



First Circuit

***Travers v. Flight Services & Systems, Inc.*, 737 F.3d 144 (1st Cir. Dec. 12, 2013), available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1438P-01A.pdf>**

Plaintiff alleged that he was terminated in retaliation for filing a FLSA lawsuit against Defendant for allegedly failing to pay the federal minimum wage. Plaintiff presented evidence pointing to several expressions by Defendant's CEO where he indicated an interest in terminating Plaintiff. Defendant's argument, on the other hand, was that it terminated Plaintiff due to his violation of their internal policy. On appeal, the First Circuit emphasized that, in reviewing summary judgment, the question is not whether a reasonable jury could find that Defendant would have terminated Plaintiff's employment in the absence of retaliatory intent; rather it is whether no reasonable jury could find otherwise. The First Circuit found that there remained a genuine dispute as to whether the persons who decided to terminate Plaintiff's employment were aware of the CEO's desire to retaliate against him, and if so, whether Plaintiff would have been terminated even in the absence of his lawsuit under the FLSA. The Court vacated summary judgment and remanded as the evidence presented would not limit the range of the jury's findings and it was plausible that pre-existing retaliatory animus motivated Plaintiff's termination.

***Diaz v. Jiten Hotel Management, Inc.*, __ F.3d __ (1st Cir. Dec. 18, 2013), 2013 WL 6645585, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1444E-01A.pdf>**

The First Circuit addressed whether a previous mandate foreclosed the district court's modification of judgment on remand under the Federal Rule of Civil Procedure 60(a), and whether the granting of disproportionate attorney's fees and costs in regards to the damages award given was an abuse of discretion. The First Circuit found that there was no foreclosure and no abuse in discretion. Thus, it affirmed.

Plaintiff filed an age discrimination suit under ADEA and the Massachusetts anti-discrimination law – in addition to other causes of action that she later withdrew -- after losing her job as executive housekeeper at the hotel operated by Defendant. She obtained a jury verdict on her state law claim. After the case had been previously appealed and remanded regarding the reduction in fee awards due to the withdrawn claims, Defendant argued that the mandate entered had precluded the district court from correcting its attorney's costs and fee award under Rule 60(a), which resulted in a higher award. The First Circuit concluded that district court the its discretion to correct the formula used to calculate the award, given that the correctness of the calculation was never addressed by the First Circuit when it entered said mandate. Additionally, the First Circuit held that under Massachusetts' law, there is no basis for concluding that disproportionality alone in the amount awarded as attorney's fees and costs (around \$104,000) and the jury's damages verdict (around \$7,000) supports vacating the district court's exercise of its discretion.

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Third Circuit

***Sheet Metal Workers International Association Local Union No. 27 v. E.P. Donnelly, Inc.*, 737 F.3d 879 (3d Cir. Dec. 13, 2013), available at <http://www2.ca3.uscourts.gov/opinarch/102201p.pdf>**

This dispute, which involved consolidated appeals arising from a construction trades jurisdiction dispute, centered on the question of whether roofing work on a new, publicly-funded community center building in Egg Harbor Township, New Jersey, should be performed by sheet metal workers or carpenters. The case involved an appeal from a final administrative decision of the National Labor Relations Board, and appeals from various summary



judgment orders entered by the District Court in a breach-of-labor-contract action brought by Sheet Metal Workers International Association Local Union No. 27 under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Sec. 185.

Background: Egg Harbor Township retained Sambe Construction Company, Inc., to serve as general contractor on a community center project, and Sambe subcontracted the roofing work to E.P. Donnelly, Inc. Both Sambe and Donnelly became signatories to a project labor agreement. However, Donnelly decided to assign the roofing work to carpenters employed by the United Brotherhood of Carpenters and Joiners, Local Union No. 623, with whom Donnelly had a collective bargaining relationship. The Carpenters union was not a party to the project labor agreement, and the Sheet Metal union, who was a party to the project labor agreement, demanded that the work be assigned to its members instead. The Carpenters union responded by threatening to picket if Donnelly reassigned the roofing work.

The Sheet Metal union invoked binding arbitration under the project labor agreement and won a determination awarding the work to its members. (Because the Carpenters union was not a party to the project labor agreement and did not participate in the arbitration voluntarily, the award was not binding upon it). The Carpenters union persisted in its threat to picket Donnelly if it reassigned the work. This continuing threat allowed Donnelly to invoke NLRB procedures designed to resolve such work jurisdiction disputes.

Under Section 8(b)(4)(ii)(D) of the National Labor Relations Act, (NLRA), 29 U.S.C.A. Sec. 158(b)(4)(ii)(D), a union commits an unfair practice by, *inter alia*, threatening to picket an employer for the purpose of forcing the employer to reassign work to that union from another union. In addition, under Section 10(k) of the NLRA, 29 U.S.C.A. Sec. 160(k), the filing of a charge under Section 8(b)(4)(ii)(D) triggers a hearing before the NLRB to resolve the underlying work jurisdiction dispute unless all interested parties agree to an alternative voluntary means of resolving the issue.

Donnelly's filing of an unfair practice charge triggered such as Section 10(k) hearing. But while the Section 10(k) hearing was pending, the Sheet Metal union filed a breach of contract action under Section 301 against Donnelly in federal court seeking declaratory and monetary relief and a preliminary injunction enforcing its arbitration award. The Sheet Metal union later amended the complaint to add Sambe, the general contractor, as a defendant.

