



Monthly Update for March

3rd Circuit:

In *Quilloin v. Tenet Health System Philadelphia, Inc., et al.*, the Third Circuit Court of Appeals addressed yet again the enforceability of boilerplate arbitration provisions contained in employment applications and policy statement forms that new employees are required to sign upon being hired. In this case, the Third Circuit enforced such an arbitration agreement, reversing a District Court decision to deny an order to compel arbitration “without prejudice” pending the resolution of supposed factual disputes. In so holding, the Third Circuit addressed a number of principles pertaining to the enforceability of employment arbitration agreements.

First, the Third Circuit reaffirmed its holding in *Sandvik AB v. Advent International Corp.*, 220 F. 3d 99, 102-3 (3d Cir. 2000), that an order denying a motion to compel arbitration may be appealed as of right, even if the order is interlocutory in nature. The Third Circuit based this holding on the language of the Federal Arbitration Act (FAA), specifically 9 U.S.C. Sec. 16.

Second, the Third Circuit rejected the employer's argument that an employee challenging the enforceability of the arbitration provision must identify a specific clause that is supposedly unconscionable, and may not challenge the provision as whole. The Third Circuit noted the distinction drawn by the United States Supreme Court between challenges to the validity of an arbitration provision, which are for judicial determination, and challenges to the contract as a whole, which are for the arbitrator to determine. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 456 U.S. 440, 445-6 (2006), *Rent-A-Center v. Jackson*, 130 S. Ct. 2772, 2778 (2010). *Rent-A-Center* held that a severable contract clause requiring challenges to the arbitration provision itself to be arbitrated was enforceable, even when a party challenges the validity of the arbitration provision as a whole. But *Rent-A-Center* did not suggest that all judicial challenges to arbitration provisions required the attacking party to identify a specific clause that it is challenging.

Third, the Third Circuit delineated the roles played by state and federal law in determining the unconscionability of an arbitration clause. Generally, a federal court looks to state law to determine whether an arbitration agreement is unconscionable. However, the FAA preempts conflicting state laws that either prohibit arbitration outright, or that “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Thus, the Court here applied Pennsylvania law to determine unconscionability, but only to the extent that such law is not displaced by the FAA.

Under Pennsylvania law, substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side, and to which the disfavored party does not assent. An arbitration agreement is considered substantially unconscionable when it alters or limits the rights and remedies that a party could have obtained in court. Thus, an arbitration provision would be deemed substantively unconscionable if it requires a prevailing party to waive attorney's fees in statutory fee-shifting cases.

The District Court had found that the arbitration provision at issue was ambiguous with respect to attorney's fees, and declined to compel arbitration pending judicial resolution of that issue. Although recognizing the ambiguity in the contract, the Third Circuit reasoned that it was for the arbitrator, not the courts, to resolve the ambiguity. An ambiguous contract provision should not be deemed unconscionable based on the assumption that it will be interpreted in an unconscionable fashion.

Pennsylvania law also deems class action waivers to substantively unconscionable. However, the Third Circuit reasoned that Pennsylvania law in that regard was preempted by the FAA, citing *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745-6 (2011), and *Litman v. Celco P'Ship*, 655 F. 3d 225, 229 (3d Cir. 2011)(applying New Jersey law).



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The arbitration provision in *Quilloin* established guidelines, but not fixed deadlines, for the employer to respond to grievances prior to the initiation of arbitration. The plaintiff argued that the absence of strict deadlines would allow the employer to “run out the clock” on the statute of limitations for invoking arbitration. In rejecting this argument, the Third Circuit held that the clause was not unconscionable because it incorporated existing statutes of limitations, because it did not establish unreasonably short time frames for commencing arbitration, and because the employee could resort to a motion to compel arbitration if the employer unreasonably delayed its responses at pre-arbitration level.

Although the Third Circuit could have rested at that point, the Court also found the arbitration clause not to be procedurally unconscionable. A contract is procedurally unconscionable under Pennsylvania law when there was a lack of meaningful choice in the acceptance of the challenged provision, and when the contract was formed through “oppression and unfair surprise.” However, more than a disparity in bargaining power is needed in order to show that an arbitration agreement was not entered into willingly. The Third Circuit found the plaintiff had entered into the arbitration agreement willingly because she had previously worked for this employer, had previously executed an identical arbitration agreement with this employer, had voluntarily left employment with another employer to return to this employer’s employ, and because the defendant was a local employer and not a multi-national corporation.

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4th Circuit:

Dulaney v. Packaging Corp. of America, _ F.3d _, 2012 WL 764465 (4th Cir. March 12, 2012).

In *Dulaney v. Packaging Corp. of America*, the Fourth Circuit reversed the summary judgment entered by the District Court for the Western District of Virginia in favor of an employer in a suit alleging gender discrimination and sexual harassment under Title VII of the Civil Rights Act of 1964, and similar state laws. The appellate court found that questions of fact existed regarding (1) whether the Packaging Corp. of America (PCA) took a tangible employment action against its employee, Dulaney, and (2) whether there was a sufficient nexus between Dulaney’s harassment and her termination to make the termination actionable.

Dulaney, formerly a production line employee with PCA, alleged submission, or *quid pro quo*, sexual harassment, whereby in order to keep her job with PCA, or to avoid loss of pay, she was required to engage in sexual acts with her nominal supervisor. The nominal supervisor was a co-worker who did not directly supervise Dulaney, but was given additional authority by PCA, including the ability to assign work to other employees, to assess points against them under PCA’s progressive discipline policy, and the power to send employees home early without pay.

When Dulaney reported the harassment to her direct supervisor, he commented that she was “replaceable.” When Dulaney expressed her intent to report the issue to a more senior supervisor, her direct supervisor threatened to fire her. Dulaney registered a complaint with the senior supervisor, and some investigatory steps were taken. The situation was not remedied, however, and because Dulaney was attempting to look for a new job, the human resources department proposed that she enter into a severance agreement. The severance agreement listed November 2, 2007 as the termination date. Under PCA’s policies, Dulaney’s pay was to stop on the termination date, even though she had not signed the agreement and was not even presented with it until.



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November 5. In addition, on November 5, Dulaney was told that she had to sign the agreement or she would be fired. Upon her refusal to sign, Dulaney was instructed to clean out her locker and return her key and was escorted off the premises. On November 7, a member of PCA's Human Resources Department wrote to Dulaney stating that she had not been fired and could return to work. Despite this, during Dulaney's November 29 unemployment hearing PCA identified her status as "terminated."

After Dulaney filed suit, PCA moved for summary judgment, asserting the *Faragher-Ellerth* defense, arguing that it had taken no tangible employment action against Dulaney and contending that Dulaney had unreasonably failed to take advantage of any preventative or corrective opportunities. The district court applied the *Faragher-Ellerth* defense and granted summary judgment for PCA, without deciding whether Dulaney's harasser was a supervisor. The appellate court reversed and remanded, finding that issues of fact precluded application of that defense, and thus summary judgment.

The appellate court determined that based on the threat of termination for failure to sign the severance agreement, being told to clean out her locker and leave PCA's premises, and the stopping of Dulaney's pay, a jury could reasonably conclude that she had been terminated, regardless of what was stated in the November 7th letter from Human Resources. If a jury were to reach that conclusion, PCA would be found to have taken a "tangible employment action" against Dulaney, and the *Faragher-Ellerth* defense would be unavailable. Equally significant, the appellate court noted that it was for the jury to determine whether Dulaney's nominal supervisor and harasser was, in fact, her supervisor for purposes of imputing liability to PCA for other actions he had taken against Dulaney, such as sending her home early without pay.

