Monthly Update for March 2015

MONTHLY CIRCUIT UPDATES

First Circuit

Soto-Feliciano v. Villa Cofresí Hotels, Inc.

First Amendment protected New York City police officer from retaliation where he spoke out against precinct-wide quota policy. While plaintiff was responsible for making routine arrests, since it was not his job duty to formulate, implement or provide feedback on police policy, his speech was constitutionally protected. Also, plaintiff spoke as a citizen because, in speaking out to his commanders, his speech was made through "channels available to citizens generally.

Vaello-Carmona v. Siemens Medical Solutions USA, Inc.

Vaello filed a complaint against Siemens alleging that he was terminated because of his disability. Approximately one month after filing the complaint Plaintiff died. After his death, the estate and relatives of Vaello filed a motion to substitute themselves as Plaintiffs. The District Court for the District of Puerto Rico denied the petition. Upon appeal, the Court of Appeals for the First Circuit vacated and remanded the case holding that claims of employment discrimination and employment disability discrimination are inheritable under Puerto Rico law.

Raymond James Financial Services, Inc. v. Fenyk

The District Court for the District of Massachusetts vacated an arbitration award of $600,000.00 in back pay in favor of stockbroker due to alleged unlawful termination, concluding that arbitrators lacked authority to grant said money because the employee did not bring claims under the state law applied by the arbitrators. The Court of Appeals for the First Circuit reversed the District Court's judgment and confirmed the award, where the arbitration decision was not beyond the scope of the panel's authority and, according to the court's limited scope to review arbitration awards, a court must uphold an arbitration award regardless of its legal or factual correctness, if it draws its essence from the contract that underlies the arbitration proceeding.

Ayala v. Shinseki

Plaintiff brought civil action against the Department of Veterans Affairs, alleging her former employer retaliated against her in violation of Title VII anti-retaliation provisions after she filed several sexual harassment charges before the Equal Employment Opportunity Commission ("EEOC"), all of which were dismissed by the EEOC. The District Court for the District of Puerto Rico granted partial summary judgment in favor of defendant dismissing all but one of Plaintiff's retaliation claims because they were time barred. The Court of Appeals for the First Circuit affirmed the judgment appealed rejecting Plaintiff's argument that the continuing violation doctrine applies to the set of facts of the case. The First Circuit held that the employment actions challenged in the claim were discrete acts outside of the 300 day statute of limitations period.

Submitted by:
José R. González Nogueras, Esq. and Mr. Gregory Figueroa
Email: jgonzalez@jgl.com
Jiménez, Graffam & Lausell
PO Box 366104
San Juan, Puerto Rico 00936-6104

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

Second Circuit

Robinson v. Concentra Health Services, ___ F.3d ___, 2015 U.S. App. LEXIS 4757 (2d Cir. March 24, 2015)

Judicial estoppel precluded plaintiff in ADA claim from claiming in litigation that she was qualified to perform the duties of her position where, in applying for Social Security disability benefits, she claimed she was fully disabled due to multiple sclerosis.

Submitted by:
Stephen Bergstein
Email:steve@tbulaw.com

Third Circuit

McMaster v. Eastern Armored Services, Inc., 780 F.3d 167 (3d Cir. 2015), 2015 WL 1036035 C.A. 3, (N.J.), March 11, 2015

The FLSA requires that non-exempt employees be paid one and one-half times their regular hourly rate of pay for all hours worked in excess of forty per week. One established exemption is the Motor Carrier Act Exemption, 29 U.S.C. Sec. 213(b)(1), which exempts from overtime pay "any employee with respect to whom the {United States} Secretary of Transportation has the power to establish qualifications and maximum hours of service," generally, drivers of commercial motor vehicles. However, in 2008, Congress enacted the SAFETEA-LU Technical Corrections Act, P.L. 110-244, 122 Stat. 1572, ("Corrections Act"), which created an exception to the Motor Carrier Act Exemption. Employees of motor carriers who hold jobs that, "in whole or in part," affect the safe operation of vehicles lighter than 10,000 pounds, other than vehicles designed to transport hazardous materials or large numbers of passengers, are now entitled to overtime pay under the FLSA. Corrections Act, Sec. 306(c).

The plaintiff in *McMaster* was a security guard/driver for the defendant, an armored courier company, who's job consisted of driving armored vehicles on certain days and riding as a passenger in armored vehicles on other days to provide security. The vehicles she drove or rode in varied from day to day. Fifty-one percent of her time was spent working on vehicles rated heavier than 10,000 pounds, and 49% of her time was spent working on vehicles rated lighter than 10,000 pounds. She received no overtime pay for work performed in excess of 40 hours per week. The District Court entered summary judgment for the plaintiff. On appeal, the Third Circuit affirmed.

The *McMaster* Court found that the plain language of the Corrections Act mandated this result. "[W]here the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." The plain language of the Corrections Act mandates that any employee of a motor carrier who's job "in whole or in part" involves the operation of vehicles lighter than 10,000 pounds is entitled to overtime pay under the FLSA. "We see no plausible alternative construction, and neither Eastern nor any of the authorities it cites attempt to offer one. Nor does Eastern point to legislative history probative of a drafting error."

Although no other circuit court had yet directly addressed this precise issue, both the Fifth and Eighth Circuits have noted that the plain language of the Corrections Act would entitle employees such as the plaintiff to overtime pay under the FLSA.

