Monthly Update for January 2015

MONTHLY CIRCUIT UPDATES

First Circuit

Ocasio-Hernandez v. Fortuno-Burset2015 WL 317135
http://caselaw.findlaw.com/us-1st-circuit/1689957.html

Former employees of the Puerto Rico Governor's mansion brought § 1983 and Puerto Rican law actions against former Governor, his chief of staff, his administrator, and his wife, claiming that they were terminated solely because they affiliated with rival political parties, which amounts to political discrimination prohibited by the First Amendment. The District Court for the District of Puerto Rico granted summary judgment in favor of the defendants. Upon appeal, the Court of Appeals for the First Circuit affirmed the lower court's judgment and held that there is no evidence that demonstrates that defendants had knowledge of plaintiffs' particular political affiliations.

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Second Circuit

Turley v. ISG Lackawana, Inc., 2014 U.S. LEXIS 23705 (2d Cir. Dec. 17, 2014).

In a racial harassment case, Court of Appeals sustained a $1.32 million award for pain and suffering but reduced the $5 million punitive damages award. On the compensatory damages, the Court noted that the facts in this case were egregious, "combining years of grotesque psychological abuse leading to a marked decline in Turley's mental health and well-being" as well as his hospitalization and PTSD and depression diagnoses. The Court reduced the punitive damages award, noting that "It appears that punitive awards for workplace discrimination rarely exceed $1.5 million" and that "a roughly 2:1 ration of punitive damages to what, by its nature, is necessarily a largely arbitrary compensatory award, constitutes the maximum allowable in these circumstances." *Turley v. ISG Lackawana, Inc., 2014 U.S. LEXIS 23705 (2d Cir. Dec. 17, 2014).*

In the same case, the Court of Appeals held the jury had an evidentiary basis to find the parent company liable for the harassment. While the law allows a corporation to organize in a way that isolates liabilities among separate entities, they can still be a "single employer" under the labor laws. The Second Circuit held that the trial record contains "some evidence" that the parent company was involved in decisions relating to plaintiff's employment "and to the course of harassment." For example, a harassment training seminar explained that all complaints must be reported to the corporate human resources department, and employees were directed to report harassment to a nationwide corporate ″hotline.″ Also, plant managers repeatedly stated that they were required to check with the corporate legal department in Chicago before providing information to assist police investigations concerning threats against Turley, and his employment ended when the parent company shut down the Lackawanna plant and sold its assets.

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Third Circuit

Albert Flora, Jr. v. County of Luzerne, et al., _F.3d_, 2015 WL 178640, C.A. 3, (Penna.), (January 15, 2015)
www2.ca3.uscourts.gov/opinarch/141854p-1.pdf

Albert Flora, Jr., served in the Public Defender's Office in Luzerne County, Pennsylvania, from 1980 until 2013. He became First Public Defender in 1990, Acting Chief Public Defender in March 2010, and Chief Public Defender in June 2010. According to his complaint, his predecessor as Chief and he had struggled for years to obtain sufficient funding from the County to provide constitutionally adequate representation services for the clients of the Public Defender's Office. When repeated efforts to obtain adequate funding from the County proved unsuccessful, and the Office's inability to service its clients had reached an alleged "critical stage," Flora decided to initiate a class action lawsuit seeking a writ of mandamus to compel the County to provide the Public Defender's Office with adequate funding and resources, with three clients of the Public Defender's Office serving as the lead plaintiffs. The lawsuit was successful.

Simultaneous with the funding litigation was the fallout from the so-called "Kids for Cash" scandal, in which two judges of the Luzerne County Court of Common Pleas had been found to have accepted kickbacks from for-profit juvenile detention facilities in exchange for sentencing unrepresented juvenile defendants to those facilities. In 2009, the Pennsylvania Supreme Court ordered the vacatur and expungement of thousands of convictions and consent decrees tainted by this scandal. But according to his complaint, in early 2013, Flora discovered that over 3,000 of these convictions and consent decrees had yet to be expunged. Flora reported this discovery to numerous bodies, including the Special Master that the Pennsylvania Supreme Court had appointed to oversee the matter. Flora asserted that he felt compelled to report the issue to the Special Master "as an officer of the court," although doing so allegedly angered Luzerne's County Manager.

Following the successful funding litigation, Luzerne County amended the Public Defender's budget to create a new, full-time Chief Public Defender position. (The decision does not explain how this new, full-time position differed from the position Flora had held since June 2010). Flora and other candidates applied for the new, full-time position. In March 2013, another candidate was selected to fill the position. At that time, a County Commissioner informed the local media that Flora had become a "controversial candidate" because of the funding litigation. Flora was relieved of all duties as Chief Public Defender on April 17, 2013. He commenced litigation in District Court several days later, alleging that he had been terminated in retaliation for the funding litigation and for disclosing the County's noncompliance with the expungement order. He asserted, *inter alia,* claims under 42 U.S.C. Sec. 1983 based on a theory of First Amendment retaliation.

