



## Monthly Update for January

### 5<sup>th</sup> Circuit:

*Umoren v. Plano Indep. Sch. Dist. Bd. Trst.* (1/6/2012):

**Posture**—Plaintiff former substitute teacher appealed from orders of the U.S. District Court for the Eastern District of Texas dismissing and granting summary judgment against his employment discrimination claims against defendants, a school district and several of its employees and officials;

**Holding**—The Title VII of the Civil Rights Act of 1964 claims against the employees and officials were properly dismissed as Title VII relief was only available against an employer, not supervisors or fellow employees. Immunity applied to state law emotional distress claims, as the Texas Tort Claims Act's limited waiver of immunity for school districts only covered claims on motor vehicle use or operation. And, Tex. Civ. Prac. & Rem. Code Ann. § 101.106 required an election to sue either the district or its employees and suing both barred claims against both. A racial discrimination claim failed for not alleging he was replaced by a person who was not African-American. A First Amendment retaliation claim failed because his speech related to his own job function, not a matter of public concern. Summary Judgment was proper on a Title VII retaliation claim because the district offered numerous evaluation forms and affidavits from other teachers indicating the teacher's poor performance and he offered no evidence indicating his removal was for any other reason. A disparate treatment claim failed because he was not similarly situated to the allegedly comparable substitute teachers; **URL**—

<http://www.ca5.uscourts.gov/opinions/unpub/11/11-40444.0.wpd.pdf>

*Swilley v. City of Houston* (1/6/2012): **Posture**—Plaintiff former senior police officer for a children's crime prevention program appealed the U.S. District Court for the Southern District of Texas' grant of summary judgment to defendants, a city and its police chief on claims of gender discrimination, retaliation, 42 U.S.C.S. § 1983 constitutional due process, equal protection, and free speech violations, and 42 U.S.C.S. § 1985 conspiracy, for actions surrounding her termination; **Holding**—The officer was not qualified because she was affirmatively unwilling to comply with her position's basic

organizational mandate. She did not argue or offer evidence of being qualified. Thus, the discrimination claim failed. She did not prove the assertion of her untruthfulness was pretext, and admitted in a post-termination appeal that she was untruthful about her statements in prior investigations; a retaliation claim failed. A due process claim failed because she had 2 pre-termination hearings, and one post-termination hearing, all with counsel. She offered only vague allegations that similarly situated persons outside of her class were treated differently and thus did not show an official policy to violate equal protection. Her First Amendment retaliation claim failed with her Title VII of the Civil Rights Act of 1964 retaliation claim because the elements required for each were the same. She conceded she presented no evidence of a conspiracy to prevent her from presenting an effective federal court case. And, the city was a single legal entity and, as a matter of law, its employees could not conspire among themselves; **URL**—

<http://www.ca5.uscourts.gov/opinions/unpub/11/11-20374.0.wpd.pdf>

*Cherry v. Shaw Coastal, Inc.* (01/19/2012): **Posture**—Plaintiff former employee sued defendant former employer, alleging, inter alia, sexual harassment and retaliation under Title VII and battery. A jury found for the employee on the sexual harassment and battery claims. The United States District Court for the Middle District of Louisiana granted the employer's motion for judgment as a matter of law and entered judgment for the employer on all claims except the battery claim. The employee appealed; **Holding**—The employee alleged that his direct supervisor's supervisor sexually harassed him by, inter alia, sending sexual text messages and regularly touching him. The employee reported the harassment and eventually resigned. The appellate court determined that the district court erred in overturning the jury's verdict in favor of the employee on his same-sex sexual harassment claim because (1) he presented more than sufficient evidence to support the conclusion that the harassment was sexual in nature, (2) the jury was reasonable in determining that the harassment was severe and pervasive based on the text messages, repeated touching, and touching of his rear end, and (3) the evidence supported the jury's finding that the



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employer did not take prompt remedial action. The employee's punitive damages claim failed because the employer's behavior did not rise to the level of malice or reckless indifference. The employee's retaliation claim failed because he did not show that he suffered any adverse employment action as a result of complaining of harassment since changes regarding overtime and task assignments applied to everyone in his position; [URL—  
http://www.ca5.uscourts.gov/opinions/pub/11/11-30403-CV0.wpd.pdf](http://www.ca5.uscourts.gov/opinions/pub/11/11-30403-CV0.wpd.pdf)

**Submitted by:**

Dale E. Williams, Esquire  
Mindy LaBrosse, Law Clerk  
Law Office of Dale Edward Williams  
212 Park Place  
Covington, Louisiana 70433  
Telephone: (985) 898-6368  
Facsimile: (985) 892-2640  
mailto:dale@daleslaw.com  
mailto:mindy@daleslaw.com

