



First Circuit

***Bellone v. Southwick-Tolland Regional School District*, 748 F.3d 418 (1st Cir. May 2, 2014), available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1341P-01A.pdf>.**

Mr. Belone brought action against his former employer alleging violations of the Family and Medical Leave Act (hereinafter, "FMLA"), 29 U.S.C. §2601-2654. The District Court for the District of Massachusetts granted summary judgment for the school district. On appeal, the First Circuit affirmed the District Court's judgment and held that the district court correctly concluded that plaintiff had demonstrated no genuine dispute of material fact that would support a finding that he suffered harm as a result of defendant's late and inadequate notices, and plaintiff did not demonstrate that he could have returned to work within the FMLA period even if defendant had properly notified him of his rights.

***Jones v. City of Boston*, ___ F.3d ___ (1st Cir. May 7, 2014), 2014 WL 1797829, available at <http://media.ca1.uscourts.gov/pdf/opinions/12-2280P-01A.pdf>.**

The District Court for the District of Massachusetts granted summary judgment for the defendants in an action in which 10 police officers, after being terminated or denied employment for testing positive for cocaine, challenged the Boston Police Department's drug testing programs because the hair tests caused a disparate impact on the basis of race in violation of Title VII. The First Circuit held that; (1) the plaintiffs proved a prima facie case of disparate impact under Title VII; (2) the defendants have proffered an uncontested legitimate need to identify those of its members who use illegal drugs. Therefore, the District Court must assess whether the department's drug testing program advances that goal and, if so, whether the plaintiffs can carry their burden of proving a failure to adopt an available alternative that meets the department's legitimate needs while reducing the disparate impact on black employees of the department. Thus, the District Court's judgment is vacated and the case is remanded for further proceedings.

***Climent García v. Autoridad de Transporte Marítimo*, ___ F.3d ___ (1st Cir. May 16, 2014), 2014 WL 1979871, available at <http://media.ca1.uscourts.gov/pdf/opinions/12-2442P-01A.pdf>.**

Climent sued her employer, alleging adverse employment action and a failure to hire on account of sex. A jury found in favor of the plaintiff on both accounts. On appeal, the defendant moved for reversal of the jury verdict, claiming that insufficient evidence was presented at the trial to support the jury's findings and, in the alternative, the defendant requested remittitur of the damages awarded. The First Circuit affirmed the jury's verdict and held that the employer failed to renew its motion for judgment as a matter of law post-verdict, which bars its sufficiency-of-the-evidence claim from review; and with regard to the damages award, the District Court did not abuse its discretion in denying defendant's request for remittitur.

***Ahmed v. Johnson*, ___ F.3d ___ (1st Cir. May 21, 2014), 2014 WL 2111236, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1054P2-01A.pdf>.**

The plaintiff, a North Arab and an Algerian-born Muslim federal employee, brought an employment discrimination action against the Secretary of the Department of Homeland Security claiming that he was denied a promotion for the position of Deportation Officer on account of his religion, race, and national origin. The District Court for the District of Massachusetts granted summary judgment in favor of the defendant. On appeal, the First Circuit held that based on the evidence presented by the plaintiff, which established that he was more appropriately suited for the position than those that were hired and that the history of hiring and promotions for the Deportation Officer positions in Boston entirely excluded African-Americans and Muslims, raised material disputed facts that foreclosed summary judgment. Therefore, the First Circuit vacated the District Court's judgment.



***Velázquez Pérez v. Developers Diversified Realty Corp.*, ___ F.3d ___ (1st Cir. May 23, 2014), 2014 WL 2142517, available at <http://media.ca1.uscourts.gov/pdf.opinions/12-2226P-01A.pdf>.**

Mr. Velázquez filed a Title VII complaint against his former employer in which he claimed that his employer terminated him based on the discriminatory efforts of a female coworker after he rebuffed her sexual advance, and retaliated against him for complaining of sexual harassment. As a matter of fact, after the plaintiff declined the sexual advances of his female coworker, she sent an email to two senior officials of the company and suggested that Mr. Velázquez should be terminated. The District Court for the District of Puerto Rico granted summary judgment in favor of the employer. The plaintiff appealed and the Court of Appeals for the First Circuit held that an employer faces liability if it terminates a worker whose job performance have been maligned by a jilted coworker intent on revenge if: (1) the coworker acted, for discriminatory reasons, with the intent to cause the plaintiff's firing; (2) the coworker's action were in fact the proximate cause of the termination; and (3) the employer allowed the coworker's acts to achieve their desired effect though it knew, or reasonably should have known, of the discriminatory motivation, thus the District Court's grant of summary judgment was vacated in part.

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Third Circuit

***Balik v. City of Bayonne*, ___ Fed. Appx. ___ (3d Cir. May 28, 2014), 2014 WL 2199366, available at www.ca3.uscourts.gov/opinarch/131815np.pdf.**

Balik worked for the City of Bayonne as its Qualified Purchasing Agent from 1995 until August 2010. On August 11, 2010, the plaintiff was called into a meeting with Bayonne's corporation counsel

and business administrator, and was confronted with apparent irregularities and improprieties in the awarding of three public contracts that he had worked on in 2009 and 2010. During the course of the meeting, the corporation counsel placed a phone call to the county prosecutor's office and confirmed that the allegations at issue could be subjected to criminal investigation. The plaintiff stated that he would be willing to undergo the investigation. However, the next day, the plaintiff informed the corporation counsel that he had changed his mind and would retire from his position effective September 1, 2010.

During his deposition, the plaintiff stated that his decision to retire "had nothing to do" with the threatened criminal investigation into the three questionable contracts. He instead attributed his decision to what he termed a "hostile work environment" and to avoid being "written up again for ... asinine things."

Plaintiff filed his complaint the day after he announced his intention to retire, asserting claims under 42 U.S.C. §1983 alleging violations of due process, deprivation of his property interest in his Qualified Purchasing Agent position, retaliation for his exercise of free speech, and denial of his liberty interest in his freedom to work, earn a living and maintain his standing in the community. He also asserted a Fair Labor Standards Act claim alleging improper withholding of payment for unused sick and vacation time, and various state law claims.

On appeal from the District Court's summary judgment dismissing all claims, the Third Circuit affirmed. With respect to the plaintiff's due process, property interest and liberty interest claims, "[i]f an employee retires of his own free will, even though prompted to do so by some action of his employer, he is deemed to have relinquished his property interest in his continued employment for the government, and cannot contend that he was deprived of his due process rights." An employee who resigns or retires is presumed to have done so voluntarily, and the presumption remains intact until the employee presents evidence that the resignation or retirement was procured involuntarily. The Third Circuit recognizes two circumstances in which an



employee's resignation or retirement will be deemed involuntary for purposes of due process claims: (1) "when the employer forces the resignation or retirement by coercion or duress, or (2) when the employer obtains the resignation or retirement by deceiving or misrepresenting a material fact to the employee," citing *Leheny v. City of Pittsburgh*, 183 F.3d 220, 228 (3d Cir. 1999). Applying this standard, the Balik Court concluded that the plaintiff had resigned of his own free will:

As the District Court pointed out, the record makes clear that Balik's decision to retire had "nothing to do with the investigation"...nor was the investigation "a concern" for him...Balik cites only to his inability to deal with his coworkers and [corporation counsel] as the basis for his decision to retire...That basis, which is, essentially, a mere dislike for certain individuals with which he works, is insufficient, without more, to render his decision to retire involuntary.

