



## Monthly Update for June 2015

### MONTHLY CIRCUIT UPDATES

#### First Circuit

##### ***Murray v. Kindred Nursing Centers W. LLC***

**2015 WL 3609907 (1st Cir. June 10, 2015)**

[http://caselaw.findlaw.com/summary/opinion/us-1<sup>st</sup> circuit/2015/06/10/273728.html](http://caselaw.findlaw.com/summary/opinion/us-1st_circuit/2015/06/10/273728.html)

A former employee of Kindred Nursing Centers, a licensed practical nurse, brought an action in the state court against her former employer alleging she was terminated for reporting concerns about a supervisor's alleged drug use, in violation of Maine's Whistleblowers' Protection Act (WPA). The plaintiff alleged retaliatory termination because she had reported concerns about another nurse being under the influence of drugs while on duty. After the plaintiff made a report with her concerns, the director of nursing began to notice some irregularities concerning the administration of medications to patients made by the plaintiff. The entries were not consistent with the times and patients they were supposed to be administered to. These irregularities lead the director to believe that the plaintiff was diverting drugs from patients. The plaintiff charges that her employer, Kindred, fired her on the account that she was a whistleblower. Kindred denies this charge and asserts that they terminated plaintiff's employment for a legitimate, nondiscriminatory reason which was the suspected drug diversion. The district court entered summary judgment in favor of Kindred. The Court of Appeals affirmed and held that despite the employee established prima facie case under the WPA: the employer articulated legitimate nondiscriminatory reason for terminating the plaintiff; the employer's alleged shifting rationale for termination and absence of direct proof of drug diversion did not show the employer's explanation for termination was pretext for retaliation; and the supervisor was not similarly situated to the plaintiff.

The Court of Appeals for the First Circuit affirmed summary judgment entered because the plaintiff could not demonstrate the causal connection required to establish a claim for whistleblower protection and that there was nothing in the evidence from which a reasonable fact finder could infer that the plaintiff's firing would not have occurred but for her whistleblowing activity treated differently by defendants.

##### ***Overka v. Am. Airlines, Inc.***

**2015 WL 3635328 (1st Cir. June 12, 2015)**

[http://caselaw.findlaw.com/summary/opinion/us-1<sup>st</sup> circuit/2015/06/12/273729.html](http://caselaw.findlaw.com/summary/opinion/us-1st_circuit/2015/06/12/273729.html)

A suit was brought by a class of "skycaps", airport porters who assist passengers with curbside check-in, among other things. The Plaintiffs alleged that the airlines violated state law by imposing at airports a \$2.00 per-bag curbside check-in fee. The airline alleged that the Airline Deregulation Act (ADA) preempted claims brought by airport porters, who assisted passengers with curbside check-in, against airline for violations of Massachusetts Tips Law arising out of airline's imposition of \$2.00 per-bag, curbside check-in fee, which allegedly decreased airport porters' compensation. The United States District Court for the District of Massachusetts, granted airline's motion to dismiss. Airport porters appealed. The Court of Appeals held that the ADA preempted claims under Massachusetts common law for unjust enrichment and tortious interference, and, also, that the ADA preempted claims for violations of Massachusetts Tips Law. 49 U.S.C. section 41713(b)(1).

The Court of Appeals for the First Circuit affirmed the dismissal of a Complaint holding that Circuit precedent and the Airline Deregulation Act preempted the skycaps' claims.

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### Second Circuit

#### *Tolbert. v. Smith*, **F.3d** , 2015 U.S. App. LEXIS 10656 (June 24, 2015)

Summary judgment was improperly granted to defendants where principal made racist comments about the student body shortly before plaintiff was denied tenure. While plaintiff was offered a fourth year of probationary employment to qualify for tenure (normally a three year process), the fourth year was an adverse action because defendants could still terminate plaintiff's employment without complying with the personnel procedures normally afforded tenured teachers. In addition, jury could draw inference of discriminatory intent where school officials deviated from the usual procedures in issuing plaintiff a poor job evaluation that resulted in his tenure denial.

#### *Fowlkes v. Ironworkers Local 40*, **F.3d** , 2015 U.S. App. LEXIS 10339 (2d Cir. June 19, 2015)

Plaintiff filed an employment discrimination action in federal court without filing an EEOC charge. This omission was not a jurisdictional defect under Supreme Court authority. Case is remanded to district court as Court of Appeals makes the following observations: first, "when an agency has previously 'taken a firm stand' against a plaintiff's position, the plaintiff's failure to exhaust administrative remedies may be excused on the ground that exhaustion would be futile." As the Second Circuit "has not had occasion to consider this particular equitable defense in the context of EEOC Title VII exhaustion, Fowlkes may have a colorable argument that filing a charge alleging discrimination based on his transgender status would have been futile." Second, failure to exhaust may be excused because plaintiff's "more recent allegations of discrimination may be 'reasonable related' to the discrimination about which he had filed an earlier charge with the EEOC." In plaintiff's federal lawsuit, he alleged that the union denied him work in retaliation for an earlier EEOC charge.

"Given the contents of Fowlke's amended complaint and the close resemblance that it bore to his earlier EEOC charge, his more recent allegations may be 'reasonably related' to those included in his earlier administrative filing with the EEOC."

#### *Glatt v. Fox Searchlight Pictures*, **F.3d** , 2015 U.S. App. LEXIS 11435 (2d Cir. July 2, 2015)

Resolving a matter of first impression, the Court of Appeals sets out the legal standard governing when interns should be treated as employees and therefore paid a salary under the Fair Labor Standards Act. The non-exhaustive factors are as follows: (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa; (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions; (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship."



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### Third Circuit

**Hansler v. Lehigh Valley Hosp. Network,**  
**F.3d (3d Cir. 2015), 2015 WL 3825049,**  
**C.A. 3, (Penna.), June 22, 2015,**  
[www2.ca3.uscourts.gov/opinarch/141772p.pdf](http://www2.ca3.uscourts.gov/opinarch/141772p.pdf)

In *Hansler v. Lehigh Valley Hosp. Network*, a Third Circuit panel, in a 2-1 decision, held that an employer violated the federal Family and Medical Leave Act (FMLA) by terminating an employee based on a medical certification that failed to disclose the nature or duration of the condition for which FMLA leave was sought. The majority found that a violation occurred because the employer did not first afford the employee the opportunity to cure the deficiencies in her medical certification.

In March of 2013, the plaintiff, an employee of Lehigh Valley Hospital, began experiencing shortness of breath, nausea and vomiting. Because the cause of her symptoms were unknown to her doctor at the time, he completed a FMLA medical certification form on March 13, 2013, "requesting intermittent leave at a frequency of 2 times weekly starting on March 1, 2013 and lasting for a probable duration of one month- or until about April 1, 2013." However, because the cause of her symptoms was unknown, the doctor could disclose neither the nature of the medical condition nor the expected duration of the condition (as opposed to the duration of the leave request).

The employer denied the plaintiff's request for intermittent leave on March 26, 2013, based to what it deemed to be the employee's insufficient medical certification. The denial occurred after the employee had already missed five days of work due to her condition.

The employer did not afford the employee the opportunity to cure the insufficiency in her medical

certification, or direct her to submit a sufficient certification. The employer then terminated her on March 28, 2013, for excessive absenteeism. After the plaintiff's termination, her doctor was able to diagnose her with high blood pressure and diabetes, which conditions were determined to be the cause of the symptoms that, in turn, had caused the absences that led to the plaintiff's termination.

