



Monthly Update for March

1st Circuit

U.S. v. TUM, __ F.3d __ (2013) (2013 WL 388002)

<http://www.ca1.uscourts.gov/pdf/opinions/11-1624P-01A.pdf>

This case is about a conviction for violating and conspiring to violate the federal wire fraud statute. On its appeal, Tum argued insufficiency of evidence, yet the Court differed and affirmed Tum's conviction. Tum's fraud consisted in being under long-term disability benefits while working elsewhere, which he never reported having this other job and even lied in order to continue receiving the disability payments. Because he sent his disability payment form by interstate wire transfers and received the benefits without being entitled to them, Tum was convicted for the crime.

Kelley v. Correctional Medical Services, Inc., __ F.3d __ (2013) (2013 WL 450560)

<http://www.ca1.uscourts.gov/pdf/opinions/11-2246P-01A.pdf>

In *Kelley*, Plaintiff alleged retaliation in violation of the American with Disabilities Act (ADA). In the Opposition to the Motion for Summary Judgment, Plaintiff presented evidence that showed the supervisor's repeated hostility towards Plaintiff's accommodation. The First Circuit held that discriminatory animus can be reasonably inferred from the facts presented. Although the District Court granted Defendant's summary judgment, the First Circuit held that Plaintiff had raised triable issues regarding whether the supervisor's reasons for Kelley's dismissal were pretextual. As such, the case was remanded for further proceedings.

Casiano-Montanez v. State Ins. Fund Corp., __ F.3d __ (2013) (2013 WL 494354)

<http://www.ca1.uscourts.gov/pdf/opinions/12-1453P-01A.pdf>

Casiano-Montanez is a case regarding political discrimination and due process violations stemming from adverse employment actions. The District Court dismissed these claims based on the *Younger* abstention.

However, the First Circuit concluded that said abstention was not applicable to the case.

Plaintiffs' claims are based on their demotion or dismissal. Plaintiffs firstly sought relief through an administrative procedure which affirmed the correctness of their demotions and dismissals. The District Court interpreted that this voluntary engagement of an administrative procedure before the filing in federal court required an abstention under *Younger v. Harris*, 401 U.S. 37 (1971). Nevertheless, the First Circuit determined that said proceeding was remedial in nature and the *Younger* abstention did not apply. Notwithstanding, pursuant to Defendants' request, the First Circuit granted a stay of the case pending the Puerto Rico Supreme Court's decision in a pending case under both the *Pullman* abstention doctrine as well as the principles of federalism, comity, and sound judicial administration.

Submitted By:

José R. González-Nogueras, Esq. & Ms. Sofiana Bird Jiménez, Graffam & Lausell

jgonzalez@jgl.com

P. O. Box 366104

San Juan, Puerto Rico 00936-6104

Tel.: (787) 767-1030 Fax.: (787) 751-4068

<http://www.jgl.com>

6th Circuit

FLSA/Administrative Exemption: *Foster v. Nationwide Mutual Insurance Co.*, __ F.3d __ (6th Cir., Mar. 21, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0073p-06.pdf>

In *Foster*, the plaintiffs were ninety-one current and former special investigators (SIs) for the defendant, which provides to customers a wide range of insurance products, alleging that they were improperly classified as



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“exempt” under the Fair Labor Standards Act’s “administrative exemption.” It maintains a Special Investigations Unit (SIU) that is run by geographic SUI Directors, who oversee a group of SIU managers, who, in turn, supervise SIs. The SIU exists to detect and reduce fraudulent insurance claims. If fraud is suspected, claims are assigned to SIs for investigation. The SIs are paid a \$75,000 starting annual salary, typically have law enforcement or insurance claim backgrounds, and “spend the majority, if not an overwhelming majority, of their time carrying out investigations of suspicious claims,” which is done free from direct supervision but subject to guidelines and strict auditing standards. With the defendant’s claims adjusters, the SIs then develop a plan of action for each investigation.

The “administrative exemption” under the FLSA requires the employee to (1) receive a salary of at least \$455 per week, (2) have as her primary duty the performance of office or non-manual work that is directly related to the management or general business operations of the employer or the employer’s customers, and (3) in carrying out her primary duty, exercise discretion and independent judgment with respect to matters of significance. The United States District Court for the Southern District of Ohio held, as a matter of law, that the SIs met the first two elements of the “administrative exemption,” but concluded that a genuine issue of fact existed as to the third. After a bench trial on the third element, the trial court found that “the primary duty of [the defendant’s] SIs is to conduct investigations into suspicious claims with the purpose or goal of resolving indicators of fraud present in those claims.” It, thus, held that the SIs were “exempt”. The Sixth Circuit affirmed.

According to the Sixth Circuit, the trial court correctly rejected the plaintiffs’ contention that the investigations involved merely the gathering and reporting of facts. Instead, the factual findings of the trial court – that the SIs primary duties were the resolution of fraud indicators and deciding when to refer claims to law enforcement – were supported by the record evidence. Noting that insurance claims adjusters satisfy the “administrative exemption” and that the SIs’ work “overlaps that of insurance claims adjusters,” the Sixth Circuit concluded that the SIs primary duties are “ancillary to” an insurance company’s

primary production activity. In short, according to the Court, the SIs’ work “remains integral to the claims adjusting function, is performed in partnership with [claims adjusters], and involves making findings that bear directly on the [claims adjuster’s] decision to pay or deny a claim.” Further, relying on the factual determinations made by the trial court, the Sixth Circuit concluded that the SIs exercised discretion and independent judgment in that they performed more than mere fact gathering and instead, made “findings,” determined what information is “relevant,” and “resolved” indicators of fraud related to insurance claims – thereby satisfying the third element of the “administrative exemption.”

***Fuhr v. Hazel Park School Dist.*, __ F.3d __ (6th Cir., Mar. 19, 2013)**

<http://www.ca6.uscourts.gov/opinions.pdf/13a0070p-06.pdf>

In 1999, the plaintiff in *Fuhr*, the former girls’ high school basketball coach for the defendant school district, successfully sued the defendant to be reinstated as the boys’ high school basketball coach. For five years she coached both the girls and boys varsity teams. In 2006, she was removed as the girls coach. She sued in 2008, alleging that her removal from her position as the girls coach and the alleged harassment she experienced resulted from her 1999 lawsuit. In support of her claim, the plaintiff described certain events that she believed were directed at her as unlawful retaliation in violation of Title VII and Title IX – including that the defendant unfairly disciplined her best players, she was denied access to the better, male locker rooms, and she was denied “resources she need[ed].”