Therefore, the plaintiff's due process, property interest and liberty interest claims were not viable.

Plaintiff's First Amendment retaliation claim failed for the same reason:

To prevail on that claim, Balik must prove that: (1) he engaged in activity protected by the Constitution; (2) Appellees responded with retaliation; and (3) his protected activity was the cause of Appellees' retaliation...Balik's retaliation claim is based upon allegations that he was "discharged" or "terminated" for engaging in protected activity ... but [because] the record makes clear that neither was the case, his retaliation claim fails at the second prong.

The dismissal of Plaintiff's FLSA claim was upheld due to his failure to produce evidence to support his claim that he had not received the full amount of

payment for his unused sick and vacation time to which he was entitled.

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Fourth Circuit

***Smith v. Gilchrist*, 749 F.3d 302 (4th Cir. May 14, 2014), available at <http://www.ca4.uscourts.gov/Opinions/Published/131702.P.pdf>.**

Plaintiff Sean Smith worked as an Assistant District Attorney ("ADA") on the crimes-against-persons team in the Mecklenburg County, North Carolina District Attorney's Office ("DA's office"). In February 2010, Smith notified District Attorney Peter Gilchrist that Smith intended to declare his candidacy for Mecklenburg County district court judge. Smith was permitted to remain in his position as ADA while pursuing the judgeship.

A few months after declaring his candidacy, and of his own accord, Smith attended a defensive driving course offered to ticketed drivers by the Safety and Health Council of North Carolina. Drivers who paid for and completed the course received a "prayer for judgment" and were not assessed a fine. The program substantially reduced the number of cases the DA's office had to handle, thereby freeing up resources for other matters.

As part of his judicial campaign, Smith gave an on-camera interview to a local news affiliate, during which he addressed his concerns about the defensive driving program. The interview did not relate to his responsibilities as an ADA on the crimes-against-persons team.

When Gilchrist learned of the interview, he requested a meeting with Smith. Gilchrist had not seen the interview himself before the meeting. Rather, he learned the content of the interview from Smith's statements during their meeting, which



included Smith's statement that he "didn't think the driving school was a good idea." When asked whether Smith disagreed with any other DA office policies, Smith declined to answer. The next day, Gilchrist fired Smith without providing him with a reason for the termination. Gilchrist later testified that he terminated Smith based on his refusal to identify the DA office policies with which he disagreed, which Gilchrist deemed to be an act of insubordination.

Smith filed suit, alleging that he was fired for the statements that he made during the interview. Gilchrist denied Smith's allegations and asserted public-official and qualified immunity. Gilchrist agreed that Smith was speaking as a private citizen on a matter of public concern and did not challenge whether Smith's interest in speaking outweighed the government's interest in efficiency. Gilchrist argued, however, that because Smith's comments criticized DA office policies, a reasonable official in Gilchrist's position "might have believed he was justified in firing Smith for publicly making the statements in question." The district court agreed with Gilchrist, finding that he was entitled to qualified immunity and public-official immunity.

On appeal, the Fourth Circuit set forth the test for determining whether an adverse employment action violates a public employee's First Amendment rights to freedom of speech as follows: (1) the employee was speaking as a citizen upon a matter of public concern rather than as an employee about a matter of personal interest; (2) his interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) his speech was a substantial factor in the employer's decision to terminate him. The appeal concerned the second prong of that test, which required the Fourth Circuit to balance the speaking employee's role and "the extent to which speech impairs the efficiency of the workplace."

Applying that balancing test, the Fourth Circuit noted that Gilchrist testified that none of the concerns raised in Smith's interview related to any DA office policy, impugned the authority of the office, or expressed disloyalty to the District

Attorney or the office. Thus, the Fourth Circuit found that there was no evidence that Smith's statements "would cause problems with harmony or discipline in the DA's office such that the efficiency would be expected to be adversely affected." The fact that Gilchrist may have disagreed with Smith's position with regard to the driving course was not sufficient to outweigh Smith's interest in speaking as a private citizen on matters of public concern.

As to the question of whether Gilchrist was entitled to qualified immunity on the grounds that a reasonable district attorney might have believed he was justified in firing Smith, the Fourth Circuit narrowly framed the right at issue as follows:

[I]t is the right of an ADA running for public office not to be fired for speaking publicly in his capacity as a candidate on matters of public concern when the speech is critical of a program that substantially reduces the DA's office's caseload but there is no reason to believe the speech will negatively impact the DA's office's efficiency.

The Fourth Circuit found that a reasonable official in Gilchrist's position as district attorney would have been aware at the time of Smith's termination. Accordingly, the Fourth Circuit reversed the district court's grant of summary judgment on qualified and public-official immunity grounds and remanded for trial.

***Santoro v. Accenture Federal Services, LLC*, 748 F.3d 217 (4th Cir. May 5, 2014), available at <http://www.ca4.uscourts.gov/Opinions/Published/122561.P.pdf>.**

Plaintiff Dr. Armond Santoro worked for the defendant Accenture pursuant to an employment contract that included an arbitration clause. At the age of 66, Santoro was terminated from his employment as part of cost-cutting measures. Santoro filed suit against Accenture in District of Columbia Superior Court, alleging age discrimination under the District of Columbia Human Rights Act. Accenture moved to compel



arbitration. Santoro opposed arbitration, arguing that the arbitration clause was void under certain whistleblower provisions of Dodd-Frank.

While the motion to compel was pending in superior court, Santoro received a right to sue letter from the Equal Employment Opportunity Commission and filed federal discrimination-based claims in the Eastern District of Virginia. Accenture again moved to compel arbitration. The district court granted Accenture's motion, concluding that Dodd-Frank "only applies to certain situations when whistleblowers are involved." Santoro appealed on the grounds that Dodd-Frank invalidates all arbitration agreements by publicly traded companies that lack a carve-out for Dodd-Frank whistleblower claims, even if the plaintiff is not a whistleblower. The Fourth Circuit disagreed with Santoro's interpretation of Dodd-Frank.

The Fourth Circuit acknowledged that Dodd-Frank protects whistleblowers by prohibiting pre-dispute agreements to arbitrate whistleblower claims. It further acknowledged that the broad federal policy favoring arbitration could be "overridden by contrary congressional command." However, the Fourth Circuit found nothing in the language of Dodd-Frank suggesting that "Congress sought to bar arbitration of every claim if the arbitration agreement in question did not exempt Dodd-Frank claims." In reaching that conclusion, the Fourth Circuit focused on the plain language of the statute, 7 U.S.C. §26(n), which made pre-dispute arbitration agreements unenforceable if the agreement required arbitration of a dispute arising under "this section." Santoro did not bring any claims arising under or provided for in section 26(n) and, accordingly, Accenture was not requiring Santoro to arbitrate any claims arising under that section. Accordingly, the Fourth Circuit held that where the plaintiff is not pursuing Dodd-Frank whistleblower claims the whistleblower protection statutes did not override the Federal Arbitration Act's mandate that arbitration agreements are enforceable.