**6<sup>th</sup> Circuit:**

**Sixth Circuit Slams District Court for Allowing the Defendant to Choose the Sole Comparator and Refusing to Allow Plaintiff Discovery on Others.**

*Bobo v. United Parcel Service, Inc.*, \_\_ F.3d \_\_, 2012 WL 34264 (6th Cir. Jan. 9, 2012)

The plaintiff, an African-American longstanding member of the Army Reserves and a combat veteran, worked as a supervisor at United Parcel Service, Inc. ("UPS"). He was employed by UPS for approximately 20 years. After he was terminated in 2007, he filed suit against UPS alleging discrimination and retaliation in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and race discrimination and retaliation under 42 U.S.C. § 1981, Title VII, and the Tennessee Human Rights Act ("THRA").

UPS argued that it terminated the plaintiff's employment because he falsified required "safety ride forms" in violation of the company's integrity policy. He was given the option to resign, but declined. His discharge occurred 2 weeks before his scheduled annual military training. During an exit interview, the plaintiff admitted that he falsified the forms, but insisted that every other supervisor did the same thing.

Five months after the plaintiff was terminated, UPS found that another supervisor, a Caucasian man, also falsified safety ride forms. That supervisor similarly admitted the violation and was given the option to resign, which he took.

The district court granted summary judgment in the defendant's favor. Plaintiff appealed to the Sixth Circuit.

His first argument on appeal was that the district court improperly restricted the scope of discovery when it allowed UPS to determine, unilaterally, that there was only one similarly-situated Caucasian, non-military supervisor. The Sixth Circuit agreed and held that the plaintiff "was not required to demonstrate an exact correlation between himself and others similarly situated; rather, he had to show only that he and his proposed comparators were similar in all relevant respects and that he and his proposed comparators engaged in acts of comparable seriousness." Moreover, the employees need not necessarily have the same supervisor to be similarly-situated. "Whether it is relevant in a particular case that employees dealt with the same supervisor depends on the facts presented."

According to the Sixth Circuit, in this case the district court "effectively blocked [the plaintiff] from obtaining relevant and potentially admissible evidence on a critical element of his case—evidence necessary to convince a jury that there were supervisors besides [the one chosen by UPS] who were similarly situated to [the plaintiff] in all relevant respects and yet received better treatment than [the plaintiff] because they did not take time off for military service or were of a different race."



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The Sixth Circuit further held that there are “problems inherent in allowing a defendant to control the designation of comparators by simply refusing to provide requested comparator evidence except as to those persons it selects.” Such a refusal “denies plaintiff the opportunity to determine whether the evidence actually reveals comparator status and different treatment, critical elements of the claim that the trier of fact must determine.”

In addition, the Sixth Circuit found that the district court unduly delayed in ruling on the plaintiff’s objections to the discovery order, his Rule 56(f) motion and his request to complete a deposition after the discovery deadline until after it granted summary judgment to the plaintiff.

Based on those discovery violations alone, the Court concluded that the district court’s grant of summary judgment could not stand and remanded the case with instructions that the district court grant the plaintiff’s motion to compel UPS to provide “appropriate discovery in response to...requests for information on proposed comparators...”

However, the Sixth Circuit also found that there the record demonstrated genuine issues of material fact for trial on most of the plaintiff’s claims. Specifically, the Court concluded that evidence of alleged comments by UPS employees, including those who could have influenced the ultimate decision maker(s) under the cat’s paw theory, created an issue of fact as to whether the plaintiff’s military service was a motivating factor in UPS’ decision to terminate him in violation of USERRA. The Court also found that the temporal proximity between the plaintiff’s military orders and his termination was sufficient to establish a prima facie case of retaliation under USERRA.

Moreover, the Sixth Circuit held that the district court improperly failed to analyze the plaintiff’s race discrimination claims under a mixed-motive framework. Under that framework, a plaintiff can proceed by demonstrating that race was a motivating factor even though other factors also motivated the discharge. The Court concluded that the plaintiff in this case had produced such evidence.

The Court did, however, affirm the district court’s grant of summary judgment on the Title VII and § 1981 retaliation claims because the plaintiff did not establish the necessary causal connection between the alleged protected activity and his discharge.

### **Sixth Circuit Clarifies that the McDonnell Douglas Burden-Shifting Method Should be Used in Analyzing FMLA Interference Claims.**

*Donald v. Sybra, Inc.*, \_\_\_ F.3d \_\_\_, 2012 WL 117613 (6th Cir. Jan. 17, 2012)

The plaintiff filed suit against her former employer, Sybra, Inc. d/b/a Arby’s, alleging discrimination and retaliation in violation of the Family Medical Leave Act (“FMLA”), Americans with Disabilities Act (“ADA”), and Michigan Persons with Disabilities Civil Rights Act (“PWDCRA”).