The school district stated that it removed her from the position as girls’ coach in anticipation, at the time, of the girls and boys basketball seasons in Michigan being realigned pursuant to a court order in another lawsuit involving the Michigan High School Athletic Association. According to the defendant, the plaintiff would have difficulty coaching both teams during the same season. The United States District Court for the



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Eastern District of Michigan granted the defendant summary judgment. The Sixth Circuit affirmed.

The Court first addressed the alleged statements by the defendant's athletic director in 2005 that "this is a good old boys network" and "they are doing this to you to get even because you stood up for your rights..." and "to get back at you for winning the lawsuit." It concluded that these alleged statements were not "direct evidence" of retaliation because they did not make clear who is part of the "good old boys network" or which acts were retaliatory. Examining, then, the plaintiff's claim under the *McDonnell-Douglas* burden-shifting paradigm, the Court concluded that she could not establish a prima facie case of retaliation. Specifically, according to the Court, "the multi-year gap" between her lawsuit and the alleged retaliatory acts "proves fatal" to her assertion that there was a causal connection between her 1999 lawsuit and the alleged adverse actions. It explained that "while temporal proximity alone cannot establish a causal connection, the lack of temporal proximity alone can be fatal to an attempt to establish a causal connection under circumstances such as these."

Workers' Compensation: *Rudisill v. Ford Motor Co.*, __ F.3d __ (6th Cir., March 11, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0061p-06.pdf>

The plaintiff in *Rudisill* received workers' compensation benefits under Ohio law after sustaining serious workplace injuries. He subsequently sued the defendant alleging an intentional tort. The U.S. District Court for the Northern District of Ohio granted summary judgment to the defendant, concluding that the plaintiff failed to create a fact issue as to whether the defendant intended to injure him. The Sixth Circuit affirmed.

The plaintiff worked on the defendant's Mold 2 line, where engine blocks are cast in molten metal. He was injured and burned during a repair job, after safety rail guards had been removed from the equipment being repaired. After the incident, the defendant modified the repair process at issue to avoid similar injuries. Under

Ohio law, the Court explained, an employee may recover for workplace torts only upon a showing that the employer acted with the deliberate intent to injure. Ohio law also creates a rebuttable presumption of intent in favor of the plaintiff when safety equipment is removed, which may be rebutted if the employer can show that it did not in fact intend to injure the employee.

After a lengthy examination of the history of Ohio's limited, intentional-tort-exception to the exclusivity of an injured employee's workers' compensation remedies, the Court pointed to record evidence belying the plaintiff's theory of intentional conduct: the lack of any prior substantially similar incidents ("despite the hundreds of millions of hours worked at the plant"); the lack of any prior citations or complaints involving substantially similar conditions; the plaintiff's (and others') admission that the repair process was not dangerous; that the plaintiff had performed in the same task hundreds of times in the past; that the plaintiff conceded that he would have spoken up if he thought the project was dangerous; and his admission that he had no reason to think that his superior intended to harm him.

The Court rejected the plaintiff's argument that whether a rebuttable presumption has in fact been rebutted is always a fact issue for a jury, stating that the determination does not "necessarily require the weighing of evidence." Concluding that the defendant rebutted the presumption, the Court turned to the issue of whether a material fact dispute remained as to the defendant's intent. It granting summary judgment for the defendant on that issue, the Court explained that the mere fact that the task was dangerous did not create a fact dispute as to intent, and the defendant's alleged failure to follow safety guidelines and perform a job safety analysis is nothing more than an allegation of negligence, not one of intentional conduct. Consequently, the defendant was entitled to summary judgment on the issue of intent.

Submitted by:

Scott R. Eldridge

Miller, Canfield, Paddock & Stone, P.L.C.

One Michigan Ave., Suite 900

Lansing, Michigan 48933



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Direct: (517) 483-4918
eldridge@millercanfield.com

7th Circuit

Equal Employment Opportunity Commission v. AutoZone, Inc., No. 12-1017 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/Q60NY4WT.pdf>

Court Affirms Jury Verdict in Plaintiff's ADA Failure To Accommodate Case and Refuses to Remit Compensatory and Punitive Damages Awards

The Seventh Circuit affirmed the jury's verdict for the plaintiff on his ADA failure to accommodate claim. As a result of the defendant denying the plaintiff's request for reasonable accommodation, the plaintiff so severely aggravated an existing back injury that he was unable to work for three months. When he was ready to return to work, the defendant fired him. This case involved questions of issue preclusion, remittitur, punitive damages, and injunctions requiring compliance with the law. The Court first addressed issue preclusion, finding that a previous jury verdict that addressed whether the plaintiff was qualified to work did not preclude a subsequent jury from answering the same question since one trial involved the plaintiff's termination and the other involved his injury prior to taking leave. Turning to the question of compensatory damages, the Court held that when plaintiffs suffer from near-daily pain, it is well within the lower court's discretion to uphold a compensatory damages award in full. The Court then refused to vacate the punitive damages award as the individuals who refused the plaintiff's accommodation had been trained on ADA procedures and were aware of the plaintiff's disability. Finally, the Court commented that there is a general disfavor of injunctions that require defendants to comply with the law. In this case, however, the Court approved of such an injunction because of the reprehensibility of the defendant's conduct, the ease of the requested and denied accommodation, and the knowing disregard for the underlying purpose of the ADA.