***Boyer-Liberto v. Fontainebleau Corporation*, __ F.3d __ (4th Cir. May 13, 2014), 2014 WL 1891209, available at <http://www.ca4.uscourts.gov/Opinions/Published/131473.P.pdf>.**

Plaintiff Reya Boyer-Liberto, an African-American woman, was employed at Fontainebleau Corporation in a number of different capacities. During her employment, Boyer-Liberto interacted with Trudy Clubb, who Boyer-Liberto admitted was not her manager or supervisor. Boyer-Liberto testified that she listened to Clubb out of respect, just as she would listen to anyone with whom she worked. On September 14, 2010, a dispute arose that ended with Clubb calling Boyer-Liberto a "porch monkey."

The next day, Boyer-Liberto complained about Clubb's conduct to the food and beverage director Richard Heubeck. Clubb came into the office and asked to speak with Boyer-Liberto. During that conversation, Clubb scolded Boyer-Liberto for leaving her post the previous day and again called her a "porch monkey." Boyer-Liberto reported Clubb's conduct to human resources on September 17, 2010. Human resources forwarded notes about the report to supervisor Mark Elman, who reviewed the notes with Boyer-Liberto to make sure they were accurate. Heubeck then met with Clubb, who denied the allegations in Boyer-Liberto's report. Nevertheless, Heubeck issued Clubb a written warning.

The day before Heubeck met with Clubb, he discussed Boyer-Liberto's performance problems with the owner, including that Boyer-Liberto behaved unprofessionally, clashed with other employees, disregarded policy, responded poorly to criticism, and had failed at four jobs to which she had been assigned, including failing the bartender test. In addition, Heubeck discussed Boyer-Liberto's conflict with Clubb. Boyer-Liberto was terminated seven days after the original incident with Clubb and four days after she complained to human resources. The owner testified that Boyer-Liberto's allegations about Clubb did not play a role in his decision to fire Liberto.

Boyer-Liberto filed suit, alleging two counts each of racial discrimination and retaliation, in violation of Title VII and 42 U.S.C. § 1981. Boyer-Liberto based her claims on the two conversations in which Clubb called Boyer-Liberto a "porch monkey." The



district court found that conduct to be too isolated to support Boyer-Liberto's claims. On appeal Boyer-Liberto argued that use of the term "porch monkey" was "particularly severe and humiliating," and that Clubb's close proximity on the first occasion was threatening. Boyer-Liberto further argued that because the duration of her employment was short, the two incidents were relatively frequent.

Acknowledging the highly offensive nature of the term "porch monkey," the Fourth Circuit nevertheless held that a coworker's use of that term twice in a period of two days was not, as a matter of law, so severe or pervasive as to change the terms and conditions of Boyer-Liberto's employment so as to be legally discriminatory. In reaching that conclusion, the Fourth Circuit noted that hostile work environment claims generally result only after an accumulation of discrete incidents of harassment rather than after a single incident. The Fourth Circuit found that Boyer-Liberto produced no evidence that Clubb, or any other employee, made racially-charged or otherwise hostile statements outside of the two conversations at issue. Contrasting other cases in which the plaintiffs were repeatedly subjected to hostile statements made by supervisors, Boyer-Liberto's evidence showed only two statements made by a coworker, which did not relate to Boyer-Liberto's terms of employment and did not have long-term ongoing consequences. As a result, the Fourth Circuit affirmed the grant of summary judgment for the employer on Boyer-Liberto's hostile work environment claims.

As to Boyer-Liberto's retaliation claims, the Fourth Circuit noted that she had to show she was terminated because she responded to an employment practice she reasonably believed was unlawful. The Fourth Circuit concluded that under the circumstances, Boyer-Liberto could not have had an objectively reasonable belief that she was complaining to management about unlawful conduct in the form of a hostile work environment. As a result, the Fourth Circuit concluded that just as Boyer-Liberto's claim for an actual hostile environment failed, her claim that she objectively believed she was reporting a hostile work environment also failed. The Fourth Circuit further concluded that there was no evidence that a hostile

environment claim could ripen since Clubb had been given a written warning regarding her conduct, and Boyer-Liberto and Clubb had no further interaction. Accordingly, the Fourth Circuit affirmed the district court's decision in full.

***Collins v. Pond Creek Mining Company*, __ F.3d __ (4th Cir. May 1, 2014), 2014 WL 1711718, available at <http://www.ca4.uscourts.gov/Opinions/Published/131702.P.pdf>.**

Johnnie Collins worked in the mining industry for more than thirty years, most recently with Pond Creek. When he stopped working, he filed a claim for lifetime benefits under the Act. Five years later, an ALJ determined that Mr. Collins was totally disabled by pneumoconiosis and entitled to benefits. Pond Creek paid the benefits until Mr. Collins' death in 1997. Shortly thereafter, Mrs. Collins applied for survivor's benefits pursuant to 30 U.S.C. § 922(a)(2). Pond Creek opposed an award of survivor's benefits and asked for a hearing before an ALJ. The ALJ ruled that the prior decision was not entitled to collateral estoppel on the issue of whether Mr. Collins suffered from pneumoconiosis. After reviewing the case, the ALJ concluded that Mr. Collins did not suffer from pneumoconiosis and, as a result, denied Mrs. Collins survivor's benefits. Mrs. Collins petitioned the Fourth Circuit for review.

The Fourth Circuit vacated the ALJ's denial of benefits, holding that the doctrine of collateral estoppel did apply to the prior holding that Mr. Collins suffered from pneumoconiosis due to coal dust exposure. The Fourth Circuit further rejected the ALJ's alternate holding that even if Mr. Collins had suffered from pneumoconiosis; Mrs. Collins had failed to establish that Mr. Collins's death was due to the disease. Accordingly, the Fourth Circuit remanded for further proceedings to determine if pneumoconiosis contributed to Mr. Collins's death.

Over the next eight years, the case moved within the administrative process. In 2012, a third ALJ denied survivor's benefits on the grounds that the physicians' opinions relied upon by Mrs. Collins were not sufficiently reasoned or documented to support a finding that Mr. Collins's pneumoconiosis



caused his death. The Benefits Review Board affirmed this ruling. Mrs. Collins again petitioned the Fourth Circuit for review.

The sole issue before the Fourth Circuit in this appeal was whether Mr. Collins's pneumoconiosis caused his death. The Fourth Circuit reiterated its prior opinion, and emphasized the two critical considerations for an ALJ when evaluating medical evidence: (1) the importance of the miner's treating physician's opinion; and (2) that even a poorly documented causation opinion that properly diagnoses pneumoconiosis should carry more weight than those opinions that have denied the presence of the disease.

In assessing the ALJ's decision, the Fourth Circuit highlighted that Mr. Collins had been found to be totally disabled by pneumoconiosis nearly ten years before his death and had been in and out of the hospital regularly for treatment in the years prior to his death. Two physicians concluded at that time that pneumoconiosis contributed to Mr. Collins's death.

Ultimately, the Fourth Circuit held "better late than never," that Mrs. Collins' satisfied the test for survivor's benefits. The Fourth Circuit further stated that the "ravages of her husband's long years in the mines should yield at least the legacy of provision for his surviving spouse. No further factual development is necessary." Accordingly, the Fourth Circuit reversed the Benefits Review Board's order and remanded with directions to award benefits without further proceedings.