The plaintiff brought action against her former employer, alleging both interference with her statutory rights under the FMLA and retaliation for her requesting and taking FMLA leave. She alleged that she had not been given proper notice that her certification was insufficient and had not been allowed seven days to cure the insufficiencies, contrary to the requirements of 29 C.F.R. § 825.305(c). The District Court dismissed the plaintiff's claims. The District Court first reasoned that because the plaintiff had requested leave for only one month, she could not have a "serious health condition" under the FMLA, because a "serious health condition" under the FMLA is a condition that requires treatment by a health care provider for an "extended period of time." Based on this reasoning, the District Court then concluded that the medical certification provided by the plaintiff was not merely "inadequate," but was "invalid," in that the condition it described failed on its face to constitute a "serious health condition." Under the District Court's reasoning, there was no "inadequacy" to cure, and the cure requirement of 29 C.F.R. § 825.305(c) was therefore inapplicable.

On appeal, the majority noted that the First, Sixth and Seventh Circuits had found "negative certifications" to be "invalid" when they revealed on their face that the employee did not have a "serious health condition" under FMLA, and in such cases found no reason to allow the employee an opportunity to cure. Those cases, however, involved certifications suggesting that that the employees at issue would not need to miss any work or could adequately perform their job functions. Without deciding whether to adopt the "negative certification" line of cases, the *Hansler* majority found these cases provided "little guidance" for cases involving "an ambiguous or non-responsive certification."



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The *Hansler* majority then determined that the plaintiff's certification was "vague and nonresponsive insofar as it request[ed] intermittent leave for one month but fail[ed] to specify whether the one month duration refers only to the length of her leave request or to the duration of her condition." As such, the certification was ambiguous and non-responsive, not "invalid," and the cure requirements of 29 C.F.R. § 825.305(c) should have been followed. Under that regulation, the plaintiff should have been notified of the medical certification's deficiencies, advised what information was necessary to render the certification sufficient, and provided with an opportunity of at least seven calendar days' duration (unless a longer period is necessary under the circumstances despite the employee's diligent good faith efforts) to cure the identified deficiencies before her request for FMLA leave could be denied.

The employer's failure to afford the plaintiff with such an opportunity to cure the deficiencies in her medical certification properly stated a claim for interference under the FMLA. An employer's breach of its obligations under 29 C.F.R. § 825.305, pertaining to medical certifications, is sufficient ground, standing alone, to support a FMLA interference claim. In addition, under Third Circuit precedent, notably *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 142 (3d Cir. 2004), an employer's failure to advise an employer of applicable substantive rights under the FMLA gives rise to an interference claim if the failure prejudiced the employee's ability to exercise his or her FMLA rights "in a meaningful way, thereby causing injury." This logic "naturally extends to an employer's failure to comply with its regulatory obligations following receipt of an insufficient or incomplete medical certification."

The majority also found that the "cure period makes abundant sense in this context," when the plaintiff and her physician were confronted with "nascent symptoms from a yet-to-be diagnosed condition." Some additional time may be needed for the physician to provide the required elements of a sufficient certification.

The *Hansler* majority also reinstated the plaintiff's FMLA retaliation claim, reasoning that "through discovery, the employee might be able to show that

Lehigh Valley had a retaliatory motive and that the stated reason for termination was pretextual."

The dissenting Judge rejected what she termed to be the majority's "strained reinterpretation of the FMLA." The certification accurately reflected what was known about the plaintiff's medical condition at the time of her request for FMLA leave, but the condition, on its face, did not qualify for FMLA leave. "This is not the case of a deficient certification that omitted necessary information. It is simply a case of a certification that described a condition that is not one for which FMLA leave can be awarded ... The employer here should not be penalized for denying leave when the complete and unambiguous request for leave did not present grounds for leave." There can be no interference with FMLA rights if the plaintiff had not been entitled to FMLA leave in the first place. The dissenting Judge likewise rejected the majority's "nascent symptoms" reasoning, arguing that nothing in the FMLA "provides for such a grace period."

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## Monthly Update for June 2015

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### Fourth Circuit

**Huntington Ingalls Industries, Inc. v. Eason, No. 14-1698, 2015 WL 3463501(4th Cir. June 2, 2015).**  
<http://www.ca4.uscourts.gov/Opinions/Published/141698.P.pdf>

The plaintiff, a pipe fitter at a dock company, injured his right knee while on the job. Following surgery, the plaintiff was out of work for nearly eight months. During that time, the defendant company paid the plaintiff temporary total disability benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA). After the plaintiff returned to work, he was evaluated by a doctor, who determined that the plaintiff had a partial, but permanent impairment. Accordingly, the company began paying the plaintiff permanent partial disability payments in addition to his weekly salary.

The plaintiff later was evaluated for continued pain in his knees. The doctor put the plaintiff on light duty restrictions for both knees, which prevented the plaintiff from performing his job duties as a pipe fitter for three months. When the plaintiff returned to work, he brought a claim under the LHWCA for temporary total disability for the three-month period he was on light-duty restrictions. The plaintiff argued that even though he received permanent partial disability compensation for his original knee injury, that compensation did not prevent the recovery of additional temporary disability compensation due to a "flare up" of that injury.

The Administrative Law Judge concluded that the compensation for permanent partial disability presumed the plaintiff's actual loss of wage-earning capacity due to the original knee injury, such that temporary compensation for the flare up was already covered by the permanent payments. The Benefits Review Board disagreed and vacated the ALJ's decision. On remand, the ALJ ordered that the company pay the plaintiff temporary partial disability benefits, and the Board affirmed.

The Fourth Circuit reviews the BRB's decision for errors of law; the ALJ's findings of fact are conclusive before the BRB if supported by substantial evidence in the record considered as a whole. The court reviews the BRB's interpretation of the LHWCA *de novo*; however, the court gives some deference to the reasonable interpretation of the Act by the Director of the Office of Workers' Compensation Programs.

The LHWCA establishes four different categories of disabilities: (1) permanent total disability; (2) temporary total disability; (3) permanent partial disability; and (4) temporary partial disability. The employer pays compensation based on the disability category of the claimant-employee. A claimant may be reclassified from one disability category to another based on changed circumstances.

The LHWCA recognizes two types of permanent partial disability. One type of permanent partial disability is referred to as "unscheduled" or "non-scheduled," with compensation is based on the employee's actual loss of wage-earning capacity; the other type is referred to as "scheduled," with compensation for a fixed number of weeks to compensate for a presumed (not actual) loss of wage-earning capacity.

Here, because the plaintiff suffered a scheduled injury, the scheduled compensation accounted for all the lost wages he was due under the LHWCA. Once the plaintiff's permanent partial disability compensation was set under the schedule, he was not entitled to receive additional disability compensation for the same scheduled injury unless the circumstances warranted a reclassification of that disability to permanent total or temporary total. The court found no evidence supporting a reclassification the plaintiff's disability to a permanent total or temporary total disability; his disability remained permanent and partial. Where the plaintiff had a scheduled permanent partial disability that allegedly changed to a temporary partial disability because his injury flared up, his loss of wage-earning capacity already was accounted for under the schedule.

The plaintiff was not entitled to additional disability compensation for the flare up of his knee injury.



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Thus, the Fourth Circuit remanded the case to the BRB for an order dismissing the plaintiff's claim.