Aaron L. Espenscheid et al., v. Directsat USA, LLC, et al., No. 12-1943 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/PL0M0OZV.pdf>

Court Affirms Decertification Of A Class When Plaintiffs Could Not Present A Feasible Way To Determine Damages For The Class

The Seventh Circuit affirmed the district court's decertification of a single class composed of 2,341 technicians. The class members alleged that the defendant owed them wages, including unpaid overtime, in violation of the FLSA. The plaintiffs sought only monetary relief, a number which, according to the Seventh Circuit, could not be determined mechanically or formulaically. The technicians had different pay structures, different reporting methods for time worked, and had worked varying amounts of unpaid overtime hours. Accordingly, the district court below would be "swamped" with 2,341 evidentiary hearings on damages. To overcome the variance in damages within the class, the plaintiffs offered to have 42 "representatives" testify but failed to show how these individuals were selected or how it was determined they appropriately represented the class, and failed to address issues of windfall or inadequate remedy for class members owed more or less than the 42 "representatives." Because the Seventh Circuit found the plaintiffs incapable of proposing a feasible litigation plan, the Court affirmed the district court's decertification of the class. However, the Court suggested that the plaintiffs file a complaint with the Department of Labor, where the class members could obtain the same relief sought in this action.

John Rutherford, et al., v. Judge & Dolph LTD. n/k/a Judge & Dolph LLC, et al., No. 09-3706 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/PL0JQ1BQ.pdf>

Court Affirms District Court's Dismissal of Plaintiffs' Claims Against Employer and Union Under Section 301 of the Labor Management Relations Act



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The Seventh Circuit affirmed the district court's dismissal of the plaintiffs' claims. The plaintiffs brought suit under Section 301 of the Labor-Management Relations Act alleging that the defendants violated the CBA by terminating them without cause and also brought suit against the union for violating its duty of fair representation by settling grievances for amounts the plaintiffs believed were unsatisfactory. The Court held that it lacked subject matter jurisdiction to consider the plaintiffs' claim against the union under Section 301 of the LMRA. In general, Section 301 provides federal subject matter jurisdiction for suits alleging violations of contracts between an employer and a labor organization, but excludes granting jurisdiction for claims by employees against unions. The narrow exception to this rule, as recognized by the Supreme Court, occurs when an employee must pursue grievances through arbitration pursuant to the CBA and the union arbitrarily or irrationally decides not to arbitrate the grievance. The employee can then bring a "hybrid" claim against the employer and the union under the LMRA. The CBA in question was not so limiting and therefore the "hybrid" exception did not apply. The Court then held that it was not possible that the employer violated the CBA, as the CBA had expired prior to the actions complained of by the plaintiffs pursuant to a timely and unambiguous notice of termination the union had served on the employer.

Carris James v. Hyatt Regency Chicago, No. 12-1511 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/PZ0JQW91.pdf>

Court Affirms Summary Judgment Holding That An Employer Has No Duty Under The FMLA To Reinstatement An Employee If Employee Cannot Perform An Essential Function Of The Job

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants on the plaintiff's FMLA and ADA claims. This case involved a banquet steward who, after taking approved FMLA leave for an eye injury, claimed that the defendant interfered with his

FMLA rights by failing to reinstate him at his earliest proposed return date. The Court held that an employer's duty to reinstate an employee returning from FMLA leave is triggered when an employee submits a statement from his or her healthcare provider which indicates that he or she may return to work. However, the Court further held that an employer has no duty under the FMLA to return an employee to his or her position if that employee cannot perform an essential function of the job. Here, the plaintiff claimed he could return to "light duty" work, a concept which the Seventh Circuit has rejected. Finding no FMLA interference, the Court turned to the plaintiff's FMLA retaliation claim and found that the plaintiff had not produced any evidence of a materially adverse action. To the contrary, the Court found that the defendant had, on multiple occasions, attempted to return the plaintiff to work. The Court also affirmed the grant of summary judgment on the ADA claim because the representation from the plaintiff's health care provider indicated that the plaintiff could not perform two essential functions of his position (lifting and bending over) and under the ADA, reassigning such tasks to another employee would essentially equate to reassignment of the job itself. Finally, the Court refused to reverse the district court's denial of the plaintiff's motion to compel discovery (and the subsequent award of attorneys' fees to the defendant), holding that after eighteen months of discovery, the plaintiff was not entitled to fish for new evidence in hopes of being able to reshape the facts of the case.

Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co., Nos. 10-3314, 10-3518 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/O00NIJF1.pdf>

Court Finds District Court Exceeded Authority in Reviewing Decision By The National Railroad Adjustment Board Award, Recognizing Scope Of Judicial Review Of A Decision By The NRAB Is Among The Narrowest Known To The Law

In this case, the defendant fired a locomotive engineer which resulted in the union filing a grievance on the engineer's behalf. This grievance eventually came before



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the National Railroad Adjustment Board. The Board ordered that the defendant reinstate the engineer with back pay, offset by any compensation earned between the termination and his reinstatement. On appeal to the district court, the court held that it did not have jurisdiction to consider the offset provision as neither party was aware of whether the engineer had earned anything during the layoff period. It then vacated the offset provision, and remanded the case back to the Board. The Seventh Circuit found that the district court exceeded its jurisdiction in vacating the offset provision. Under the Railway Labor Act, a district judge may only vacate a decision if the Board failed to comply with the statute, exceeded its jurisdiction, or if a member of the Board committed fraud or corruption. None of these circumstances were present. The Seventh Circuit also found that the district court judge overstepped his jurisdiction by remanding the case back to the Board. The Court then clarified for future cases such as this that the question for decision by a district judge asked to set aside an arbitration award is not whether the arbitrator *erred* in interpreting the contract; it is simply whether they interpreted the contract.

Michael A. Teruggi v. The CIT Group/Capital Finance, INC., b/d/a CIT RAIL, No. 12-2314 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/Q4177187.pdf>

Court Holds Plaintiff Must Show More Than a Bad Employment Decision to Establish an Employer's Stated Reason for Termination is Pretextual

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants on the plaintiff's claims of age and disability discrimination, and retaliation for filing a workers' compensation claim. The plaintiff relied, in part, on evidence showing that he interviewed for a position that had already been filled (the position had been offered to an alien, requiring the company to post the position internally before the candidate could officially accept the position), that the defendant monitored his email account for almost a year without informing the plaintiff, and that his employment was terminated for an "inconsequential" violation of a company policy (failing

to protect confidential information of the defendant's suppliers). The Court found the plaintiff's argument unavailing as it did not point to discriminatory intent, individually or collectively. The Court noted that though the defendant may have made an unwise employment decision, the plaintiff must still show that the employer's stated reason for the adverse action was a lie and not just an error, oddity, or oversight. Finally, the Court reasoned that the plaintiff failed to proffer evidence of a causal connection between the termination of his employment and the settlement of his workers' compensation claim. This settlement occurred eighteen months before the defendant fired the plaintiff—an amount of time that the Court said was "not at all suspicious."