The NLRB issued its Section 10(k) determination six months after the Sheet Metal union filed its Section 301 action. The NLRB determined that the work should be awarded to the Carpenters union. When the Sheet Metal union persisted in its Section 301 lawsuit, Donnelly filed a second unfair practice charge, asserting that the Sheet Metal union's continued pursuit of its lawsuit was a violation of Section 8(b)(4)(ii)(D) in that it sought reassignment of work in contravention of the NLRB's Section 10(k) determination.

While this second unfair practice charge was pending, the Sheet Metal union filed a second amended complaint. It no longer sought reassignment of the work, but instead demanded money damages from Sambe and Donnelly for its members' loss of the work. The district court entered summary judgment on the breach of contract claim and awarded \$365,349.75 in damages against Donnelly and \$1.00 in nominal damages against Sambe.

Two years after the district court granted summary judgment, the NLRB issued a final decision on the second unfair practice charge, holding that the Sheet Metal lawsuit against Donnelly was an unfair practice in violation of Section 8(b)(4)(ii)(D) because it directly conflicted with the NLRB's Section 10(k) determination. As a remedy, the NLRB ordered the Sheet Metal union to withdraw its lawsuit against Donnelly. However, because Sambe had not been a party to the Section 10(k) proceeding, the NLRB allowed the Sheet Metal union claims against Sambe to continue.

Appeals from all of these determinations were consolidated before the Third Circuit.



Analysis: The *Donnelly* case afforded the Third Circuit the opportunity to revisit and clarify its precedent on whether unfair practice liability may be premised upon the union's pursuit of a Section 301 action for money damages.

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983), the Supreme Court outlined a two-prong test for determining whether a lawsuit constitutes an unfair practice under Section 8(b)(4)(ii)(D): there must be (1) an improper motivation and (2) a lack of a reasonable legal basis for the suit. However, in *dicta*, the Supreme Court identified an exception to this two-part test: when the lawsuit has an objective that is illegal under federal law. *Id.* at 737, n. 5.

The Third Circuit addressed the *Bill Johnson's Restaurants* standard in what came to be known as the *Gundle* trilogy of cases. In *Hoerber v. Local 30, United Slate Tile & Composition Roofers*, 939 F.2d 118, 122 (3d Cir. 1991) (*Gundle I*), the Third Circuit upheld the denial of the NLRB's application for a preliminary injunction barring a union from pursuing a Section 301 action contrary to an NLRB Section 10(k) determination. Among other factors, the Third Circuit in *Gundle I* expressed skepticism that the union lawsuit would meet the "improper motivation" prong of the *Bill Johnson's Restaurants* test.

However, in *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419 (3d Cir. 1993) (*Gundle II*), the Third Circuit affirmed a final NLRB determination which found that this same union had committed an unfair practice by pursuing its Section 301 action, and which ordered the union to withdraw its lawsuit. In *Grundle II*, the Third Circuit agreed that the continued pursuit of a Section 301 action for money damages in the face of a contrary Section 10(k) determination constituted an unfair practice under the *Bill Johnson's Restaurants* "illegal objective" exception.

The *Donnelly* Court agreed that *Grundle II* controlled the case before it, rejecting the Sheet Metal union's argument that *Grundle II* was "inconsistent" with *Grundle I*. The two cases arose

in different procedural postures, and whereas *Grundle I* involved only the application of the "improper motivation" test, *Grundle II* instead applied the "illegal objective" exception.

The *Donnelly* Court also rejected the Sheet Metal union's argument that a legal action for money damages in lieu of work is distinguishable from an action seeking reassignment of the disputed work. Again citing *Grundle II*, the Court found the distinction between seeking the work itself and seeking payment for it to be "ephemeral." A majority of Courts of Appeals have held that there is no material difference between seeking disputed work and seeking payment in lieu of the disputed work. "Twenty years ago, we warned that 'if a union is permitted to recover damages for work awarded to another union in a Section 10(k) proceeding, the policy underlying Section 8(b)(4)(ii)(D) of protecting employers from the detrimental impact of jurisdictional disputes would be severely undermined ... These policy concerns, which motivated our decision in *Grundle II*, are equally persuasive today."

However, the *Donnelly* Court clarified that its precedent applied only to suits for damages against the employer that actually made the disputed work assignment resolved by the NLRB's Section 10(k) determination. The precedent does not apply with respect to other parties, such as general contractors, that were not responsible for making the disputed work assignments. Joining the NLRB and the Seventh Circuit, the *Donnelly* Court held that there was no bar against the Sheet Metal union pursuing its Section 301 claim against Sambe, the general contractor who played no role in the making the disputed work assignment.

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Fourth Circuit

***Durham v. Jones*, 737 F.3d 291 (4th Cir. Dec. 10, 2013), available at <http://www.ca4.uscourts.gov/Opinions/Published/122303.P.pdf>**

The Fourth Circuit Court of Appeals affirmed a jury's \$1.1 million judgment on a deputy sheriff's First Amendment retaliatory discharge claim, finding that the Sheriff was not entitled to qualified immunity.

