Monthly Update for February 2015

MONTHLY CIRCUIT UPDATES

Second Circuit

Matthews v. City of New York, ___ F.3d ___, *2015 U.S. App. LEXIS 3016 (2d Cir. Feb. 26, 2015)*

First Amendment protected New York City police officer from retaliation where he spoke out against precinct-wide quota policy. While plaintiff was responsible for making routine arrests, since it was not his job duty to formulate, implement or provide feedback on police policy, his speech was constitutionally protected. Also, plaintiff spoke as a citizen because, in speaking out to his commanders, his speech was made through "channels available to citizens generally."

Leitner v. Westchester Community College, ___ F.3d ___, *2015 U.S. App. LEXIS 2798 (2d Cir. Feb. 25, 2015)*

As community colleges in New York are not "arms of the state" and the state does not cover any judgment obtained against them, the Eleventh Amendment does not bar suits against them in federal court).

Roach v. T. L. Cannon Corp., ___ F.3d ___, 2015 U.S. App. LEXIS 2054 (2d Cir. Feb. 10, 2015)

Plaintiffs who claim management did not pay hourly employees an extra hour of pay when working a ten-hour day, as required under New York law, may bring class action. Distinguishing *Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013),* the Court of Appeals reasons that "the fact that damages may have be ascertained on an individual basis is not sufficient to defeat class certification."

Velazco v. Columbus Citizens Foundation, ___ F.3d ___, 2015 U.S. App. LEXIS 2278 (2d Cir. Feb. 13, 2015)

New York City Human Rights Law provides plaintiffs with broader protections against discrimination than federal statutes, including Title VII and the Age Discrimination in Employment Act. While recent Supreme Court authority, *Gross v. FBL* Financial Services, holds that plaintiffs must prove "but for" causation, City law allows the plaintiff to prevail if age was merely a motivating factor for the adverse action).

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Third Circuit

EEOC v. Allstate Ins. Co, _F.3d_, 2015 WL 619616 C.A. 3, (Penna.), February 13, 2015
www2.ca3.uscourts.gov/opinarch/142700p.pdf

In 1999, the Allstate Insurance Company initiated what was then the latest in a series of changes in the manner in which it sells insurance. This latest change involved a business reorganization that called for the termination of the at-will employment contracts of approximately 6,200 sales agents. The terminated agents were each offered the choice of four severance options: the "Conversion Option" that would allow them to continue selling Allstate products as independent contractors; the "Sale Option" that would provide the agent with $5,000 and an economic interest in their existing accounts, to by sold by September 2000 to buyers approved by Allstate; the "Enhanced Severance Option" consisting of one year's severance pay; and, the "Base Severance Option" consisting of thirteen weeks' severance pay. Agents who selected the Conversion Option also received a minimum bonus of $5,000, were exempted from repaying any office-expense advances, and acquired transferable interests in their accounts two years after converting to independent contractor status. However, like agents who selected the Sale Option and the Enhanced Severance Option, agents who selected the Conversion Option were required to execute a

release waiving all legal claims against Allstate related to employment or termination that had accrued as of the date of execution. The release included claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). The release also did not prohibit the agents from filing charges with the Equal Employment Opportunity Commission (EEOC).

Many of the agents who signed the release subsequently filed charges with the EEOC, which, in turn, filed a civil action against Allstate on the theory that "Allstate illegally retaliated against its employee agents by allowing them to continue their careers with the company only if they waived any discrimination claims." Following a "lengthy and convoluted" procedural history, which included parallel individual and putative class actions brought by employee agents, the District Court granted Allstate summary judgment in the EEOC's retaliation suit. The EEOC appealed, and the Third Circuit affirmed.

A *prima facie* case of illegal retaliation under Title VII, the ADA or the ADEA requires a showing of protected employee activity, adverse action by the employer after or contemporaneous with the protected activity, and a causal connection between the protected activity and the adverse action.

The Third Circuit termed it "hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled … Nothing in the employment-discrimination statutes undermines this rule." Releases must be knowing and voluntary, cannot waive future claims, and must provide consideration to the employee in exchange for the release that the employee would not otherwise have received.