Melissa J. Reddinger and Scott LeFebvre v. SENA Severance Pay Plan and Newpage Wisconsin System Inc. Nos. 10-2361, 10-2362 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/Q50FF92M.pdf>

Court Holds That Under ERISA A Plan Administrator's Decision To Determine Eligibility Is Reviewed Under An Arbitrary And Capricious Standard

The Seventh Circuit affirmed the district court's grant of summary judgment on the plaintiffs' ERISA claim. In this case, the employer only provided severance to persons whose employment was involuntarily terminated. The plaintiffs were told that the plant was closing and were offered a termination date. However, before the plaintiffs executed the release agreement, the defendants informed the plaintiffs that their employment would continue for a few more months. The plaintiffs elected to ignore this extension, and instead submitted the release agreement and left work on the original (earlier) termination date. The plan administrator thus found that the plaintiffs were ineligible for severance benefits. The Court, applying the arbitrary and capricious standard of review, upheld the plan administrator's decision to deny the plaintiffs benefits. The Court reasoned that since the plaintiffs decided to stop working on the original termination date even though they were aware that their employment had been extended by months, their termination was not



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involuntary. The Seventh Circuit also rejected the plaintiffs' claim that the plan's administrator breached its fiduciary duties because the plaintiffs provided no evidence showing that the decision to keep the mill open later was in any way motivated by a desire to avoid its obligations under the severance plan.

Milwaukee Police Association and Melissa Ramskugler v. Board of Fire & Police Commissioners of The City of Milwaukee, Edward Flynn, and The City of Milwaukee, No. 11-2314 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/Q60K7O4G.pdf>

Court Finds A Unions Request To Proceed With An Appeal Where The Employee Settled Did Not Adequately Demonstrate The Policy Presented A "Brooding Presence" With A "Substantial Adverse Effect" To Avoid The Controversy Being Rendered Moot

In this case, an employee had satisfied the State of Wisconsin's requirements to become a police officer, but had not yet completed the additional, mandatory probationary period. As a result, when the employee was terminated, questions were raised about whether the defendant was required to follow Wisconsin's statutorily prescribed procedures for terminating police officers. The employee brought suit along with the union representing Milwaukee officers, claiming that the termination wrongfully deprived the employee of property without due process. After the district court granted summary judgment and the plaintiffs filed an appeal, the employee signed a complete release and settlement. However, the union wished to proceed with the case. The Seventh Circuit held that the union never had standing to bring these claims on its own and any claims derived from its members became moot when settlement was reached. In order to avoid general mootness in cases that claim associational standing, the Court held that the organization must show that its members would otherwise have standing to sue in their own right. Here, the union members would not have satisfied this requirement. The Court further rejected the union's argument that the case should continue as an ongoing policy dispute between

parties having adverse legal interests, as well as because the case was of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The Court found that this case did not present an ongoing policy that was a "continuing and brooding presence" that had a substantial and adverse effect on the petitioning parties. As a result, the Seventh Circuit found that this case has become an abstract dispute about the law and dismissed the case as moot.

William D. Grote III, et al., v. Kathleen Seblius, in her official capacity as the Secretary of the United States Department of Health and Human Services, et al., No. 13-1077 (7th Cir. February 2013)

<http://www.ca7.uscourts.gov/tmp/Q60LPOF9.pdf>

Court Holds Appellants Established A Reasonable Likelihood Of Success On Their Claim That The Contraception Mandate Of The Patient Protection Affordable Care Act Violates The Religious Freedom Restoration Act

The Seventh Circuit granted the appellant-company's motion for an injunction pending appeal upon finding that the company established a reasonable likelihood of success on the merits that the contraception mandate of the Patient Protection Affordable Care Act ("ACA") violates the Religious Freedom Restoration Act. Appellants in this case own a privately held, family-run business and provide their employees with self-insured group health insurance. The appellants are Catholic and attempt to operate their business in accordance with the precepts of their faith. The ACA includes a mandate that would require appellants' health insurance plan to provide no-cost coverage for all FDA-approved contraceptives, sterilization procedures, and related services or face substantial financial penalties. In reviewing the facts of this case, the Court found that the equitable balance tipped in favor of granting the injunction; the harm to the appellants' religious liberty rights outweighed the temporary harm to the government's interest in providing greater access to cost-free contraception and related services. The appellants' claimed that they cannot comply with both the legal duties imposed on them by the



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contraception mandate and with their religious faith. Ultimately, the Court found that the government failed to show that this mandate was the least restrictive alternative, and that failing to issue the injunction would cause appellants to suffer irreparable harm.

Alam v. Miller Brewing Co. & MillerCoors LLC, No. 11-2456 (7th Cir. February 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D02-27/C:11-2456:J:Bauer:aut:T:fnOp:N:1090232:S:0>

Court Affirms Dismissal of Plaintiff's Title VII Retaliation Claim, Finding Plaintiff Failed to Exhaust Administrative Remedies Against One Defendant, and Failed to Properly Allege the Second Defendant was an Employer as Defined by Title VII

The Seventh Circuit affirmed the district court's dismissal of the plaintiff's Title VII retaliation claims against the two defendants, finding that the plaintiff failed to properly allege that the first defendant was an employer as defined by Title VII and that the plaintiff failed to name the second defendant in his EEOC charge, thereby failing to exhaust his administrative remedies. In this case, the plaintiff alleged that the defendants were refusing to do business with him in retaliation for a charge of discrimination he filed against Miller Brewing in 2006. The Court affirmed the district court's dismissal against the first defendant without having to address the merits of the plaintiff's claims. The plaintiff named only the second defendant, MillerCoors, in his EEOC retaliation charge and further failed to allege in his Complaint that Miller Brewing had notice of the EEOC charge against it. The Court then affirmed the dismissal of the plaintiff's claims against the second defendant, finding that the defendant was not an employer as defined by Title VII. Rather, the plaintiff was indisputably an independent contractor at the time of the alleged retaliation.