***Pender v. Bank of America Corp., No. 14-1011,*  
**2015 WL 3541927 (4th Cir. June 8, 2015)****

<http://www.ca4.uscourts.gov/Opinions/Published/141011.P.pdf>

The defendant Bank permitted eligible participants to transfer their 401(k) account balances to a pension plan under which participants were guaranteed to receive at least the value of the original 401(k) balance. In addition, the pension plan was to provide the same investment options as the 401(k) plan. However, unlike the 401(k) plan, the Bank placed the assets in investments of its choosing, rather than investments chosen by the participants.

Subsequent to the transfer of assets, the IRS concluded that the transfers violated the Internal Revenue Code. The Bank entered into a closing agreement with the IRS under which it paid a fine, set up a special-purpose 401(k) plan, and transferred the pension plan assets back to the special-purpose 401(k) plan. The plaintiffs, employees who elected to transfer funds from the original 401(k) plan to the pension plan, filed suit under ERISA, seeking to recover any profits the Bank retained after it transferred pension plan funds to the special-purpose 401(k) plan. The district court granted summary judgment, holding that the plaintiffs lacked standing.

On appeal, the Fourth Circuit reversed, holding that the plaintiffs had both statutory and Article III standing.

With regard to statutory standing, the Fourth Circuit ruled that the plaintiffs lacked standing under ERISA sections 502(a)(1)(B) and 502(a)(2), but had standing under section 502(a)(3). The Fourth Circuit reasoned that for section 502(a)(3) to apply, the plaintiffs had to show that the asset transfers at issue violated a covered ERISA provision and that the relief requested was "appropriate equitable relief" to redress that violation. The Fourth Circuit ruled that the asset transfers at issue violated ERISA section 204(g)(1), which prohibits plan amendments that decrease the balance of a participant's account. The court explained that an ERISA sponsor may not

act in a manner that decreases the participants' account balances. The Fourth Circuit found that because the Bank, rather than the participants, chose how the assets in the pension plan were invested, the plan amendments had the potential to decrease the participants' accounts and, thereby, violated ERISA section 204(g)(1). The Fourth Circuit further ruled that the relief sought, an accounting of profits, was "appropriate equitable relief" as contemplated by section 502(a)(3). Accordingly, the Fourth Circuit concluded that the plaintiffs' had statutory standing under section 502(a)(3).

The Fourth Circuit next turned to the question of Article III standing. The court identified three "irreducible minimum requirements" for Article III: (1) an injury in fact (a "concrete and particularized" invasion of a "legally protected interest"); (2) causation (a "fairly ... trace[able]" connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (it is "likely" and not merely "speculative" that the plaintiff's injury will be remedied by the relief the plaintiff seeks in bringing suit).

The Fourth Circuit first ruled that financial loss is not a prerequisite for Article III standing to bring a disgorgement claim under ERISA. The court found that the plaintiffs incurred an injury in fact, an invasion of a legally protected interest, because they suffered a loss equal to the difference between the Bank's profit earned by investing the retained assets and the amount paid to the plaintiffs. The court further found that but for the Bank's improper retention of profits, the plaintiffs would not have suffered an injury, thereby satisfying causation. Further, the Fourth Circuit found that the relief sought was not speculative, as the profits were readily ascertainable. Accordingly, the Fourth Circuit concluded that the plaintiffs also have Article III standing.

Finally, the Fourth Circuit ruled that North Carolina's ten-year statute of limitations applied and that the plaintiffs' claims were not time barred.

Having determined that the plaintiffs' claims were timely and that they had statutory and Article III standing, the Fourth Circuit reversed the district court and remanded for further proceedings.



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**Revazuddin v. Montgomery County, Maryland, No. 14-1299, 2015 WL 3651710 (4th Cir. June 15, 2015)**  
<http://www.ca4.uscourts.gov/Opinions/Published/141299.P.pdf>

The Defendant County decided to consolidate several offices and departments into a single call center and modernize the technology. The County's license for the new software permitted use in either "high-interactivity mode" or "standard-interactivity mode." High-interactivity mode is not accessible to blind employees because it is not compatible with the screen reader program; standard-interactivity mode is compatible.

Although it was technologically feasible for some employees to operate the software in high-interactivity mode and for others to operate in standard-interactivity mode, the County chose to configure the software for all employees in high-interactivity mode. The plaintiff, who is blind, worked for one of the County's call centers prior to the consolidation and performed her job duties using the screen reader software. As part of the consolidation, the County planned to transfer the plaintiff, along with four sighted co-workers, to the new call center facility. However, when the four sighted employees were transferred to the new facility, the plaintiff was asked to remain at her original office to perform various "make-work" tasks. The County later informed the plaintiff that she would not be transferred to the new facility because it was too expensive. Although the plaintiff received the same salary, grade, and benefits over the next two years, she received only make-work assignments and never had full-time work. The plaintiff also applied for a vacant call center position, but was not offered the position.

The plaintiff filed suit under section 504 of the Rehabilitation Act of 1973, asserting claims for failure to accommodate and disparate treatment, and under the Americans with Disability Act of 1990. The district court granted the County's motion for summary judgment and dismissed all of the plaintiff's claims. The Fourth Circuit reversed the district court on the Rehabilitation Act claims, finding that genuine issues of material fact precluded summary judgment on those claims

but affirmed the dismissal of the ADA claim.

To establish a prima facie case on her failure-to-accommodate claim, the plaintiff had to show that (1) she qualified as an "individual with a disability"; (2) the County had notice of her disability; (3) she could perform the essential functions of her job with a reasonable accommodation; and (4) the County refused to make any reasonable accommodation. Even if the plaintiff established her prima facie case, the County could avoid liability if it showed as a matter of law that the proposed accommodation would cause "undue hardship" in the particular circumstances. The dispute in this case centered on the third and fourth elements of the plaintiff's prima facie case, and the County's undue hardship defense. Both sides presented expert testimony on the costs and feasibility of making the call center technology accessible to the plaintiff.

The Fourth Circuit found, like the district court, that there was a genuine issue of material fact whether the plaintiff could perform the essential job functions with a reasonable accommodation. The plaintiff had to show that her proposed accommodation of the call center equipment was feasible or plausible, and the Fourth Circuit ruled that the district court engaged in an improper weighing of evidence when it credited the County's expert over the plaintiff's, rather than viewing evidence in the light most favorable to the plaintiff as the non-moving party. Because it was undisputed that both experts were qualified, the conflicting expert reports amounted to a "battle of the experts" that the Fourth Circuit concluded was not properly resolved on summary judgment.

Acknowledging that an employer may reasonably accommodate an employee without providing the exact accommodation requested, the Fourth Circuit noted that the accommodation still must provide a meaningful employment opportunity. The Fourth Circuit found that a reasonable jury could conclude that the "make-work" tasks assigned to the plaintiff did not amount to full, meaningful employment and, therefore, was not a reasonable accommodation.

On the question of undue hardship, the Fourth Circuit again found that the district court improperly weighed conflicting expert evidence and credited the County's expert. The Fourth Circuit further



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found that the district court improperly focused exclusively on the costs associated with the proposed accommodation, and credited the County's claim of spillover effects on the call center's operations when the plaintiff had presented evidence to the contrary.

