mitigation efforts and whether StuartCo acted in bad faith.



**Jury verdict reversed on Iowa common law wrongful discharge claim because employee was not “at-will,” and therefore could not assert a tort claim for wrongful discharge.**

*Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, \_\_\_ F.3d \_\_\_, 2015 U.S. App. LEXIS 14608 (8th Cir. Aug. 20, 2015).

Hagen was a practicing obstetrician/gynecologist for Siouxland subject to an employment contract. Each physician at Siouxland had privileges at St. Luke’s Hospital located across the street. On November 5, 2009, one of Dr. Hagen’s patients was admitted to St. Luke’s because of complications with her pregnancy. Dr. Hagen’s colleague, Dr. Eastman, did not see the patient upon admission, and Dr. Hagen was later contacted because the unborn baby was having severe complications. When Dr. Hagen arrived at the hospital, he was told that the baby had died. Dr.

Hagen swore at the nurse and accused her of killing the baby. The following day Dr. Hagen reported himself to St. Luke’s chief financial officer for yelling at the nurses, reported that the nurse did not treat the patient well, and reported that Dr. Eastman did not come see the patient. Dr. Hagen then contacted an attorney who advised him to report the incident to the medical board. He informed Dr. Eastman that he intended to do so. On November 9, Dr. Hagen was given a ten-day suspension from St. Luke’s for swearing. That day, he told his partners that he was going to advise the patient to call a lawyer because the nurse and Dr. Eastman “missed the boat.” The other three physicians discussed leaving the prac-

tice, but contacted an attorney instead. After speaking with the attorney, the physicians decided to terminate Dr. Hagen “for willful contravention of professional ethics and substantial and willful violations of other terms or conditions of his employment agreement.” Dr. Hagen sued for, *inter alia*, wrongful termination in violation of Iowa’s public policy. The jury found in Dr. Hagen’s favor and awarded him over one million dollars in compensatory damages.

The 8th Circuit reversed. Although the Iowa Supreme Court had not previously addressed the specific question of whether the tort of wrongful discharge in violation of public policy



only applied to at-will employees, the 8th Circuit held that it would. The court noted that the tort was derived from the inequality of the bargaining position in a typical at-will employer-employee relationship, and the inability of employees to otherwise obtain protection, and that inequality of the bargaining positions did not exist here. The 8th Circuit concluded that the proper action would have been a breach of contract claim for wrongful discharge, but because plaintiff declined to pursue that claim at trial, the court reversed the judgment and ordered the district court to enter judgment as a matter of law for defendants.

**Summary judgment reversed in age discrimination case, employer can be held liable even where biased individual is not decisionmaker, so long as individual involved in decisional process.**

***Thomas v. Heartland Empl. Servs. LLC*, 2015 U.S. App. LEXIS 14171 (8th Cir. Aug. 13, 2015).**

Cynthia Thomas sued Heartland Employment Services LLC, and others, alleging that the defendants terminated her employment based on her age, in violation of the Missouri Human Rights Act (MHRA). The district court granted summary judgment for the defendants and the Eighth Circuit reversed, holding a genuine issue of material fact for trial existed as to whether age was a contributing factor in Thomas's

discharge.

Thomas worked for Heartland for approximately 1 year as an account liaison and was fired when she was 53 years old. Hagen, a hospice administrator, was alleged to have unlawful age bias. According to a Heartland employee, Hagen stated in June or July 2011 "that older people didn't work as fast or were as productive as younger people," and made "comments about having fresh blood, younger employees." Hagen referred to Thomas as "the old short blond girl," and soon after Tho-

mas's discharge, Hagen told a Heartland client who expressed concern about Thomas's departure that "he likes to keep himself surrounded with young people."

Hagen denied that he supervised Thomas or had authority to discharge her; however, the regional human resources manager for Heartland testified that Hagen was "an indirect supervisor" of the account liaison personnel, and would have been "perfectly within his rights to have input on whether or not Cynthia



Thomas was terminated."

Thomas was fired in June 2011 after an audit into her mileage reimbursement requests found inaccuracies. Thomas disputed the audit's findings and insisted her requests were accurate and honest. Heartland took the position that Hagen was not a decisionmaker and thus her motive was irrelevant. The Eighth Circuit disagreed, holding that a jury could find Hagen was "closely involved" in the termination decision or the decisional process even if he did not make the decision on his own.