The defendant attempted to rely on a series of District Court cases that, in turn, relied on language in a Seventh Circuit case, *Collins v. Heritage Wine Cellars, Ltd.*, 589 F.2d 895, 901 (7th Cir. 2009). The *Collins* Court opined that "[d]ividing jurisdiction over the same drivers, with the result that their employer would be regulated under the Motor Carrier Act when they were driving the big trucks and under the Fair Labor Standards Act when they were driving trucks that might weigh only a pound less, would require burdensome record-keeping, create confusion, and give rise to mistakes and disputes." *Id.* Rejecting this analysis as a "policy statement," the *McMaster* Court reasoned that "{n}either history nor policy, however, can overcome an express change to the statutory scheme."

The *McMaster* Court expressly declined to address two additional issues under the Corrections Act exception to the Motor Carrier Act Exemption. First, the *McMaster* Court declined to consider the defendant's argument that the plaintiff could claim overtime only for those workweeks in which she actually worked on vehicles lighter than 10,000 pounds. The argument had not been raised at the District Court level and was therefore waived.

Second, the *McMaster* Court declined to "affix a firm meaning to the term 'in part,'" reasoning that an employee who spent 49% of her time on vehicles rated at less than 10,000 pounds would easily meet that standard under any definition of the term.

The plaintiff in *Werkheiser* served as an elected official on Pocono Township's three-member board of supervisors. In 2008 he was appointed by his board colleagues to serve as the Township's "Roadmaster," that is, a director of public works. During the course of 2012 the plaintiff, in his capacity as an elected board member, publically criticized certain personnel actions approved by his fellow board members. In December 2012, those board members decided that they no longer wanted the plaintiff to serve as Roadmaster, and in January 2013, they acted to deny the plaintiff reappointment into that position. The plaintiff commenced litigation, alleging in part that he had been denied reappointment as Roadmaster as a result of speech he expressed in his capacity as an elected official, in alleged violation of the First Amendment. After removing the case to federal court, the defendants moved to dismiss the complaint on the ground, *inter alia*, that they were entitled to qualified immunity on the First Amendment claim. The District Court denied the defendants' qualified immunity claim. On appeal, the Third Circuit reversed.

Under *Saucier v. Katz*, 533 U.S. 194 (2001), a two-step analysis is applied to determine whether a public employee defendant is entitled to qualified immunity from suit on a claimed violation of a federal constitutional right: whether the facts alleged by the plaintiff show the violation of a constitutional right, and whether the right at issue was clearly established at the time of the alleged misconduct. The steps may be applied in either order in the court's discretion. A right is deemed "clearly established" if, at the time of the challenged conduct, the contours of the right, defined at the appropriate level of specificity, are sufficiently clear that every reasonable official would have understood that the challenged conduct violates that right.

The *Werkheiser* Court found that the First Amendment right asserted by the plaintiff was not "clearly established" in two respects. First, the *Werkheiser* Court held that it was not clearly established that an elected official is entitled to First Amendment speech protection. Under *Garcetti v. Ceballos, 547 U.S. 410 (2006),* public employees are not entitled to First Amendment protection for speech in which they engage as public employees in the course of performing their public employee duties. Canvassing the case law that exists currently, the *Werkheiser* Court concluded that it was unsettled whether the rationale of *Garcetti* applies to elected officials who speak in the course of performing the responsibilities of their elected offices. The *Werkheiser* Court itself also suggested conflicting reasons why the logic of *Garcetti* could and could not be applied to elected officials. Without attempting to resolve the issue, the *Werkheiser* Court concluded that the plaintiff's entitlement to First Amendment speech protection as an elected official was not clearly established.

Second, the *Werkheiser* Court found that it was not clearly established that the type of retaliation alleged by the plaintiff would violate the First Amendment. The plaintiff is an elected official. Established case law holds that the First Amendment rights of an elected official such as the plaintiff are violated when his ability to serve in his *elective office* is infringed upon in retaliation for his speech. It is less clear, however, that First Amendment protection extends to *ancillary positions* to which an elected official may be appointed by his colleagues. It is clearly established that a public official such as the plaintiff cannot be excluded from elected office or have his ability to fulfill his elected obligations impaired. It is less clear under existing precedent whether the same logic applies to ancillary positions to which the elected official may be appointed by his peers as long as his ability to serve in his elected position remains unimpaired. Once again declining to decide the issue, the *Werkheiser* Court found no clearly established right that was applicable to the plaintiff's claim. The *Werkheiser* Court therefore concluded that the defendants were entitled to qualified immunity.

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

Stephen E. Trimboli is a founding member of the law firm of Trimboli & Prusinowski, located in Morristown, New Jersey. Mr. Trimboli specializes in labor and employment law on behalf of management, representing public and private sector employers in the full range of labor and employment law issues. His practice also includes commercial litigation, administrative law, occupational safety and health law, interest arbitration, police and fire disciplinary hearings, pension law disputes, appeals, wage and hour law, and EEO compliance. He is a member of the New Jersey chapter of the Federal Bar Association, and regularly reports on labor and employment law developments in the Third Circuit. He is a graduate of the Johns Hopkins University and the New York University School of Law.

Fourth Circuit

Fraternal Order of Police Metro Transit Police Labor Committee, Inc. v. Washington Metropolitan Area Transit Authority, 780 F.3d http://www.ca4.uscourts.gov/Opinions/Published/141332.P.pdf

The Washington Metropolitan Area Transit Authority ("Transit Authority") operates the Metro rail and bus systems in Washington, D.C., Maryland, and Virginia. As part of that work, the Transit Authority is authorized to employ a police force, the Metro Transit Police Department ("MTPD"), pursuant to a collective bargaining agreement with the officers. The plaintiff union serves as the bargaining agent of the officers. Under the collective bargaining agreement, officers may be terminated only for just cause pursuant to a grievance procedure that culminates in arbitration.