Lastly, the appellate court reemphasized that if a harasser's discriminatory intent sets in motion the tangible employment action, the employer may be liable for discrimination under Title VII. Whether a sufficient nexus between the harassment and any tangible employment action existed in Dulaney's case was a question to be decided by the jury.

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4th Circuit Continued...

Shirvinski U.S. Coast Guard, _ F.3d _, 2012 WL 764464 (March 12, 2012).

In *Shirvinski v. U.S. Coast Guard*, the Fourth Circuit affirmed the District Court for the Eastern District of Virginia's grant of summary judgment on two distinct sets of claims brought by a terminated subcontractor against the U.S. Coast Guard and one of its other subcontractors, Booz Allen Hamilton (Booz Allen). In doing, so the appellate court found that the subcontractor failed to meet the substantial burden necessary to bring a procedural due process claim against a governmental entity. The court also concluded that the subcontractor failed to present the requisite evidence to support his claims of common law civil conspiracy, statutory conspiracy or tortious interference against Booz Allen.

The plaintiff, Shirvinski, was independently employed as a subcontractor to Mowhawk Information Systems and Consulting, Inc., (MISC), which itself was a subcontractor working under, SFA Inc. (SFA), on a contract with United States Coast Guard. Shirvinski was placed in an office with employees of both the United States Coast Guard and Booz Allen, which had been retained by the Coast Guard on a different contract from SFA's. Tensions arose between Shirvinski and his officemates, particularly one employee of Booz Allen. As a result, a Coast Guard employee sent an email to several Coast Guard officials about Shirvinski's behavior. The email ultimately led to the Coast Guard requesting that Shirvinski be removed from the project and Shirvinski's termination by MISC.



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In an amended complaint, Shirvinski brought procedural due process claims against the Coast Guard seeking a declaratory judgment ordering that Shirvinski's record be amended to indicate that the allegations against him were false. Shirvinski also brought claims of common law civil conspiracy, statutory conspiracy or tortious interference against Booz Allen, based on his belief that Booz Allen's employee with whom he had a dispute had contributed to the email that resulted in his termination.

In reviewing Shirvinski's allegations against the Coast Guard, the Fourth Circuit found that "Shirvinski's procedural due process claim [was] nothing more than an ordinary defamation action dressed in constitutional garb." The court held that Shirvinski's claim failed because he did not allege a constitutionally cognizable injury and did not demonstrate state action in his termination. In reaching this conclusion, the court noted that allowing such a claim against a government actor to proceed would undermine government efficiency and diverge from the standards applied by other circuits.

The appellate court found Shirvinski's claims against Booz Allen to be similarly lacking in evidentiary muster under Virginia state tort law. The court found that Shirvinski had offered no evidence that the Booz Allen employee had worked in cooperation with the Coast Guard employee in sending the allegedly defamatory email; that the defendants acted with a criminal or unlawful purpose, or that the defendants used criminal or unlawful means. Thus, the court eliminated both his common law and statutory conspiracy claims. Finally, the court concluded that Shirvinski had failed to allege that Booz Allen had used improper methods to interfere with his business expectancy as was necessary to sustain his claim of tortious interference with prospective economic advantage under Virginia law.

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4th Circuit Continued...

Gerner v. County of Chesterfield, Virginia, _ F.3d _, 2012 WL 887597 (4th Cir. March 16, 2012).

In *Gerner v. County of Chesterfield, Virginia*, the Fourth Circuit reversed the summary judgment entered by the District Court for the Eastern District of Virginia in favor of an employer in a suit brought by a former employee alleging disparate treatment on the basis of sex (female) in violation of Title VIII of the Civil Rights Act of 1964. The appellate court found that the lower court had erred when it concluded that the payment of severance benefits does not constitute an employment action under Title VII and that Title VII does not protect former employees against discriminatory actions.

The plaintiff, Gerner, began working for the County of Chesterfield in 1983 (the County). In 2009, after having served twelve years as the Director of Human Resources Management, Gerner was informed that, due to re-organization, her position was being eliminated. Gerner was told that if she voluntarily resigned and waived any cause of action against the County she would receive severance in the form of three months pay and health benefits. Gerner declined the severance offer and was subsequently terminated. Gerner brought suit against the County alleging that the severance package she had been offered was grossly inferior to that which had been offered to similarly situated male counterparts, some of whom had received six months or more of pay and benefits.

In response to Gerner's complaint, the County moved for summary judgment on two grounds. The County first asserted that the conditions and terms of a severance agreement do not constitute an adverse employment action as required to establish a Title VII claim. The County also asserted that Gerner's comparison between herself and her similarly situated counterparts was lacking. The District Court granted the summary judgment based on the County's first ground, that the severance agreement did not qualify as an adverse employment action, and did not reach a conclusion on the county's second ground. The district court reasoned that the severance package was not an adverse employment action because 1) it was not a contractually entitled benefit and 2) the offer was made after Gerner was terminated from employment.



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Reviewing the district court's rationales for granting the motion, the Fourth Circuit disagreed with both conclusions. The court emphasized that the Supreme Court's decision *Hishon v. King & Spalding* made it clear that an employment benefit need not be a contractual right in order to be the basis of a Title VII claim. The court noted that the lower court had overlooked this well recognized principle by referring to cases that were dissimilar from the one at hand.

The Fourth Circuit also found that a question remained as to when Gerner's actual termination occurred relative to the severance offer. Regardless of this outstanding issue, the appellate court held that Title VII protects former employees as well as potential and current employees from adverse employment action.

Based on these findings, the appellate court reversed the district court's judgment and remanded the case for further consideration. The appellate court declined to consider two new arguments raised by the County on appeal, limiting its consideration to the two points relied on by the district court in granting summary judgment.

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5th Circuit

Gray v. Powers (2/29/2012): Posture—Employee sued his employer and one of several members of a LLC that owned the bar where plaintiff worked for violating the minimum wage standards. The Southern District of Texas granted summary judgment to the LLC member (defendant), holding that he was not an employer under the FLSA. Plaintiff appealed. **AFFIRMED**; Holding—Applying the economic reality test, the court concurred with the district court's conclusion that no reasonable jury could have found defendant to be an employer. Defendant's participation in a joint decision with co-owners of the bar proved nothing about whether he had the authority individually to control employment terms of lower-level employees. Nonetheless, plaintiff asked the court to infer such based on defendant's

position as a member of the LLC. The court declined to adopt a rule that would impose individual liability on all shareholders, members, and officers of entities that were employers under the FLSA based on their position rather than the economic reality of their involvement. Plaintiff failed to offer any evidence of defendant's supervision and control over work schedules or employment conditions. The evidence that defendant occasionally signed checks for the lounge and that bartenders casually told him how much money they made in tips during his rare trips to the club did not indicate that he determined the employees' rate or method of payment; URL—<http://www.ca5.uscourts.gov/opinions/pub/10/10-20808-CV0.wpd.pdf>

Mora v. Univ. of Tex. Southwestern Med. Ctr. (3/8/2012): Posture—Plaintiff appealed the Northern District of Texas' dismissal of her lawsuit against her former employer the ADA for failure to state a claim for relief. **AFFIRMED**; Holding—A "disability" under the ADA was not alleged. She did not specify which of her "life activities" was substantially limited by her alcoholism and was being impaired in the performance of her specific job was insufficient. When she was denied treatment for alcoholism from an Employee Assistance Program, she no longer met the "essential eligibility requirements" for the receipt of such services because the EAP was only provided to employees, and she was no longer employed, so she was not a "qualified individual with a disability."

