Monthly Update for February

3rd Circuit:

In *Hayberger v. Lawrence County Adult Probation and Parole*, the Third Circuit addressed the question whether a supervisor in a public agency may be subject to individual liability under the federal Family and Medical Leave Act (FMLA). Although this was an issue of first impression for the Third Circuit, it is an issue on which other circuits have split. In *Hayberger*, the Third Circuit joined the Fifth and Eighth Circuits in holding that public agency supervisors are subject to FMLA liability as "employers." It also held that supervisors' liability may be imposed upon those who do not have the final authority to hire and fire.

The plaintiff was the office manager for the Lawrence County, Pennsylvania, office of adult probation and parole. She reported to the Director of Probation and Parole. She also suffered from Type II diabetes, heart disease and kidney problems.

The plaintiff alleged that she had been disciplined by the Director for poor attendance despite his recognition that her absences were due to illness. Her evaluations called for her to "improve her overall health and cut down on the days that she misses due to illness." She was placed on a six-month probation, and was required to attend informal weekly progress assessments and formal monthly meetings. The probation was apparently based on a variety of performance issues pertaining to her "conduct, work ethic and behavior," including her attendance. When her performance had not improved by the end of the probationary period, the Director recommended that the plaintiff be fired. The Director's superiors approved the recommendation and "permitted" the Director to terminate the plaintiff.

Neither the plaintiff nor the Director disputed that public agency supervisors could be held liable as "employers" under FMLA. Therefore, the District Court did not address the question. The District Court instead found that the Director was not an "employer" because he did not have final authority to hire and fire, and granted the Director summary judgment on that basis.

On appeal, the Third Circuit decided first to address the antecedent issue whether public agency supervisors could be held liable as "employers" under FMLA, an issue on which the circuits had split. The issue arises from an ambiguity in the FMLA statutory definition of "employer," found at 29 U.S.C. Sec. 2611(4)(A). Sec. 2611(4)(A) includes four subparagraphs:

The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--**(I)** any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in {the Fair Labor Standards Act of 1938 (FLSA)}; and

(iv) includes the Government Accountability Office and the Library of Congress.

Subparagraph (ii)(I) extends liability as an "employer" to individuals acting as agents of an employer, such as corporate officers, managers and supervisors. However, because "public agencies" are identified as "employers" in a different and parallel subparagraph, the statute could be read as not extending liability to public agency officers, managers and supervisors. This is the conclusion drawn by the Sixth Circuit, which interprets the four subparagraphs as each relating to the term "employer," but not to each other. *Mitchell v. Chapman*, 343 F.3d 811 (6th Cir. 2003).

The Third Circuit rejected this interpretation, instead adopting the approach of the Fifth Circuit in *Modica v. Taylor*, 465 F.3d 174 (5th Cir. 2006). *Accord*, *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002).

{T}he FMLA indicates a relationship between § 2611(4)(A)'s modifiers by stating that the term "employer" "means" its definition in § 2611(4)(A)(i) and then "includes" the provisions in § 2611(4)(A)(ii)-(iv). ... Therefore, an "employer" "means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees" and "includes" both "any person who acts, directly or indirectly, in the interest of an employer" and public agencies. ... Because the definition of "employer" includes public agencies, and Congress provided that an employer may include individuals, it plainly follows that an individual supervisor at a public agency may be subject to liability.

The "public agency" provision was not superfluous because, read in conjunction with 29 U.S.C. Sec. 2611(4)(B), it was intended to relieve plaintiffs of proving that public agencies are engaged in interstate commerce. Finally, because Congress intended for courts to "treat the FMLA the same as the FLSA," and because the FLSA allows for public agency supervisor liability, extending FMLA liability to public agency supervisors is consistent with Congressional intent.

The Eleventh Circuit declined to extend FMLA liability to public agency supervisors on the ground that they lack sufficient control over employment. *Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999). The Third Circuit rejected this "blanket approach" in favor of a case-by-case analysis.

The Third Circuit then reversed the granting of summary judgment to the Director, finding that a genuine dispute of fact existed as to whether the Director was the plaintiff's "employer" for FMLA purposes. "{A}n individual is subject to FMLA liability when he or she exercises 'supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation' while acting in the employer's interest … an individual supervisor has adequate authority over the complaining employee when the supervisor 'independently exercise[s] control over the work situation.'" The appropriate standard is one of "economic reality" that depends on the totality of the circumstances rather than on technical concepts of the employment relationship. Factors to be considered include whether the supervisor (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. No one of these factors is dispositive standing alone, and the court must consider "any relevant evidence."

Based on this standard, the Third Circuit found sufficient evidence on the record to warrant trial on the Director's status as an "employer" for FMLA liability purposes. The District Court had erred by treating the lack of power to hire and fire as dispositive, thereby failing to consider the "total employment situation."

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5th Circuit

Hernandez v. Yellow Transportation, Inc. (2/9/2012): Posture—Plaintiffs alleged race discrimination, retaliation, and hostile work environment (HWE) against defendant employer under Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act. The Northern District of Texas granted summary judgment. Plaintiffs appealed. AFFIRMED; Holding—Nothing showed the events creating the uncivil workplace were based on race. The specific incidences were neither physically threatening nor humiliating and did not unreasonably interfere with work performance. Evidence of an HWE for African-Americans did not show an HWE for the Hispanic employees, nor was the alleged non-race-based harassment shown as part of a pattern of race-based harassment. There was evidence the white employee was harassed for reasons unrelated to his association with

minorities. The employer's acquiescence did not violate Title VII. Nor did he assert he complained to management. He did not show "but for" causation, and temporal proximity was not enough. The first employee's race discrimination claim failed because his termination, for threatening a coworker, was upheld by a formal grievance committee. And, he failed to show his conduct was nearly identical to those not fired. Nor was there evidence that the individuals responsible for his termination were tainted by discriminatory animus; URL—http://www.ca5.uscourts.gov/opinions/pub/09/09-10183-CV1.wpd.pdf