David Kristofek v Village of Orland Hills and Thomas Scully, No. 12-2345 (7th Cir. March 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-11/C:12-2345:J:Williams:aut:T:fnOp:N:1097381:S:0>

Court Reverses The District Court's Dismissal Of A Former Police Officer's First Amendment And § 1983 Claims, Finding Constitutional Protection Even Where The Speech Is Motivated In Whole Or In Part By Self-Interest Of The Plaintiff

The Seventh Circuit reversed the district court's dismissal of the plaintiff's First Amendment retaliation claims brought pursuant to § 1983. This case involved a police officer who claimed he was fired in retaliation for reporting to other officers and the FBI possible political corruption, political favoritism, and criminal activity within his department. His reports of potentially unlawful behavior relate to an arrest in which he was involved. The district court dismissed the plaintiff's claims, finding that his reports did not address matters of public concern. Instead, the district court concluded that they were motivated by the plaintiff's desire to protect himself from liability. The Seventh Circuit reversed the dismissal, finding that a public employee's speech may be protected if the speaker has mixed motives that include a desire to help the public. The Court noted that the plaintiff reported the unlawful activity before he was likely aware of his own liability, which speaks to a latent concern that goes beyond self-interest. The Court further noted that even if the plaintiff was motivated exclusively by his own self-interest, his First Amendment claim would not necessarily be dismissed. Under the *Connick* test, the determination of whether speech is a matter of public concern depends on an analysis of content, form, and context. Accordingly, as the speakers' motive is only part of the inquiry into context which in turn is only part of the entire analysis, motivation cannot be dispositive.

The Seventh Circuit also found that that the municipal body-defendant could plausibly be liable for a § 1983 violation as the Police Chief who fired the plaintiff had *de facto* authority to set hiring and firing policies. The Court reached this conclusion by noting the Police Chief had an unchecked ability to fire employees.



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Brian Teed et al., v. Thomas Betts Power Solutions, L.L.C., Nos. 12-2440, 12-3029 (7th Cir. March 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-26/C:12-2440:J:Posner:aut:T:fnOp:N:1106464:S:0>

Court Recognizes Default Rule Of Applying The Federal Common Law Standard For Successor Liability In Suits To Enforce Federal Labor Or Employment Laws

The Seventh Circuit affirmed the district court's decision to apply successor liability in the plaintiff's FLSA class action. This case involved the defendant's purchase of the assets of a company where the purchase included an express condition that the defendant would not assume any liabilities from the company's ongoing class action FLSA litigation. Despite the condition of the sale, the district court permitted the plaintiffs to substitute the defendant as the previous company's successor. Had the defendant's successor liability been evaluated under Wisconsin law, the law under which the assets were sold, the defendant would have been relieved of liability and could not have been substituted as the defendant. However, the Court noted that when liability is based on a violation of a federal statute, the federal common law standard of successor liability is applied. In affirming the district court's application of successor liability, the Court reasoned that such liability is appropriate to enforce federal labor and employment statutes even when the successor has expressly disclaimed liability. The Court did note, however, that certain circumstances might warrant withholding successor liability, such as lack of notice. The Court also pointed out that the application of the federal standard might result in potential windfalls. For example, employees gain the ability to recover monetary relief from the new, solvent employer. The Court justified this potential windfall by noting its counterpoint—preventing employers such as the defendant from “stiffing” workers who have valid claims.

Juana Sanchez v. Prudential Pizza Inc., No. 12-2208 (7th Cir. March 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-04/C:12-2208:J:Hamilton:aut:T:fnOp:N:1093013:S:0>

Court Finds Plaintiff Entitled To Attorneys' Fees and Costs In Addition To The Amount Specified In The Accepted Offer Of Judgment, Where The Offer Was Silent As To Fees And Costs

The Seventh Circuit reversed the district court's judgment that denied the plaintiff attorneys' fees in addition to the amount specified in the Defendant's Rule 68 offer of judgment. This case involved a Title VII plaintiff who, before the case went to trial, accepted a Rule 68 offer of judgment that specified its application to “all of Plaintiff's claims for relief” but contained no language addressing fees and costs. The district court denied the plaintiff's request for attorneys' fees and costs in addition to the amount specified (and accepted) in the defendant's Rule 68 offer. The district court construed the offer to already include compensation for fees and costs based on an interpretation of “all of Plaintiff's claims for relief.” The Seventh Circuit rejected the district court's approach of reviewing the offer of judgment as it would an ordinary contract, noting that the stakes of accepting or denying an offer of judgment are much higher for a plaintiff. In further emphasizing this point, the Court stressed that a Rule 68 offer must include “specified terms.” Therefore, the Court plainly rejected the defendant's argument that a request for fees in a plaintiff's Complaint would logically be included in “all of Plaintiff's claims for relief.” To the contrary, as the Court pointed out, claims and demands for relief are “different animals in civil procedure.” Accordingly, as the defendant's offer was silent as to costs and fees, as the prevailing party, the plaintiff is entitled to her attorneys' fees and costs in addition to the amount specified in the offer of judgment.



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Gary Vaughn v. Thomas H. Vilsack, Secretary, United States Department of Agriculture., No. 11-3673 (7th Cir. March 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-08/C:11-3673:J:Ripple:aut:T:fnOp:N:1096557:S:0>

Court Holds That Plaintiff Who Had Been Accused Of Sexual Harassment Was Not Meeting The Employer's Legitimate Expectations And Thus Could Not Establish His Prima Facie Case For Title VII Retaliation

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's Title VII retaliation claim. This case involved a Career Development Specialist with the U.S. Department of Agriculture who filed numerous internal EEO complaints alleging age and race discrimination as well as retaliation. One such complaint progressed to a federal lawsuit. Two days after signing a settlement agreement resolving these matters, including the lawsuit, the plaintiff received notice that his work schedule was being switched from regular weekday hours to a schedule that required him to work until midnight and to work on the weekends. He was also passed over for several opportunities which would have resulted in him earning additional compensation. The Court evaluated the plaintiff's retaliation claim using the indirect method of proof and held that the plaintiff was not meeting his employer's legitimate expectations at the time of the alleged adverse action (the schedule change). The plaintiff had previously been accused by a coworker of sexual harassment. The coworker made internal complaints as well as filed an EEOC charge that included these allegations. As part of the settlement of the coworker's claim, the plaintiff was no longer permitted to be at the worksite at the same time as the coworker. The Court did not accept the plaintiff's attempts to attack the veracity of the allegations of sexual harassment or the coworker's credibility, as, the Court held, the relevant inquiry is whether the defendant believed in good faith that its decision was appropriate to remedy the plaintiff's harassing behavior. This is true whether the plaintiff's conduct was unlawful or not.

Toy Collins v. American Red Cross, No. 11-3345 (7th Cir. March 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-08/C:11-3345:J:Kanne:aut:T:fnOp:N:1096567:S:0>

Court Affirms Summary Judgment For Defendant On Plaintiff's Title VII Race Discrimination And Retaliation Claims

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's retaliation and race discrimination claims. The plaintiff in this case, an African-American, complained internally and to the EEOC that her coworkers put tacks on her chair, damaged her property, demanded private information, stole her files, required her to pay business costs from her own pocket, and otherwise harassed and sabotaged her. Though the plaintiff received a right to sue notice from the EEOC, she did not sue. Three months later, the defendant received reports that the plaintiff had told coworkers that the defendant was out to get minorities and that she had engaged in other misconduct including saying she could not work with homosexuals, instructing an employee to falsify records, coercing a subordinate into teaching a class for free, and giving out blank certifications for courses. After conducting an investigation into these allegations, the defendant terminated the plaintiff's employment. The plaintiff argued that there was a causal connection between her termination and EEOC charge, but the Court did not agree. Rather, the Court held that the plaintiff's comments about minorities were meant to increase racial tension in the workplace and noted that the plaintiff failed to offer evidence establishing a connection between her protected activity and her termination. The Court also found the plaintiff's efforts to attack the credibility of the investigation report that led to her termination unpersuasive. The Court stated that plaintiffs must do more than deny a defendant's allegations to establish pretext. Rather, here, the plaintiff was required to show that the report contained deliberate lies. Ultimately, the Court found that the plaintiff failed to present any evidence of discriminatory or retaliatory animus and affirmed summary judgment.



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***Donald Tompkins v. Central Laborers' Pension Fund*, No. 12-1995 (7th Cir. March 2013)**

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-13/C:12-1995:J:Williams:aut:T:fnOp:N:1098980:S:0>

Court Applies Arbitrary-And-Capricious Standard In Affirming Dismissal of ERISA Plaintiff's Claims After Finding Insufficient Evidence To Warrant The Application Of A Heightened Standard of Review

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ERISA claims. The plaintiff challenged the Fund's interpretation of "total and permanent disability." When the fund no longer considered him totally and permanently disabled, he stopped receiving benefits. The Fund based its conclusion on the fact that the plaintiff had returned to full-time work. In affirming summary judgment, the Court found that the Fund's determination was entitled to deference under the applicable arbitrary-and-capricious standard of review. The Court noted that this deference is conditioned on the Fund exercising its discretion honestly and fairly. The plaintiff argued that the Fund acted in bad faith, first claiming that the Fund failed to disclose documents that were available to the trustees at the time the plaintiff's benefits were terminated. The Court found this argument unavailing as ERISA requires the Fund to disclose only documents *relevant* to a claim for benefits. The plaintiff did not argue to the contrary. The plaintiff further alleged that the Fund had a conflict of interest in making the decision to terminate his benefits as they were simultaneously considering the high cost of the retirement plan. The Court was equally unconvinced by this argument because the plaintiff's evidence of improper motivation either predated the termination of his benefits by four years, or was not in existence until after the decision was made. Accordingly, the Court refused to apply a heightened standard of review. Instead, applying the arbitrary-and-capricious standard, the Court concluded that the Fund's interpretation of the language in question and its subsequent termination of the plaintiff's benefits was reasonable. Finally, the Court addressed the plaintiff's argument that the Fund breached its fiduciary duties by providing him with incorrect or insufficient notice of the terms of his benefits. As the Court found no evidence of

intent to disadvantage or deceive plan participants, it held that the district court had properly dismissed the plaintiff's claim.

***Gregory Simmons v. Timothy Gillespie*, No. 12-3381 (7th Cir. March 2013)**

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-19/C:12-3381:J:Easterbrook:aut:T:fnOp:N:1102181:S:0>

Court Holds Plaintiffs Cannot Use The Due Process Clause Of The Fourteenth Amendment To Seek A More Favorable Outcome Than One Already Obtained Through Previous State Court Litigation

The Seventh Circuit affirmed the dismissal of the plaintiff's § 1983 claim. This case involved a former police officer who had been suspended without pay for 20 days by the Board of Fire and Police Commissioners. The suspension was for disobeying an order. However, the order was later found to be unlawful by an Illinois appellate court. The plaintiff then filed a federal lawsuit under § 1983 alleging that the city owed him wages lost during his suspension, pursuant to the due process clause of the Fourteenth Amendment. The district court dismissed the plaintiff's claims, concluding that Illinois law only provides back pay when the Board, rather than a court, rules in an officer's favor. In addressing the plaintiff's previous litigation in state court, the Court commented that the plaintiff split his claim by demanding one kind of relief from the state court, and another kind of relief from the federal court. The Court noted that the plaintiff's claims were subject to *res judicata* but since the defendant did not raise this affirmative defense, they had waived the argument. The Court pointed out that the due process clause only guarantees public employees process, not a favorable outcome. The Court recognized that the plaintiff had ample opportunity to obtain his lost wages which he chose not to take. The plaintiff neither requested monetary relief from the appellate court nor requested remand back to the Board where he could have obtained the favorable ruling to entitle him to back pay under the



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law. Though the Court disagreed with how the district court resolved this claim, it nonetheless affirmed the dismissal of this action.

Ehnae Northington v. H & M International, No. 12-1233 (7th Cir. March 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D03-21/C:12-1233:J:Cudahy:aut:T:fnOp:N:1103962:S:0>

Court Holds Plaintiff's Complaints Of Personal Conflicts Are Not Protected Activity Under Title VII And That Defendant's Negligent Spoliation Of Evidence Does Not Give Rise To An Adverse Inference That Would Preclude Summary Judgment

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's Title VII retaliation claim. This case involved a railroad and trucking terminal lot checker who filed internal and criminal complaints claiming she was harassed and assaulted by a coworker. These complaints, however, involved a purely personal conflict between the plaintiff and the coworker and did not include allegations of discrimination or harassment based on her race or gender. Accordingly, the Court held that the plaintiff's complaints were not protected activity under Title VII and affirmed the district court's holding that the plaintiff's retaliation claim failed as a matter of law. The Court further rejected the plaintiff's claim that the discovery sanction she was awarded required the application of an adverse inference that would preclude summary judgment. The plaintiff argued that since the district court found that the defendant's negligence resulted in the destruction of evidence, she was entitled to an inference that the missing information contained evidence of Title VII violations. The Court disagreed and pointed out that the spoliation must be willful to give rise to such an inference. Rather, as part of the district court's sanctions, the defendant was only prohibited from inferring an absence of discrimination from the lack of evidence. Therefore, the Court held that such a limitation on the defendant's strategy would not preclude summary judgment.

Submitted by:

Ruth I. Major, Esq.

Erica Suskind, Esq.

Kevin Zezima, Esq.

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

30 W. Monroe Street, Suite 1650

Chicago, Illinois 60603

Telephone: 312.893.7544

www.major-law.com

10th Circuit

ADAAA: *Wehrley v. American Family Mutual Insurance Co.*, 2013 WL 1092856 (10th Cir., March 18, 2013).

<http://www.ca10.uscourts.gov/opinions/12/12-1079.pdf>

In *Wehrley*, the 10th Circuit joined other circuits in confirming that the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") does not apply retroactively. Because the alleged disability discrimination in *Wehrley* took place before January 1, 2009, the Court applied the original Act's more limited definition of "disability," and held that the Plaintiff did not present sufficient evidence to defeat summary judgment under that standard. However, because he had a reasonable belief that he was "disabled" under the prior Act, the Court found that he made out a prima facie case of retaliation; but it affirmed Summary Judgment because he did not present sufficient evidence of pretext.

Plaintiff was a claims adjuster for American Family Mutual Insurance Co., where his duties included on-site property inspections. The position's job description included "the ability to work in high, precarious places between 1 and 33% of the time," "the ability to climb or balance between 1 and 33% of the time," and "the ability to stoop, kneel, crouch or crawl between 1 and 33% of the time." Plaintiff injured his knee and back in a fall



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while investigating a roof in June of 2007, and obtained a doctor's report precluding him from doing roof or ladder work. After the Company accommodated him with claims processing work for several months, an IME doctor determined that he could work without restrictions. However, in July of 2008 Plaintiff obtained another doctor's report, indicating that he still could not do ladder or roof work, that his restrictions were permanent, and that he needed surgery. After Defendant's workers' compensation carrier denied insurance coverage, Defendant engaged in an ongoing discussion with Plaintiff about taking FMLA leave and obtaining personal insurance coverage for his surgery. In July of 2008, Defendant told Plaintiff that climbing roofs was an important part of his job, and that if he did not perform roof claims, his job could be in jeopardy because his absence increased the work for other adjusters. When Plaintiff indicated that he had not applied for FMLA leave or obtained personal insurance for his surgery, the Supervisor terminated his employment, citing his inability to perform roof inspections.

Plaintiff asserted claims for (1) discrimination in violation of the Americans with Disabilities Act (ADA), (2) violation of Colorado public policy, (3) retaliation under the FMLA, and (4) retaliation under the ADA. The district court granted summary judgment on all four claims; as to Plaintiff's ADA discrimination claim, the district court held that Wehrley was not "substantially impaired" in any major life activity.

Under the ADA, a person is disabled if he (1) has a physical or mental impairment that substantially limits one or more of his major life activities, (2) has a record of such an impairment, or (3) is regarded by his employer as having such an impairment. 42 U.S.C. § 12102(1). Plaintiff claimed his knee and back injuries were a qualifying physical impairment. The Court cited the three-step process for determining whether an impairment exists. Plaintiff must (1) show he has a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show that the impairment substantially limits one or more of those activities. The parties disputed whether Wehrley was substantially impaired in any major life activity.

As the Court recited, the ADAAA had a stated purpose of

superseding a number of Supreme Court decisions applying a restrictive definition of "disability," and created a statutory definition of "major life activities" which includes major bodily functions as well as specific activities previously accepted by the Courts as "major." See 42 U.S.C. § 12102(2)(A). However, the Court confirmed that the ADAAA does not operate retroactively. Because Plaintiff's employment was terminated in August of 2008 and the ADAAA did not take effect until January 1, 2009, the Court applied the ADA as it stood when Defendant terminated Plaintiff.

The pre-2009 version of the ADA did not define "major life activity," but the Department of Labor regulations in place in 2008 defined the term as including "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2008 version). Prior to the ADA Amendments Act, the Supreme Court had said the phrase "major life activity" needed to be "interpreted strictly to create a demanding standard for qualifying as disabled." Accordingly, the 10th Circuit said "major life activities" referred to "those activities that are of central importance to daily life."

Under this standard, the Court found that Plaintiff had failed to raise a dispute of material fact regarding his disability. The Court concluded that Plaintiff had identified four activities that qualified as major life activities under the pre-ADAAA standard: sleeping, sitting, walking and standing, while rejecting "household activities such as cleaning."

The Court then asked whether Plaintiff was "substantially impaired" in any of these activities when he was fired. The 2008 Department of Labor regulations defined "substantially limit[ed]" as being "(i) Unable to perform a major life activity that the average person in the general population can perform," or "(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1) (2008).