The EEOC argued that the Conversion Option was not lawful because only "severance benefits" could constitute consideration for a release, and the offer of the option to continue selling insurance as an independent contractor does not constitute "severance." The Third Circuit rejected this argument. It is counterintuitive to hold simply firing employee agents in exchange for severance payment to be lawful, but that offering the option to continue selling in a different capacity is somehow unlawful retaliation. The employees who selected the Conversion Option received something of real value to which they were not otherwise entitled. The EEOC could not cite "a single decision holding that it is unlawful for an employer to require its employees to release all their claims in order to continue working for the company," and "the EEOC here fails to articulate any good reason why an employer cannot require a release of discrimination claims by a terminated employee in exchange for a new business relationship with the employer." In sum, the Court was "not persuaded by the Commission's efforts to arbitrarily limit the forms of consideration exchangeable for a release of claims by a terminated employee."

The EEOC also argued that refusing to sign a release constitutes opposition to unlawful discrimination, an alleged protected activity, and that Allstate's policy and practice of refusing to offer independent contractor status to agents who refused to sign releases therefore constitutes "retaliation" against protected activity. The Third Circuit rejected each prong of this second argument. "In our view, such inaction does not communicate opposition sufficiently specific to qualify as protected employee activity ... Because Allstate's Release barred its signatories from bringing *any* claims against Allstate concerning their employment or termination, employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination … Accordingly, the EEOC cannot show that any adverse action taken by Allstate was triggered by opposition to unlawful discrimination, dooming its retaliation case at the outset."

Further, the EEOC's second argument failed because Allstate took no adverse action. Absent selecting the Conversion Option, "the terminated agents were not entitled to convert to independent contractor status ... an employer commits {no} adverse action by denying an employee an unearned benefit on the basis of the employee's refusal to sign a release."

Geneva College, et al. v. Secretary, U.S. Dep't of Health and Human Services, et al., _F.3d_, 2015 WL 543067, C.A. 3, (Penna.), February 11, 2015, www2.ca3.uscourts.gov/opinarch/133536p.pdf

The Patient Protection and Affordable Care Act (PPACA) and its implementing regulations require covered employers to provide contraceptive coverage for women, at no cost to them, within employee group health insurance plans. The implementing regulations authorize an exemption from contraceptive coverage for "religious employers" as so defined under the Internal Revenue Code, which includes churches, their integrated auxiliaries, conventions and associations of churches, and exclusively religious activities of any religious order. Organizations that are not "religious employers," but oppose contraception coverage on religious grounds, are instead offered an accommodation. To receive the accommodation, the organization must certify that it is a non-profit organization, that it holds itself out as a religious organization, and that it objects to some or all of the required contraceptive coverage on religious grounds. At that point, the obligation to provide the contraceptive coverage at issue passes to the health insurance issuer or third party administrator, at the issuer's or administrator's expense. The contraceptive coverage must remain separate and distinct from the objecting employer's group health plan, and the health insurance issuer or third-party administrator must provides notice to the plan participants and beneficiaries regarding contraceptive coverage that is "separate from" materials that are distributed in connection with the regular group health coverage.

The plaintiffs in *Geneva College* included religious organizations that were eligible for this accommodation, but argued that the accommodation still placed a "substantial burden" on their religious exercise under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. Section 2000bb to 2000bb-4. The RFRA applies to any federal statute that impacts a person's exercise of religion. The "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; 42 U.S.C. Section 2000bb-1(b). A substantial burden exists if (1) an individual is forced to choose between following the precepts of the religion and forfeiting benefits otherwise generally available, or abandoning one of the precepts of the religion in order to receive the benefit, or (2) government puts substantial pressure on an adherent to substantially modify his or her behavior in a way that violates religious beliefs.

The District Courts in various actions filed by the plaintiffs enjoined the application of the contraceptive mandate under the RFRA. The multiple cases were consolidated for appeal, and, in a single decision, the Third Circuit reversed each injunction.

The crux of the plaintiffs' case was that by invoking the accommodation by certifying to their objection to contraceptives, they were initiating a process that resulted in the use of contraceptives, thereby causing tenets of their faith to by violated. The Third Circuit began its analysis by announcing the applicable standard:

> we should defer to the reasonableness of the appellees' religious beliefs, {but} this does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on the appellees' religious exercise. This involves an assessment of how the regulatory measure actually works. Indeed, how else are we to decide whether the appellees' religious exercise is substantially burdened? … We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion—all without delving into the appellees' beliefs.