Patel v. Tex. Dept. of Trans. (2/23/2012): Posture— Plaintiff appearing pro se appeals the district court's grant of summary judgment in favor of the Texas Department of Transportation on his Title VII racial discrimination and retaliation claims. AFFIRMED; Holding— Patel argues that the evidence supplied by TxDOT to the district court in support of its summary judgment motion was fabricated by Beeman, Halterman, and Marek. Patel also maintains that the negative performance evaluations were only created to build a paper trail intended to cover up discriminatory and retaliatory actions. He failed to present evidence that he was treated less favorably than similarly situated employees. Patel failed to identify any non-Indian employee whom he considered similarly situated and who received more favorable treatment under circumstances nearly identical to his. When viewed as a whole, the record shows that Patel had received a number of negative performance reviews beginning as far back as 2005, well before Patel filed his grievance. There is nothing in the record to construe his termination as a form of retaliation; URL— http://www.ca5.uscourts.gov/opinions/unpub/11/11-50116.0.wpd.pdf

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6th Circuit

NLRA: *NLRB v. Jackson Hospital Corporation*, _ F.3d _, 2012 WL 265846 (6th Cir. Jan. 31, 2012).

In *Jackson Hospital Corp.*, the Sixth Circuit enforced a supplemental decision and order directing an employer to pay specific back pay amounts to an employee who had been unlawfully fired. The D.C. Circuit had previously enforced a National Labor Relations Board ("NLRB") order finding that the employer illegally discharged eight employees because of their participation in a strike. After the employer did not comply with the reinstatement and back pay order, the NLRB issued a supplemental decision and order. The Sixth Circuit enforced the order in its entirety.

The employer initially argued that the employee's felony conviction for attempting to obtain Demerol for a toothache by fraud terminated the employee's right to reinstatement. The court, however, concluded that the NLRB did not abuse its discretion in rejecting this argument where, among other things, the employer had continued to employ a felon and dozens of substance abusers in the past. Next, the court held that the employee's resignation from interim employment did not toll the back pay liability. The court concluded that the NLRB did not abuse its discretion in concluding that the employee's decision to resign from a position that was incompatible with her child care duties did not constitute a "willful loss of earnings" that would terminate back pay. Finally, the court enforced the NLRB's conclusion that the employee's medical leave, which lasted eight months, did not end the back pay liability because the employer's written leave policy did not foreclose the possibility of an eight-month leave. Thus, while the employee was not entitled to back pay during the leave, the leave itself did not relieve the employer of further back pay liability.

Title VII and FMLA: *Romans v. Michigan Department of Human Services*, _ F.3d _, 2012 WL 488707 (6th Cir. Feb. 16, 2012).

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In *Romans*, the Sixth Circuit affirmed dismissal of a fire and safety officer's Title VII race discrimination claim, but reversed dismissal of the officer's Family Medical Leave Act ("FMLA") interference and retaliation claims. The officer, a Caucasian male who worked at a facility that houses juveniles in the State of Michigan's custody for delinquency, had a history of employment actions taken against him during his employment, including suspensions, formal counselings (which were not considered disciplinary actions pursuant to the union contract) and written reprimands.

In September 2007, a co-worker filed a harassment complaint against the officer. The harassment investigator's investigation substantiated several claims and concluded that the officer's alleged harassment may have been racially motivated because of race relations in the historical context of the United States and in the particular Michigan county involved. The harassment investigator's findings were forwarded to a labor relations representative, who directed a second investigation and stated that the department would not discipline the officer based on the first investigation. Based on the second investigation, however, the labor relations representative recommended that the officer be fired.

Initially, the court concluded that the officer failed to present direct evidence of race discrimination based on the results of the initial investigation. The court explained that although one could infer the harassment investigator was racially motivated based on her conclusory assumption that the officer was racially motivated to harass another employee, "because one must draw an inference to determine her motivation, the report does not amount to direct evidence of discrimination." Additionally, even if the report was direct evidence of discrimination, it could not be imputed to the ultimate decisionmaker, who relied on a separate independent investigation that broke the causal chain of alleged animus.

Next, the court addressed whether there was circumstantial evidence of race discrimination. The court first found that the officer presented evidence that the employer was the unusual employer who discriminates against the majority based on a hiring policy that favored African Americans in the past. However, the officer failed to establish that he was treated differently than similarly situated individuals because the conduct that led to his termination was distinguishable from conduct of his alleged comparables. The court also concluded that the officer failed to establish pretext where the employer honestly relied on the particularized facts of the second investigation despite the fact that the officer contested at least two of the disciplines documented in the second investigation.

Addressing the officer's FMLA interference claim, the court held that the officer was entitled to take leave when he left work to go to the hospital to make a decision with his sister regarding whether his mother should continue on life support. The court explained that 29 C.F.R. § 825.116(b) does not require that the employee be the only family member available to provide the care. Furthermore, the same regulation also permits leave "to make arrangements for changes in care," and this clause is not limited to those instances where the employee is subbing for another family member. The officer also created a factual dispute regarding whether the denial of the officer's request to leave his post was based on a legitimate business reason. Finally, the court held that the officer raised sufficient facts to establish pretext regarding his FMLA retaliation claim.

FLSA: *Orton v. Johnny's Lunch Franchise*, _ F.3d _, 2012 WL 539373 (6th Cir. Feb. 21, 2012).

In *Orton*, the Sixth Circuit reversed the dismissal of a former salaried employee's claim for unpaid wages and expenses. In August 2008, the employer had trouble making payroll and ceased paying the employee any wages even though he did not stop working. After being formally laid off on December 1, 2008, the employee sued under the Fair Labor Standards Act ("FLSA") to recover his wages. Because the employee conceded his job was administrative in nature, the district court dismissed the case under Rule 12(b)(6), holding that exempt salaried employees have no claim under the FLSA for back wages.