She was not denied alcohol treatment "by reason of" her alcoholism. The ADA did not encompass the claim of being wrongly fired for being an alcoholic. While she alleged the employer "disparaged" her to potential employers after she was fired, she did not identify any "protected activity" for which she was supposedly retaliated against. No causal connection between her discrimination charge and the alleged disparagement was shown. Her failure to accommodate charge was only made after she was fired and removed from the EAP. Before she was fired, she was being accommodated through the EAP; URL—<http://www.ca5.uscourts.gov/opinions/unpub/11/11-10279.0.wpd.pdf>



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Nassar v. Univ. of Tex. Southwestern Med. Ctr. (3/8/2012): **Posture**—A jury in the Northern District of Texas found in favor of plaintiff's Title VII constructive discharge and retaliation claims. Defendant appealed, challenging the sufficiency of the evidence, and the back pay and compensatory damages awards. The doctor appealed a denial of front pay. VACATED as to constructive discharge, AFFIRMED as to retaliation, and REMANDED for reconsideration of award; **Holding**—the harassment was no more than the minimum required for a hostile work environment, and his promotion had been approved, thus, the constructive discharge (CD) claim failed for lack of an aggravating factor. There was no basis to upset the retaliation verdict as the jury had resolved the conflicting evidence as to whether the doctor's position at an affiliated hospital was blocked due to his harassment complaints. Since the CD claim failed, and damages were not separated by claim, remand for recalculation was needed. Further, the loss of honoraria to be paid by a third party was improperly considered in the back pay award but is awardable as compensatory damages to the extent the loss was caused by blocking the hospital job, a factual question to be resolved on remand; **URL**—<http://www.ca5.uscourts.gov/opinions/pub/11/11-10338-CV0.wpd.pdf>

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6th Circuit:

Hybrid § 301/Fair-Representation Case: *Chapman v. UAW, Local 1005 and GM*, 670 F.3d 677 (6th Cir., Mar. 1, 2012)

In *Chapman*, the Sixth Circuit granted *en banc* review to change the standards a unionized plaintiff must meet before filing a “hybrid” suit under the labor contract against both the employer and the union. Plaintiff, a temporary worker, worked year to year in an auto plant. One year, he got informal assurances that his job would be there if he took a little extra time off, but he never got formal approval. When he came back there were no

openings. He had to wait a year to return and then found that the union had not filed a grievance for him. He sued both his Union, alleging a breach of the duty of fair representation, and his employer, alleging a breach of Section 301 of the Labor Management Relations Act – “a combination referred to as a hybrid § 301/fair-representation case,” according to the Sixth Circuit. The plaintiff alleged that the UAW failed to pursue his oral complaint against GM through the contractual grievance process, despite that he never filed a grievance and never expressly asked his union to file one on his behalf. He approached a UAW Shop Chairman about why a grievance was never filed, but the Shop Chairman told him that he did not have a good case. The plaintiff never appealed that decision under the UAW Constitution.

The U.S. District Court for the Northern District of Ohio granted the defendants summary judgment, holding that the plaintiff's claims were barred because he failed to exhaust his internal union remedies, which also precluded the plaintiff's claim against GM. An initial *en banc* panel of the Sixth Circuit affirmed.

The plaintiff argued that the Court's previous decision in *Williams v Molpus* permitted him not to have to exhaust his internal remedies simply because he alleged a fair representation claim. The Sixth Circuit noted that a hybrid §301/fair-representation case encompasses remedies under the collective bargaining agreement – i.e., those governing the relationship between the Union and the employer – and remedies under the Union constitution – i.e., those governing the relationship between the employee and the Union. Each, according to the Court, has its own distinct exhaustion doctrine. The Court candidly admitted, “In *Molpus*, we applied the wrong exhaustion doctrine.” Divulging that its reasoning in *Molpus* “resulted from a misunderstanding of Supreme Court precedent and the national labor policy upon which it relies,” the Sixth Circuit affirmed the dismissal of Chapman's claims.

The Court explained that, in a hybrid case concerning contractual remedies, the employee need not exhaust remedies because he already “must prove both claims to recover from either defendant,” including the “inextricably interdependent” claim that the union mishandled the matter. By contrast, the Supreme Court's decision in *Clayton v International Union* governs cases involving internal union remedies.



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That case recognized that internal union appeals procedures are, indeed, different from contractual grievance procedures negotiated between a union and employer. Under *Clayton*, the Court explained, when an employee chooses not to undertake exhaustion of internal union remedies, he denies the union an opportunity to correct the very conduct of which he complains. Thus, the general policy for excusing exhaustion in the *grievance process* based on the union's actions or inactions – i.e., conduct beyond the employee's control – does not apply. Consequently, merely alleging a breach of the duty of fair representation, the Court concluded, will not excuse an employee's failure to exhaust internal union remedies.

According to the Court, “*Molpus* mistakenly applied the exhaustion doctrine applicable to contractual grievance procedures...to a case that turned on failure to exhaust internal union remedies.” Thus, the Court overruled those portions of *Molpus* and its progeny analyzing the exhaustion of internal union remedies, and “align[ed its] precedent with the analysis articulated in *Clayton*.”

Unfair Labor Practices: NLRB, *Sheet Metal Workers International Association, Local Union No. 133 v. Galicks, Inc.*, __ F.3d __; 2012 WL 678142 (6th Cir., Mar. 2, 2012)

In *Galicks*, the National Labor Relations Board (NLRB) found that Galicks, Inc., a sheet metal contractor in the construction industry, failed to recall laid-off workers because of anti-union animus, unlawfully withdrew recognition of the Union, and twice refused to provide requested information to the Union during the bargaining process.

Galicks, through its membership in a construction association, was a party to a collective bargaining agreement that mandated that only journeymen could perform certain sheet metal work. Despite hiring journeymen, Galicks assigned journeymen-only work to production employees, who were in the same Union but paid at a lower wage. In 2004, Galicks laid-off all but one journeyman, but still continued to assign production employees to journeymen-only work. In 2005, the production employees expressed dissatisfaction with the Union and expressed their desire to no longer be represented. Galicks, in turn, notified the Union that it was no longer recognizing it as the representative of the production employees. Galicks also withdrew from the

construction association. The employed journeyman, along with the laid-off journeymen, endorsed the Union as their representative and asked Galicks to voluntarily recognize the Union as the journeymen's representative. Galicks refused, and the Union petitioned for an election. That same day, Galicks laid-off its last-employed journeyman. All of the laid-off journeymen then petitioned for an election to have the Union as their exclusive bargaining representative. Three days later, Galicks hired a non-journeyman and assigned him work that would have normally been assigned to only journeymen under the construction association's CBAs. Galicks then refused the Union's subsequent requests for information on the work Galicks performed and a list of employees performing that work.

In August 2005, the Union filed a charge with the NLRB alleging that Galicks should have been bound by certain successor agreements between the Union and the construction association, despite Galicks' withdrawal from the association. The NLRB dismissed the charge, and the Union and Galicks then bargained over a new contract for Galicks' journeymen. In August 2006, the Union again requested information from Galicks about the work it performed and a list of employees, which Galicks refused. By that time, Galicks had laid-off all of its journeymen and stated that they should not expect a recall because there would likely be no journeymen work for them to perform. Galicks then again withdrew recognition of the Union.