**\$24 million in total verdicts vacated in 2 related wage and hour class cases; Nebraska wage law only allows for recovery of wages employer expressly agreed to pay regardless of what FLSA requires.**

*Acosta v. Tyson Foods, Inc.*, \_\_\_ F.3d \_\_\_, 2015 U.S. App. LEXIS 15043 (8th Cir. Aug. 26, 2015) & *Gomez v. Tyson Foods, Inc.*, \_\_\_ F.3d \_\_\_, 2015 U.S. App. LEXIS 15041 (8th Cir. Aug. 26, 2015).

In a pair of cases under the FLSA and Nebraska's wage payment law, the Eighth Circuit held that employers had not specifically agreed to pay employees for pre- and post-shift time, and that Nebraska's Wage Payment and Collection Act did not allow for recovery of wages unless the employer previously agreed to pay

the wages.

In *Acosta*, the trial court had granted summary judgment to the plaintiffs and awarded \$19 million in damages for unpaid pre- and post-shift time, or "donning and doffing" time. In *Gomez*, a jury awarded \$5 million to the plaintiff class. The Eighth Circuit reversed and granted judgment as a matter of law to the defendants in both cases.

Nebraska's wage act requires employers to pay wages to employees as the parties agreed. The plaintiffs argued that, if

payment of wages is required by the FLSA, then it must be paid pursuant to the Nebraska law. The Eighth Circuit rejected that argument and held that, notwithstanding what the FLSA requires, employees may only bring suit under the Nebraska law for wages that the employer had previously, expressly agreed to pay—regardless of what the FLSA requires.



## Summary judgment for plaintiffs in FLSA action reversed, fact question whether drivers are employees or independent contractors.

***Gray v. FedEx Ground Package Sys.*, \_\_\_ F.3d \_\_\_, 2015 U.S. App. LEXIS 14693 (8th Cir. Aug. 21, 2015).**

Plaintiffs, a class of FedEx drivers, sued for misclassification under the FLSA. The trial court granted plaintiffs summary judgment on the question of whether they were employees under the FLSA (rather than independent contractors). The Eighth Circuit reversed and remanded, holding that a jury must decide whether the drivers were misclassified

employees.

The Eighth Circuit held that fact questions existed on several corollary issues of whether the drivers were misclassified. Namely, the extent of control under the parties' contracts did not, as a matter of law, weigh in favor of employee status because the operators were not required to deliver packages themselves, but could hire others to do it for them; and while the ongoing nature of the relationship suggested that the operators were employees, a reason-

able jury could have found that restrictions on the right to discharge, the payment scheme, and the requirement that operators provide their own vehicles favored independent contractor status.

## Ninth Circuit Cases

**The Ninth Circuit rejected Defendants' argument that they were entitled to judgment as a matter of law because, at most, they had only shown that there was conflict in the evidence presented to the jury.**

*Radtke, et al. v. Lifecare Management Partners, et al., No. 14-7079 (July 28, 2015).*

Kathy Radtke (“Radtke”) and Carmen Cunningham (“Cunningham”) (Radtke and Cunningham are collectively referred to as “Plaintiffs”) were employed as medical coders for Defendants Lifecare Management Partners and Advanta Medical Solutions, LLC (“Defendants”).

Plaintiffs alleged that Defendants failed to pay them overtime in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 207(a) *et seq.* Defendants asserted that Plaintiffs were exempt from the FLSA under the administrative and professional exemptions defined in 29 C.F.R. § 541.200 and § 541.300. Plaintiffs prevailed in a jury verdict which found that Plaintiffs were not exempt from overtime pay.

On appeal, Defendants argued that: (1) they were entitled to judgment as a matter of law notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(a); and (2) the district court erred in denying their motion for a new trial, pursuant to Fed. R. Civ. P. 59(a)(1).

Defendants argued they were entitled to judgment as a matter of law notwithstanding the verdict because no reasonable jury could have concluded that Plaintiffs were non-exempt based on the evidence at trial. Defendants argued that the statements in Plaintiffs’ resumes, job applications and emails demonstrated that their jobs fell within the administrative exemption and that Plaintiffs’ duties fit the exemption: Cunningham supervised between 9 and 22 coders, provided training and feedback to physicians regarding documentation and coding, and worked independently to evaluate

and revamp coding procedures, and Radtke was responsible for educating physicians and other clinicians and proper coding of visits, procedures and diagnoses and worked independently on projects. Further, Defendants argued that Plaintiffs’ jobs required independent judgment and discretion and Plaintiffs were hired because they were “seasoned professionals with the educational background and experience to work independently.”

