



## Monthly Update for June

### 1<sup>st</sup> Circuit

*Weiss v. DHL Exp., Inc.*, \_\_ F.3d \_\_ (2013) 2013 WL 2382591

<http://media.ca1.uscourts.gov/pdf/opinions/12-1853P-01A.pdf>

The case involves two causes of action, one for violation of the Massachusetts Wage Act, and another for breach of contract. The District Court only allowed the breach of contract claim to go to the jury. The jury found for plaintiff. DHL appealed the jury verdict and plaintiff cross-appealed the grant of Partial Summary Judgment dismissing the claim under the Massachusetts Wage Act. The First Circuit reversed the jury verdict and affirmed the Summary Judgment. Pursuant to the company's Bonus Plan, plaintiff was entitled to a \$60,000.00 bonus if he remained employed at the end of 2009. If he was terminated without cause before then, he was still entitled to the bonus. If he was terminated for good cause he would not receive the bonus. Under the Bonus Plan, the company's Employment Benefits Committee had sole discretion to determine whether plaintiff was terminated for good cause for purposes of the payment of the bonus. The Committee determined that plaintiff was terminated with good cause and hence was not entitled to the bonus. The First Circuit reversed the jury verdict because it found that the District Court had erred by allowing the jury to determine whether the termination had been for good cause. Then, the First Circuit affirmed the prior Summary Judgment after holding that the bonus at issue did not constitute "wages" under the Massachusetts Wage Act.

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### 4<sup>th</sup> Circuit

*Chamber of Commerce of the United States v. N.L.R.B.*, No. 12-1757, 2013 WL 2678592 (4th Cir. June 14, 2013)

<http://www.ca4.uscourts.gov/Opinions/Published/121757.P.pdf>

In *Chamber of Commerce*, the Fourth Circuit considered whether the National Labor Relations Board ("NLRB" or "Board") had the authority to require all employers subject to the National Labor Relations Act ("NLRA" or "Act") to post a notice informing employees of their rights under the NLRA. The Fourth Circuit held that the NLRB was not empowered to promulgate the notice-posting rule. The NLRA grants the Board the authority to make "such rules and regulations as may be necessary to carry out the provisions of the [Act]," but the Court found that there was no provision in the Act that a notice-posting rule was necessary to carry out because the Board serves expressly "reactive roles"-- conducting representation elections and resolving unfair labor practices.

The NLRB promulgated a notice-posting rule in 2011, titled "Notification of Employee Rights Under the National Labor Relations Act," which required employers to post a notice informing employees of their rights under the NLRA. Seeking final review of the notice-posting rule, the Chamber of Commerce filed a complaint for injunctive relief in district court. The district court granted summary judgment for the Chamber, holding that the NLRB exceeded its authority in promulgating the rule. The NLRB appealed.

On appeal, the Fourth Circuit applied the general rules for review of an agency's rule-making function. The Court initially rejected the Board's argument that the notice-posting rule should be analyzed under the standard outlined in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). *Mourning* requires a court to "defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority," but the Court reasoned that *Mourning* applies only



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after a court has determined that Congress has delegated interpretive powers to that agency. The Court rejected the Board's argument that it should be considered to have the authority to promulgate the rule unless Congress expressly withheld that authority.

The Court then applied the familiar two-step analysis of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step is "whether Congress has directly spoken to the precision question at issue" and focuses on the "expressed intent of Congress." Only "if the statute is silent or ambiguous with respect to the specific issue" will the court proceed to *Chevron's* second step, asking "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The Fourth Circuit found the first step dispositive. Looking first to the plain language of the Act, the Court found that the Act did not charge the Board with informing employees of their rights under the Act. The Board emphasized its authority under Section 6 of the NLRA to issue rules that are "necessary to carry out" the provisions of the Act, but the Court rejected the Board's contention that the word "necessary" was ambiguous and should be construed to allow the Board to promulgate any regulation that was reasonably related to the statute's purpose. The Court agreed with the Chamber's interpretation that the NLRA had to provide the "explicit or implicit authority to issue a rule." The Court explained that there was "no general grant of power to the NLRB outside the roles of addressing unfair labor practice charges and conducting representation elections."