In 2011, the Transit Authority fired two officers for engaging in physical altercations and making false statements. The union filed grievance actions on behalf of both officers and pursued those actions to arbitration. The Board of Arbitration overturned the terminations, finding that suspension was the appropriate remedy. Accordingly, the Board of Arbitration ordered that the Transit Authority reinstate both officers.

The union again filed grievances on behalf of both officers. However, rather than request arbitrations through the grievance process, the union filed an action in district court. The union alleged that the Transit Authority failed to comply with the initial arbitration awards in violation of the collective bargaining agreement. The district court granted summary judgment in favor of the union and ordered that the Transit Authority reinstate both officers. The Transit Authority appealed.

On appeal, the Fourth Circuit joined the Third and Seventh Circuits and held that when an employee is terminated, ordered reinstated by an arbitrator, and then terminated again for an independent reason, the employee cannot challenge the second termination through an action seeking enforcement of the first arbitration award. The Fourth Circuit found that the Maryland Commission's denial of the officers' applications for recertification was an independent basis for terminating the officers the second time, as the recertification issue was not before the Board of Arbitration during the initial grievance process. Fourth Circuit noted that the union provided reasons for questioning whether the Transit Authority terminated the officers for "just cause" under the collective bargaining agreement, but the court said the union had to pursue such an issue before the Board of Arbitration. Accordingly, the Fourth Circuit reversed the district court's order requiring reinstatement.

The Fourth Circuit noted that the union provided reasons for questioning whether the Transit Authority terminated the officers for "just cause" under the collective bargaining agreement, but the court said the union had to pursue such an issue before the Board of Arbitration. Accordingly, the Fourth Circuit reversed the district court's order requiring reinstatement.

Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (4th Cir. 2015), http://www.ca4.uscourts.gov/Opinions/Published/132212.P.pdf

The plaintiff initially was hired by the clerk of court to work as an office assistant. She was later promoted to deputy clerk and was assigned to assist patrons with inquiries at the front desk. The plaintiff, who had been diagnosed with social anxiety disorder, began experiencing extreme stress, nervousness, and panic attacks while at the front counter. The plaintiff spoke with and sent emails to her direct supervisors and to the clerk of court requesting to be assigned to a role with less direct interpersonal interaction. After three weeks with no action on the plaintiff's request for accommodation, the plaintiff's employment was terminated although she had never before received any negative performance review.

The plaintiff brought suit against the Administrative Office of the Courts ("AOC") under the Americans with Disabilities Act (ADA), including claims for disability discrimination, retaliation, and failure to accommodate. The district court granted summary judgment for the AOC on all counts. The district court found that the plaintiff was not disabled as a matter of law and that she had therefore failed to establish a prima facie case of disability discrimination and failure to grant a reasonable accommodation. The district court also found that there was no evidence in the record that the clerk of court knew of the plaintiff's request for an accommodation at the time the plaintiff was fired, and that the plaintiff, therefore, failed to establish a prima facie case of retaliation. On appeal, the Fourth Circuit reversed the dismissal of the ADA claims. The court first held that the district court erred by failing to consider all of the evidence in the record and by resolving disputed facts in favor of the AOC. For example, the district court concluded, based on the report of the AOC's expert and a private investigator's report of the plaintiff's behavior, that the plaintiff was not disabled; the court omitted any mention of the plaintiff's expert's opinion that the plaintiff was disabled under the ADA. In addition, the district court found that there was no evidence that the clerk of court knew the plaintiff had requested an accommodation even though it was undisputed that the plaintiff emailed an accommodation request to the clerk of court and discussed the request in person prior to her termination. The Fourth Circuit held, contrary to the district court's order, that disputed issues of material fact existed with regard to whether the plaintiff was disabled and whether the defendant knew of that disability at the time the plaintiff was terminated.

The Fourth Circuit next addressed the AOC's claim that the plaintiff did not have a disability as a matter of law. The EEOC has identified "interacting with others" as a major life activity under the ADA. Applying the familiar two-step *Chevron*[1] analysis, the Fourth Circuit determined the EEOC's regulation was reasonable and therefore entitled to deference. The Fourth Circuit found that the plaintiff's testimony that front counter work caused her extreme stress and anxiety attacks was sufficient to create a disputed issue of fact whether her social anxiety disorder substantially limited her interactions with others.

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)

Assessing the prima facie case for the retaliation claim, the Fourth Circuit found it undisputed that the plaintiff engaged in protected activity by requesting an accommodation and that the AOC took an adverse action against her by terminating her employment. The Fourth Circuit held that the close temporal proximity of the request for accommodation and the termination decision was sufficient to establish a disputed issue of fact as to the causation element of the plaintiff's prima facie case. The Fourth Circuit again found sufficient evidence of pretext and concluded that the retaliation claim should likewise proceed to trial. Finally, the Fourth Circuit held that the plaintiff

presented sufficient evidence in support of her failure-to-accommodate claim. The evidence of the plaintiff's disability, the AOC's notice of her disability, and the failure to accommodate that disability was sufficient to establish those elements of the prima facie case, and the court also found sufficient evidence that the plaintiff could perform the essential functions of a deputy clerk. First, the court found that working at the front desk was not an essential function of the position of deputy clerk. Second, the court found that there was a genuine dispute of fact whether the plaintiff could have performed the essential function of a deputy clerk with the accommodation that she requested additional training and limited duty at the front desk.