Throughout her two-plus years of employment with the defendant, the plaintiff suffered from a variety of medical problems, which required her to miss work. At least one of her absences was covered by the FMLA.

In early 2008, the plaintiff was absent for a few days due to renal stones, but did not provide formal written notice nor a request for FMLA leave. Upon returning to work, her supervisor confronted her about the fact that the Company believed that she was stealing. The plaintiff refused to acknowledge the theft and her employment was terminated.

In mid-2009, she filed suit in the United States District Court for the Eastern District of Michigan. The district court granted summary judgment in the defendant’s favor finding that even if the plaintiff could establish a prima facie case of FMLA interference and retaliation, she could not establish that the defendant’s legitimate reasons for terminating her were pretextual.

On appeal, the Sixth Circuit clarified that the *McDonnell Douglas* burden-shifting framework should, in fact, be applied in both FMLA retaliation and FMLA interference suits.

In applying that framework to the facts of the case, the Sixth Circuit agreed with the district court and found that the plaintiff could not prove pretext. Her arguments centered around the timing of the defendant’s decision to



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terminate, which gave the Court “pause”, but which were not enough to withstand summary judgment.

The Court also found that the plaintiff could not prevail on her ADA and PWDCRA claims. She asserted that she was regarded as disabled by the defendant (under the version of the ADA that existed before the 2009 amendments), but offered no evidence indicating that the defendant thought that she was unable to engage in a major life activity. The only evidence provided by the plaintiff was a stray remark that was taken out of context. Consequently, the Court affirmed the district court's grant of summary judgment to the employer.

**Sixth Circuit Upholds Judgment in Plaintiff's Favor on FMLA Interference Claim and Remands to the District Court for an Award of Liquidated Damages.**

*Thom, Jr. v. American Standard Inc.*, \_\_ F.3d \_\_, 2012 WL 162682 (6th Cir. Jan. 20, 2012)

The plaintiff, a 36 year employee of the defendant, filed suit alleging that the defendant interfered with his rights under the Family Medical Leave Act (“FMLA”)

The plaintiff took FMLA leave due to a non-work-related shoulder injury that required surgery. He initially requested and was granted the full 12 weeks of leave – from April 27, 2005 to June 27, 2005. However, his shoulder healed more quickly. After a follow up appointment, his physician wrote him a note stating that he was released to return to light duty work on May 31 and that he would likely be released without restrictions on June 13 (two weeks before his previously-approved leave was to end). However, when he attempted to come back to work to perform “light duty” on May 31, he was told that the defendant did not permit employees with non-work-related injuries to perform light duty temporarily after FMLA leave.

On June 14, the defendant contacted the plaintiff by phone inquiring as to why he did not come to work on June 13. He said that he was experiencing increased pain and that he would return to work on June 27, at the end of his approved leave. He promised to get another doctor's note extending his time for recovery to June 27, but could not get an appointment. However, he did schedule an appointment with his primary care physician for June 17 and left a voicemail for the defendant notifying the company of his progress.

After his June 17 appointment, he brought a note into the defendant requesting an extension of his leave until July 18. The defendant, however, had already terminated his employment because it counted his absences from June 13 to 17 as unexcused.

After filing suit, the district court granted partial summary judgment to the plaintiff on the FMLA interference claim. Because the parties waived their right to a jury trial, the court also awarded the plaintiff damages, including attorneys fees, costs, and other relief. It denied, however, to award liquidated damages finding that despite violating the FMLA, the defendant acted both in “good faith” and with reasonable grounds for its actions when it discharged the plaintiff.

The defendant appealed to the Sixth Circuit arguing that the district court should not have granted summary judgment on the plaintiff's interference claim and that the damages award was unreasonable. The plaintiff filed a cross-appeal regarding the district court's refusal to award liquidated damages.

On appeal, the defendant argued that the plaintiff's FMLA leave expired on June 13 because it used a “rolling” 12 month period instead of a “calendar” method. However, the Sixth Circuit noted that at no time did the Company tell the plaintiff that his leave would be governed by a rolling period. The only document the defendant gave him said that he had been approved to take leave until June 27.

The defendant argued that the plaintiff should have known this fact because it was undisputed that the union in which the plaintiff was a member knew. The Sixth Circuit agreed with the district court and held that employers must inform their employees in writing of which method they will use to calculate the FMLA leave year. In this case, the defendant failed to properly do that. In addition, the fact that it actually approved his leave to June 27 trumps any constructive notice the he may have through the union. Therefore, the Court upheld the district court's grant of summary judgment to the plaintiff on his FMLA interference claim.



