



## Monthly Update for February

### Third Circuit

***Burton v. Teleflex Inc., et. al* (3<sup>rd</sup> Ct. Feb. 20, 2013).**

<http://www.ca3.uscourts.gov/opinarch/113752p.pdf>

In *Burton v. Teleflex Inc., et. al*, decided February 20, 2013, the Third Circuit reaffirmed its position that a plaintiff in a federal discrimination case need not produce proof of discriminatory animus in order to survive a motion for summary judgment. A plaintiff need only show that the defendant's articulated legitimate reason for the alleged adverse employment action is simply not worthy of belief.

The *Burton* plaintiff was a woman who had founded two successful medical device parts manufacturing and distribution companies that were subsequently acquired by defendant Teleflex, which kept plaintiff on as an employee involved in new business development. Her relationship with her new immediate supervisor was not a happy one, culminating in a confrontation at a trade show that lay at the heart of the parties' dispute. Defendants argued that plaintiff effectively tendered her resignation during the confrontation while plaintiff denied having done so, claiming instead that she had been terminated. Each side produced competent evidence to support its position on the question whether plaintiff had or had not resigned her employment.

Plaintiff had brought legal action on a variety of claims, including sex discrimination under Title VII and age discrimination under the federal Age Discrimination in Employment Act (ADEA). The District Court granted summary judgment

in defendants' favor on all claims. With respect to Title VII and the ADEA, the District Court applied the familiar *McDonnell Douglas* standard, found that plaintiff had made out a *prima facie* case of sex and age discrimination, but concluded that she could not demonstrate that defendants' articulated legitimate reason for her removal was a pretext for discrimination. The District Court found that defendants' legitimately believed that plaintiff had resigned, and that plaintiff had produced no evidence of discriminatory animus. The Third Circuit reversed.

To make a showing of pretext, "the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action."

The plaintiff's evidence, if it relates to the credibility of the employer's proffered justification, "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Once a plaintiff has come forward with sufficient evidence to allow a finder of fact to discredit the employer's proffered justification, she need not present additional evidence of discrimination beyond her *prima facie* case to survive summary judgment. "This is because the factfinder may infer from the combination of the *prima facie* case, and its own rejection of the employer's proffered reason, that the employer engaged in the adverse employment action for an invidious reason."



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The *Burton* Court first faulted the District Court for improperly making credibility determinations on a motion for summary judgment. "Burton has proffered evidence from which a factfinder could conclude that Teleflex terminated her. Burton maintains that she did not resign from Teleflex, and that she never told anyone that she had resigned. In fact, no Teleflex employee ever confirmed with Burton that she had actually resigned before Teleflex 'accepted [her] resignation.'... By crediting the testimony of the Teleflex employees and disregarding the Burtons' conflicting testimony, the District Court improperly made credibility determinations, which it may not do at summary judgment."

The *Burton* Court then faulted the lower court's pretext analysis. "To the extent the District Court's pretext analysis suggested that Burton was required to show evidence of discriminatory animus to demonstrate pretext, that suggestion is unsupported by our precedent."

Submitted by:

**Stephen E. Trimboli, Esq.**  
Trimboli & Prusinowski, LLC  
210 Park Avenue - Suite 302  
Florham Park, New Jersey 07932  
(973) 660-1095 Phone  
[striboli@trimprulaw.com](mailto:striboli@trimprulaw.com)

### 6<sup>th</sup> Circuit

**ERISA: *Price v. Board of Trustees of Indiana Laborer's Pension Fund*, \_ F.3d \_\_, 2013 WL 561354 (6<sup>th</sup> Cir. Feb. 14, 2013).**

<http://www.ca6.uscourts.gov/opinions.pdf/13a0043p-06.pdf>

In *Price*, the Sixth Circuit reversed summary judgment in favor of a disabled ERISA plan participant and remanded with directions for the district court to enter judgment in favor of the plan's Board of Trustees ("Board"). The participant began receiving benefits in 1990 under the plan's "Total and Permanent Disability Benefit" category. In 2001, the participant was informed that he could no longer receive benefits under that category, but that he could receive the plan's "Occupational Disability Benefit." In 2004, the Board exercised its amendment authority under the plan to limit Occupational Disability Benefits for participants, such as the plaintiff, who had been receiving benefits prior to January 1, 2005. As a result, the plaintiff's benefits were terminated December 31, 2006.

The Sixth Circuit had previously reversed and remanded the district court's initial decision to reinstate benefits because the district court failed to consider the reasonableness of the Board's decision regarding interpretation of the plan's terms under the arbitrary and capricious standard of review. On remand, the district court again entered judgment in favor of the plaintiff based on the lack of reasoning in the Board's decision letter. The Sixth Circuit reversed, noting that the district court improperly focused on whether the Board's "decision letters" were arbitrary and capricious. Instead, the district court should have focused on whether the Board's "decision" was arbitrary and capricious. Interpreting the terms of the plan, the Sixth Circuit held that the language permitting amendments was ambiguous and "capable of multiple interpretations, including an interpretation that permits amendment of disability benefits after disability occurs." Therefore, the Board reasonably concluded that it had the authority to approve amendments to disability benefits after the disability occurs.