The focus of this analysis is the burden imposed upon the persons' religious burden,

on the persons themselves. "{F}ree exercise jurisprudence instructs that we are to examine the act the appellees must perform—not the effect of that act—to see if it burdens substantially the appellees' religious exercise. The Supreme Court has consistently rejected the argument that an independent obligation on a third party can impose a substantial burden on the exercise of religion in violation of RFRA."

Under this standard, the contraceptive accommodation did not substantially burden the plaintiffs' religious belief. The obligation placed on insurance providers/third party administrators to provide contraceptives in place of the plaintiffs is an obligation imposed by federal law, not by the plaintiffs themselves; thus, the argument that the plaintiffs were somehow "triggering" the provision of contraceptives was misplaced. In reaching this conclusion, the Third Circuit joined the Sixth, Seventh and District of Columbia Circuits.

Neither were the plaintiffs making themselves "complicit" in the provision of contraceptives. "{B}ecause the appellees specifically state on the self-certification form that they object on religious grounds to providing such coverage, it is a declaration that they will not be complicit in providing coverage. Ultimately, the regulatory notice requirement does not necessitate any action that interferes with the appellees' religious activities."

Several of the plaintiffs aligned with the Catholic Church raised the additional argument that granting houses of worship an exemption from the contraceptive mandate, while offering religious nonprofits only the accommodation, had the effect of improperly "splitting" the Church. The Third Circuit deferred to the PPACA regulations on this issue, finding the distinction to be rational balance between respect for religious interests and the government interests served by the contraceptive requirement. Further, the court found nothing to support the claim that "the challenged accommodation poses any burden on the *exempted* appellees' religious exercise, particularly a burden that would require the appellees to 'expel' the religious nonprofit organizations from the Dioceses' health insurance plans."

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Fifth Circuit

Esma L. Etienne v. Spanish Lake Truck & Casino Plaza, LLC, ___ F.3d ___ (5th Cir. Feb. 3, 2015), 2015 WL412269
http://www.ca5.uscourts.gov/opinions/pub/14/14-30026-CV0.pdf.

Plaintiff Etienne, a former waitress and bartender at Spanish Lake Truck & Casino Plaza, filed suit under Title VII claiming that she was denied a promotion based on her race and color. In opposing summary judgment, Plaintiff presented evidence from a former manager that the general manager allocated responsibilities based on race, that he would not assign "a dark skinned black person" to handle any money, and that he told the former manager that Plaintiff was "too black to do various tasks at the casino."

The Fifth Circuit found that these statements were direct evidence of discrimination because the comments "clearly and explicitly" indicate that Plaintiff was disqualified from performing certain tasks because of her skin color. The court also found that these statements constituted direct evidence of discrimination under the four factor test for distinguishing stray remarks because the comments were: (1) related to plaintiff's protected characteristic; (2) proximate in time to the challenged decision because, even though the evidence was unclear as to when the comments were made, the evidence supported the inference that the comments were not isolated or anomalous but were in keeping with a routine, ongoing practice of allocating responsibilities based on skin color; (3) made by an individual with authority; and (4) related to the challenged decision.

Because the district court ruled that plaintiff had not established a prima facie case, it did not reach the issue of whether the employer had carried its burden of showing that it would have made the same decision absent the evidence of discrimination. Nevertheless, the Fifth Circuit addressed that issue on the appeal. Based on the record before it, the Court concluded that the employer had not carried its burden. Simply proving that the person it hired was more qualified was insufficient because the employer "must do more than merely identify a legitimate basis for its decision – it must show that any reasonable jury would conclude that it would have made the same decision absent the discrimination."