On appeal, the Sixth Circuit reviewed only whether the employer satisfied the FLSA's salary-basis test for determining whether an employee qualifies as exempt. The court concluded that the district court improperly relied on an outdated rule of law, the pre-2004 regulations, when it concluded that employment agreements are the starting point for determining whether an employee is exempt. Instead, the relevant question is what compensation the employee actually received. Next, the Sixth Circuit concluded that the district court failed to place the burden of establishing the exemption on the employer. Thus, the employer failed to establish that it paid the employee a predetermined amount, or made a proper

deduction under the regulation. The court also noted that "[t]he regulation makes no exception for deductions in pay just because they were motivated by cash flow shortages."

ERISA: *Pfeil v. State Street Bank and Trust Co.*, _ F.3d _, 2012 WL 555481 (6th Cir. Feb. 22, 2012).

In *Pfeil*, the Sixth Circuit reversed dismissal of a class action alleging that State Street Bank and Trust, the fiduciary for two General Motors ("GM") retirement plans, breached its fiduciary duties by continuing to allow plan participants to invest in GM common stock, even though public information indicated that GM was headed for bankruptcy. The plans at issue were defined contribution plans for salaried and hourly employees, each of which maintained individual accounts for each participant. The plans offered several investment options, including the General Motors Stock Fund. The plan documents provided that the company stock fund "shall be invested exclusively" in GM stock, but also provided that the stock restriction did not apply (a) if there were serious questions regarding GM's short-term viability as a going-concern without resort to bankruptcy proceedings or (b) if there was no possibility in the short-term of recouping substantial proceeds from the sale of stock in bankruptcy proceedings. If either of the conditions were met, then the plan documents directed State Street to divest the plan's holdings in the GM Stock Fund.

On July 15, 2008 GM Chief Executive Rick Wagoner announced that the company needed to implement a "significant" restructuring plan. On November 21, 2008, State Street informed participants that it was suspending further purchases of the GM Common Stock fund. On March 31, 2009, State Street began to sell off the plan's holdings in company stock, a process that was completed on April 24, 2009. GM filed for bankruptcy on June 1, 2009.

State Street filed a motion to dismiss, which the district court granted. The district court concluded that the plaintiffs sufficiently pled a breach of fiduciary duty claim alleging that State Street continued to operate the GM Stock Fund even after public information raised serious questions about GM's short-term viability as a going concern without resort to bankruptcy. Ultimately, however, the district court concluded that the plaintiffs had not plausibly alleged that the fiduciary breach proximately caused losses to the plan because the plan participants had a menu of investment options from which to choose and also retained control over the allocation of assets in their accounts at all times.

On appeal, the Sixth Circuit first addressed the presumption of prudence that applies to fiduciaries of Employee Stock Ownership Plans ("ESOP"). This presumption, described in *Kuper v. Ivenko*, 66 F.3d 1447 (6th Cir. 1995), holds that a fiduciary's decision to remain invested in employer securities is presumed to be reasonable, but that a plaintiff may rebut the presumption by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision.

The Sixth Circuit initially held that the plaintiffs pled sufficient facts to overcome the presumption. Although the court acknowledged that it need not decide whether the *Kuper* presumption created a heightened pleading standard, the court proceeded to resolve the issue, holding that the presumption of reasonableness is not an additional pleading requirement and does not apply at the motion to dismiss stage. According to the court, the *Kuper* presumption was an evidentiary presumption to be applied to a fully developed record. The Sixth Circuit distinguished sister circuit case law applying the presumption of prudence at the motion to dismiss stage, concluding that those circuits adopted a more narrowly-defined test for rebutting the presumption. The non-Sixth Circuit tests require proof that the company faced a "dire situation," something short of "the brink of bankruptcy" or an "impending collapse." In the Sixth Circuit, the *Kuper* presumption establishes an abuse of discretion standard, forcing plaintiffs "to carry out a demanding burden." The court further explained that even if the presumption applied at the pleading stage, the plaintiffs had carried their burden.

Next, the court held that the plaintiffs adequately pled that State Street proximately caused the losses to the plan. The Sixth Circuit explained that State Street was obligated to exercise prudence when designating and monitoring the menu of investment options offered to participants. Therefore, the fact that the participants had authority to reallocate their investments among the fund options did not insulate State Street from liability.

Finally, the Sixth Circuit held that the safe harbor in ERISA §404(c), which provides that a plan trustee "is not liable for any loss caused by any breach which results from the participant's exercise of control over those assets," does not apply at the motion to dismiss stage because it is an affirmative defense that was not raised in the complaint. The court further held that even if the plans satisfied the Department of Labor's regulations to qualify for the safe harbor, §404(c) does not apply to the circumstances of the

the case because it does not relieve fiduciaries of the responsibility to screen investments. The court explained that because the safe harbor relieves fiduciaries of responsibility for decisions it did not control, it does not apply to fiduciary decisions – such as the selection of a plan investment option – that the fiduciary does control.

Title VII Race Harassment: *Berryman v. SuperValu Holdings*, _ F.3d _, 2012 WL 593106 (6th Cir. Feb. 24, 2012).

In *Berryman*, the Sixth Circuit affirmed dismissal of Title VII claims brought by eleven current and former employees who alleged that they were exposed to a racially hostile work environment in SuperValu's warehouses. In response to SuperValu's separate motions for summary judgment, the employees submitted a detailed list of incidents which formed the basis of their claims. Applying the totality-of-the-circumstances test articulated in *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999), the district court limited its analysis to those events that were either perceived by the individual employee or that the employee knew about.