***Feldman v. Law Enforcement Associates Corp.*, __ F.3d __ (4th Cir. May 12, 2014), 2014 WL 1876546, available at <http://www.ca4.uscourts.gov/Opinions/Published/131849.P.pdf>.**

Plaintiff Paul Feldman was President of Law Enforcement Associates Corporation ("LEA") from about 2001 until his termination in 2009. During that time, LEA's Board consisted of two "Inside Directors," including Feldman, and three "Outside Directors." Near the end of 2007, a divide existed between the Inside Directors and the Outside Directors. Tensions grew after Feldman raised

concerns alleging illegal exports involving LEA founder John Carrington. In January of 2008, Feldman informed the United States Department of Commerce about the potentially illegal exports, which resulted in a federal investigation.

Several other conflicts arose in 2008 between Feldman and the defendants. In March, Feldman relocated LEA's headquarters to Raleigh, signing a new lease without the prior approval of the Outside Directors. Sometime later, the Outside Directors raised concerns that information requested from Feldman was either not provided or was insufficient. In May, Feldman challenged various bills for legal services rendered to LEA, arguing that they were fraudulent and refusing to pay.

Conflicts continued into 2009. In April, Feldman and other LEA representatives met with LEA shareholders who were threatening to sue LEA. When the shareholders expressed dissatisfaction with the Board, Feldman replied that he also wished the Board "would do more." In a July meeting with shareholders, Feldman stated that the Outside Directors were loyal to Carrington rather than to LEA. Feldman then wrote a letter to the Outside Directors urging them to resign. Finally, in July or August 2009, Feldman and Martin Perry, the other Inside Director, reported to the Department of Commerce their suspicion that LEA was involved in insider trading because several prominent North Carolina politicians were shareholders.

On August 26, 2009, one of the Outside Directors told Perry that the Outside Directors planned to terminate Feldman at the next Board meeting because they had lost confidence in him and because of Feldman's statements to the shareholders. The Outside Directors agreed that Perry would stay on at LEA. Perry told Feldman of the conversation, and neither attended the next Board meeting. The Board terminated Feldman at that Board meeting, and terminated Perry about a month later.

Feldman sued, arguing that he was unlawfully fired in retaliation for engaging in activities protected under SOX in 2007 and 2008, including: (1) reporting to the Board and the federal government about the potentially illegal exports; (2) objecting to



falsified Board meeting minutes; (3) objecting to leaks of information by the Outside Directors to Carrington; (4) objecting to and refusing to pay legal bills; and (5) notifying the government of suspected insider trading. The district court granted summary judgment for the defendants and Feldman appealed.

The Fourth Circuit explained that to succeed on a SOX claim, the plaintiff carries the initial burden of establishing a prima facie case by proving, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." Feldman's appeal focuses on the fourth factor.

The Fourth Circuit acknowledged that the definition of a contributing factor is "broad and forgiving." However, the Fourth Circuit concluded that Feldman failed to satisfy even this light burden. The Fourth Circuit based its decision on two main factors. First, the gap between Feldman's report regarding the illegal exporting and Feldman's termination was too lengthy. Although the Fourth Circuit considered this to be Feldman's most significant protected activity, it occurred about twenty months before his termination. The Fourth Circuit found that the lack of temporal proximity weighed against a finding that it was more likely than not that the protected activity was a contributing factor in Feldman's termination.

Second, the Fourth Circuit noted that Feldman had admitted that the Outside Directors considered him to have "thrown them under the bus" during his meetings with the shareholders in which Feldman said that the Outside Directors were loyal to Carrington rather than LEA. The Fourth Circuit further noted that Feldman's termination came less than one month after that meeting and Feldman's subsequent letter asking the Outside Directors to resign. The Fourth Circuit considered Feldman's actions to constitute a legitimate intervening event between his earlier protected conduct and his termination.

Given "long history of antagonism" and the lengthy gap between protected activity and termination, Fourth Circuit held that even the forgiving standard of proving a "contributing factor" would be "toothless" if the court found in favor of Feldman.

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Fifth Circuit

Crossley v. CSC Applied Technologies, LLC, ___ Fed. Appx. ___ (5th Cir. May 22, 2014), 2014 WL 2119156, available at <https://www.ca5.uscourts.gov/opinions%5Cunpub%5C13/13-10788.0.pdf>.

Employee filed suit alleging that employer discriminated against her by failing to accommodate her disability in violation of the ADA. The district court granted summary judgment for the employer. The Fifth Circuit affirmed on appeal.

Plaintiff suffered from posttraumatic stress disorder. As a result of her condition she was unable to travel due to her medical appointments. As part of a reduction in force, her employer informed employees of reassignments to other locations. Plaintiff declined a transfer from her San Angelo location due to her inability to travel, and she acknowledged that she understood she could be fired if she was not able to accept the transfer. Plaintiff was terminated, but told she was eligible for rehire should positions for which she qualified become available.

Plaintiff filed an application for total disability benefits with the Department of Veterans Affairs and then filed suit against her former employer. Affirming the district court's grant of summary judgment for the employer, the Fifth Circuit noted that travel was an essential function of Plaintiff's job, and Plaintiff conceded as much. Plaintiff asserted that the only reasonable



accommodation for her inability to travel was to be placed on indefinite leave until additional jobs opened in the San Angelo location. The Fifth Circuit recognized that an employer is not required to wait an indefinite period to accommodate an employee, and moreover, Plaintiff did not allege how indefinite leave would address her inability to travel. In addition, Plaintiff did not actually apply for jobs that became available in San Angelo. The Fifth Circuit also noted her claim for total disability filed with Department of Veterans Affairs wherein her physician stated she was "unemployable" due to her disability. Plaintiff's "good faith belief" that she could perform the essential functions of her job was not enough for a jury to find that she could perform the essential functions of her job, given the apparent inconsistency in her Department of Veteran's Affairs disability application. The Fifth Circuit concluded that Plaintiff could not show that she could perform the essential functions of her job, and was therefore not a qualified individual under the ADA.

***Gorman v. Verizon Wireless Texas, LLC*, ___ F.3d ___ (5th Cir. May 28, 2014), 2014 WL 2210478, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-20562-CV0.pdf>.**

Plaintiff was terminated for violating her employer's honesty policy. She sued in state court alleging retaliation for complaining of discrimination and harassment in violation of the Texas Commission on Human Rights Act ("TCHRA"). Before filing suit, she filed a charge of discrimination with the Texas Workforce Commission ("TWC") but filed her lawsuit before receipt of a right to sue letter from the TWC. After filing suit, she received the right to sue letter.

The Fifth Circuit affirmed district court's summary judgment for the employer. The Fifth Circuit agreed with the district court that the TCHRA's right to sue requirement is a condition precedent, not a jurisdictional requirement, and that Plaintiff's error in filing suit before receipt of the right to sue letter was subsequently cured by receipt of the TWC right to sue letter after suit had commenced. The Fifth Circuit reasoned that the TCHRA's exhaustion of remedies requirement is not expressly required by

statute but is inferred by the courts; therefore, the "clear legislative intent" required by Texas law to render a provision jurisdictional is lacking. Therefore, if the exhaustion of remedies requirement is not jurisdictional, neither is the right to sue letter requirement. The Court also looked to Title VII, under which the right to sue letter is a condition precedent that can be cured by subsequent receipt, and reasoned that it would be anomalous to characterize receipt of a right to sue letter as a jurisdictional requirement for the TCHRA but not under Title VII.

