



Monthly Update for July

5th Circuit:

EEOC v. Boh Brothers Const. Co., LLC 07/27/2012.

Posture—In a Title VII sexual harassment and retaliation case, Boh Brothers appeals a jury's finding of liability and its award of \$200,000 compensatory damages and \$250,000 punitive damages, which resulted from a three-day trial. Holding--The EEOC presented evidence that because a male worker would not conform to expectations of "male behavior" on the construction site, he was brutally mocked. Boh Brothers convinced the Panel that the same-sex harassment evident in the submitted facts was based on same-sex stereotyping, which was not, the Court concluded, one of the three evidentiary paths established to show same-sex harassment by *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Ultimately, the Court held that there was insufficient evidence that Boh Brother's agent acted on the basis of gender in his treatment of plaintiff. "To the contrary", the Court concluded, "misogynistic and homophobic epithets were bandied about routinely among crew members, and the recipients, [plaintiff] not excepted, reciprocated with like vulgarity." Reversed and rendered.

<http://www.ca5.uscourts.gov/opinions/pub/11/11-30770-CV0.wpd.pdf>

Gary Sawyer, et al v. EI DuPont de Nemours & Co.

07/27/2012. Posture—When DuPont spun off terathane products unit to a wholly owned subsidiary, its unionized workers lost their right to be discharged only for "just cause". The workers claimed that their assent to this arrangement was obtained through fraud and deception. Disposition--The Panel vacated its previous opinion and instead certified to the Supreme Court of Texas the question of whether under the "at will" doctrine, employers can lie to their employees, inducing them to quit, without legal consequence. And if so, does the doctrine also extend to employees covered under a 60-day cancellation-upon notice collective bargaining agreement which limits the employer's ability to discharge its employees only for just cause?

Junial Douglas v. Smith International, Inc. 07/10/2012 (unpublished). Posture—Employer appealed trial court's grant of summary judgment for employee. At issue was the interpretation of Saudi Arabia's Labor and Workmen Law, which entitled a rotational oil field worker who was a U.S. citizen of Texas, employed by virtue of a written agreement under Texas law, to obtain an end-of service severance award greater than similar benefits he had received from his U.S. contract. At issue was the sum of \$144,657.45. Holding--The Court affirmed the district court's grant of summary judgment in favor of the employee and based its decision on language in the U.S. agreement which acknowledged the applicability of Saudi labor law and which was susceptible to only one reasonable interpretation.

Submitted by:

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



Monthly Update for July

6th Circuit

Race Discrimination Case (application of *McDonnell Douglas*): *Keys v. Humana, Inc.*, __ F.3d __; 2012 WL 2505534 (6th Cir., July 2, 2012)

In *Humana*, Kathryn Keys, a former Humana, Inc. employee, filed a class-action lawsuit alleging race discrimination under federal law. Humana moved to dismiss Keys's complaint arguing that she failed to plead a prima facie case of race discrimination under the *McDonnell Douglas* burden-shifting paradigm. According to Keys's complaint, she was discriminated against because she is an African American. For example, she claimed that her Caucasian supervisor did not initially give her the correct job title of "Director," but did give comparable Caucasians the "Director" title; that she was not provided a compensation plan equal to her fellow Directors who were Caucasian; that her duties were eventually removed and transferred to a Caucasian male; that she was eventually eliminated from weekly sales meetings even though the other Directors, all Caucasian, were invited; that she was demoted to the role of "Individual Contributor" as part of a management reorganization, under which no Caucasian Director of Vice President was demoted; and that she and ten-to-twelve African American manager-level employees were placed on performance improvement plans and then were eventually forced to resign or terminated, unlike similarly-situated Caucasian employees.

The U.S. District Court for the Western District of Kentucky granted Humana's motion to dismiss, concluding that, under the *McDonnell Douglas* analysis, Keys failed to allege plausibly that she was treated differently than similarly-situated non-protected employees. It noted Keys's failure to allege facts suggesting that white employees were similarly-situated in performing similar tasks as Keys and doing so to the same standards, and then concluded that

"the absence of any such allegations from the complaint prevents the court from inferring that the employees who were not terminated were similarly-situated to plaintiff." The Sixth Circuit reversed.

Specifically, the Sixth Circuit held that the district court improperly applied the *McDonnell Douglas* analysis to a motion to dismiss on the pleadings. It explained that the district court mistakenly relied upon a previous Sixth Circuit decision, *White v. Baxter Healthcare Corp.*, which applied the *McDonnell Douglas* burden-shifting paradigm in the context of a *summary judgment* motion. Relying on the Supreme Court's decision in *Swierkiewicz v. Sorema*, the Sixth Circuit stated that "the prima facie case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement." Moreover, the Court explained, "the Supreme Court's subsequent decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz*." In fact, the Sixth Circuit noted, "*Twombly* distinguished *Swierkiewicz*" and "reemphasized that application of the *McDonnell Douglas* prima facie case at the pleadings stage 'was contrary to the Federal Rules' structure of liberal pleading requirements'."