The Court next examined the overall structure of the NLRA. According to the Court, "[a]n examination of the Act reveals no provision that a notice-posting rule is 'necessary' to carry out." The Court emphasized that the "NLRB serves expressly reactive roles: conducting representation elections and resolving [unfair labor practice] charges." The Court explained there was no section in the NLRA implying that "Congress intended to grant the NLRB authority to issue the notice-posting rule *sua*

*sponte.*"

The Court also found no evidence in the history of the Act of intent to allow the NLRB to impose duties upon employers proactively. The Court noted that since the NLRA's enactment in 1935, Congress had considered and rejected a different notice provision in the NLRA. Additionally, the Court observed how Congress included notice-posting requirements in other federal labor laws, during the same time it was amending the NLRA, but did not grant the NLRB the statutory authority to issue such a requirement. The Court concluded, "Congress's continued exclusion of a notice-posting requirement from the NLRA, concomitant with its granting of such authority to other agencies, can fairly be considered deliberate . . . . Had Congress intended to grant the NLRB the power to require the posting of employee rights notices, it could have amended the NLRA to do so."

Accordingly, the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the Chamber of Commerce. The D.C. Circuit has also held the notice-posting rule was invalid. *See Nat'l Ass'n of Mfrs. v. NLRB*, \_\_\_ F.3d \_\_\_, 2013 WL 1876234 (D.C. Cir. May 7, 2013) (holding that notice-posting rule violated NLRA Section 8(c), which prohibits NLRB from finding employer speech that is not coercive to be unfair labor practice).

***Collins v. Baltimore City Board of School Commissioners*, No. 11-2386, 2013 WL 2466813 (4th Cir. June 10, 2013) (unpublished)**

<http://www.ca4.uscourts.gov/Opinions/Unpublished/112386.U.pdf>

In *Collins*, the Fourth Circuit affirmed the district court's grant of summary judgment for the School Board on claims of race and age discrimination under Title VII and the Age Discrimination in Employment Act ("ADEA"). The Fourth Circuit majority held that the plaintiff failed to establish a prima facie case on the race discrimination claim and failed to produce any evidence that the School Board's explanation for its action was pretextual on



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the age discrimination claim. Judge Diaz dissented from the majority's ruling on the age discrimination claim. The majority and the dissent disagreed on the application of the Supreme Court's reasoning in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), to the facts of this case.

The plaintiff, a 60 year old African-American, was an administrator and teacher for the Baltimore City School system. During her final year of employment, the plaintiff worked at Patterson High School as the Department Head for Foreign Language and Director of the Twilight Program. In response to an inquiry to teach summer school, the plaintiff informed Patterson's principal that she did not wish to teach summer school and needed to "take this chance to have a new beginning." Although the plaintiff did not intend for the letter to be a transfer request, the principal interpreted the letter as a transfer request and informed human resources that the plaintiff wished to be transferred. The principal told the human resources representative that the plaintiff had taught French in the past and the human resources representative assumed the plaintiff was certified to teach French, which was incorrect. The plaintiff was transferred to a French teaching position at different high school, which resulted in a salary reduction. The plaintiff retired and filed a grievance seeking reinstatement, which was denied.

Thereafter, the plaintiff filed an action in district court alleging race and age discrimination under Title VII and the ADEA. In analyzing the School Board's decision, the district court assumed that the plaintiff established a prima facie case of race and age discrimination. The district court held that the School Board provided a legitimate, non-discriminatory reason for the adverse action and granted summary judgment in favor of the School Board.

The Fourth Circuit analyzed the plaintiff's claims of race and age discrimination under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Thus, to establish a prima facie case of discrimination, the plaintiff had to produce evidence: (1) she was a member of a protected class; (2) she suffered an adverse

employment action; (3) she was performing satisfactorily at the time of her adverse employment action; and (4) the adverse employment action occurred under circumstances which gave rise to an inference of unlawful discrimination. The Court further explained that if the plaintiff established a prima facie case, the burden shifted to the School Board to provide a legitimate non-discriminatory reason for the employment action. At that point, to preclude summary judgment, the plaintiff had to produce evidence that the reason presented for the School Board's action was pretextual.