The Union again filed charges with the NLRB. An ALJ dismissed the failure-to-recall charge, but concluded that Galicks had unlawfully withdrawn its recognition of the Union and unlawfully refused to provide the requested information. Both parties appealed to the NLRB. A three-member NLRB affirmed the charges for which the ALJ found Galick liable *and* concluded that Galicks failed to recall the journeymen due to anti-union animus. Galicks appealed to the Sixth Circuit.

According to the Sixth Circuit, because it had to review the NLRB's decisions under a “substantial evidence” standard, it was charged with determining “whether the circumstantial evidence in the record can shoulder the weight of the Board's inferences.” Noting that its job was not to determine which party's interpretation of the facts is correct, the Sixth Circuit affirmed the NLRB and held that there was substantial evidence in the record to



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support its findings. Specifically, according to the Court, Galicks did not actually challenge on appeal the NLRB's finding that Galicks unlawfully refused the Union's information requests in 2005, and thus it effectively admitted the NLRB's finding on that point.

Regarding the failure-to-recall claim, the Court concluded that there was "more than enough" evidence to support the NLRB's conclusion because Galicks could not show that the NLRB's "story was unreasonable," and "simply showing that the evidence supports an alternative story is not enough." In reaching this conclusion, the Court rejected Galicks' argument that statements it made about "not [being] interested in being union" were protected speech under the First Amendment. It also rejected Galicks' argument that there was simply no work to give the journeymen, where Galicks' own production summaries showed that non-journeymen continued to perform journeymen work. According to the Court, Galicks also deviated from past practices in not recalling the journeymen, and the "large amount of evidence shows that Galicks expressed hostility towards unionization with proximity in time between the journeymen's union activities and their layoff or failure to be recalled."

Finally, the Sixth Circuit concluded that substantial evidence existed to support the NLRB's determinations that Galicks unlawfully withdrew its recognition of the Union and refused in 2006 to provide requested information. The Court rejected Galicks' argument that it did not have a duty to bargain because it had one or fewer journeymen in the bargaining unit. Specifically, according to the Court, Galicks did not prove that it would have recalled one or fewer journeymen in the absence of the company's anti-union animus, and the number of journeymen actually fluctuated such that Galicks could not prove that its one-man or no-man unit was stable.

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7th Circuit

Abner v. Illinois Department of Transportation (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GT0AY2G9.pdf>

Court Affirms Denial of Motion for Reconsideration Based On State Court Judgment That Termination Was Supported By Just Cause

The Seventh Circuit affirmed the district court's denial of plaintiff's motion for reconsideration based on the conclusion that the plaintiff's retaliatory discharge claim was precluded by the state court judgment sustaining his discharge. Plaintiff, a former employee of the Illinois Department of Transportation ("IDOT") was terminated after engaging in disruptive conduct. After exhausting state administrative remedies, which eventually sustained IDOT's decision to discharge plaintiff, plaintiff filed a Title VII action alleging he was discharged in retaliation for filing a charge of racial discrimination against IDOT several years earlier. The district court dismissed the suit, concluding plaintiff's claim of retaliation was precluded by the state court's determination, on administrative review of plaintiff's termination, that his discharge was supported by just cause. Plaintiff appealed, arguing that his retaliation claim did not arise from the same set of operative facts as the claim he made in state court, and further, that he was not afforded a full and fair opportunity to litigate his retaliatory discharge claim in the state case.

The Seventh Circuit began its analysis by noting that the judgment of a state court sitting in review of an administrative agency is entitled to full faith and credit in federal court. In this case the Seventh Circuit concluded that the district court properly deemed plaintiff's retaliatory discharge claim precluded by the state court judgment sustaining his discharge.

Cook v. IPC International Corporation (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GT0EW9PN.pdf>

Court Reverses and Remands Case For New Trial Finding Errors In Jury Instruction Were Not Harmless



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The Seventh Circuit reversed and remanded case for a new trial based on grounds that the jury instruction and subsequent verdict were unsound. Plaintiff brought suit against defendant under Title VII for sex discrimination and retaliation stemming from a series of events, which culminated in plaintiff's belief that she had been terminated because of her gender and in retaliation for having complained to her supervisor about his behavior towards women. The district court judge instructed that in order to find for plaintiff the jury must find that plaintiff had been fired and "that a decisionmaker for IPC fired plaintiff either because she was female or because she complained about sexually harassing comments." Plaintiff's counsel objected to the "decisionmaker" instruction, arguing that all the jury had to do was determine whether plaintiff was discharged as a result of her gender and/or in retaliation for resisting sexually harassing or discriminatory conduct. The judge rejected this objection without explanation. When the jury later asked for clarification, the judge, again over plaintiff's objection, confirmed that what was meant by the instruction was that plaintiff's supervisor must have been the sole decisionmaker. The jury came back with a finding that while plaintiff had indeed been fired, they could not find that plaintiff's supervisor had been the sole decisionmaker who terminated plaintiff's employment, causing plaintiff to lose her case. Plaintiff subsequently appealed from the judgment and from the district court's denial of her motion for new trial.

The Seventh Circuit determined that both the jury instruction and verdict were unsound, stating that from a legal standpoint, the case was simple, and should have been presented to the jury as such. Plaintiff claimed that her supervisor fired her because she was a woman and in retaliation for complaining about his sexually offensive behavior and discrimination in favor of his male subordinates. Defendant, in turn, claimed that plaintiff had not been fired, but was instead offered a transfer and had not responded to the offer when she quit. The Seventh Circuit concluded that all the jury had to do was choose between the two narratives, and that by injecting "sole decisionmaker" into the jury deliberations the district court required the jury to find that plaintiff's supervisor had been the sole decisionmaker before imposing liability, in effect directing a verdict for the defendant. Because the errors were not harmless and because a properly instructed jury may have found in

plaintiff's favor, the judgment was reversed and the case remanded for new trial.

Equal Employment Opportunity Commission v. United Airlines, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FHOM7.pdf>

Court Affirms District Court Determination that the Americans with Disabilities Act Does Not Mandate Reassignment of Employees, but Strongly Recommends en banc Review Because the Court Thinks the EEOC's Position is Likely Correct but Insufficient to Overcome Stare Decisis

The Seventh Circuit affirmed the district court holding in favor of defendant that the Americans with Disabilities Act ("ADA") does not mandate reassignment, but strongly recommended *en banc* review because the EEOC's logic is persuasive on the merits but insufficient to justify departure from the principles of *stare decisis*. The EEOC filed suit against defendant alleging that defendant's competitive transfer policy violates the ADA. The EEOC argued instead that the ADA requires employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified. The district court rejected this argument, citing *EEOC v. Humiston-Keeling*, Seventh Circuit precedent directly on point, and further rejected the EEOC's contention that the Supreme Court's decision in *US Airways, Inc. v. Barnett* undermined *Humiston-Keeling*. As such the district court granted defendant's 12(b)(6) motion to dismiss the suit, and the EEOC appealed.

The Seventh Circuit began its analysis by noting to succeed, the EEOC must convince the Court to abandon *stare decisis* and overrule *Humiston-Keeling*, which found a competitive transfer policy did not violate the ADA. The Court notes that the EEOC's position is probably the more supportable interpretation of the ADA, but that it must show that *Humiston-Keeling* is inconsistent with an on-point Supreme Court decision or is otherwise incompatible with a change in statutory law. The Seventh Circuit began by first addressing the EEOC's argument that *Barnett* undermined *Humiston-Keeling*, and that the Court should adopt the position of its sister circuits who have found that the ADA requires reassignment.