In 2008, while on routine patrol, the deputy used pepper spray and physical force to subdue a motorcyclist who was fleeing from a Maryland State trooper. Thereafter, the deputy prepared an incident report and submitted the report to his immediate supervisors. Because of concerns of a potential lawsuit, the deputy's supervisors authorized detectives to interrogate him and to coerce him to change his initial report and delete several follow-up reports so that the record would reflect a basis for criminal charges against the suspect. After initiating internal grievance procedures, the deputy sent correspondence to public officials and the media describing the incident and the unlawful practices of the Sheriff's Office. Thereafter, the deputy was terminated.

The deputy brought an action under 42 U.S.C. § 1983 alleging that the Sheriff, in his individual capacity, retaliated against him in violation of his First Amendment rights. The district court denied the Sheriff's motion to dismiss the claims on grounds of qualified immunity, and at trial, denied the Sheriff's motion for judgment pursuant to Rule 50(b) based on qualified immunity. The jury awarded the deputy \$1,112,200 in combined economic and non-economic damages.

On appeal, the Fourth Circuit analyzed whether the deputy had cognizable First Amendment claim for retaliatory discharge using the three-part test outlined in *Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012): (1) the plaintiff was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) the plaintiff's interest in speaking upon the matter of public concern outweighed the government's interest

in managing the working environment; and (3) the plaintiff's speech was a substantial factor in the termination decision. The Sheriff did not dispute that the deputy's speech was a substantial factor in his decision to terminate the deputy's employment; thus, the issue on appeal was whether the deputy had established the first two factors.

The Court first determined that the deputy was speaking on a matter of public concern. Speech involves a matter of public concern "when it involves an issue of social, political, or other interest to a community," but it does not include "personal complaints and grievances about conditions of employment." Here, the deputy was claiming First Amendment protection for his publicizing of material in connection with his allegations of law enforcement misconduct. The Court ruled that "an allegation of evidence tampering by a high-ranking police officer is a matter in which the public should be interested."

Next, the Court examined the record to determine the extent to which the protected speech had disrupted the operation of the Sheriff's office. The Court held there was no substantial evidence in the record supporting the Sheriff's contention that the government's interest in managing the working environment of a law enforcement agency outweighed the deputy's First Amendment rights. The Sheriff did not present any evidence at trial that there was any actual disruption or adverse impact to his Office. Accordingly, the Fourth Circuit affirmed the district court's conclusion that the deputy's interests outweighed those of the Sheriff's Office, and the jury's finding that the Sheriff violated the deputy's rights.

Finally, the Court of Appeals held that, at the time of the deputy's termination, his rights were "clearly established" and that a reasonable person would have known that termination of his employment violated the First Amendment. The Court explained that the Fourth Circuit has been very clear that "where public employees are speaking out on government misconduct, their speech warrants protection." The Court further explained that "the mere fact that [the Sheriff] may have had an independent basis to impose some lesser



disciplinary sanction on [the deputy] short of outright termination, such as a short suspension from duty, does not muddle the clarity of that legal principle." In sum, the Fourth Circuit held the deputy's constitutional rights were violated and affirmed the judgment of the district court.

***National Treasury Employees Union v. Federal Labor Relations Authority*, 737 F.3d 273 (4th Cir. Dec. 6, 2013), available at <http://www.ca4.uscourts.gov/Opinions/Published/122574.P.pdf>**

In *National Treasury Employees Union*, the Fourth Circuit denied a petition to review a Federal Labor Relations Authority ("FLRA") decision, which held that the IRS was not required to bargain with the National Treasury Employees Union ("Union") over a proposed amendment to the parties' collective bargaining agreement. The Court upheld the FLRA's decision that a provision that would have allowed probationary employees the right to use grievance procedures to challenge removals was "contrary to law and regulation" and, therefore, outside the IRS's duty to negotiate.

The Union sought to amend its collective bargaining agreement with the IRS to allow probationary employee to grieve removals where the grievance was confined to enforcing the procedures or rights contained in a statute. The IRS refused to negotiate the Union's proposal, asserting that it was outside the duty to negotiate codified in 5 U.S.C. § 7117 because it was "contrary to law and regulation." Federal law distinguishes between probationary and non-probationary employees, and the Office of Personnel Management's rules do not affirmatively grant probationary employees the right to grieve removals.

The Union appealed to the FLRA, which, following three decades of precedent, ruled in favor of the IRS. The FLRA held that proposals that would grant probationary employees separation-related procedural protections beyond those required by statute or OPM regulations, or the ability to grieve separation disputes, fall outside the good-faith-negotiation requirement of 5 U.S.C. § 7117. The Union petitioned for review of the FLRA decision.

The Fourth Circuit will uphold a decision of the FLRA "unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Union argued that because Congress did not exclude probationary employees from the statutory definitions of "employee" and "grievance" in 5 U.S.C. §§ 7103(a)(2), (a)(9), probationary employees are generally covered by the grievance procedure. The Union further argued that because Congress did not exclude disputes over removals from the grievance procedure, probationary employees should be able to grieve such disputes where the removals are alleged to be in violation of statutory rights or procedures. The Fourth Circuit rejected this argument in a detailed analysis of the statutory and regulatory scheme for probationary employees.

Probationary employees are, by such designation, subject to summary dismissal. The Court noted "numerous ways that the law treats probationary and non-probationary employees differently." Courts have consistently recognized Congress's intention to provide fewer procedural protections to probationary employees. The Court agreed there is "an inextricable link between the effective operation of the probationary period and the agency's right to summary termination."