Because the district court erred in requiring Keys to plead a prima facie case under *McDonnell Douglas* and "because Keys's Amended Complaint tender[ed] more than the 'naked assertions' devoid of 'further factual enhancement' that *Twombly* and *Iqbal* prohibit," the Sixth Circuit reversed.

Rehabilitation Act Case: *John Doe v. The Salvation Army in the U.S., et al.*, __ F.3d __; 2012 WL 2816809 (6th Cir., July 11, 2012)

In *Salvation Army*, John Doe sued the Salvation Army for employment discrimination under § 504 of the Rehabilitation Act when one of its Ohio adult rehabilitation centers refused to hire him as a truck driver.



Monthly Update for July

The Sixth Circuit heard only one issue on appeal in this case of first impression: whether Doe satisfied the fourth element of a prima facie case under § 504, which requires a plaintiff to establish that the program or activity accused of discrimination is receiving federal financial assistance. Under the Rehabilitation Act, the phrase “program or activity” permits consideration of the whole organization if the organization is principally engaged in the business of providing social services. Granting summary judgment to the Salvation Army, the U.S. District Court for the Southern District of Ohio concluded that the Salvation Army is a religious organization and therefore could not be principally engaged in the business of providing social services. The Sixth Circuit reversed and remanded to the district court.

Doe sued the Salvation Army and one of its warehouse supervisors in September 2005, alleging that the supervisor asked unlawful questions about the types of medications he was taking. According to Doe, the supervisor refused to hire him when he said that he was taking “psychotropic” medications. The Salvation Army moved for summary judgment arguing that the local program of the Salvation Army that declined to hire Doe, the Columbus Adult Rehabilitation Center, did not receive federal funds. Doe responded that congress had rejected a program-specific analysis and that the actions of the local rehabilitation center were subject to the Rehabilitation Act because other parts of the Salvation Army received federal assistance and the organization as a whole was “principally engaged in social services.” The Salvation Army never argued in the district court that religious organizations were exempt or that it was not principally engaged in the business of providing social services. Nonetheless, the district court, relying on the Salvation Army’s answers to interrogatories, concluded that the local rehabilitation center was a religious organization and, thus, not principally engaged in providing social services. In its interrogatory answers, the Salvation Army stated that it is “an international religious charitable organization, the primary purpose of which is to preach the Gospel of Jesus Christ to men and women untouched by ordinary religious efforts, the underprivileged, homeless, alcoholics, drug addicts, and all those rejected by society.”

It also stated that the local rehab centers “operated without assistance from the government.”

According to the Sixth Circuit, although the local rehab center is not a recipient of federal assistance, the Salvation Army admitted that it received \$148 million of government funds in 2005. This, according to the Court, was enough to show that Doe had establish a threshold question of whether the fourth prong of the prima facie case had been satisfied. It explained that Congress in 1988 expressly defined “program or activity,” as it appears in § 504, as including “all of the operations of...an entire corporation, partnership, or other private organization” if either federal financial assistance is extended to the corporation, partnership, or private organization “as a whole” or the organization is “principally engaged in the business of providing education, health care, housing, social services, or parks and recreation” and “any part” of the organization received federal financial assistance. The statute, the Court noted, does not further define what it means to be “principally engaged” in one of the enumerated businesses, or what “social services” entails.

The Court turned next to those issues. In examining the statutory language, the Sixth Circuit concluded that the Rehabilitation Act does not exclude religious organizations from coverage and that the Salvation Army is principally engaged in providing social services. First, the Sixth Circuit explained that the Rehabilitation Act does not per se exclude “religious organizations” from coverage. Noting that “[a] natural reading of the statute does not explicitly exclude or include religious organizations,” the Court concluded that “the plain meaning of the relevant terms does not weigh in favor of creating an implicit exception for religious organizations,” as the list of businesses in the statute “easily could be religious organizations” and religious groups “have a long tradition of providing education, health care, and social services.” Further, the Court concluded, “the provision of social services may be a form of religious worship, but that makes it no less the provision of social services.” The Sixth Circuit, thus, rejected the district court’s reliance on a Senate Committee Report in which it was stated that “religious organizations institutions such as churches,



Monthly Update for July

dioceses and synagogues would not be considered to be principally engaged in the business of providing...social services.” Instead, according to the Court, “[t]here is nothing in the legislative history that suggests that Congress intended to exclude *all* religious organizations from § 504.”