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In declining to overrule *Humiston-Keeling*, the Seventh Circuit noted that it has previously determined that *Barnett* does not conflict with *Humiston-Keeling*, and that courts within the Circuit have continued to cite *Humiston-Keeling* as good law. The Court notes that the previous decisions have not provided detailed analyses but finds that the mere existence of those decisions compels the Court to find that *Humiston-Keeling* remains good law. The Seventh Circuit concluded that the district court was correct in finding that the ADA does not require employers to reassign employees who will lose their current positions due to disability to a vacant position for which they are qualified, but strongly recommends *en banc* consideration of the case because the EEOC's position on the merits is persuasive.

Good v. University of Chicago Medical Center (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FIJHR.pdf>

Court Affirms Summary Judgment On Grounds that Plaintiff Failed to Present Sufficient Evidence of Reverse Racial Discrimination Under Either the Direct or Indirect Methods, and Recognizes that the Direct and Indirect Methods of Proving Employment Discrimination Have Become Too Rigid

The Seventh Circuit affirmed the district court grant of summary judgment in favor of defendant, finding that plaintiff failed to present sufficient evidence to allow her reverse race discrimination case to move forward. It is undisputed that plaintiff had performance problems at work. Instead plaintiff brought suit under Title VII alleging defendant discriminated against her on account of her race (white) when it terminated her employment rather than demoting her as it had three employees who were not white. The district court determined that plaintiff failed to present sufficient evidence of racial discrimination under either the direct or indirect methods of proof. The district court granted defendant's motion for summary judgment and plaintiff appealed.

The Seventh Circuit began its analysis by considering whether plaintiff's claim was able to survive defendant's motion for summary judgment under the direct method of proof. First, the Seventh Circuit found that all three comparator employees highlighted by plaintiff were similarly situated, overruling the District Court regarding

two of them. The District Court had found that because two of the employees were managerial employees and plaintiff was a supervisory employee, and because they had different supervisors, they were not comparable. But the Seventh Circuit found that because all were supervised by the same person, had similar performance deficiencies, and were held to a higher standard, the other two managers were similarly situated for summary judgment purposes. And the Seventh Circuit acknowledged that the three non-white comparators received better treatment than plaintiff. Still, the Seventh Circuit upheld the District Court's holding that summary judgment was appropriate regarding the direct method because there was no evidence, without reliance on speculation, leading directly to the conclusion that the employer was illegally motivated. Moreover, the Seventh Circuit noted that the record did not contain a hint of race-based animus and that plaintiff was replaced by another white supervisor. The Seventh Circuit then turned to the indirect method of proof. The Seventh Circuit agreed with the District Court's finding that plaintiff failed to meet the first prong necessary to make a prima facie case of racial discrimination. That prong requires plaintiff to show background circumstances demonstrating the employer has a reason or inclination to discriminate. The Seventh Circuit found there was nothing in the record that demonstrates defendant has an anti-white bias or a history of discriminating against white people, and again notes that plaintiff was replaced by a white person. The Seventh Circuit concludes by recognizing that the direct and indirect methods for proving and analyzing employment discrimination cases have become too complex, too rigid, and too far removed from the statutory question of causation, but that even if it looks at the summary judgment evidence as a whole, there is still no evidence allowing a reasonable finding of discrimination in this case.

Gordon v. FedEx Freight, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FJE5X.pdf>

Applying Illinois Law, Court Affirms Summary Judgment Finding Plaintiff Failed to Show Her Discharge Was in Retaliation for Exercising a Protected Right



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The Seventh Circuit affirmed the district court grant of summary judgment in favor of defendant finding that plaintiff failed to present a genuine issue of material fact for trial. Plaintiff's position was eliminated as part of a national reduction of force the day after she suffered an injury at work. There were three employees in plaintiff's office, two supervisors and plaintiff, who was employed as a clerk. Defendant determined that there had to be a supervisor present when the facility opened at 4:00 a.m. and when it closed at 10:00 p.m., and that one person could not do both. Following her termination, plaintiff filed a workers' compensation claim, and later filed suit against defendant for terminating her in retaliation for exercising her workers compensation rights. Having determined there existed no genuine issue of material fact, the district court granted summary judgment in favor of defendant.

The Seventh Circuit began by reiterating that to maintain a claim for retaliatory discharge, an employee must prove (1) his/her status as an employee of the defendant before the injury; (2) his exercise of a right granted by the Illinois Workers' Compensation Act (IWCA); and (3) a causal relationship between the discharge and the exercise of the employee's right. In this case, the only issues were whether plaintiff could establish she exercised a right granted by the Illinois Workers' Compensation Act and that a causal relationship existed between her exercise of this right and her termination. First, the Seventh Circuit found that plaintiff had exercised a right granted by the IWCA because, under Illinois law, an employee does so merely by requesting and seeking medical attention. Second, the Seventh Circuit examined whether plaintiff had offered evidence of a causal relationship between the exercise of that right and her termination, which required plaintiff to affirmatively show that her discharge was in retaliation for her exercise of a protected right. The Seventh Circuit noted that more than just a sequential connection was required and that the only other evidence plaintiff offered was inadmissible hearsay. Moreover, the Seventh Circuit found that defendant presented legitimate, nondiscriminatory reasons for eliminating plaintiff's position (a nationwide reduction in staff and the need to have a supervisor in the office at all times), and concluded that the district court did not err in granting summary judgment.

Hanners v. Trent, et al. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FK5RU.pdf>

Court Affirms Summary Judgment Based On Plaintiff's Failure to Show Defendant's Comments and Actions Were Based on Plaintiff's Race Rather Than Plaintiff's Conduct

The Seventh Circuit affirmed the district court grant of summary judgment in favor of defendants finding no genuine issue of material fact existed. Plaintiff, an Illinois State Police ("ISP") Master Sergeant, brought suit against fellow ISP employees alleging they discriminated against him because of his race, in violation of 42 U.S.C. §§ 1981 and 1983. After having sent an inappropriate email to sixteen ISP employees using his ISP email account, plaintiff became the subject of an investigation and subsequent disciplinary action. After refusing a settlement offered by the disciplinary review board, plaintiff received a 30-day suspension. Plaintiff's subsequent promotional rating also suffered as a result of this email incident. After unsuccessfully challenging his promotional rating, plaintiff filed suit in the district court alleging that the ISP had imposed sanctions and assigned him a promotional rating in a racially discriminatory manner. After consideration of the evidence the district court granted summary judgment in favor of defendants and plaintiff timely appealed.

