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Labor & Employment Law Section Monthly Update

First Circuit Cases

The First Circuit held that the defendant failed to provide evidence to satisfy the burden of proof in regards the latter claim and thus granted the petition to enforce the NLRB Order.

National Labor Relations Board v. Le Fort Enterprises,

2015 WL 3982393, (1st Cir. July 1, 2015)

<http://caselaw.findlaw.com/us-1st-circuit/1706422.html>

The NLRB petitioned for the enforcement of its order under 29 USC §§ 159 (d) and 160(e) against the defendant, a cleaning service with 500 customers and an annual gross of \$1,000,000 in

sales, for committing unfair labor practices. The defendant's twenty-nine (29) employees had voted, 16-12, to be represented by a Union and the Union was then certified by the Board as their exclusive representative. Le Fort refused to bargain with the Union, alleging that the NLRB exceeded its jurisdictional limits by classifying it as a retail business as well as claiming that the election brought about by the employees was pervaded and

coerced. The First Circuit held that the defendant failed to provide evidence to satisfy the burden of proof in regards the latter claim and thus granted the petition to enforce the NLRB Order.

The First Circuit granted the Board's petition and rejected Le Fort's objections to both the Board's jurisdiction and the validity of the employees' election.



Submitted By:
José R. González-Nogueras,
Esq., and Ms. Kathleen
Fernández Vidal

Jiménez, Graffam &
Lausell

jgonzalez@jgl.com
P. O. Box 366104
San Juan, Puerto Rico
00936-6104

José González is a partner with the firm of Jiménez, Graffam & Lausell in Puerto Rico. His practice focuses on Labor & Employment Law and Civil Litigation.

First Circuit Cases Cont.

The First Circuit held that the plaintiff did not present the necessary evidence to establish a retaliation claim under Title VII.

Planadeball v. Wyndham Vacation Resorts, INC.

2015 WL 4385928, (1st Cir. July 17, 2015).

[http://
caselaw.findlaw.com/us-
1st-circuit/1708278.html](http://caselaw.findlaw.com/us-1st-circuit/1708278.html)

The plaintiff filed a
Complaint against Wynd-

ham alleging that she was subject to hostile work environment in retaliation for complaining about the supervisor's conduct.

The First Circuit affirmed summary judgment of all claims because plaintiff failed to meet her

burden for a retaliation claim

The First Circuit held that the plaintiff did not present the necessary evidence to establish a retaliation claim under Title VII.

Second Circuit Cases

Expert witness fees are not available as "costs" to the prevailing party under the Fair Labor Standards Act.

Gortat v. Capala Brothers,
__ F.3d __, 2015 U.S. App. LEXIS
13179 (2d. Cir. July 29, 2015).

The prevailing party under the Fair Labor Standards Act is not entitled to expert witness fees. "Absent explicit statutory authorization, a district court

may not award reimbursement for expert fees beyond the allowances authorized by 28 U.S.C. sec. 1920, as limited by 28 U.S.C. sec. 1821." While other statutory provisions explicitly authorize such reimbursement, such authorization does not appear in the FLSA.

Plaintiff unable to change theory of his disability discrimination case by pointing to an affidavit attachment that further sets forth the nature of his claim.

Smith v. Hogan,
__ F.3d __, 2015 U.S.
App. LEXIS 12625
(2d. Cir. July 22, 2015)

Court of Appeals disallowed plaintiff from changing his theory of li-

ability in this disability discrimination case, where the complaint did not explicitly allege the nature of his anxiety disorder. While plaintiff pointed to an attachment/affidavit to

the complaint that set forth his claim for relief, that affidavit did not qualify as the kind of "written instrument" that would qualify as a legitimate attachment under Fed.R.Civ.P.10(c).



Submitted by :

Stephen Bergstein
steve@tbulaw.com



Plaintiff unable to change theory of his disability discrimination case by pointing to an affidavit attachment that further sets forth the nature of his claim.

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___ F.3d ___, 2015 U.S.
App. LEXIS 12625
(2d. Cir. July 22, 2015).

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the kind of "written instru-
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a legitimate attachment
under Fed.R.Civ.P.10(c).

Contract attorney who reviews documents for large law firm entitled to overtime pay.

Lola v. Skadden Arps,
___ F.3d ___, 2015 U.S.
App. LEXIS 12755 (2d.
Cir. July 23, 2015).

Contract attorney
who reviewed documents
for large law firm under
the supervision of firm
attorneys was entitled to
overtime pay under the

Fair Labor Standards Act.
While "profession-
al" workers are not entitled to
overtime pay under the
FLSA, plaintiff was not
performing "professional"
services. Rather, "A fair
reading of the complaint in
the light most favorable to
Lola is that he provided
services that a machine

could have provided. The
parties themselves agreed
at oral argument that an
individual who, in the
course of reviewing dis-
covery documents, under-
takes tasks that could oth-
erwise be performed en-
tirely by a machine cannot
be said to engage in the
practice of law."

Third Circuit Cases

A Plaintiff lacks constitutional standing to seek monetary equitable relief under ERISA based on that alleged diminution of assets of a defined benefit plan unless the plaintiff can show either that he failed to receive the plan benefits to which he is entitled, or unless he can show that the plan's liabilities exceed its assets under the statutorily-defined accounting method.

Perelman v. Perelman, et al.,
_ F.3d _ (3d Cir. 2015), 2015 WL
4174537, C.A. 3, (Penna.), July 13,
2015, available at
[www2.ca3.uscourts.gov/
opinarch/141663p-1.pdf](http://www2.ca3.uscourts.gov/opinarch/141663p-1.pdf)

In the *Perelman* case, the Third Circuit Court of Appeals addressed the question of constitutional standing to seek monetary equitable relief under the federal Employee Retirement Income Security Act of 1974 (ERISA). The issue arose in the context of an apparently-ongoing battle within the Perelman family.

Raymond Perelman, the father, became chairman of the General Refractories Company (GRC) in 1982. Between 2003 and 2009, he served as a trustee of GRC's defined benefit employee retirement plan, and also served as the plan's administrator between 2003 and 2005. As plan administrator,

he exercised discretionary control over management of plan assets, and therefore qualified as a plan fiduciary and "a party in interest" under ERISA.

Raymond's son Jeffrey was an employee of GRC and a participant in GRC's employee pension plan. Raymond's other son, Ronald, is well known as the controlling shareholder of Revlon, Inc., and its wholly-owned subsidiary, Revlon Consumer Products Corporation.

The lawsuit pitted Jeffrey, the plaintiff, against father Raymond, brother Ronald, and other defendants. The crux of Jeffrey's claim was that father Raymond had covertly invested plan assets in the corporate bonds of allegedly-struggling companies owned and controlled by brother Ronald, allegedly to allow Ronald to raise capital for Revlon without sacrificing his position as controlling shareholder. Jeffrey alleged that these transactions were not properly re-



Submitted by:

Stephen E. Trimboli
Trimboli & Prusinowski,
L.L.C.
268 South Street
Morristown, New Jersey 07960
(973) 660-1095, x. 180
stimboli@trimprulaw.com

Stephen Trimboli is a founding member of the law firm of Trimboli & Prusinowski. He specializes in labor and employment law on behalf of management. His practice also includes commercial litigation, administrative law, occupational safety and health law, interest arbitration, police and fire disciplinary hearings, pension law disputes, appeals, wage and hour law, and EEO compliance. He is a graduate of the Johns Hopkins University and the New York University School of Law.



ported under law, had depleted plan assets, and had increased the risk that the plan would default on its obligations, thereby allegedly placing Jeffrey's defined benefits under the plan into jeopardy.

Jeffrey filed suit in October 2010, later amended his complaint, and on July 21, 2011, filed a Second Amended Complaint asserting the following ERISA claims: breach of fiduciary duty of care; prohibited party-in-interest transactions; failure to diversify plan assets; failure to update or maintain proper plan documents; improper delegation of control of plan assets; and, failure to prosecute a co-fiduciary's breach of fiduciary duty. For relief, Jeffrey sought monetary equitable relief in the form of restitution of plan losses and disgorgement of profits. He also sought injunctive relief in the form of removal of Raymond as trustee, the appointment of an independent trustee, performance of an outside audit for plan years 2002 through 2010, an order enjoining Raymond from ever again serving in a fiduciary capacity for any ERISA plan, and an order declaring void any provision in the plan or its trust agreement that would indemnify any of the named defendants for their legal costs. Jeffrey also sought attorneys fees and costs.