On the defendants' Rule 12(b)(6) motion, the District Court dismissed Flora's complaint, concluding that he had failed to state a First Amendment claim because the filing of the state court action and the reporting of unfinished expungements were "related to" his official duties as Chief Public Defender, and were therefore not protected by the First Amendment. On appeal, the Third Circuit reversed.

To establish a First Amendment retaliation claim, a public employee must show that the First Amendment protects his speech, and that the speech was a substantial or motivating factor in what is alleged to be the employer's retaliatory action. The sole issue on the *Flora* appeal was whether Flora's alleged speech fell within the gambit of First Amendment protection. A public employee's speech is protected by the First Amendment when: (1) the employee spoke as a citizen, (2) the speech involved a matter of public concern, and (3) the government employer did not have an adequate justification for treating the employee differently from any other member of the general public as a result of the

speech. The parties in *Flora* disputed only whether Flora has spoken as a citizen, or as an employee, when he initiated the funding litigation and reported the County's noncompliance with the expungement order. Thus, under *Garcetti v. Ceballos, 547 U.S. 410 (2006), and Lane v. Franks, _U.S._, 134 S.Ct. 2369 (2014),* the case turned on whether these particular forms of speech fell within Flora's ordinary job duties.

The Third Circuit first found that the District Court had improperly engaged in fact-finding in deciding the Rule 12(b)(6) motion rather than accepting Flora's allegations as true. Whether particular speech falls within a particular plaintiff's job duties is a mixed question of fact and law. The scope and content of a plaintiff's job responsibilities is a question of fact, while the ultimate constitutional significance of those facts is a question of law. The pleadings in the case presented a factual dispute as to whether Flora's job duties including making the statements at issue. The District Court failed to accept Flora's factual allegations on this point as true, and thereby erred.

Further, the District Court applied an incorrect legal standard. The District Court deemed a public employee's speech to be unprotected by the First Amendment when the speech was "related to" the public employee's job duties. On appeal, the defendants similarly argued that any speech that relates to "special knowledge" or "experience" acquired through a public employee's job would be unprotected. The Third Circuit rejected each theory as unduly restrictive. Citing *Garcetti* and *Lane,* the Third Circuit articulated the appropriate standard as whether the speech is itself *ordinarily within the official duties* of the public employee, not merely whether the speech concerns those duties. The First Amendment does not protect speech that is ordinarily within the public employee's official duties. Speech that merely relates to the employee's duties, or concerns information learned through public employment, enjoys First Amendment protection unless it is demonstrated that it also fell within the public employee's ordinary official duties.

Applying the correct legal standard to the facts alleged by Flora, the Third Circuit concluded that Flora's speech would enjoy First Amendment protection. "As claimed in his complaint, and as described in the statute creating the Public Defender, Flora's ordinary job duties did not include the public reporting of lingering effects from government corruption or the filing of a class action suit to compel adequate funding for his office. Rather, he represented indigent clients in criminal court and in related proceedings…While certain statements in Flora's complaint do suggest that the speech at issue bore some relation to his job duties and may have, indirectly, benefitted his clients, that does not bring the speech within the realm of his ordinary job duties." The order of dismissal was vacated, and the matter was remanded for further proceedings.

Jeffrey J. Heffernan v. City of Paterson, et al., _F.3d_, 2015 WL 265514, C.A. 3, (N.J.), January 22, 2015
www2.ca3.uscourts.gov/opinarch/141610p-1.pdf

Heffernan is a Paterson, New Jersey, police officer who was allegedly demoted from an administrative detective position to a "walking post" after he was observed obtaining a mayoral candidate's campaign sign for his mother. The candidate in question was a former police chief with whom Heffernan was friendly and whom Heffernan wanted to win. However, Heffernan neither worked on the candidate's campaign nor was involved in the campaign, and because Heffernan did not live in Paterson, he could not even vote for the candidate. His sole involvement in the campaign was to pick up a campaign sign for his bedridden mother to replace a smaller one that had been stolen from her lawn. But a police officer assigned to the incumbent mayor's security staff apparently observed Heffernan picking up the sign. Heffernan was confronted by his supervisors and "demoted" to a "walking post" because of what was taken to be his "overt involvement" in a political campaign.

Heffernan thereupon commenced litigation under 42 U.S.C. Sec. 1983, asserting claims of retaliatory demotion based on his exercise of free speech rights and free association rights. After a complicated procedural history – which included summary

judgment determinations entered by two separate District Court judges who refused to allow the parties to file opposition briefs, and a jury verdict in Heffernan's favor that was vacated when the District Court judge who presided over the trial "retroactively recused" himself due to a conflict of interest – summary judgment ultimately was entered in favor of the defendants. On appeal, the Third Circuit affirmed.