On appeal, the Court ruled that the plaintiff did not establish the fourth element of the *McDonnell* prima facie case of race discrimination because she did not show that the transfer occurred "under circumstances which give rise to an inference of unlawful discrimination." To meet that element, the Court explained that a plaintiff usually shows that she was replaced by an individual outside her protected class. Here, the record did not show that the plaintiff was replaced as Department Head. The Court noted the plaintiff relied on testimony from another teacher, who indicated that a Caucasian woman "seemed" to replace the plaintiff. However, that woman denied that she took on the responsibilities of Department Head, and there was testimony that the Department Head position was never filled. Accordingly, the Court held the plaintiff failed to establish a prima facie case of race discrimination.

Analyzing the plaintiff's age discrimination claim, the Fourth Circuit majority agreed with the district court that the plaintiff presented sufficient evidence to establish a prima facie case. The majority also agreed with the district court's conclusion that the plaintiff failed to produce any evidence that the School Board's explanation for its action was pretextual. The majority found reasonable the principal's assertion that she interpreted the plaintiff's letter as a transfer request. Additionally, the majority rejected the plaintiff's contention that the School Board's explanation that the plaintiff requested a transfer was inconsistent with the transfer paperwork. The evidence showed that the "demotion" box on the Human Resources change form was checked, and the box for a "voluntary"



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transfer was not checked. The majority explained there was no testimony showing that either of the boxes was marked because anyone associated with the school thought the transfer was not voluntary. The Court said the “demotion” box on the change form was marked because of the decrease in pay, and there was a lack of the requisite paperwork to mark the “voluntary” transfer box. The majority concluded, “Given this uncontradicted explanation, the form is not inconsistent with the School Board’s explanation for the transfer and is not evidence of pretext.”

Judge Diaz dissented from the majority’s decision that the plaintiff failed to offer adequate evidence of pretext on her age discrimination claim. Judge Diaz argued there were “multiple flaws and inconsistencies in the School Board’s nondiscrimination rationale.” According to Judge Diaz, the plaintiff presented sufficient evidence to discredit the School Board’s justification and created a triable issue as to pretext under *Reeves*.

Under *Reeves*, “a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” Judge Diaz departed from the majority in considering this further direction from the Supreme Court: “Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory.” Judge Diaz accused the majority of resurrecting the “pretext-plus” proof scheme he said that *Reeves* had laid to rest.

Both the majority and Judge Diaz agreed that a genuine mistake is not evidence of pretext. However, Judge Diaz found that the plaintiff had sufficiently discredited the School Board’s nondiscriminatory explanation that it had misunderstood that the plaintiff wanted to transfer. The idea that the School Board would actually believe the plaintiff would want a demotion was inherently suspect. Further, Judge Diaz considered the paperwork that the majority discounted was

inconsistent with the School Board’s assertion that it viewed the plaintiff’s transfer as voluntary. He concluded that the plaintiff presented evidence that provided a legally sufficient basis for a jury to find for her on the age discrimination claim.

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

***Louzon v. Ford Motor Co.*, \_ F.3d \_\_, 2013 WL 2398042 (6<sup>th</sup> Cir. Jun. 4, 2013).**

<http://www.ca6.uscourts.gov/opinions.pdf/13a0158p-06.pdf>

In *Louzon*, a product engineer (“employee”) took an approved leave of absence from his employer, (“Ford”) to visit family in Gaza. While aboard, security issues caused Israel to close its borders, which made it impossible for the employee to return to the United States before the end of his leave. Ford extended his leave, but by the time the State Department was able to evacuate the employee, the extension expired. When the employee returned to work, he learned that Ford had terminated him in the interim.

The employee filed suit alleging discrimination in violation of the Age Discrimination in Employment Act (“ADEA”) and national origin discrimination under Title VII, as well as retaliation for engaging in protected activity. He also alleged analogous state law claims under Michigan’s Elliot-Larson Civil Rights Act (“ELCRA”). After the district court denied Ford’s summary judgment motion, Ford filed a motion in limine to exclude evidence and argument concerning non-comparable employees. The district court granted the motion, issued an



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order to show cause as to why summary judgment should not issue and then granted summary judgment. The employee appealed.

Initially, the Sixth Circuit held that the district court improperly considered non-evidentiary matters when ruling on the motion in limine. The court noted that allowing a party to relitigate a matter that has been or should have been decided at the summary judgment stage “not only allows those dissatisfied with the court's initial ruling a chance to relitigate, but also deprives their opponents of the procedural protections that attach at summary judgment.” The court concluded that a motion in limine that is nothing more than a rephrased summary judgment motion should not be considered.