In August 2012, the District Court found that Jeffrey lacked constitutional standing to pursue his claims for monetary equitable relief -- restitution and disgorgement -- because he had failed to demonstrate an actual injury to himself, as opposed to a generalized injury to the plan. Jeffrey was permitted to pursue his other claims for injunctive relief; however, during the pendency of the case, Raymond terminated himself as trustee of the plan and appointed an outside company to take over that role. GRC also retained the services of an independent investment manager for the plan, while Raymond voluntarily contributed \$270,446.42 to plan's trust. All these actions were taken voluntarily and without any admission of culpability or wrongdoing. The District Court subsequently denied Jeffrey's motion to file a Third Amended Complaint due to his continuing failure to allege an actual injury and ultimately dismissed all of Jeffrey's remaining claims. The District Court also denied Jeffrey's application for attorneys' fees and costs. Jeffrey appealed the determination on constitutional standing and the denial of attorneys' fees and costs. The Third Circuit affirmed.

There are three required elements for constitutional standing. The plaintiff must suffer an injury in fact that is concrete, particularized, and actual or imminent, as opposed to conjectural or hypothetical. There must be a causal connection between injury and the conduct complained of; that is, the injury has to be fairly traceable to the challenged action of the defendant and not be the result of an independ-



ent action of some third party not before the court. Third, it must be likely, as opposed to merely speculated, that the injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Under Third Circuit precedent, for a party to possess constitutional standing to bring a claim for monetary equitable relief under ERISA, the party must demonstrate that he or she is a plan participant who suffered individualized financial harm traceable to the defendant's alleged ERISA violation. Injury to the plan itself is insufficient. (In contrast, constitutional standing to seek purely injunctive relief may exist simply by virtue of the defendant's violation of an ERISA statutory duty). For claims seeking "make whole" monetary equitable relief, the plaintiff would need to demonstrate financial harm in the form of an actual loss. In a claim seeking monetary equitable relief in the form of disgorgement of profits, the plaintiff must demonstrate "the measure of the defendant's unjust profits coupled with the right of the [plaintiff], as opposed to plan, to those profits."

Jeffrey alleged financial injury in the form of an alleged "net diminution in [plan] assets of approximately \$1.3 million as a result of Raymond's investment of plan assets in Revlon debt." This diminution in assets allegedly "increased dramatically" the plan's risk of default. However, Jeffrey conceded that he received all distributions under the plan to which he had been entitled. This failure to identify any individualized loss was fatal to Jeffrey's claim:

In the case of defined benefit plan, like the plan here, the Supreme Court has established that diminution in plan assets, without more, is insufficient to establish actual injury to any particular participant ... this stems from the fact that participants in such a plan are entitled only to a fixed periodic payment, and have no "claim to any particular asset composing a part of the plan's general asset pool" ... Accordingly, even if the defendants' dealings resulted in a diminution in plan assets, they are insufficient to confer standing upon Jeffrey absent a showing of individualized harm.

The Court cited *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999).

On the other hand, "there is some support for the notion that a participant or beneficiary in a defined benefit plan has suffered an injury sufficient to pursue a claim



“With regard to attorney’s fees, ERISA permits the District Court to award reasonable attorneys’ fees and costs even to a losing party that has achieved some degree of excess on the merits.”

for “make-whole” equitable monetary relief ... when a fiduciary’s alleged misconduct ‘creates or enhances the risk of default by the entire plan.’” However, “Congress has sought rigorously to minimize or eliminate such risk by requiring defined benefit plans ‘to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guarantee Corporation for plan termination insurance.’” In particular, the plan sponsor is required under ERISA to make minimum required contributions to its defined benefit plan whenever the value of plan assets is less than the plan’s yearly funding target, defined by law as “the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.”

Based upon the statutory valuation formula mandated by Congress to take effect beginning December 31, 2011, the GRC plan has assets that exceeded its anticipated liabilities, thereby rendering the plan properly funded under current law. Jeffrey argued, however, that under the statutory valuation formula that had existed prior to December 31, 2011, the plan’s liabilities would exceed its assets. Jeffrey argued that “the dueling legitimacy of the two accounting approaches is a question of fact that must be resolved at trial.” The Third Circuit rejected this argument:

We agree with the District Court, however, that the controlling yardstick here is provided by the finely tuned framework established by Congress. Where a plan’s assets exceed its liabilities under a statutorily accepted accounting method, it passes muster as a matter of law, i.e. the employer need not make additional contributions to remove a designation of “at-risk” or “underfunded” status ... Here, the evidence is undisputed that as of January 1, 2013, under a valuation method approved by Congress, the plan was appropriately funded, and GRC had no obligation to make further contributions to stabilize the plan’s finances. Under the circumstances, Jeffrey’s allegation that the plan is nonetheless at risk of default is entirely speculative ... Thus, like the District Court, we conclude that [Jeffrey] fails to allege the actual harm required to sustain constitutional standing for an individual claim of “make-whole” equitable relief under Sec. 502(a)(3) [of ERISA].



Similarly, Jeffrey did not possess constitutional standing to seek disgorgement of profits because he failed to demonstrate an individual right to any profits that he claimed were improperly earned.

Jeffrey also argued that “he need not prove an individualized injury insofar as he seeks monetary equitable remedies in a ‘derivative’ or ‘representative’ capacity on behalf of the [p]lan.” The Third Circuit found no support for such a theory in its own case law, and found that the Fourth, Sixth, Eighth, and Ninth Circuits had rejected such a theory. “Jeffrey provides no authority or other convincing reason for us to break from the reasoned consensus of our sister circuits.”

With regard to attorney’s fees, ERISA permits the District Court to award reasonable attorneys’ fees and costs even to a losing party that has achieved “some degree of excess on the merits.” Pointing to Raymond’s stepping down as plan trustee, the appointment of an independent trustee and the reimbursement of certain plan losses by Raymond voluntarily, as well as other corrective actions taken by the plan, Jeffrey alleged that his lawsuit was the “catalyst” to these actions, and asserted that he was therefore entitled to attorneys’ fees. However, even when a party has achieved success on the merits, the District Court retains discretion whether to award fees in light of the following factors: the offending parties’ culpability or bad faith; the ability of the offending parties to satisfy an award of attorneys’ fees; the deterrent effect of an award of attorneys’ fees against the offending parties; the benefit conferred on the members of the pension plan as a whole; and, the relative merits of the parties’ positions. The Third Circuit concluded that the District Court had not abused its discretion by declining to award attorney’s fees. The culpability of the defendants remains speculative. The benefit of Jeffrey’s lawsuit to other plan participants was of a limited and non-monetary nature, and Jeffrey’s legal efforts were predicated upon “a flawed theory of constitutional standing.” As such, the denial of attorney’s fees and costs was affirmed.



Submitted by:

Paul Sun
Emily Erixson
ELLIS & WINTERS LLP
Paul.sun@elliswinters.com
Post Office Box 33550
Raleigh, North Carolina
27636
Telephone: 919.865-7000
www.elliswinters.com

Paul Sun's practice focuses primarily on business litigation and appeals. Mr. Sun has experience in the areas of trade secrets and unfair competition, business and health care fraud (civil and criminal), employment, consumer claims, premises and product liability, and contract disputes. He has tried cases in areas as varied as health care fraud, product liability/wrongful death, and First Amendment. Mr. Sun also regularly handles civil and criminal appeals in the North Carolina and federal appellate courts. He has served as the Rules Editor for the American Bar Association's *Appellate Practice Journal*.

Fourth Circuit Cases

Fourth Circuit reverses summary judgment for airline, finding sufficient evidence of racially hostile work environment based on racist death threats.

Pryor v. United Airlines, Inc., No. 14-144, 2015 WL 3973562 (4th Cir. July 1, 2015), available at <http://www.ca4.uscourts.gov/Opinions/Published/141442.P.pdf>

An African-American flight attendant for United Airlines discovered a note in her company mailbox containing racial slurs and an implicit death threat. The note read, “Nigger Tag—Federal Nigger Hunting License” and showed a person hanging from a pole with the words “this is for you.” The flight attendant immediately showed the note to her supervisor. The supervisor did not report the complaint to United’s Employee Service Center, as required by company policy. Instead, he gave the flight attendant a form to fill out, and told her there was nothing United could do because the mailroom did not have security cameras.