Second, in addressing (but rejecting) the Salvation Army’s “better argument” that “the Salvation Army, like many churches, is not principally engaged in providing social services because such services are only incidental to its other activities,” the Sixth Circuit disagreed with the district court’s conclusion that the Salvation Army should not be distinguished from other churches “simply because it uses different methods to spread its message.” This, according to the Sixth Circuit, incorrectly “implies that social services cease to be social services when done as a form of worship or religious exercise.” It concluded: “Even starting from the proposition that the Salvation Army is a church and conducts these social programs as a form of worship, there remains a genuine issue of material fact regarding whether the Salvation Army’s principal activities are the provision of ‘social services’ within the plain meaning of those terms.” Specifically, the Court pointed to the record that shows that the Salvation Army runs day cares, nursing homes, rehabilitation centers, and homeless shelters “that offer numerous services to the public.” Viewing this evidence in a light most favorable to Doe, the Sixth Court remanded the case because “the fact that the Salvation Army views its social service as a way of spreading its spiritual teachings is not dispositive – an activity can be both.”

Race Discrimination Case (Cat’s Paw Theory):
***Chattman v. Toho Tenax America, Inc.*, ___ F.3d ___;**
2012 WL 2866296 (6th Cir., July 13, 2012)

In *Chattman*, the Sixth Circuit, following recent Supreme Court precedent, reversed the district court and remanded for trial Everett Chattman’s race discrimination claims. At issue was whether under the 2011 Supreme Court decision in *Staub v. Proctor Hospital*, which was decided after the district court entered summary judgment for Toho, Chattman’s supervisor’s alleged discriminatory animus could – on a “Cat’s Paw” theory – be imputed to the ultimate, unbiased decision-maker who terminated his employment.

Chattman, an African American, worked as a shipping coordinator for Toho for 20 years at its Rockwood, Tennessee plant. He alleged that Jeff Tullock, a Caucasian and then HR Director at the plant, harbored racial bias against him and other African Americans demonstrated by alleged racial comments Tullock made on at least three separate occasions toward African Americans. According to Chattman, Tullock’s biases motivated him to recommend that upper management terminate Chattman’s employment following an incident of horseplay between Chattman and a Caucasian coworker, Frank Johnson.

Chattman and Johnson gave different accounts of the incident. Pending an investigation, Tullock suspended Chattman. Thereafter, during discussions with the Vice President of HR at Toho’s parent company, Tullock recommended that Chattman be terminated, and falsely told him that the Vice President of Operations had agreed. At his deposition, Tullock gave confusing accounts of the nature and scope of his investigation and whether he kept upper management fully apprised of what he was doing. Toho, nonetheless, gave both Chattman and Tullock final written warnings, which, under company policy, rendered employees ineligible for receiving a promotion for one full year. Chattman was disciplined for engaging in horseplay; Johnson for exaggerating alleged injuries that he claimed he incurred during the horseplay and for falsely recounting the details of the incident during the company’s investigation.

Chattman alleged that the final written warning kept him from receiving a promotion when his immediate supervisor’s job opened and that Toho, thus, violated Title VII of the Civil Rights Act and of the Tennessee Human Rights Act. The U.S. District Court for the Eastern District of Tennessee granted summary judgment in Toho’s favor, concluding that Chattman failed to make out a prima facie case and failed to prove pretext. On appeal, Chattman argued that Tullock’s racial animus, which he described as “direct evidence” of racial bias, could be imputed to the members of Toho’s upper management, who ultimately decided to issue Chattman the final written warning.

The Sixth Circuit agreed that Tullock’s alleged racist comments could constitute “direct evidence” even though they were not “temporally proximate to” the employment decision, but it concluded that Chattman’s claims should also survive under the *McDonnell-Douglas* burden-shifting paradigm, which does not require a showing of “direct evidence.”



Monthly Update for July

Focusing on whether Chattman could show a causal link between his race and his adverse employment action and whether Toho's justification for disciplining Chattman was a pretext, the Court noted that the record was replete with evidence suggesting that Chattman received harsher discipline than Caucasian workers who engaged in similar horseplay. The Court also specifically rejected Toho's argument that Johnson's injury during horseplay made Chattman's conduct more serious than others' horseplay. According to the Court, Chattman presented evidence that Johnson exaggerated, if not invented, his injury and that Toho's upper management should have known. In addition, the Court noted, Chattman presented evidence that Toho's upper management was aware that horseplay was common in its Rockwood facility, and that it often went unpunished. The Sixth Circuit, accordingly, concluded that a fact dispute existed regarding the fourth prong of Chattman's prima facie case and whether Toho's justification was a pretext for race discrimination.