The Fourth Circuit also held that the district court erred in dismissing the plaintiff's disparate-treatment claim. To establish a prima facie case of disparate treatment, the plaintiff had to show that she (1) has a disability; (2) is otherwise qualified for the employment; and (3) was excluded from that employment due to discrimination solely on the basis of her disability. It was undisputed that the plaintiff has a disability, and the plaintiff had sufficient evidence that she was "otherwise qualified" based on the same evidence the Fourth Circuit found sufficient to create a genuine issue of material fact regarding the plaintiff's ability to perform the essential job functions with a reasonable accommodation. Having rejected the district court's conclusion that the County had established its undue hardship defense as a matter of law, the Fourth Circuit concluded that the County had not established a nondiscriminatory reason for the failure to transfer the plaintiff.

With regard to the plaintiff's claim under Title II of the ADA, the Fourth Circuit joined the majority of circuits and concluded that Title II does not provide a vehicle for public employment discrimination claims. Accordingly, the Fourth Circuit reversed the district court's order granting summary judgment on the plaintiff's Rehabilitation Act claims and affirmed the district court's dismissal of the plaintiff's Title II claim.

***Adams v. Anne Arundel County Public Schools,***  
**No. 14-1608, 2015 WL 3651735 (4th Cir. June 15, 2015)**

**<http://www.ca4.uscourts.gov/Opinions/Published/141608.P.pdf>**

The plaintiff, a middle school assistant principal, was accused of engaging in a physical altercation with a student. Both Child Protective Services and the School Board investigated the incident. During the course of the investigations, the assistant principal began several periods of medical leave for anxiety caused by the abuse allegations and berating comments by the principal. The assistant principal's

doctor informed the Board that he suffered from post-traumatic stress disorder and would require a transfer to lower-stress school environment. The Board required that the assistant principal undergo additional evaluation by Board-chosen specialists, who ultimately agreed regarding the transfer. The Board approved the assistant principal's transfer to another school following the end of his medical leave.

While the assistant principal was on medical leave, the Board notified him of a pre-disciplinary conference regarding the ongoing investigation. The conference was delayed so that the assistant principal's attorney could attend. Following the hearing, the Board formally reprimanded the assistant principal for the incident. The assistant principal then returned from medical leave and began his new job, at which he reportedly excelled. In accordance with a union contract, the assistant principal's salary remained the same for the first two years of his employment and then was reduced by less than one percent due to the new school's smaller size. The assistant principal never requested a transfer.

The assistant principal filed suit against the Board for violations of the FMLA, ADA, Title VII, and state law. After dismissing all but the FMLA and ADA claims, the district court granted summary judgment for the Board on those claims as well. The assistant principal appealed both the motion to dismiss and summary judgment orders. The Fourth Circuit affirmed the dismissal of the claims.

The assistant principal argued that the Board interfered with his FMLA leave and retaliated against him for taking leave. To make out an "interference" claim under the FMLA, the assistant principal had to demonstrate that (1) he was entitled to an FMLA benefit; (2) the School Board interfered with the provision of that benefit; and (3) that interference caused harm. The Fourth Circuit noted what it termed a "salient fact": the assistant principal took three separate FMLA medical leaves. The court rejected the argument the Board interfered with the exercise of the assistant principal's FMLA rights by requiring him to submit to three examinations by a Board-chosen specialist; the FMLA explicitly allows employers to seek a second, and even a third, opinion to verify an employee's



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medical claims. The court also rejected the argument that scheduling the disciplinary hearing during the assistant principal's leave period unlawfully forced him to "work." The court said the conference was a legitimate part of an on-going investigation, and the Board accommodated the assistant principal's request to delay the conference. Finally, the Fourth Circuit found no evidence that the verbal and written reprimands constituted adverse employment events or discouraged the assistant principal from taking FMLA leave. The assistant principal was not subject to further discipline and his pay and benefits were unaffected.

The assistant principal's retaliation claim required him to prove three elements to establish a prima facie case: (1) he engaged in a protected activity; (2) his employer took an adverse employment action against him; and (3) there was a causal link between the two events. Analyzing the retaliation claim, the Fourth Circuit reiterated that the Board's actions were consistent with the FMLA when it required evaluations by the specialists and further that none of the Board's actions constituted adverse employment actions. The Fourth Circuit further found that the assistant principal's transfer was not retaliatory, as it was recommended by his own doctor and he stated that he was not adverse to the transfer. The Fourth Circuit concluded that the transfer was a timely accommodation for the assistant principal's disability.

For these same reasons, the Fourth Circuit found that the assistant principal's ADA claims, which required evidence of an adverse employment action, could not survive. The court also ruled that the transfer to another school was a reasonable accommodation of the assistant principal's claimed disability. Accordingly, the Fourth Circuit affirmed the district court's dismissal as to all claims.

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### Fifth Circuit

#### **Bodle v. TXL Mortg. Corp., No. 14-20224 (June 1, 2015)**

The defendants filed a prior state court action against the plaintiffs claiming that plaintiffs had violated their noncompetition covenants with TXL. In that state court action, the parties filed a joint motion for entry of agreed final judgment pursuant to a private settlement agreement. The state court granted the parties' motion and entered an agreed final judgment. The private settlement agreement between the parties contained a broad release of all actual and potential claims by the plaintiffs.

The plaintiffs filed the federal court FLSA action for unpaid overtime. The defendants moved for summary judgment asserting *res judicata* and argued that the plaintiffs had released all claims against the defendants arising from the parties' employment relationship. The district court granted the defendants' motion.

The Fifth Circuit reversed and remanded, holding that the general rule establishes that FLSA claims (for unpaid overtime, in this case) cannot be waived. See [Brooklyn Sav. Bank](#), 324 U.S. at 706-08, 65 S.Ct. 895.



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The absence of any mention or factual development of any claim of unpaid overtime compensation in the state court settlement negotiations precluded a finding that the release resulted from a bona fide dispute under *Martin*.

The Fifth Circuit has excepted unsupervised settlements that are reached due to a bona fide FLSA dispute over hours worked or compensation owed. *Martin v. Spring Break '83 Productions, L.L.C.*, 688 F.3d 247 (5th Cir.2012). The Court held that the *Martin* exception does not apply to the instant case. The prior state court action did not involve the FLSA and the parties never discussed overtime compensation or the FLSA in their settlement negotiations. There was no factual development of the number of unpaid overtime hours nor of compensation due for unpaid overtime. Therefore, the general prohibition against FLSA waivers applied in this case, and the state court settlement release was not enforced against the plaintiffs' FLSA claims.

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### Sixth Circuit

**No cases to report**

### Seventh Circuit

#### *Shell v. Smith*, No. 14-2958, 2015 WL 3649612 (7th Cir. June 15, 2015)

Plaintiff Marc Shell ("Shell") worked for the City of Anderson Transit System ("CATS") as a

Mechanic's Helper. Because a Mechanic's Helper occasionally needs to drive CATS' buses to fieldlocations, and a commercial driver's license ("CDL") is required to drive CATS' buses, CATS informed Shell that he had to obtain a CDL or face termination. Shell suffered from hearing and vision impairments and, as a result, he could not obtain a CDL. Shell was unable to obtain a CDL and his employment was terminated. Shell subsequently sued the City of Anderson under the Americans with Disability Act (ADA) for failing to accommodate his disability. The district court granted summary judgment in favor of the City and Shell appealed.

The Seventh Circuit began its review by framing the issue for appeal. The court noted that "discrimination" under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." The Court went on to note, however, that to establish a claim for failure to accommodate, a plaintiff must show that he or she "can perform the essential functions of the employment position with or without a reasonable accommodation." Based on this, the Court held that the issue on appeal was whether the record contained sufficient evidence from which a reasonable jury could conclude that driving a bus was not an essential function of Shell's job as a Mechanic's Helper.