The Sixth Circuit held that *Jackson* militates against aggregating the claims. The court explained that "[i]mplicit in the consideration of the totality of the circumstances is that a plaintiff was aware of harassment that was allegedly directed toward other employees." Thus, while a plaintiff need not be a target or witness to the harassment, the employee needs to know about the harassment. The court found that the employees failed to show they were individually aware of the harassment experienced by their co-plaintiffs, and therefore summary judgment was appropriate.

LMRA: *Road Sprinkler Fitters Local 669 v. Dorn Sprinkler Co.*, _ F.3d _, 2012 WL 614925 (6th Cir. Feb. 28, 2012).

In *Road Sprinkler Fitters Local 669*, the Sixth Circuit affirmed a grant of summary judgment against a local union alleging breach of an obligation of arbitration arising out of a collective bargaining agreement. The employer, Dorn Sprinkler, failed to contribute to various employee benefit funds and eventually went out of business. The union sued Dorn Fire Protection, an entity formed by the son of the owner of Dorn Sprinkler, under an alter ego theory, after Dorn Fire Protection refused to arbitrate.

At the outset, the court resolved conflicting Sixth Circuit authority and held that the standard of review when an alter-ego determination is made on summary judgment is *de novo*. The court then addressed the various alter-ego factors. Initially, the court found that the management structure at the two companies was "not substantially identical." Despite the fact that three family members worked at both entities, their roles differed at Dorn Sprinkler and Dorn Fire Protection. Next, the court found that the operation of the two companies was not related, the companies were competitors and only two of fourteen Dorn Fire Protection employees had worked for Dorn Sprinkler around the time of its closing. The court also noted that Dorn Fire Protection began operations with its own equipment and that any equipment purchased from Dorn Sprinkler was acquired through arms-length purchases. Next, the court found that there was not a significant overlap between the two entities' customers. Finally, the court found no evidence of intent on the part of the two companies to avoid the effect of the collective bargaining agreement.

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7th Circuit

***Hess and Warren v. Kanoski & Associates, et al.* (7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/FZ0DS1EG.pdf

Court Reverses and Remands District Court Grant of Summary Judgment in Part on Contract Claims Involving Compensation Arising Out of Post-Termination Settlements

The Seventh Circuit affirmed the district court's grant of Summary Judgment for most, but not all, of plaintiff's eleven claims against defendants. Because the district court erred in finding the Illinois courts had already determined the issue raised by plaintiff's contract claims, the Seventh Circuit concluded summary judgment was inappropriate and reversed and remanded for proceedings

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consistent with its opinion.

Davis v. Ockomon, et al. **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/FZ0DKBJF.pdf

Court Affirms District Court's Determination That the Senior Humane Officer Can be Dismissed For Political Reasons

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of defendants finding the Senior Humane Officer could be dismissed for political reasons because the City ordinance in question authorized the Senior Humane Officer to exercise policymaking discretion. Plaintiff, the former Senior Humane Officer, was dismissed in January 2008 when a mayoral candidate plaintiff had opposed in the general election took office. Plaintiff brought suit alleging his termination was in violation of the First and Fourteenth Amendments.

Heinen v. Northrop Grumman Corporation **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/FZ0DMKD5.pdf

Court Affirms District Court Order Compelling Arbitration of Relocation Benefits Which are "Employment-Related" And Thus Covered by the Arbitration Clause

The Seventh Circuit affirmed the district court's order compelling arbitration of a dispute involving relocation benefits. Plaintiff appealed this decision, arguing that his demand for relocation benefits was collateral and separate from the employment contract. While true, the Seventh Circuit deemed this fact irrelevant. Plaintiff had accepted an offer of employment with defendant that was contingent on plaintiff signing Defendant's "Dispute Resolution Process." The Dispute Resolution Process required arbitration of any employment-related claim against the company, save for several inapplicable exclusions involving workers compensation, taxes and pensions. The Seventh Circuit noted that the breadth of "employment-related" was why the clause had to specifically exclude such disputes. Because the Seventh Circuit determined that relocation benefits were clearly employment-related, the Court affirmed the district court's order compelling arbitration.

Nauman, Roller, and Loughery v. Abbot Laboratories and Hospira, Inc. **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/FZ0DOD6H.pdf

Court Affirms Judgment in Favor of Defendants Finding Defendants Did Not Have The Requisite Intent To Interfere With Plaintiffs' Pension Benefits As Required Under ERISA

The Seventh Circuit affirmed the district court's judgment in favor of defendants on Plaintiffs' Employee Retirement Income Security Act ("ERISA") claims and breach-of-fiduciary-duty claim finding that the evidence supported both judgments. This case involved the "spin" of Abbott Laboratories Hospital Products Division ("HPD") into a separate company called Hospira. After the spin, HPD employees who had previously had access to Abbott's pension plan, became employees of Hospira, which did not offer a pension plan. As a result, when HPD employees ceased employment with Abbott and became employees of Hospira, their non-vested pension rights in the Abbott plan were eliminated. In addition, the terms of the spin included reciprocal no-hire policies, which meant that retirement-eligible HPD employees were effectively prevented from retiring from Abbott before the spin to begin collecting Abbott pension, then joining Hospira. Plaintiffs, representing a certified class, brought suit alleging Abbott violated § 510 of ERISA by using the spin and no-hire policy to relieve itself of pension liability. Furthermore, Plaintiffs alleged that Hospira used the no-hire policy to deter HPD employees from exercising pension benefits before the spin, and finally that Abbott breached its fiduciary duty by failing to disclose prior to the spin that Hospira would not offer the same benefits. Ultimately the district court entered judgment for defendants on all counts and plaintiffs appealed.

The Seventh Circuit began its analysis by noting that §510 of ERISA prohibits retaliation for the exercise of plan benefits and interference with the attainment of those benefits. However, under this section it is not enough to simply claim a loss of benefits, plaintiffs must also demonstrate that their employers acted with the specific intent of preventing or retaliating for the use of benefits.