Next, the Court addressed whether Tullock's alleged racial animus could be imputed to upper management – the ultimate decision makers – because “[p]roof of Tullock's racial animosity toward African Americans does not establish Toho's liability.” According to the Court, Chattman must show that by relying on the alleged “discriminatory information flow,” the ultimate decision-makers “acted as the conduit of the supervisor's prejudice – his cat's paw.” After examining the Supreme Court's reasoning in *Staub*, which it believed to be “dispositive in this case,” the Sixth Circuit determined that the district court erred in dismissing Chattman's cat's paw theory. *Staub* defined cat's paw liability as “if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and that if that act is a proximate cause of the ultimate employment action, then the employer is liable.” That the ultimate decision maker undertook his own investigation does not resolve the issue, the Court explained. The supervisor's “biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.” As such, the *Staub* decision, according to the Sixth Circuit, “refused to completely absolve an employer based on its claim to have conducted an independent investigation.”

Noting further that all discipline at the Rockwood plant went through Tullock as HR Director, the Sixth Circuit concluded that there was ample evidence in the record to create a fact dispute as to whether Tullock intended to cause the adverse action and whether his discriminatory animus was the proximate cause of the ultimate employment action. Specifically, according to the Court, “[t]here can be little doubt that Tullock desired Chattman's termination when he made his recommendation and fabricated the agreement of the other supervisors in his communications with [upper management].” And because, under *Staub*, the supervisor's actions need not be the sole cause of the adverse action, Chattman could rely on Tullock's “discrimination in what information he presented to senior managers” to show proximate cause. For example, the Court pointed out, Tullock knew, but chose not to report to upper management, that white employees had engaged in similar horseplay. Thus, upper management's decision to discipline Chattman was not “unrelated” to Tullock's actions. Summary judgment, according to the Court, was therefore improper.

Railway Labor Act Case: *Emswiler v. CSX Transportation Inc., Brotherhood of Locomotive Engineers and Trainmen*, __ F.3d __; 2012 WL 2948522 (6th Cir., July 21, 2012)

In *Emswiler*, Michael Emswiler sued his employer, CSX Transportation, Inc. (CSX), a railroad, and the Brotherhood of Locomotive Engineers and Trainmen (BLET) after his seniority on the roster of train engineers was adjusted. He alleged breach of the collective bargaining agreement and disability discrimination under state law. The U.S. District Court for the Southern District of Ohio granted CSX and BLET summary judgment, concluding that it could not reach the merits of the breach of the CBA and state disability claims because he failed to pursue arbitral remedies required by the Railway Labor Act. It also granted summary judgment on Emswiler's claim for breach of duty of fair representation. The Sixth Circuit affirmed.

The Railway Labor Act (RLA), the Court explained, governs disputes between management and labor in the railroad industry. It “promotes stability in labor-management relations by providing effective and efficient remedies for labor dispute, thereby preventing interruptions in rail service.” The RLA also “establishes a mandatory arbitral mechanism for the prompt and orderly settlement...of disputes.” For “minor disputes” – i.e., those dealing with the interpretation of existing CBAs – the RLA provides initially for settlement through contractually agreed-upon grievance procedures



Monthly Update for July

known as “on the property” remedies. If the parties fail to resolve minor disputes “on the property,” they are compelled to engage in binding arbitration by a division of the National Railroad Adjustment Board (NRAB) or a privately established arbitration panel. Thereafter, an aggrieved employee may file a claim in federal district court.

CSX operates a 23,000 mile railroad system in twenty-three states and two Canadian provinces. BLET is the bargaining representative for engine-service workers and United Transportation Union (UTU) is the bargaining representative for train-service workers. The CBA between CSX and BLET, which governs the terms of CDX engineers' employment contained detailed provisions for how to determine an employee's seniority. Shift assignments are then based on an employee's seniority within a particular category of service. Emswiler, who has Type I diabetes, was initially employed in 1980 as a train-service worker. Due to his condition, he was not medically cleared to work as an engine-service worker, which pays more money. After a hiatus from CSX of more than a decade, Emswiler returned to CSX but retained his original seniority date (1980). Upon his return, he worked again as a train-service worker. Emswiler later started using an improved insulin pump that allowed him to be medically cleared to enter training as an engine-service worker.