The Court found that where Congress had refrained from granting probationary employees the right to grieve removals in violation of statutory rights or procedures, it gave OPM the discretion whether or not to grant such a right. The Court said that OPM's extensive regulations "faithfully reflect Congress's intention for the probationary period." OPM's regulations give probationary employees fair notice of removal and the right to appeal those removals in certain circumstances, but sharply limit probationary employees' rights to challenge removals. The Court concluded that additional protections not explicitly provided for, such as those in the Union's proposal, would conflict with the regulations and thus be outside the IRS's bargaining obligations.

In conclusion, the Fourth Circuit followed the D.C. Circuit and other sister circuits in holding that probationary employees are not permitted under law



or regulation to grieve removals. The Court declined to upset this "uniform course of court and agency decisions." Accordingly, the Court denied the Union's petition for review.

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Fifth Circuit

***Mendoza v. Bell Helicopter*, ___ F.3d ___ (5th Cir. Dec. 2, 2013), 2013 WL 6225181, available at www.ca5.uscourts.gov/opinions%5Cunpub%5C12/12-11053.0.pdf**

Employee of Hispanic descent who worked as a tool and die maker brought a case alleging race discrimination and retaliation under 42 U.S.C. 1981 and Chapter 21 of the Texas Labor Code. The Fifth Circuit affirmed summary judgment in favor of employer because the employee failed to make a *prima facie* case for either his hostile work environment or retaliation claims. The employee's allegations that he endured race-based comments and was subjected to race-based flyers and unfair job assignments, sporadically, over a several year period, failed to establish a *prima facie* case of race discrimination under a hostile work environment theory. The employee's allegations that he was subjected to "bogus discipline," was verbally counseled at least three times for taking too long on assignments, and received one written warning would not have dissuaded a reasonable employee from making or supporting a charge of discrimination. Therefore, the employee failed to establish a *prima facie* case of retaliation.

***D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. Dec. 3, 2013), available at www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-60031-CV0.pdf**

The employer, D.R. Horton, Inc., required all

employees to sign an arbitration agreement that prohibited collective or class actions. A former employee superintendent and nationwide class of superintendents initiated arbitration over FLSA claims. The employer responded with the collective action bar and invited claimants to initiate individual arbitration proceedings. The former employee filed an unfair labor practice charge before the NLRB alleging the class action waiver violated the NLRA.

The employer challenged the constitutional validity of a NLRB member's recess appointment and argued that the decision was rendered after the expiration of that member's recess appointment, which resulted in no quorum, which rendered the Board without authority to act. The Fifth Circuit determined that it did not have to consider the constitutional validity of the recess appointment to have jurisdiction and, because the Board issued its decision within the member's recess term, the Board met the quorum requirement and had authority to take action.

The employer also challenged the Board's authority to act as a three-member panel - because the Board only had three, not four, members. The Fifth Circuit inferred that when the entire Board - be it a Board of only three members - decides to act, the Board has given itself authority to act as only three members.

Turning to the Board's decision, the Court found the Board failed to give proper weight to the Federal Arbitration Act, and found nothing in the FAA, NLRA, or their legislative histories prevented employers from adopting class or collective action waivers, and therefore, the arbitration agreement was to be enforced according to its terms.

The Fifth Circuit then turned to the arbitration agreement's language in which the employee "knowingly and voluntarily waived the right to file a lawsuit or other civil proceeding . . . as well as the right to resolve employment-related disputes in a proceeding before a judge or jury" finding it reasonable that an employee could believe he is waiving both trial and administrative rights. The Court determined that the Board properly required the employer to clarify with its employees that the



arbitration agreement did not eliminate their rights to pursue claims of unfair labor practices with the NLRB.

***Bellow v. LeBlanc*, ___ F.3d ___ (5th Cir. Dec. 19, 2013), 2013 WL 6671805, available at www.ca5.uscourts.gov/opinions%5Cunpub%5C13/13-30075.2.pdf**

Plaintiff Bellow brought suit against Defendant LeBlanc, individually, alleging her termination violated the Family Medical Leave Act (“FMLA”). Defendant moved to dismiss under Fed. R. Civ. P 12(b)(6) on the basis of qualified immunity. When the trial court denied that motion, Defendant brought this interlocutory appeal

The Fifth Circuit identified the issues as whether Plaintiff had a clearly-established statutory right not to be terminated for taking leave under the FMLA, and if so, was the Defendant's terminating her for taking FMLA leave objectively unreasonable in the light of that then clearly-established law? The court found that the Plaintiff had a statutory right to take medical leave and that Defendant had fair warning that terminating Plaintiff for availing herself of her statutory right was a violation. Because the Defendant has fair warning, his motion to dismiss on the basis of qualified immunity was properly denied.

***Bell v. Thornburg*, ___ F.3d ___ (5th Cir. Dec. 30, 2013), 2013 WL 6850026, available at www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-30155-CV0.pdf**

Former employee commenced an action in state court against Chapter 13 standing bankruptcy trustee, alleging that she had been terminated because of her race in violation of the Louisiana Employment Discrimination Law (LEDL). The trustee removed the action under the federal officer removal statute.