To make out a free speech claim, Heffernan was required to show that he spoke or engaged in expressive conduct on a matter of public concern. ("Expressive conduct" exists when there is an intention to convey a particularized message, and the likelihood is great that those who view the message would understand it). But because Heffernan disavowed any intention to engage in any expression in support of any candidate for mayor, he could not meet this requirement.

To make out a free expression claim, Heffernan was required to show that the he worked for a public agency in a position that does not require a political affiliation, that he maintained an affiliation with a political party, and that his political affiliation was a substantial or motivating factor in his demotion. But "Heffernan himself confirmed that regardless of what others may have perceived, he did not have any affiliation with the campaign other than the cursory contact necessary for him to pick up the sign for his mother." Thus, Heffernan could not show that he maintained an affiliation with a political party.

Heffernan then argued that he could proceed on each claim under a "perceived support" theory, asserting that the defendants' retaliation was "traceable to a genuine but incorrect or unfounded belief that the employee exercised a First Amendment right." But the Third Circuit rejected the argument as being "squarely foreclosed by our own binding precedent, which holds that a free-speech retaliation claim is actionable under §1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." This Third Circuit precedent is in accord with that of the Fifth, Seventh and Ninth Circuits in the context of free speech.

Heffernan urged the Court to follow the Sixth Circuit decision in *Dye v. Office of the Racing Comm'n, 702 F.3d 286 (6th Cir. 2012),* which held that employer's mere assumption of a political affiliation, whether founded or not, was sufficient for an employee's free *association* (as opposed to free speech) First Amendment claim to proceed. The Third Circuit rejected Heffernan's invitation. "{W}e have no reason to believe that the holding of *Dye* can be reconciled" with Third Circuit precedent. "But beyond that, we are not convinced that *Dye* provides any reason to depart from our established holding on this point." The *Dye* Court purported to rely on First and Tenth Circuit precedent that involved adverse employment actions taken against employees who did not adopt a position on a local political issue. "Like the District Court, however, we read {those cases} as natural applications of the settled First Amendment principle that an employer may not discipline an employee based on the decision to remain politically neutral or silent … And indeed, the emphasis on that point … is, if anything, consistent with the {proposition} that a First Amendment retaliation claim under §1983 must rest upon the actual exercise of a particular constitutional right—whether it be the right to speak on a political issue, to associate with a particular party, or to not speak or associate with respect to political matters at all." Because Heffernan "has not presented evidence that he was retaliated against for taking a stand of calculated neutrality," he presented no cognizable First Amendment claim.

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Fourth Circuit

Power Fuels, LLC v. Federal Mine Safety & Health Review Comm'n, 2015 WL 332128 (4th Cir. Jan. 27, 2015).

Petitioner Power Fuels, LLC operates a coal-blending terminal that tests, samples, mixes, and stores thousands of tons of coal per day for a nearby power plant. In 2012, an investigator from the Department of Labor's Mine Safety and Health Administration ("MSHA") visited the terminal to observe Power Fuels' operations. Based on the investigator's report, the Secretary of Labor determined that the blending terminal was subject to MSHA's jurisdiction.

In 2013, MSHA issued three citations to Power Fuels for violations of the Mine Safety and Health Act ("Mine Act"). Power Fuels contested the citations, arguing that it was not the operator of a mine and, therefore, MSHA did not have jurisdiction. The ALJ held that MSHA had jurisdiction because Power Fuels was engaged in the "work preparing the coal" under the Mine Act, 30 U.S.C. § 802(h)(1)(C). Power Fuels petitioned for judicial review.

The Fourth Circuit first considered whether MSHA had regulatory jurisdiction under the Mine Act as opposed to OSHA under the Occupational Safety and Health Act ("OSH Act"). The Fourth Circuit reasoned that where Congress has enacted an industry-specific statute conferring authority over working conditions on another agency, the OSH Act does not apply. Based on the statutory text, the Fourth Circuit concluded that the Mine Act is a broadly written statute that covers workers involved in both extraction and preparation.

Applying the plain language of the Mine Act, the Fourth Circuit concluded that Power Fuels' operations were covered by the Mine Act. The Mine Act broadly states that a covered coal mine may engage in the "work of preparing coal" such as mixing, storing, cleaning, washing, and loading coal. In addition, the Fourth Circuit noted that coal mines covered by the Mine Act may include "custom coal preparation facilities."

The Fourth Circuit found that Power Fuels not only engages in many of the activities listed in the Mine Act, but also that the performance of those activities is the entire reason Power Fuels is in business. Power Fuels blends the coal according to the precise specifications of its primary power plant customer, thereby providing services akin to custom coal preparation. Accordingly, the Fourth Circuit denied Power Fuels' petition, concluding that the Mine Act does not foreclose MSHA's assertion of authority in this case.