The Sixth Circuit stated it was concerned with the district court employing an incorrect legal standard and resolving genuine issues of material fact. Regarding the incorrect legal standard, the court explained that determining whether someone is “similarly-situated” does not automatically require the comparable employee to have the same supervisor. Instead, district courts must conduct an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of a non-protected employee. Given the facts of the case, the court stated that whether an alleged comparator worked for the same supervisor should not be given significant weight. The Sixth Circuit also found that the district court improperly resolved issues of fact to determine whether comparators were similarly situated.

***Sadie v. City of Cleveland*, \_ F.3d \_, 2013 WL 2476729 (6<sup>th</sup> Cir. Jun. 11, 2013).**

<http://www.ca6.uscourts.gov/opinions.pdf/13a0163p-06.pdf>

In *Sadie*, the Sixth Circuit affirmed summary judgment in favor of the City of Cleveland (“City”). The retired police officers (“retirees”) alleged violations of the Age Discrimination in Employment Act (“ADEA”), Ohio’s age-discrimination statute, and the Equal Protection Clause of the Fourteenth

Amendment related to their forced retirement at age of 65 pursuant to a City ordinance. The ordinance called for the mandatory retirement of all police officers who reached the age of sixty-five. It also allowed an extension of service upon written request, the Chief of Police’s approval and passing an independent medical exam.

In prior years, the extensions of service were granted without incident. Due to budgetary cuts, the City laid off and demoted police officers. In turn, the Chief of Police denied all requests for extensions of service. The retirees submitted requests for extension of service and were denied, forcing them into mandatory retirement. The retirees sued, and the City moved for summary judgment. The district court granted the motion and the retirees appealed. At issue was whether the City’s mandatory-retirement plan ordinance was a subterfuge to evade the purposes of the ADEA under 29 U.S.C. §623(j).

Initially, the retirees argued that the district court improperly placed the burden on them to prove that the mandatory-retirement ordinance was a subterfuge to evade the ADEA. The Sixth Circuit held that it did not need to determine whether §623(j) provides an affirmative defense or whether the burden was on the retirees. The court stated that even if the district court incorrectly placed the burden of proof on the retirees, the City met its burden. It found that the City’s retirement plan provides that it exists “in the interest of [the Police Department’s] efficiency” and that the Department provides an essential public function and “it is important that it do so efficiently by maintaining a balanced workforce.” Because the layoffs and demotions created a need for officers, the Chief of Police’s decision to deny all requests for extension of service was in furtherance of the stated purpose of the retirement plan.

Next, the retirees argued that the City enforced its ordinance to discriminate against older officers. However, the court noted that the ADEA “explicitly allows for the termination of police officers on the basis of age.” Finally, addressing the equal protection claim, the Sixth Circuit held that the police department’s decision to require all police officers to retire at age of sixty-five was rationally



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related to legitimate purpose of addressing budget concerns.

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

***Muor v. U.S. Bank National Association, No. 12-2757 (8th Cir. June 13, 2013) (Race and National Origin Discrimination, Retaliation).***

<http://media.ca8.uscourts.gov/opndir/13/06/122757P.pdf>

Ranna Muor (“Muor”), a native of Cambodia, alleged her former employer, U.S. Bank N.A. (“U.S. Bank”), discriminated against her based on her race and national origin, and retaliated against her for opposing the discrimination. Muor started working for U.S. Bank in 1983, and thereafter in a variety of positions. In 2003/2004 a co-worker, who would eventually become her supervisor in 2006, commented to a manager that Muor could not write or speak English, “should go back to Cambodia where she came from”, and had “slanty eyes”. From 2005 through 2008, Muor was given varying degrees of performance reviews. In response to her poor 2007 performance review, she reported that she felt she was being discriminated against.

Eventually, in February 2009, after receiving her 2008 performance evaluation and written warning for poor performance, she became ill and went home. Days later she again accused her supervisor of discrimination. After exhausting her vacation days, she went on short-term disability. In April

2009 she filed a charge of discrimination. She returned to work part-time for two weeks in June 2009, at which time she was told by her supervisor to keep her discrimination complaint confidential. In December 2009, U.S. Bank hired another individual for the same position. In January 2010 U.S. Bank informed her that she had been absent without approval since July 2009 and if she did not return by January 18, 2010, her position would be filled.