Before he started his engineer training, Emswiler was told by a CSX employee that he would retain his existing seniority date upon becoming an engineer. Emswiler completed his training and started working as an engineer. He also initially retained his 1980 seniority date. BLET subsequently received a protest against Emswiler's seniority. Invoking his powers under the CBA, BLET General Chairman Rick Finamore signed a proposal from CSX Director of Labor Relations Rick Heil adjusting Emswiler's seniority date to 2008 as a settlement of the dispute. Emswiler wrote to Heil to request that his seniority be restored to 1980. Heil refused the request. Although UTU wrote to Heil to request an “on the property” proceeding, neither UTU nor Emswiler processed his claim before the NRAB. Emswiler, instead, filed a lawsuit in district court.

The Sixth Circuit concluded that the district court could not entertain those claims that should have first been considered as part of the Railway Labor Act's compulsory arbitral mechanisms. According to the Court, “an employee may not forego resort to the [NRAB] and opt to have a dispute with a carrier considered, in the first instance, by a federal court.” While explaining that the mandatory arbitral mechanisms are not a jurisdictional requirement, the Court concluded that Emswiler did not satisfy any one of the several exceptions to the RLA's exhaustion requirement to permit judicial review of his claims for breach of the CBA and disability discrimination.

Specifically, the Sixth Circuit rejected Emswiler's argument that invoking the RLA-mandated arbitral processes would have been futile because the railroad and the union had colluded to violate the CBA and discriminate against him. Nothing in the record, according to the Court, demonstrated a “clear and positive showing of futility” and that there was collusion between CSX and the union. Emswiler, the Court noted, only pointed out that BLET and CSX agreed about how the CBA should be interpreted with regard to his seniority date. This, according to the Court, did not demonstrate a scheme of collusion designed to discriminate against Emswiler and prevent him from challenging the adjustment to his seniority date. In fact, the Court explained, Emswiler could have pursued his claim to the NRAB without the union and chose not to do so.

The Sixth Circuit thus affirmed the district court's decision to dismiss Emswiler's claim for breach of the CBA. It also concluded that the RLA preempted Emswiler's state law discrimination claims because resolving the claim cannot be decided without interpretation of the CBA and, thus, required him to exhaust his RLA-mandated arbitral remedies.

NLRA Case (Federal Court Jurisdiction): *DiPonio Construction Co, Inc v. Int'l Brotherhood of Bricklayers and Allied Craft Workers, Local 9*, __ F.3d __; 2012 WL 3000641 (6th Cir., July 24, 2012)



Monthly Update for July

In *DiPonio*, the “underlying dispute” was whether DiPonio Construction Company had any obligation under the National Labor Relations Act (NLRA) to bargain with the Union for a new collective bargaining agreement following the termination of the parties’ previous CBA. This issue, according to the Sixth Circuit, hinged on whether the previous CBA was entered into pursuant to section 8(f) of the NLRA (29 U.S.C. § 158(f)) or section 9(a) of the NLRA (29 U.S.C. § 159(a)): “If the CBA is a § 8 contract, DiPonio had no duty to negotiate for a new CBA; however, if it is a § 9 contract it did.” Because the § 8/§ 9 distinction necessarily involves whether the Union was actually the designated representative of employees, the underlying dispute also called into question whether a federal court had jurisdiction to hear the case.

DiPonio, a Michigan masonry company, had entered into a CBA with the Union. On July 31, 2009, DiPonio terminated the CBA according to its terms. The Union complained, however, that DiPonio refused to bargain for a new CBA, which it claimed DiPonio was required to do under the NLRA. It filed an unfair labor practice charge with the NLRB the same day. The NLRB, in turn, filed a ULP complaint against DiPonio on February 16, 2010. Five days earlier, DiPonio filed an action in the U.S. District Court for the Eastern District of Michigan asking the court to declare that it properly terminated the CBA and that there was no existing CBA between the two parties. The NLRB moved to intervene. After DiPonio moved for summary judgment on its claim, the Union filed a motion to dismiss, arguing that the NLRB had exclusive jurisdiction to hear the case. DiPonio then amended its complaint to include a breach of contract claim under § 301 of the Labor Management Relations Act, alleging that the Union “failed to honor DiPonio’s termination of the CBA, and instead attempted to force DiPonio to bargain for a new contract and to provide information.” DiPonio also moved to stay the NLRB proceedings, which the district court denied.

The district court concluded that the NLRB had exclusive jurisdiction to hear the initial claim “because deciding whether the CBA is a § 8(f) or § 9(a) agreement is primarily representational and overlaps with the proceedings already before the NLRB.” As for the “breach of contract” claim, the district court held that, even if DiPonio raised a colorable claim,

the district court held that, even if DiPonio raised a colorable claim, the court “should decline to exercise jurisdiction over this matter and instead defer to the jurisdiction and expertise of the NLRB.” The Sixth Circuit affirmed.