<u>*Weidman v. Exxon Mobil Corp.*, 2015 WL 103954 (4th Cir. Jan. 8, 2015)</u>

The plaintiff worked as a senior physician for the defendant ExxonMobil from 2007 until termination of his employment in 2013. Following his termination, the plaintiff filed suit against ExxonMobil and several individuals alleging retaliation for reporting illegal pharmacy practices.

The plaintiff alleged that he discovered ExxonMobil was operating illegal pharmacies in several states and had illegally stockpiled prescription drugs. The plaintiff further alleged that ExxonMobil's Medical

Director asked the plaintiff to "participate in a scheme" to distribute that medication. The plaintiff also alleged that he reported ExxonMobil's pharmacy law violations.

According to the plaintiff, ExxonMobil's Medical Director then began engaging in retaliatory conduct including physical intimidation, continuous humiliation in front of colleagues, falsely classifying him as a poor performer, and making statements at an office gathering that implied he was a pedophile. The plaintiff reported this conduct to senior management and reiterated his concern that ExxonMobil was violating pharmacy laws. An internal investigation found no fault. Following the investigation, the plaintiff was designated as a "poor performer" and was placed under a performance review plan.

The plaintiff complained to human resources that the performance review plan was designed to cause his failure rather than improve his performance. During what the plaintiff describes as a "hostile and confrontational" meeting, the plaintiff claimed to have suffered a stress-related heart attack. Several months later, ExxonMobil terminated the plaintiff's employment for failure to comply with the performance review plan. The district court granted ExxonMobil's motion to dismiss the plaintiff's claims for fraud, intentional infliction of emotional distress, personal injury, and wrongful discharge.

The Fourth Circuit affirmed the district court's order on the fraud, intentional infliction of emotional distress, and personal injury claims, but reversed the dismissal of the plaintiff's retaliation claim. Recognizing the strong presumption that employment at will may be terminated for any reason, the Fourth Circuit noted an exception for an employee's claim that the termination violated public policy. Under Virginia law, an employee may show a violation of public policy where the employee was terminated for exercising a statutorily created right, the public policy is expressed in the statute and the employee is a member of the class to be protected, or the termination was based on the employee's refusal to engage in a criminal act.

In this case the plaintiff alleged he was terminated for refusing to obtain a license in states where ExxonMobil operated illegal pharmacies. Although the plaintiff did not expressly cite to Virginia statutes, the Fourth Circuit noted that Virginia law makes it unlawful for anyone to practice pharmacy or distribute prescription drugs without a license. The Fourth Circuit further noted that the refusal to practice pharmacy without a license is akin to refusal to engage in a criminal act. Based on these allegations the Fourth Circuit found the plaintiff sufficiently alleged a termination in violation of Virginia's public policy.

Jones v. Southpeak Interactive Corp., 2015 WL 309626 (4th Cir. Jan. 26, 2015)

In 2009, appellee Andrea Jones, former chief financial officer for the Southpeak Interactive Corp., learned that the company had failed to record a debt paid from Chairman Terry Phillips' personal account on either the company balance sheet or in its quarterly report. When Jones confronted Phillips about the omission, he failed to provide her with a "credible" explanation. Jones contacted the audit committee to report her suspicion that the company was engaging in fraud. Outside counsel for the company thereafter proposed an amendment to the quarterly report which denied intentional fraud or misstatement. Jones refused to sign the amended report and was terminated that same day.

Jones filed a complaint with OSHA, alleging that Southpeak, Phillips, and CEO Melanie Mroz violated the Securities Exchange Act by terminating her employment in retaliation for her attempts to correct the quarterly report. After more than 180 days passed, Jones informed OSHA and Southpeak that she was electing to file suit in federal court pursuant to the Sarbanes-Oxley Act. Nearly two years later, Jones filed suit against Southpeak, Mroz, and Phillips ("Appellants") for violations of the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The district court granted the motion to dismiss the Dodd-Frank claims based on retroactivity grounds. The district court denied the motion to dismiss the Sarbanes-Oxley claims

rejecting arguments that those claims were barred by the statute of limitations or that Jones failed to exhaust her administrative remedies.

Following a trial, the jury found Appellants liable under the Sarbanes-Oxley Act and awarded Jones backpay and compensatory damages for emotional distress. The trial court reduced the compensatory award against Phillips and Mroz and further awarded attorneys' fees jointly and severally against all defendants. In addition to arguments related to inconsistencies in the jury verdict and allocation of attorneys' fees, Appellants argued that the statute of limitations barred Jones' action, that Jones failed to exhaust her administrative remedies, and that the Sarbanes-Oxley Act does not permit an award of damages for emotional distress.