On appeal, the Fifth Circuit held that a Trustee falls within the federal officer removal statute (28 U.S.C. §1442) as a “person acting under” an officer of the

United States, the Trustee raised a colorable federal defense, and the Trustee did not qualify as an employer under LEDL because there was no evidence that he employed the minimum of twenty employees.

***Venable v. Louisiana Workers' Compensation Corp.*, ___ F.3d ___ (5th Cir. Dec. 30, 2013), 2013 WL 6857992, available at www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-30965-CV0.pdf**

After Plaintiff Timothy Venable suffered a heart attack at work, he sued his employer. The parties and the LWCC (the employer's insurer, although not yet a party) participated in a settlement conference during which the parties agreed to a settlement. After the settlement conference, LWCC refused to consent to the settlement. Plaintiffs then joined LWCC as a party to the suit, relying on 33 U.S.C. §933(g)(1) (2012) to create a private cause of action.

The Fifth Circuit found there was no subject matter jurisdiction over LWCC. It determined that, while §933 preserves and codifies a maritime worker's common law right to pursue a negligence claim against a third party that is not the employer or a coworker; it does not create a cause of action nor establish a third party's liability for negligence. The Court further determined that no federal cause of action was pleaded and none of Plaintiffs' claims required proving a federal issue as an element of the claim. Because there was neither subject matter jurisdiction nor federal question jurisdiction, the Fifth Circuit dismissed the claims against LWCC.

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Sixth Circuit

***Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017 (6th Cir. Dec. 13, 2013), available at <http://www.ca6.uscourts.gov/opinions.pdf/13a0343p-06.pdf>**

A former employee who worked as an excavator operator for a county road commission brought an action against his former employer alleging discrimination under the Americans with Disabilities Act. The employee was not allowed to return to work after a motorcycle accident that resulted in the amputation of his left leg. The district court granted the employer's motion for summary judgment ruling that the employee could not perform the essential functions of the excavator operator position and that no reasonable accommodation was possible.

The Sixth Circuit reversed the district court's summary judgment on the basis that there were triable issues of fact as to whether hauling an excavator was an essential function of the employee's excavator operator position because there was evidence that hauling the excavator did not take much of the excavator operator's time and was a relatively marginal function. The court also found that there were triable issues of fact as to whether the employee was qualified, with or without accommodations, to perform the various functions throughout the year of the excavator operator position. The court did, however, affirm the district court's determination that reassigning the employee to a year-long blade truck driver position was not a reasonable accommodation.

***Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415 (6th Cir. Dec. 6, 2013), available at <http://www.ca6.uscourts.gov/opinions.pdf/13a0338p-06.pdf>**

A long-term disability plan participant brought an Employee Retirement Income Security Act ("ERISA") action against an insurer challenging the insurer's denial of benefits. The district court ruled that insurer's decision was arbitrary and capricious. Subsequently, the participant died and the administrators of his estate were substituted as

plaintiffs. Administrators moved for an equitable accounting and disgorgement of profits. The district court adopted the participant's expert's metric as the basis for determining profits.

The Sixth Circuit Court held that disgorgement was an appropriate equitable remedy under ERISA and the district court did not abuse its discretion in adopting return on equity metric to calculate insurer's profits for disgorgement purposes. The Sixth Circuit reasoned equitable disgorgement of profits cannot fairly be characterized as punitive because it leaves the insurer no worse off than it would have been had the insurer paid benefits to the participant when they were due as the law required. The dissent argued that the disgorgement of profits undermines ERISA's remedial scheme because ERISA does not seek to punish violators, but rather, attempts to place the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing.

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Seventh Circuit

***Craig v. Rich Township High School District 227*, 736 F.3d 1110 (7th Cir. Dec. 13, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-03/C:13-1398:J:Williams:aut:T:fnOp:N:1251189:S:0>**

Plaintiff, a tenured high school guidance counselor who self-published a relationship advice book with numerous sexually explicit references and references to his employment at the school, was terminated after the school board received complaints about the book. Plaintiff sued and alleged that the school district violated his First Amendment rights. The district court dismissed the case because the book was not protected speech due to its sexually explicit nature.



On appeal, the Seventh Circuit affirmed the dismissal, but on different grounds. The Seventh Circuit rejected the district court's finding that the book was not protected speech because, while sexually graphic, it touched on the issue of "adult" relationships; however, it affirmed dismissal because the pleadings established that students could be uncomfortable speaking with plaintiff about relationship issues; therefore the school's interest in providing effective counseling outweighed his interest in publishing the book.

***EEOC v. Mach Mining, LLC*, 737 F.3d 171 (7th Cir. Dec. 20, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-20/C:13-2456:J:Hamilton:aut:T:fnOp:N:1262102:S:0>**

An employee filed an EEOC charge for gender discrimination and, after investigation, the EEOC determined there was cause to believe defendant discriminated against a class of female job applicants. The EEOC notified defendant of its intent to begin informal conciliation. After determining the conciliation process failed, the EEOC filed suit. Defendant affirmatively defended the case by alleging that the EEOC failed to conciliate in good faith. The EEOC filed a motion for summary judgment on the "conciliation defense," arguing that no such defense existed. The district court denied the motion, but certified the question for interlocutory appeal. The Seventh Circuit ruled that the requirement that the EEOC "negotiate first and sue later" does not implicitly create a defense for employers who have allegedly violated Title VII.