The Seventh Circuit noted that a plaintiff pursuing a race discrimination case under the direct method of proof must demonstrate a triable issue as to whether discrimination motivated the adverse employment action, and may do so by relying on either direct or circumstantial evidence. After evaluating the evidence upon which plaintiff relied, the Seventh Circuit concluded that plaintiff failed to demonstrate that any of the individuals he put forth were similarly situated to him. In fact, only three individuals offered by plaintiff had engaged in the same conduct for which plaintiff was disciplined, and of those three individuals, plaintiff failed to provide evidence regarding the disciplinary measures taken against the three ISP employees who had been reprimanded for disseminating the email in question. Further, plaintiff did not provide any evidence regarding whether any of



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***Ruan Transport Corporation v. National Labor Relations Board* (7th Cir. 2012)**

<http://www.ca7.uscourts.gov/tmp/GU0FKTTA.pdf>

Court Affirms Board's Decision to Count Irregular Ballot Finding Voter Intent Was Clear

The Seventh Circuit affirmed the National Labor Relations Board's decision certifying the union in question. The dispute in this case centers on whether a ballot with irregular markings – the deciding vote in the election – should be counted. Arguing that the irregular markings on the ballot made the voter's intention unclear, plaintiff refused to recognize or bargain with the local union, giving rise to this action for unfair labor practices. Once before the Court, plaintiff petitioned the Seventh Circuit to reverse the Board's decision certifying a local union to be the representative for plaintiff's employees. Noting that their review of the Board's decision to certify a collective bargaining agent following an election is extremely limited, and will be given deference unless abuse of discretion is found, the Court concluded that despite the ballot's irregularities, the intent of the voter in favor of the local union was clear. As such, the Board did not abuse its discretion in counting the ballot.

***Smith v. Lafayette Bank & Trust Company* (7th Cir. 2012)**

<http://www.ca7.uscourts.gov/tmp/GU0FLRJA.pdf>

Court Affirms Summary Judgment Finding Retaliation Claim Failed as a Matter of Law

Plaintiff brought suit against defendant under the Age Discrimination in Employment Act of 1967 ("ADEA") alleging age discrimination and retaliation. Defendant counterclaimed and moved for summary judgment. After plaintiff waived her age discrimination claim, the district court granted summary judgment on plaintiff's retaliation claim, and remanded defendant's counterclaims to state court for further proceedings. Plaintiff appealed. Affirming the district court's grant of summary judgment, the Seventh Circuit noted that in this case plaintiff had not filed her charge of discrimination with the EEOC until months after she was terminated rendering her unable to show that the defendant was aware of the charge when it terminated

her. Consequently, plaintiff's retaliation claim failed as a matter of law.

***Schultz and Kelly v. Aviall, Perkins Coie, and Prudential Insurance* (7th Cir. 2012)**

<http://www.ca7.uscourts.gov/tmp/GU0FMLF8.pdf>

Court Affirms Dismissal of Case Finding Social Security Benefits Paid to Dependent Child May Be Offset as "Loss of Time Disability" Benefits

The Seventh Circuit affirmed the dismissal of this case based on Rule 12(b)(6). Plaintiffs brought this putative class action under the Employee Retirement Income Security Act ("ERISA") alleging that the long-term disability benefit plans maintained by their former employers (Aviall and Perkins Coie) and issued by Prudential do not authorize Prudential to include in the offset calculation the benefits paid to their dependent children on account of plaintiff's disability. Because the plain and relevant language of both plans require offsets for "loss of time disability" benefits, and because the children's Social Security benefits based on their parents' total disability counted as "loss of time disability" benefits, the district court dismissed plaintiffs' case for failure to state a claim.

Reviewing the Plans' interpretation of the offset provisions *de novo*, the Seventh Circuit noted that the interpretation of language in a plan governed by ERISA is controlled by federal common law, which draws on the general principals of contract interpretation. With this in mind, the Seventh Circuit concluded that the Plans' offset language was not ambiguous, and that the only reasonable interpretation of the applicable language is that when a disabled employee's dependent children receive Social Security payments by reason of the parent employee's disability, those benefits are disability benefits based on the employee's "loss of time," making the offsets permissible under these plans. Furthermore, the Court noted that the offset provisions in these plans specifically referred to Social Security disability benefits paid to children to compensate the household for the loss of income it has suffered as the result of the disability of one of its breadwinners. For these reasons the judgment of the district court was affirmed.



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Steffen v. Donahoe (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FNFMI.pdf>

Court Affirms Grant of Summary Judgment Based on Plaintiff's Failure to Show Defendant Regarded Him as Substantially Impaired in a Major Life Activity Under the Applicable Version of the Americans with Disabilities Act

The Seventh Circuit affirmed the grant of summary judgment in favor of defendant, the United States Postal Service ("USPS"), finding that plaintiff was not "disabled" within the meaning of the Rehabilitation Act of 1973 and the Americans with Disabilities Act ("ADA"). Plaintiff, a part-time employee of the USPS suffered an injury, which resulted in plaintiff working only one week out of the last three years of his tenure with USPS. Although plaintiff never filed the proper paperwork for leave or to substantiate his injury, defendant agreed to allow plaintiff to return to work providing plaintiff did not have any restrictions on his ability to work. In the event plaintiff was limited in his capacity to work he could file for disability retirement. Upon evaluation, plaintiff was placed on restriction, and when he did not file for disability retirement, defendant fired him. Plaintiff brought suit under the Rehabilitation Act and ADA claiming his termination constituted disability discrimination. The district court dismissed plaintiff's claim, finding he was not "disabled" under either statute. Plaintiff appealed.

The Seventh Circuit began its analysis by noting that as an initial matter, to come within the protection of either the Rehabilitation Act or the ADA, plaintiff must show that he is disabled as defined by those acts. Plaintiff abandoned the argument that he qualified for protection based on actual disability, and rather, hinges his claim for protection on the fact that the USPS regarded him as being disabled under the ADA. Under the applicable version of the ADA, to succeed under the "regarded as" theory, plaintiff must establish an accepted major life activity under the ADA and prove that his employer believed him to be substantially limited in that major life activity. Because plaintiff failed to provide evidence by which a reasonable jury could conclude that the USPS regarded him as substantially limited in a major activity, the Seventh Circuit concluded plaintiff's claim must fail.

King v. Acosta Sales and Marketing, Inc., et al. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FOQ2S.pdf>

Court Reverses Grant of Summary Judgment In Part On Grounds That Defendant Must Prove Factors Asserted Are Actually Accounted For In Determining Differential Pay

The Seventh Circuit affirmed in part and reversed in part the District Court grant of summary judgment in favor of defendant. After quitting in 2007, plaintiff brought suit against defendant alleging a hostile work environment in violation of Title VII and discrimination in pay in violation of Title VII and the Equal Pay Act. The District Court granted summary judgment in favor of defendant and plaintiff appealed.

The Seventh Circuit first address plaintiff's claim of hostile work environment claim. After finding that the District Court erred in its application of *National Railroad Passenger Corp. v. Morgan*, the Seventh Circuit upheld summary judgment on the claim because plaintiff failed to establish a pattern of hostility that continued into the 300 days before filing her charge with the EEOC. The Seventh Circuit then turned to plaintiff's claims related to discrimination in pay. Here, the Court concluded that plaintiff established a marked difference in pay between men and woman. In fact, plaintiff's evidence demonstrated that some men in the same job classification, doing the same work under the same conditions, received more than twice plaintiff's pay. Defendant argued that education and experience account for the discrepancies in pay, but the Seventh Circuit held that defendant's argument was unpersuasive without proof that they actually account for such factors in setting salaries. Therefore, the Seventh Circuit reversed and remanded the District Court's grant of summary judgment, saying that for summary judgment to be proper, defendant must prove, not simply assert, that education and experience account for the marked pay differential between men and women.

Hayes v. City of Chicago (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FPKNW.pdf>



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Court Affirms Dismissal Finding Suit Barred by Claim Preclusion

The Seventh Circuit affirmed the District Court's dismissal of a wrongful termination suit brought by plaintiff, a police officer, after his termination from the Chicago Police Department. Before filing a case with the District Court, plaintiff brought a claim before the Circuit Court of Cook County. The Seventh Circuit found that plaintiff's Title VII claim arose from the same set of operative facts and the same underlying transaction that was addressed by the litigants in plaintiff's earlier claim in state court. Because the issues raised by plaintiff at the District Court were or could have been litigated during the earlier proceeding, the Seventh Circuit concluded that plaintiff's lawsuit was barred by claim preclusion.