The Sixth Circuit explained that, under § 9 of the NLRA, employers are required to bargain with a union that has been designated by a majority of the employees in a unit for the purposes of collective bargaining with the employer. Section § 8(f) of the NLRA allows unions and employers in the construction industry to enter into CBAs without requiring the union to establish that it has the support of a majority of the employees in the unit covered by the CBA. According to the Court, “[a]long with creating an exception to section 9(a)’s rule that unions must demonstrate a showing of majority support, section 8(f) also is an exception to the NLRA’s requirement that the employer is bound to bargain with the exclusive representative even after the contract has expired.” This means, the Court explained, that “a construction-industry employer may refuse to bargain after the expiration of an 8(f) agreement because the union never enjoyed the presumption of majority support.”

Noting that the NLRB and federal courts may have concurrent jurisdiction over disputes where a party’s conduct leads to charges of both unfair labor practices under the NLRA (reserved for the NLRB) and breach of a CBA under § 301 of the LMRA (reserved for the federal courts), the Sixth Circuit, relying on prior precedent, explained that “simply referring to [a] claim as a ‘breach of contract’ is insufficient” to confer federal court jurisdiction “[w]hen a dispute is ‘primarily representational’ under § 7 or § 8 of the [NLRA].” The phrase “primarily representational” means either the “NLRB has already exercised jurisdiction over a matter and is...considering it or has already decided the matter” or “where the issue is an ‘initial decision in the representation area’.” Thus, the Court noted, a district court “should not exercise jurisdiction where it could not determine whether the CBA had been violated without first deciding whether the union was elected as the employees’ bargaining representative.”



Monthly Update for July

In this case, the Sixth Circuit concluded that DiPonio's claims were "primarily representational" even though it alleged a breach of contract claim. According to the Court, DiPonio's breach of contract claim "mischaracterize[d] the parties' dispute." The issue, the Court explained, was "whether DiPonio has a duty to negotiate with the Union for a new CBA, and this question turns on the § 8(f)/§ 9(a) distinction." Because that issue was "the same issue as that before the NLRB," the Court held that the "the matter is representational."

Submitted by:

Scott R. Eldridge
Miller, Canfield, Paddock & Stone, P.L.C.
One Michigan Ave., Suite 900
Lansing, Michigan 48933
Direct: (517) 483-4918
eldridge@millercanfield.com

7th Circuit

Blasdel v. Northwestern University (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K8106HNL.pdf>

Court Affirms Summary Judgment For Defendant, Noting That Plaintiffs Face An Uphill Fight Proving Discrimination In University Tenure Decisions

The Seventh Circuit affirmed summary judgment for Defendant Northwestern University on Plaintiff Isabelle Blasdel's Title VII gender discrimination claim. This case involved a university professor's denial of tenure, and the Court's determination of whether the denial was because the professor, Plaintiff, is a woman. The Court initially noted that regardless of whether an employment discrimination plaintiff is a salesman or a scientist (as Plaintiff is in this case), the applicable legal standard is the same. However, the Court went on to point out that there are practical considerations that make challenges to tenure decisions an "uphill fight," especially considering the flexible, subjective criteria for tenure decisions at the university or college level. Addressing the evidence presented by Plaintiff, the Court applied an ordinary circumstantial evidence analysis and concluded that there was insufficient evidence for a reasonable jury to find sex discrimination.

Matz v. Household International Tax Reduction Investment Plan (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K80YW1NR.pdf>

Court Addresses Its Authority To Hear Appeal Of Rule 23(F) Order Partially Decertifying Class

This case involved an ERISA plaintiff asking the Seventh Circuit for leave to appeal an order from the district court, which partially decertified an existing class. Defendant questioned the Seventh Circuit's authority to hear such an appeal. Rule 23(f) permits appeals from orders that grant or deny class certification, but does not mention subsequent modifications to the scope of an existing certified class. The Court held that an order that materially alters a previous order granting or denying class certification falls within the scope of the rule,



Monthly Update for July

regardless of whether the order to be appealed changes the grant to denial, or vice versa.

McCleskey v. DLF Construction Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K81083JD.pdf>

Court Finds CBA Language Clearly Requires Employer's Contribution To Union Funds Regardless Of Category Of Work Performed

The Seventh Circuit affirmed the district court's grant of summary judgment for Plaintiff. At issue was whether the collective bargaining unit required Defendant's contribution into union funds for all hours worked by a union member, or only for hours spent performing bargaining unit work. The Court looked to the plain language of the contract and determined that it was "straightforward and plain," and that no language existed to limit Defendant's obligations to make contributions to the union funds based on type of work performed by covered workers.

Passananti v. Cook County (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K8109X6N.pdf>

Court Reverses In Part District Court's Grant Of Judgment For Defendant, Notwithstanding The Jury Verdict, With The Resulting Damages Award Lowered By More Than \$4 Million

The Seventh Circuit reversed in part and affirmed in part the district court's grant of Defendant Cook County's motion for judgment as a matter of law. The Court determined that the district court erred in setting aside the jury's verdict in favor of Plaintiff on her Title VII sexual harassment claim. After engaging in an extensive analysis of the evidence offered at trial, the Court used the framework of the Title VII sexual harassment prima facie case and held that a reasonable jury could have found that Plaintiff suffered a hostile work environment. In its analysis, the Court took care to note that words of now-common use are not necessarily neutralized as to their derogatory nature and may be sufficient to give rise to an actionable sexual harassment claim. The Court then analyzed the evidence concerning Plaintiff's § 1983 gender on claim,

and ultimately held that no reasonable jury could have found Plaintiff's termination was motivated by her gender. Finally, the Court instructed the district court to enter a judgment against Defendant for \$70,000, in contrast to Plaintiff's initial \$4.7 million award.

Craig v. Fed Ex Ground Package Systems, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K810C2BK.pdf>

Court Certifies Questions for Kansas Supreme Court, Recognizing Far Reaching Policy Implications of Employee-Independent Contractor Classifications

The Seventh Circuit considered whether, under Kansas state law, drivers for Defendant FedEx are properly classified as employees or independent contractors. The Court noted that while there is no absolute rule as to whether a worker falls into one category or another, the "right to control" test is the primary consideration. Still, the Court noted that it was unsure what principles should guide courts in the weighing process, especially in close cases. The Court also stressed the national economic implications of classifying workers as employees versus independent contractors before ultimately determining that the Kansas Supreme Court is in a better position to decide this issue, within this particular set of circumstances.

Milligan v. Board of Trustees of Southern Illinois University (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K810C2BK.pdf>

Court Affirms Summary Judgment for Defendant in Student-Worker Sexual Harassment Claim

The Seventh Circuit affirmed the district court's grant of summary judgment for Defendant on Plaintiff's Title VII and Title VI sexual harassment and retaliation claims. This case involved a student-worker's complaint of a hostile work environment resulting from a professor's inappropriate conduct and comments. As the alleged harasser was not Plaintiff's supervisor, the Court determined that Defendant could only be liable if negligent in discovering or remedying the harassment.



Monthly Update for July

The Court addressed the evidence presented, and concluded that Defendant's response was reasonable and thus Defendant did not act negligently. Further, commenting on the dissenting opinion in this case, the Court firmly held that the legal standard, and therefore the level of protection, for student-workers should remain identical to that afforded other employment discrimination plaintiffs. The breach of trust and disparate positions of power, the Court reasoned, are common to most harassment cases, and are not unique to cases of harassed student-workers. Finally, the Court applied the direct method of proof to determine whether summary judgment was appropriate on Plaintiff's retaliation claim, and concluded that there was insufficient evidence presented for a reasonable jury to find retaliation.

Marantz v. Permanente Medical Group, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/K810H7I8.pdf>

Court Finds No ERISA Violation In Denying Plaintiff Long Term Disability Benefits

The Seventh Circuit affirmed the district court's holding that Plaintiff was not due long term disability benefits under Defendant Permanente Medical Group's disability insurance plan. District courts review denials of benefits under an ERISA plan de novo, therefore whether Plaintiff received a full and fair hearing by the plan administrator is irrelevant. The Seventh Circuit reviews the district court's findings of fact and application of law for clear error, as the district court does not *review* anything, but rather comes to an independent decision regarding a plaintiff's eligibility for benefits. The Court paid particular attention to Plaintiff's contention regarding the reliability of surveillance evidence, ultimately concluding that though it may have limitations, surveillance evidence can impact credibility determinations and can certainly be relevant to resolving factual disputes (particularly when considered in context with other evidence).

The Court then engaged in an analysis of the evidence presented by Plaintiff and Defendants, and concluded that the district court's holding that Plaintiff failed to meet her burden of proving her entitlement to disability benefits was proper.

Submitted By:

Ruth I. Major, Esq.

Erica Suskind

The Law Offices of Ruth I. Major, P.C.