To answer this question, the Court first looked at what constitutes an "essential function" under the ADA. The Court held that there was sufficient evidence that a genuine issue of material fact existed as to whether driving a bus was an essential function of the Mechanic's Helper position. In reaching this finding, the Seventh Circuit rejected the City's reliance on its job description for the Mechanic's Helper position, that stated a Mechanic's Helper is "responsible for assisting with mechanic duties, and washing, cleaning, lubricating, and refueling vehicles." The Court held that while an employer's judgment as to what functions is essential and



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determining whether a job duty constitutes an essential function. These include: (i) the employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs. The Court also held that the district court did not draw reasonable inferences in Shell's favor, as required at the summary judgment stage. For these reasons, the Seventh Circuit reversed the district court's grant of summary judgment.

### **Miller v. St. Joseph County, No. 14-2989 (June 9, 2015)**

Plaintiff, Michael Miller ("Miller"), was a sergeant in the Detective Bureau of the St. Joseph County Police Department in Indiana. In 2010, Michael Grzegorek ("Grzegorek") was elected County Sheriff. Upon becoming Sheriff, Grzegorek did not appoint Miller as the Assistant Chief of the Police Department, despite Miller calling Grzegorek and expressing interest in the position. As a result, Miller took a position in the Police Department's "Property Room," located in the basement of the police station, where he was responsible for sorting guns. After Miller expressed his dissatisfaction with this position, he was offered a position in the Police Department's Family Violence Unit. Miller declined this position, and continued working in the Property Room until he finished his sorting assignment, at which point he returned to his other duties in the Detective Bureau. Miller subsequently filed suit against the Police Department, Grzegorek, and other entities and individuals, claiming that his assignment to the Property Room was degrading, and that he was not asked about his possible interest in other vacant positions that would have been promotions for him. The district court granted summary judgment in favor of the defendants and Miller appealed.

The Seventh Circuit affirmed the district court's grant of summary judgment. Before conducting its analysis, however, the Court announced its support for a new analysis to replace the "direct" and "indirect" methods of proving discrimination. The court held that "in order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she [or, of course, he if the plaintiff is male] is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason." While this test does not do away with the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) test, the Court conveyed that this simplified test is an alternative way to prove discrimination.

The Seventh Circuit held that there was no evidence that Miller suffered an adverse employment action because of his race. The Court noted that even if Miller was assigned to the Property Room, there was no evidence that this was because of his race – "someone had to prune the department's excessive gun collection." Furthermore, as soon as Miller expressed his desire to switch to a different assignment he was offered the opportunity to do so, and there was no evidence that Miller's assignment to the property room was an act of retaliation (as Miller also claimed). The Court also held that there was no indication that Miller was unaware of the vacant positions that he could have been considered for and, in any event, there was no evidence that Miller would have received a promotion if he was white. Lastly, the Court noted that Miller's wages and benefits were the same before, during, and after the period in which he claimed to have been discriminated against, including during his time in the property room. Based on this, the Court affirmed the district court's grant of summary judgment in favor of the defendant



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### Eighth Circuit

*Ludlow v. BNSF Ry. Co.*, \_\_\_ F.3d \_\_\_, 2015 U.S. App. LEXIS 9288 (8th Cir. June 4, 2015)  
<http://media.ca8.uscourts.gov/opndir/15/06/142486P.pdf>

Former Claims Representative Kirk Ludlow sued BNSF Railway for wrongful termination in violation of Nebraska public policy and whistleblower law. A jury found BNSF liable on the whistleblower claim and awarded Ludlow damages. The district court denied BNSF's pre- and post-verdict motions for judgment as a matter of law (JMOL) and granted Ludlow \$206,514.13 in attorney's fees and \$22,202.16 in nontaxable costs. The Eighth Circuit affirmed.

Ludlow worked for BNSF for ten years and had no negative disciplinary history. In 2009, Ludlow discovered his forged signature on documents submitted to the Department of Veterans Affairs (VA) certifying that coworker Larry Fernandes was eligible to receive VA training program benefits. Ludlow reported the forgery to his supervisor, Barry Wunker. Wunker did not investigate the claimed forgery or report it to his superiors. In April 2010, Ludlow reported the forgery to the BNSF police; Wunker expressed displeasure and told Ludlow that his immediate superior, Bill Renney, was angry about the reports. Wunker threatened Ludlow that his disclosure could cost him his job.

Over the ensuing months, Wunker and Renney increased scrutiny of Ludlow, directed Ludlow to stop investigating and disclosing the forgery, and Wunker complained to HR about Ludlow's performance. In May 2010 Ludlow was contacted by a VA investigator but was directed not to speak to the investigator. The VA continued to look into the forgery.

On July 13, Ludlow and Mary Adamson, a janitor, were engaged in workplace banter when Ludlow made a karate kick motion towards her, lightly striking Adamson's head and neck when he slipped. Adamson did not report the incident, which she considered accidental, but another supervisor learned of the incident from a different employee and reported it to Wunker on July 16. On July 21,



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after learning of Ludlow's scheduled meeting with a VA investigator, Wunker and Renney drafted an e-mail recommending that Ludlow be terminated due to the kick incident.

The recommendation to fire Ludlow ultimately went up several chains of command to Charles Shewmake, BNSF's Vice President and General Counsel. Shewmake decided to terminate Ludlow based exclusively on the information provided by subordinates, including Wunker and Renney, and did not conduct any independent investigation. Ludlow testified that Renney's version of the incidents was either false or heavily distorted. Ludlow was fired the next day.

BNSF appealed arguing that Ludlow failed to prove he engaged in protected conduct and that he couldn't establish causation. The Eighth Circuit first held that BNSF had not preserved appeal on the issue of protected conduct. BNSF filed a Rule 50(a), pre-verdict motion challenging the protected conduct issue. BNSF then filed a Rule 50(b), post-verdict motion, renewing its Rule 50(a) motion, but failing to raise any issue regarding Ludlow's protected conduct. In order to appeal an issue on the sufficiency of the evidence at trial, a party is required to file a Rule 50(b) motion, renewing its Rule 50(a) motion, on that particular issue. Because BNSF did not do so, it failed to preserve that issue for appeal.

The Eighth Circuit next held that the evidence was sufficient to prove causation. BNSF argued that *Nassar's* determinative factor standard of causation should apply to Ludlow's retaliation/whistleblower claim, because that is what the Nebraska Supreme Court would do. The Eighth Circuit noted that "whether 'motivating factor' or 'determining factor' was the proper causation standard, [is] an issue that has bedeviled Title VII courts and Congress for twenty-five years."

In what appears to be a significant decision, the Eighth Circuit held that, for a cat's paw theory case (such as Ludlow's), courts apply neither a motivating or determinative factor standard. Rather, under the Supreme Court's decision in *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011), courts must apply a proximate cause standard. The court quoted *Staub*: "In a cat's paw

case, an employer may be vicariously liable for an adverse employment action if one of its agents -- other than the ultimate decision maker -- is motivated by discriminatory animus and intentionally and proximately causes the action."

The Eighth Circuit held the evidence was sufficient for the jury to find that Ludlow's supervisors made comments to the decisionmaker with retaliatory motive, and those comments proximately caused the decisionmaker to terminate Ludlow's employment.

The Eighth Circuit also rejected BNSF's argument that the trial judge committed plain error in instructing the jury that they need only find a "motivating factor" as "boarder[ing] on the frivolous." Nebraska law is that retaliation need only be proved by "a causal connection," and BNSF failed to establish how the jury instruction was plainly erroneous.

Finally, the appellate court upheld the award of attorney's fees and costs, because awarding fees for a second attorney at depositions, travel time and for jury consultants and focus groups was not an abuse of discretion.

***Stewart v. Rise, Inc.*, F.3d. , 2015 U.S. App. LEXIS 11179, (8th Cir. June 30, 2015), available at <http://media.ca8.uscourts.gov/opndir/15/06/133579> P.pdf**

Bernadine Stewart sued her employer, Rise, Inc., alleging a hostile work environment and discriminatory termination based on a combination of race, sex, and national-origin discrimination, as well as retaliation. The district court granted summary judgment on all of Stewart's claims, and the Eighth Circuit reversed with respect to the hostile environment claim, affirming the remainder.

Stewart, an American-born African-American woman, alleged specifically that a group of her subordinates, consisting largely of male, Somali-born immigrants, created the hostile work environment. She further alleged that her own supervisors ignored her complaints for assistance, denied her the authority to terminate the offending employees, allowed the hostile environment to persist, and eventually



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terminated her employment as an act of discrimination and retaliation. The allegations of hostile work environment that Stewart claimed her supervisors were made aware of included, for instance:

1. Haid, Robleh, and Jama openly called Stewart a bitch. Jama regularly called Stewart a bitch.
2. Robleh and Haid called Damani a bitch, screamed at Damani, and slammed doors in her face.
3. Haid said, "African American women are bitches and that's why nobody likes you."
4. Haid and Robleh said African-American women have no value.
5. Haid yelled at Stewart, "F\*\*k you, everyone around here does not like you."
6. Robleh stood in the doorway to Damani's office with his pants unzipped. When Damani and another woman asked Haid to say something to Robleh, Robleh and Haid spoke in Somali and smiled, but Robleh did not correct the problem.
7. Haid threw a case file at Stewart with enough force to push a phone book across her desk while screaming he would not take directions from her. Damani reported the incident to Pham, describing the incident as Haid throwing a book at Stewart's head. Damani also stated that Haid admitted the incident occurred and that Haid said he would do it again. Stewart reported the incident to Stransky, who told Stewart she was "making a mountain out of a molehill." Stewart asked for Haid to be fired after the incident. Pham failed to fire Haid, and Stewart felt unable to have a subordinate discharged.
8. When Stewart would wear black clothing, Jama commented on her clothes asking if she was "looking for a husband or a man?" Robleh told Stewart and Damani, "women who wear black need a man" and also stated, "are you looking for a husband? Those are colors that you wear when you look for a man."
9. An audit of Robleh's files revealed forged client signatures and resulted in a requirement that Stewart sign Robleh's files. In response, Robleh stated of the female auditor that if he could get his "hands around her neck he would have choked her to death." And Haid described the female auditor, stating, "She's just a white woman; she doesn't know what she's doing."

The Eighth Circuit listed out many more instances of harassment. Most of the evidence Stewart relied on exist only in Stewart's affidavit, answers to interrogatories, or deposition. One of Stewart's coworkers, an American-born African American female, also quit and filed an EEOC charge alleging a hostile work environment. She provided some supporting evidence for Stewart's claims.

Stewart claims to have reported many of these instances to her supervisor and to human resources, both of whom did not work in the same building as Stewart. Stewart conceded that she never documented the harassment by her subordinate employees in their performance reviews or in any other formal discipline.

The Eighth Circuit reversed the trial court on the hostile environment claim, criticizing the lower court's application of the summary judgment and citing to the recent Supreme Court decision in *Tolan v. Cotton*, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014) (per curiam) ("By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party."). The appellate court held that "fact questions abound," criticized the court's application of the *Faragher/ Ellerth* defense and remanded the case.

The Eighth Circuit held that Stewart presented ample evidence that she was subject to unwelcome harassment based on her sex, race, and/or national origin, and Rise took little or no action to improve the situation. While they were "closer calls," the Eighth Circuit held that Stewart could also establish that he harassment was severe and that Rise knew or should have know about it. In reaching its conclusion, the Eighth Circuit relied solely on the plaintiff's own testimony, which the trial court had rejected as "self serving." The Eight Circuit stated:

"The Federal Rules of Civil Procedure expressly contemplate the use of affidavits, depositions, interrogatory answers, and declarations as permissible forms of evidence at the summary judgment stage. Fed. R. Civ. P. 56(c)(1)(A) & (c)(4). Neither the absence of written reports nor the self-serving nature of affidavits, interrogatory answers, or deposition testimony serve to make such evidence inherently infirm. As such, we generally do not discount such evidence at the summary judgment stage."



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The court held that Stewart's testimony could allow a jury to find that she was subjected to a hostile environment that her supervisors were aware of and failed to correct. The Eighth Circuit noted that the facts are close, and that Stewart's role as supervisor, and allegations that the hostility was perpetrated by subordinates, will make it difficult to prove hostile environment. But the court concluded, "**Under *Tolan v. Cotton***, however, we may not indulge in the discounting or weighing of evidence as requested by Rise."

The Eighth Circuit affirmed summary judgment on Stewart's wrongful termination (discriminatory and retaliatory). It held that Stewart's claim for discrimination largely rested on the facts supporting her claim for hostile environment, and that Stewart could not show any link between the hostile treatment by her subordinates and the decision makers' motive in terminating her. Stewart was preceded and succeeded by members of the exact same protected classes, and Stewart could show no evidence of discriminatory motive leading to her termination. Similarly, a jury could not find that her termination was motivated by retaliation. Stewart filed her EEOC charge after the undisputed evidence proved that Rise had made the decision to fire her.

***Yousuf v. Fairview Health Servs.*, 2015 U.S. App.**

**LEXIS 10236, \*2 (8th Cir. June 18, 2015**

**<http://media.ca8.uscourts.gov/opndir/15/06/143687U.pdf>**

Plaintiff, a Muslim woman of Somali national origin, brought claims under Title VII and 42 U.S.C. § 1981, claiming that Fairview discriminated against her on the basis of her national origin, race, sex, pregnancy, and religion when it terminated her for failing to return from a leave of absence. The Court of Appeals affirmed summary judgment on all claims except the pregnancy discrimination claim, finding there was no genuine issue of material fact on those claims.

With respect to the pregnancy discrimination claim, the Court held that the district court "failed to recognize . . . that Title VII, as amended by the

Pregnancy Discrimination Act, also prohibits and employer from discriminating against a woman because of her capacity to become pregnant." Accordingly, the Court partially vacated the district court's grant of summary judgment and remanded the matter to consider in the first instance whether the record presented sufficient evidence to allow a jury to infer discrimination based upon Yousuf's capacity to become pregnant.

***Greater Omaha Packing Co. v. NLRB*, F.3d. , 2015**

**U.S. App. LEXIS 10439 (8th Cir. June 22, 2015),**

**<http://media.ca8.uscourts.gov/opndir/15/06/141651P.pdf>**

In April 2012, ten to twelve employees left their workstations at Greater Omaha Packing Co.'s meat processing plant to protest working conditions. Plant Manager Jose Correa agreed to meet with them at the end of the day, and the employees complained they were not paid enough and that the conveyors were moving too fast for current staffing levels. In May 2012, the conditions had not improved, so Jorge Degante planned a work stoppage for May 14 at 10:00 a.m. Degante asked co-worker Susan Salgado to inform the other employees, which she did. Carlos Zamora was among the employees who had learned of the work stoppage.

At 9:30 a.m. on May 14, Correa summoned Zamora to his office and asked what he wanted. When Zamora responded that he wanted a pay increase, Correa told him he was fired. Zamora was escorted from the plant.

Shortly after 9:30 a.m., Degante was summoned to Garcia's office where Correa and Garcia were waiting. Garcia accused Degante of being the one "agitating people." Degante denied doing anything but agreed he was not happy with his salary. Degante was fired.

Later that morning, four supervisors including Correa and Garcea spoke to Salgado in the supervisor's locker room. Correa accused her of being one of the leaders of the strike and stated, "In here, there are no witnesses. You didn't take good care of your job. You are fired." Salgado was escorted from the plant, and the strike did not occur.



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At the ALJ hearing, Greater Omaha disputed the factual allegations of all three terminations.

After the evidentiary hearing, the ALJ first found that the three employees were terminated in retaliation for organizing or implementing a collective walkout to protest working conditions, and the Board affirmed. The Eighth Circuit affirmed the Board's decision, finding that there were "no extraordinary circumstances" causing [it] to question the ALJ's well-supported credibility findings.

Next, the ALJ concluded that the NLRB's General Counsel failed to "prove illegal interrogations and/or surveillance." The General Counsel appealed, and the Board found in the General Counsel's favor and modified the ALJ Decision and Order accordingly. The Eighth Circuit reversed the Board's modification. With respect to the coercion claim, the Board focused on Correa asking Zamora, "what is it that [Zamora] wanted."

The Eighth Circuit concluded that the question did not coerce Zamora not to exercise his rights, and therefore Greater Omaha did not engage in unlawful interrogation/coercion. Finally, the Eighth Circuit also reversed the Board's decision on the illegal surveillance claim. Citing *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984) for the proposition that "absent a tendency to coerce, surveillance or creating the impression of surveillance does not constitute a § 8(a)(1) violation," the Court reiterated that there was no evidence that any coercion took place. Accordingly, Greater Omaha did not engage in illegal surveillance.

**[Wagner v. Gallup, Inc., F.3d., 2015 U.S. App. LEXIS 9856 \(8th Cir. June 12, 2015\)](http://media.ca8.uscourts.gov/opndir/15/06/142746P.pdf)**  
**<http://media.ca8.uscourts.gov/opndir/15/06/142746P.pdf>**

Rodd Wagner sued his former employer, Gallup, Inc., claiming age discrimination and misappropriation of his likeness. The Eighth Circuit affirmed summary judgment on both claims.

Wagner worked for Gallup for 12 years as a subject matter expert, which included authoring two best selling books on managing employees. Wagner alleged that his new supervisor ("Go-To"), a 35-year old, terminated his employment due to his age. Wagner alleged that Gallup maintained an overall

culture of ageism, was terminating older employees, and in the sole conversation Wagner had with his new supervisor the supervisor used the terms "old school" and "historically."

After his termination, Gallup continued to state on its website "Rodd Wagner is a *New York Times* bestselling author and a principal of Gallup;" Wagner argued that failing to modify this statement to include "former principal" appropriated his name or likeness.

The Eighth Circuit held that the use of the terms "old school" and "historically," in the context of the discussion (which was audio recorded) could not allow a jury to find that the terms were evidence of age discrimination: "Bogart used the word 'historically' when talking to Wagner about how to get Wagner to think differently about certain concepts than Wagner had *in the past*—a temporal reference.

Further, Bogart did not, as Wagner alleges, call Wagner 'old school.' 'Old school' is used during the conversation not to describe Wagner, but rather in response to Wagner's expressed frustration that Gallup did not use [materials from one of his books] more and his perception that he was the only one touting the use of his concepts in practice."

The court further held that Wagner did not provide sufficient evidence of an overall ageist culture because, inter alia, he did not demonstrate comparators were treated more favorably. In his appeal, Wagner objected to the district court's denial of his motion to compel comparator evidence that would have supported his age discrimination claim. In a footnote without any discussion, the Eighth Circuit rejected Wagner's appeal stating simply that the district court did not commit a gross abuse of discretion.

The Eighth Circuit also affirmed dismissal of Wagner's appropriation claim because a jury could not find that Gallup acted intentionally to appropriate Wagner's likeness, an essential element of the tort claim.

Finally, the court affirmed a sanction upon Wagner's attorney for improperly issuing a trial subpoena. The attorney had signed subpoenas requesting two witnesses appear at courthouses in Nebraska and the



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District of Columbia for video-conference testimony at the Minnesota courthouse, for five days. The court held that the Rules of Civil Procedure did not provide the authority for such subpoenas and upheld the monetary sanction against the attorney. The court further noted that one of the two witnesses was subject to a protective order that had been entered previously in the case.

**[Watson v. Heartland Health Labs., Inc., F.3d, 2015 U.S. App. LEXIS 10738 \(8th Cir. June 25, 2015\) http://media.ca8.uscourts.gov/opndir/15/06/142402P.pdf](http://media.ca8.uscourts.gov/opndir/15/06/142402P.pdf)**

Plaintiff Chavonya Watson was employed as a probationary phlebotomist for Defendant Heartland Health Labs for approximately 90 days. On September 10, 2012, Watson was assigned to draw blood from patient

Charles Ramsey at Plaza Manor, one of the locations to which Watson rotated in her position. Ramsey physically assaulted Watson by touching her inside thigh and moving his hand upwards. Watson pushed him away, but Ramsey's behavior continued until Watson walked away. Ramsey also attempted to forcibly kiss Watson.

Watson immediately reported the incident to her supervisor, Michelle Gaunt, who relayed the information to her supervisor, Tina Akers. Gaunt entered an alert on the file that only male phlebotomists were to draw blood from Ramsey, and Watson was not required to provide services to him again. Watson also requested to move to another location, but that request was denied.

Between September 10 through September 21, 2012, Ramsey harassed Watson in the hallways of the facility, referring to her as a "bitch," a "nigger," and warning her, "They're putting me out, bitch. I'm going to get you." Meanwhile, Watson received disciplinary action from Heartland, including two verbal warnings and a 30-day extension of her probationary period. On Monday, September 24, 2012, Watson sent a text message to someone at Heartland indicating she had a flat tire. That same day, Ramsey was removed from the Plaza Manor.

Watson did not come into work for two days, and did not answer or return several phone calls from Heartland. Watson testified that she stopped answering her phone from Heartland, and simply Court concluded "an objective person would not find that Ramsey's conduct was sufficiently pervasive to poison Watson's work environment or permeate it with intimidation, ridicule, and insult." Deleted the messages without listening to them. Under Heartland's policy, an employee is considered to have voluntarily abandoned their job after two consecutive days of absence without properly notifying Heartland. Accordingly, on September 26, 2012, Heartland considered Watson to have voluntarily abandoned her job. Watson sued Heartland, claiming a hostile work environment and retaliation under the Missouri Human Rights Act. The district court dismissed her claims on summary judgment.

The Court first found that Ramsey's seven instances of harassment over the course of ten days – each of which lasted only seconds, did not rise to an actionable level of a hostile work environment. Given the short duration of Ramsey's actions.