Muor responded with a note from her doctor that she was unable to return to work. In February 2010 Muor provided U.S. Bank with a doctor’s note that she could return March 2, 2010 on a part-time basis. By then, U.S. Bank had filled her position. She was offered a different position, which she rejected. She applied online for yet another position and did not receive an interview. On March 17, 2010 she was offered a position making the same salary, which she declined. Finally, she resigned her employment in March 2010.

The district court granted summary judgment in favor of U.S. Bank on both claims. In upholding the judgment, as to the race and national origin discrimination claim, the 8<sup>th</sup> Circuit held that “[e]ven assuming the written warning constituted an adverse employment action and that Muor otherwise can establish a prima facie case, Muor has failed to demonstrate that U.S. Bank’s legitimate, non-discriminatory reason for issuing the warning – Muor’s poor performance – was pretextual.” The Court noted that no evidence was provided which created an issue of fact that U.S. Bank’s rationale for issuing a written warning lacked a basis in fact. Further, the Court noted that while later performance reviews were mere “exacting” they reiterated problems previously identified by other supervisors that were not alleged to have discriminated against Muor. The Court also held that the statements made about returning to Cambodia and “slanty eyes” were made well before the individual making them became her supervisors and years prior to her written warning; accordingly, no evidence existed that the remarks were related to the decision to issue the written warning. Finding a “lack of evidence showing that discriminatory animus motivated the adverse employment action



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and U.S. Bank's well-documented history of Muor's job performance" the statements and job criticisms did not establish a material issue of fact concerning pretext. The Court also held that Muor failed to show that there were any "similarly situated" non-Asian employees and that they were treated differently.

As to the retaliation claim, Muor argued that U.S. Bank's filling of her position and offering her two other positions constituted an adverse employment action. The Court held that she failed to show a causal connection between her complaints of discrimination and the adverse employment action. She did not suffer escalating pattern of adverse actions that were close in time to her complaints of discrimination. Further, other than being asked to keep her complaint confidential, the remainder of her adverse actions occurred approximately eight months after her protected activity, which "vitiates" her "contention that the temporal proximity gives rise to an inference of retaliatory motive". Accordingly, the Court concluded she failed to show the necessary causal connection and upheld summary judgment for U.S. Bank.

***Ridout v. JBS USA, LLC, No. 12-3220 (8th Cir. June 14, 2013) (Age Discrimination).***

<http://case.lawmemo.com/8/ridout.pdf>

Lyle Ridout ("Ridout") was a 40-year employee of JBS USA, LLC ("JBS") who was terminated after an equipment failure for which he was held accountable as the Superintendent of the Rendering Department. After the machine broke down causing substantial backlog to the operation, he was confronted by the plant engineer and general manager. Ridout admits that he raised his voice, but only because he was next to a large loud piece of equipment for which employees had to speak loudly. He also argued that he had considerable hearing loss from working in the factory over 40 years which caused him to regularly speak loudly. A few days later, Ridout was suspended without pay. Thereafter, Ridout acknowledged to JBS's Human Resources that he should have handled the discussion differently and asked to return to work,

proposing that he would agree to take a demotion if need be, and mentioned that two other older supervisory level employees had recently been terminated for "safety violations" which each claimed was pretext for age discrimination.

Instead, the company decided to terminate Ridout for raising his voice to supervisors and poor performance. Thereafter, Ridout was replaced with an individual who was between 35-38 years old. That individual was demoted a year and a half later for poor performance, and replaced by an individual who was 33 years old and had previously been terminated by JBS for making a mock Ku Klux Klan hood out of industrial materials and displaying it to a black employee.

The Eighth Circuit Court of Appeals reversed the district court's summary judgment for the employer, noting that Ridout had made a sufficient showing that JBS's proffered reasons are mere pretext for age discrimination. While JBS offered declining performance as a reason for termination, the fact that the records showed he was meeting JBS's reasonable expectations at the time of termination creates a fact issue as to pretext. Ridout had never been counseled or warned about his alleged declining performance prior to his termination. Rather, the evidence supported that he was a productive and satisfactory employee for over 40 years.