United’s corporate security group investigated the note, but did not conduct any interviews or preserve any physical evidence or hard copy documents. Although the supervisors knew that, a few months earlier, a different racist message been found in the flight attendants’ break room, the supervisors did not report the earlier incident to corporate security. Unable to identify any suspects, security group closed the investigation into the threatening note without informing the flight attendant.

The flight attendant eventually called the Employee Service Center, but United still could not identify any suspects. The flight attendant also contacted the police. Two and one-half months after the flight attendant discovered the racist death threat, United sent a “must-read” email stating that it was investigating offensive material and instructing employees to notify a manager

if they had any information.

A few months later, the flight attendant and four other African-American colleagues found nearly identical racist death threats in their company mailboxes. United reported the second incident to the police, installed security cameras in the mailroom, and recorded fingerprints of all employees who had touched the notes. These measures did not generate any leads, and the investigation was closed.

The flight attendant filed an EEOC charge and then a complaint asserting claims under Title VII and 42 U.S.C. § 1981 for hostile work environment. The district court granted summary judgment for United, ruling that the racist notes were sufficiently severe to create a hostile work environment, but holding that the conduct could not be imputed to United. The flight attendant appealed, and the

Fourth Circuit reversed.

To prevail on either her Title VII claim or her Section 1981 claim for a racially hostile environment, the flight attendant had to show that the conduct was 1) unwelcome; 2) based on her race; 3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment; and 4) imputable to United. United did not contest the first two elements.

When assessing the work environment, the court determines the objective severity of the harassment from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. An isolated incident of harassment, if "extremely serious," may amount to a discriminatory change in the conditions of employment. Here, although the racist notes may not have been pervasive, the Fourth Circuit agreed with the district court that the threats were sufficiently severe to permit a jury to find a hostile work environment, given the use of the word "nigger," the clear inference of violence, the fact that the notes were left in a secure mailroom at a major airport where security is a priority, and the fact that other racist threats had been made.

The Fourth Circuit held that the district court erred when it ruled United could not be held liable. The flight attendant had to show that United knew or should have known about the harassment and failed to take remedial action reasonably calculated to end the harassment. In evaluating the reasonableness of remedial action, the court examines the promptness of the investigation, the specific measures taken, and the effectiveness of those measures, taking into account the seriousness of the harassment.

The parties agreed that United's response to the second threatening note was adequate, but the Fourth Circuit ruled that a reasonable jury could find that United's remedial action after the first note was neither prompt nor reasonably calculated to end the harassment. The court noted that the supervisors did not call the police, contact the Employee Service Center, inform corporate security about the racist message previously discovered in the break room, install cameras, or interview any co-workers. The Fourth Circuit found it "significant, albeit not dispositive," that United's response was ineffectual—the notes reappeared months later. The Fourth Circuit rejected the district court's reasoning that there was no evidence that the perpetrator could have been found if United had taken additional steps; the proper test was whether United's response was reasonably calculated to end the harassment, and here there was adequate evidence that it was not.

The Fourth Circuit vacated the district court's award of summary judgment and remanded for further proceedings .





“The Fourth Circuit identified three additional factors that are most significant: the authority to hire and fire; day-to-day supervision; and who furnishes the equipment and place of employment.”

Fourth Circuit adopts hybrid test for assessing Title VII liability in a joint employer situation and reverses summary judgment against employee who worked for temporary agency at automobile parts manufacturing plant.

Butler v. Drive Automotive Industries of America, Inc., No. 14-1348, 2015 WL 4269615 (4th Cir. July 15, 2015), available at <http://www.ca4.uscourts.gov/Opinions/Published/141348.P.pdf>

The plaintiff was hired by a temporary employment agency to work for an automotive company at its manufacturing facility. While working at the plant, the employee reported to both the temporary agency and the automotive company that her supervisor verbally and physically harassed her by making sexual comments and rubbing his crotch against her on several occasions. Neither company took any action. When the employee reported another incident to her supervisor’s manager, the manager requested that the agency terminate the employee. A few days later, the temporary agency terminated her employment.

The employee initially sued both the employment agency and the automotive company, but she later agreed to dismiss the claims against the agency. The district court granted summary judgment for the automotive company on all claims, concluding that the company did not exercise sufficient control to be deemed an employer under Title VII. On appeal, the Fourth Circuit reversed.

The Fourth Circuit had not addressed before this case whether two parties can be considered joint employers and therefore both be liable under Title VII. On this question of first impression, the Fourth Circuit held that the joint employment doctrine applies in Title VII cases.

In a joint employment case, the question is whether each of the putative employers exercises significant control over the employee at issue. The Fourth Circuit held that the

“hybrid test” should be applied in answering this question. The hybrid test is a multi-factor test where control is the most important, but not dispositive, factor. The Fourth Circuit identified three additional factors that are most significant: the authority to hire and fire; day-to-day supervision; and who furnishes the equipment and place of employment. Other considerations include the length of time the employee has worked for the putative employer and has been assigned solely to that employer; training provided; whether the individual’s duties are akin to a regular employee’s duties; and the intention of the parties.

Applying the hybrid test, the Fourth Circuit held as a matter of law that the automotive company and the temporary agency were joint employers. The court concluded that the automotive company exhibited a high degree of control over the



terms of the worker's employment, specifically the termination of her employment. She worked side-by-side with other employees of the automotive company, performing the same tasks with the same equipment as part of the company's core business, and was supervised by the same automotive company personnel.

The Fourth Circuit reversed and remanded for the district court to consider the merits of the employee's claims.

Employees subjected to a tip-pooling arrangement could not state a claim under Fair Labor Standards Act where they were paid a full minimum wage without considering the tips.

Trejo v. Ryman Hospitality Properties, Inc., No. 14-1485, 2015 WL 4548259 (4th Cir. July 29, 2015), available at <http://www.ca4.uscourts.gov/Opinions/Published/141485.P.pdf>

Employees who worked as servers at hotels and restaurants brought a Fair Labor Standards Act claim alleging a violation of the Act's tip credit provision. The employees alleged that they had not voluntarily agreed to tip-pooling, but their employers collected and redistributed a portion of the servers' tips to bartenders, busboys, and food runners. The employees asserted

that their employers failed to pay them all earned tips in violation of 29 U.S.C. § 203(m). The employees did not allege that they were forced to work overtime without pay, and they conceded that they were paid the minimum wage absent their tips.

The district court granted the employers' motion to dismiss. The district court reasoned that because the employees had been paid the minimum wage, they had no basis for a FLSA claim. On appeal, the Fourth Circuit affirmed.

The Fourth Circuit explained that the FLSA is best understood as a

"minimum wage/maximum hour law."

Here, the employees conceded that they were paid a full minimum wage absent any tips. Section 203(m) permits employers to take a credit against the minimum wage by claiming tips as part of the wages calculation, but in this case the employers were not using tips to help meet the minimum wage. The Fourth Circuit held that Section 203(m) does not create a free-standing right to claim lost tips as lost wages. Thus, the Fourth Circuit affirmed the dismissal of the employees' FLSA claim.



Submitted by :

Steven F. Griffith, Jr.
Shareholder
Baker Donelson Bearman Caldwell & Berkowitz, PC
201 St. Charles Ave., Ste. 3600
New Orleans, Louisiana 70170
Direct: 504.566.5225
sgriffith@bakerdonelson.com

Steve is a shareholder with a national employment law practice and assists clients in various industries including affordable housing, construction, marine and hospitality. Steve's practice includes wage and hour, defending nationwide FLSA collective actions, as well as related class actions. He has extensive litigation experience with civil rights claims, Title VII, the ADA, FMLA and ADEA. Finally, his practice includes pursuing and defending complex breach of contract, trade secret and unfair trade practice claims.

Fifth Circuit Cases

The Fifth Circuit affirms the dismissal of a retaliation claim, but reverses dismissal of an age discrimination claim in favor of trial on the merits.

***Goudeau v. National Oilwell Varco, LP*, No. 14-20241 (5th Cir. July 16, 2015)**

Goudeau was a Maintenance Supervisor for National Oilwell Vardo (and its predecessor) for 18 years until his termination in 2011 at the age of 57. Once receiving a new supervisor in August of 2010, that supervisor made comments to Goudeau about “old farts” that worked at the company and an intent to terminate them. Goudeau complained to Human Resources regarding the comments, and he stopped interacting with his supervisor except as necessary. Beginning in January 2011, Goudeau received a series of write-ups and warnings from his supervisor up until his termination on August 11, 2011. Goudeau filed suit alleging violations of the Age Discrimination in Employment Act, Texas Commission Human Rights Act, and claims of retaliation under the ADEA. The district court granted summary judgment on all claims, and Goudeau appealed.