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The Sixth Circuit also held that the plaintiff was entitled damages for loss of his pension and backpay.

Finally, the Court found that the district court's denial of liquidated damages to the plaintiff was improper because the defendant's "after-the-fact reliance on the rolling method—its primary justification in the district court and on appeal—was a pretextual reason never raised in [the plaintiff's] case before the discharge and only raised by [the defendant] once the case was in litigation." The Court further held that "[p]retextual reasons for discharge manufactured after the fact in order to justify an earlier wrong are not consistent with good faith. The rolling calendar pretext is an ostensible motive given after-the-fact as a cover for the real reason for firing this 36-year employee—whatever those economic motives may have been."

The Sixth Circuit explained that to avoid paying liquidated damages under the FMLA, the burden was on the defendant to prove both parts of the statutory exception and that there is "a strong presumption in favor of awarding liquidated damages that are double the amount of any compensatory damages." To establish good faith under the FMLA, a defendant must show that "it honestly intended to ascertain the dictates of the FMLA and to act in conformance with it." However, the defendant failed to make such a showing. The Court, therefore, reversed the district court's judgment on liquidated damages and remanded for the doubling of damages in accordance with the opinion.

### **Submitted by:**

**Leigh M. Schultz**  
**Miller, Canfield, Paddock & Stone, P.L.C.**  
**277 South Rose Street, Suite 5000**  
**Kalamazoo, Michigan 49007**  
**Direct: (269) 388-6810**  
**[schultzl@millercanfield.com](mailto:schultzl@millercanfield.com)**  
**19,800,730.1\088888-03848**

### **7<sup>th</sup> Circuit:**

*Coleman v. Donahue (7th Cir. 2012)*

<http://www.ca7.uscourts.gov/tmp/F30VOSSK.pdf>

### **Court Reverses Summary Judgment while Broadening Application of Similarly Situated Requirement in Cases Involving Allegations of Employee Misconduct and Applies Comparator Evidence when Determining Pretext**

The Seventh Circuit reversed Defendant's grant of summary judgment on Plaintiff's Title VII discrimination and retaliation claims, broadening the application of the similarly situated requirement in cases of employee conduct.

Plaintiff, an African American Female, worked as a mail processing clerk for the United States Postal Service for 32 years. In June 2005, Plaintiff requested advanced sick leave for a surgical procedure. Her direct supervisor denied her request. Upon her return to work after surgery, Plaintiff requested medical accommodation which, too, was denied by her supervisor. In July 2005, Plaintiff checked herself into a psychiatric unit of a hospital for approximately three weeks. During private sessions with her doctor, Plaintiff expressed "homicidal ideations" while discussing her supervisor. Her doctor informed Plaintiff's supervisor of her expressed threats to his life, despite Plaintiff's stellar final report and no indication of violent tendencies. Plaintiff was placed on off-duty status in August 2005 and terminated in January 2006 for violating the Postal Service's policy against violence. Plaintiff filed a grievance, and subsequent to an arbitrator's order of reinstatement, returned to work two years after her initial suspension.

Plaintiff filed suit under Title VII in 2009, alleging that Defendant denied Plaintiff's requests for advanced sick leave and post-surgery accommodations based on her sex and race, and that Defendant placed her on off-duty status in retaliation for filing a charge with the Equal Employment Opportunity Commission in August 2005. The District Court granted summary judgment in favor of Defendant on Plaintiff's discrimination and retaliation claims, finding that Plaintiff failed to provide similarly situated comparators, failed to meet her prima facie case under the indirect method of proof as articulated in *McDonnell Douglas*, failed to show Defendant's proffered reason for termination was pretextual, and failed to offer sufficient evidence of discriminatory or retaliatory animus under Title VII's direct method of proof.



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The Seventh Circuit discussed, at length, the question of how similar a comparator must be to allow a reasonable juror to infer discriminatory animus or motivation in the context of a termination based on impermissible conduct. The Court stated, unequivocally, comparators need not be identical, but merely similar enough for meaningful comparison. Recognizing the tendencies of judges in employment discrimination cases to strictly construe the “similarly situated” standard, the Court then articulated two proper inquiries. First, whether the plaintiff and comparator(s) received disparate treatment by the same decision maker, rather than focusing on whether they reported to the same supervisor. Second, not whether the plaintiff and comparator(s) shared job titles, but whether the employer subjected them to the same employment policies. Supported by the Supreme Court’s holding that precise equivalence is not the ultimate question, *Coleman* focused instead on comparable seriousness. Courts should not require strict factual parallels if the plaintiff and proposed comparator(s) violated the same policy in an equivalent or more serious manner. Otherwise, the Court commented, finding comparators may create an incredible hurdle that employment discrimination plaintiffs are unable to overcome.