Thompson v. City of Waco, ___ F.3d ___ (5th Cir. Feb. 26, 2015), 2015 WL 849008, http://www.ca5.uscourts.gov/opinions/pub/13/13-50718-CV1.pdf

Previously, in ***Thompson v. City of Waco, 764 F.3d 500 (5th Cir. 2014),*** the Fifth Circuit reversed the district court's dismissal of a Title VII plaintiff's claim pursuant to Rule 12(b)(6). The district court had held that plaintiff failed to allege that he suffered an adverse employment action when he alleged that he was subjected to certain restrictions that stripped him of the "integral and material responsibilities of a detective," and effectively constituted a demotion and made him an assistant to other detectives. Reiterating the Fifth Circuit's requirement that a substantive claim must allege an "ultimate employment decision" (such as hiring, firing, promoting, demoting, granting leave, and compensating), the Fifth Circuit found that Plaintiff alleged a significant and material change in or loss of job responsibilities similar to a demotion, which qualified as ultimate employment decisions.

The Defendant sought rehearing en banc, which was denied on February 26th. In dissenting from the denial of en banc rehearing, Judge Golly summarized the inconsistencies in Fifth Circuit jurisprudence dealing with the issue of what constitutes an ultimate employment action, and criticized the panel opinion for creating "a new legal standard" that a change in or loss of job responsibilities may be so significant and material that it rises to the level of an adverse employment action. A future panel "can find language, and indeed even legal principles, that likely will support any conclusion that it may reach." Judge Jolly asserts that this panel opinion should not be binding given its inconsistency with prior panel opinions and dissents from the Court's refusal to give grant rehearing to clarify the standard for district judges and litigants.

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Sixth Circuit

Conlon v. InterVarsity Christian Fellowship, No. 14–1549, ___ F.3d ___, 2015 WL 468170 (6th Cir. Feb.5,2015).
http://www.ca6.uscourts.gov/opinions/opinion.php

Alyce Conlon was a "spiritual director" for the InterVarsity Christian Fellowship/USA ("IVCF"), an evangelical Christian campus organization. Conlan was having marital problems with her husband, and pursuant to IVCF policy, notified her supervisor. Her supervisor placed her on a leave to "repair her marriage," denied her requests to return to work, and then ultimately terminated her employment for "failing to reconcile her marriage." Conlon alleged that IVCF's actions constituted gender discrimination in violation of Title VII and Michigan's Elliot-Larsen Civil Rights Act, and identified at least two similarly situated male employees who divorced their spouses during their employment without being disciplined or terminated.

The district court dismissed Conlon's complaint under Rule 12(b)(6), finding that the ministerial exception affirmative defense barred Conlon's claim.

In agreeing with the district court's dismissal, the Sixth Circuit examined the scope of the ministerial exception for the first time since the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012). First, the Sixth Circuit examined whether the exception even applied to IVCF because unlike the employer Hosanna-Tabor, IVCF was not a church. Rejecting this narrow reading of the exception, the Sixth Circuit noted that the exception broadly applies to "multidenominational and nondenominational religious organizations" whose "mission[s are] marked by clear or obvious religious characteristics." Accordingly, IVCF met Hosanna-Tabor's definition of a "religious group" because its purpose is to advance the understanding and practice of Christianity in colleges and universities.

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Eighth Circuit

Austin v. Long, ___ F.3d. ___, 2015 U.S. App. LEXIS 2644 (8th Cir. Ark. Feb. 23, 2015), http://media.ca8.uscourts.gov/opndir/15/02/142044P.pdf

Austin alleged that Long fired him because of his race. Long moved for summary judgment based on qualified immunity. The district court denied the motion, concluding that a jury could find that Long's decision to fire Austin was motivated by race. Long appealed and the Eighth Circuit affirmed the denial of summary judgment.

The Eight Circuit first clarified that a party may only seek interlocutory appeal of purely legal issues relating to qualified immunity on summary judgment—not factual issues. Thus, the Eighth Circuit rejected Long's effort to appeal the district court's determination that a jury could find pretext, because that determination involved resolving factual disputes and not an abstract issue of law.

The appellate court held that Long presented two purely legal arguments on qualified immunity, and rejected both arguments. First, Long argued that, as a matter of law, Austin failed to demonstrate that any similarly situated employees were treated less favorably. Austin presented evidence that two other employees engaged in worse conduct that that Long alleged Austin engaged in, but were not terminated. According to Long, Austin failed to contribute funds to his operational expense account. But another prosecutor was convicted of driving under the influence, and a second was formally convicted for ethics violations—both were white and neither were terminated for their misconduct. Long argued that the misconduct of the two white prosecutors was not similar to Austin's purported failure to fund his expense account. The Eighth Circuit reiterated that the search for a comparable employee is not a search for a "clone," and that "[c]oworkers can be similarly situated in all relevant respects if their misconduct is comparable to or 'more serious than that of the plaintiff.'" (Emphasis added.)