The Fifth Circuit began by clarifying the “stray remarks” case law on which it relies for a *prima facie* analysis. The Court explained that in direct evidence cases, which are outside of the *McDonnell Douglas* framework, a stray remark must be proximate in time to an action, made by an individual with authority over the decision, and related to the challenged decision. In such a case, the stray remark is the entire case of discrimination, and so the need to engage in a burden-shifting *McDonnell Douglas* analysis is not necessary. However, in a circumstantial case under *McDonnell Douglas*, the discriminatory remarks are one ingredient in an overall evidentiary mix, and stray remarks are considered under a more flexible standard. To be relevant, the comment must show discriminatory animus on the part of the person that is either primarily responsible for the employment action or by a person having influence or leverage over the decision maker. The district court found that the comments easily satisfied that standard in the context of the *prima facie* case, and the Fifth Circuit agreed. Therefore, the Court moved to the pretext element of the analysis.

Citing evidence from Goudeau regarding the inconsistent nature by which warnings were given to him, including evidence that the warnings were not presented to him at all until the day of his termination, the Fifth Circuit found that a jury could conclude that age was the reason for his termination. The



Court noted that although National Oilwell was not required to give Goudeau any warnings prior to termination, when an employer opts to have a disciplinary system that involves warnings, the failure to follow that system may give rise to inferences of pretext. And, the Court noted the lack of signature on the employee's warning documents as evidence – at the summary stage – that would support the argument that Goudeau had no prior notice of his warnings. Therefore, the Court found that Goudeau had raised an issue of fact regarding dismissal under the pretext analysis.

On retaliation, however, Goudeau was required to show that he engaged in protected activity, suffered an adverse employment decision, and a causal link between the two. The Court found that the temporal gap of 8-10 months between Goudeau's complaint to H.R. and the adverse employment action, and the absence of evidence that his supervisor even knew of the earlier complaint to H.R. required dismissal of that claim.

The Fifth Circuit affirms the dismissal of a portion of a retaliation claim, but reverses and remands for further proceedings on one aspect of the claim.

***Wallace v. Tesoro Corp.*,
No. 13-51010 (5th
Cir.7/31/2015).**

Wallace was the Vice-President of Pricing and Commercial Analysis at Tesoro, and he contended that he was fired in March of 2010 after engaging in protected activity. Specifically, Wallace contended that he took steps to reveals four different categories of unlawful activity by Tesoro.

In May of 2010, Wallace filed a complaint of Sarbanes-Oxley violations against Tesoro with OSHA, alleging retaliation

regarding two of the four categories on which he ultimately filed suit. OSHA dismissed the complaint in October of 2010. In February of 2011, Wallace filed suit in federal court. The Amended Complaint in federal court alleged retaliation regarding all four categories of protected activity. Tesoro moved to dismiss, and the District Court granted the Motion. First, the Court concluded that three categories were, in fact, not protected activity at all for various reasons. The Court also found that, as to the fourth activity, Wallace had not ex-

hausted the administrative requirement to present the issue to OSHA prior to filing suit. Wallace appealed.

The Fifth Circuit began by confirming that the Sarbanes-Oxley Act protects employees from retaliation for engaging in protected activity, and the Court found that the exhaustion standard from Title VII cases applied to SOX complaints. That is, the complaint would be limited "to the scope of the investigation which could reasonably be expected to grow out of a



charge of retaliation.” The Court rejected the notion that SOX did not require exhaustion of the administrative remedies, and the Court went on to note that the OSHA Complaint in this case did not include certain practices sought to be pursued in federal court for the first time. The Court also rejected Wallace’s argument that his Amended Complaint in federal court somehow related back to the administrative complaint, rendering the exhaustion a moot defense, as well as some other protected arguments.

The Fifth Circuit did, however, find that the Complaint adequately pled that Wallace reasonably believed he was reporting a wire fraud violation of SOX. The Court determined that the level and role of Wallace’s account of expertise and how that should weigh for or against him was not capable of being resolved at the 12(b)(6) stage. Further, the Fifth Circuit also noted that there was no obligation to plead fraud with particularity in a SOX retaliation suit. Specifically, the Court noted that an employee may pursue a claim for retaliation for conduct he reasonably believes to be wire fraud, even if the conduct turns out not to be fraudulent. The inquiry into a reasonable belief is independent from whether fraud actually occurred and it would be practically difficult for an employee in a retaliation suit to plead the time, place and contents of false representations (ordering Rule 9 requirements) if, as the SOX retaliation provisions require, an employee need only reasonably believe there is a violation of the law before filing a retaliation claim.

Finally, the Fifth Circuit rejected several other theories of Tesoro as to why the Complaint was deficient on its face, but the Fifth Circuit finding, on each of those issues, that this stage of the proceeding was too early to consider such arguments. The case was remanded for further proceedings regarding one aspect of Wallace’s retaliation claim

Sixth Circuit Cases

Court held that the Tribe's sovereignty rights did not preclude application of the NLRA.

***Soaring Eagle Casino and Resort v. National Labor Relations Board*, _ F.3d __, 2015 WL 3981378 (6th Cir. July 1, 2015).**

In September 2009, Susan Lewis, a housekeeper at the Soaring Eagle Casino and Resort (“the Casino”), began engaging in union solicitation activities on behalf of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (“the Union”). Lewis’ supervisors told her that her activities violated their handbook and exposed her to discipline. Lewis persisted and received a written notice informing her that she could not discuss Union activities with other employees. Lewis then began handing out wristbands that read “Band Together 2010” and the Casino suspended her. When she returned to

work, she talked to another co-worker about the Union again and the Casino terminated her employment.

The Casino’s employee handbook prohibited solicitation “in any work area. Employees are also prohibited from soliciting during their assigned working time or soliciting other employees during their assigned working time...” Employees were also prohibited from “posting notices, photographs, or other written materials on bulletin boards or any other Soaring Eagle premises.”

The Union filed a Charge with the National Labor Relations Board alleging that the Casino violated the National Labor Relations Act by having an overbroad no-solicitation policy and by banning employee discussions of union activities, as well as by terminating Lewis for engaging in union activity. Be-

cause the Casino is an enterprise of the Saginaw Chippewa Indian Tribe of Michigan (“the Tribe”), the Casino filed a response contesting the Board’s jurisdiction. The Administrative Law Judge (“ALJ”) held that the Board had jurisdiction over the Casino because the Board’s jurisdiction does not interfere with the Tribe’s right of self-governance, does not interfere with any relevant treaty, and nothing in the NLRA shows a congressional intent to exclude Native American tribes from its purview. The ALJ then held that the no-solicitation policy was unlawful and that Lewis was unlawfully discharged. The Tribe appealed the decision to the Board and the Board affirmed. The Tribe then appealed to the Sixth Circuit.

The Tribe did not contest that its actions were unlawful under the NLRA, so the only issue



Submitted by:

Leigh M. Schultz
James D. Boufides
Miller, Canfield, Paddock & Stone, P.L.C.
277 S. Rose, Suite 5000
Kalamazoo, Michigan 49007
schultzl@millercanfield.com

Leigh provides employers with advice and counsel on day-to-day employment-related issues and regularly defends employers against administrative charges and lawsuits filed by current, former and prospective employees. In addition, Leigh assists businesses in defending and prosecuting lawsuits involving commercial (non-employment) claims such as breach of contract, breach of warranty, negligence, fraud, nuisance, trespass, unjust enrichment, conversion, defamation, breach of fiduciary duty, tortious interference and minority shareholder oppression.



before the Court was whether the NLRA applied to the Tribe. The Tribe relied on an 1864 Treaty through which the United States released the real property used for the Casino to the Tribe and which gave the Tribe the ability to exclude non-Native people from residing on that land. Yet Congress has the power to abrogate Native American rights pursuant to a treaty, and so the question was whether or not Congress did so through the NLRA. The Court held that the 1864 Treaty, although it gave the Tribe “a general right of exclusion,” without “additional specificity,” this right “is insufficient to bar application of federal regulatory statutes of general applicability.” Without a direct conflict between the right of exclusion and “the entry necessary for effectuating the statutory scheme,” the Court declined to prohibit the application of such statutory schemes solely on the existence of such a treaty.