The Court then clarified that a similarly situated employee’s favorable treatment serves not only as an element of the plaintiff’s prima facie case, but may also satisfy the plaintiff’s burden to prove the proffered legitimate, nondiscriminatory reason for adverse action was pretext. In conduct cases, inconsistent policy application may call into question the honesty of an employer’s rationale, causing the similarly situated inquiry to dovetail into questions of pretext.

Addressing Plaintiff’s retaliation claim, the Court examined the “convincing mosaic of circumstantial evidence” presented, and noted that evidence of pretext combined with suspicious timing might allow the fact-finder to reasonably infer retaliatory motivation. *Coleman* reiterates that the Seventh Circuit does not apply a bright line numeric rule to find a causal nexus between protected activity and adverse action, but comments that a few weeks or even months may be sufficient to lend support to an inference of retaliation.

Judge Wood, concurring, wrote only to express concern regarding the multitude of tests and burden-shifting hurdles parties to employment discrimination litigation must overcome. Acknowledging the utility of *McDonnell Douglas* forty years ago, when claims brought under Title VII were relatively new, Judge Wood proposes that all tests should now collapse into one, as is the current practice at the trial stage of a case.

*Harris v. Warrick County Sheriff’s Department*

<http://www.ca7.uscourts.gov/tmp/F30VPU56.pdf>

### **Court Affirms Summary Judgment Finding Insufficient Evidence to Support Racial Animus or Similarly Situated Comparators**

The Seventh Circuit affirmed summary judgment in favor of Defendant on Plaintiff’s Title VII discrimination claim, finding insufficient evidence of racially charged behavior and no meaningful comparison between Plaintiff and proposed comparators.

Defendant terminated Plaintiff’s probationary employment as a Deputy Sheriff, claiming Plaintiff violated standard operating procedures, failed to follow orders, and lacked sufficient commitment to the job. Plaintiff, an African American male, filed suit under Title VII, alleging discrimination based on race. The District Court granted Defendant’s motion for summary judgment.

Proceeding under the direct method of proof, Plaintiff relied on circumstantial evidence purportedly proving racially charged workplace behavior and more favorable treatment for similarly situated white probationary deputies. The Court, addressing Plaintiff’s allegations of racially charged behavior, found no connection between Plaintiff’s work-given nicknames derived from the movie *Blazing Saddles*, and any decision-makers. Plaintiff tenuously, and as the Court noted, incorrectly, argued the “cat’s paw” theory of liability at trial. However, he did not advance this argument on appeal until his reply brief, thus, the Court considered this argument waived. Turning next to Plaintiff’s offered comparators, the Court made quick work of dismissing Plaintiff’s claims of similarity. Noting again that it does not sit as a super-personnel department, the Court held that the proposed comparators



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the Court held that the proposed comparators cannot be similarly situated, as the other deputies had not committed similar acts of misconduct. Concluding, the Court clarified that the “same-actor” theory, while not dispositive, may be used to draw inferences in cases lacking sufficient evidence of discrimination.

*Keeton v. Morningstar, Inc.*

<http://www.ca7.uscourts.gov/tmp/F30VQAZI.pdf>

### **Court Affirms Summary Judgment After Plaintiff Fails to Timely File Response**

The Seventh Circuit affirmed summary judgment in favor of Defendant on Plaintiff’s Title VII discrimination and retaliation claims after Plaintiff failed to timely file her response to Defendant’s motion for summary judgment.

Plaintiff, an African American female, worked for Defendant as a “Compliance Consultant” in the legal department. Plaintiff filed suit in August 2010, alleging that Defendant discriminated against her on the basis of race by paying her less than non-minority employees with less seniority and fewer qualifications, and that Defendant retaliated against her for complaining about her perceived disparate treatment, and by engaging in an investigation after discovering Plaintiff wrongfully possessed confidential company e-mails. Defendant moved for summary judgment on March 25, 2011. Twenty days after Plaintiff’s response was due, the district court entered judgment in favor of Defendant. Twenty-three minutes before this order, Plaintiff filed a motion for leave to file her summary judgment response *instanter*. The court denied Plaintiff’s motion that afternoon.

The Court addressed Plaintiff’s argument that the district court erred in denying as moot her motion for leave to file her summary judgment response *instanter*, and recognized Plaintiff’s misunderstanding of the district court’s ruling. The district court did not find the *case* to be moot as Plaintiff believed, but rather Plaintiff’s motion. As final judgments necessarily deny any pending motions, Plaintiff’s motion was denied twenty-three minutes after filing, when the district court entered judgment in favor of Defendant. The Court next considered whether the district court abused its discretion

in denying Plaintiff’s motion. Federal Rule of Civil Procedure 6(b) grants the court discretion in granting extensions if deadlines are missed because of excusable neglect. However, as the court pointedly comments, neglect due to a busy schedule, or vague references to medical emergencies that did not prevent representation of other clients will not suffice as explanations amounting to excusable neglect. Combined with plaintiff counsel’s representation, made ten days before judgment, that a response would be filed the next day, here, the Court found the district court to be well within the bounds of allowable discretion.