Long's second purely legal argument was that Austin's allegation that he was fired because of his race did not implicate any violation of a clearly established constitutional right. The Eighth Circuit rejected this argument out of hand, holding that "the constitutional right to be free from 'invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it.

Johnson v. Wheeling Mach. Prods., ___ F.3d. ___, 2015 U.S. App. LEXIS 2567 (8th Cir. Ark. Feb. 20, 2015), http://media.ca8.uscourts.gov/opndir/15/02/133786P.pdf

Kendrick Johnson sued U.S. Steel Tubular Products, Inc. ("U.S. Steel") alleging that his former employer interfered with his entitlement to FMLA and discriminated against him for taking protected FMLA leave. Both of his FMLA claims require Johnson to establish that he had a serious medical condition. The Eighth Circuit held that he could not do so at trial and affirmed summary judgment on that basis.

In May 2004, Johnson began working at a U.S. Steel plant and was eventually promoted to a lead position. On May 12, 2011, he informed his supervisor that he was suffering from blurred vision, a stiff neck, back pain, and a headache, and that he felt as though his head would "explode." Johnson left the employee-relations supervisor a voicemail stating that he was not feeling well and was leaving work to see a doctor. Johnson then saw a physician assistant and was diagnosed with high blood pressure on May 12. The physician assistant told him not to return to work until May 16, gave Johnson a note, and Johnson gave the note to his supervisor the same day.

U.S. Steel fired Johnson on May 18, purportedly because Johnson forged the medical note excusing him from work. Immediately after being fired, Johnson provided U.S. Steel with a signed statement from his physician assistant that the physician assistant wrote the note and that Johnson did not forge it, but U.S. Steel did not reinstate Johnson. At no point after May 12, when Johnson told his supervisor that he was ill, did U.S. Steel provide Johnson any notice of his rights under the FMLA.

Sometime after his termination, Johnson saw a physician at his regular doctor's office, who found that his blood pressure was normal and who advised him to use exercise to control it. Johnson did not offer any evidence to show the specific date on which this follow-up visit took place.

Johnson did not offer any evidence that he had any further communication or appointments with Stewart regarding treatment for or updates on his condition.

The district court granted summary judgment to U.S. Steel on two bases, that Johnson failed to provide proper notice to be protected under the FMLA, and that Johnson could not present evidence allowing a jury to find U.S. Steel's stated termination reasons were pretextual. The Eighth Circuit upheld summary judgment, but on separate grounds. The Eighth Circuit held that Johnson failed to show that he had a "serious medical condition."

The Eighth Circuit held that Johnson did not meet the FMLA's "two-treatments definition" because Johnson could not recall the date of his subsequent doctor appointment—thus he could not prove that it was within 30 days of his initial appointment, as required by the FMLA regulations. In addition, the physician assistant who advised Johnson to have a follow up appointment did not provide a timeframe for the follow up.

Next, the Eighth Circuit rejected Johnson's argument that he could meet the "regimen" definition. While Johnson was prescribed medication, the FMLA requires that a medical provider "supervise" the prescription regimen in order to qualify as a serious health condition. The Eighth Circuit reasoned that this interpretation is necessary to effectuate Congress's intent in excluding minor or short-term health conditions from FMLA protection. The court provided examples of "supervision" that would qualify, such as "a phone call with the health care provider to communicate updates on the patient's condition and progress—or a follow-up appointment soon after the first visit." Johnson's regular doctor did not renew his prescription. The Eighth Circuit also noted that exercise, which Johnson was directed to undertake by his doctor, does not constitute a "regimen" of treatment under the FMLA's regulations.

The court rejected Johnson's argument that U.S. Steel failed to comply with the FMLA by not providing him with the mandated FMLA notice because Johnson could not show that U.S. Steel's violation harmed or prejudiced him in any way.