The Tribe also asserted that its inherent sovereignty rights precluded application of the NLRA to the Casino. The Court cited binding precedent, *NLRB v. Little River Band of Ottawa Indians Tribal Government*, No. 14-2239, 2015 WL 3556005 (6th Cir. Jun. 9, 2015), which held that the Board could apply the NLRA “to the operation of a casino resort” of a Native American tribe. Because the Court was bound by this precedent, it applied it, even though it vehemently stated that it did not agree with it and would rather, if writing on a clean slate, hold that the NLRA did *not* apply to the Tribe. Yet because it was bound to do so, the Court held that the Tribe’s sovereignty rights did not preclude application of the NLRA.

Court held that Plaintiff’s complaints were not too vague to constitute protected activity under Title VII.

***Yazdian v. ConMed Endoscopic Technologies, Inc.*, _ F.3d __, 2015 WL 4231698 (6th Cir. July 14, 2015).**

Plaintiff was an Iranian-American, non-practicing Muslim who sold

endoscopic products for ConMed Endoscopic Technologies for five years. He was a talented salesman and received numerous awards and promotions. His performance evaluations were always “good” or “very good” in all categories.

Plaintiff alleged that his supervisor created a hostile work environment and discriminated against him based on his national origin and religion. For example, Plaintiff claimed that the supervisor: (1) once sent him an unsolicited article about ancient



“The comments to Plaintiff regarding the article on ancient Persia and the Honey Baked Ham Store gift certificate may have been insensitive but were not evidence of negative animus toward Iranians or Muslims.”

Persia, thus singling him out because of his ethnic background; (2) gave a number of employees gift certificates to the Honey Baked Ham Store but told Plaintiff that they carried non-pork products as well, thus allegedly singling him out again on the basis of his religion; (3) gave another employee advance notice that he would not be receiving an award, but failed to give Plaintiff, who was also up for the same award and did not receive it, that same advance notice; (4) passed him over for a promotion in favor of less senior, white employees; and (5) refused to publish an article Plaintiff had written that was “embarrassing,” “poorly worded,” and “far too self-serving.”

Plaintiff complained to the supervisor that he created a hostile work environment and did not like Plaintiff’s race. The supervisor cited numerous incidents in which he felt Plaintiff’s personal behavior was inappropriate and combative. Plaintiff was given a written warning for numerous reasons including rude outbursts and using a threatening tone, but among the reasons for the warning were Plaintiff’s comments about the supervisor not liking his race and creating a hostile work environment. When the supervisor called Plaintiff to inform him of the written warning, Plaintiff launched into a tirade, saying things like “I’m going to bring you up on charges before the Board,” “[y]ou have been out of line with me from day one,” “[y]ou are a bad individual,” “I’m going to respond with counsel,” “I’m going to “[b]ring a lawsuit,” “[h]ostile work environment,” “I will have an attorney respond,” and “I will be responding with charges.”

ConMed subsequently terminated Plaintiff’s employment for violating the conduct policy, “prior behavioral issues, and because when he received his written warning, he became combative.”

Plaintiff sued for discrimination on the basis of his national origin and religion as well as for retaliation. In analyzing the retaliation claim, the Court held that Plaintiff’s complaints were not too vague to constitute protected activity under Title VII. The fact that Plaintiff never made a complaint to Human Resources or ConMed’s counsel did not matter; protected activity includes complaints to co-workers and managers. And while some of Plaintiff’s complaints were about his supervisor’s management style—which is not protected—a reasonable jury could conclude that Plaintiff engaged in protected activity. Furthermore, a reasonable jury could conclude that Plaintiff had direct evidence of retaliation because the written warning was predicated in part on Plaintiff’s comments about discrimination and a hostile work environment, and because the supervisor made the decision to terminate Plaintiff immediately after the phone call during which Plaintiff made the aforementioned statements. Thus the Court reversed the district court’s grant of summary judgment in favor of ConMed on Plaintiff’s retaliation claim.

The Court affirmed summary judgment in favor of ConMed on the discrimination claim, however, because there was no genuine issue of material fact that Plaintiff’s discharge was not a pretext for discrimination. The comments to Plaintiff regarding the article on ancient Persia and the Honey Baked Ham Store gift certificate may have been insensitive but were not evidence of negative animus toward Iranians or Muslims. There was also no evidence that national origin or religion entered into the decision not to promote Plaintiff either. Thus Plaintiff could not prove discrimination.



Submitted By:
Kwabena Appenteng
Associate
Chicago, IL
kappenteng@littler.com
(312) 795-3268

Kwabena Appenteng represents and counsels employers across various industries in a broad range of employment matters before federal and state courts and administrative agencies. Kwabena has significant experience handling single and multiple plaintiff discrimination and harassment cases and has successfully obtained numerous summary judgment dismissals.

Seventh Circuit Cases

Federal Court Split on Consideration Needed to Enforce a Restrictive Covenant in Illinois Remains Unresolved.

Instant Technology, LLC v. DeFazio, Case Nos. 14-2132 and 14-2243 (7th Cir. July 14, 2015)

Instant Technology, LLC (“Plaintiff” or “Instant”) is an information-technology staffing firm where employees work to either recruit qualified candidates or pitch the candidates to the firm’s clients. As a condition of employment, Instant’s employees signed agreements in which they covenant not to solicit business from the firm’s clients, not to recruit the firm’s candidates or employees to other jobs, and not to disclose the firm’s confidential information to third parties. Defendant DeFazio was employed as Vice President for Sales and Operations until Instant

terminated her employment in January 2012. One month later, DeFazio and several of her former co-workers at Instant started a new tech-staffing firm and successfully solicited business from several of Instant’s clients.

After a bench trial, the district court ruled that the non-solicitation covenant and non-recruitment covenant in the former employees’ employment agreements were invalid and unenforceable. The district court also held that DeFazio’s counterclaim failed, because she failed to prove that she was entitled to the remainder of her purportedly earned bonus.

The Seventh Circuit affirmed both of the district court’s holdings.

The Court accepted as reasonable the district court’s determinations that: Plaintiff did not demonstrate a protectable interest in its clients because the industry is not characterized by client loyalty; plaintiff did not demonstrate that its candidate lists are valuable due to the information being accessible by other means and a “short shelf life” of value; and Plaintiff did not demonstrate a protectable interest in a “stable workforce” to justify the non-recruitment provisions, because its workforce was not stable.

The Seventh Circuit rejected Plaintiff’s argument that the district court erred in only considering these particular protectable interest, rather

than the “totality of the circumstances” analysis set forth by the Illinois Supreme Court in *Reliable Fire Equipment v. Arredonodo* for two reasons. First, Plaintiff did not point to any circumstances that the district court “should have considered but didn’t.” Second, the totality of the circumstances analysis does not require a court to consider *all* of the circumstances underlying a restrictive covenant. Rather, the district court may limit its discussion to those it deems most material, a determination that will be upheld absent an abuse of discretion. The Seventh Circuit went on to lament the fact that such a broad grant of discretion creates tremendous uncertainty as to which covenants courts will enforce, and to identify perceived problems that such uncertainty creates. However, the Court then commented that, “Reforming that law, or trying to undermine it, is beyond our remit.”

The Seventh Circuit also upheld the district court’s rejection of the counterclaim, finding that the language upon which the counter-plaintiff relied was not susceptible to any reasonable interpretation, and therefore could not support the counterclaim.



Submitted By:
David K. Haase
Shareholder
Chicago, IL
dhaase@littler.com
(312) 795-3286

David K. Haase has extensive experience representing employers in all aspects of labor and employment law. He has particular expertise in litigating wage and hour class/collective actions, unfair competition claims, such as noncompetition agreements and trade secrets, and employee benefits litigation. David has litigated the full panoply of employment-related matters before the federal and state courts. David is the chair of Littler’s Pro Bono Committee.



Submitted by:
Phillip Kitzer, Attorney
Teske, Micko, Katz, Kitzer
& Rochel
kitzer@teskemicko.com
www.teskemicko.com
222 South 9th Street, Ste
4050
Minneapolis, MN 55402

Phillip Kitzer's practice consists solely of representing employees in employment-related disputes. He represents clients in matters involving whistleblower retaliation, employment discrimination

Eighth Circuit Cases

Summary judgment affirmed where employee could not show that employer regarded him as disabled, and where decision not to hire was made prior to any allegedly protected conduct.

***Fischer v. Minneapolis Pub. Sch.*, ___ F.3d ___, 2015 U.S. App. LEXIS 11727 (8th Cir. July 8, 2015).**

Danny Fischer sued Minneapolis Public Schools ("MPS") claiming that MPS violated the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) by refusing to reinstate him as a Janitor Engineer. The district court granted MPS's motion for summary judgment and the Eighth Circuit affirmed.