***McCleary-Evans v. Maryland Department of Transportation, State Highway Administration*, 780 F.3d 582 (4th Cir. 2015), http://www.ca4.uscourts.gov/Opinions/Published/132488.P.pdf.**

The plaintiff, an African American female, brought a Title VII action against the Maryland Department of Transportation, State Highway Administration ("Highway Administration"), alleging that the Highway Administration did not hire her for either of the two positions for which she applied because of her gender and race. The plaintiff alleged that her applications were subject to review by a committee that was "influenced and controlled" by a White male and a non-Black female who, based on a "history of hires," had predetermined to hire white candidates. The district court granted the Highway Administration's motion to dismiss. On appeal, the Fourth Circuit applied the holding in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), that a plaintiff is not required to plead facts sufficient to make a prima facie case in order to survive a motion to dismiss, in light of the Supreme Court's later decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Assessing the plaintiff's complaint under the *Twombly/Iqbal* "plausibility" standard, the Fourth Circuit found that the plaintiff did not allege facts sufficient to support a claim that the Highway Administration failed to hire her *because* of her sex or race. The Fourth Circuit noted that although the plaintiff alleged that the decision to hire white candidates was "predetermined" during the, the plaintiff failed to include any allegations regarding what occurred during the interview process that would support her claim. Further, the Fourth Circuit noted that the plaintiff failed to allege any facts regarding the hired candidates' qualifications, experience, and performance during their interviews, permitting only speculation that those applicants were less qualified for the jobs.

The Fourth Circuit concluded that the plaintiff's allegations of bias and discrimination were merely conclusory and "stopped short of the line between possibility and plausibility," as required by *Iqbal* and *Twombly*. Accordingly, the Fourth Circuit affirmed the district court's order dismissing the plaintiff's claims.

Judge Wynn, dissenting part, concluded that the plaintiff had stated a claim for race discrimination. Judge Wynn found that the plaintiff's allegations went beyond what the Supreme Court found sufficient in *Swierkiewicz* and that she had stated a plausible claim for race discrimination.

Submitted by:
Paul K. Sun, Jr.
Ellis & Winters LLP
Post Office Box 33550
Raleigh, North Carolina 27636
Direct Telephone: 919-865-7014
Office Telephone: 919-865-7000
Direct Facsimile: 919-573-5514
Office Facsimile: 919-865-7010
E-mail: paul.sun@elliswinters.com>

Paul Sun's practice focuses primarily on business litigation and appeals. Sun has experience in the areas of trade secrets and unfair competition, employment law, business and health care fraud (civil and criminal), consumer claims, premises and product liability, and contract disputes. He is a Fellow of the American College of Trial Lawyers , and a member of the American Law Institute. Sun has a B.A. degree from Wittenberg University, a masters degree from Vanderbilt University, and a J.D. degree from Duke University. Before entering private practice, He served as law clerk-

to Hon. J. Dickson Phillips, Jr., of the United States Court of Appeals for the Fourth Circuit.

Sixth Circuit

Michael Keller v. Miri Microsystems LLC, No. No. 14–1430, ___ F.3d ___, 2015 WL 1344617 (C. A. 6, Mar. 26, 2015)
http://www.ca6.uscourts.gov/opinions.pdf/15a0055p-06.pdf

Plaintiff-Keller ("Keller") filed suit against Defendant-Miri Microsystems ("Miri") asserting that he was denied overtime compensation due pursuant to the Fair Labor Standards Act ("FLSA"). Miri obtained summary judgment from the district court, which found that Keller was an independent contractor, and therefore not subject to the provisions of the FLSA. Concluding that there were multiple questions of fact as to whether Keller was an employee or independent contractor, the Sixth Circuit reversed and remanded.

Keller worked as a satellite installation technician, installing and repairing satellite dishes. Keller worked six days a week, from 5:00 am to midnight, taking only Sunday off. He was paid by the job, with an installation lasting approximately four hours, plus travel time, and a repair lasting between one and two hours. After he stopped working for Miri, Keller filed suit alleging that he was denied overtime in violation of the FLSA.

The Sixth Circuit stated that the determination of whether a FLSA plaintiff is an employee or an independent contractor is a mixed question of law and fact. It then cited the economic-reality test, which includes the following six factors:

> 1) the permanency of the relationship between the parties; 2) the degree of skill required for the rendering of the services; 3) the worker's investment in equipment or materials for the task; 4) the worker's opportunity for profit or loss, depending upon his skill; . . . 5) the degree of the alleged employer's right to control the manner in which the work is performed[; and] . . . [6)] whether the service rendered is an integral part of the alleged employer's business.

Analyzing each factor, the court found that there were facts that precluded a finding of summary judgment as to each factor. As to the permanency of the relationship between the parties, the court found a material issue of fact because it was inconclusive as to whether the technicians could engage in other jobs, and thus whether there was an exclusive working relationship between the parties. The court found that Keller was a "skilled" worker, but then held that there was a material question of fact "regarding whether the degree of skill required of Keller shows that he was an employee or an independent contractor." Although the court found that most of the equipment Keller used was common equipment most people would have, it held that "the trier of fact should decide how Keller's capital investments compared to Miri's, and whether Keller's capital investment demonstrates that Keller was economically independent."