Roundy's Inc. v. National Labor Relations Board (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FQ7D6.pdf>

Court Denies Review of National Labor Relations Board Order Finding Plaintiff Lacked Exclusionary Property Interest Necessary to Oust Nonemployee Handbillers from Property

The Seventh Circuit denied plaintiff's petition for review of the National Labor Relations Board's order and granted the Board's cross-petition for enforcement of its order. After plaintiff ejected nonemployees who were distributing extremely unflattering handbills of the company on its various properties, the General Counsel for the Board issued a complaint against plaintiff alleging plaintiff violated the National Labor Relations Act by discriminatorily prohibiting the Union handbillers from distributing materials while allowing nonunion solicitations and distributions on plaintiff's property. The ALJ found that plaintiff, as a nonexclusive easement holder, did not have a state property right to exclude the handbillers, and thus, had violated the Act by preventing the Union from engaging in protected activities on its property. The Board affirmed, and plaintiff sought review of the Board's order.

At the outset, the Seventh Circuit reiterated that while it had jurisdiction to review the Board's order, the Board's decision is given substantial deference in both its findings of fact and its interpretations of the Act. Where, as here, the Board adopts the ALJ's findings of fact and conclusions of law, the Court reviews the ALJ's determinations. In reviewing the ALJ's determination that plaintiff did not have

a state property right, the Seventh Circuit noted that an employer has no right to exclude union representatives engaged in a protected activity under Section 7 of the Act from areas where it lacks an exclusionary property interest. Because plaintiff failed to meet its burden to prove that it had a state property interest sufficient to oust the nonemployee handbillers, and because the Board's factual findings and interpretations of the Act were reasonable, the Seventh Circuit denied plaintiff's petition for review and granted the Board's cross-petition for enforcement of its order.

Rochelle Waste Disposal, LLC v. National Labor Relations Board (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/GU0FOT4L.pdf>

Court Affirms Board's Order Finding Discharged was Based on Protected Union Activity

The Seventh Circuit denied plaintiff's petition for review of the National Labor Relations Board's order, and granted the Board's application for enforcement of said order. Plaintiff employed five permanent employees at the time of the events leading up to this dispute. One employee, Jeff Jarvis, worked under the title "Landfill Supervisor." When talk of unionizing surfaced, plaintiff asserted that Jarvis was a "supervisor" and therefore ineligible for inclusion in a bargaining unit. The Board heard this dispute and concluded Jarvis was not a supervisor. Jarvis was subsequently terminated. Despite being terminated, Jarvis cast a vote, the final tally of which was 3-2 in favor of unionizing. Plaintiff thereafter refused to bargain with the newly formed collective bargaining unit. An ALJ subsequently found that Jarvis was improperly terminated. The Board affirmed the decision that Jarvis was not a supervisor, and that he was improperly terminated, and this petition for review and cross-petition for enforcement followed.

The Seventh Circuit began by noting that it would enforce the Board's orders if its factual findings were supported by substantial evidence and its conclusions had a reasonable basis in law. The Seventh Circuit upheld the Board's finding that Jarvis was not a supervisor because there was substantial evidence that Jarvis was not held accountable for the performance of other employees and he could not take action to correct the work performance of other employees, which is required to be a supervisor under the National Labor Relations Act. Furthermore, the Seventh Circuit determined that the Board's conclusion that Jarvis's



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termination was retaliatory was supported by substantial evidence showing an antiunion animus was a substantial or motivating factor in Jarvis's termination. As such, the Court granted the Board's cross petition for enforcement of its orders and denied plaintiff's petition for review.

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8th Circuit

***Gibson v. American Greetings Corp.*, No. 11-1467 (8th Cir. March 5, 2012) (Age and race discrimination, retaliation).**

James and Lena Gibson brought suit against American Greetings Corp. ("AGC") based on age and race discrimination and retaliation. Both long-standing employees of AGC alleged discrimination and retaliation in "parallel claims". Lena Gibson alleged she was not cross-trained for higher-level positions due to her age and race, and retaliation for filing two internal complaints of age and race discrimination. James Gibson alleged he was terminated and retaliated against due to his wife's internal complaint that was pending at the time of his termination. They both alleged being held to higher standards than their younger, white colleagues.

AGC, on the other hand, relied on two policies – an internal mediation program and its progressive discipline policy set forth in its Associate Handbook for its position. AGC stated that Lena Gibson was not promoted as she received too many written warnings, which, according to the handbook, made her ineligible for the promotions. AGC stated that James Gibson was terminated after five written warnings, also pursuant to its progressive discipline policy. James Gibson was replaced by a 56-year old African-American male.

The district court granted summary judgment in favor of AGC. The Gibson's appealed, arguing their testimony corroborated the other spouse's arguments.

They also argued the court should have relied on the deposition testimony of another long-time former employee in an unrelated case against AGC by other employees. The Eighth Circuit upheld the district court's judgment. As to the race claims, the Court noted that the fact that they have similar claims "may shed light on managerial motives" and that they may, depending on the facts and circumstances, "be used to show discriminatory intent" in a § 1981 claim. Yet, the Court held that the Gibson's evidence was insufficient to prove that AGC had any discriminatory intent in their failure to promote/termination claims. Rather, AGC provided persuasive evidence from their personnel files in support of the actions taken against the Gibson's.

The Court also concluded that, as to the Gibson's age claims, they provided no evidence to overcome AGC's nondiscriminatory reasons for termination/failure to cross-train. As to the retaliation claims under Title VII, the Eighth Circuit held that an individuals' self-serving allegation that an employer's decision was retaliatory in nature, is insufficient to establish a genuine issue of material fact. And, although James Gibson was terminated in close proximity in time to his internal complaint, he presented no evidence that would allow a jury to conclude AGC's reason for his termination was pretextual (timing alone is not enough).

***Local 36 Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Whitney*, No. 11-1782 (8th Cir. March 6, 2012) (Issue of first impression – whether a non-signatory to a CBA can be forced to arbitration prior to a court determining whether it is indeed an alter ego of a signatory to the CBA).**

Local 36 Sheet Metal Workers' International Association, AFL-CIO ("Local 36") obtained an arbitration award against Michael Whitney, d/b/a Whitney Industrial ("Whitney"), a non-signatory to any collective bargaining agreement with Local 36. Whitney Mechanical Contractors ("Whitney Mechanical"), on the other hand, did sign a standard form collective bargaining agreement between the Southwest Missouri Area Contractors Association and Local 36 ("CBA"). Michael Whitney and his wife owned 3% of Whitney, a company largely owned by his father. After Michael Whitney's father's death, Whitney Mechanical was wound-up (Michael Whitney and his wife surrendered their shares), and failed to pay into certain union benefit funds as required by the CBA.



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The CBA required that unresolved grievances be submitted to the Local Joint Adjustment Board (“JAB”) for binding resolution. Local 36 filed a grievance against Whitney and Whitney Mechanical, claiming that Whitney (a non-union entity) was an alter-ego of Whitney Mechanical, and also violated the CBA. Whitney never responded to the JAB regarding the hearing, and did not appear at the hearing. The JAB found that both Whitney and Whitney Mechanical violated the CBA and entered an award against both entities. Although Whitney was aware of the award, he took no action in response. Local 36 sued to enforce the arbitration award against Whitney. Whitney argued the award was unenforceable as he was not a party to the CBA, thus, the arbitrators had no jurisdiction over him.