Turning to the merits, the Fifth Circuit affirmed the district court's summary judgment for the employer on the grounds that Plaintiff established a prima facie case of retaliation. She was fired ten months after her protected activity, thereby discrediting the link between the protected activity and her firing. Moreover, the supervisor who fired her did not know about her alleged protected activity. Therefore, Plaintiff failed to establish a causal link between her protected activity and her firing.

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Sixth Circuit

***City of Pontiac Retired Employees Ass'n v. Schimmel*, ___ F. 3d ___ (6th Cir. May 5, 2014), 2014 WL 1758913, available at <http://www.ca6.uscourts.gov/paceruser.html>.**

In *Schimmel*, the retired city employees' association and its representatives filed a class action lawsuit challenging the city emergency manager's power to reduce and eliminate their health care benefits. The district court denied plaintiffs' motions for temporary restraining order and for preliminary injunction. The Court of Appeals vacated the district court's ruling and remanded the case.



At the hearing en banc, the Court of Appeals held that vacation of district court's order and remand for further proceedings was warranted. Further, the Court of Appeals stated that the parties and district court should develop a more thorough factual record supporting carefully considered legal arguments about the following: (1) whether, under § 903(1) of the Bankruptcy Code, Public Act 4 prescribes a method of composition of indebtedness that binds the retirees without their consent and, if so, whether principles of state sovereignty preclude application of § 903(1) in this case; (2) whether the emergency manager's orders were legislative acts under the Contract Clause; (3) whether the reductions and eliminations of health care benefits were "necessary and reasonable" under the Contract Clause; (4) whether the retirees' procedural due process claim is viable; and (5) assuming the Due Process Clause's procedural protections apply, whether the collective bargaining agreements, considered in their entirety, establish protected property rights.

***Sexton v. Panel Processing, Inc.*, ___ F.3d __ (6th Cir. May 9, 2014), 2014 WL 1856692, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0095p-06.pdf>.**

In *Sexton*, an employee filed an action under the Michigan's Whistleblowers' Protection Act, and a claim for breach of implied employment contract. Sexton alleged that he was terminated in retaliation for his one-time unsolicited email complaining of an alleged ERISA violation. After removal, the district court found that the Employee Retirement Income Security Act (ERISA) preempted whistleblower claim and granted summary judgment for employer on the ERISA claim. The company invoked complete preemption, a doctrine that converts state law claims within the scope of ERISA's civil enforcement provisions into federal claims and recharacterized the employee's state whistleblower claim as an ERISA claim.

ERISA prohibits an employer from retaliating against an employee because he has given information or has testified or is about to testify in any inquiry or proceeding relating to ERISA. The Court of Appeals held that employee did not provide information in an inquiry. The Court of Appeals

reasoned that the employee did not send the email in connection with an official investigation and he did not send the email in response to a question or request for information. The Court of Appeals noted that most federal statutes that prohibit retaliation (*i.e.*, Title VII and the Fair Labor Standards Act) include separate clauses protecting employees who complain about or oppose unlawful practices but since the legislature chose not to include a similar clause in ERISA, then the court should respect that choice. Accordingly, the district court affirmed dismissal of the ERISA retaliation claim and declined to exercise supplemental jurisdiction over the state law claim.

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Seventh Circuit

***Cung Hnin v. TOA (USA), LLC*, ___ F.3d ___ (7th Cir. May 5, 2014), 2014 WL 1758457, available at http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D05-05/C:13-3658:J:St_Eve:aut:T:fnOp:N:1338976:S:0.**

The Seventh Circuit affirmed the district court's grant of summary judgment on plaintiff's Title VII national origin discrimination claim and his Title VII retaliation claim. Plaintiff, of Chin ethnicity from the country of Myanmar, worked for the defendant as an associate in the metal stamping department. Plaintiff was accused of misconduct, including sexual harassment, acting in an intimidating manner, and instructing his co-workers to slow their work so that they could work more overtime. He was interviewed by the Director of Operations regarding the complaints and was terminated after he became very aggravated and spoke in an elevated tone. The Seventh Circuit found that plaintiff failed to establish that any similarly situated employees were treated differently and that the defendant's reasons for terminating plaintiff were legitimate. The Court rejected



plaintiff's argument that his conduct did not rise to the level of sexual harassment and held that the focus of the pretext determination is whether defendant honestly believes that plaintiff violated its harassment policy. The Court also rejected plaintiff's claim that defendant retaliated against him after he raised concerns that Chin associates were not awarded promotions as frequently as American-born associates. It held that plaintiff did not provide sufficient evidence for this claim. Thus, the Seventh Circuit affirmed the district court's grant of summary judgment.

David Campbell v. Forest Preserve District of Cook County, Illinois, ___ F.3d ___ (7th Cir. May 15, 2014), 2014 WL 1924479, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D05-15/C:13-3147:J:Tinder:aut:T:fnOp:N:1346023:S:0>.

The Seventh Circuit affirmed the district court's dismissal of plaintiff's §1981 claim. Plaintiff was a laborer at a facility operated by defendant. Following plaintiff's termination, the plaintiff brought §1983 and §1981 claims. The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant as to the §1983 claim because it was time-barred by Illinois's two-year statute of limitations. The Seventh Circuit rejected the plaintiff's argument that subsection (c) of §1981, as amended by the Civil Rights Act of 1991, superseded prior Supreme Court decisions and provided for a cause of action against state actors. The Court held the fact that Congress created a specific remedy against state actors under §1983 still counsels against inferring a remedy against them under §1981 even after the Civil Rights Act of 1991. Thus, because §1981 does not create a private right of action against state actors, plaintiff's §1981 claim against the defendant failed to state a claim upon which relief can be granted because it was time barred by §1983 two-year statute of limitations.

Meanith Huon v. Johnson & Bell, Ltd., et al., ___ F.3d ___ (7th Cir. May 16, 2014), 2014 WL 1999042, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D05-16/C:13-2033:J:PerCuriam:aut:T:fnOp:N:1347362:S:0>.

The Seventh Circuit affirmed the defendants' motion for judgment on the pleadings, concluding that the plaintiff's suit was barred by claim preclusion because it arose out of the same series of connected transactions as claims the plaintiff had previously litigated in state court.

Plaintiff, an attorney, filed suit against his former law firm and several of the firm's attorneys alleging intentional discrimination based on race and national origin in violation of Title VII of the 1964 Civil Rights Act. The Court rejected the plaintiff's argument that there was no identity of claims between his two suits because the suits arose out of different employment decisions made by different people at different times. Plaintiff argued that the state suit was based on the 2007 written performance evaluation and related employment decisions in 2006 and 2007, while his federal suit is based on a series of actions by defendants between 2003 and 2008.