The court noted that there was little evidence that Keller could have improved his efficiency such that he could perform more work and gain more profit, but again concluded that there was "a material dispute as to whether Keller could have increased his profitability had he improved his efficiency or requested more assignments." As to the control factor, the court again found material issues of fact regarding the control Miri exercised over how Keller performed his work, whether Miri could effectively discipline Keller, and whether Miri "retained the right to dictate the manner and details" of how Keller performed his duties. Finally, the court found it likely that Keller's role as a satellite-dish technician was integral to Miri's business, holding that this factor would weigh in favor of a finding that Keller was an employee, again precluding summary judgment.

The court concluded that there "were many genuine issues of material fact and reasonable inferences from which a jury could find that Keller was an employee. Summary judgment for the defendant is not appropriate when a factfinder could reasonably find that a FLSA plaintiff was an employee."

A final issue in the case was whether Keller established that he worked enough hours to qualify for overtime pay. The court concluded that based on Keller's testimony and that of Miri, it was likely that Keller worked up to sixty hours a week, entitling him to overtime. The court further held that it was Miri's burden to establish Keller's working hours and whether he would have qualified for overtime, which it failed to do. Therefore, the court reversed the grant of summary judgment and remanded the case for trial.

Charles T. Oxender and Brian Schwartz
MillerCanfield
150 West Jefferson, Suite 2500
Detroit, Michigan 48226 (USA)
T +1.313.496.7921 | F +1.313.496.8453
zavaleta@millercanfield.com

Charles Oxender's specialty area is traditional labor law, collective bargaining, grievance and arbitration processing.With his extensive background in these areas, he can assist clients with negotiating and bargaining collective bargaining agreements and represent clients at arbitration hearings. He also participates in employment litigation matters.

Eighth Circuit

Wagner v. Campbell, 779 F.3d. 761 (8th Cir. 2015)

Plaintiff was employed as an office manager for the Merrick County sheriff's department. In January 2011, Plaintiff's supervisor, Sheriff Kevin Campbell, informed Plaintiff that he wanted to train another employee to perform her job duties so that someone else could operate the office in her absence. Later that month, Campbell complained to Plaintiff that she was not training the employee as requested. Campbell also informed Plaintiff that he received a complaint from a judge about the delay in depositing bond money with the court. He told Plaintiff he wanted to change the office policy to have bond money taken directly to the court rather than deposited in the sheriff's office checking account. Plaintiff expressed concern over the never returned.

Plaintiff sued Campbell and seven members of the board in state district court for, *inter alia*, retaliation for engaging in protected speech under both state and federal law. More than two months later, Defendants sought removal to federal court, which was granted. Plaintiff moved to dismiss the claims against all Defendants except Campbell and sought remand. The Court granted Plaintiff's motion to dismiss but denied her motion to remand. After discovery, Campbell moved for summary judgment on the retaliation claims and his motion was granted. Plaintiff appealed the motion to remand and the motion for summary judgment.

The Eighth Circuit declined to review the district court's decision on the motion to remand, noting that jurisdiction would have existed in the district court from the inception of the 42 U.S.C. § 1983 lawsuit.

The Eighth Circuit affirmed summary judgment on the retaliation claims because Plaintiff failed to demonstrate any adverse employment action. While the Court noted that a reprimand can be an adverse action when the employer uses it as a basis for changing the terms or conditions of the employee's job for the worse, Plaintiff did not produce any evidence suggesting there was any change in the terms or conditions of her employment.

Minnihan v. Mediacom Communs. Corp., 779 F.3d 803 (8th Cir. 2015)

Plaintiff was employed as a technical operations supervisor (TOS) at Defendant's Ames, Iowa, facility. The TOS position required Plaintiff to be in the field for at least fifty percent of the time, which included tasks such as observing technicians performing installations; responding to customer complaints by going to their homes to discuss the complaints and/or fix the technical issue if it hadn't been resolved; being on call twenty-four hours a day, seven days a week, to respond to cable outages; conducting accident investigations when field technicians were involved in an accident; performing unannounced safety checks on technicians; delivering equipment to technicians in the field; and accompanying technicians taking vehicles in for repairs.

On December 1, 2009, Plaintiff experienced a seizure at work. Iowa law prohibits an individual who experienced a seizure from driving until that person has not had an episode of loss of consciousness or loss of voluntary control for six months. Defendant accommodated Plaintiff's driving restrictions by allocating his driving responsibilities to other employees.

Less than six months later, Plaintiff experienced another seizure at work, triggering a second six-month driving restriction. On May 7, 2010, a Human Resource Manager sent a letter to Plaintiff indicating the company could no longer accommodate his restriction and provided him 14 days to apply for positions that did not require driving. On May 20, 2010, Plaintiff's attorney sent a letter suggesting legal action if Defendant terminated him. Over the next two months, the attorneys exchanged letters about the situation, and on July 20, 2010, Plaintiff met with several company representatives about two no-driving positions available in the Des Moines office. Plaintiff was told that if he did not apply for one of the positions and/or did not accept one if it was offered to him, he would be terminated.

On July 25, 2010, Plaintiff sent an email stating the two positions did not work for him because they were in Des Moines and suggested three alternatives, including a suggestion that Defendant accommodate him until his restrictions were lifted in October. Defendant agreed to accommodate him until October, and he returned to work without restrictions after his doctor cleared him to work.