Plaintiff's medical examination reports indicated that



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“prolonged walking or standing” made his knee pain worse; that he needed to change positions to alleviate the pain; that he “has difficulty walking very far and pain disrupts his sleep,” and that his injuries caused “disabilities that result in substantial limitations that affect [Plaintiff’s] ability to do one or more major life activities.” His own affidavit stated that these limitations were as severe when his employment was terminated in August of 2008 as they were when the reports were prepared. Because the evidence did not show that Plaintiff was “unable” to perform any major life activities, the Court was required to consider whether he was “significantly restricted” in the manner or duration of performing those activities. See 29 C.F.R. § 1630.2(j)(1) (2008). As to walking and standing, the medical report said only that prolonged walking or standing caused Plaintiff knee pain, not that the injury restricted his ability to walk or stand in the ordinary course of a day. As to sleeping, the report only indicated that pain “disrupts” or “impacts” his sleep, and said nothing about the extent or severity of the impact on his sleep. Finally, the fact that Plaintiff had to change positions every thirty minutes while sitting was not a substantial limitation, considering how few daily activities required prolonged sitting in one position. In summary, the Court found that Plaintiff had not introduced enough evidence to overcome summary judgment on the issue of whether he was substantially impaired in a major life activity, and therefore had not satisfied the first element of a prima facie case of ADA discrimination.

However, the Court reversed the district court’s conclusion that Plaintiff had failed to meet the first prong of a prima facie case of retaliation, because “no reasonable jury could find that, in June 2007, [Plaintiff] had a reasonable, good faith belief that simply because he could not descend a ladder he was disabled within the meaning of the ADA.” The 10th Circuit held that Wehrley’s evidence that he “has difficulty walking very far and pain disrupts his sleep,” that he had “limitations” in lifting, squatting, kneeling, crawling, climbing, working on ladders or at unprotected heights, and that his disabilities “affect his ability” to do household activities such as cleaning, was sufficient to create a factual issue regarding Plaintiff’s good faith belief that he was disabled, even though he did not actually meet that standard under the pre-ADAAA standards. The Court held that the district

court had erred by focusing on Plaintiff’s beliefs regarding his condition in June 2007 rather than when he was terminated in August 2008. The district court also erred by considering only his inability to descend a ladder and disregarding his other limitations, such as limitations in walking long distances, lifting, squatting, kneeling, crawling, climbing, and working at unprotected heights.

The *Wehrley* case is a reminder that under the ADAAA, employers must construe the term “substantially limited” more broadly, but that employment decisions made prior to 2009 will still be evaluated under the pre-ADAAA standards. Additionally, in analyzing retaliation claims, the Courts apply a less restrictive test to a Plaintiff’s “reasonable belief” that they are disabled than the test for determining whether the Plaintiff actually suffered from a disability.

Submitted by:

James R. Moss

PAYNE & FEARS LLP

222 South Main Street, Suite 547

Salt Lake City, UT 84101

T 385.282.5147 • F 385.282.5001

www.paynefears.com

jrm@paynefears.com

11th Circuit

***Koch Foods, Inc. v. Secretary of U.S. Department of Labor and Bailey* [3/11/13]: Whistleblower**

<http://www.ca11.uscourts.gov/opinions/ops/201114850.pdf>

The case of *Koch Foods, Inc. v. Secretary of U.S. Dept. of Labor* dealt with the whistleblower provision in the Surface Transportation Assistance Act (STAA), which protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with state and federal safety regulations



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or for complaints of noncompliance. Timothy Bailey was a former employee of Koch Foods who was terminated, and brought a claim that his termination was in violation of the law. Specifically, the day before his termination, Bailey observed that his truck weighed 84,000 pounds - 4,000 pounds over the permitted weight limit the STAA. He drove the truck and did not report the violation. The following day, he encountered the same type of truck waiting for him and, without weighing the truck, assumed it also was over the limit. He refused to drive the truck, but did not inform his boss of the problem. He was suspended, and then fired days later.

The Administrative Law Judge found that Bailey's actions were not protected under the whistleblower statute, as the statute only protects actual violations of the law – not in circumstances where the driver reasonably but incorrectly believes the operation would result in a legal violation. The Eleventh Circuit agreed, and vacated and remanded the lower decision to determine whether the operation of the truck would have resulted in an actual violation.

***Reinaldo Lamonica, et. al. v. Safe Hurricane Shutters, et. al.* [3/6/13]: FLSA**

<http://www.ca11.uscourts.gov/opinions/ops/201115743.pdf>

The case of *Reinaldo Lamonica, et. al. v. Safe Hurricane Shutters, et. al.* dealt with employees' claims for unpaid overtime wages under the Fair Labor Standards Act (FLSA). The employees brought claims against the corporate defendant (Safe Shutters), the president, the CEO, and two of the company's directors. A jury found in favor of the employees against all defendants, and the employees were awarded liquidated damages. Defendants appealed.

On appeal, the defendants argued *in pari delicto* defenses that the employees participated in wrongdoing by failing to accurately report the income they earned from Safe Shutters to the IRS, and because one of the employees was undocumented and applied for work using a false social security number. The Court did not find these arguments persuasive.

The defendants also argued that the district court gave erroneous instructions on the issue of individual liability. The Court recognized that the FLSA provides a right of action against any employer who violates minimum wage or overtime provisions. Specifically, the Court acknowledged employer is interpreted broadly to include "both the employer for whom the employee directly works as well as any person acting directly or indirectly in the interests of an employer in relation to an employee." Therefore, based on the broad definition, the Court found a corporate officer with operational control is an employer, who is jointly and severally liable. The Court also found that non-officers could be personally liable under the FLSA, and especially individuals who "control a corporation's financial affairs and can cause the corporation to compensate (or not to compensate) employees in accordance with the FLSA." The Court recognized that the fact that the individuals owned a substantial percentage of the corporation suggests that they had control over the company's financial affairs and support a finding of personal liability. The fact that control is exercised only occasionally does not diminish the significance of its existence, but that control must be substantial and related to company's FLSA obligations.

Finally, the Court found that the defendants did not waive the application of a fluctuating workweek method by failing to plead it as an affirmative defense. The Court further held that a district court may issue jury instruction which allow, but do not require, the jury to apply the fluctuating workweek method to calculate damages

Accordingly, the 11th circuit affirmed the judgment.

Submitted by:

Lindsey Wagner, Esq.

CATHLEEN SCOTT & ASSOCIATES, P.A.

250 South Central Boulevard Suite 104-A

Jupiter, Florida 33458

(561) 653-0008 Telephone (561) 653-0020 Facsimile

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