The Fourth Circuit rejected Appellants' argument that the two-year statute of limitations set forth in 28 U.S.C. § 1658(b) applied to Jones' Sarbanes-Oxley claims, finding the "catchall" four-year statute of limitations in section 1658(a) applicable in this case. The Fourth Circuit acknowledged that courts have applied section 1658(b) to private rights of action that involve a fraud claim. However, Jones' Sarbanes-Oxley retaliatory discharge claim did not require proof that her employer's conduct was legally actionable fraud. Thus, the Fourth Circuit ruled that Jones' Sarbanes-Oxley claims were timely under the four-year limitations period of section 1658(a).

The Fourth Circuit also rejected Appellants' argument that Jones failed to exhaust her administrative remedies as to Mroz and Phillips because the OSHA complaint did not clearly identify them as respondents. The Fourth Circuit noted that Jones' OSHA complaint was substantially similar to her complaint in federal court and that the harm alleged was identical in both complaints. Further, the OSHA complaint clearly identified Mroz and Phillips as "persons who are alleged to have violated the Act." Recognizing that the primary objective of the exhaustion requirements is to provide parties with notice of the allegations against them, the Fourth Circuit found that there was no doubt Mroz and Phillips, as CEO and Chairman of Southpeak, were aware of Jones' allegations.

Finally, the Fourth Circuit also rejected Appellants's argument that the Sarbanes-Oxley Act does not provide for emotional distress damages. Joining the Fifth and Tenth Circuits, the Fourth Circuit held that the language in Sarbanes-Oxley permitting "all relief necessary to make [the claimant] whole" contemplates emotional distress damages. The Fourth Circuit noted that since Sarbanes-Oxley protects against a range of retaliatory conduct, including threats and harassment, the primary harm for violations of Sarbanes-Oxley will at times be noneconomic. The Fourth Circuit analogized the Sarbanes-Oxley Act to the False Claims Act, which all courts agree permits noneconomic compensatory damages. Accordingly, the Fourth Circuit affirmed the district court's judgment awarding compensatory damages for emotional distress.

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Sixth Circuit

Ruffin v. MotorCity Casino, No. 14-1444, --- F.3d. ----, 2015 WL 72840 (6th Cir. Jan. 7, 2015)

Plaintiff-Appellants are security guards for Defendant-Appellee MotorCity Casino. The security guards receive meal periods but are required to stay on property, monitor radios and respond to emergencies. The guards alleged that they were owed overtime under the Fair Labor Standards Act ("FLSA") because they were not compensated for their meal periods.

The issue presented by the security guards was whether their meal times were compensable under the FLSA The District Court ruled that they were not compensable and granted summary judgment in favor of MotorCity Casino because the time spent by the security guards during the meal periods was not predominately spent for the employer's benefit.

The Sixth Circuit affirmed the District Court's dismissal of the claim looking at "totality of circumstances." First, in response to the guards' argument that monitoring their radio was substantial duty that was compensable, the Court stated that numerous courts have held that an employer's requirement for an employee to carry a radio and respond in emergencies does not convert meal time to work time because it is a de minimis, insubstantial duty. Second, the court noted that the guards did not introduce evidence to demonstrate how often their meal periods were actually interrupted by any calls. Finally, the Court stated that the guards' inability to leave the employer's property during meal period is not compensable because the Department of Labor Regulations state that "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period."

Tilley v. Kalamazoo Cnty. Rd. Comm'n, No. 14-1679, --- F.3d ----, 2015 WL 304190 (6th Cir. Jan. 26, 2015)

Plaintiff-Appellant, a 59 year old former employee, filed an action against Defendant-Appellee claiming that his termination was age discrimination in violation of Michigan's Elliot–Larsen Civil Rights Act (ELCRA), interfered with his right to medical leave under Family Medical Leave Act (FMLA) and was in retaliation for exercising those rights. Defendant argued that Plaintiff was terminated for failing to complete assignments in a timely fashion.

The District Court granted summary judgment for Defendant on all claims. The Sixth Circuit affirmed in part and reversed in part.

The Court affirmed dismissal of Plaintiff's ELCRA age-discrimination claim. The Court ruled that the Plaintiff did not make a prima facie case because he did not establish through direct or circumstantial evidence that he was replaced by a younger worker or that any younger workers engaged in similar conduct and remained employed. Plaintiff had no evidence that any of the animus he claimed his superiors had towards him was *because* of his age.

