



Third Circuit

***Coleman v. Pennsylvania State Police*, ___ Fed. Appx. ___ (3d Cir. Mar. 20, 2014), 2014 WL 1064379, available at www2.ca3.uscourts.gov/opinarch/133255np.pdf**

The Third Circuit Court of Appeals upheld Pennsylvania State Police's "Seizure Protocol" policy, which bars state troopers from performing full duty until they remain seizure free for a period of five years, finding that the policy is a valid and enforceable qualification standard under federal disability discrimination laws.

The state police officer Plaintiff was terminated before completing his probationary period after he suffered three seizures within six months during his probationary period. His seizures were due to posttraumatic epilepsy he incurred as a result of a traumatic brain injury that he sustained in an off-duty automobile accident. Plaintiff was not permitted to return to full duty under the Seizure Protocol, which required him to remain seizure-free for a period of five years from the date of his last seizure. After a determination that the State Police would not be able to retain the plaintiff on limited duty for five or more years (any intervening seizure episode would re-start the five-year clock), the plaintiff was terminated.

The Seizure Protocol had been established by the State Police Medical Officer, who drew on his own research into epilepsy recurrence and on consultations with the chief epileptologist at Hershey Medical Center to develop the Protocol. With limited exceptions arising from specific types of disorders, a person suffering from multiple seizures has 75 to 90 percent risk of another seizure within the next five years. But if that person remains seizure free for five years, the risk of another seizure drops to less than two percent. A state police officer who suffers a seizure while on duty would be unable to perform many of an officer's required functions.

The State Police Medical Officer determined that the Seizure Protocol should be applied to the plaintiff based on his review of the plaintiff's medical history. However, the Medical Officer did

not perform his own medical examination of the plaintiff. In contrast, plaintiff presented a medical report from his personal physician opining that the plaintiff had a three percent or lower chance of a repeat seizure. The plaintiff was terminated nonetheless.

Plaintiff filed suit against the State Police in federal district court under the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), which prohibits discrimination against an "otherwise qualified individual with a disability" in "any program or activity receiving federal financial assistance." The standards used to determine whether the Rehabilitation Act has been violated are the same that are applied under Title I of the Americans with Disabilities Act: the plaintiff must show that he or she is disabled, that he or she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation, and that he or she was nonetheless terminated or prevented from performing the job. If the employee makes this showing, the burden shifts to the employer to show that the accommodations requested by the plaintiff are unreasonable or would impose an undue burden on the employer.

Applying these standards, the district court granted summary judgment in favor of the State Police. Plaintiff appealed and argued that he was qualified to work as a state police officer, that he did not pose a "direct threat" to public safety, and that the State Police failed to reasonably accommodate him. The Third Circuit agreed that the plaintiff had not demonstrated that he was otherwise qualified to perform the essential functions of a state police officer. He had not completed the mandatory probationary period and was therefore not qualified to serve as an officer. Further, the qualification standard that prevented him from completing the probationary period – the Seizure Protocol – was a valid standard that prevented individuals from posing a "direct threat" to the health and safety of others. "In the context of regulations governing law enforcement officers, courts have found that 'employers do not violate the ADA by ensuring that officers are ... fit for duty.'" A "direct threat" is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable



accommodation.” The Seizure Protocol “appropriately addresses the issue of whether employment would pose a ‘direct threat’” based on the significant probability of “having another incapacitating seizure ... at a critical time.” The “time period of five years is a reasonable requirement and [is] suited to the end for which it is designed.” The record thus “adequately explained that the threat of a seizure is significant enough to constitute a ‘direct threat’ and that the Seizure Protocol is a justified response to that threat.”

The Third Circuit also rejected Plaintiff’s argument that an independent medical examination was required, or that the State Police Medical Officer was required to examine him personally. The Medical Officer “was well aware of [the plaintiff’s] seizure history and applied the Seizure Protocol only after reviewing [the plaintiff’s] file and learning that [the plaintiff] had suffered a ‘generalized clonic/tonic seizure’... [he] did not necessarily need to re-examine troopers or trooper-candidates whose fitness for duty was in question.” He also had the “authority to override a treating physician’s recommendation.”

With respect to reasonable accommodation, the Third Circuit relied on existing precedent to hold that the State Police were not required to modify the essential functions of a job in order to accommodate the plaintiff, to create a new position in order to accommodate the plaintiff, or to transform a temporary light duty position into a permanent position for the plaintiff’s benefit. Plaintiff failed to establish that the State Police had an available vacant and funded position whose essential duties he was capable of performing that was at an equivalent level or duplication of the position he had previously held. Accordingly, the State Police had not violated any reasonable accommodation obligation owed to him.

Submitted by:

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

Fourth Circuit

***Equal Employment Opportunity Commission v. Baltimore County*, __ F.3d __ (4th Cir. Mar. 31, 2014), 2014 WL 1273650, available at <http://www.ca4.uscourts.gov/Opinions/Published/131106.P.pdf>**

The Fourth Circuit held that Baltimore County’s retirement plan violated the ADEA because the plan’s employee contribution rates were determined by the employee’s age at the time of enrollment. The Court further held that the County was not shielded by the ADEA’s “safe harbor provision” applicable to early retirement benefit plans.

Pursuant to the County’s mandatory employee retirement plan, employees were eligible to retire and receive pension benefits at age 65, regardless of the length of their employment. At the inception of the plan, the County hired actuarial firm Buck Consultants (“Buck”) to calculate the contribution rates. Buck based its calculations on the number of years an employee would contribute to the plan prior to reaching the retirement age of 65. Using age 65 as a marker, Buck recommended that employees who were older at the time of enrollment contribute a higher percentage of their salaries because their contributions would earn interest for fewer years than would the contributions of younger employees. The County adopted Buck’s recommendation such that the older an employee was at the time he or she enrolled in the plan, the higher the required contribution rate was for that employee. Since its inception, the County modified the plan in a number of ways, including adding an alternative term of retirement eligibility that permitted retirement after a fixed number of years of service regardless of the employee’s age. The County left intact, however, the original provision that based contribution rates on the employee’s age at the time of enrollment.

Based on the disparate contribution rates, two County employees filed charges with the EEOC alleging age discrimination. The EEOC filed suit on behalf of those employees, and a class of similarly situated employees, alleging that the plan violated the ADEA by requiring employees within the



protected class to pay higher contribution rates than younger employees. The district court initially granted summary judgment for the County, concluding that “the plan’s employee contribution rates were not motivated by age, but by the number of years remaining until an employee reached retirement age.” On that basis, the district court held that the disparate rates were lawfully based on the financial consideration of “the time value of money.” The Fourth Circuit vacated that judgment, holding that the district court failed to consider the plan’s alternative, which permitted retirement after a fixed number of years of service without regard to age. On remand, the district court granted partial summary judgment for the EEOC, holding that the “but for” cause of the disparate contribution rates was, in fact, age.

On appeal, the County argued that the district court failed to apply the factors in *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008), which would have shown that “the time value of money,” rather than age, was the “but for” cause of the differing contribution rates. The Fourth Circuit rejected the County’s argument, distinguishing *Kentucky Retirement* from the present case. In doing so, the Fourth Circuit noted that under the plan in *Kentucky Retirement*, if an employee became disabled prior to reaching the qualifying retirement age, the plan would impute the years of service required to qualify for retirement and include those imputed years in the calculation of pension benefits. If an employee became disabled after reaching the qualifying retirement age, however, the plan did not impute additional years as part of the pension benefits calculation. Therefore, the Supreme Court in *Kentucky Retirement* was required to consider whether “pension status,” or retirement eligibility, unlawfully constituted a “proxy for age.” In contrast, the Fourth Circuit explained that the question in this case was not whether “pension status” unlawfully constituted a “proxy for age,” but rather, whether disparate contribution rates based on age “could be justified on any permissible basis.”

In answering that question, the Fourth Circuit rejected the County’s argument that the “time value of money” was a permissible basis for the disparate contribution rates. The Fourth Circuit noted that

although the “time value of money” may have explained the disparate rates at the inception of the plan, that basis ceased to apply once the County amended the plan to permit the alternative of retiring based solely on a fixed number of years of service. Regardless of whether employees chose to retire after reaching retirement age or after working the fixed number of years, employees were required to contribute to the plan pursuant to the disparate age-based rates. Therefore, the number of years to the retirement age could not have formed the basis for the disparate contribution rates.

The Fourth Circuit further held that the ADEA’s “safe harbor” provision in 29 U.S.C. § 623(l)(1)(A)(ii)(I) did not apply because that provision “does not address employee contribution rates nor does it permit employers to impose contribution rates that increase with the employee’s age at the time of plan enrollment.” For these reasons, the Fourth Circuit affirmed the district court’s grant of partial summary judgment in favor of the EEOC and remanded the case for further proceedings regarding the issue of damages.

Dickenson-Russell Coal Company, LLC v. Secretary of Labor, ___ F. 3d ___ (4th Cir. Mar. 27, 2014), 2014 WL 1244794, available at <http://www.ca4.uscourts.gov/Opinions/Published/131374.P.pdf>

The Fourth Circuit held that implementing regulation 30 C.F.R. § 50.20(a) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) imposes an unambiguous and unconditional duty on mine operators to report an occupational injury within ten days. Petitioner, the owner-operator of a mine, was not relieved of that duty where the injured person’s employer also filed a report for the same incident.

Congress passed the Mine Act to “strengthen federal regulatory oversight of the mining industry.” Despite that oversight, however, Congress placed “primary responsibility” for ensuring safe working conditions with mine operators. Thus, the Mine Act imposes several affirmative duties on mine operators, including the duty to notify the Mine Safety and Health Administration (“MSHA”) of



“any accident occurring in a coal or other mine.” Specifically, implementing regulation 30 C.F.R. § 50.20(a) requires that “each operator” must report within ten days any accident or injury occurring at the operator’s mine by filing an MSHA Form 7000-1. The MSHA uses Form 7000-1 to determine whether to investigate the operation of the mine.

Dickenson-Russell Coal Company (“Dickenson Coal”) owned and operated the Roaring Fork No. 4 Mine (“Roaring Fork”) in Virginia. Bates Contracting, a temporary labor agency, supplied miners to work at Roaring Fork. While working in the mine, a Bates employee suffered a reportable injury as defined by 30 C.F.R. § 50.20(a). At the time of the injury, the Bates employee was under the supervision and control of Dickenson Coal, rather than Bates, personnel. Bates timely filed a Form 7000-1 with the MSHA to report the injury. Dickenson Coal, however, made no such filing, claiming it had a policy not to report injuries suffered by the employees of independent contractors, such as Bates.

Pursuant to 30 C.F.R. § 50.20(a), the MSHA issued Dickenson Coal a citation for failure to timely report the injury. Dickenson Coal contested the citation, arguing that either Dickenson Coal or Bates, but not both, was required to report the injury. The ALJ rejected Dickenson Coal’s argument and granted “summary decision” to the Secretary. In doing so, the ALJ found that Bates was not an “operator” under the regulatory definition because it was not “operating, controlling or supervising” mining activities. The ALJ found that because Bates was not obligated as an operator to file a report of the injury, its report was merely gratuitous and did not relieve Dickenson Coal from fulfilling its own reporting obligation. After exhausting its administrative remedies, Dickenson Coal sought the Fourth Circuit’s review of the ALJ’s decision.

In its petition, Dickenson Coal first argued that the ALJ should have applied the statutory definition of “operator,” which includes independent contractors like Bates, rather than the regulatory definition, which does not. The Fourth Circuit found, however, that Dickenson Coal’s reporting obligation under 30 C.F.R. § 50.20(a) does not depend on whether Bates

is considered an “operator,” because the regulation contemplates more than one operator. The Fourth Circuit first analyzed whether the regulation itself is unambiguous such that its plain language controls. The Court noted that the regulation provides that “each operator” shall report “each” incident. As such, the plain language of the regulation unambiguously provided that “where there are two or more operators who are subject individually to the reporting requirement in 30 C.F.R. § 50.20(a), every one of them must report every qualifying accident or injury.” Therefore, even assuming Bates was an operator under the regulatory definition, its filing of an injury report would not relieve Dickenson Coal, also an operator, of its own reporting obligation.

Dickenson Coal further argued that a plain language reading of the regulation would lead to various policy concerns such as duplicative and unnecessary reporting and otherwise “absurd” results. The Fourth Circuit rejected Dickenson’s arguments, noting in part that any reporting redundancies “ensure[] that accidents and injuries do not go unreported and that the MSHA is able to compile accurate statistics which promotes increased industry safety.” For these reasons, the Fourth Circuit denied the petition for review.

Barton v. House of Raeford Farms, Inc., F.3d (4th Cir. Mar. 11, 2014), 2014 WL 929362, available at <http://www.ca4.uscourts.gov/Opinions/121943.P.pdf>

Reversing the jury’s award on the plaintiffs’ South Carolina Wages Act claims, the Fourth Circuit holds those claims are preempted by § 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185. The Fourth Circuit also reversed in part and affirmed in part certain plaintiffs’ state law retaliation claims based on sufficiency of the evidence.

Wages Claims

Employee wages at House of Raeford Farms Inc., d/b/a Columbia Farms, Inc. (“Columbia Farms”) were governed by a collective bargaining agreement (“CBA”) with a workers’ union. The CBA provided for an eight-hour workday and forty-hour work



week and further delineated the hourly rates for different employees. Pursuant to a negotiated revision of the CBA in 2004, employees received a 3.1% raise in their hourly rate and “one unpaid meal period and [one] unpaid rest period per day, totaling approximately sixty (60) minutes, [with] the allocation between the meal and rest periods to be allocated by the company.

Although the CBA did not specify how employees' time would be calculated, Columbia Farms had a long-standing practice of paying production employees based on “line time”—the time actually spent on the production line processing chickens. According to that practice, “line time” did not include the time it took to put on protective gear, clean that gear before and after work, or walk to and from the production line. In addition, Columbia Farms stopped the production line for two 30-minute breaks per shift which, pursuant to the CBA, were not compensable.

Columbia Farms provided new employees with an orientation form titled “Terms of Employment,” which was filled out with the employee's specific hourly rate and general hours of that employee's shift. New employees also received an Employee Handbook which explained the administration of the time cards, noting, among other things, that employees “must be dressed for work when punching in or out”; that “[e]mployees are to be at their workstations ready and dressed for work at their scheduled starting time and are to remain at their workstations until the scheduled quitting time”; and that employees “will be paid for all time worked per [their] schedule.”

Plaintiffs, all of whom were covered by the CBA, sued for wages due under the Fair Labor Standards Act (“FLSA”) and South Carolina Wages Act, claiming that they should have been paid “clock time”—that is, the time set forth in their scheduled shift—including the time spent putting on their protective gear and otherwise preparing for work. In addition, plaintiffs claimed that because each of their two breaks was shortened by the time spent changing into and out of protective gear, Columbia Farms must compensate them for that time. Plaintiffs further claimed that Columbia Farms

failed to notify them in writing at the time of hire the exact number of hours they would work as required by the South Carolina Wages Act.

The district court granted summary judgment for Columbia Farms on the plaintiffs' FLSA claims and similar South Carolina Wages Act claims based on the Fourth's Circuit's earlier decision in *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009), which held that changing into and out of protective gear constituted “changing clothes” and that employers and unions could regulate whether that time was compensable in the collective bargaining agreement. With regard to the plaintiffs' claims under the South Carolina Wages Act, the district court denied summary judgment and the claims proceeded to trial. At trial, several former employees testified that Columbia Farms never distinguished “line time” from “clock time,” but rather simply informed employees through the “terms of employment” document that they would be paid based on when they clocked in and out for their shifts. The jury awarded the plaintiffs unpaid wages and the district court trebled the damages as authorized by state law.

On appeal, Columbia Farms argued that the plaintiffs' South Carolina Wages Act claims were preempted by § 301 of the LMRA. Section 301 of the LMRA permits actions for violation of collective bargaining agreements to be brought in federal district court. As the Fourth Circuit explained, to ensure uniform interpretation those agreements, the Supreme Court has found that § 301 of the LMRA “preempts and entirely displaces ‘any state cause of action for violation of contracts between an employer and a labor organization.’” *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). The Fourth Circuit further explained that § 301 does not broadly preempt all independent state law contract claims as a matter of law simply because a collective bargaining agreement exists and may be a part of the litigation. However, §301 will preempt a state law claim where resolution of that claim is “inextricably intertwined” with and requires interpretation of the terms of the collective bargaining agreement.



Considering plaintiffs' South Carolina Wages Act claims, the Fourth Circuit's majority opinion explained that the CBA, by its terms, was the exclusive employment contract between plaintiffs and Columbia Farms. Therefore, any wages owed to plaintiffs "were necessarily those agreed to in the CBA." The Fourth Circuit further explained that the CBA provided for the number of work hours per day and per week, the hourly rate for "hours worked," and two unpaid breaks as allocated by Columbia Farms. As such, the Fourth Circuit found that plaintiffs' arguments that "hours worked" meant "clock time"—that is time spent on the shift—rather than "line time"—that is, time spent on the production line only—"are nothing more than a disagreement with Columbia Farms' interpretation of how to calculate their 'hours worked' under the CBA." The Fourth Circuit further found that to accept plaintiffs' argument that they understood that the determination of "hours worked" was governed by individual employment contracts, irrespective of the exclusive nature of the CBA, would "inappropriately usurp the CBA's federally protected role." For these reasons, the majority held that plaintiffs' South Carolina Wages Act claims were preempted by § 301 and should not have been submitted to the jury.

Retaliation Claims

In addition to the claims based on unpaid wages, eight former employees alleged that Columbia Farms terminated their employment in retaliation for instituting a workers' compensation proceeding. Under South Carolina law, "[n]o employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law." The primary question on appeal was whether the eight employees "instituted" a workers compensation proceeding within the meaning of the statute.

Based on that South Carolina Supreme Court precedent, the Fourth Circuit found that the district court erred in holding that six of the eight plaintiffs "instituted" a workers' compensation proceeding. Specifically, the Fourth Circuit found that the district court failed to require six plaintiffs to show either that Columbia Farms agreed to pay for

medical care or received a bill for the plaintiff's care from an independent health care provider. Because South Carolina law did not provide other alternatives to instituting a workers' compensation proceeding, the Fourth Circuit found that these plaintiffs did not "institute" a proceeding as required by the retaliation statute.

In addition, the Fourth Circuit found that the district court erred in concluding that the six plaintiffs were terminated because they instituted any workers' compensation proceeding, as is required by the statute. The Fourth Circuit explained that it is the plaintiffs' burden to show that they would not have been discharged "but for" the institution of the workers' compensation provision." Here, the six plaintiffs did not carry that burden.

Finally, the Fourth Circuit upheld the district court's judgments in favor of two other plaintiffs who filed retaliation claims. In contrast to the six plaintiffs discussed above, these two plaintiffs fell at work and were treated by the company doctor, thereby meeting the threshold for "instituting" a workers' compensation proceeding. In addition, these plaintiffs met their causation burden by showing that the company doctor recommended that each plaintiff take breaks from the production, and that Columbia Farms terminated the plaintiffs for taking excessive breaks during that period of time. Based on the foregoing, the Fourth Circuit affirmed in part and reversed in part.

***Lincoln v. Office of Workers' Compensation Programs*, ___ F.3d ___ (4th Cir. Mar. 11, 2014), 2014 WL 929367, available at <http://www.ca4.uscourts.gov/Opinions/Published/131594.P.pdf>**

Steven Lincoln filed a claim with the Director of the Office of Workers' Compensation Programs (OWCP) seeking benefits for hearing loss allegedly sustained during his employment as a longshoreman for Ceres. Ceres responded with a notice of controversion, conceding that the hearing loss was noise related, but stating that it needed additional information to determine the correct disability payment. OWCP then served Ceres notice of Lincoln's claim, after which time Ceres "voluntarily



paid" Lincoln one week of permanent partial disability. At Ceres' request, Lincoln agreed to submit to independent medical testing, which demonstrated a 10% hearing loss in both ears. Several months later, Lincoln and Ceres agreed to a settlement compensation order awarding Lincoln nearly \$24,000 in compensation and \$4,000 in medical benefits. Ceres had not made any payments between the initial partial payment and entry of the settlement compensation order.

Following entry of the settlement compensation order, Lincoln sought attorneys' fees under 33 U.S.C. § 928(a). Section 928(a) shifts attorneys' fees from a successful claimant to the employer when the employer "declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim." The Director found that because Ceres made a partial disability payment within thirty days of receiving notice of Lincoln's claim, Ceres was not liable for attorneys' fees under the fee shifting provisions of § 928. Upon review, the Benefits Review Board found the Director acted within his discretion in denying Lincoln's fee petition. Lincoln then sought review by the Fourth Circuit.

Lincoln argued that the term "any compensation" means "all compensation due," such that an employer's failure to pay the entire claim within thirty days triggers the fee shifting provision in § 928(a). The Fourth Circuit disagreed, finding that the plain language of § 928(a) unambiguously encompasses payments of partial compensation. In Lincoln's case, Ceres voluntarily paid one week's worth of compensation within thirty days of receiving notice of Lincoln's claim.

The Fourth Circuit found that Lincoln's argument did not fare any better under the safe harbor provision of § 928(b). The Fourth Circuit explained that pursuant to § 928(b), an employer is liable for attorneys' fees only if it pays partial compensation, a dispute about the total benefits arises, and each of the four additional requirements are met: (1) an informal conference occurs; (2) the deputy or Board provides a written recommendation regarding compensation; (3) the employer refuses to adopt the written recommendation; and (4) the employee

procures the services of an attorney to obtain an award greater than what employer was willing to pay in light of the written recommendation. In this case, although Ceres may have paid only partial compensation and raised a dispute about total benefits, Lincoln never sought an informal conference regarding that dispute. Rather, Lincoln proceeded to settlement negotiations and ultimately agreed to a settlement compensation order

Lincoln further argued that Ceres' payment was not technically "compensation" at all because "it was merely an attempt by Ceres to avoid liability." In support of this argument, Lincoln relied on *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), wherein the court found that the employer's \$1 payment did not constitute "compensation" under § 928(a). The Fourth Circuit rejected Lincoln's argument, finding the \$1 payment in *Green* to be "dramatically" different from the over \$1,200 partial compensation paid to Lincoln by Ceres.

Finally, Lincoln argued that when Ceres filed its notice of controversion prior to making the partial payment, Ceres "signaled that it was controverting his claim and, by doing so, irrevocably triggered § 928(a)." Noting that Lincoln had not raised this issue before the Benefits Review Board, the Court, in dicta, found the merits of Lincoln's argument to be "wanting." For these reasons, the Fourth Circuit denied Lincoln's petition for review.

***Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, ___F.3d ___ (4th Cir. Mar. 6, 2014), 2014 WL 868620, available at <http://www.ca4.uscourts.gov/Opinions/Published/131143.P.pdf>**

In *Carnell Construction*, the Fourth Circuit held that a corporation can acquire a racial identity and establish standing to seek a remedy for alleged race discrimination under Title VI. Based on the district court's prejudicial evidentiary ruling, the Fourth Circuit remanded the discrimination claims for a new trial and also ordered a new trial on damages related to the plaintiff's contract claim.

In 2008, the Danville Virginia Housing Authority solicited bids for site preparation in advance of a



large public housing construction project. Carnell Construction Corporation (“Carnell”) submitted a bid for the site preparation project, representing at that time that it was certified as a minority business enterprise because its owner is African-American. The Housing Authority contracted with Carnell, the lowest bidder, and subsequently leased the project site to Blaine Square, LLC (“Blaine”) for tax reasons. The Housing Authority, however, was to provide actual supervision of the site preparation and construction projects.

After Carnell began work on the site preparation project, its relationship with the Housing Authority deteriorated, with each party attributing delays and other problems with the project to the other party. In late 2008, Carnell’s president, Michael Scales, complained of race discrimination to the Housing Authority’s Executive Director. Mr. Scales explained that he believed Carnell was “being singled out as a minority contractor and was “expected . . . to work for free” on “excessive” project modifications. In May 2009, the Housing Authority advised that it would not extend Carnell’s contract beyond the stipulated completion date and that Carnell would be required to remove its equipment by that date whether or not the work was completed. Carnell left the project two weeks early and requested reimbursement for unpaid work. After the Housing Authority refused the reimbursement request, Carnell filed claims against the Housing Authority and Blaine for race discrimination under Title VI and 42 U.S.C. § 1981 and breach of contract.

Carnell based its race discrimination claim on statements made by the Housing Authority’s Program Director and Contracting Officer and disparate treatment regarding payments and change order requests. As to the breach of contract claims, Carnell asserted that it was improperly removed from the project and owed for work it was directed to perform but for which it was not paid. In the first trial, the jury awarded Carnell more than \$3.1 million dollars on its race discrimination claims. The district court, however, ordered a new trial based on a post-trial ruling that certain of Carnell’s evidence was false. Before the second trial, the court granted summary judgment to Blaine on the

race discrimination claim, holding that there was no evidence Blaine directly participated in or controlled the actors engaging in the alleged discriminatory conduct. The jury in the second trial was unable to reach a verdict and the court declared a mistrial. In the third trial, the jury found in Carnell’s favor as to the breach of contract claims, but not the race discrimination claims. The parties filed cross-appeals.

In a matter of first impression, the Fourth Circuit considered whether Carnell, as an entity, had standing to assert claims of race discrimination and retaliation under Title VI. The defendants did not dispute that Carnell sufficiently alleged the constitutional standing requirements of (1) an actual or threatened injury that is concrete and particularized, and not conjectural; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is likely redressed by a favorable decision. Rather, the defendants argued that Carnell failed to meet the prudential standing requirement that “a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision.” *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). The relevant statute at issue in this case, 42 U.S.C. § 2000d, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The defendants argued that Carnell is not a “person” within the meaning of the statute. In support, the defendants relied on the Supreme Court’s statement in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), that a corporation “has no racial identity and cannot be the direct target” of race discrimination.

Following *Arlington Heights*, the First, Second, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits have all rejected the prudential standing argument to bar a minority-owned corporation’s race discrimination claims where that corporation meets the constitutional standing requirements. Joining those Circuits, the Fourth Circuit held that “a corporation that is minority-owned and has been



properly certified as such under applicable law can be the direct object of discriminatory action and establish standing to bring an action based on such discrimination.” As applied to the facts of this case, the Fourth Circuit found that the Commonwealth of Virginia certified Carnell as a minority-owned business, and Carnell represented that fact when it entered into the contract with the Housing Authority. The Fourth Circuit further found that Carnell alleged discrimination based on the race of its owner and alleged a direct injury as a result of that discrimination. As such, the Fourth Circuit held that “Carnell’s corporate status does not prevent its race discrimination claims from falling within the zone of interests protected by Title VI.”

The Fourth Circuit further rejected the defendants’ alternative argument that Carnell lacked standing because it was not an intended beneficiary of the federal funding for the construction project. The Fourth Circuit explained that Title VI does not require a party to be an intended beneficiary of the federal funding and that Carnell met the determinative standing test as discussed. Thus, the Court found that Carnell had standing to bring its race discrimination claim in this case.

As to the other matters on appeal, the Fourth Circuit affirmed the district court’s dismissal of the race discrimination claims against Blaine, noting first that the record failed to reveal any direct discriminatory action by Blaine personnel. Carnell also argued that Blaine could be held vicariously liable. Assuming, without deciding, that vicarious liability may be asserted in the context of a Section 1981 claim, the Fourth Circuit noted that the contract between Blaine and the Housing Authority expressly stated that “[n]othing herein contained shall be construed to constitute any party as the agent of another party,” and there was no evidence on the record that Blaine “actually controlled any of the regular operations of the Housing Authority.”

Equal Employment Opportunity Commission v. Propak Logistics, Inc., ___ F.3d ___ (Mar. 25, 2014), 2014 WL 1199493, available at <http://www.ca4.uscourts.gov/Opinions/Published/131687.P.pdf>

In *Propak Logistics*, the Fourth Circuit held that the district court did not abuse its discretion in finding that the EEOC acted unreasonably in filing and continuing to prosecute a complaint and affirmed an award of attorneys’ fees for the defendant under Title VII’s fee shifting provision.

In January of 2003, Michael Quintois filed a charge of discrimination with the EEOC alleging that his former employer, Propak Logistics, Inc. (“Propak”) had terminated his employment based on national origin discrimination. The EEOC notified Propak of the charge, Propak responded to the charge by May of 2003, but the EEOC delayed scheduling interview of Quintois until the spring of 2004. After designating the matter as a “class case,” the EEOC conducted two interviews in October of 2004 and March of 2005, after which time the EEOC did not contact Propak again for approximately two years.

In 2007, the EEOC attempted to interview the hiring manager at the time Mr. Quintois filed his discrimination charge, but the manager was no longer employed by Propak and her whereabouts were unknown. Mr. Quintois received a right to sue letter and filed a lawsuit against Propak in March of 2008. That lawsuit was dismissed by agreement of the parties four months later. In September of 2008, the EEOC concluded its investigation and sent Propak a “determination letter” stating that the EEOC had found reason to conclude that Propak violated Title VII for failing to hire based on national origin. The EEOC invited Propak to engage in informal conciliation, including the implementation of training programs for supervisors and managers at Propak’s North and South Carolina locations. At that time, however, Propak had closed all facilities in North and South Carolina and, therefore, could not implement any of the remedial measures suggested by the EEOC. Although Propak notified the EEOC of this fact, the EEOC filed its lawsuit in district court over six and one-half years after Mr. Quintois filed his discrimination charge.

Propak filed a motion to dismiss arguing, in part, that the action should be dismissed based on laches. The district court denied the motion without prejudice to the laches defense and ordered limited discovery on the question whether Propak was



prejudiced by the EEOC's "extensive delay in initiating the litigation." Following discovery, Propak filed a motion for summary judgment, again raising the defense of laches. The district court granted Propak's motion, finding unreasonable the EEOC's delay in initiating the litigation. The district court further held that Propak was prejudiced by the delay through the loss or inability to locate certain witnesses and documents. The EEOC appealed, but later sought dismissal of the appeal, which the Fourth Circuit granted upon the agreed motion of the parties.

Thereafter, the district court granted Propak's motion for attorneys' fees, concluding that the EEOC "knew or should have known that its claim 'was frivolous, unreasonable, or groundless.'" In so concluding, the district court found that EEOC acted unreasonably because it was "abundantly clear" when the EEOC filed its complaint that the lawsuit against Propak was moot. The EEOC appealed the attorneys' fees award.

On appeal, the EEOC argued for the first time that the district court was not permitted to apply the defense of laches in a lawsuit brought by the federal government. The Fourth Circuit found that the EEOC's argument in this regard was relevant to the district court's summary judgment decision, but that the EEOC abandoned its appeal of that ruling. As such, the Fourth Circuit rejected the EEOC's laches argument without further analysis. As to attorney's fees award, the EEOC argued that the district court improperly engaged in "hindsight logic" to find the EEOC's conduct unreasonable by referring to its previous opinion on laches. The Fourth Circuit disagreed, finding that the district court rested its summary judgment and attorneys' fees decisions on two separate grounds. As to summary judgment, the Fourth Circuit found the district court's laches holding was based on the EEOC's unjustified delay in bringing the lawsuit and resulting prejudice to Propak. As to attorneys' fees, however, the Fourth Circuit found that the district court based its decision on the finding that the EEOC's lawsuit was moot at its inception and, therefore, unreasonable.

In considering whether the district court abused its discretion by finding the EEOC's actions

unreasonable, the Fourth Circuit found no clear error in the district court's factual finding that at the time it filed the complaint the EEOC had failed to identify a class of victims who could be entitled to monetary relief. The Fourth Circuit also ruled that the district court was entitled to consider the lack of remedies available to the EEOC once the Propak facilities closed. The Fourth Circuit found no merit in the EEOC's argument that it was entitled to maintain a suit against Propak even though the EEOC had learned nine months before filing the complaint that Propak had closed its North Carolina facilities. Affording the district court "great deference," the Fourth Circuit affirmed the district court's holding that the EEOC acted unreasonably in this case.

Submitted by:

Paul Sun

Emily Reardon

ELLIS & WINTERS LLP

Post Office Box 33550

Raleigh, North Carolina 27636

Telephone: 919.865-7000

Paul.sun@elliswinters.com

Fifth Circuit

***Taylor v. Bailey Tool Mfg. Co.*, ___ F.3d ___ (5th Cir. Mar. 10, 2014), 2014 WL 928340, available at <https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-10715-CV0.pdf>**

Taylor brought a state court action against his employer alleging racial discrimination and retaliation. Nine months later, he amended his petition to include federal claims of discrimination. Employer Bailey Tool removed the case to federal court and moved to dismiss the claims as time barred. Taylor argued that his federal-law claims, although filed after the statutory period, were not time-barred because they related back to the date of his original petition in state court pursuant to Federal Rule of Civil Procedure 15(c)(1).

On appeal, the Fifth Circuit held that Texas' relation-back statute, which barred claims in the amended complaint that were subject to plea of limitation when the pleading was filed, applied to



determine whether plaintiff's amended petition filed in state court related back to date of his original petition. The federal rule did not apply because Taylor's state law claims in the original state court complaint were untimely when filed and Taylor's federal claims were untimely when filed in the state court amended complaint. Therefore, Taylor's claims were not revived once the case was removed to federal court.

***Grimes v. BNSF Ry. Co.*, ___ F.3d ___ (5th Cir. Mar. 18, 2014), 2014 WL1099049, available at <https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-60382-CV1.pdf>**

The Fifth Circuit withdrew the opinion reported in the March Monthly Circuit Update and substituted this new opinion for clarification.

Grimes, a BNSF railway employee, was injured in an accident while working with two other employees. Grimes' story changed during the company investigation and he was terminated for violating work rules requiring honest answers in investigations. The union appealed Grimes' termination to the Public Law Board (PLB) pursuant to the Railway Labor Act (RLA), which found that Grimes was dishonest but reinstated him without back pay. Grimes then sued alleging violations of 49 U.S.C. §20109(a), which prohibits a railroad carrier from discharging an employee due to the employee's good faith act of reporting a work-related personal injury. The district court "gave preclusive effect to the arbitral finding of fact . . . that Grimes had been dishonest" and therefore had not engaged in "protected activity" which requires reporting the incident in good faith, and granted BNSF's summary judgment motion.

The Fifth Circuit vacated the district court's opinion and remanded finding that, while arbitral proceedings can have a preclusive effect on litigation, the decision to apply the preclusive effect is within trial court's discretion. But, because the railroad that conducted the investigation and hearing and terminated Grimes and because the PLB only reviewed a closed record, the procedures were not adequate for collateral estoppel to apply. Consistent with *Reed v. Norfolk Southern Railway Co.*, 740

F.3d 420 (7th Cir. 2014), the Fifth Circuit held that FRSA's election-of-remedies provision did not bar the action because the plain meaning of the statute does not preclude Grimes from obtaining relief under FRSA simply because he appealed his grievance to Public Law Board.

***Flex Frac Logistics, L.L.C. v. N.L.R.B.*, ___ F.3d ___ (5th Cir. Mar. 24, 2014), 2014 WL 1178698, available at <https://www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-60752-CV0.pdf>**

Flex Frac required each employee to sign a confidentiality policy addressing, among other items, customer and sales information, as well as personnel information. After Flex Frac fired Kathy Lopez in 2010, she filed an Labor Relations Board (NLRB) charge. The NLRB issued a complaint alleging that Flex Frac promulgated and maintained a rule prohibiting employees from discussing employee wages. The Board also addressed Ms. Lopez's termination, but severed and remanded that claim. Flex Frac argued that its employees did not actually interpret the confidentiality provision to restrict their Section 7 rights.

The Fifth Circuit denied Flex Frac's petition for review and enforced the NLRB order, finding that, although there was no reference to wages or other specific terms and conditions of employment in the confidentiality clause, the confidentiality clause violated the National Labor Relations Act (NLRA) because it defined confidential information to contain personnel information. Whether employees interpreted the confidentiality provision to restrict their Section 7 rights was not determinative; rather, the Board is merely required to determine whether employees would reasonably construe the disputed language to prohibit Section 7 activity.

The Court avoided Flex Frac's constitutional challenge to the validity of the NLRB member's recess appointment because it was not timely raised and thus not a jurisdictional issue to be considered.

***Lizalde v. Vista Quality Markets*, ___ F.3d ___ (5th Cir. March 25, 2014), 2014 WL1226730, available at <https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-50015-CV0.pdf>**



Lizalde was injured during the course of his employment with Vista. He brought a state court action asserting non-subscriber negligence and gross negligence claims as well as claims for discrimination and retaliation under the Employee Retirement Income Security Act (ERISA). Vista removed the case to federal court on the basis of federal question based on the ERISA claim. The district court declined to exercise supplemental jurisdiction and remanded the state law negligence and gross negligence claims. Vista filed the motion to compel arbitration and stay proceedings pending arbitration on the ERISA claim. The district court held that the arbitration agreement provided Vista the unrestrained right to unilaterally terminate the parties' arbitration agreement was not enforceable as illusory.

On appeal, the court addressed recognized that, under Texas contract law principles, the arbitration agreement was not illusory because Vista's power to terminate the arbitration obligation was thus limited. Finding that Vista's termination of the arbitration agreement was restricted to prospective claims, did not apply to claims that accrued prior to termination, and was not effective until ten days after reasonable notice was given to the employee, the Fifth Circuit reversed and remanded the district court's decision and held that the arbitration agreement was enforceable.

***Odle v. Wal-Mart Stores, Inc.*, ___ F.3d ___ (5th Cir. Mar. 31, 2014), 2014 WL1282753, available at <https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-10037-CV0.pdf>**

Stephanie Odle was an original member of the class of plaintiffs in *Betty Dukes, et al. v. Wal-Mart Stores, Inc.*, which the Supreme Court decertified in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011). After a tortured history in *Dukes*, on remand, the United States District Court for the Northern District of California held that all former class members who had an EEOC notice to sue had until October 28, 2011 to file suit. Odle filed this putative class action in the United States District Court for the Northern District of Texas. Wal-Mart moved to dismiss Odle's claims on the basis that

they were time barred because the last possible date for her to file suit was January 18, 2011 – 90 days after the Ninth Circuit issued its mandate because it was a final adverse determination. The district court agreed and dismissed Odle's claims as time-barred.

Applying the Supreme Court's decisions in *American Pipe* and *Crown, Cork & Seal* and distinguishing two earlier Fifth Circuit cases, the Fifth Circuit reversed and remanded. The Court held that that the Ninth Circuit's ruling was not a "final adverse decision." By instructing the California district court to consider Rule 23(b)(3) certification on remand, the Ninth Circuit continued proceedings on the certification issue. The first court to expressly or impliedly rule on the former Wal-Mart employees' class status was the California district court, when on remand, it gave the October 28, 2011 deadline. Because Odle filed this suit before the filing deadline expired, her action was timely and the statute of limitations remained tolled.

Submitted by:

Susan Cone Kilgore
Box 461313
San Antonio, Texas 78246
Phone: 210-320-2749
susan@kilgore.com

Sixth Circuit

***Laster v. City of Kalamazoo*, ___ F.3d ___ (6th Cir. Mar. 13, 2014), 2014 WL 960892, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0048p-06.pdf>**

Mark Laster is an African-American male who was a Public Safety Officer for the Kalamazoo Department of Public Safety. He held this position for over twenty-three years, and alleged that he was subject to less favorable treatment than similarly-situated employees many times over this period. He alleged that this disparate treatment was due to his race. He claimed to have been subject to an improper evaluation downgrade, denied a request to attend an outside training program (to which two Caucasian employees were later granted permission to attend), refused use a meeting room for personal use (despite those requests being routinely granted



to other employees), left out of an important meeting that all other employees on his shift attended, and singled out for failing to refill air bottles. He also alleged that, after showing a co-worker a photo of his family with President Obama, a common computer at the station had its screen saver changed to a picture of a dog urinating on an Obama campaign sign. He also claimed to be present at a Human Resources training program when the deputy chief threatened that no one in the Department should file a report with the EEOC before coming to him first.

Laster filed a complaint with the EEOC alleging race discrimination and retaliation. He later filed another charge with the EEOC alleging further retaliation. The EEOC issued right-to-sue letters for both charges. Afterwards, Laster and his family attended an event in Kalamazoo at which President Obama was present, and the Kalamazoo Department of Public Safety was helping provide security. The Department filed a report that indicating that Laster crashed his car into a police vehicle at that event and left the scene of the accident, as well as committed other actions that suggested that he was intoxicated. Laster alleged that this report was completely fabricated, that he would not have gotten into the event or would have been arrested if this had happened, and he would certainly not be allowed near the President if he had acted in such a fashion. The matter proceeded to a pre-arbitration determination hearing. Before the hearing, Laster heard a rumor from a co-worker that the decision had already been made to terminate him at that hearing. Fearing that he would lose his health insurance benefits for him and his family, he chose to retire before the hearing.

Laster filed suit for race discrimination and retaliation in violation of Title VII, as well as for retaliation for engaging in First Amendment-protected activity. As to proving a *prima facie* case of discrimination, the parties disputed as to whether or not Laster had suffered an adverse employment action. Laster alleged that he was constructively discharged, but the Sixth Circuit disagreed. The court stated that while Laster had provided evidence that he was subjected to heightened scrutiny and was treated differently than other employees, there

was no evidence that this behavior was undertaken with the intention of forcing Laster to quit. Further, even though a constructive discharge may still exist when an employer has effectively communicated to the employee that he or she is about to be fired, Laster quit because of the speculation of a co-worker who had no inside information and no part in the decision-making process. Thus there could be no constructive discharge, no adverse employment action, and no discrimination claim.

Yet Laster also brought a Title VII retaliation claim. The district court failed to analyze this claim independently, instead only adjudicating whether or not Laster had a claim for retaliation in violation of his First Amendment rights. The court stated that retaliation protection extends to “complaints to management and less formal protests of discriminatory employment practices.” Furthermore, establishing a materially adverse employment action is a “less onerous” burden in a retaliation context than in a discrimination context, as it can simply mean that the action might dissuade an employee from pursuing or supporting a charge of discrimination. In this case, Laster presented adequate evidence that after he began making complaints he was denied training opportunities, singled out for selective enforcement of policies, and disciplined more harshly than his co-workers. Viewed in the light most favorable to Laster, he had provided evidence that showed that the investigation of him after the President Obama event was “frivolous and malicious.” There was also evidence that all of the employer’s responses to Laster’s various complaints were wholly inadequate. Accordingly, summary judgment in favor of the Department was inappropriate as to the retaliation claim because the court failed to analyze it separately from the discrimination claim.

***Huffman v. The Hilltop Companies, LLC*, ___ F.3d ___ (6th Cir. Mar. 27, 2014), 2014 WL 1243795, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0056p-06.pdf>**

Plaintiffs were employees of Hilltop who were hired to review the files of mortgage loans originated by PNC Bank. Each of the employees had an employment agreement with 24 clauses, including



an arbitration clause and a survival clause. Interestingly, the survival clause listed 12 of the 24 clauses in the agreement as surviving the expiration of the agreement, but did *not* list the arbitration clause. After the end of the Plaintiffs' employment, they brought an action for unpaid overtime under the Fair Labor Standards Act, and Hilltop asserted that the parties were still bound by the arbitration clause and thus the case must be dismissed. The district court denied Hilltop's motion to dismiss, holding that the intentional enumeration of 12 clauses in the contract as surviving expiration acted as an intentional exclusion of the rest of the clauses from survival.

On appeal, the Sixth Circuit reversed the district court and emphasized the strong federal policy in favor of arbitration, and recognized that this policy extends to post-expiration arbitration. If the parties were not bound to arbitrate after the contract expired, then one of the parties could simply wait until the contract expired to bring his or her action and thus circumvent the arbitration agreement. If an agreement to arbitrate is "broadly-worded," it should be enforced unless there is "positive assurance" that it is not supposed to cover the relevant dispute. The clause in this case was broadly worded because it stated that "[a]ny Claim arising out of or relating to this Agreement, or the breach thereof," must be submitted to arbitration. All doubts are resolved in favor of arbitration, and this presumption overrides the presumption that all doubts regarding a contract's interpretation are resolved against the contract's drafter.

The court held that the proper analysis was to consider the contract as a whole to determine whether the parties unambiguously intended the arbitration agreement to expire with the employment agreement, and that in this case the parties did not intend the list contained in the survival clause to be exhaustive. Further bolstering this was that the non-compete clause, which was to remain operative for twelve months after the agreement's expiration, was similarly not listed in the survival clause. Additionally, neither the integration clause nor the severability clause was listed in the survival clause. Yet the court concluded that it was not logical that the parties no longer intended the agreement to be

severable after its expiration. This logic, coupled with the strong presumption in favor of arbitration, was enough to hold that the arbitration agreement was still in effect and binding.

Demyanovich v. Cadon Plating & Coatings, LLC, ___ F.3d ___ (6th Cir. Mar. 28, 2014), 2014 WL 1259603, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0058p-06.pdf>

Alan Demyanovich was an employee of Cadon for over twenty years, during which period he took multiple periods of FMLA leave due to his dilated cardiomyopathy and congestive heart failure. His doctor had provided ongoing restrictions that he was not to work more than 40 hours per week or lift more than 50 pounds. In 2010, Demyanovich's doctor advised him to quit working completely and begin collecting social security disability. Instead, Demyanovich requested another period of FMLA leave from his employer. This request was denied, as the employer believed it did not have enough employees to be subject to the Act, and Cadon's supervisor called Demyanovich a "liability." Demyanovich was terminated later that same day.

Demyanovich brought actions for FMLA interference, FMLA retaliation, disability discrimination and retaliation under the ADA, and disability discrimination under the Michigan Persons With Disabilities Civil Rights Act. The court stated that to prove a *prima facie* case of FMLA interference, an employee must show "(1) he was an eligible employee; (2) the defendant was a covered employer under the FMLA; (3) he was entitled to take leave under the FMLA; (4) he notified his employer of his intent to take leave; and (5) the employer denied him benefits or rights to which he was entitled under the FMLA." Cadon argued that it was not a covered employer and Demyanovich was not denied any benefits to which he was entitled.

While Demyanovich was unable to prove that Cadon had 50 or more employees, he was able to create a genuine issue of fact as to whether or not MNP, an affiliated company with over 500 employees, was an "integrated employer" with Cadon. The two companies share several common



managers, the operation of the two companies are interrelated (they maintain the same business address, jointly obtain quality certifications, and engage in the same business), MNP exercised control over Cadon's labor relations, and both companies are owned by the same group of investors. This was enough to show that Cadon may have been a covered employer for FMLA purposes. Furthermore, the court held that it was not indisputable that Demyanovich would not have been able to return at the end of the leave that he requested, and thus there was also a genuine dispute as to whether he was denied benefits. Simply because his doctor advised him to stop working, it does not mean that he would not have been able to return in twelve weeks.

Because Demyanovich was able to prove a *prima facie* case, the burden shifted to Cadon to articulate a legitimate reason for terminating Demyanovich's employment after he requested FMLA leave. Cadon asserted that (1) any further absences would have subjected Demyanovich to termination under its "no-fault" absence policy, and (2) Demyanovich would not have been able to return at the end of the 12-week FMLA leave period. The court held, however, that Demyanovich had made a sufficient showing of pretext because he actually was *not* subject to termination under the no-fault absence policy when he was terminated, and Cadon had absolutely no evidence or information at the time of the termination on which to base the assertion that Demyanovich could not have returned to work within 12 weeks. Thus the district court's granting of summary judgment in favor of Cadon on the FMLA interference claim was improper.

There was also a genuine issue of fact as to the FMLA retaliation claim, because Demyanovich asserted that his supervisor called him a "liability" after he had requested FMLA leave and then fired him later that same day. Cadon had not responded with sufficient evidence to prove it would have terminated Demyanovich even if he had not requested FMLA leave.

Finally, Demyanovich had also made a sufficient *prima facie* showing as to his disability-related claims. He was disabled because his heart condition

substantially limited several major life activities. This disability was a "but for" cause of his termination, because he would not have been terminated had he not requested leave relating to his medical condition. Demyanovich had further provided sufficient evidence from which a jury could conclude that he was qualified to work in his position at the time he was terminated. Cadon's legitimate reasons for termination were the same as in response to the FMLA claims—Demyanovich was subject to termination under the no-fault absence policy, and he would not have been able to return at the end of his FMLA leave. For the same reasons listed above, Demyanovich had made a sufficient showing of pretext. Thus all of Demyanovich's claims survived summary judgment.

Submitted by:

James D. Boufides

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

277 South Rose Street, Suite 5000

Kalamazoo, Michigan 49007

boufides@millercanfield.com

Seventh Circuit

Brotherhood of Maintenance of Way Employees Division/IBT, v Norfolk Southern Railway Co., ___ F.3d ___ (7th Cir. Mar. 11, 2014), 2014 WL 930786, available at

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D03-11/C:12-3415:J:Bauer:aut:T:fnOp:N:1305584:S:0>

Plaintiff is a union representing maintenance-of-way workers who keep railways clear, safe, and navigable. Parties have a collective bargaining agreement requiring a "fair and impartial" investigation prior to disciplinary proceedings. Four union members were terminated after an investigation that used accident reconstruction reports. Appeals to overturn the terminations failed. Plaintiff filed for a permanent injunction to ban defendant from using such reports.

The district court dismissed the case finding that it constituted a minor dispute under the Railway Labor Act. The Seventh Circuit affirmed the dismissal



because plaintiff sought an interpretation of the collective bargaining agreement and not the Railway Labor Act and was therefore a minor dispute requiring the use of dispute procedures outlined in the Act. Accordingly, the Seventh Circuit affirmed the district court's dismissal for lack of jurisdiction.

Carmody v. Board of Trustees of the University of Illinois, et al., ___ F.3d ___ (7th Cir. Mar. 28, 2014), 2014 WL 1266289, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D03-28/C:13-2302:J:Hamilton:aut:T:fnOp:N:1316217:S:0>

Plaintiff worked for Defendant for over 25 years and had a property interest in his employment. In a separate suit, plaintiff obtained defendant's internal emails under a protective order. Defendant discovered plaintiff possessed the emails and investigated him for using them for a non-university purpose without permission. However, Plaintiff would not answer investigative questions because of the court order. The order was amended to allow plaintiff to respond, but defendant terminated him anyway.

Plaintiff sued alleging he had no adequate opportunity to be heard and was retaliated against for reporting an improper activity three years earlier. The district court dismissed all claims. The Seventh Circuit reversed the dismissal of the due process claim because a protective order is similar to being unavailable due to illness. The Seventh Circuit affirmed the dismissal of the retaliation claim because three years between an activity and alleged retaliation is implausible on its face.

Mitchell v. JCG Industries, Inc., ___ F.3d ___ (7th Cir. Mar. 18, 2014), 2014 WL 1027714, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D03-18/C:13-2115:J:Posner:aut:T:fnOp:N:1309962:S:0>

Plaintiffs, union represented line workers at a poultry plant, are required to wear sanitary covers over their street clothing, protective gloves, and hairnets. They must remove this equipment to attend their lunch break. Plaintiffs sued alleging violations of the FLSA and Illinois Minimum Wage Law

demanding compensation and overtime pay for the time spent donning and doffing.

The district court granted summary judgment for defendant. The Seventh Circuit affirmed and found that plaintiffs worked two four-hour work days rather than one eight-hour work day, and that changing was part of a bona fide meal break, which was not required under the FLSA. The court also found the meal break was primarily for the employee's benefit, and therefore did not violate the Illinois Minimum Wage Law. The court noted that issues like this should be dealt with in collective bargaining agreements.

Corina Bass v. Joliet Public School District, ___ F.3d ___ (7th Cir. Mar. 26, 2014), 2014 WL 1229578, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D03-26/C:13-1742:J:Wood:aut:T:fnOp:N:1314349:S:0>

Plaintiff was a custodian for an elementary school and entitled to one long term disability leave of up to 12 months under the governing collective bargaining agreement. The school had a policy against working with restrictions. Plaintiff injured herself in 2005 and again in 2007, and she used a total of 20 months leave. Plaintiff injured herself again in 2010 and was told she would not receive any additional leave. Plaintiff was unable to return without restrictions and was fired.

Plaintiff filed suit alleging sex discrimination under Title VII. The district court granted summary judgment for defendant. The Seventh Circuit affirmed because plaintiff was in clear violation of the attendance policy and three male custodians had been fired for the same conduct.

Submitted By:

Ruth I. Major, Esq.
Austin J. Wightman, Esq.
The Law Offices of Ruth I. Major, P.C.
30 W. Monroe Street, Suite 1650
Chicago, Illinois 60603
Telephone: 312.893.7544



Eighth Circuit

***Ames v. Nationwide Mutual Insurance Co.*, __ F. 3d __ (8th Cir. Mar. 13, 2014), 2014 WL 961020, available at <http://media.ca8.uscourts.gov/opndir/14/03/123780P.pdf>**

Plaintiff Angela Ames sued Nationwide Mutual Insurance for sex and pregnancy discrimination after she resigned. During Ames's pregnancy, the length of Ames's Family and Medical Leave Act (FMLA) maternity leave was originally calculated wrong; the head of Ames's department discouraged Ames from taking additional unpaid leave because it would cause "red flags". However, the department head stated that she wanted to find a mutually agreeable date of return and offered to extend Ames's maternity leave an additional week.

When Ames returned to work, the company nurse told Ames that, per Nationwide's Lactation Policy, Ames had to fill out paperwork that required three days to be processed before Ames would have access to the lactation room. The nurse suggested using a wellness room and requested that Ames receive access to the lactation room as soon as possible. While waiting to use a wellness room, Ames's supervisor told her that she needed to complete all the work that she missed in the next 2 weeks or she would be disciplined. Ames went to the head of her department to try to find a place to lactate. Ames was visibly upset and the head of her department stated "I think it is best that you go home to be with your babies" and Ames resigned.

The district court granted Nationwide's summary judgment on the premise that Ames had not shown constructive discharge. The Eighth Circuit affirmed the district court's decision. Nationwide tried to accommodate Ames throughout her pregnancy, and treated Ames no different than other employees. All employees in Ames's job position are required to keep up with their work or face discipline. Even though Ames's FMLA leave was incorrectly calculated and Ames's was discouraged from taking unpaid leave, Nationwide gave Ames an extra week of maternity leave. Per Nationwide's Lactation Policy, every nursing mother was required to complete and submit the paperwork to gain access

to the lactation rooms. Nationwide attempted to accommodate Ames by offering an alternative place to lactate, and expediting the paperwork to gain access to the lactation room. Even if the department head's comment about going home to take care of her children is a constructive discharge, Ames did not give Nationwide a reasonable opportunity to address the conditions. Ames did not meet her burden of demonstrating constructive discharge.

***Allied Sales Drivers and Warehousemen, Local No. 289, Intern. Broth. of Teamsters v. Sara Lee Bakery Group*, __ F.3d __ (8th Cir. Mar. 19, 2014), 2014 WL 1057292, available at <http://media.ca8.uscourts.gov/opndir/14/03/123585P.pdf>**

Sara Lee Bakery Group and Allied Sales Drivers and Warehousemen, Local No. 289, International Brotherhood of Teamsters, and Teamsters Local No. 120 ("unions") entered into a collective bargaining agreement (CBA) and an outsourcing agreement. The outsourcing agreement permitted Sara Lee to outsource certain positions. If Sara Lee decided to outsource to a contractor, and "subsequently changes subcontractors," the outsourcing agreement also required that Sara Lee ensure the new contractor conform to "the then current labor agreement" for that agreement's "remaining term." Sara Lee did outsource to a contractor. However, Sara Lee refused to require the contractor to adhere to the CBA for its remaining term, which the unions contended was a breach of the outsourcing agreement. The district court granted Sara Lee's motion for summary judgment, reasoning the CBA had no "remaining term" to which the outsourcing agreement could apply. The Eighth Circuit affirmed.

The Eighth Circuit found it unnecessary to determine if there was any remaining term of the CBA because the Eighth Circuit held that Sara Lee did not change contractors. The court determined that the agreement required Sara Lee to switch to another contractor, which means initially hiring a contractor, terminating that relationship, and then hiring a different contractor. Sara Lee only used one contractor; therefore, there was no change in contractors and no requirement for the contractor to adhere to the agreement.



***Madden v. Lumber One Home Center, Inc.*, ___ F.3d ___ (8th Cir. Mar. 17, 2014), 2014 WL 998187, available at <http://media.ca8.uscourts.gov/opndir/14/03/132214P.pdf>**

Three former employees of Lumber One Home Center Inc. filed suit claiming that Lumber One incorrectly classified them as executive employees, exempt from FLSA overtime pay. A jury returned a verdict in favor of Lumber One. Plaintiffs moved for judgment as a matter of law, which the district court granted. The Eighth Circuit affirmed as to two employees and reversed as to the third employee.

Plaintiffs Terry Madden, