Monthly Update for June

1st Circuit:

Grajales v. Puerto Rico Ports Authority, __ F.3d __ (2012)

(2012 WL 2126116)

http://www.ca1.uscourts.gov/pdf.opinions/11-1404P-01A.pdf

This case required the Court to revisit the plausibility threshold that a complaint must cross in order to survive a motion to dismiss, specifically when political discrimination is alleged.

The appellants presented a substantive argument and a procedural argument. The Court decided to answer only the plaintiff-appellant's substantive argument, since the case could be resolved on the merits, leaving out the procedural claim. The latter being if the district court had abused of its discretion in granting dismissal of all the plaintiff's claims based on their lack of plausibility after having already engaged in nine months of discovery.

The First Circuit reversed the district court's judgment dismissing and remanded the case for further proceedings. It concluded that the plaintiff-appellant had in fact demonstrated, with his factual allegations, a plausible section 1983 claim for political discrimination. It stated that paucity of direct evidence is not fatal in the plausibility inquiry. "Smoking gun" proof of discrimination is rarely available, especially at the pleading stage. Nor is such proof necessary. As held by the Court, the plausibility threshold simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the illegal conduct.

5th Circuit

EEOC v. Kansas City Southern Railway Co. Revised 6/23/2012: Posture—EEOC appeals the district court's grant of summary judgment in favor of railroad against the EEOC and four African-American plaintiffs bringing Title VII claims of race discrimination and retaliation. REVERSED IN PART (as to two plaintiffs) AND AFFIRMED (as to two plaintiffs)

Holding—Plaintiffs need only show that discriminatory/retaliatory animus motivated the initial disciplinary decision, and not later appeals within the company framework, and, employer's burden of coming forth with a legitimate non-discriminatory/retaliatory reason is not satisfied unless the initial reason is set forth with reasonable particularity. URL-- http://www.ca5.uscourts.gov/opinions/pub/09/09-30558-CV0.wpd.pdf

Glover v. Smith, as Acting Clerk of Shreveport City Court 6/13/2012: Posture—Glover appeals grant of summary judgment on her claims of violation of procedural due process, protected speech, race discrimination and retaliation under federal and state law. AFFIRMED; Holding—9 month delay between protected comments insufficient to prove causation (5th Cir. Precedents permit up to four months); going out of its way, the Court found that there is no cause of action for retaliation in the context of an employment discrimination case which exists under Louisiana law, citing the legislature's repeal of R.S. 51:2242-2245 and its replacement with R.S. 23:301 et seq. The court dismissed the fact that the definitional section of the LHRA continues to define an "unlawful practice" as "a discriminatory practice in connection with employment" and instead adopted the reasoning of a Lowry, 893 So.2d at 968 (La. App., 3d Cir.). The Court noted that the Louisiana Supreme Court has yet to rule on the issue, but the Court apparently declined to request certification. URL-- http://www.ca5.uscourts.gov/opinions/unpub/11/11-30595.0.wpd.pdf

Lee v. Regional Nutrition Assistance, Inc. 6/1/2012 (Summary Calendar): Posture—Lee appeals grant of summary judgment in her Title VII race discrimination and hostile work environment claim. AFFIRMED; Holding—three separate incidents at the workplace do not affect a term or condition of employment, or constitute a hostile work environment, 1)where a coworker used a racial epithet to refer to her in a conversation with another coworker, 2)where the same co-worker said she was "too dark to be seen without the benefit of sunlight" in the presence of Lee's supervisor, and 3)where an employee drew a tombstone on a

chalkboard with the abbreviations "R.I.P." and Lee's initials, "G.L.". The Court stated that the drawing of the tombstone provided "no indication the drawing was related to her race nor does she allege the coworker who made the comment also drew the tombstone." URL-- http://www.ca5.uscourts.gov/opinions/unpub/11/11-31084.0.wpd.pdf

Kinnison v. City of San Antonio 5/31/2012: Posture—Kinnison owned a building demolished by the City which was deemed "a clear and imminent danger to the life, safety, and/or property necessitating an immediate demolition." Unknown to the City, the property had been sold and foundation work had begun. The City appealed the district court's grant of summary judgment for Kinnison and the jury-determined damage award in a constitutional tort action based on the Fourth and Fourteenth Amendments and on 42 U.S.C. §1983, where City waived its *Monell* defense. VACATED AND REMANDED; Holding—requirements of proving "official policy," a "final" policymaker, policymaker "knowledge" of, or "deliberate indifference" to, a risk of constitutional violations under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) may now be waived by defendants in the 5th Circuit. Weighing the importance of protecting public safety, the Court determined that a fact finder should determine whether the state actor had reasonable grounds for summarily effecting a property deprivation. URL-- http://www.ca5.uscourts.gov/opinions/unpub/11/11-31084.0.wpd.pdf

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6th Circuit

ERISA Breach of Fiduciary Duty and Preemption: *McLemore v. Regions Bank*, _ F.3d _ , 2012 WL 2052950 (6th Cir. June 8, 2012).

In *McLemore*, an investment advisor embezzled funds while acting as a third-party administrator for various 401(k) plans. After the advisor went bankrupt, its bankruptcy trustee and former clients sued the bank where the advisor had held the fiduciary accounts, alleging that it negligently or knowingly allowed the advisor to steal the money. In particular, the trustee asserted a breach of fiduciary duty claim under the Employee Retirement Income Security Act ("ERISA"), as well as various violations of state law. The district court granted the bank's motion to dismiss, and the plaintiffs appealed.

A divided Sixth Circuit panel affirmed. Writing for the majority, Judge Cook first concluded that the bankruptcy trustee had standing to pursue ERISA claims against the bank. A bankruptcy trustee generally lacks standing to pursue claims that do not belong to the debtor's estate. But, this general rule ignores the role of a trustee who acts as an ERISA fiduciary. Because the trustee adequately alleged his ERISA-fiduciary status, he had standing.

Next, the court found that the doctrines of *in pari delicto* and unclean hands did not bar the trustee's claims. While these doctrines would have barred the advisor's claims if he had sued, the trustee was suing as an ERISA fiduciary protecting the plans' interest, rather than a bankruptcy trustee suing to enlarge the debtor's estate. In other words, any funds recovered inured to the plans, rather than to the bankruptcy estate.

Plaintiffs were not so successful, however, on the substantive claims. The ERISA fiduciary-duty claims failed because the bank did not qualify as an ERISA fiduciary where the discretionary control over the plan assets remained with the advisor and his company.

Merely holding the assets for the advisor was not enough to exert control by the bank (regardless of what the bank should have noticed about the advisor's activity), and there was no evidence that the bank did anything other than collect routine fees.

As to the state law claims, the parties did not dispute whether Tennessee's Uniform Fiduciaries Act ("UFA") displaced the plaintiffs' common law negligence claims. The issue was whether additional claims based on actual knowledge (e.g., aiding and abetting) or bad faith survived. The Sixth Circuit found that ERISA preempted those claims. The federal statute already provides the exclusive remedial mechanism concerning breaches of the duties that fiduciaries owe to ERISA plans. According to the court, the bank's liability under the state law claims turned on the existence of the plans and the substance of ERISA and not from any legal duty independent of ERISA.

Judge Merritt dissented, arguing that court had extended the breadth ERISA's preemptive scope beyond the appropriate bounds of the policies that it was designed to serve.

Title VII and State Law Sexual Harassment and Retaliation: *Wasek v. Arrow Energy Services*, _ F.3d _, 2012 WL 2330824 (6th Cir. June 20, 2012)

Despite some "particularly offensive" facts, the Sixth Circuit affirmed summary judgment in favor of the employer in a lawsuit asserting same-sex sexual harassment hostile work environment and retaliation claims under Title VII and Michigan's Elliott-Larsen Civil Rights Act. Wasek was an oil derrick-hand assigned to work on a derrick in Pennsylvania. There, his coworker and one-time roommate subjected him to sexual touching (e.g., grabbing his rear and poking it with a hammer handle), sexual comments (e.g., "boy you have pretty lips"), as well as sexually explicit jokes, fantasy-descriptions and name-calling. On more than one occasion, the employee reported these incidents to his superiors. Plaintiff's rig boss actually witnessed some of the events and laughed, instead of correcting them.

When Plaintiff reported an incident to the rig boss, the rig boss told him not to report it up the chain, or plaintiff would be run off the site. `One night, other disputes between Wasek and his tormentor (e.g., teasing, petty theft) came to a head, and Wasek reported all of the conduct – sexual and non-sexual – up the chain. His superiors did not immediately resolve the disputes, even though Wasek had threatened to walk if they did not. So, Wasek left the worksite and went home. In conversations over the next few days, he told human resources that he did not intend to quit, and the company assured him that it would not fire him. But it also said that this is the way the oil industry is, and he needed to adapt. The company reassigned him to another oil well in Michigan, with more than a month-long gap in work and pay. The employee, however, found another job closer to home, failed to show up for the Michigan reassignment, and instead sued.

The court addressed the hostile work environment claims under *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75(1998), and noted that "the conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim's gender." Based on the particular evidence that Wasek presented, he could only succeed if he established that the harasser was a homosexual. Because Wasek only relied on speculation and conjecture and could not present any "credible evidence" of the harasser's sexual orientation, his claim failed. The state-law claim used an identical analysis.

Turning to the retaliation claim, the court found that Wasek engaged in protected activity (i.e, opposition to unlawful activity) when he complained because he had a reasonable, good faith belief he was the victim of harassment. The court also concluded that Wasek suffered an adverse action when the company barred him from working in Pennsylvania, although the one-month delay in reassigning him was not separately actionable since it was just an"inconvenient result of the Pennsylvania ban." The retaliation claim ultimately failed, however, because Wasek was the cause of his own termination. Wasek admitted in deposition that his supervisors were fed up with the way he left them in a lurch. He also left them *before* they reassigned him. He offered no evidence connecting the firing with the harassment. In short, all of the available evidence established that the ban was the result of the employee leaving the worksite and not because of any protected activity. Again, the state-law analysis was identical.

Monthly Update for June

NLRB: *Frenchtown Acquisition Co. v. NLRB*, _ F.3d _, 2012 WL 2330619 (6th Cir. June 20, 2012).

In *Frenchtown*, the Sixth Circuit held that substantial evidence supported the National Labor Relations Board's ("Board") conclusion that charge nurses employed by a long-term care and rehabilitation facility were not supervisors under the National Labor Relations Act ("Act") and, therefore, the employer must negotiate with them in good faith.

The 43 charge nurses were represented by a unit of the American Federation of State, County and Municipal Employees, AFL-CIO (the Union). In 2004, the employer entered into a collective bargaining agreement with the Union. When it expired in 2009, the employer filed a unit clarification petition and sought to have the Board determine that the charge nurses qualified as statutory supervisors under §2(11) of the Act and thus did not have the right to unionize and bargain collectively.

Under the Act, individuals are considered supervisors if they: (1) have the authority to engage in any one of the twelve supervisory actions listed in the statute; (2) use "independent judgment" in exercising that authority; and (3) hold that authority "in the interest of the employer." The employer bears the burden to demonstrate supervisory status, and it is a highly fact-intensive inquiry. The company in *Frenchtown* argued that the charge nurses were supervisors because of their authority to assign, responsibly direct, discipline, hire, and transfer other employees, or effectively recommend these actions. The Board disagreed, finding that the employer failed to meet its burden of proving that the charge nurses actually engaged in any one of these supervisory actions. The facts supported that the higher-level managers actually performed the supervisory roles. Affirming the Board's findings, the Court rejected the employer's efforts to rely on generalized testimony, isolated examples and job descriptions that asserted the charge nurses engaged in supervisory activities. Overall, the employer failed to produce specific examples of the charge nurses engaging in supervisory duties.

ADA: *Gecewicz v. Henry Ford Macomb Hospital Corp.*, _ F.3d _, 2012 WL 2362524 (6th Cir. June 22, 2012).

In *Gecewicz*, the Sixth Circuit affirmed the dismissal of an employee's "regarded as" disabled claim under the Americans with Disabilities Act ("ADA"). The employee was terminated after she accumulated too many unexcused absences during a twelve month period. As support for her "regarded as" claim, she identified three statements from her supervisor: (1) that she has had a lot of surgeries for one person (made 6 years before her termination); (2) that gastric-bypass surgery the employee was going to have was a risky procedure (made 5 years before termination); and (3) that she if she did not have so many surgeries, she would not have so much time off (made 1 year before termination).

The Sixth Circuit found that none of these isolated statements showed that the supervisor believed that the employee had a physical or mental impairment of a duration longer than six months. Additionally, the court noted that the concern in each statement centered on the employee's excessive absenteeism, not a perceived disability and that "[b]eing absent from work is not a disability." Finally, the court rejected the employee's argument that her last "no show" should have been treated as evidence that the supervisor regarded her as being disabled because there was no evidence in the record that the employee formally requested the day off work.

ERISA Breach of Fiduciary Duty: *Bidwell v. University Medical Center*, __ F.3d __, 2012 WL 2477588 (6th Cir. June 29, 2012).

In *Bidwell*, the Sixth Circuit affirmed dismissal of breach of fiduciary duty claims brought by two plan participants who suffered loses to their self-directed retirement accounts in connection with the transfer of investments from a stable value fund to a Qualified Default Investment Alternative ("QDIA"). The plan fiduciary sent a notice to all plan participants that all existing investments in a stable value fund would be transferred to a new fund unless the participants gave instruction otherwise by a specified date. The two participants alleged that they never received the notice and by the time they transferred their investments back to the stable value fund, they had suffered financial losses due to market fluctuations.

The plan fiduciary relied on a safe harbor regulation, issued by the Department of Labor ("DOL") pursuant to the Pension Protection Act, 29 C.F.R. §2550.404c–5, which shelters administrators of plans that allow participants to direct their own investments into QDIAs. The participants argued that the safe harbor did not apply to them because they had previously elected their investment vehicle, rather than having it chosen for them by default. They argued that the

safe harbor only applies to automatic initial enrollments. The court disagreed. Quoting the DOL's interpretation of the regulation, the court found that the safe harbor applies whenever a participant or beneficiary has the opportunity to direct the investment of assets, but does not do so. The court also rejected an argument by plaintiffs that would have excluded from the regulation transfers from an existing fund to a QDIA. Such an interpretation was not consistent with the DOL's commentary on the regulation.

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9th Circuit

Harris v. County of Orange, 9th Cir, June 8, 2012.

Retiree Health Benefits

Before 2007, the County of Orange pooled active and retired employees into one collective group of health plan participants, thus lowering retiree premiums below what their rates otherwise would have been. Retired employees also received a monthly grant to apply toward the cost of their health insurance coverage. Effective January 2008, the County discontinued pooling active and retired employees and reduced the monthly grants. This resulted in two lawsuits that were consolidated.

First, REAOC, a non-profit corporation representing County retirees, filed suit challenging the changes, alleging there was an implied agreement to continue the monthly subsidy. REAOC's case sought only declaratory and injunctive relief. In an earlier decision, the Ninth Circuit certified to the California Supreme Court the question of whether, under California law, there can be an implied contract conferring on retired employees vested rights to health benefits. The California Supreme Court answered by holding that a vested right to health benefits for retired county employees can be implied, under certain circumstances, from a county ordinance or resolution.

Second, in addition to the suit brought by REAOC, a group of retirees brought a class action, alleging that the United States and California constitutions, was a breach of contract and constituted age discrimination under the California Fair Employment and Housing Act. The class action sought damages in addition to injunctive and declaratory relief.

On appeal, the Ninth Circuit reversed the district court's decision that the class action was barred by the earlier REAOC suit. The court held that the REAOC suit did not bar the later class action under claim preclusion rules because the class action sought damages, whereas damages could not be sought in the REAOC case.

The Ninth Court also reversed the district court's dismissal of the class action's claims that the retirees had a vested right to the monthly grant. The Ninth Circuit agreed with the district court that the retirees had failed to allege the explicit legislative or statutory authority from which such a right could be implied, but held that the retirees should have been allowed to amend their complaint to fix that deficiency.

Finally, the Ninth Circuit held that the requirement of exhausting administrative remedies under the FEHA was satisfied as to the whole class because one of the named plaintiffs had filed an administrative charge and obtained a right-to-sue letter.

http://www.ca9.uscourts.gov/datastore/opinions/2012/06/13/11-55669.pdf

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