Finally, Johnson argued that U.S. Steel was precluded from arguing that he did not have a serious health condition because the company failed to challenge his entitlement to FMLA under the statutory certification procedures. In rejecting Johnson's argument, the Eighth Circuit appeared to back off of its holding in *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000). The court held that "*Thorson* did not create a *per se* preclusion rule … that would apply in all cases in which an employer fails to avail itself of the FMLA's certification procedures [but] merely held that an employer could not use medical evaluations conducted long after the period of incapacity to create a genuine dispute of material fact over a plaintiff's incapacity when the plaintiff offered contemporaneous medical evidence of incapacity."

Hilde v. City of Eveleth, ___ F.3d. ___, 2015 U.S. App. LEXIS 1802 (8th Cir. Minn. Feb. 5, 2015), http://media.ca8.uscourts.gov/opndir/15/02/141016P.pdf

The City of Eveleth did not promote LeRoy Arthur Hilde, age 51, to Chief of Police. Hilde filed suit claiming that the City's failure to promote him was because of his age and thus violated the Age Discrimination in Employment Act (ADEA) and the Minnesota Human Rights Act (MHRA). The trial court granted summary judgment for the City, and the Eighth Circuit reversed holding that a jury can find Hilde was not promoted because of his age.

Hilde was on the police force for 29 years, was highly respected and had good performance by all accounts. The Chief of Police retired, and Hilde applied for the opening. The City utilized a three-member commission to decide on hiring the new chief. When Hilde applied, he was 51 years old. Under Minnesota law, a City officer with at least three years of service was retirement eligible at age 50. Since Hilde was over 50, he was eligible for retirement. The commissioners were all aware that Hilde was over 50 and retirement eligible. Hilde's primary competition, an outside candidate, was 43 years old and thus not eligible for retirement.

Hilde presented evidence that the Commission decided not to hire Hilde, at least in part, because he

was eligible for retirement and would not be committed to the job. In a meeting with the unsuccessful candidates, Commissioner England said that Hilde's eligibility for retirement "might have" been a factor in the commission's decision. Hilde never told the commissioners he was seeking retirement or would not be committed to the position.

The district court reasoned that the Commission's decision was based on Hilde's eligibility for retirement, not his age. The Eighth Circuit reversed the district court's conclusion, holding that age could not be "analytically distinct" from his eligibility for retirement. The Eighth Circuit reiterated that, under the Supreme Court's decision in *Hazen Paper*, employers are prohibited from using criteria as a "proxy for age." In this case, retirement eligibility was always correlated with age because it was dependent on the employee reaching 50 and could not be "divorced from age." Moreover, the court held, "[t]o assume that Hilde was uncommited to a position because his age made him retirement-eligible is age-stereotyping that the ADEA prohibits."

The Eighth Circuit also held that the City's selection criteria was at least partially subjective, which allowed for unlawful age bias to play into the selection process. And, the Commissioners modified their interview scores during deliberations for Hilde, but not for any other candidates. According to the Eighth Circuit, this was sufficient evidence to infer discrimination because an "employer's failure to follow its own policies may support an inference of pretext when the departure affects only the affected candidate."

Finally, the district court held that "the eight-year age gap between Hilde and Koivunen 'dooms' Hilde's case," because the 43 year old who was hired was not "substantially younger." The Eighth Circuit rejected this conclusion, instead holding that the difference in age must be considered in light of the factual context of the case. Here, because the commissioners thought Hilde was retirement eligible due to his age, a jury could find that age was a motivation in the City's decision not to hire him.

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Ninth Circuit

Asper v. Costco Wholesale Corp., No. 13-35695, 2015 WL 367098 (9th Cir. Jan. 29, 2015)

Asper appealed the district court's dismissal of her claims arising under Montana's Wrongful Discharge from Employment Act ("WDEA") against Costco Wholesale Corp. ("Costco") for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Asper argued on appeal that although she never sought reinstatement in her prior successful WDEA claim against Costco, she argued that Costco was required to rehire her as a result of prevailing in the first lawsuit. In affirming the district court, the Ninth Circuit noted that "[t]he district court correctly concluded that the plaintiff's claim for relief was not cognizable under the" WDEA because "to hold that an employer who wrongfully discharges an employee must subsequently rehire that employee would impermissibly create a remedy that the statute itself does not recognize."