Plaintiffs responded that the majority of their “primary duties” entailed coding medical records, which they supported with time cards showing Cunningham spent 75% of her time coding medical records and Radtke spent 92% of her time coding medical records. Moreover, Plaintiffs asserted that medical coding does not require the exercise of independent judgment



Submitted by :

Whitney Sedwick Meister  
Fennemore Craig  
2394 East Camelback Road,  
Suite 600  
Phoenix, AZ 85016-3429  
p: (602) 916-5412  
f: (602) 916-5612  
e: wmeister@fclaw.com

Ms. Meister practices in Arizona and Colorado in the areas of employment and labor law, civil appeals, and commercial litigation. Her practice focuses on employment litigation and counseling clients on employment issues. She represents clients on a variety of employment matters in arbitrations and mediations and before administrative agencies and courts.



and, even if some of their duties did require the exercise of discretion and independent judgment, these tasks were not Plaintiffs' primary duties.

The Ninth Circuit rejected Defendants' argument that they were entitled to judgment as a matter of law because, at most, they had only shown that there was conflict in the evidence presented to the jury. In so doing, the Court rejected Defendants' reliance on *Robinson-Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010), for the proposition that whether an employee is exempt under the administrative exemption is a question of law because in the *Robinson-Smith* case, the material facts were largely undisputed. Rather, as the Supreme Court has explained, "The question of how the [employees] spent their working time . . . is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law." Quoting *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

Defendants next argued that if they were not entitled to judgment as a matter of law, they were entitled to remand for a new trial for three reasons: (1) Radtke gave "improper testimony" that influenced the jury's verdict; (2) the court should not have allowed Cunningham to repeatedly contradict herself without giving the jury a perjury instruction; and (3) Plaintiffs attorney stated, in his opening statement, that Defendants needed to prove that Radtke and Cunningham were exempt by clear and convincing evidence.

Radtke's "improper testimony," which she "blurted out" after the trial court sustained Defendants' objection to the question, was that she was not treated as exempt under the FLSA in a subsequent job she held with Advanta. Defendants argued that the bell could not be unrung even though the trial court instructed the jury to disregard the statement. The Ninth Circuit disagreed with Defendants finding that the jury instruction, which was given twice during the trial and as part of his instructions to the jury to disregard any stricken testimony, were sufficient and there was no indication that the jury did not or was unable to follow the court's instructions.

The Ninth Circuit also rejected Defendants' argument that a new trial was warranted because Cunningham was allowed to "repeatedly contradict herself" and the trial court did not give the jury a perjury instruction. In so doing, the Ninth Circuit recognized that credibility judgments are in the "sole province of the jury" and the trial judge was not required to himself weigh the evidence, assess Cunningham's credibility and then instruct the jury as to his view of the evidence.

Finally, the Ninth Circuit addressed Defendants' final argument that a new trial was required because Plaintiffs' attorney stated, during opening statements, that Defendants needed to prove that Plaintiffs were exempt by clear and convincing evidence when the correct instruction was that Defendants had to prove every element of their defenses that Plaintiffs were exempt. The Court rejected Defendants' argument and declined to decide the appropriate standard of proof in the case "because the jury instructions and verdict form enforced the standard of proof most favorable to [Defendants] of the available options."

The Ninth Circuit affirmed the judgment of the district court.

## Tenth Circuit Cases



### **Americans with Disabilities Act, Direct Threat to Health or Safety: Summary Judgment Reversed where Job Offer Revoked but Accommodation Could Have Eliminated Significant Threat to Others.**

*Osborne v. Baxter Healthcare Corp.*, 2015 WL 4998318 (10<sup>th</sup> Cir. 2015).

Plaintiff Osborne, who is deaf, applied to work as a plasma center technician (“PCT”) at BioLife, and was conditionally offered the position pending final tests. When BioLife’s human resources department received Osborne’s medical information, it determined that she could not safely monitor the donor area of the facility because she could not hear alarms on machines which sound when some-

thing goes wrong or requires attention. When Osborne reported for her first day of work, she was informed that BioLife had rescinded her offer. She brought a claim under the Americans with Disabilities Act (ADA). The district court determined that Osborne failed to identify any accommodation that would allow her to perform the essential functions of the position, and granted summary judgment to BioLife. The Tenth Circuit reversed, concluding that Osborne raised a genuine dispute of material fact regarding her ability to per-

form the essential functions of the PCT position with reasonable accommodation.

The parties agreed that Osborne’s deafness constituted a disability for purposes of the ADA, satisfying the first element of the prima facie test for disability discrimination, as she could not hear the audible alert on the plasmapheresis machine or verbal requests from donors. The parties also agreed that BioLife rescinded her job offer specifically because she is deaf, which satisfied the third element of the



*prima facie* test. See 42 U.S.C. § 12112(a) (prohibiting discrimination against qualified individuals in job application procedures and hiring).