Secondly, JBS relied on insubordination (raising his voice and swearing) as a reason for termination. It was undisputed, however, that the conversation took place next to a very loud piece of equipment and that company policy/practice was to raise one's voice while on the factory floor. Further, it was relatively common to have heated arguments involving swearing on the factory floor. No supervisor could recall a single instance where an employee was terminated for yelling or swearing.

Ridout, on the other hand, provided evidence that younger employees were treated more favorably. One was demoted (not terminated) for poor performance, in the same position as he with the same supervisors. Another (the second successor) was rehired after having been terminated for racist



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behavior. The Court held that the three individuals were comparable, and the evidence supported that the two younger employees were disciplined differently. Accordingly, the evidence was sufficient to allow a rational factfinder to find that JBS's proffered reasons for termination were pretext for age discrimination. Further, the Court noted that the evidence is "entirely consistent with such an inference [of age discrimination] and the "ultimate question as to whether Ridout's termination was a result of unlawful discrimination is not one for summary judgment."

***Evanca v. Trumann Health Services, LLC, No. 12-2654 (8th Cir. June 18, 2013) (Gender, Religion and Disability Discrimination).***

<http://media.ca8.uscourts.gov/opndir/13/06/122654P.pdf>

Jenny Evanca ("Evanca") was a licensed practical nurse ("LPN") at Trumann Health and Rehabilitation Center ("Trumann"). It was undisputed that in July 2010 she was in the room of an 80 year old resident who suffered from dementia and who touched her breast, had her hand between his legs, and attempted to put his hand up her skirt. However, she claims the resident initiated contact and placed her hand between his legs. Other employees witnessed this behavior and reported it. An internal investigation ensued and multiple employees supplied affidavits averring Evanca engaged in inappropriate conduct with the residence. Following the internal investigation, Evanca was terminated for improper sexual contact with the resident. Thereafter, both a police investigation and Arkansas Office of Long-Term Care concluded that the allegations of misconduct were "unfounded".

Evanca claimed that she "felt ostracized by other employees" because of her Pentecostal religion and cleft palate. She also claimed that her termination was direct evidence of discrimination because no other LPN had been criticized for a resident's behavior.

The 8<sup>th</sup> Circuit Court of Appeals affirmed summary

judgment for Trumann, holding that the record does not contain any evidence of a discriminatory attitude toward her "other than Evanca's own uncorroborated speculation that her religion and disability made her unpopular". The Court again reiterated: "We are not 'a 'super-personnel department' with the power to second-guess employers' business decisions" and that it is not unlawful for an employer to make decision based on erroneous information and evaluations."

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### 10<sup>th</sup> Circuit

**Sarbanes-Oxley Retaliation/Whistleblowing:**  
***Lockheed Corporation v. Administrative Review Board of United States Department of Labor, 2013 WL 2398691 (10<sup>th</sup> Cir., June 4, 2013).***

<http://www.ca10.uscourts.gov/opinions/11/11-9524.pdf>

**Employee presented sufficient evidence that she engaged in activity protected under the Sarbanes-Oxley Act by accusing manager of improperly using company funds to engage in inappropriate personal relations with service members in Iraq, even though she did not allege fraud against shareholders. Employee also submitted sufficient evidence of constructive discharge, which required only a showing that protected activity was a "contributing factor," not a prima facie showing of causation as under Title VII.**

Andrea Brown was employed by Lockheed Martin ("Lockheed") as a Communications Director. In that position she was involved in the Company's



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pen-pal program with service members in Iraq. The Administrative Law Judge described Brown's discovery and reporting of troubling activity by her superior, Wendy Owen, who was Vice President of Communications:

In approximately May 2006, Brown had difficulty getting responses on work-related matters from Owen. Brown discussed this difficulty with Tina Colditz, a communicator who reported directly to Owen, who also ran a Pen Pal program between Lockheed employees and U.S. soldiers in Iraq. Colditz told Brown that Owen had developed sexual relationships with several soldiers in the Pen Pal program, purchased a laptop computer for one soldier, sent inappropriate e-mails and items to soldiers in Iraq, and had traveled to welcome-home ceremonies to visit soldiers on the pretext of business when she actually took soldiers in limousines to expensive hotels for intimate relations rather than working. Colditz told Brown that she was concerned that Owen was expending company funds for these activities. Brown understood that most expenses employees incurred were passed on to the customer, presumably the government in this case. Brown knew that Lockheed's standard business practice was to bill its costs to its customers. Colditz told Brown that she had personally witnessed these activities or that Owen had told her about them.