Gaur v. City of Hope, 589 F. App'x 359 (9th Cir. 2015)

Former employee plaintiff appealed a jury verdict in

on appeal, the plaintiff challenged the district court's exclusion of "evidence relating to promotion decisions made by" the prior director of the defendant who was not "the ultimate decision-maker with respect to . . . [the plaintiff's] denial of promotion and discharge." The plaintiff argued that the prior director's "allegedly 'discriminatory decisions' with respect to Asian and white professors is relevant to establishing a pattern of discrimination that continued under" the subsequent director, relying "on the so-called "cat's paw" theory of liability" discussed in ***Staub v. Proctor Hosp., 562 U.S. 411 (2011).*** In holding that the district court did not abuse its discretion in excluding the evidence, the Ninth Circuit explained that the plaintiff did not establish that the first director's actions were "the 'proximate cause of the ultimate employment action[]' and, therefore, the prior director's conduct was irrelevant for determining why the subsequent director did not promote the plaintiff.

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Eleventh Circuit

***Claude R. Short v. Mando American Corporation,* F.3d (11th Cir. February 27, 2015).**
http://law.justia.com/cases/federal/appellate-courts/ca11/11-14213/11-14213-2015-02-27.html

The Plaintiff's complaint asserted seven counts, only three of which were relevant to his appeal. Under 42 U.S.C. § 1981 and Title VII, he raised claims of racial discrimination, national origin discrimination, and retaliation. In support of those claims, he alleged that he had suffered three adverse employment actions at the hands of his employer: (1) he was demoted from his position as Director of Quality Control in December 2008; (2) he was demoted from his position as Director of Customer Service and Warranty and transferred to Michigan in June 2009; and (3) his employment was terminated in August 2009. According to the Plaintiff, the employer demoted him and eventually discharged him on account of his race (white) and his national origin (American), and because he exercised his Title VII and § 1981 rights to oppose the employment policies as discriminatory.

As for the §1981 demotion claim, the Eleventh Circuit affirmed the district court's judgment, and found that the Plaintiff's arguments for new trial had no merit.

The Court also found that under the ***McDonnell Douglas*** framework, the employer proffered a legitimate non-discriminatory reason for its decision to transfer the Plaintiff to a different location (Michigan). Specifically, the Court found that cost cutting measures, and need to improve services to its customers located in that specific geographic area, were sufficient. Further, the Court found that the Plaintiff's focus regarding the employer's "business judgment" and subjective reasons for its decisions, were not sufficient to demonstrate that the employer's reasons for the transfer were pre-textual.

The Court also found that an alleged statement of the Plaintiff's supervisor that he "wanted a Korean" in the Plaintiff's position could be considered circumstantial evidence of discriminatory animus, however it was "isolated and unrelated to the challenged employment decision" because the statement was made six (6) months before the employer made the decision to transfer the Plaintiff to Michigan. In sum, the Court concluded that this statement was insufficient to establish a genuine fact issue on pretext.

With regard to the discriminatory termination claim, the Court found that the employer's reason for terminating the client (failure to accept company's relocation offer) was not pretext for discrimination. The Court also found that employers decision to cut costs and provide better service to customers

in a certain geographic location were not a pretext for retaliatory conduct. The Court affirmed the lower court's ruling on the employer's summary judgment as to these remaining claims.

Bernard F. Campbell v. Secretary of Department of Veterans Administration, _____F.3d _____ (11th Cir. February 20, 2015).
http://law.justia.com/cases/federal/appellate-courts/ca11/14-13087/14-13087-2015-02-20.html

The Court affirmed the lower court's granting of the employer's summary judgment motions, finding that the employer had given legitimate, nondiscriminatory reasons for terminating the Plaintiff and that the Plaintiff had not presented any evidence that the employer's reasons were pretext for discrimination.

Thereafter, the Plaintiff filed a post-judgment motion pursuant to Rule 60(d)(3), which permits a court to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). The Plaintiff claimed that the district judge, along with the three judges on this Court who affirmed the district court's judgment, defrauded the court by ignoring his evidence, failing to consider his arguments, and preventing his case from going to a jury. The lower court found no evidence of fraud and denied the motion and the Plaintiff appealed.