On April 5, 2011, Plaintiff experienced a third seizure at work, restricting him from driving for six months. Defendant offered to transfer Plaintiff to Des Moines, but in May Plaintiff responded that it was unreasonable because he could not drive to and from Des Moines. Defendant suggested Plaintiff arrange transportation or take FMLA leave. On April 26, 2011, Plaintiff did not report to the new position in Des Moines. Defendant suggested transportation options to Plaintiff, including the name of another employee who commuted between the cities and rideshare options between the cities. Plaintiff asked for non-driving positions in Ames, and Defendant replied there were none.

On May 2, 2011, Defendant sent a letter to Plaintiff indicated that if he did not report to work at the new position in Des Moines or submit FMLA paperwork by May 10, 2011, his employment would be terminated. Plaintiff did neither, and his employment was terminated on May 16, 2011. Plaintiff sued under the Iowa Civil Rights Act ("ICRA") and the ADA for disability discrimination and a failure to provide a reasonable accommodation. Defendant removed the action to federal court and the district court granted summary judgment on all counts.

The Eighth Circuit affirmed summary judgment on all counts. With respect to the discrimination claims, the Eighth Circuit held that driving was an essential function of the job, and that Plaintiff was incapable of driving with or without reasonable accommodations. Plaintiff was in the field at least fifty percent of the time, and being in the field required driving. Because Iowa law prevented individuals who experienced seizures from driving for six months, Plaintiff could not perform the essential functions of the job. Accordingly, Plaintiff was not a qualified individual under the ADA or the ICRA.

The Eighth Circuit also affirmed summary judgment on Plaintiff's claim that Defendant failed to provide a reasonable accommodation. Defendant spoke with Plaintiff over the course of several months about possible accommodations, it provided Plaintiff with information about other positions within the company, and it provided him time on the job to apply for other positions. Moreover, Plaintiff declined to accept the offered reassignment, which was not inferior to his current position.

Lyons v. Vaught, ___ F.3d. ___, No. 14-1623 (8th Cir. Mar. 24, 2015), 2015 U.S. App. LEXIS 4755, http://media.ca8.uscourts.gov/opndir/15/03/141623P.pdf

Plaintiff taught a course as a part-time lecturer at the University of Missouri at Kansas City (UMKC). Plaintiff failed a student-athlete in the fall of 2010, and the student-athlete appealed in January 2011. Plaintiff met with the Director of the Program for Adult Education, Reginald Bassa, to defend his grading. Bassa determined the student should be allowed a second midterm paper before resolving

the appeal. Plaintiff was concerned about the legitimacy of the appeals process and the preferential treatment provided to student athletes, and complained to Dean Vaught. Vaught referred the appeal to the Academic Standards Committee, who determined the student athlete should be allowed a second paper. Plaintiff challenged the determination to Vaught, who upheld the Committee's ruling. In November 2011, the student-athlete submitted a second midterm paper, and the appointed committee gave the student-athlete a 75% grade. Vaught instructed the registrar to change the student's grade to a D+.

In late November, Plaintiff met with Chancellor Morton to express his concerns about preferential treatment to student-athletes on campus, and to recommend the Chancellor undertake a comprehensive investigation into preferential treatment of student-athletes. Morton said no. After the meeting, Plaintiff also spoke with Bassa and Vaught and "voiced the same concerns he communicated to Chancellor Morton." Bassa and Vaught told Plaintiff they would speak to Morton, but Plaintiff heard nothing more. Plaintiff's course was eliminated for the spring semester.

Plaintiff sued Bassa and Vaught for First Amendment retaliation, alleging they did not recommend him for reappointment in retaliation for protected speech. Plaintiff's complaint did not allege that he voiced his protected speech directly to Bassa and Vaught, but only to Morton. The district court denied the motion to dismiss, holding that the meeting with Morton concerned speech of a public concern, and the court should not dismiss the complaint because it could not determine from the pleading whether Plaintiff was speaking as a citizen outside the student appeal process.

While the Eighth Circuit agreed with the district court's reasoning, it nevertheless dismissed the claim. Plaintiff acknowledged that his only protected speech was his complaint to Morton; however, the complaint failed to allege that either Bassa or Vaught, the two remaining defendants, were aware of Plaintiff's protected speech to Morton. Therefore, Plaintiff's complaint, as alleged, failed to "clearly establish" that the failure to reappoint Plaintiff was wrongful retaliation because of Plaintiff's protected speech to Morton, and therefore the defendants were entitled to qualified immunity.

Walz v. Ameriprise Fin. Inc., 779 F.3d. 842, No. 14-2495 (8th Cir. Mar. 9, 2015), 2015 U.S. App. LEXIS 3629, http://media.ca8.uscourts.gov/opndir/15/03/142495P.pdf

Plaintiff was employed as Process Analyst for Amerprise in Minnesota. Plaintiff suffered from bipolar affective disorder, which caused her to interrupt meetings, disturb her coworkers, and disrespect her supervisor. Plaintiff was confronted about her behavior and was given a behavioral warning. Plaintiff applied for and received Family Medical Leave Act leave, but never disclosed her disability to Defendant. After returning, Plaintiff's erratic and disruptive behavior returned, and Defendant eventually fired her. Plaintiff filed suit alleging disability discrimination in violation of the Americans with Disabilities Act ("ADA") and the Minnesota Human Rights Act ("MHRA"). The district court granted summary judgment on all claims, concluding that Plaintiff failed to establish a prima facie case because she could not establish at trial that her termination was based on her disability. The court also held that Plaintiff's failure to accommodate claims failed because Plaintiff could not prove that she ever requested an accommodation. The Eighth Circuit affirmed.