The primary question was whether Osborne satisfied the second element of the *prima facie* test: (1) whether she could perform the essential functions of the job, and (2) if not, whether any reasonable accommodation would enable her to perform those functions. To meet this test, the employee must show that an accommodation is reasonable on its face, meaning that it would enable her to perform the essential functions. If she does so, the burden shifts to the employer to “show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.” If the employer meets that burden, the employee must present evidence concerning her individual capabilities and suggestions for possible accommodations.

The parties agreed that the essential functions of the PCT position included “monitoring the donor area for any adverse reactions to the plasmapheresis process.” BioLife’s job description specified that the “ability to hear equipment sounds from a distance is required.” BioLife argued that if Osborne would pose any risk to the health and safety of its patients, she was unqualified to perform the essential functions of the position. The Court held that BioLife misstated the law, and noted that the ADA defines a “direct threat” as “a *significant* risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3)(emphasis added). The EEOC’s “direct threat” regulation identifies four criteria courts may consider when determining whether an individual would pose a direct threat: “(1) [t]he duration of the risk; (2)[t]he nature and severity of the potential harm; (3)[t]he likelihood that the potential harm will occur; and (4)[t]he imminence of the potential harm.” 29 C.F.R. § 1630.2(r). When the “direct threat” standard is applied in the ADA’s summary judgment burden-shifting framework, the plaintiff must initially demonstrate that her performing essential functions with a proposed accommodation would not *significantly* threaten the health and safety of others, *McKenzie v. Benton*, 388 F.3d 1342, 1354 (10th Cir.2004); otherwise the accommodation would not be “reasonable on its face,” *Barnett*, 535 U.S. at 402. Thus, the Court rejected BioLife’s argument that even a *de minimis* risk makes an accommodation unreasonable.

The district court had rejected three accommodations proposed by Osborne: (1) restructuring the PCT position by having Osborne work primarily in the sample



preparation area and less often in the phlebotomy area where monitoring donors was required, (2) visual or vibrating alerts, and (3) call buttons for use by donors. The Circuit Court agreed that the first accommodation was unreasonable, because it would still leave Osborne responsible to some extent for the essential function of donor monitoring; the Court noted that employees must be able to perform *all* of a position's essential functions, even if they are rarely called upon to perform them in practice.

The Court considered the second and third proposed accommodations together, and concluded there were genuine disputes of fact as to whether installing visual or vibrating alerts and providing call buttons to donors together would allow Osborne to perform the essential functions of the position.

Osborne had offered expert testimony that individuals with disabilities were successfully employed in the health care industry using simple technological interventions, and evidence that BioLife could request modifications that would add enhanced alert systems to its machines. This was consistent with the ADA definition of accommodation, which specifically includes "acquisition or modification of equipment or devices." 42 U.S.C. § 12111(9)(B), and with EEOC guidance pointing to the use of appropriate emergency notification systems as a form of reasonable accommodation for a deaf employee. The Court held that this evidence raised a triable issue as to whether the accommodation would allow her to perform the job's essential functions. The Court also found that the District Court had improperly required Osborne to show that the cost of such modifications was reasonable, pointing out that BioLife was required to show the proposed accommodation is *not* feasible or would constitute an undue hardship. BioLife's evidence that the modifications would require BioLife to engage its vendor to provide the modifications did not meet the standard of undue hardship.

Osborne's third proposed accommodation was to issue call buttons to donors to notify her if they experience discomfort or distress. Osborne's expert witness testified that donors could have been provided with a call button system that would visually alert her that a donor needed her attention, similar to call buttons in hospitals. BioLife argued that donors may find it difficult to use, and that Ms. Osborne may not be able to determine who pressed the call button, resulting in delayed identification of a donor in distress. The Circuit Court found that the minimal risk of these "hypotheticals" occurring simultaneously "does not come anywhere close to constituting a 'direct threat.'" to



donor health and safety. The Court warned that “[p]ermitting employers to obtain summary judgment by identifying such unlikely scenarios would eliminate ADA protection for disabled individuals working in professions where they might be tasked with the health and safety of others.”

Finding that BioLife had not supported its assertion that Osborne’s identification of the donor in distress would produce a delay, or that any delay would render Osborne unable to perform the essential function of donor monitoring, the Court found triable issues of fact as to whether the second and third accommodations together would have eliminated any “direct threat” to health and safety, and enabled Osborne to perform the essential functions of the position. The case highlights the interaction between the “direct threat” defense and the plaintiff’s *prima facie* test, and is a reminder that courts will carefully scrutinize any attempts by employers to use speculative assertions regarding such potential threats.