The Seventh Circuit held the district court correctly concluded that plaintiff's claims in his federal suit mirror those in his state suit because they arose from the same series of connected transactions. The Court held that though the federal complaint had additional allegations, because they arose from the same facts underlying the state suit, his job conditions and his discharge, they arose from the same series of connected transactions. Additionally, though some of the events occurred at different times, the Court held this was not sufficient to find they did not arise out of the same set of operative facts. Furthermore, the Court held that there was identity of parties or their privies in the two suits because the defendants all shared a similar interest. Finally, the Court rejected the plaintiff's argument that he did not have a full and fair opportunity to litigate his claims in federal court. The Seventh Circuit found plaintiff's claims to be barred because Illinois law precludes the sequential pursuit not only of claims actually litigated, but of those that could have been litigated.



Kurt Fuqua v. SVOX AG, SVOX USA, Inc., Nuance Communications, Inc., Volker Jantzen, Eugen Stermetz, Martin Reber, Eric Lehmann and Thomas Soseman, ___ F.3d ___ (7th Cir. May 16, 2014), 2014 WL 1999040, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D05-16/C:12-1870:J:Kanne:aut:T:fnOp:N:1347339:S:0>.

The Seventh Circuit affirmed the district court's grant of defendant's 12(b)(6) motion to dismiss for failure to state a federal claim and declined to exercise supplemental jurisdiction over the state claims.

Plaintiff, a computational linguist, was hired in January 2009 to help market linguistic products. In June 2009, defendant asked plaintiff to sign a new employment contract with an inventions assignment clause. Plaintiff believed the disclosure required by the new agreement would violate various federal and state laws and refused to sign the contract. Five months after the initial contract proposal, defendant terminated plaintiff's employment.

Following termination, plaintiff filed a complaint with Office of Inspector General of the Department of Defense alleging defendant violated section 1553 of the American Recovery and Reinvestment Act of 2009, which prohibits retaliation for disclosures of wrongdoing relating to covered funds under the Act. Following an inquiry, the Office of Inspector General declined to investigate further and plaintiff then brought suit in district court.

The Seventh Circuit held plaintiff failed to plead how the data received by the defendant constituted covered funds and thus failed to state a cause of action. Additionally, the Seventh Circuit found, even if the defendant's had received covered funds, plaintiff failed to provide a nexus between his alleged disclosures and the misuse of these funds as required under section 1553. Finally, because the federal claims were dismissed, the Seventh Circuit held the district court properly declined to exercise supplemental jurisdiction over the remaining state law claims.

Joshua Bunn v. Khoury Enterprises, Inc., ___ F.3d ___ (7th Cir. May 28, 2014), 2014 WL 2198557, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D05-28/C:13-2292:J:Kanne:aut:T:fnOp:N:1352373:S:0>.

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant as to both of plaintiff's claims.

Plaintiff, who is visually impaired, was employed at a Dairy Queen owned by the defendant. Plaintiff quit his job and sued his former employer alleging the employer failed to accommodate his disability as required by law and that it subjected him to illegal disparate treatment when it reduced his scheduled hours during the winter months.

As to the failure to accommodate claim, the Seventh Circuit granted summary judgment for defendant because defendant had provided a reasonable accommodation. Specifically, the Court found when it became clear to defendant that plaintiff could not perform the rotating duties of a regular hourly employee, the store manager worked with the plaintiff to determine which job functions he could perform and which he could not. Following this conversation, defendant scheduled plaintiff only to tasks he could adequately perform. The Seventh Circuit held this was the type of reasonable accommodation envisioned by the regulations applicable to the American Disability Act.

As to the disparate treatment claim, the Seventh Circuit held that plaintiff failed to create any triable issues of fact through either the direct or the indirect method of proof and as a result, defendant was entitled to judgment as a matter of law. The Seventh Circuit found plaintiff failed to identify non-disabled employees who were not disciplined for the conduct for which plaintiff was disciplined.

Additionally, the Court found the evidence shows that plaintiff did not meet his employer's legitimate expectations. Specifically, the Court found plaintiff had missed numerous days of work and had been suspended for his conduct. The Court also found, given defendant's line of business, it had a



legitimate reason for the reduction in scheduled hours during the winter season. Thus, the Seventh Circuit affirmed the district court's grant of summary judgment for the defendant as to all of plaintiff's claims.

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Eighth Circuit

***A Petroski v. H&R Block Enterprises, LLC*, __ F. 3d __ (8th Cir. May 2, 2014), 2014 WL 1719660, available at <http://media.ca8.uscourts.gov/opndir/14/05/132076P.pdf>.**

Plaintiffs filed a collective action suit against H&R Block Enterprises LLC ("H&R Block") alleging that they should have been compensated for time spent completing twenty-four hours of Continuing Professional Education ("CPE"). The Plaintiffs were tax professions who prepared tax returns at H&R Block during the tax season which runs from late December until mid-April each year. Tax professionals who would like to work during the following tax season must submit an application, be interviewed, and must have completed at least twenty-four hours of CPE. Tax professionals were not guaranteed a job just because they completed 24 hours of CPE training. H&R Block offers CPE courses, but tax professional may obtain CPE hours by taking courses offered by other providers. During the time at issue, no federal regulation required tax professional to complete CPE training to prepare tax returns. Although H&R Block did not formally inform the Plaintiffs in writing that they would not be paid for CPE training, the H&R Block handbook does explain that tax professionals must complete CPE training to be eligible for rehire. The Plaintiffs filed suit alleging that their employment continued from one tax season to the next and they were employees who were entitled to compensation when completing CPE training.

The lawsuit began as three separate actions that

were all consolidated and conditionally certified as a FLSA collective action. The District Court granted summary judgment in favor of H&R Block. The District Court concluded that the Plaintiffs were trainees and not employees when they completed the required CPE hours and they were not eligible to be compensated for their time spent at the CPE training under the FLSA. The 8th Circuit Court of Appeals affirmed the District Court's decision.

The Plaintiffs argued that their employment continued from tax season to tax season and relied on two National Labor Relations Board cases (NLRB) in support of their position. The 8th Circuit rejected the applicability of these cases stating that employee classifications under other statutes do not apply to the FLSA. The Court of Appeals reasoned that because of the fact that the Plaintiff's had a long break in service between tax seasons, the plaintiffs were not actually preparing tax returns or doing work for H&R Block during CPE training, and the plaintiffs were free to seek other employment or unemployment during the off season all supported the conclusion that the Plaintiffs were trainees and not employees. Additional factors in the analysis were the fact that H&R Block did not receive any immediate advantage from CPE training and the Plaintiff's did not displace any regular employees during CPE training.

***Jones v. City of St. Louis*, __ Fed. Appx. __ (8th Cir. May 23, 2014), 2014 WL 2136048, available at <http://media.ca8.uscourts.gov/opndir/14/05/132809U.pdf>.**

African-American Plaintiff is an electrician employed by the City of St. Louis. In 2012, he brought suit against the City claiming he suffered race-based discrimination, harassment, and retaliation in violation of Title VII and 42 U.S.C. § 1983. The District Court dismissed the suit for failure to state a claim. The 8th Circuit Court of Appeals reversed part of the District Court's decision and affirmed part of the decision.