With respect to the disability discrimination, the Court declined to address whether the termination was based on her disability, but instead held that Plaintiff was not qualified for her position. Plaintiff admitted that working well with others and being skilled at managing interpersonal relationships were essential functions of her job. Plaintiff disability caused her to be erratic, aggressive, unintelligible and rude in ways that disturbed her coworkers and disrupted the workplace. Therefore, the Court concluded that Plaintiff's disability prevented her from performing the essential function of her position without an accommodation. Moreover, Plaintiff failed to inform Defendant of her disability or request an accommodation, and Plaintiff's disability was not "open, obvious, and apparent" to Defendant. Accordingly, Defendant had no duty to accommodate her. Plaintiff also claimed that Defendant failed to provide reasonable

not force her onto FMLA leave when it allegedly recognized she had a medical problem. The Eighth Circuit affirmed summary judgment on this claim, noting that Defendant provided her leave when she requested it, and that Plaintiff's supervisor suggested Plaintiff take time off when she noticed Plaintiff's behavioral problems.

Beauford v. ActionLink, LLC, ___. F.3d ___, (8th Cir. Mar. 20, 2015), 2015 U.S. App. LEXIS 4539, available at http://media.ca8.uscourts.gov/opndir/15/03/133265P.pdf

In September 2011, the Department of Labor (DOL) began investigating a complaint that ActionLink, LLC, a marketing company, had misclassified some of its employees as exempt under the Fair Labor Standards Act (FLSA) and failed to pay overtime compensation.

Following the DOL's investigation, ActionLink agreed to reclassify the employees as non-exempt and to pay them their missing back wages. The company then sent the employees checks with a purported disclaimer stating that the checks represented "full payment from Actionlink or wages earned, including minimum wage and overtime, up to the date of the check." Some of the employees then sued ActionLink, claiming that they were entitled to additional pay under the FLSA. On summary judgment, the trial court held that the employees were non-exempt, but that the plaintiffs who had cashed ActionLink's checks had waived their rights to pursue additional damages. The Eighth Circuit affirmed the trial court's holding that the employees were non-exempt, but reversed and remanded, holding that by cashing the checks, the employees had not waived their claims. The Eighth Circuit held that signing the checks did not constitute a waiver of FLSA claims. Employers may settle FLSA claims under 29 U.S.C. § 216(b) and thereby avoid paying additional damages and attorneys' fees. But because FLSA rights are statutory and generally cannot be waived, companies can settle claims in only two ways. Prior to filing suit, any settlement must be supervised by the Secretary of Labor. After commencing litigation, employees can waive their rights only if the parties agree on a settlement amount and the district court enters a stipulated judgment.

In an issue of first impression for the Eighth Circuit, it held that "[s]imply tendering a check and having the employee cash that check does not constitute an 'agreement' to waive claims; an agreement must exist independently of payment.'" The Eighth Circuit also held that the DOL did not "supervise" the settlement, because the DOL investigator did not approve the amounts of the checks until one month after the checks were distributed, and were thus not approved prior to being sent to the plaintiffs. The record was also unclear as to whether the DOL investigator approved the waiver language at all.

The Eighth Circuit agreed with the trial court that the employees were non-exempt. The employees were brand advocates employed by a marketing company to promote electronics products. They did not fall within the FLSA exemption for outside salespersons, because their activities were better understood as non-exempt promotional work under 29 C.F.R. § 541.503. They promoted the employer's products to retail store employees. And the brand advocates were not exempt administrative employees under 29 C.F.R. § 541.200, because they followed set procedures and had to seek approval before deviating from them, and their discretion and independence were minimal.

***Jain v. CVS Pharm., Inc.*, 779 F.3d 753 (8th Cir. 2015)**

Dimple Jain, a woman of East Asian descent, sued CVS Pharmacy, Inc. for discrimination and retaliation in violation of the Missouri Human Rights Act. Jain worked as a pharmacist for CVS for several years. Jain complained that she was being discriminated against based on her national origin and her complaint was investigated. Subsequently, Jain was promoted and given a pay raise. Seven months later, Jain was terminated based on several performance deficiencies. The trial court granted summary judgment and the Eighth Circuit affirmed.

At summary judgment, Jain submitted a declaration from her husband stating that she had improved the ranking of her pharmacy in every performance metric. The trial court granted CVS's motion to strike the declaration. Jain's husband's declaration stated that an "arithmetic comparison" of Triple-S scores, KPM scores, and Execution Scorecards showed that the pharmacy had improved in every performance metric after Jain became PIC.

The trial court struck the declaration and its exhibits because Mr. Jain "never worked for [CVS] and did not claim to have industry experience that would allow him to provide testimony analyzing and providing conclusions from [the attached] business records." The Eighth Circuit upheld the motion because Mr. Jain did not have any personal knowledge or perceptions based on industry experience, which are required in order for lay opinion testimony to be admissible.

The appellate court upheld dismissal on the discrimination claim because Jain's only evidence was insufficient to allow a jury to find in her favor. Jain relied exclusively on alleged differential treatment between her and her white male coworker. However, Jain had significantly more serious performance issues that the coworker, because, for instance, she was on a final warning prior to failing an audit, and the coworker was not. The Eighth Circuit upheld dismissal of the retaliation claim because she was promoted after her protected report, and was terminated seven months thereafter—evidence that would preclude a jury from finding that her termination was based on her reports.