***Garcia v. Colvin*, ___ F.3d ___ (7th Cir. Dec. 20, 2013), 2013 WL 6698045, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-20/C:13-2120:J:Posner:aut:T:fnOp:N:1261776:S:0>**

Plaintiff filed for disability when he was forty years old and after an administrative hearing, an administrative law judge ruled that because plaintiff

could perform intermittent physical labor, he could perform sedentary work and was therefore not disabled. The district court affirmed the denial of benefits.

On appeal, the Seventh Circuit reversed and rejected the administrative law judge's reasoning because it was not supported by any evidence, finding that plaintiff was entitled to benefits. The Court noted plaintiff was one of the "most seriously disabled applicants for social security disability benefits whom [the Court] ever encountered," and, since plaintiff stopped drinking, his alcoholism was not a "contributing factor" that barred him from obtaining disability benefits, even though his disabilities were all exacerbated or caused by heavy drinking.

***Anthimos Gogos v AMS Mechanical Systems, Inc*, 737 F.3d 1170 (7th Cir. Dec. 16, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-16/C:13-2571:J:PerCuriam:aut:T:fnOp:N:1258777:S:0>**

Plaintiff was a pipe welder with elevated blood pressure who experienced intermittent blindness. Plaintiff was terminated by his foreman after he obtained permission from his supervisor to seek medical treatment for his condition. The district court dismissed the case because plaintiff's medical conditions were "transitory" and "suspect" and did not qualify as disabilities under the ADA and therefore lacked subject matter jurisdiction. The Seventh Circuit reversed the district court's dismissal and found that subject matter jurisdiction did in fact exist because the 2008 Amendments to the ADA included transitory or minor disabilities if the impairment substantially limits a major life activity, even if the limitation is brief or occurs infrequently.

***Andrew Ortony v Northwestern University*, 736 F.3d 1102 (7th Cir. Dec. 3, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-03/C:12-3897:J:Easterbrook:aut:T:fnOp:N:1250995:S:0>**

After Plaintiff, a tenured university professor,



sought unpaid leave to visit another university, the Defendant instead offered him paid leave for the year if he agreed to work an additional three years, upon which he would receive another year of paid leave and retire. Plaintiff accepted, but later, when reminded that his final year would be paid leave, plaintiff insisted he had not made such an agreement. He then filed a charge under the ADEA alleging wrongful termination because of his age. The district court dismissed the case because plaintiff filed his charge more than 300 days after he learned his employment would end, finding that the 300 day period began when plaintiff learned his employment would end, not when he received the reminders years later. The Court also found that plaintiff was not terminated, but instead, was bought out of his tenure by the university when it contractually promised him five years' pay for three years' work.

Brian W. Swetlik v Kevin Crawford, Former Mayor, individually and in his official capacity, ___ F.3d ___ (7th Cir. Dec. 23, 2013), 2013 WL 6731780, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-23/C:12-2675:J:Easterbrook:con:T:fnOp:N:1263347:S:0>

Plaintiff, a police officer, made complaints about the Chief of Police, and the city council voted to bring charges against him because it found his statements to be untruthful. After the city council terminated his employment, Plaintiff filed suit alleging that the charges against him and his dismissal violated his First Amendment rights. The district court dismissed the case because plaintiff's statements were not a matter of "public concern."

On appeal, the Seventh Circuit rejected the district court's finding that plaintiff's statements were not a matter of public concern, but affirmed the summary judgment because the city performed a reasonable investigation into the matter and reasonably believed that plaintiff's statements were false, and therefore, there was no discrimination. The Court found "defendants' interest in ensuring the proper functioning of the department outweighed [plaintiff's] interest in making his statement [about

the Chief of Police]."

Volkman v Ryker, 736 F.3d 1084 (7th Cir. Dec. 2, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D12-02/C:12-1778:J:Kanne:aut:T:fnOp:N:1250229:S:0>

Plaintiff, a correctional facility employee who complained to the State's Attorney regarding the handling of a disciplinary matter at the facility where he worked, received a written reprimand and was suspended for five days. Plaintiff sued, alleging retaliation in violation of his First Amendment rights. The district court conducted a bench trial and found defendants' conduct was not retaliatory and that defendants were immune.

The Seventh Circuit affirmed the district court's ruling and found that, in the paramilitary context of a correctional facility, defendants' interest in maintaining order and security outweighed plaintiff's interest in expressing his opinion regarding a workplace prosecution.

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Eighth Circuit

Burton v. Arkansas Sec'y of State, 737 F.3d 1219 (8th Cir. Dec. 17, 2013), available at <http://media.ca8.uscourts.gov/opndir/13/12/131427P.pdf>

Richard Burton sued his former employer, Arkansas Secretary of State Mark Martin ("Secretary of State"), in his official capacity, and the Chief of the Arkansas State Capitol Police, Darrell Hedden, in his individual and official capacities, (collectively, "state defendants") for race discrimination and



retaliation under Title VII and 42 U.S.C. § 1983. The state defendants filed an interlocutory appeal challenging the trial court's denial of qualified immunity, and asked the Eighth Circuit to review the trial court's denial of summary judgment as well, arguing the issues were "inextricably intertwined." The Eighth Circuit upheld denial of summary judgment and reversed the denial of qualified immunity on the retaliation claim only.