In the Plaintiff's complaint, he stated that he filed a charge of discrimination with the Missouri Commission on Human Rights and the Equal Opportunity Commission (EEOC) in July 2009. The



Plaintiff further alleged that Caucasian individuals were not subject to the same level of scrutiny and review, especially during emergency calls. The Plaintiff was charged for failing to respond to an emergency call in 2009 and the Board of Public Services determined the charge was unfounded. During that time, the Plaintiff suffered emotion distress and missed four months of work; when he returned, the City refused to accept a health care release from his Doctor. The Plaintiff claimed the City accepted doctor releases from Caucasian electricians. In June 2009, the Plaintiff received a poor performance review and claimed his poor performance review was discriminatory and retaliatory because he received no warnings or feedback prior to the review. In July 2010, the Plaintiff passed out from heat exhaustion while operating a City-owned vehicle and was ordered to submit to a fit-for-duty examination, and eventually placed on restricted duties where he lost wages because he was not eligible to work overtime. The Plaintiff alleged that Caucasian individuals were not required to undergo fit-for-duty examinations.

The 8th Circuit concluded that the Plaintiff failed to allege that the acts were a result of a City policy or custom as required under a § 1983 claim. The Court determined that the Plaintiff failed to state a Title VII claim for harassment because he did not allege facts that show server or pervasive acts. The 8th Circuit did determine that the Plaintiff stated a Title VII claim for discrimination because he suffered adverse employment actions with negative consequences and that similarly situated individuals were treated more favorable. Additionally, the Plaintiff stated a title VII claim for retaliation because he filed a charge of discrimination with the Missouri Commission on Human Rights and the EEOC. The court stated that a plaintiff must contain sufficient factual allegations to state a plausible claim; however, it does not need to contain specific facts establishing a prima facie case.

***Associated Elec. Co-op., Inc. v. Int'l Bhd. of Elec. Workers, Local No. 53*, __ F. 3d __ (8th Cir. May 14, 2014), 2014 WL 2313819, available at <http://media.ca8.uscourts.gov/opndir/14/05/123712P.pdf>.**

Associated Electric Cooperative, Inc. (AECI) has about 175 employees that are represented by Local 53 of the International Brotherhood of Electric Workers (“the Union”) and covered under a collectively bargained agreement (CBA). In April 2011, AECI did a random drug test. Leo Johnson, a Union member and employee of AECI for over 28 years provided a urine sample and told his manager that he would test positive because he has recently smoked marijuana with family members while on leave to attend his brother’s funeral. AECI offered Johnson a Union representative at a disciplinary hearing, but Johnson declined. Johnson was suspended without pay and signed a standard Last Chance Agreement (“LCA”) that required Johnson’s termination if he tested positive for drugs. Johnson drug test came back negative. Johnson completed a treatment program and was required to pass a return-to-work drug test. Johnson tested positive for a prescription drug for which he did not have a prescription and Johnson was fired.

The Union and Johnson filed a grievance asserting that there was no “just cause for termination.” The Arbitrator determined that the LCA was “unconscionable” because Johnson’s initial drug test was negative and therefore he had not broken and work rules. Johnson was not given the chance to explain the failed drug test, which he states he failed because he took a family member’s wrong prescription by mistake. As a result, Johnson was first suspended, and then fired without just cause. The Arbitrator awarded Johnson reinstatement and back-pay. AECI filed suit in the District Court against the Union seeking to vacate the arbitrator’s award. The District Court vacated the award and determined that the LCA superseded the CBA and the arbitrator ignored the clear and unambiguous terms of the LCA.

The 8th Circuit Court of Appeals reinstated the arbitrator’s award of reinstatement, and modified the award of back-pay. The 8th Circuit determined that the initial grievance was in regards to Johnson’s termination and, therefore, he is not entitled to back from the day he was suspended until the day he was discharged. In reinstating the arbitrator’s decision, the 8th Circuit noted that the courts give decisions by labor arbitrators’ substantial deference. In this case,



the Union did not agree to the LCA, and the LCA was a result of a mutual mistake, that Johnson had violated AECP's drug policy. The arbitrator was not contractually bound to apply the LCA's termination clause if there was not just cause for terminating Johnson. Therefore, the arbitrator's decisions should be upheld.

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Tenth Circuit

***Hwang v. Kansas State University*, __ F.3d __ (10th Cir. May 29, 2014), 2014 WL 2212071, available at <http://www.ca10.uscourts.gov/opinions/13/13-3070.pdf>.**

Plaintiff signed a written one-year contract to teach at Kansas State University, but before the term began she learned that she had cancer and needed treatment. The University gave her a six-month paid leave of absence. As the next term approached, her doctor advised her to seek more time off. She asked the University to extend her leave through the end of the spring semester, promising to return in time for the summer term, but the University refused, explaining that its policy allowed no more than six months' sick leave. The University provided long-term disability benefits, but Plaintiff alleged that it effectively terminated her employment.

Plaintiff sued under the Rehabilitation Act, which prohibits recipients of federal funding from discriminating on the basis of disability. 29 U.S.C. § 794(a). Like the Americans with Disabilities Act, a disabled plaintiff can establish a claim for discrimination by showing that she is qualified for her job; that she can perform the essential job functions with a reasonable accommodation for her disability; and, that her employer failed to provide a reasonable accommodation despite her request for one. If a plaintiff makes this showing, the employer generally may avoid liability only if it can prove the

accommodation imposes an undue hardship on its business. *See Sanchez v. Vilsack*, 695 F.3d 1174, 1177 & n.2 (10th Cir. 2012); see also 29 U.S.C. § 794(d); *Alexander v. Choate*, 469 U.S. 287 (1985); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

The district court dismissed Plaintiff's complaint and she appealed to the Tenth Circuit. The Court of Appeals asked, "Must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act?" The Court found that the Plaintiff failed to pass the *prima facie* test, because there was "no question she wasn't able to perform the essential functions of her job even with a reasonable accommodation...It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions -- and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. *After all, reasonable accommodations...are all about enabling employees to work, not to not work.*" (Emphasis added). Although a leave of absence may be required as a form of reasonable accommodation, the difference between a reasonable and unreasonable amount of leave depends on "factors like the duties essential to the job in question, the nature and length of the leave sought, and the impact "on fellow employees." Given Plaintiff's inability to perform any work during her absence, the Court found it "difficult to conceive how an employee's absence for six months — an absence in which she could not work from home, part-time, or in any way in any place — could be consistent with discharging the essential functions of most any job in the national economy today."

Plaintiff argued that the Court was bound by the EEOC's guidance manual, which has recently been used to strike down "inflexible" leave policies allowing a specified period of leave, even as long as one year:

If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it



can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. EEOC, No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), 2002 WL 31994335, at *15.

The Court responded that the EEOC manual “commands our deference only to the extent its reasoning actually proves persuasive.” The manual did not specify when a modification to an inflexible leave policy was legally necessary to provide a reasonable accommodation. Additionally, the manual later states that an employer does not have to retain an employee unable to perform her essential job functions for six months just because another job she can perform will open up then, “because six months is beyond a reasonable amount of time.” *Hwang*, at *21. Plaintiff interpreted the EEOC manual to always require modification of an inflexible leave policy unless one of two enumerated conditions is met — unless an alternative accommodation would be effective or the requested leave modification would constitute undue hardship. But the Court held that the language of the sentence “clearly indicates that these two enumerated conditions come into play only after it’s clear the leave policy modification is a reasonable accommodation necessary to ensure the employee can perform his essential job functions.”