Fischer worked as a janitor for MPS from 2008 to 2010 without issue. He was laid off for budget reasons and was ultimately called back in 2011. He was offered a position subject to a strength test. Fischer underwent the strength test

and scored a "medium" ranking. He was not offered the job because of his relatively low strength test results.

Fischer alleged that MPS discriminated against him based on its perception that Fischer was disabled. The Eighth Circuit agreed with the trial court's conclusion that no reasonable juror could find that MPS regarded Fischer as having a physical or mental impairment as defined by the ADA/MHRA. "Even though there may be sufficient evidence in the record to infer that MPS attributed Fischer's CRT-test score to his back strength, nothing in the record suggests that MPS regarded Fischer as suffering from a physiological disorder, cosmetic disfigurement, anatomical loss, or disease." In short, MPS's belief that

Fischer possessed medium strength, and its desire to hire a janitor with more strength, did not violate the ADA or MHRA.

Fischer also alleged retaliation under the MHRA, claiming that he was denied reinstatement because he complained that the test was unfair and requested a retest. The Eighth Circuit held that even if Fischer engaged in protected conduct, a jury could not find that his complaints motivated MPS's decision not to hire him, because the decision not to hire him and MPS's communication of that decision to Fischer occurred before Fischer made any complaints. Indeed, Fischer complained about the results of the test after he was told he would not be hired for the job as a result of the test.



Summary judgment affirmed in FMLA discrimination claim because employee had taken FMLA several times in past without incident and engaged in multiple, serious mistakes that she was told could lead to termination.

***Burciaga v. Ravago Ams. LLC*, ___ F.3d ___, 2015 U.S. App. LEXIS 11431 (8th Cir. July 2, 2015).**

Elizabeth Burciaga sued her employer, Ravago Americas LLC (Ravago), alleging Family and Medical Leave Act (FMLA) violations. The district court granted summary judgment and the Eighth Circuit affirmed.

Burciaga began working at one of Ravago's unit branches in August 2007 as a customer service representative (CSR). Burciaga's tasks included contacting sales representatives and customers, receiving and processing orders, scheduling shipments, and resolving customer issues for distributing plastic and rubber resin. For the duration of Burciaga's employment with Ravago, Jeremy Howe was her supervisor.

In the Eighth Circuit, there are three types of FMLA claims: interference, discrimination and retaliation. Burciaga asserted a discrimination claim, which occurs when "an employer takes adverse action against an employee because the employee exercises rights to which he is entitled under the FMLA." It required Burciaga to establish that her employer was motivated by her exercise of rights under the FMLA in taking action against her. The Eighth Circuit affirmed the district court's holding that Burciaga could not prove to a jury that her termination was caused by her FMLA leave.

Burciaga's comparator evidence was insufficient because she committed shipping errors that were far more serious and frequent than any other employee she identified. Although Burciaga pre-

sented evidence of shipping errors committed by her fellow employees, these employees did not commit the number of errors Burciaga did within such a short span of time, the majority of the fellow employees did not have the same or similar amount of experience when they committed their errors as Burciaga did when she committed hers, and the evidence presented by Burciaga is unclear as to whether the errors committed by Burciaga's fellow employees involved a CSR failing to recognize between his or her own long-term clients.

Next, Burciaga argued that Howe's lack of providing a full report of her errors demonstrated pretext—but failed to establish why. Undisputed evidence that Burciaga admitted she made the shipping errors at issue, and that Howe previously in-



formed Burciaga of the possibility of termination if she continued making shipping errors was enough to establish that Burciaga's FMLA leave did not cause her termination.

Finally, Howe indicated in his deposition he was "probably a little frustrated" by Burciaga's need to be absent from work. However, this comment was insufficient to survive summary judgment. Burciaga provided no context or timetable for Howe's sentiment or whether it related to her FMLA leave at issue in this matter. Moreover, Burciaga had taken FMLA leave multiple times in the past, Howe allowed Burciaga the flexibility to rearrange her schedule and take time off of work, and he never made any comments about Burciaga's need to take FMLA leave.

Summary judgment in failure- to-promote claim affirmed where plaintiff could not show causal link between lack of females in executive positions and the decision to not promote her.

***Cox v. First Nat'l Bank*, ___ F.3d ___, 2015 U.S. App. LEXIS 11541 (8th Cir. July 6, 2015).**

Stacy A. Cox sued First National Bank of Omaha for gender discrimination under Title VII, after the Bank promoted a male employee over her to Senior Vice President of Operations. The district court granted summary judgment and the Eighth Circuit affirmed.

In spring 2011, First National sought a successor for the retiring Sen-

ior Vice President of Operations, Mr. Downing. First National primarily considered two candidates: Cox and Jon P. Doyle, a male. Cox began at First National in 2008, reporting directly to Downing. She had 21 years of loans experience. Doyle began at First National in 2000, and in 2006 became a Vice President reporting directly to Downing as well. Doyle worked in banking for over ten years before joining First National, though not in loans.

After deciding to retire, Downing, on his

own initiative, created a matrix rating potential candidates on the qualities he determined a senior leader should have. Cox and Doyle were among the highest-rated candidates on the matrix (the best-rated candidate, a female, opted out of consideration). Cox rated higher in one category: "People Management Skills," while Doyle rated higher in three categories: "Leadership," "Peer Respect," and "Managerial Acceptance."

First National President Daniel K. O'Neill made the decision

to promote Doyle over Cox. O'Neill did not interview Cox or Doyle and did not review their resumes or performance appraisals but relied on Downing's matrix and tenure. At the time, only one of 15 executive officers at First National was female, as was one member of the 12-member Board of Directors and one of 18 employees reporting directly to O'Neill.

The sole disputed issue was whether Cox offered sufficient evidence of pretext to allow a jury to find the decision was motivated by sex. According to Cox, five categories of evidence establish pretext: (1) her qualifications compared to Doyle's; (2) O'Neill's improper reliance on tenure; (3) the subjective nature of the hiring process; (4) O'Neill's limited investigation of the candidates; and (5) First National's male-dominated culture.

First, the undisputed evidence could not show that Doyle was less qualified than Cox—only, at best, that they had essentially similar qualifications. Thus, it was insufficient to allow a finding of discrimination.

Second, Cox quarreled with O'Neill's use of tenure “as a proxy for good work relationships.” But, taken in the light most favorable to Cox, the evidence could not show that O'Neill's stated belief that Doyle's longer tenure made him superior to Cox was “unworthy of credence.”

Third, while the evidence was sufficient to show that the hiring process was subjective, “subjectivity alone does not render an employment decision infirm.” There was no evidence—and, indeed, Cox did not even argue—that O'Neill used the matrix to invent reasons to disfavor Cox: *Downing* created the matrix, not O'Neill, and Cox did not argue that Downing was motivated by sex discrimination.

Fourth, Cox argued that O'Neill's failure to investigate the candidates raises the inference that his decision was based on sex. Cox criticized O'Neill's lack of rigor in making the decision, but lacked any legal authority to establish that the hiring steps she would have preferred are required to inform a promotion decision. O'Neill had significant knowledge of the candidates and worked with them for years and had Downing's matrix to rely on.

Finally, Cox relied on First National's male-dominated culture. The Eighth Circuit held that the evidence showed a male-dominated culture, and Cox argued, “[e]ven where quantitative evidence does not alone demonstrate discrimination to some judicially created standard of statistical conclusiveness, it is still relevant in conjunction with all other evidence in determining intentional discrimination.” However, the Eighth Circuit held that, “[t]aken as a whole, Cox does not raise a genuine dispute of material fact that O'Neill's reasons for promoting Doyle are ‘unworthy of credence.’” Cox simply needed more evidence to show that sex motivated the hiring decision.



“Eighth Circuit held that, [t]aken as a whole, Cox does not raise a genuine dispute of material fact that O'Neill's reasons for promoting Doyle are unworthy of credence.”



Summary judgment affirmed in favor of defendants on claims under ADA, ADEA, and Iowa Civil Rights Act.

Sellers v. Deere & Co.,
___ F.3d.___, 2015 U.S.
App. Lexis 11506, (8th
Cir. July 2, 2015).