Burton, an African American, was employed as a law enforcement officer from June 9, 2009 until his termination on April 12, 2010. Burton was allegedly fired for failing to report to work and failing to follow other directives. Burton presented sufficient evidence to allow a jury to find race discrimination under Title VII and §1983 based on Burton being treated less favorably than a similarly-situated white coworker. The Eighth Circuit clarified that "[t]he similarly situated co-worker inquiry is a search for a substantially similar employee, not for a clone."

The court held that to the extent *E.E.O.C. v. Kohler*, 335 F.3d 766 (8th Cir. 2003) is inconsistent with its earlier holding in *Lynn v. Deaconess Med. Ctr.-W. Campus*, 160 F.3d 484 (8th Cir. 1998), *Lynn* controls because it was earlier in time. Accordingly, a comparator must simply "match the characteristics of the plaintiff employee in as many respects as possible," but it is not necessary to be an exact match in every respect. Applying its clarified rule, the Eighth Circuit held a jury could find at least one of Burton's white coworkers was similarly situated since both employees had the same supervisor and were subject to the same standards. Burton's evidence showed the white officer was treated more leniently than Burton for engaging in similar purported misconduct.

The Eighth Circuit exercised pendent jurisdiction over Burton's Title VII race discrimination claim because resolution of the qualified immunity issue necessarily resolved the discrimination claim. Because a jury could find Chief Hedden was motivated by race discrimination, he was not entitled to qualified immunity on the § 1983 discrimination claim and summary judgment was properly denied.

But the trial court erred in denying Chief Hedden qualified immunity defense on the equal protection claim pursuant to § 1983. Burton was required to predicate his § 1983 retaliation claim on an underlying constitutional violation, and, in his complaint, pled an underlying violation of the Equal Protection Clause. However, there is no established right to be free from retaliation under the Equal Protection Clause. The court noted that freedom from retaliation is established as a First Amendment right, and pursuant to statute under Title VII, but not under the Equal Protection Clause. The Eighth Circuit declined to exercise pendent jurisdiction over Burton's Title VII retaliation claim because its resolution of the § 1983 retaliation claim did not necessarily resolve the Title VII retaliation claim.

***McMiller v. Metro*, 738 F.3d 185 (8th Cir. Dec. 26, 2013), available at <http://media.ca8.uscourts.gov/opndir/13/12/123536P.pdf>**

Eartha McMiller sued the Bi-State Development Agency of the Missouri-Illinois Metropolitan District ("Metro"), her former employer, alleging that her supervisor had sexually harassed her in violation of Title VII. The Eighth Circuit reversed, in part, the trial court's grant of summary judgment.

McMiller alleged her supervisor, Louis Brown, engaged in several acts of sexual harassment, including: putting his arms around McMiller and kissing her face; attempting to put his arm around McMiller's shoulder; locking McMiller in his office and directing her to remove an ingrown facial hair, then grabbing and kissing her on the face and forehead while stating that he could prevent her from being terminated. Approximately one month after the final incident, McMiller was terminated for not being "a good fit."

McMiller alleged two distinct claims of sexual harassment: hostile work environment and *quid pro quo* harassment. The Eighth Circuit reversed the trial court, holding McMiller presented enough evidence of *quid pro quo* harassment that a jury must resolve the issue. Brown kissed and/or touched McMiller, and attempted to do the same,



several times and reacted angrily when McMiller rebuffed him. A jury could find Brown locking McMiller in his office and bringing her into close proximity, grabbing her and kissing her, while reminding McMiller that he could prevent her from being terminated, was *quid pro quo* sex harassment. A jury could further infer that McMiller's rebuffing Brown's advances motivated her termination. While Brown did not make the decision to terminate McMiller, the person who did admitted that she relied on Brown's comments in making the decision. Even though the employer presented evidence that McMiller's poor work performance motivated its decision to terminate her, the facts were disputed, rendering summary judgment inappropriate.

The Eighth Circuit agreed with the lower court's holding that Brown's behavior was not severe or pervasive enough to alter the terms and conditions of McMiller's employment. Judge Murphy dissented in part, concluding that the evidence was sufficient to allow a jury to conclude Brown created a hostile work environment.

***Hill v. Walker*, 737 F.3d 1209 (8th Cir. Dec. 16, 2013), available at <http://media.ca8.uscourts.gov/opndir/13/12/131381P.pdf>**

Yulanda Hill sued her former employer, the Arkansas Department of Human Services ("the Department") and her former supervisor, Carolyn Walker, individually. Hill pled violations of the Family and Medical Leave Act (FMLA), Fair Labor Standards Act (FLSA), Americans with Disabilities Act (ADA) and Rehabilitation Act. The district court dismissed the FMLA and FLSA claims on a Rule 12 motion and ADA and Rehabilitation Act claims on a Rule 56 motion. The Eighth Circuit affirmed.

Hill worked for the Department as a Family Service Worker. Hill's job description stated "frequent exposure to physical and verbal abuse is required" and "[f]ederally mandated service deadlines coupled with heavy case loads and the life and death nature of the work creates a stressful environment." Hill suffered from depression and anxiety, ultimately

causing her to request medical leave from May 25 through June 20.