***Nassar v. Jackson*, 779 F.3d 547 (8th Cir. 2015)**

Ray Nassar and Gena Smith, both white, sued the school district of Hughes, Arkansas ("school district") claiming they were fired because of their race. A jury found for both plaintiffs and awarded them damages. The Eighth Circuit rejected the defendant's appeal based on the merits of the claims because it failed to preserve that issue for appeal, and remitted the jury's award because the jury improperly decided front pay, a legal issue for the court to decide.

The school district filed a motion for relief under Fed. R. Civ. P. 50(a) that was very vague and short. Later, it renewed the motion under Rule 50(b), providing a much more detailed account of its requests for relief. However, the defendant failed to properly articulate why it believed it was entitled to judgment as a matter of law, stating only that "the defendants would move for a directed verdict based on the plaintiffs' failure to carry their burden on all but the due process claim. And I—I could go through all the evidence, but the Court—I won't go any further." This was not sufficient to state a claim for relief under Rule 50, and thus was not a basis for appeal.

The Eighth Circuit held that a jury is not allowed to determine front pay, and thus reduced the jury's award to omit the front pay award—allowing the plaintiffs to choose between the amounts without the front pay or to seek a new trial on those damages.

Lastly, the Eighth Circuit affirmed the trial court's award of attorneys' fees. In particular, the Eighth Circuit held that it was proper for the trial court to enhance plaintiff's counsel's hourly rate from $250 per hour to $375 per hour based on trial court's determination of "superior legal and advocacy skills." However, because the "results obtained" is one factor relevant to a court's calculation of fees, the appellate court remanded in light of its reduction in the jury's award, "leav[ing] alteration of the fee, if any, to the sound discretion of the district court."

***Conners v. Gusano's Chi. Style Pizzeria*, 779 F.3d 835 (8th Cir. 2015)**

Jacqueline Conners filed a Fair Labor Standards Act (FLSA) collective action against her former employer and a number of associated entities (collectively, Gusano's Pizza) alleging illegal tip pooling. One month later, the Gusano's Pizza restaurants each implemented a new mandatory arbitration policy in the form of an agreement that purports to bind all current employees who did not opt out of the arbitration agreement. The agreement was accompanied by a memorandum specifically explaining that one effect of the agreement is to prevent the employee from joining Conners in the collective action.

The plaintiffs filed an emergency motion to prohibit enforcement of the arbitration agreement to prevent current employees from opting into the collective action. The district court granted the motion citing public policy concerns, including not condoning employers' practice of "cutting plaintiffs off at the knees" with these types of arbitration agreements. The Eighth Circuit reversed and remanding, holding that the plaintiffs lacked standing to pursue the motion.

Monthly Update for March 2015

The Eighth Circuit first held that it had jurisdiction to hear the interlocutory appeal because the district court's order was essentially one for an injunction in form and substance, despite not being called an injunction.

The Eighth Circuit then held that the plaintiffs did not have Article III standing to pursue an injunction in the first place. At the time the plaintiffs filed their emergency motion, only former, and no current, employees had opted into the collective action. Neither counsel for either party was able to state with any certainty that any current employees would soon opt into the class action. Consequently, the Eighth Circuit held that no plaintiff could show that they had any immediate threat of harm, because the arbitration agreement was only enforceable for current employees, not former employees.

The Eighth Circuit also held that the injunction could not be enforced based on the interests of putative class members, because the U.S. Supreme Court held that "the sole plaintiff in an FLSA collective action whose individual claim was mooted during the course of litigation 'ha[d] no personal interest in representing putative, unnamed claimants.'"

Submitted by:
Phillip Kitzer, Attorney
Teske, Micko, Katz, Kitzer & Rochel
Email: kitzer@teskemicko.com
www.teskemicko.com
222 South 9th Street, Suite 4050
Minneapolis, MN 55402
Phone: 612-746-1558

Phillip Kitzer's practice consists solely of representing employees in employment-related disputes. He represents clients in matters involving whistleblower retaliation, employment discrimination and retaliation, and workers' compensation retaliation. He is a past President of the Minnesota chapter of the National Employment Lawyers Association, and currently serves as *ex officio* and Chair of the Legislative Committee.

Eleventh Circuit

Moss v. City of Pembroke Pines, No. 14-11240 (March 31, 2015)

In *Moss v. City of Pembroke Pines*, former Assistant Fire Chief Moss brought a claim against the City for retaliation under §1983 for violations of his First Amendment rights after he was terminated. Moss alleged he was terminated after he spoke out about the City's handling of the budget and pension issues while as a member of the City's pension board. Specifically, while Moss served on the board, the City approved a budget that was insufficient to fund employees' collective bargaining agreements. As management, Moss was not directly affected by the agreements, but was critical of the City's decision and complained to the Chief between January and May 2010. In June 2010, his position was eliminated he was terminated. At trial, the City contended the speech was not protected by the First Amendment because it was made pursuant to official duties, and that the City's interest to avoid dissention in the fire department outweighed

Plaintiff's interest in the speech. The Distct court granted the City's renewed motion for judgment as a matter of law, based on these arguments. The 11th Circuit affirmed, finding that Moss' speech was made in the course of his duties of employment, and not protected. The 11th Circuit concluded that even if the speech was protected, the City's interests to restrict the speech outweighed Plaintiff's wish to express his position.

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

Cathleen Scott & Associates, P.A. offers quality legal services to employers and employees in the areas of labor and employment.