Turning to the merits of the summary judgment ruling, the Court stressed Plaintiff’s failure to comply with Local Rule 56.1 (requiring submission of a statement of facts), resulting in admittance of Defendant’s submitted statement of uncontested facts. Regardless of whether the non-moving party submits a response, summary judgment must still succeed on the motion’s merits, rather than the absence of a response. Addressing Plaintiff’s claims of discrimination and retaliation, the Court focused on the question of pretext. After considering Defendant’s proffered legitimate, nondiscriminatory reason for Plaintiff’s disparate salary, the Court found no evidence of pretext for race discrimination. The Court next considered Plaintiff’s retaliation claim, and turned to the indirect proof analysis. To succeed, Plaintiff must prove she engaged in protected activity, but here, Plaintiff failed to mention race as an issue when complaining to her employer. Finally, the Court found no evidence of retaliation in what was ultimately found to be Defendant’s legitimate investigation into Plaintiff’s wrongful possession of confidential documents.

*EEOC v. Management Hospitality of Racine, Inc.*

<http://www.ca7.uscourts.gov/tmp/F30VOT18.pdf>

### **Seventh Circuit Affirms in Part and Reverses in Part District Court’s Rulings on Post-Trial Motions in Mutli-Defendant Sexual Harassment Case**



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The Seventh Circuit, subsequent to a jury trial finding the named defendant liable for hostile environment sexual harassment under Title VII, affirmed the denial of Defendants' Motion for Judgment as a Matter of Law and Motion for New Trial, reversed the grant of the EEOC's post-trial motion for judgment against the two co-defendants and dissolved the injunction against one of the co-defendants requiring the implementation of a new sexual harassment policy and training program.

The EEOC filed suit under Title VII on behalf of two food servers, formerly employed at an International House of Pancakes, alleging hostile work environment sexual harassment. After trial, a jury found in favor of the servers. The jury awarded both servers compensatory damages, and one server punitive damages. Subsequent to the jury verdict, the EEOC filed two post-trial motions, first moving for judgments to find the defendants jointly and severally liable, and second, moving for an order of injunctive relief. The Defendants, in turn, filed for a Judgment as a Matter of Law, or Alternatively for a New Trial or Remittitur. The district court denied Defendants' motion, and granted the EEOC's motions.

The court first considered the Defendants' Motion for Judgment as a Matter of Law. Looking first to the evidence presented at trial, the court found that a rational jury could have found that both servers were subjected to a sexually hostile work environment. On appeal, defendants contend their motion should be granted, as they satisfied the *Faragher/Elzerth* affirmative defense. Reviewing the question of whether the Defendants exercised reasonable care by instituting a sexual harassment policy with a reasonable complaint procedure, the court found that a rational jury could find they satisfied the elements to successfully assert the affirmative defense. However, the court found that sufficient evidence was also presented for a rational jury to find otherwise. Here, the court found that the policy, though in place, could be perceived as not effectively in practice due to lack of management training, illusory protections, and an obscure complaint mechanism. Though defendants claim the servers failed to act reasonably to prevent further harm, the jury found otherwise. In turn, the court found that the jury's determination was not unreasonable.

The court next considered the jury's award of punitive damages to one of the servers. Defendants contend the implementation and application of their sexual harassment policy shielded them from an award of punitive damages. The court acknowledged that policies alone cannot protect employers from punitive damages; rather, policies must be implemented in good faith and accompanied by reasonable and good faith efforts to comply with Title VII.

Defendants moved for a new trial pursuant to Federal Rule of Civil Procedure 59(a), claiming the district court's exclusion of interrogatories on the special verdict form relating to the affirmative defense was an abuse of discretion, and effectively took the issue away from the jury. The court noted that the jury heard instructions on defendants' affirmative defense. As relevant case law only mandates that special verdict forms not be confusing or misleading to the jury, the court found no abuse of discretion.