After review of the district court's findings at trial, the Seventh Circuit determined that the district court's conclusion that employee benefits had no part of the decision to spin HPD was not clearly erroneous, and supported by witness testimony and evidence documenting the rationale for the spin. The Seventh Circuit also concluded that the district court's finding that the no-hire policy was not motivated by an intention to interfere with employee benefits was not clear error. The district court's conclusion that the no-hire policy was created to promote stability and productivity at both Abbott and Hospira post spin was well supported by evidence. In sum, the Seventh Circuit found that plaintiffs had simply failed to prove specific intent on the part of defendants to interfere with employee benefits – a crucial requirement under §510.

Finally, the Seventh Circuit agreed with the district court's finding that Plaintiffs' breach-of-fiduciary-duty claim must also fail. Because Hospira created the benefits plan after the spin and without input from Abbott, the Seventh Circuit found that the district court's conclusion that Abbott had no fiduciary duty with respect to the plan naturally followed. Furthermore, even if Abbott had owed a fiduciary duty, the district court's holding that Abbott committed no breach because it did not materially misrepresent anything about the later developed Hospira plan was not in error.

Johnson v. GDF, Inc. d/b/a/ Domino's Pizza **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/FZ0DX3E5.pdf

Court Reverses and Remands District Court Award of Attorney's Fees for New Calculation

The Seventh Circuit reversed and remanded the district court's assessment of attorney's fees and costs for abuse of discretion. The background of the fee dispute spanned several years and first involved plaintiff's claim for overtime wages, and later a federal suit whereby plaintiff alleged he was fired in retaliation for his overtime claim in violation of the Fair Labor Standards Act. While the parties had one brief discussion of settling "everything," such talks did not come to fruition. The state suit was later resolved through a consent judgment, while the federal suit proceeded to trial where the jury returned a verdict for plaintiff, awarding him back pay and punitive damages. The only remaining issue was attorney's fees, to which plaintiff was entitled as the prevailing party. At the close of the fee dispute, the district court concluded only four of the one hundred and ninety hours billed by plaintiff's attorney, Earnest Rossiello, were reasonable, that the relevant measure of Rossiello's hourly rate was cases where his fee had been challenged and upheld, and finally that had Rossiello candidly disclosed plaintiff's damages the case would have settled more expeditiously, and thus trial costs were not awarded. Rossiello appealed the district court's calculation of the lodestar.

The Seventh Circuit began by noting that while a district court has significant discretion in determining the lodestar, it cannot base its decision on an irrelevant consideration or reach an unreasonable conclusion. As the Seventh Circuit's analysis revealed, the district court did of both in this case. Because the dispute concerned the correct calculation of plaintiff's reasonable attorney's fee as set by the lodestar, plus costs, the Seventh Circuit considered (1) the number of hours reasonably expended by plaintiff's counsel, (2) the reasonable hourly rate for those services, and (3) costs.

Beginning with the hours reasonably expended by plaintiff's counsel, the Seventh Circuit noted that the District Court's conclusion that all but four of the one hundred and ninety billable hours were unnecessary was an abuse of discretion. The district court based this determination on its agreement with the defendant that had plaintiff revealed the true value of his claim for damages the case could have been settled more quickly. The Seventh Circuit was unconvinced by this argument, pointing out that the record simply did not support the assertion that the small amount of damages claimed caught defendant off guard. Furthermore, defendant had not conceded liability, and in fact, disputed whether plaintiff had been fired at all. While defendant's offer to "settle everything" may be taken into consideration in determining reasonable attorney's fees, the Seventh Circuit concluded that plaintiff's rejection of such an offer was not unreasonable given the possibility that plaintiff might, and did, recover liquidated and punitive damages in the federal case. Because defendant knew approximately what it was up against and proceeded to trial, without an offer of judgment or concession of liability, the Seventh Circuit concluded that defendant must pay for the attorney hours reasonably required to

to see the case through trial, to appeal, and for the collection of fees.

With respect to the alleged hourly rate, the Seventh Circuit noted that the best evidence of an attorney's market rate is his or her actual billing rate for similar work. In this case, the district court concluded that Rossiello had failed to establish his actual billing rate, which the Seventh Circuit confirmed was a determination within the district court's discretion. The district court next chose to disregard the third-party affidavits presented by Rossiello in which the affiants claimed they did not bill differently for FLSA and Title VII cases based on its conclusion that the billing rates for FLSA and Title VII cases *must* be different. The Seventh Circuit admonished this type of a priori declaration about prevailing market rates as an abuse of discretion. Furthermore, the Seventh Circuit concluded that the district court abused its discretion by considering only cases where Rossiello's fees were challenged, noting that a previous attorneys' fee awarded is useful for establishing a reasonable market rate for similar work, whether it is disputed or not.

Lastly, for the reasons above, the district court's refusal to award plaintiff costs based on its conclusion that it was unreasonable for plaintiff's case to go to trial was incorrect. Accordingly, the Seventh Circuit reversed and remanded the attorney's fee award for a new calculation, with instructions to include costs associated with trial.

***McReynolds, et al., v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/FZ0E5RXE.pdf

Court Reverses District Court Denial of Class Certification in Disparate Impact Employment Discrimination Case

The Seventh Circuit reversed the district court's denial of class certification finding that limited class action treatment was appropriate in this case. Plaintiffs were 700 black brokers currently or formerly employed by defendant who brought suit under Title VII challenging the alleged disparate impact of defendant's "teaming" and "account distribution" policies. The "teaming" policy permits brokers in the same office to form teams, and once formed, the team decides whom to admit as a new member. Team members share clients, and the aim of forming or joining a team is to gain access to additional clients. The Account Distributions policy refers to the process by which a broker's customers' accounts are transferred when a broker leaves Defendant's employ. Accounts are transferred within a branch office based on an interoffice competition which includes consideration of the competing brokers' records of revenue generated for the company and of the number and investments of clients retained. Plaintiffs sought class certification for two purposes – deciding a common issue (*i.e.* whether the defendant has engaged and is engaging in practices that have a disparate impact on members of the class in violation of federal antidiscrimination law) and providing injunctive relief. The district court denied certification, albeit with resignation.