The Court reversed dismissal of Plaintiff's FMLA claim. While the Court agreed that Plaintiff was not an eligible employee because Defendant did not meet or exceed the FMLA's "50/75-Employee Threshold" the Court ruled that there was a material fact question as to whether Defendant was estopped from making this argument based on Plaintiff's pleadings. To plead estoppel, Plaintiff had to demonstrate "(1) a definite misrepresentation as to a material fact, (2) a reasonable reliance on the misrepresentation, and (3) a resulting detriment to the party reasonably relying on the misrepresentation." Plaintiff argued that Defendant's employment manual contained "clear misrepresentations" regarding his eligibility to receive FMLA benefits that he relied on to his detriment. The issue of whether Plaintiff's assertion is credible is one for the jury to decide, not the Court. As such, the Sixth Circuit remanded the FMLA claim back to the District Court and also instructed the District Court to review the merits of Plaintiff's interference and retaliation claims.

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Eighth Circuit

Pedersen v. Bio-Medical Applications of Minn., ___ F.3d. ___, No. 14-1284 (8th Cir. Jan. 6, 2015), 2015 U.S. App. LEXIS 90, http://media.ca8.uscourts.gov/opndir/15/01/141284P.pdf.

Plaintiff was employed as a nurse for Defendant, a clinic that specializes in helping patients suffering from end-stage renal disease. On April 12, 2012, Plaintiff noticed a box of blood samples that had been packaged incorrectly, which she believed could have been compromised. On April 17, 2012, Plaintiff received discipline for several performance issues, and was told she would be transferred to another location. Later that day, Plaintiff reported the blood samples incident to the nephrologist, an outside contract physician. Plaintiff's supervisor told Plaintiff not to discuss the incident with the nephrologist. Plaintiff then reported the incident to the area manager, and suggested that the physicians and medical director should be notified.

On April 19, 2012, a patient reported that Plaintiff slapped her arm during two previous treatments, and Defendant received several other complaints about Plaintiff. Defendant suspended Plaintiff and then placed her on a corrective action plan. Plaintiff went on medical leave, and while she was out, the area manager asked the clinic manager several times if there were ways to "get rid of" Plaintiff, suggesting a number of reasons she could use to justify Plaintiff's termination. When Plaintiff returned, Defendant offered her employment back as a patient care technician rather than a registered nurse, with the caveat that she receives additional training to return to her nurse position. Plaintiff asked for certain conditions to be met before returning to work, but Defendant did not meet them and ultimately terminated her in September 2012.

Upon summary judgment, the district court granted defendant's motion by finding that Plaintiff had not engaged in statutorily protected conduct. The Court of Appeals affirmed summary judgment, finding that Plaintiff had not demonstrated direct evidence of discrimination, and could not demonstrate pretext under the *McDonnell Douglas* framework. With respect to the direct method, Plaintiff pointed to the area manager's comments that she wanted to find ways "to get rid of" Plaintiff, but the Court held that those comments were not sufficient because Defendant subsequently offered to return Plaintiff to work on a corrective action plan. With respect to the *McDonnell Douglas* burden-shifting framework, the Court held that Plaintiff could not demonstrate that the reasons behind the decisions to suspend, demote, and terminate Plaintiff were pretext for an illegal motivation because of her performance, absence, and refusal to return to work.

Gibson v. Geithner, ___F.3d.___, No. 12-2817 (8th Cir. Jan. 9, 2015), U.S. App. LEXIS 348 http://media.ca8.uscourts.gov/opndir/15/01/132817P.pdf.

Plaintiff, an African-American male, was employed in 2008 as a probationary full-time seasonal tax examiner by Defendant, the IRS. Tax examiners were responsible for coding and editing tax returns, and quality assurance examiners would randomly select five to ten of the probationary employees' returns to review.

In March 2008, Plaintiff's supervisor, Felicia Butler, noticed that Plaintiff appeared not to be editing entire bundles of returns, but rather arranged his work so it looked like he did while only editing the beginning and end of the bundle. Butler also observed Plaintiff claiming work that was done by someone else, recording hours he was not there, and improperly altering a government document. Butler verbally counseled Plaintiff on March 24, 2008 and followed up with a memorandum.

Plaintiff responded by denying intentional falsifications, and claimed he was being unfairly targeted.

On March 25, Butler found three instances where Plaintiff claimed credit for editing documents that did not exist. On March 31, Plaintiff sent a memorandum to his union representative stating that Butler was harassing and retaliating against him by singling him out for unfavorable treatment. Plaintiff's work product was thereafter subject to 100% review, and was found to have an unacceptably high error rate.

On April 18, Deputy Manager Vanessa Hunter authorized Butler to meet with Plaintiff and advise him that he would be removed from his position unless he chose to resign. Plaintiff refused to resign and he remained employed for the time being. The Operations Manager contacted the Labor Relations Specialist and was told Plaintiff should be terminated. On April 21, Plaintiff delivered a letter to his local union representative alleging sexual harassment, retaliation, harassment, and hostile work environment by Butler. The operations manager received the letter and ordered an investigation, which found the allegations unsubstantiated. On April 21, the Operations Manager terminated Plaintiff.