The Eighth Circuit held that the question of whether Whitney was an alter ego of Whitney Mechanical (and thus subject to the CBA) “fits squarely within the realm of substantive jurisdictional challenges” that are for the district courts to decide. Whitney argued the arbitrator denied him this opportunity. Local 36 argued, and the district court agreed, that Eighth Circuit precedent provided that a party cannot sit back and wait for court action to enforce an award, but must act affirmatively (in one of four methods) to challenge the arbitrator’s authority. The Eighth Circuit acknowledged it has required signatories to a CBA to follow one of its four affirmative methods to preserve substantive jurisdictional challenges, but has never determined if that precedent should apply to non-signatories to a CBA.

In an issue of first impression, the Eighth Circuit held, relying on the Second Circuit, that “non-signator[ies] to an arbitration agreement need not participate in the arbitration while expressly reserving the jurisdictional questions, file a preemptive declaratory judgment action, notify the arbitrator of its refusal to participate, or timely initiate a court action to vacate the arbitrator’s award in order to have the ‘question of whether the parties agreed to arbitrate...be decided by the court, not the arbitrator’”. (citing *AT&T Techs ...*). The Court cautioned, however, that should a non-signatory demonstrate intent to present such questions to the arbitrator, just with a signatory, it might effect a waiver of the right to have a court determine the issue.

The Eighth Circuit held the JAB had no authority to determine whether Whitney was an alter ego of Whitney Mechanical, and remanded to the district court to independently determine the answer to that question.

***Guimaraes v. SuperValu, Inc.*, No. 11-1046 (8th Cir. March 23, 2012) (National-origin discrimination (based on citizenship/alienage) and retaliation – Title VII and Minnesota Human Rights Act).**

Katia Aguiar Guimaraes, a dual citizen of Brazil and Canada, alleged national-origin discrimination and retaliation against SuperValu in violation of Title VII and the Minnesota Human Rights Act. Guimaraes began working for SuperValu in 2005 under an H-1B visa (employer-sponsored non-immigrant visa allowing temporary residency) and received “above expectations” ratings. SuperValu sponsored her application for legal permanent residency (commonly called a “green card”).

In 2008 Lisa Delia Bautista Grubbs (“Grubbs”), a native of Mexico, joined SuperValu as a manager and met Guimaraes (they were introduced by someone erroneously believing they both spoke Spanish, which they laughed about). Months later, Grubbs became Guimaraes’ Business Development Manager. At the same time, Guimaraes’ annual review was due. Her second-level manager, Lanny Hoffmeyer (“Hoffmeyer”) completed her review, with an overall 3 out of 5 “consistently meets expectations” review and a 9.1 percent raise.

Once Grubbs began supervising Guimaraes, the relationship between the two soured as Guimaraes believed Grubbs was giving her tasks that she should not have to complete. In turn, Grubbs criticized Guimaraes’ job performance. Grubbs often became upset with Guimaraes, did not assist when asked, constantly asked Guimaraes to repeat herself, pretended like she did not understand what she was saying, excluded her from meetings, rolled her eyes, smirked at her, and walked away while Guimaraes was talking. Several meetings took place between July and September 2008 between the two, and at the end of every meeting Grubbs told Guimaraes she was not improving. In October 2008, Grubbs approached SuperValu’s human resources department to discuss Guimaraes’ poor performance, but decided to wait a couple of weeks to address the deficiencies as she was leaving the office for a couple of weeks to get married. Days after Grubbs’ return, Guimaraes spoke with human resources and alleged discriminatory treatment based on her accent and national origin. An internal investigation concluded that no such treatment occurred.

At some point, Grubbs told another SuperValu employee that she was targeting Guimaraes and trying to get her fired and stop her “Green Card process”, complaining how long it would take to terminate her. She admitted to manipulating Hoffmeyer to take her side, which he did. Eventually, Grubbs



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and Guimaraes were sent to an internal mediation to work out their differences. The following day, Grubbs placed Guimaraes on a Performance Action Plan ("PAP") – which Guimaraes disagreed with. Guimaraes alleged Grubbs "routinely" cancelled meetings and failed to provide feedback and guidance regarding the PAP. In December 2008, Guimaraes was placed on a second PAP by Grubbs. Guimaraes responded that the second PAP was unfair in light of her last performance review (not because of national-origin discrimination or retaliation).

In January 2009, Guimaraes went on FMLA leave, during which time SuperValu underwent reorganization. Guimaraes' position was selected for termination based on her disciplinary status and performance reviews. She was terminated when she returned to work. Another individual began to report to Grubbs following Guimaraes' termination. This individual also complained to human resources about treatment by Grubbs, and stated she was aware of Grubbs' manipulation of Hoffmeyer as it concerned Guimaraes.

The Eighth Circuit held that the statement by Grubbs that she was trying to stop Guimaraes' Green Card process did not show discriminatory animus toward national origin. The Court noted that aliens are protected from illegal discrimination under Title VII based on national origin – not because of citizenship or alienage. Guimaraes alleges that "green card" is a code word for her national origin. However, the Court held that not to be true – that such a statement is "facially neutral as to national origin, and neutral statements, without more, do not demonstrate animus on the part of the speaker." The Court concluded no reasonable jury could find the "green card" statement to give rise to an inference of national-origin discrimination.

The Court held that comments ridiculing an employee's accent may be relevant toward showing national-origin animus, but that without more, such behavior does not raise an inference of national-origin discrimination. The Court also recognized that while the PAP was somewhat subjective, the nature of a "supervisor's assessment of a particular employee's performance is necessarily subjective". This subjective assessment may be found relevant by a jury, but is insufficient on its own to raise an inference of discrimination.

As to SuperValu's failure to follow its own human resource policies (and an inference that Grubbs was setting Guimaraes up to fail), the Court noted this too, without more, does not create a reasonable inference that Grubbs was motivated by a

discriminatory animus. The Court held that while a reasonable jury could find that SuperValu's reason for placing Guimaraes had no basis in fact, Guimaraes still did not present sufficient evidence to show that Grubbs was "targeting Guimaraes because of her national origin" but that it could have been because of personality conflict or even because Grubbs knew Guimaraes was attempting to get her green card, none of which violate Title VII.

As to her retaliation claim, the Court held that while temporal proximity can provide some evidence of pretext, SuperValu was concerned about Guimaraes' performance prior to her engaging in any protected activity. The Eighth Circuit reminds us that federal courts are not "super-personnel departments" and affirmed dismissal of the national-origin and retaliation claims.

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9th Circuit:

Emeldi v. University of Oregon,

-F.3d-, (9th Cir, March 21, 2012);

Title IX Retaliation; Burden of Proof

The plaintiff was a Ph.D. student in the University of Oregon's Special Education Department. She complained that the Department was not supportive of female students. She alleged that the Department thereafter retaliated against her by preventing her from completing her Ph.D. She sued under Title IX. The district court granted summary judgment in favor of the University.

In a case of first impression in the Ninth Circuit, the court held that Title IX retaliation cases are subject to the same burden shifting formula used in Title VII cases. The court reversed the summary judgment, finding that a reasonable jury could conclude that the plaintiff was retaliated against in violation of Title IX.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/03/21/10-35551.pdf>

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