As a preliminary matter the Seventh Circuit addressed defendant's assertion that plaintiff's appeal was untimely. Rule 23(f) of the Federal Rules of Civil Procedure permits appeals from orders granting or denying class certification within 14 days of the entry of the order despite the general policy against allowing interlocutory appeals in the federal court system. In this case, plaintiffs' initial motion for class certification was denied in August 2010. In July 2011 plaintiffs' filed an amended motion for class certification, which was denied in September, and within 14 days of that denial Plaintiffs sought leave to appeal. Defendant argued that plaintiffs' appeal was an untimely request to appeal the August 2010 denial of certification, while plaintiffs argued their 14 days to seek leave to appeal ran anew from the denial of their amended motion for class certification. The Seventh Circuit concluded that the time limit in Rule 23(f), having been created by the Court rather than Congress, is governed by the "competence" standard under which the subject-matter jurisdiction of the federal courts includes all cases in which the courts are competent, *i.e.* legally empowered, to decide. Furthermore, the Court noted, an appellate court's exercise of jurisdiction over Rule 23(f) appeals is entirely discretionary.

After recognizing that a new challenge is timely if filed as soon as a new development which may warrant certification occurs, the Seventh Circuit remarked that the basis of plaintiffs' renewed motion for class certification

was the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc., v. Dukes*. In *Wal-Mart* the Supreme Court held that if employment discrimination is practiced by the employing company's local managers, exercising discretion granted them by top management rather than implementing a uniform policy established by top management to govern the local managers, a class action of more than a million current and former employees would be unmanageable. Because there was no company-wide policy to challenge in *Wal-Mart*, the incidents of discrimination complained of did not present a common issue capable of effective resolution in a single proceeding. Though the district court judge again denied plaintiff's motion for certification, he noted that *Wal-Mart* added much to the landscape of class certification, and that this case in particular cried out for a 23(f) appeal. The Seventh Circuit agreed.

The Seventh Circuit noted that while in this case certain directors as well as branch-office managers were able to exercise a measure of discretion with regard to teaming and account distribution, this discretion was still influenced by the defendant's company-wide teaming and account distribution policies. It was these policies, rather than managerial discretion, that plaintiffs' challenged as exacerbating racial discrimination by brokers. The Court went on to conclude that whether the teaming policy causes racial discrimination in violation of Title VII and whether such a policy is nonetheless justified by business necessity are issues common to the entire class and appropriate for class-wide determination. Likewise, whether the team-inflected account distribution system does have a disparate impact, but is nonetheless also justified by business necessity is also a question common to the class. As such the Seventh Circuit concluded that plaintiffs' challenge to these policies was not forbidden by the *Wal-Mart* decision, and that the practices challenged presented a pair of issues that would be most effectively determined on a class-wide basis.

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8th Circuit

***EEOC v. CRST Van Expedited, Inc.*, Nos. 09-3764/09-3765/10-1682 (8th Cir. Feb. 22, 2012) (Issue of first impression for federal appellate courts – EEOC is not judicially estopped from bringing suit in its own name even when employee is judicially estopped from recovery; EEOC must complete pre-suit investigation for each individual alleged victim of discrimination while pursuing class claim).**

The EEOC filed suit in its name against CRST Van Expedited, Inc. ("CRST"), one of the country's largest interstate trucking companies, alleging a single individual (Monika Starke) and "approximately 270 similarly situated female employees" were subject to a hostile work environment, in violation of Title VII. The district court granted summary judgment for CRST and awarded $92,842.21 in costs and $4,467,442.90 in attorneys' fees and expenses, pursuant to 42 U.S.C. § 200e-5(k) and 28 U.S.C. § 1920, for failing to reasonably investigate and conciliate in good faith. In its 59 page opinion, the Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. The highlights of the thorough opinion follow.

The EEOC alleged that female driver trainees were subjected to severe and pervasive sexual harassment in CRST's New-Driver Training Program. CRST employs more than 2,500 long-haul drivers, and utilizes a "team driving" model. Team driving is an efficiency measure whereby one driver sleeps while the other drives and they alternate for up to 21 days. New hires must successfully complete the training program before they may drive full time for full pay as certified CRST drivers. During the new-driver orientation they are provided a Driver Handbook which provides for an anti-harassment policy and procedures for reporting. Additionally, employees are trained how to report harassment complaints. After orientation, new hire drivers are paired on a 28 day over-the-road trip with a Lead Driver who familiarizes the new hire with CRST's driving model. The Lead Driver either

passes or fails the driver trainee. They cannot hire, fire, promote, demote or reassign trainees.

On December 1, 2005, Starke filed a charge of discrimination with the EEOC alleging sexual harassment in violation of Title VII. The EEOC designated a "relevant period" for its first request for information and sought information only related to Starke's allegations. On December 21, 2005, CRST submitted its position statement and provided information in response to the request for information. In the following months, the EEOC issued four additional requests for information, seeking information beyond Stark's individual allegations. In July 2007, the EEOC presented CRST with a Letter of Determination, notifying CRST that it had found reasonable cause to believe Starke and "a class of employees" was subjected to sexual harassment, and offered to conciliate the claim. CRST attempted to conciliate with the EEOC, but the parties could not reach conciliation. In September 2007, the EEOC filed suit, on behalf of Starke and others similarly situated.

For nearly two years thereafter, the EEOC did not identify the 270 women allegedly comprising the putative class. Thus, as noted by the district court, CRST faced a "continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial." Finally, the EEOC identified and made 150 women available for deposition; the district court precluded the EEOC from pursuing relief for the remaining 120 women. Thereafter, the district court dismissed claims for over one-half of the 150 women. The EEOC appealed 107 of those dismissals.