In 2001, Plaintiff's supervisor, Clyde D'Cruz, changed Plaintiff's position from Supply Management Specialist to Process Pro. The position was a lateral move, and the change did not alter Plaintiff's pay and benefits. Shortly after changing positions, Plaintiff's relationship with D'Cruz deteriorated. Plaintiff observed D'Cruz make negative comments about older employees, comparing them to "sheep that can be slaughtered," and repeatedly saying, "We need to get these old farts [or 'old dogs'] out of here. Plaintiff complained that these comments sounded like age discrimination and recommended D'Cruz "temper [his] words."

In August 2003, Daria Jerauld became Plaintiff's direct supervisor. Plaintiff's duties began to increase, and he told Jerauld he was unsure if he

could handle the extra work because of depression. Jerauld and D'Cruz continued to have problems with Plaintiff's work, and in his 2004 performance review, rated him "does not meet expectations."

In 2005, Plaintiff's depression and anxiety worsened, and he was diagnosed with Post-Traumatic Stress Disorder arising, in part, from the stress he experienced at work. On March 1, 2005, Plaintiff took medical leave and has not returned since.

On April 26, 2005, Plaintiff filed a discrimination charge with the EEOC, which was cross-filed with the Iowa Civil Rights Commission. In 2012, Plaintiff received a right-to sue letter from both agencies. Plaintiff brought suit claiming age discrimination, failure to accommodate his disability, disparate treatment because of his disability, retaliation, and a hostile work environment. The district court granted sum-

mary judgment, and Plaintiff appealed.

The Court first held that Plaintiff was unable to demonstrate an adverse employment decision. Plaintiff first claimed "effective demotion," but the Court held that this claim fails for two reasons. First, Plaintiff did not properly identify this act in his charge with the EEOC, and therefore he was prohibited from alleging the demotion in the lawsuit. Second, even if he did properly identify the alleged demotion in his charge, it fails because there is no change in Plaintiff's employment or working conditions.

Plaintiff also argued that his increased workload was an adverse employment action. The Court dismissed this claim because it was not clear that any of the complained-of duties altered his pre-existing responsibilities. Plaintiff admitted that his position was "dynamic" and "fluid" position which



job assignments and projects could change and responsibilities could be added at any time.

The Court next dismissed Plaintiff's hostile work environment claim. Plaintiff identified two incidents in four years in which D'Cruz yelled at him, berated him, and engaged in extreme behavior such as spitting, pushing furniture, and pounding his fists, but the Court found that these were merely a few isolated incidents that did not support a hostile work environment claim. Plaintiff also argued he was given too much work, not allowed to use conference rooms, and wrongfully blamed for a failed audit. The Court found that these may have been "rude or unpleasant," but were not severe enough to affect the terms, conditions, or privileges of his employment.

The Court of Appeals affirmed summary judgment for employer on race discrimination claims because Plaintiff could not demonstrate that the reason for his termination was pretext for illegal discrimination.

Huynh v. United States DOT, ___ F.3d. ___, 2015 U.S. App. Lexis 12791, (8th Cir. July 24, 2015).

Plaintiff began working for the FAA in 2009 at the Minneapolis Air Route Traffic Control Center. After graduating from the FAA Training Academy, he accepted a position as a trainee air traffic controller at the Minneapolis Air Route Traffic Control Center (the "Center.") The training is governed by the FAA's Air Traffic Techni-

cal Training Order (the "training order"), which provides trainees a set number of "on the job" training hours at the radar and data controller positions within the sectors of their assigned areas.

Plaintiff was initially assigned to a training team, but did not get along with his trainers. He complained to his training supervisor and was promptly assigned to a different team in Sector 27. Plaintiff's new supervisors reported that he performed poorly, and Plaintiff was granted 42 additional on the job train-

ing hours above the 180 target hours. After Plaintiff completed his additional training hours, one of his instructors, Todd Martenson, recommended that the training supervisor, Greg Santer, certify Plaintiff at Sector 27, and Santer agreed.

Plaintiff was then assigned to complete training and certify as a data controller at Sector 38, the second of his twelve required certifications. His trainers, Brian Vance and Martenson, reported that he performed poorly throughout his training. Plaintiff's team provided



“Plaintiff was the only person suspended, and the only person to have received additional training opportunities.”

numerous opportunities for him to improve, but his performance did not improve. Vance and Martenson reported that Plaintiff did not have command of basic air traffic control terminology and geography and that he became defensive when trainers brought mistakes to his attention.

Because of his poor skills, Santer recommended that Plaintiff’s training be suspended, an act within Santer’s discretion. Plaintiff was the only person suspended, and the only person to have received additional training opportunities. Plaintiff attempted to transfer to dozens of positions at a lower level air traffic control facility, but no other facilities offered to hire him. Meanwhile, a three-member review board examined Plaintiff’s written training records and interviewed Plaintiff and his supervisor to determine if Plaintiff’s training should continue. Two members voted to discontinue his training, while one recommended continued training. Air traffic manager Nelson reviewed the recommendation and decided to allow him to continue training in Area Six. Plaintiff was given several weeks to refresh his learning before starting his training again.

Shortly after beginning his second round of training, he reported problems with his supervisors and classmates. Plaintiff complained to Patrick Sullivan that his supervisors belittled and criticized him, and that some coworkers had used racial slurs and imitated an “Asian accent” around him. Plaintiff also complained that he found an application to McDonalds in his headset bin at work, which he interpreted as an insult. Sullivan worked with Plaintiff and a union official to accommodate a transfer to a different area within the Center. Plaintiff requested a transfer to Area Three, but Sullivan and the union official recommended a transfer to Area Five because they believed it better utilized Plaintiff’s training he already received. Plaintiff decided to stay in the area he was in.

At the end of Plaintiff’s training, Santer administered a certification check, and Plaintiff again performed poorly. The review board unanimously recommended discontinuing his training, and air traffic manager Nelson agreed. Plaintiff was notified he would be demoted, reassigned, or separated. Plaintiff recommended letters to facilitate his transfer to a lower level facility. Sullivan offered to write a letter for a lower level position, but not for an air traffic controller position. Santer declined to write a letter for Plaintiff, but did write one for a white trainee who successfully transferred. Plaintiff then attempted to transfer through a different process, but Nelson declined to support transferring him to serve as an air traffic controller either at the Center or a lower level facility. Because Plaintiff could not transfer, he was discharged.

Plaintiff brought race discrimination claims under Title VII and the Minnesota Human Rights Act, claiming two separate adverse actions: suspension of his training and termination from the program. The district court granted summary judgment, and Plaintiff appealed.

Both parties agreed that Plaintiff’s termination was an adverse employment action, but the Court held that the suspension from his training was not. The DOT offered Plaintiff a month of additional classroom and other training after his leave of



absence, and provided him an addition 42 hours for on the job training beyond the 180 hours that he had received. Moreover, the denial of a positive recommendation letter did not rise to the level of an adverse action.

The Court then dismissed Plaintiff's termination claim because Plaintiff could not demonstrate that the reasons for termination were pretext for discrimination. Plaintiff first alleges that racist comments and jokes made by his coworkers, the harsh treatment he received from his supervisors, the discovery of a McDonald's job application in his personal effects at work, and Sullivan's refusal to transfer him all combined to create an inference of discrimination. The Court held that the comments by his coworkers were "stray remarks" and that the record evidence indicated that his supervisors gave him numerous opportunities to improve. Therefore, this evidence does not suggest a discriminatory intent.

Finally, Plaintiff argued that he was treated differently than other similarly situated white trainees because the white trainees were allowed to proceed with the program. However, the Court found that the other trainees were not similarly situated because they had different supervisors who made recommendations about whether to allow them to proceed.

The Court of Appeals affirmed summary judgment in favor of Defendant because Plaintiff failed to make a prima facie showing of religious discrimination or retaliation.

***Shirrell v. St. Francis Med. Ctr.*, ___ F.3d ___, 2015 U.S. App. LEXIS 12260 (8th Cir. July 16, 2015)**

Plaintiff, who is Jewish, was employed by St. Francis as a part-time, weekend nurse. In or around February 2012, Co-worker Lisa Miller was having a discussion about the purchase of a camper with another co-worker in

Plaintiff's presence. Miller commented that she was going to try to "Jew down" or had "Jewed down" the seller of the camper to a lower price. The following day, Plaintiff informed her supervisor, Tammy Hahn-Brown, about the comment. Hahn-Brown told the department director, Gerry Salter, about the incident, posted a copy of the harassment policies in the nurses' room, and sent

an email to nurses and nursing assistants reminding them to be careful with their words and actions at all times.