Brown reported Owen anonymously to the Company's Ethics Director in May of 2006, believing that her activities might be fraudulent or illegal. Shortly after submitting her complaint, Lockheed discontinued the Pen Pal program. In March of 2007, Lockheed reorganized the Communications Department and accepted applications for a new Communications Director. The Company rejected Brown's application, took her office, and denied her any leadership position, while suggesting that she might soon be separated from the Company. Brown eventually had an emotional breakdown and resigned. She filed a Retaliation charge with the United States Department of Labor in January of 2008, alleging violation of the Sarbanes-Oxley Act.

The DOL Administrative Law Judge held a hearing

and found Lockheed liable, ordering reinstatement, back pay, medical expenses, and compensatory damages in the amount of \$75,000. The 10<sup>th</sup> Circuit affirmed. The Court of Appeal first found that Brown had presented sufficient evidence that she engaged in "protected activity" as defined by Section 806 of SOX, which provides as follows:

Whistleblower protection for employees of publicly traded companies.—No [publicly traded] company ..., or any officer [or] employee ... of such company ... may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of ... [18 U.S.C. §§ ] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

....

(C) a person with supervisory authority over the employee....

18 U.S.C. § 1514A.

Under the regulations implementing Section 806, a claimant must establish the following elements of a prima facie claim: (1) she engaged in protected activity or conduct; (2) the employer knew of her protected activity; (3) she suffered an unfavorable personnel action; and (4) her protected activity was a contributing factor in the unfavorable personnel action. See 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b); 29 C.F.R. § 1980.104(b)(1) (2007). The 10<sup>th</sup> Circuit rejected Lockheed's argument that a claimant must report shareholder-related fraud, finding instead that SOX's definition of "protected activity" includes mail fraud, wire fraud, bank fraud, securities fraud, "any rule or regulation of the SEC," or any provision of Federal law relating to fraud against shareholders. Because Brown had alleged



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wire or mail fraud, her report qualified as protected activity.

The Court also held that Brown met the subjective and objective tests for having a “reasonable belief” that the reported conduct is illegal, even if she did not specifically allege at the time that Owen’s conduct was fraudulent or illegal.

The Court agreed with the Administrative Law Judge that Brown only needed to present evidence that her report was a “contributing factor” to the Company’s subsequent actions to make out a prima facie case, and found that she had presented sufficient evidence. The Court pointed out that the “contributing factor” test is more lenient than the *prima facie* causation test required for a Title VII case, and therefore refused to follow cases rejecting liability under that standard. Specifically, the Court declined to follow cases finding that a period of a few months between protected activity and an adverse action was too long to allow an inference of liability, and held that the relevant timing was the commencement of the Company’s negative treatment of Brown, not the final events leading to her discharge.

Finally, the Court found sufficient evidence that Lockheed’s conduct would have “created working conditions so intolerable that a reasonable person in the employee’s position would feel forced to resign.” The Court relied on Brown’s loss of an office, failure to be considered for any leadership position, and being left in suspense for months regarding her future with the Company.

The case is a good reminder that the standards of proof for a Retaliation claim under Sarbanes-Oxley are more lenient than for other Retaliation theories, and that a broad range of employee activity may be considered “protected” under Sarbanes-Oxley.

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

***Goodman, et. al. v. Kimbrough, et. al.* [6/21/13]:  
42 USC § 1983 - Civil action for deprivation of rights**

<http://www.ca11.uscourts.gov/opinions/ops/201210732.pdf>

The case of *Goodman, et. al. v. Kimbrough, et. al.* dealt with 42 USC § 1983, a civil action for deprivation of rights. In *Goodman*, Mary Goodman brought a claim on behalf of herself and as next friend (wife) of Bruce Goodman, a 67-year-old man with dementia, who was arrested after wandering from his trailer home and attempting to enter into another trailer. Plaintiffs claimed Mr. Goodman was severely beaten by his cellmate while being detained at the County Jail, and concerned the Jail Officers’ dereliction of duty. Plaintiffs brought the claim against the two officers charged with Mr. Goodman’s supervision in individual capacities, as well as the Sheriff’s in official capacity, and Mrs. Goodman brought a claim for loss of consortium. Per Sheriff Department policy, the officers’ were required to do a cell check once per hour after midnight; neither officer did in the case of Mr. Goodman. The next morning, the officers found Mr. Goodman covered in blood and severely battered. As a result, Goodman is now confined to a nursing home.