The EEOC challenges the dismissal of 67 claims based on its failure to reasonably investigate or conciliate in good-faith. The Eighth Circuit upheld the dismissal, detailing the pre-suit requirements of Title VII. Notably, the Eighth Circuit upheld the district court's holding that because the EEOC did not conduct any investigation of the specific allegations of the allegedly aggrieved individuals before filing the Complaint and did not issue a reasonable cause determination as to those allegations (nor attempt to conciliate them), it "wholly abandoned its statutory duties". The Eighth Circuit noted that the EEOC's suit's allegations of multiple acts of discrimination by CRST arose out of Starke's single charge, expansion of which is permitted, "so long as the EEOC satisfies all its pre-suit obligations for each additional claim." The Court notes that Title VII limits the latitude of the EEOC in order to place a strong emphasis on administrative (not judicial) resolution of disputes.

In an issue of first impression for any federal appellate court, the Court also held that the EEOC is not judicially estopped "from brining suit in its own name to remedy allegedly unlawful employment practices because those practices were perpetrated against an employee who herself is judicially estopped." The Eighth Circuit notes this is consistent with the EEOC's role as a plaintiff in its own name under § 706. As noted above, this decision is extensive and worth a complete review by those responding to Charges or an EEOC suit.

***Chambers v. The Travelers Cos., Inc.*, No. 11-1473 (8th Cir. Feb. 9, 2012) (defamation, failure to pay wages, unilateral contract to pay performance bonus, age discrimination, interference with ERISA rights).**

Karen Chambers was a Managing Director, supervising six underwriters. In September 2007, one of her underwriters complained to Michele Cady, Human Resources Manager, that Chambers had a controlling management style, brought personal stress to the department, made inappropriate religious comments, and sold religious items in the office which he felt obligated to purchase to stay on her "good side". Since the reporting underwriter was on a performance improvement plan, Cady sought advice from her supervisor as to how to proceed. Cady was instructed to perform a "climate survey" and provided a template with neutral questions. Cady provided this survey to the six underwriters who reported to Chambers. The responses supported the initial complaint, and Cady provided Chambers with a Written Behavior Warning. Three months later, Cady and Chambers' two supervisors learned that Chambers had taken family members on business trips with her and expensed their food and drinks. Chambers failed to disclose the extent to which family members attended, which the Travelers learned of. She was terminated immediately, and told it was because of "continuing issues".

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Chambers alleged defamation based on the above, but the district court held the statements made and the written warning were entitled to a qualified privilege. Travelers had a duty to investigate staff morale, and the negative comments made by staff were summarized. The Eighth Circuit held that such communications, made by the employer's agents in the course of an investigation or in punishing employee conduct is properly made as the employer has an interest to protect itself and the public against dishonest or harmful employees. (citing Minnesota law). The Court noted a qualified privilege is lost if the employee can demonstrate the employer acted with actual malice – merely pointing to how the employer could have better conducted the investigation does not provide basis for the actual malice.

As to the breach of contract and unpaid wages claims made by Chambers for unpaid bonus, the Court held that all Travelers documents clearly stated the award of a bonus was within Travelers' discretion, which is "virtually unreviewable". The Court noted the policies provided that they were "informational", did not create a contract or alter an existing one and required the employee to be employed to receive the bonus. Accordingly, the Court held the Minnesota Payment of Wages Act, Minn. Stat. § 181.13 et. seq. was not violated as the bonuses were not "actually earned an unpaid". (citing *Lee v. Fresenius Med. Care., Inc*.). As to the age claim, the district court noted Chambers was 52, and the discharge decision makers were 50 and 59, respectively. A 51 year old assumed her responsibilities, and eventually a 44 year old was hired to assist. The Eighth Circuit concluded that Chambers failed to shower her replacements were "sufficiently younger".

Finally, as to her ERISA claim, Section 510 prohibits discharge in order to interfere with the attainment of any right which an employee may be entitled under a benefit plan. Chambers argued her dismissal interfered with Traveler's severance plan – that expressly provided that in the event of discharge for cause, the employee is ineligible for severance. The Court rejected the argument, and noted it required "little discussion". Chambers also argued her dismissal interfered with her right to pension benefits, but the Court again held that she was terminated for cause and Travelers' past actions did not provide pretext for intentional interference.

***Murphy v. St. Louis University*, No. 11-2818 (8th Cir. Feb. 6, 2012) (Missouri Human Rights Act claims not proper before federal court).**

Affirming the employee's Title VII and ADEA claims, the Eighth Circuit held the Missouri Human Rights Act ("MHRA") claims should have been dismissed. The Court noted "we are uncertain as to how Missouri courts could view those claims" as the MHRA safeguards are not identical to federal law, and can offer greater discrimination protection. The Court remanded the case to district court with instructions to dismiss those claims without prejudice.

***Moten v. Warren Unilube, Inc.*, No. 11-2579 (8th Cir., Jan. 31, 2012) (Title VII age and gender discrimination, retaliation due to termination in RIF).**

In this short affirmation of summary judgment for the employer, the Eighth Circuit Court stuck to its precedent, confirming that a complaint of a single incident involving offensive language with a co-worker is not trialworthy. Citing a string of cases, the Court noted that it is not a super-personnel department, a decline in revenue is legitimate business justification for a reduction-in-force, and unless extremely serious, isolated incidents will not amount to discriminatory changes in terms and conditions of employment.