The Eleventh Circuit found that the facts proffered by the Plaintiff in support of his claim of fraud on the court, directly related to the merits of his employment claims and not the issue of fraud. Therefore, the Eleventh Circuit held that the Plaintiff's motion was a "misguided effort to relitigate claims already raised and rejected" and affirmed the lower court's decision.

Bruce Ayala v. Sheriff, Broward County Florida, et al., _____F.3d _____ (11th Cir. February 19, 2015).
http://law.justia.com/cases/federal/appellate-courts/ca11/14-10582/14-10582-2015-02-19.html

The plaintiff claimed that his employer eliminated his position in the crime lab as part of a reduction in force (RIF) based on his age. The Eleventh Circuit found that the plaintiff did not sufficiently demonstrate that he was qualified to be transferred to another available position at the time of his discharge. The Court further held that the ADEA does not require employers to transfer or rehire workers during the course of an RIF. To the contrary, it just requires that "a discharged employee who applies for a job for which she is qualified and which is available at the time of her termination must be considered for that job along with all other candidates, and cannot be denied the position based upon her age." In addition the Eleventh Circuit placed particular importance that in situations involving an RIF, the position must be available and the employee must have applied for the position in order to establish a prima facie case of age discrimination.

In sum, the Eleventh Circuit concluded that it wasn't enough for the plaintiff to merely demonstrate that he was qualified for his current position. In situations involving total elimination of a position for a non-discriminatory reason, the plaintiff must show that they were qualified for another available job with that employer at the time of discharge, and applied for that position. The Court affirmed the lower court's decision.

Cynthia Turner v. Bob Inzer, _____F.3d _____ (11th Cir. February 17, 2015).
http://law.justia.com/cases/federal/appellate-courts/ca11/14-11357/14-11357-2015-02-17.html

The district court granted summary judgment on all claims in favor of the employer, which was affirmed by the Eleventh Circuit on appeal. The district court also denied fees for the employer with respect to the Whistle Blower Act, finding that, although the plaintiff's whistle blower claim was frivolous, it was not brought in bad faith, as required by the Whistle Blower Act for an award of fees to an employer. However, the district court awarded the employer attorney's fees because it found that the Plaintiff's Title VII claims were frivolous.

The Eleventh Circuit found that the plaintiff did not bring the Whistleblower claim in bad faith. However, the Court found that the plaintiff's Title VII claims were frivolous because the suspension, transfer and probation of the plaintiff were reasonable disciplinary measures perceived by the employer to be acts of insubordination.

In addition, the Eleventh Circuit found that the lower court's holding that the employer should only receive a portion of fees that it would not have paid, but for the frivolous claim was the correct standard, and the award by the district court of only the costs that would have been incurred absent the whistleblower claim, was appropriate. Eleventh Circuit affirmed lower court's decision.

Ferenc Fodor v. Eastern Shipbuilding Group, _____F.3d _____ (11th Cir. February 3, 2015).
http://law.justia.com/cases/federal/appellate-courts/ca11/14-11713/14-11713-2015-02-03.html

The plaintiff claimed that the employer refused to promote and ultimately terminated him because of his nationality and disability. In addition, he claimed that his employer was responsible for a hostile work environment.

As to the nationality and disability discrimination claims, the Eleventh Circuit found that that the Plaintiff failed to proffer any evidence refuting the employer's assertion that a hiring freeze was a legitimate reason for refusing promotion. Further the Eleventh Circuit held that the Plaintiff's failure to show up to work on three consecutive days was also a legitimate non-discriminatory reason for the decision to terminate employment.

With regard to the hostile work environment claim, the Eleventh Circuit found that the employer sufficiently demonstrated that they exercised reasonable care to prevent and promptly correct the harassing behavior and that the Plaintiff unreasonably failed to take advantage of any preventative opportunities. Specifically, the Court found that the employer proffered evidence that it had an anti-harassment policy which was sufficient to demonstrate reasonable care to prevent harassment. IN addition, the Court found that the employer proffered evidence that the Plaintiff failed to report the harassment, which was sufficient to demonstrate he failed to take advantage of the preventative measure (anti-harassment policy). Finally, the Court concluded that because the employee never gave the employer "an opportunity to address the situation and prevent further harm from occurring," and because the employer took reasonable care to prevent harassment beforehand, they were shielded from liability for a hostile work environment. Eleventh Circuit affirmed.

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