The court next addressed the EEOC's motion to find liable defendant Flipmeastack, a corporate affiliate of plaintiff's direct employer, MHR. MHR contracted with Flipmeastack to provide management consulting services including accounting and payroll, corporate IHOP franchise reporting and compliance, and human resources assistance such as hiring. After reviewing the record, the court agreed with the defendants and found the EEOC's control theory was introduced too late in the case. The district court considered this argument after the close of evidence, which effectively deprived defendants of any meaningful opportunity to rebut the EEOC's contentions. Thus, the court held the district court abused its discretion when granting the EEOC's motion and that the matter should have been resolved by the jury. The issue of liability as to Flipmeastack was reversed and remanded for trial. Because the court reversed the finding of liability with respect to Flipmeastack, the injunction entered against Flipmeastack pursuant to the EEOC's second post-trial motion requiring defendants to create a new sexual harassment training program was dissolved and also reversed and remanded a punitive damage award against a Flipmeastack employee.

*Ross v. RBS Citizens, N.A.*

<http://www.ca7.uscourts.gov/tmp/F60RWG4C.pdf>



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**Seventh Circuit Affirms Class Certification Order Finding Rule 23(c)(1)(B) Compliance and Commonality, Satisfying *Wal-Mart Stores, Inc. v. Dukes***

The Seventh Circuit affirmed the class certification order, in light of the Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, in an action brought under the Fair Labor Standards Act and the Illinois Minimum Wage Law, claiming current and former employees were denied overtime pay.

Defendant operates over one hundred bank branches in Illinois. Plaintiffs allege that Defendant violated the FLSA and the IMWL by maintaining an unofficial policy of denying overtime pay to its non-exempt employees, and by misclassifying non-exempt employees as exempt. The plaintiffs sought to certify two classes for the IMWL claim: one for "Hourly" employees and another for "ABM" (Assistant Branch Manager) employees. The district court found that both classes satisfied the requirements under Federal Rule of Civil Procedure 23(a) and 23(b)(3), and certified both as opt-out classes under Rule 23(b)(3). Defendant filed an interlocutory appeal contesting both class certifications.

*Ross* presents an issue of first impression for the Seventh Circuit: the full meaning of Rule 23(c)(1)(B). This rule requires, in relevant part, that class certification orders define the class and the class claims, issues, or defenses. The court turned to the Third Circuit for guidance, as no other circuit has fully addressed this subsection of Rule 23. The court found the Third Circuit's plain language analysis persuasive when read with the history and purpose of Rule 23, as well as noting the Federal Rule's move towards voluntary trial plans. Adopting the Third Circuit's analysis, the court held that an order must include two elements: A clear and precise statement defining the parameters defining the class or classes sought to be certified, and a clear and complete list of the claims, issues, or defenses to be treated on a class basis.

The court first addressed whether the class was properly defined. Defendant contended that by including the word "unlawful" in the order the district court created a conditional class that depended on a finding of liability. The court rejected this argument, relying on the certification order's attached opinion. finding that the

district court properly inferred, for class certification purposes, an unlawful policy based on the number of individuals making similar allegations, across Defendant's branches. The court next considered whether the class claims, issues or defenses were properly defined. Though Defendant listed seven additional claims it contends should have been included in the order, the court disagreed, instead finding Defendants' list to contain only issues of trial strategy or proof. Ultimately, the court held, the lower court's order identified all claims to be resolved at trial.

The court next considered the commonality prerequisite in light of *Dukes*, and found both classes to be properly certified. The court noted that the Supreme Court has held commonality is found not just when individuals suffer violations of the same provision of law, but when these individuals also suffer the same injury. Defendant attempted to show the same problematic individualized liability inquiries which prevented class certification in *Dukes* by citing to the multiple ways in which employees could have been denied overtime in the Hourly class and the amount of discretion exercised by its branch managers at each location when assigning tasks to employees of the ABM class. The court found this argument unpersuasive. Though enforcement of Defendant's unofficial policy denying over overtime pay may vary, the plaintiffs suffered the same injury under the same policy. Further, individual examination of an ABM's job duties is irrelevant to a claim based on the existence of a company-wide policy that worked to deny overtime compensation.

**Submitted By:**

Ruth I. Major, Esq.  
Erica Suskind  
**The Law Offices of Ruth I. Major, P.C.**  
30 W. Monroe Street, Suite 1650  
Chicago, Illinois 60603  
Telephone: 312.893.7544  
[rmajor@major-law.com](mailto:rmajor@major-law.com)  
[esusking@major-law.com](mailto:esusking@major-law.com)



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### **9<sup>th</sup> Circuit (December):**

#### **Sullivan v. Oracle Corporation,**

##### **-F.3d-, (9th Cir, December 6, 2011); Wage and Hour**

This is the latest in a series of opinions in this case involving work by non-resident employees of Oracle, a California-based company. The employees in question were instructors for Oracle who resided outside California. They performed work in a number of states, including California. They sued in California alleging Oracle violated the California Labor Code and California Business and Professions Code by not paying overtime for work performed in California. They also alleged Oracle violated the California Business and Professions Code by violating the FLSA with respect to work performed outside California. The Ninth Circuit earlier certified to the California Supreme Court the questions of the applicability of California's Labor Code and Business and Professions Code. Consistent with the California Supreme Court's answers to the certified questions, the Ninth Circuit held that the California statutes did apply to work performed by the non-residents in California but that the Business and Professions Code did not apply with respect to work performed outside California.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/12/13/06-56649.pdf>