The Court next addressed Watson's constructive discharge element, and found that Watson "was not reasonable in voluntarily abandoning her job after giving her employer only ten working days to remedy the perceived intolerability."

Finally, the Court addressed Watson's retaliation claim and found that she did not suffer any adverse action, and that even if she did, she could not show a causal link to Watson's protected activity. To demonstrate adverse action, a plaintiff must show some tangible change in employment conditions or damage to her. The Court noted that Heartland did not reduce Watson's pay, lower or hours, or change her job duties, and therefore she could not demonstrate any damage. Moreover, Watson could not demonstrate causation. Watson had received two warnings prior to engaging in protected conduct, she admitted one of her verbal warnings was legitimate, and she admitted that she "didn't have a problem with extending the [probationary] period" because she "needed more time . . . to be consistent and things like that." Accordingly, the Court affirmed the district court's dismissal of Watson's retaliation claim.



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**Ninth Circuit**

**Allen v. Bedolla, F.3d , No. 13-55106, 2015 WL 3461537 (9th Cir. June 2, 2015)**

The Ninth Circuit vacated a class action settlement agreement for procedural deficiencies in the court's approval process.

The case started over six years ago when plaintiff Jeffrey Allen ("Allen") filed an action in state court against Labor Ready Southwest ("Labor Ready") on behalf of day laborers alleging violations of state and federal labor laws. Labor Ready successfully removed and, after the court denied certification and granted summary judgment as to many of Allen's claims, it remanded the remaining claims to state court. Allen appealed. In the midst of these proceedings, the parties engaged in two unsuccessful mediations and finally negotiated a settlement after a third in October 2012.

The three key provisions of the settlement included (1) a gross settlement amount of \$4.5 million that would revert to Labor Ready after claims made, attorneys' fees, and administration costs; (2) injunctive relief; and (3) an agreement that Labor Ready would not contest an award of 26% of the \$4.5 million common fund. Upon learning of these details, plaintiffs from other actions against Labor Ready, which had been litigated almost as long as Allen's, sought to intervene. The district court denied their motion as untimely but provided them an opportunity to object at the preliminary approval.

The court granted final approval in August 2013, overruling four objections with little discussion.

After affirming the district court's denial of the motion to intervene, the Ninth Circuit went on to remind the district court of the heightened procedural requirements placed on it when reviewing the fairness of a class action agreement, especially in cases where the parties negotiated in the absence of certification. This requirement compelled the court to provide written responses to any non-frivolous objection.

Moreover, the Ninth Circuit expected more reasoning from the district court to justify the settlement in light of three signs indicating that self-interest of class counsel drove the negotiations rather than interests of the class: (1) disproportionate fee arrangement; (2) defendant would not object to the arrangement, and (3) reverter of unclaimed funds to defendant. Although the Ninth Circuit did not categorically bar such agreements, it noted the district court had a "special 'obligation'" to assure fairness and provide a reasoned analysis given these facts. The court also noted that any award of attorney fees must only be awarded after the court provided adequate opportunity to object *after* counsel completed and filed its motion for fees.

**International Broth. Of Teamsters, Airlines Div. v. Allegiant Air, LLC, F.3d , No. 14-16465, 2015 WL 3540907 (9th Cir. June 8, 2015).**

The Ninth Circuit vacated a preliminary injunction enjoining changes to policies pending negotiations with a recently recognized union under the Railway Labor Act ("RLA").

For approximately a decade, defendant Allegiant Air ("Allegiant") had received and addressed pilot grievances through an advocacy group organized at Allegiant's request (the Allegiant Air Pilots Advocacy Group, or "AAPAG"). Allegiant and the AAPAG also negotiated several company policies addressing leave, pay, scheduling, and other issues that mattered to them. Six years into this relationship, the parties negotiated the most recent set of policies. Two years later, the pilots sought to unionize with the Teamsters. In the unionizing campaign, the AAPAG took the position that the pilots did not have a binding contract with the company and the Teamsters represented to the Board that the pilots did not have an RLA representative. The Board held an election and the pilots voted to unionize. Two weeks later, the

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Teamsters notified Allegiant that it intended to negotiate a collective bargaining agreement and it expected Allegiant would not make changes to its work policies in the meantime. Allegiant did, the Teamsters filed suit, and the district court granted a preliminary injunction.

The Ninth Circuit first analyzed whether the court had jurisdiction to issue the preliminary injunction, finding in the affirmative. The Ninth Circuit noted that district courts have the power to enjoin a carrier from changing a bargaining agreement while the parties complete bargaining mandated by the RLA. Allegiant, however, argued that the district court did not have jurisdiction to decide whether the AAPAG represented the pilots such that they had the power to enter into a collective bargaining agreement that the carrier could be enjoined from changing. Although the Ninth Circuit agreed that the district court could not decide who *currently* represented the pilots, as a matter of first impression, it found no reason to prohibit a determination regarding previous representation. Although it noted estoppel issues were implicated by the Board's apparent acceptance of the Teamster's representation that the pilots were unrepresented at the time of the election, it found Allegiant had waived this argument by not meaningfully addressing it in its briefing.

The Ninth Circuit next analyzed whether the AAPAG did represent the pilots for purposes of collective bargaining under the RLA, finding it did not. The Ninth Circuit emphasized the need for certainty in this arena, noting several implications that arose from the recognition of a group as an RLA representative, including legal obligations imposed on both the employer and representative. Given the needed clarity, the Ninth Circuit found that an entity becomes an RLA representative only when certified by the Board or voluntarily recognized by the employer. The Ninth Circuit found no evidence that the AAPAG ever represented itself as the pilots' RLA representative (rather than a non-RLA employee committee), much less that Allegiant recognized the AAPAG for that purpose. Accordingly, the parties had not entered into a collective bargaining agreement that the district court could enjoin changes to pending the Teamster's negotiation.

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### Tenth Circuit

#### Rock v. Levinski, June 29, 2015

Plaintiff Joyce Rock was terminated from her position as principal of a school in the Central Consolidated School District after she spoke at a public meeting in opposition to a proposal by the District's administration to close her school. Rock expressed her opinion that some students at the school would not be able to succeed at another school and would drop out. The District then determined that the school would remain open, but gave Rock a "growth plan" indicating that she should only voice her opposition to the Superintendent outside of the work place and work time.

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However, the Superintendent decided to terminate her employment. Rock brought suit under 42 U.S.C. 1983 against the District's Board of Education and Superintendent Levinski, alleging that they violated the First Amendment by retaliating against her for her speech. The District Court of New Mexico granted summary judgment in favor of Defendants, concluding that (1) Rock's speech was not protected because it was made pursuant to her official duties; (2) even if Rock did not speak in her official capacity, the District's interests in efficient public service outweighed Rock's interest in the speech; and (3) Levinski was entitled to qualified immunity because he did not violate a clearly established First Amendment right.

The Tenth Circuit affirmed on the second ground. Claims by public employees that they have suffered retaliation for exercising their right to speak are subject to a five-part test: (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. The Court resolved the appeal on the third element, which it defined as "whether the government had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer." The Court was required to consider "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." The Court found that because, as a principal, Rock was charged by New Mexico law with carrying out District policy, and her speech did not expose corruption or improper conduct but merely expressed her opposition to District policy, the right of the district to expect support for its policies from upper managers outweighed Rock's right to express her opinion.

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### Eleventh Circuit

**No Cases to report**

### DC Circuit

**No Cases to report**