The request was initially granted, but on May 31, Walker sent Hill a letter reversing the initial decision granting leave time and requested that Hill return to work on June 6. Hill did not reply to the letter and did not appear for work on June 6. On June 7, Hill emailed Walker, requesting accommodation pursuant to her doctor's note. Hill was terminated on June 17 for failing to return to work.

Hill acknowledged she was not eligible for FMLA leave at the time of her termination, but argued that the Department violated the FMLA by terminating her in order to prevent her from becoming eligible for FMLA benefits, citing decisions from other circuits. The Eighth Circuit did not reject or adopt the holdings from other circuits protecting employees who make pre-eligibility requests for post-eligibility leave; rather, the court held such cases would not aid Hill because she did not request leave for any period of time *after* she would have been eligible for FMLA—the entire time period for which Hill sought leave was prior to her 12 month anniversary date.

Hill further argued that the Department should be equitably estopped from raising a defense that she was not eligible for FMLA leave. The Eighth Circuit rejected this argument because Hill did not allege in her complaint that the Department guaranteed her more FMLA leave than the FMLA allowed or that she relied to her detriment on such a representation—two factors required for estoppel.

The Eighth Circuit affirmed dismissal of Hill's FLSA claim against Walker in her individual capacity because Hill failed to plead that Walker controlled Hill's compensation or made the decision to not pay her for compensatory time.

The Eighth Circuit affirmed summary judgment on Hill's discrimination claims because she could not perform the essential functions of her job. Specifically, Hill was not able to handle particularly stressful cases as a result of her disabilities. Because dealing with all cases, including difficult



and stressful cases, is an essential function of the Family Service Worker position, Hill was not a qualified disabled person entitled to protection from disability discrimination.

The Eighth Circuit affirmed summary judgment on Hill's retaliation claims as well, holding that Hill could not produce adequate evidence of pretext. Hill's evidence of temporal proximity, based on all of the circumstances, was not sufficient by itself to allow a jury to conclude that the Department's termination reason was pretextual.

***Frierson v. SBC Global Servs., Inc.*, ___ Fed. Appx. ___ (8th Cir. Dec. 30, 2013), 2013 WL 6851519, available at <http://media.ca8.uscourts.gov/opndir/13/12/131900U.pdf>**

In a brief, *per curiam* opinion, the Eighth Circuit affirmed summary judgment on Frierson's claims for retaliation in violation of the Missouri Human Rights Act (MHRA) and 42 U.S.C. § 1981. The Eighth Circuit's opinion contained no analysis, but held that the district court did not err in concluding Frierson's evidence could not establish that her termination pursuant to a reduction-in-force was motivated by the protected conduct she engaged in nearly one-and-a-half years earlier.

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Ninth Circuit

***Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. Dec. 3, 2013, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/12/03/12-35492.pdf>**

This case involves public employees' rights under §1983 to allege First Amendment violations based on reports of departmental safety concerns to a supervisor.

Hagan, an officer with the Eugene Police Department, was transferred out of the K-9 unit after expressing concerns about departmental safety issues involving repeated incidents with accidental firearm discharge. Hagan sued the City of Eugene and various officials involved under 42 U.S.C. §1983, claiming that he had been retaliated against for exercising his free-speech rights under the First Amendment. The district court denied the City's summary judgment motion and motion for judgment as a matter of law, holding that Hagan's speech "was a matter of public concern as a matter of law" because accidental firearm discharges by police officers were inherently public.

The Ninth Circuit reversed, and held that a public employee who reports departmental safety concerns to his or her supervisors pursuant to a duty to do so does not speak as a private citizen and is not entitled to First Amendment protection. The Court examined the law enforcement context specifically, noting that in such a highly hierarchical employment setting where employees raise complaints internally up the chain of command regarding the workplace and job duties, that speech is generally undertaken in the course of performing the duties of the job. When, however, a public employee takes job concerns to persons outside the workplace in addition to raising them up the chain of command internally, the communication is not made as an employee, but as a private citizen. Because Hagan raised his concerns about fellow officers' safety internally and within the chain of command, the Ninth Circuit held that the comments "were made as a public employee, and not as a private citizen."

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Eleventh Circuit

***Franklin v. Curry*, ___ F. 3d ___ (11th Cir. December 23, 2013), 2013 WL 6728101, available at <http://www.ca11.uscourts.gov/opinions/ops/201310129.pdf>**

The case of *Franklin* involves an interlocutory appeal regarding allegations of qualified immunity of supervisory defendants. Ms. Franklin was a detainee at a jail, who brought a claim against corrections officers, their supervisors, and the sheriff at the jail stemming from allegations of sexual assault and the surrounding issues. Her claim also included individual constitutional claims against the Supervisory Defendants, pursuant to 42 U.S.C. 1983. The Eleventh Circuit recognized that evaluating a claim for qualified immunity involves questions as to whether the plaintiff alleged a violation of a constitutional right, such as deliberate indifference of a supervisor, and whether it was clearly violated. Following this evaluation, the Eleventh Circuit overturned the lower court's decision, noting that Franklin's conclusory allegations that Defendants were "deliberately indifferent" or "knew or should have known" about the assault was insufficient, without additional facts, to show a violation of a constitutional right. Therefore, the Court held officers had qualified immunity, as Franklin failed to properly plead she had a constitutional right to destroy qualified immunity.

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