Six weeks later, Plaintiff informed Hahn-Brown that the work environment had become hostile, that Miller asked why she complained to Hahn-Brown, and that Miller accused Plaintiff of trying to get her in trouble.



Shortly thereafter, Hahn-Brown transferred to another position and Miller took over as supervisor.

Over the course of the next several weeks, Plaintiff accumulated over 12 points in disciplinary action, including 7 points for patient/family complaints, 3 points for 5 unscheduled absences in a 12-month period, and 2 disciplinary points for reluctance, disinterest, and/or neglect in carrying out her duties. Pursuant to company policy, which dictates termination for 12 or more points within a 12-month period, Plaintiff was fired.

Plaintiff brought religious discrimination and retaliation claims under Title VII and the Missouri Human Rights Act (“MHRA.”) With respect to Plaintiff’s retaliation claims, the Court found that Plaintiff could not demonstrate causation between her report of discrimination and her termination. The Court stated that the only evidence of causation produced by Plaintiff was the timing of her complaint, but timing alone is insufficient to prove causation.

With respect to Plaintiff’s discrimination claims, the Court affirmed summary judgment because Plaintiff failed to present any evidence that would support the conclusion that religion was a contributing factor in her discharge. Rather, St. Francis terminated her pursuant to hospital policy after she accrued 12 disciplinary points.

Summary judgment affirmed on race discrimination claim because there was no evidence that Defendant’s decision to demote Plaintiff was pretext for illegal discrimination, and summary judgment affirmed on Plaintiff’s failure to accommodate claims because Defendant was not aware of any alleged disability until after Plaintiff engaged in misconduct.

Schaeffhauser v. UPS,
___ F.3d.___, 2015 U.S.
App. Lexis 12673, (8th
Cir. July 23, 2015).

In February 2012, Plaintiff, a white male, was chatting with three African-American colleagues about another colleague. During that conversation, Plaintiff commented, “If he ever hit

me, I would hit him back so hard it’d knock the black off him.” UPS performed an investigation, and Plaintiff claimed his medical condition was a “contributing factor in [his] poor chose of words.” Plaintiff asked that UPS consider his disability and keep him in his current position. Plaintiff was de-

moted from manager to supervisor, and he then sued, alleging race discrimination and failure to accommodate a disability. The district court granted summary judgment to UPS, and the Court of Appeals affirmed.

The Court first held that Plaintiff’s claim



failed under the direct method because there was insufficient evidence to support discriminatory animus. The Court next held that Plaintiff's claim failed under the *McDonnell Douglas* test because Plaintiff could not demonstrate that UPS's legitimate reason for termination was pretext for illegal discrimination. Plaintiff argued that UPS failed to follow its own investigation guidelines, and it failed to investigate all relevant facts, but the Court held that Plaintiff could not demonstrate a connection between UPS's failure to follow its own guidelines and a discriminatory animus. The Court also held that none of the other employees served as sufficient comparators because none of them made racist comments.

With respect to Plaintiff's failure to accommodate claim, the Court noted that Plaintiff did not inform UPS of his disability or request an accommodation until after he made the comment. Because an employer is not required to ignore misconduct that occurred because the employee later asserts it was the result of a disability, Plaintiff's disability claims failed.

Ninth Circuit Cases

No Cases to Report

Tenth Circuit Cases

No Cases to Report



Submitted by:
Lindsey Wagner
Cathleen Scott & Associates, P.A.
Telephone-(561)-653-0008
Fax-(561)-653-0020
250 S. Central Blvd.
#104A, Jupiter, FL 33458

Lindsey is an associate at Cathleen Scott & Associates, P.A. She is experienced in matters of litigation, arbitration, and administrative hearings, and is admitted to practice in Florida state court, as well as the United States District Court for the Middle and Southern Districts of Florida. In addition, she handles appeals of employment matters in the Florida's Fourth District Court of Appeal and the United States Eleventh Circuit Court of Appeal.

Eleventh Circuit Cases

Unplanned Serious Health Conditions are Not Subject to the Stringent Notice Requirements for Foreseeable FMLA Leave; Summary Judgment Ruling Should Consider Evidence Not Known to Employer at Time Employee was Terminated.

White v. Beltram Edge Tool Supply, Inc., No. 14-11750 (11th Cir. June 12, 2015)

Plaintiff-Appellant Regina White suffered a knee injury and sued her former employer for interference under the Family Medical Leave Act (FMLA), claiming she was fired instead of being granted leave. The district court ruled for the employer on summary judgment, finding that White was not entitled to FMLA leave because (1) she did not suffer from a serious health condition; (2) she did not give proper notice of her need for leave; and (3) she initially requested more than the twelve weeks guaranteed by the FMLA. On appeal, the 11th Circuit reversed, finding disputes of fact as to all grounds. White's medical

provider certification called her situation a "serious health condition," and it was eventually determined that she could have returned to work in less than twelve weeks. Even though the employer did not have this information at the time it made its firing decision, these were disputes of fact not viewed in a light most favorable to the non-moving party for summary judgment purposes. Whether White met her obligations to provide notice under the Act was a separate matter, and the ruling found that she did. White's condition was unplanned (a recent injury made surgery "relatively urgent") and therefore not foreseeable. As such, the timing and content requirements for notice of leave were relaxed, and the employee only need provide

the employer with sufficient information to determine that FMLA leave may apply, and to do so as soon as practicable. Finally, the 11th Circuit spoke on the district court's decision not to hear two unpleaded claims at the summary judgment stage: White's cause of action regarding failure to give FMLA notice was properly dismissed because her complaint lacked any notice for that claim. But, because White did allege that she was terminated for taking leave, the employer did have notice of a retaliation cause of action. Affirmed in part, reversed in part, and remanded.



Default Judgment Subject to Twombly/Iqbal Pleading Standard, as if 12(b)(6) Motion to Dismiss.

Surtain v. Hamlin Ter-race Foundation, No. 14-12752 (11th Cir. June 16, 2015)

Plaintiff, an African-American female, brought three claims against her former employer: (1) racial discrimination under Title VII of § 1981 and the Florida Civil Rights Act (FCRA); (2) disability discrimination under the Americans with Disabilities Act (ADA); and (3) interference and retaliation under the Family Medical Leave Act (FMLA). The district court twice rejected the plaintiff's motions for default judgment, with warnings that the race and disability counts did not allege sufficient facts. Faced with the same situation on the second amended complaint, the district court sua sponte dismissed the case with

prejudice. On appeal, the 11th Circuit found the district court erred in applying a McDonnell Douglas prima facie case framework (an evidentiary standard) to the plaintiff's motion for default judgment when it should have applied a Twombly/Iqbal pleading standard, just as if it were subjected to a Rule 12(b)(6) failure to state a claim challenge. Under this standard, the 11th Circuit found enough in the pleadings to sustain Surtain's claim of racial discrimination, and vacated the lower court's denial of default judgment. But Surtain still failed to make out a disability discrimination claim because she did not establish a disability under the ADA definitions. Nor did Surtain allege enough

under the FMLA, because her "conclusory allegations" that she was a covered employee and that Hamlin was a covered employer under the Act were not "well-pleaded facts." As such, the district court properly denied default judgment for the ADA and FMLA counts. Finally, though, because the district court did not previously warn Surtain of problems with the FMLA claims, the district court committed procedural error in dismissing them without leave to amend. The interference portion under the FMLA was remanded to allow repleading (the court stated amending the retaliation portion would be futile based on the allegations). Affirmed in part, vacated in part and remanded.



Six-Year Statute of Limitations on ERISA Breach of Fiduciary Duty Suit Starts Running at Time of Alleged Failure to Remove Bad Investments

***Stargel v. SunTrust Banks, Inc.*, No. 14-13207 (11th Cir. June 30, 2015).**

Selethia Pruitt, as plaintiff in a class action under the Employee Retirement Income Security Act (ERISA), alleged breaches of fiduciary duties due to an alleged failure to remove imprudent invest-

ments from a plan. While several district court orders were under appeal, the Supreme Court decided *Tibble v. Edison Int'l*, ___ U.S. ___, 135 S.Ct. 1823, 191 L.Ed.2d 795 (2015), finding that fiduciaries have a duty to reevaluate and remove imprudent investments. Suits are timely under ERISA if the alleged breach occurred within six

years. The court agreed with the parties that the case be remanded in light of the *Tibble*, but denied plaintiffs' request to assign a new district judge. The court did not find a need for such a "severe remedy." Vacated and remanded.

D.C. Circuit Cases

No Cases to Report

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