On appeal, and with regard to the individual liability claims, the 11<sup>th</sup> circuit found that the plaintiffs could not surmount the high burden to show the officers acted with deliberate indifference to a serious risk Goodman would be injured. Specifically, the court noted that, while there may be evidence of negligence, this is not enough to justify liability – Plaintiffs needed to show that the officers “subjectively knew of the substantial risk of serious harm and that they knowingly or recklessly disregarded that risk.”

As to the claims against the Sherriff in his official capacity, the court upheld the notion that supervisory officials are not liable under §1983 for the unconstitutional acts of their subordinates. Finally, with regard to the loss of consortium claim,



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the court noted that because Mr. Goodman's principal claims failed, her claim failed as well.

As such, the 11<sup>th</sup> Circuit found the district court did not err in granting Defendant's Motion for Summary Judgment.

***U.S. Steel Mining Co., LLC v. Director, OWCP, et. al.*** [6/27/13]: black lung benefit program

<http://www.ca11.uscourts.gov/opinions/ops/201114468.pdf>

The case of *U.S. Steel Mining Co., LLC v. Director, OWCP, et. al.* dealt with an appeal by employer, U.S. Steel, for an award of benefits to the widow of a deceased miner, under the Federal Coal Mine Health and Safety Act's black lung benefits program, and a split in circuit decisions. Specifically, federal law provides black lung benefits program which establishes benefits to miners who suffer from the disease, and allows surviving spousal benefits. The Patient Protection and Affordable Care Act amended a provision of the black lung benefits program, and courts were split as to whether survivors were required to establish cause of death to receive benefits. Since the introduction of the benefits program, Congress had changed the interpretation of the Black Lung Benefits Act multiple times, which created confusion as to the proper interpretation of whether a spouse must show cause of death to receive benefits.

The widow of a deceased miner won a benefits award as a surviving spouse by an administrative law judge from her late husband's employer, U.S. Steel, without having to show the cause of death, following her husband's award of benefits in May 2000. U.S. Steel appealed the award to the Department of Labor's Benefits Review Board, which affirmed the decision, and found retroactive application of the Patient Protection and Affordable Care Act's amendment was a violation of due process. The 11<sup>th</sup> Circuit agreed, and concluded the black lung benefits program, as amended by the Affordable Care Act, eliminated the need for survivors who can meet its requirements to prove

their associated miners died due to black lung. The 11<sup>th</sup> Circuit found the program applied retroactively, as well, and that retroactive application did not violate due process.

***Davila v. Menendez, et. al.*** [6/10/13]: FLSA and Florida Minimum Wage Act and liquidated damages

<http://www.ca11.uscourts.gov/opinions/ops/201211049.pdf>

The case of *Davila v. Menendez, et. al.* dealt with liquidated damages and claims by an employee that her employer failed to pay her minimum wage under federal and state law as a nanny. On appeal, the 11<sup>th</sup> Circuit examined the following: 1.) whether a jury should have decided if the employer willfully violated federal and state minimum wage laws that the employer was aware of the laws regarding payment and disregarded them, and 2.) whether the district court could deny an employee's request for liquidated damages before a jury made a determination about willful violations. The 11<sup>th</sup> Circuit held 1.) the employee introduced sufficient evidence for a jury to find there was a willful violation, and 2.) the district court could not rule on the motion for liquidated damages before the jury decided on the willful violations. Specifically, the court noted that the employers admitted to the employee that they knew of hourly wage laws, but failed to investigate whether they complied with the laws. The court also upheld the notion that willfulness must be answered first by the jury to determine the period of limitations, and then by the district court to determine liquidated damages. As such, the 11<sup>th</sup> Circuit vacated the lower court's decision and remanded in accordance with its holding.

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