Plaintiff brought suit in federal district court, and the district court dismissed all claims on summary judgment. Plaintiff appealed only the retaliation claim. The Court of Appeals affirmed summary judgment, finding that Plaintiff could not demonstrate evidence that the employer's reason for termination was pretext for unlawful retaliation. Specifically, Plaintiff could not show that the proffered reasons were false or that the justification shifted. Plaintiff's only evidence of pretext, according to the Court, was timing, and when evaluated in the context of other evidence, was insufficient to create an inference of retaliatory motive.

Fatemi v. White, ___ F.3d. ___, No. 13-2536 (8th Cir. Jan. 6, 2015), 2015 U.S. App. LEXIS 89, **http://media.ca8.uscourts.gov/opndir/15/01/132536P.pdf**.

Plaintiff was a second-year neurosurgery resident at the University of Arkansas for Medical Sciences. Plaintiff was the only female resident in the program at the time, and complained of discrimination on numerous occasions. Over the course of six months, Plaintiff received numerous complaints from other resident doctors, supervising doctors, and the nursing staff for behavioral issues, patient safety issues, and performance issues. Plaintiff was transferred to another facility, but received numerous complaints at that facility.

Plaintiff was terminated in June 2010, and brought suit in June 2011, alleging discrimination based on race, national origin, and gender; damage to her professional reputation; violations of due process and equal protection under the Arkansas and United States Constitutions; violations of the First Amendment of the United States Constitution and the Arkansas Public Employees Political Freedom Act; and interference with her business expectancy; and retaliation. The district court granted summary judgment on all counts, and Plaintiff appealed the dismissal of her gender discrimination claim.

The Court of Appeals held that Plaintiff provided no evidence to prevail under the direct method, and therefore must rely on the *McDonnell Douglas* framework. Under that model, the Court held that the plaintiff did not provide sufficient evidence to demonstrate that the reasons for any adverse action taken against her were pretext for illegal discrimination. First, Plaintiff argued that four other male physicians were ostensibly treated more favorably were valid comparators. While the Court noted that comparators need not be "clones," they must have been treated differently based on violations of "comparable seriousness." In this case, three of the physicians had received criticism during the tenure of a different Department Chair, and the fourth physician was disciplined for far less serious problems than Plaintiff. Plaintiff next alleged that Defendant failed to provide her the same training opportunities as a male first-year resident, but the Court dismissed this argument because the male resident had attended both graduate and medical school at that campus and therefore was far more familiar with the campus and computer systems. Finally, Plaintiff argued that Defendant's reasons for disciplining and terminating her were pretext because they were "shifting explanations." The Court rejected this argument because many of the same complaints about Plaintiff's performance were

present in the second disciplinary letter, and some new incidents had accrued since her last meeting with her supervisors.

***Magee v. Hamline Univ.*, ___ F.3d.___, No. 14-1699 (8th Cir. Jan. 7, 2015), 2015 U.S. App. LEXIS183, http://media.ca8.uscourts.gov/opndir/15/01/141699P.pdf**

Pro se Plaintiff was terminated in July 2011 from her position as a tenured professor from Hamline University School of Law after being found guilty of four misdemeanor counts of failure to file state tax returns. In April 2011, she filed an action under 42 U.S.C. § 1983 alleging that the Dean of Hamline University, the Trustees of Hamline University, and a police officer with the City of St. Paul worked in concert to terminate her in violation of her constitutional rights. In April 2012, the district court granted Defendants' motion to dismiss, and the Court of Appeals affirmed. In May 2013, Plaintiff served a second lawsuit claiming a violation of 42 U.S.C. § 1981. Defendants removed to federal court and the district court granted Defendants' motion to dismiss based on res judicata. The Court of Appeals affirmed, finding that both the 1981 claim and the 1983 claim arose "out of the same nucleus of operative facts."

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Eleventh Circuit

Morales v. Zenith Ins. Co., No. 12-11755 (11th Cir. 2015)(January 22, 2015)

The claim arose when Santana Morales, Ms. Morales' late husband, was crushed to death by a palm tree while working as a landscaper. The employer had a "workers compensation and employers liability insurance policy" with Zenith, including two types of coverage: workers' compensation and employer liability insurance (ELI). The ELI insurance required Zenith to "pay all sums [the employer] legally must pay as damages because of bodily injury to its employees," provided the injury was covered. The provision contained an exclusion of coverage for obligations imposed by workers' compensation law.

In 1999, the Estate brought a wrongful death action against the employer, claiming negligence by the employer, and default judgment was granted in favor of the Estate. For damages, a jury awarded $9.925 million.