30 W. Monroe Street, Suite 1650

Chicago, Illinois 60603

Telephone: 312.893.7544

rmajor@major-law.com

esuskind@major-law.com



Monthly Update for July

8th Circuit

Otto v. City of Victoria, No. 11-2753 (8th Cir., July 19, 2012) (ADA)

Leland Otto worked for the City of Victoria, Minnesota for almost 25 years as a general maintenance worker. After suffering an on-the-job injury, doctors placed the employee on permanent work restrictions that made him unable to perform the basic functions of his position. Mr. Otto disputed the work restrictions and told the City that he could return to work. Because of the restrictions, the City terminated Mr. Otto's employment.

Mr. Otto sued the City, alleging a violation of the American's With Disabilities Act. He claimed that the City could have accommodated his restrictions by either allowing him to continue in his previous role against the doctor's work restrictions, or creating a job for him in another department. In affirming the district court's grant of summary judgment for the City, the Eighth Circuit held that the ADA does not require an employer to allow an employee to perform duties forbidden by doctors nor does it require the creation of an entirely new job to accommodate the employee's restrictions.

United Steel Workers of America Local 2660 v. United States Steel Corporation, No. 11-3002 (8th Cir., July 2, 2012) (WARN).

In 2008, as the economy slowed down, United States Steel Corp. ("US Steel") provided a group of 313 employees at its Keewatin, MN plant with notice under the Worker Adjustment and Retraining Notification Act ("WARN") that they would be laid off. In its notice, US Steel sent notice that the layoffs would occur due to "recent major and unanticipated downturn in the United States and global economy, and the resultant sharply lower demand" for its products.

The WARN requires covered employers to provide sixty (60) days notice of any layoffs of either one-third (1/3) of the employees or a plant closing. However, there is an exception that allows employers to raise the affirmative defense of unforeseen business circumstances. In this case, the union alleged that the layoffs violated the WARN because inadequate notice was given and the unforeseen business circumstances exception did not apply. Specifically, the union claimed that US Steel's evidence of rapidly declining customer orders was inadequate to sustain its burden of proving the exception. The Eighth Circuit affirmed the lower court's grant of summary judgment and found that the unforeseen business circumstance exception applied to the economic downturn that occurred at that time.

Marez v. Saint-Gobain Containers, Inc., No. 11-2354 (8th Cir., July 31, 2012) (FMLA Retaliation).

Kathleen Marez worked as a Production Supervisor for Saint-Gobain Containers in Pevely, Missouri. On January 28, 2008, Ms. Marez informed her supervisor that she needed to take FMLA leave to attend to her spouse after his surgery. Ms. Marez was not scheduled to work the following two days, but was called into work anyway. Upon her arrival, Ms. Marez was fired. The company claimed that the termination of employment was due to her failure to follow company procedures. Ms. Marez alleged her termination was retaliation for her FMLA request.

The district court jury awarded her \$206,500 in damages and \$206,500 in liquidated damages based on her FMLA retaliation claims. The court also awarded her part of her requested attorneys' fees for a damages total of more than \$413,000. The employer appealed and the Eighth Circuit upheld the jury award. Specifically, in assessing whether the 48 hours between her FMLA request and her firing alone was evidence enough of causation, the court noted, "we have rarely been faced with two events so close in time."



Monthly Update for July

Susan Bauer v. Curators of the University of Missouri, No. 11-2758 (8th Cir., June 6, 2012) (Equal Pay Act).

Susan Bauer is a nurse at the University of Missouri Hospital and Clinics. She brought suit against her employer, alleging a violation of the Equal Pay Act (“EPA”). Ms. Bauer claimed that the hospital was paying her less than a man who performed similar work based on her gender. At trial, the district court gave the jury a “business-judgment instruction” saying, “You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable.” The jury found in favor of the hospital and Ms. Bauer appealed, claiming that this jury instruction should not have been given.

Under the EPA, the employee must only prove that the employer pays men more than women. Discriminatory intent is irrelevant. An employer must then prove an affirmative defense (*i.e.*, that any pay disparity is justified by a seniority system, a merit system, a pay system based on quantity or quality of output, or a disparity based on any other factor other than sex).

The Eighth Circuit found that a “business-judgment” defense does not apply in EPA cases. Rather, the burden is on employers to affirmatively show that pay differentials between similarly situated employees was based on a factor other than sex. As such, the jury instruction was inappropriate. The Court went on to find that, even though the jury instructions contained the business-judgment rule, as a whole, the jury instructions correctly stated the law and the verdict was upheld.

Submitted By:

Corie J. Tarara

Seaton, Peters & Revnew, P.A.

7300 Metro Blvd. Ste 500

Minneapolis, MN 55439

Tel. - 952-921-4615

Fax - 952-896-1704

ctarara@seatonlaw.com

Licensed in MN, WI, IA