#### **Johnson v. Board of Trustees,**

##### **- F.3d -, (9<sup>th</sup> Cir., December 8, 2011)**

##### **Disability – Reasonable Accommodation**

The plaintiff was a special education teacher with bipolar disorder and other mental illnesses. A requirement of her job was a teaching certificate for the 2007-08 school year, which in turn required completion of certain course work before the beginning of the 2007-08 school year. The plaintiff failed to complete the course work because she suffered a major depressive episode in the summer of 2007. She requested the school board to apply to the state for permission for her to teach without the credential. The school board declined to do so. The district court granted summary judgment in the school board's favor on the plaintiff's ADA claim. The Ninth Circuit affirmed, holding that an employer's duty of reasonable accommodation does not extend to assisting an employee to meet the minimum qualifications for a job. Thus, without the teaching certificate, the plaintiff was not a "qualified individual with a disability."

<http://www.ca9.uscourts.gov/datastore/opinions/2011/12/08/10-35233.pdf>

#### **Plaza Auto Center v. NLRB,**

##### **- F.3d -, (9<sup>th</sup> Cir., December 19, 2011)**

##### **NLRA – Protected Activity**

Nick Aguirre was a car salesman employed by Plaza Auto Center ("PAC"), a non-unionized employer. During a meeting concerning Mr. Aguirre's questions about vehicle costs, commissions and minimum wage, Mr. Aguirre lost his temper and berated his boss with obscenities. PAC fired Mr. Aguirre. The NLRB found that the termination violated the National Labor Relations Act because Mr. Aguirre had engaged in protected activity, notwithstanding his angry and obscene outburst. On a petition for review, the Ninth Circuit applied the four part test set forth in Atlantic Steel Co., 245 N.L.R.B. 814 (1979) to determine whether otherwise protected activity loses its protection because it is abusive or obscene. The four factors are "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice." The court remanded to the Board for further consideration of the third factor.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/12/19/10-72728.pdf>

#### **Submitted by:**

James A. Odium  
Mundell, Odium & Haws, LLP  
650 E. Hospitality Lane, Suite 470  
San Bernardino, CA  
92408-3595  
909.890.9500  
[jodium@mohlaw.com](mailto:jodium@mohlaw.com)

### **9<sup>th</sup> Circuit (January):**

#### **Shelly v. Geren,**

##### **-F.3d-, (9th Cir, January 12, 2012);**

##### **Age Discrimination – Summary Judgment**

The plaintiff was a federal civilian working for the Army Corps of Engineers. He was a GS-13 who applied for a promotion to GS-14. The Corps filled the GS-14 position in a two-step process, first by filling the opening temporarily for 120 days and later by filling the opening permanently. The plaintiff, age 54, applied both for the temporary position and the permanent position. He was not selected for the temporary position and not even interviewed for the permanent position. A 42 year old who already was a GS-14 was selected for both the temporary and permanent positions. The plaintiff sued for age discrimination under the ADEA. The district



## Monthly Update for January

The district court granted summary judgment in favor of the Corps, but the Ninth Circuit reversed. The court held that the McDonnell-Douglas test should be used to analyze a summary judgment motion in an ADEA case. The court further held there was sufficient evidence to raise an issue of pretext, including evidence suggesting the plaintiff's qualifications were better than the successful applicant and conflicting evidence concerning the reasons for not selecting the plaintiff.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/01/12/10-35014.pdf>

**White v. City of Pasadena,**  
**-F.3d-, (9th Cir, January 17, 2012);**

### **Issue Preclusion**

The plaintiff, a police officer, challenged the termination of her employment through an administrative proceeding, in which she alleged discrimination, harassment and retaliation. After she lost the administrative proceeding, she unsuccessfully sought a writ of mandamus in the California state courts. Finally, she sued again in state court, alleging discrimination, harassment and retaliation, including a claim under 42 U.S.C. § 1983. The City removed to federal court. The Ninth Circuit held that the plaintiff's lawsuit was barred under California issue preclusion rules.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/01/17/08-57012.pdf>

### **Submitted by:**

James A. Odlum  
Mundell, Odlum & Haws, LLP  
650 E. Hospitality Lane, Suite 470  
San Bernardino, CA  
92408-3595  
909.890.9500  
[jodlum@mohlaw.com](mailto:jodlum@mohlaw.com)