After Mr. Morales' passing, Zenith began paying workers' compensation benefits to the estate, and did so for nearly four years. In 2003, Zenith them made a full settlement of the Estate's workers' compensation claims against the employer, and the parties entered into a settlement agreement with language that the settlement constituted an election of remedies as to coverage provided by the employer.

As such, Zenith refused to pay the wrongful death tort judgment, and the employer, in turn, brought a claim against Zenith for breach of insurance policy. The district court granted Zenith's summary judgment, concluding the policy workers' compensation exclusion barred the judgment. The appeal ensued, and the 11th Circuit certified three questions to the Florida Supreme Court, including whether the Estate had standing to bring a claim against Zenith under the employer liability policy, whether the exclusion barred the tort judgment., and if not, did the release in the settlement release the claims. The Florida Supreme Court concluded the Estate had standing, but that the exclusion and

release prevented recovery of the tort judgment. As such, the 11th Circuit affirmed the district court's grant of summary judgment in Zenith's favor.

Bailey v. TitleMax of Georgia, Inc., No. 14-11747 (11th Cir. 2015)(January 15, 2015)

In *Bailey v. TitleMax of Georgia, Inc*., Santonias Bailey, an employee of TitleMax of Georgia, brought a claim under the Fair Labor Standards Act for unpaid overtime. During the year of his employment, Bailey regularly worked hours off the clock when his supervisor told him that the company did not pay overtime and when his supervisor changed Bailey's time records to reflect less than 40 hours per week. The district court granted the employer's summary judgment, which argued unclean hands as Bailey was responsible for his overtime for failure to report his supervisor's actions, and failing to follow the employer's policy to accurately report hours, which he was aware.

On appeal, the 11th Circuit examined the question as to "if an employer knew its employee underrepresented his hours, can it still assert equitable defenses based on employee's own conduct in underreporting as a total bar to the employee's FLSA claims?" The 11th Circuit concluded it could not. Specifically, the 11th Circuit noted that knowledge of an employee's overtime may be imputed to a supervisor or management when they "encourage artificially low reporting." The employer's unclean hands defense was insufficient as the employer had constructive knowledge of the hours Bailey worked, through his supervisor, and because the supervisor encouraged this. A contrary finding would undermine the FLSA.

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DC Circuit

Williams v. Johnson, --- F.3d ----, 2015 WL 220989 (D.C. Cir. January 16, 2015).
http://www.cadc.uscourts.gov/internet/opinions.nsf/0111AE926C025F5485257DCF0053B99B/$file/12-7074-1532472.pdf

A city employee testified to the D.C. Council that her department's new software was not working and behind schedule. She claimed she was harassed as a result, eventually having to resign, suing under the D.C. Whistleblower Protection Act. The Court upheld a $300,000 jury award, rejecting tardy notice and sufficiency of evidence challenges.

The employee asserted that, as a Council hearing started, she saw answers she had drafted in advance were changed to be misleading, so she chose to instead give her original, truthful responses. She claimed her boss later told staff the testimony had make the department look like "crooks." The Court determined that the allegations about the software were significant enough to be protected, consistent with a Council member's comments that they revealed the agency was "just burning money" and might reflect a False Claims Act violation. Alternatively, the reported attempt to dilute the employee's testimony was sufficient evidence of an abuse of authority.

What the City argued was tardiness in notifying it that the employee asserted constructive discharge was excused because the D.C. Council had since dropped a six month notice requirement and the Court applied the change retroactively as procedural in nature. The Court also rejected the City's contention that the employee had to make a separate showing she subjectively believed her disclosures were of serious wrongdoing.

World Color (USA) Corp. v. NLRB, --- F.3d ----, 2015 WL 221054 (D.C. Cir. January 16, 2015).
http://www.cadc.uscourts.gov/internet/opinions.nsf/850313ABACBB5B0E85257DCF0053B9DC/$file/14-1028-1532484.pdf

The Court remanded as faulty an NLRB finding that employee rights were violated by a company safety policy prohibiting the wearing of baseball caps other

than those issued by the company, bearing its logo.

The union filed an Unfair Labor Practice, asserting a violation of 29 U.S.C. § 158(a)(1), which prohibits interference/restraint/coercion of employe organizing and collective bargaining rights set out under §157. The Court noted it was undisputed that, absent special circumstances, employees had the right to wear union insignia at work.

The Court concluded that the National Labor Relations Board erroneously believed that the employer did not dispute that the policy facially prohibited hats bearing union insignia, justifying remand.

The proper analysis of a policy said to violate §158 is whether it expressly restricts protected activity. If not, it nonetheless is a violation if employees reasonably would construe it as doing so, it was issued in response to union activity, or the rule has been applied so as to violate employee rights. NLRB was found to have ignored the employer's statements that it permitted employees to add union insignia to its official caps, meaning that the Board's conclusion constituted reversible error, having no basis in the record.

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