***Crawford v. BNSF Railway Co.*, No. 11-1953 (8th Cir. Jan. 11, 2012) (Title VII sexual and racial harassment claims barred by *Ellerth-Faragher* affirmative defenses).**

Five former BNSF Railway Company ("BNSF") employees sued BNSF alleging sexual and racial harassment by supervisor. BNSF did not dispute inappropriate behavior by the supervisor at issue. However, it had a "zero tolerance" policy on workplace harassment and employees were instructed five different ways they could report harassment. The policy also prohibited retaliation for reporting discrimination. The employees argued BNSF management was aware of the supervisor's harassing conduct through "informal comments" but failed to take action.

Months after the alleged harassment began the employees each filed a charge with the Nebraska Equal Opportunity Commission and the EEOC. After

BNSF immediately started an investigation, placed the supervisor on administrative leave, and terminated him a few weeks later, after completion of the investigation. The employees testified they delayed the report fearing retaliation and desiring to build up evidence against the supervisor.

The district court held BNSF was not liable as it was entitled to its *Ellerth – Faragher* affirmative defenses, concluding BNSF exercised "reasonable care to prevent and correct promptly any harassing behavior" and noted the employees failed to use the company's reporting procedures.

In their appeal, the employees conceded that distribution of an anti-harassment policy is "compelling proof that an employer exercised reasonable care to prevent and correct harassing behavior." However, they argued the policy was not actually enforced. The documents provided otherwise, and showed that whenever a report was made through one of the five channels, BNSF investigated the complaint and took action. The employees also argued that BNSF management was aware of the harassing behavior and did nothing. The Eighth Circuit held that a comment to a superior that a supervisor was doing "inappropriate things" was insufficient, as was an ambiguous reference to "peter tracks", to put BNSF on actual notice of suspected harassment. The Court held that as "BNSF had a 'published policy that provides a procedure for reporting suspected harassment, [the employees] must have invoked this procedure in order to establish actual notice.'" – constructive knowledge is irrelevant to defeat the affirmative defenses where an effective anti-harassment policy is in place. The Court also held the employees failed to avail themselves of the complaint procedure for approximately eight months, and only a genuine and truly credible threat of retaliation may make a delayed report reasonable. Further, the Court held that neither delaying to collect evidence nor belief that "their reports would have fallen on deaf ears" excuse a delay in reporting.

***Breckenridge O'Fallon, Inc. v. Teamsters Union Local No. 682*, No. 11-1436 (8th Cir. Jan. 9, 2012) (review of whether arbitrator's decision "draws its essence" from the CBA).**

Breckenridge's employee Ron Eguia ("Eguia") injured his back while driving a ready-mix concrete truck. Eguia was treated and released by his physician without restrictions. Breckenridge required Eguia to complete a Functional Capacity Evaluation ("FCE") before returning to work. After he failed the FCE, Breckenridge sent Eguia to a neurosurgeon who determined Eguia reached maximum medical improvement, with a permanent lifting restriction (40 pounds), which was less than that required in the job requirements (60 pounds). Eguia was placed on unpaid medical leave. A few months later, Eguia provided Breckenridge with a Report to Employer from his personal physician, with no restrictions. Breckenridge asked the neurosurgeon to provide a "re-certification" which was unchanged (with the lifting restrictions). Breckenridge provided Eguia a list of physicians and required him to select one and obtain a third opinion. The third physician also determined he had reached MMI with permanent lifting restrictions below that required for the position (45 pounds). Breckenridge told Eguia he could not be scheduled for further work as a ready-mix driver as he was unable to perform the job.

The Teamsters Union Local No. 682 ("Union") filed a grievance on Eguia's behalf, noting that two employees had previously failed FCE's, received full medical releases thereafter, were allowed to re-take the FCE, and were returned to duty. It argued that refusing to allow Eguia to retake the FCE was an unreasonable, inconsistent implementation of Breckenridge's FCE policy. The Union argued this violated the "just cause", seniority rights, and management rights clause of the CBA. Breckenridge, on the other hand, argued that FMLA regulations allow it to obtain a third, tie-breaking medical opinion. (29 C.F.R. § 825.307(c)). It also argued the FCE policy unambiguously reserved the right "in its sole discretion" to require an employee to undergo a FCE before returning to work.

The arbitrator determined that Eguia had not been discharged, but did retain his seniority rights if able to meet the job requirements. The arbitrator also noted that the CBA's management rights clause provided Breckenridge the right to establish the FCE rules, but determined it must administer the FCE rules consistently, and may not choose to discard its rules in favor of the FMLA process. The arbitrator determined Breckenridge violated the CBA by failing to allow Eguia to take a second FCE as it had all other previous individuals in similar situations. The district court granted summary judgment, confirming the arbitrator's decision drew its essence from the CBA.

Breckenridge appealed, arguing the award failed to draw its essence from the CBA. The Eighth Circuit noted the "draws its essence" issue was unusual as the arbitrator's award only involved the management rights provision of the CBA, whereas typically the issue is whether the employer had just cause for the termination. The Court noted that determining whether a management rights provision that is expressly limited to the right to establish *reasonable* work rules is within an arbitrator's authority. However, in this instance, the CBA contained an *unlimited* declaration of management rights which the Court notes raises the question "largely unexplored in reported judicial decisions - - may the arbitrator nonetheless review whether Breckenridge's exercise of those rights was 'reasonable'." Yet, the Court determined it need not resolve the question, holding Breckenridge expressly conceded when submitting the grievance to the arbitrator, that the CBA only granted it the right to establish "*reasonable* safety and work rules".

With this self-imposed limitation, the Court held the FCE policy did not require Breckenridge to require Eguia to take a second FCE, but that did not matter as the arbitrator decided the award based on violation of the management rights clause when it inconsistently applied the FCE policy. Further, the Court held that Breckenridge's contention that the arbitration decision failed to acknowledge the FMLA was without merit as the FMLA merely provides the employer may require a third medical opinion, but does not mandate it. Thus, the permissive regulation does not diminish Breckenridge's duty under 29 U.S.C. § 2652(a) to comply with the CBA. The Court affirmed summary judgment for the Union.

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