**Eleventh Circuit Cases**



**No Cases to Report**



Submitted by:

Jack Blum  
Paley Rothman  
4800 Hampden Lane, 6th  
Floor  
Bethesda, Maryland 20814  
(301) 968-3415  
jblum@paleyrothman.com

Jack Blum, an associate in the Litigation, Family Law and Employment Law practice groups, has experience with a wide range of litigation matters, including real estate, commercial, corporate and complex estate actions. In the area of employment law, he has worked with employers to defend employment discrimination lawsuits, assisted both employers and employees in disputes over the enforcement/ interpretation of employment agreements and drafted employment contracts and independent contractor agreements.

## D.C. Circuit Cases

**D.C. Circuit upholds Department of Labor regulation eliminating FLSA exemption for home health aides employed by third-party agencies and limiting scope of "companionship services" exemption for all home health workers."**

*Home Care Ass'n of America v. Weil*, No. 15-5018, 2015 WL 4978980 (D.C. Cir. August 21, 2015).

This case involved a challenge to a 2013 Department of Labor amendment to the FLSA exemptions for workers providing companionship services and live-in workers. While the district court had previously granted the request of three home health care agency associations to invalidate the amendments, the U.S. Court of Appeals for the District of Columbia Circuit held that the amendments were a valid exercise of the Department

of Labor's rulemaking power.

In 1975, the Department of Labor had enacted regulations creating an FLSA exemption for workers providing "companionship services" – defined as services providing fellowship, care, and protection to those who because of old age or infirmity cannot care for their own needs – and workers who are employed in domestic service in a household in which the worker resides. The 1975 regulations extended the exemptions to workers who were employed by third-parties other than the family or

household using the worker's services.

After failed attempts to alter these rules in 1993, 1995, and 2001, the Department of Labor in 2013 amended the companionship services and live-in worker exemptions. The 2013 amendment provided that, unlike under the 1975 regulations, third-party employers of workers providing companionship services or live-in domestic services could not avail themselves of the FLSA exemption. The 2013 amendment also narrowed the "companionship services" exemption by limiting the amount of house-



hold work (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medication, and arranging medical care) to 20% of the total hours worked. Previously, an exempt companionship services worker could perform an unlimited amount of these services while still remaining exempt.

The D.C. Circuit analyzed the amendments' validity under the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), first looking to whether the statutory provision on which the regulation was based is unambiguous or ambiguous and then, if the provision is ambiguous, analyzing whether the Department of Labor's interpretation was a reasonable interpretation.

The D.C. Circuit found that the FLSA was ambiguous as to whether the companionship and live-in services exemptions applied to third-party employees. It based this find-

ing on the 2007 case of *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), in which a third-party employee challenged the 1975 regulations as barred by the FLSA's unambiguous language. The Supreme Court in *Coke* found that the FLSA was ambiguous as to the coverage of third-party employees and upheld the 1975 regulations as a reasonable interpretation of the statute.

The D.C. Circuit then ruled that the new amendments removing the exemption for third-party employees was also a reasonable interpretation of the FLSA. The court noted that the FLSA is generally a remedial statute that should be interpreted broadly. It also explained that the statutory amendments to the FLSA that added the companionship and live-in services exemptions in 1974 were intended to expand the FLSA's coverage, not to reduce it. Finally, the court noted legislative history in which key congressmen had explained the exemptions as intending to

cover casual workers, not the professional caregivers that typify today's home care industry.

Unless the U.S. Supreme Court grants certiorari review and reverses the D.C. Circuit's decision, the Department of Labor's 2013 amendments will go into effect and employees providing companionship or live-in domestic services will no longer be exempt from the FLSA's minimum wage and overtime requirements if those employees are employed by third-party agencies.



The Federal Bar Association (FBA), founded in 1920, is dedicated to the advancement of the science of jurisprudence and to promoting the welfare, interests, education, and professional development of all attorneys involved in federal law. Our members run the gamut of federal practice: attorneys practicing in small to large legal firms, attorneys in corporations and federal agencies, and members of the judiciary. The FBA is the catalyst for communication between the bar and the bench, as well as the private and public sectors.

The Labor and Employment Law Section provides valuable and informative publications to Section members throughout the year. In addition to our quarterly newsletter, *The Labouring Oar*, the Section also publishes *Circuit Updates* with information about labor and employment law decisions from federal appellate courts. If you have an interest in contributing to our publications, please contact Corie Tarara, Chair of our Committee on Publications and Public Relations at [ctarara@seatonlaw.com](mailto:ctarara@seatonlaw.com).