The Court also rejected the argument that an “inflexible” six-month leave policy is inherently discriminatory. In fact, the Court held that such policies can actually protect disabled employees by ensuring that they are not singled out for discriminatory treatment through an abuse of broadly granted discretion. Inflexible leave policies are subject to attack if they provide “unreasonably short” sick leave periods, which may result in termination of employees who could perform their jobs’ essential functions “with just a little more forgiven absence.” Of course, if the policy is not evenly applied it could also result in liability.

Somewhat ironically, the *Hwang* case responds to the EEOC’s criticism of inflexible leave policies by precluding inflexible application of the EEOC’s position: before an inflexible leave policy can be stricken, the Plaintiff must show that reasonable accommodation was possible and was prevented by the employer’s policy *given the facts of his or her specific situation*.

Eleventh Circuit

***Skye v. Maersk Line* ___ F. 3d ___ (11th Cir. May 15, 2014), 2014 WL 1924441, available at <http://www.ca11.uscourts.gov/opinions/ops/201216433.pdf>.**

The Court addressed whether a seaman, former chief mate, could recover monetary damages under the Jones Act for an injury stemming from excessive overtime work hours to the point of fatigue and erratic sleep schedule.

In 2000, Plaintiff Skye’s physician diagnosed him with benign arrhythmia and recommended more rest. His diagnosis did not change three years later, and, in fact, he worked more, with duties including logging cargo and inspecting cargo. In addition to his arrhythmia, by 2008, he developed headaches and burning sensations in the chest. His doctor ordered him to stop working for his employer. In 2011, Skye filed a complaint against his employer for negligence under the Jones Act for failure to provide reasonable working hours and adequate crew.

The jury returned a verdict in favor of Skye and awarded damages, which the district court reduced. The district court denied the employer’s motion for judgment as a matter of law and entered judgment in favor of Skye. On appeal, the Eleventh Circuit reversing the denial of the motion for judgment as a matter of law and rendered judgment in favor of the employer. The Court held that an injury caused by work-related stress was not actionable under the Jones Act because work-related stress is not a “physical peril.”



Barthelus v. G4S Government Solutions, Inc. ___ F. 3d ___ (11th Cir. May 27, 2014), 2014 WL 2179331, available at <http://www.ca11.uscourts.gov/opinions/ops/201314121.pdf>.

Pro se plaintiff Barthelus, a black Haitian, filed suit against his former employer, G4S. Barthelus claimed he was discriminated against because of his national origin when he was denied a promotion in 2005 because of his accent, denied amendment of a poor performance review, denied a pay increase, and denied extra days off during holiday.

The district court granted summary judgment in favor of the employer dismissing the discrimination and retaliation claims under Title VII 42 U.S.C. §1981. The court accepted the employer's position that Barthelus' was terminated for a legitimate non-discriminatory reason based on his performance deficiencies, as documented by the evaluations from 1999 his termination. The district court held Barthelus was unable to show pretext.

On appeal, the Eleventh Circuit reversed the summary judgment and remanded, holding that the district court failed to account for a pattern of workplace discrimination based on race and national origin. The court further found that material issues of fact were regarding pretext existed, including evidence of an independent audit of Barthelus' work that showed the negative performance reviews may have been misplaced.

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District of Columbia

McCormick v. D.C., ___ F.3d ___ (D.C. Cir. May 27, 2014), 2014 WL 2178831, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/7892F1E28248FD9185257CE5004E37C7/\\$file/12-7115-1494472.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7892F1E28248FD9185257CE5004E37C7/$file/12-7115-1494472.pdf).

At-will manager with D.C. Department of Corrections was fired after an internal investigation found he struck a handcuffed inmate. Rejection of D.C. whistleblower claim was proper due to lack of direct evidence, ten month lapse between disclosure and termination, and lack of involvement of disclosure target in the termination. His 5th Amendment liberty/due process claim also was correctly rejected, given he was at-will and had a post-termination opportunity to clear his name.

Broad. Bd. of Governors Off. of Cuba Broad. v. Fed. Lab. Rel. Auth., ___ F.3d ___ (D.C. Cir. May 16, 2014), 2014 WL 1978224, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/0D7D2969B4336B8385257CDA004EF5EA/\\$file/12-1463-1493233.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/0D7D2969B4336B8385257CDA004EF5EA/$file/12-1463-1493233.pdf).

The D.C. Court of Appeals rejected an invitation from the Broadcasting Board of Governors, Office of Cuba Broadcasting, to second guess a decision of the Federal Labor Relations Authority (FLRA), finding it lacked jurisdiction. For the Court to have jurisdiction, FLRA's decision must have been based on an Unfair Labor Practice (ULP). The arbitrator had rejected the Board's claim that it had no duty to negotiate over layoffs when the collective bargaining agreement (CBA) already addressed the subject in detail. The Court found FLRA's hypothetical consideration of whether a ULP existed only to reject one's existence not enough to grant the Court jurisdiction. The Court also noted that the principle of non-negotiability of matters already set out in existing detail (the "covered by" defense) was applicable to statutory duties rather than ones arising from negotiation of the CBA.

It was significant to the Court that FLRA's upholding of the arbitrator's decision did not require FLRA to reject the "covered by" defense, rather FLRA found that defense to be misinterpreted by the Board. The Court finally rejected the Board's attempt at jurisdiction that asserted it violated sovereign immunity to require the Board to give those laid off priority consideration for other positions. The Court said agreeing to give priority to certain candidates could be negotiated, as opposed to requiring the agency to hire particular candidates.



***Foote v. Moniz*, ___ F.3d ___ (D.C. Cir. May 13, 2014), 2014 WL 1887374, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/C2A4CF8FBFABB7A385257CD70050597F/\\$file/13-5093.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/C2A4CF8FBFABB7A385257CD70050597F/$file/13-5093.pdf).**

Ronnie Foote was denied a position with the Department of Energy (DOE) after failing to be certified under its Human Reliability program, which applies to positions having access to nuclear devices/materials/facilities. Foote claimed the DOE psychologist failed him because of race, suing under Title VII. DOE asserted the rejection of Foote was the sort of national security question that may not be second guessed under the holding of *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988) (security clearance determinations reserved to Executive Branch under Commander in Chief authority).

The appellate court found application of *Egan* was dependent on the Human Reliability Program being the type of procedure and the psychologist the type of professional that legitimately made judgment calls about the appropriateness of someone being entrusted with national security matters. The government was found to have a legitimate national security interest in limiting access to nuclear materials. The Human Reliability Program was noted to require applicants to have or seek a Q-level security clearance [DOE category specific to nuclear materials convertible for explosives use; at higher levels, also to design/manufacture/use information]. DOE's program was deemed to align with *Egan* in attempting to predict whether an applicant might compromise sensitive information for one reason or another.

The psychologist was found to fall under *Egan* given duties to identify whether applicants presented a security concern or had conditions that could prevent reliable and safe performance of duties. Psychologists in the Reliability Program had to meet specific education and experience requirements.

Because both the program and staff involved were found to be making *Egan*-like decisions about fitness for work involving national security interests, the choice not to approve Foote for hiring

was unreviewable notwithstanding Foote's claim it actually was based on race. The District Court's grant of summary judgment was affirmed.

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