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**ADA and State Law Discrimination: *Smith v. Perkins Board of Education*, \_ F.3d \_, 2013 WL 692519 (6<sup>th</sup> Cir. Feb. 27, 2013)**

<http://www.ca6.uscourts.gov/opinions.pdf/13a0055p-06.pdf>

In *Smith*, a diabetic teacher alleged that she was terminated on the basis of her age in violation of Ohio state law, denied reasonable accommodations and was retaliated against under the Americans with Disabilities Act (“ADA”) and state law and that her former employer committed the common law tort of intentional infliction of emotional distress (“IIED”). Among other things, the teacher was accused of sleeping in class, which she maintained was the result of her disability, which made it appear that she was sleeping. After her termination, the teacher requested a state law administrative hearing that resulted in the referee issuing a written decision concluding that the teacher was terminated for just cause. The teacher did not challenge that decision and instead filed suit in federal court.

The employer moved for summary judgment, arguing that the age discrimination claim was foreclosed by state law and that the remaining claims were barred by collateral estoppel. The district court dismissed all the claims, finding that the age discrimination claim was not authorized by statute and that the retaliation-based claims were barred by collateral estoppel. The court then concluded that the failure to accommodate claim failed on the merits and the IIED claim was inadequately pled.

The Sixth Circuit initially affirmed the dismissal of the age discrimination claim. The applicable state law provision proscribed discharge on the basis of age for employees “discharge[d] without just cause” and stated that the cause of action was not available where a discharge has been arbitrated

and has been found to be for just cause. The Sixth Circuit found that the teacher termination proceeding that the teacher requested pursuant to Ohio Rev. Code §3319.16 provided procedural safeguards “at least equivalent to those in arbitration.”

Next, addressing the collateral estoppel argument, the Sixth Circuit noted that the Supreme Court had previously held that collateral estoppel principles did not apply in similar context to claims brought under Title VII and the Age Discrimination in Employment Act. The court then applied these precedents to the ADA claims, finding that “common law collateral estoppel principles do not apply to claims brought under the ADA because Congress has demonstrated its intent that unreviewed state administrative findings did not have preclusive effect in this statutory context.” The court noted that the ADA’s enforcement proceedings require the EEOC to give “substantial weight” to state administrative findings, which implies that the EEOC and federal courts are not required to give preclusive effect to those findings.

Finally, the Sixth Circuit held that the district court improperly granted summary judgment on alternative grounds than those raised in the employer’s motion. The teacher lacked notice that the court was considering granting summary judgment on alternative grounds because the briefing focused solely on collateral estoppel. Additionally, the teacher suffered prejudice because the district court held in abeyance a ruling on a discovery dispute pending the outcome of the summary judgment motion and the teacher was prevented from developing the record.

*Submitted by:*

**Brian Schwartz**

Miller, Canfield, Paddock & Stone, P.L.C.  
150 W. Jefferson Avenue, Suite 2500



## Monthly Update for February

Detroit, Michigan 48226  
Direct: (313) 496-7551  
[schwartzb@millercanfield.com](mailto:schwartzb@millercanfield.com)

### 8<sup>th</sup> Circuit

***Luiken v. Domino's Pizza*, No. 12-1216 (8th Cir. Feb. 4, 2013) (Rule 23(b)(3) Class Action).**

<http://www.ca8.uscourts.gov/opndir/13/02/121216P.pdf>

The Eighth Circuit reversed the district court's determination to certify a class action of pizza delivery drivers. Dominos had implemented a per-delivery charge to customers. However, the delivery drivers did not receive any portion of this charge, which they alleged was rightfully theirs as a gratuity under state law. Some of the drivers always told customers that the delivery charge was not a tip, while other drivers either never told customers of this fact or only sometimes told customers that they did not receive the delivery charge.

Relying on *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011), the Court held that due to the varying circumstances in whether a customer might reasonably believe the delivery charge is payment for personal services, the class did not meet the Rule 23(b)(3) requirement of commonality. Further, the Court noted that whether the charge might be construed as a tip in one transaction does not determine whether it might be construed as a tip in another. Accordingly, the Court ruled there is no commonality "because the varied circumstances of deliveries prevent 'one stroke' determination."

***Lenzen v. Workers Compensation Reinsurance Ass'n.*, No. 12-1211 (8th Cir. Feb. 11, 2013) (ADA)**

<http://www.ca8.uscourts.gov/opndir/13/02/121211P.pdf>

Jennifer Marie Lenzen alleged disability discrimination (ADA) along with state claims against her employer, the Workers Compensation Reinsurance Association (WCRA). Lenzen was hired in 1995 as a part of the WCRA's administrative staff. In 2001, Lenzen began having medical problems (including chronic fatigue syndrome, fibromyalgia and chronic depression), which continued through her termination in December 2008. Lenzen was allowed to nap each day at work and always allowed time off for medical appointments. However, her attendance was problematic.

In January 2008 Lenzen received a promotion and pay raise. However, by March 2008 she had missed so much work (30 hours beyond PTO she had accrued) that she was demoted, which even she admitted was a "good thing". Following her demotion, she had several other performance issues. On December 23, she was terminated for violating the terms of a final warning and being insubordinate. WCRA filed for summary judgment on all claims and the district court granted the motion.

The Eighth Circuit upheld the decision, noting that it had "considerable doubt that Lenzen was a qualified person with a disability" but assumed she was for purposes of the motion. The Court found that the "basic flaw" in Lenzen's claim was her failure to show a causal connection between her medical condition, her workplace environment in the months prior to her termination, and her termination. The Court



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held that while Lenzen believed her workplace problems were all attributed to her medical problems, her “subject belief is not evidence of intentional disability discrimination by WCRA” or its officers.

Specifically, Lenzen claimed that she referenced her medical condition when complaining about her work environment, which created an inference of disability discrimination. Like the district court, the Court held that there was no evidence giving rise to such an inference when she first went on disability three and a half years prior. Lenzen also argued that a letter she provided to the CEO was protected activity because it referred to her medical condition when complaining about her supervisor’s hostile management. Again, the Court held that such a reference to medical problems was insufficient as protected activity, but even if it were, there was no causal connection between that letter and her termination over three months later.

Lenzen also argued her final warning letter was retaliatory, but the Court held that disagreement over an employer’s work performance must do more than raise doubts of the wisdom of the supervisor. Citing Lenzen’s intervening unprotected conduct (poor work performance and insubordination), the Court held that there was no inference of a causal connection between the letter and her termination. Lenzen alleged that she was not provided reasonable accommodations because she was not paid for nap breaks, did not offer her a private office for naps, and thus she was forced to nap on her floor or at her desk. The Court noted that Lenzen failed to present evidence that the inadequate nap accommodation negatively impacted her medical condition or job performance.

*Submitted By:*

**Corie Tarara**

Seaton, Peters & Revnew, P.A.

7300 Metro Blvd. Ste 500

Minneapolis, MN 55439

Tel. - 952-896-1700

Fax - 952-896-1704

[ctarara@seatonlaw.com](mailto:ctarara@seatonlaw.com)

### 11<sup>th</sup> Circuit

***Moore, et. al. v. Appliance Direct, Inc.***  
**[2/13/13]**

<http://www.ca11.uscourts.gov/opinions/ops/201115227.pdf>

The case of *Moore v. Appliance Direct* dealt with a suit for damages for retaliation under the Fair Labor Standards Act, and cross appeals. Plaintiffs originally brought suit for violations of the overtime provisions of FLSA against their employer and the employer’s CEO, Pak. Plaintiffs then brought a separate suit claiming retaliation after the Plaintiffs were not offered continued employment when the employer changed workers’ status to independent contractors and did not offer them positions following their filing of the lawsuit for overtime. The retaliation case against Appliance Direct was stayed after it filed bankruptcy, and continued against individual defendant Pak. The court denied Pak’s judgment as a matter of law, and the jury returned a verdict for Plaintiffs with an economic damages award of \$30,000.00 each.

Defendant Pak appealed the district court’s entry of judgment against him individually, and denial of renewed motions for judgment as a matter of law



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claiming that he was not an employer under the FLSA and Plaintiffs did not prove their damages. Plaintiffs appealed the court's denial of an award for liquidated damages. This was an issue of first impression.

On appeal, the court determined that Pak was an employer as he was 75% owner of the company, his involvement was more than majority ownership interest, he guided company policy, gave instructions to managers about job duties, was the ultimate decision maker, negotiated leases, and directed that Plaintiffs not be given certain subcontracts.

Regarding Plaintiffs' request for liquidated damages, the court found that while the FLSA makes liquidated damages mandatory for unpaid minimum wage, that the FLSA does not make liquidated damages mandatory for overtime pay. Instead, liquidated damages for overtime pay is discretionary, and is left to decision of the court "as may be appropriate." Therefore, the court affirmed the district court's denial, finding the decisions were not abuse of discretion.

*Submitted by:*

**Lindsey Wagner, Esq.**

Cathleen Scott & Associates, P.A.

250 South Central Boulevard Suite 104-A

Jupiter, Florida 33458

(561) 653-0008 Telephone

(561) 653-0020 Facsimile

[LWagner@csapalaw.com](mailto:LWagner@csapalaw.com)

[www.FloridaLaborLawyer.com](http://www.FloridaLaborLawyer.com)

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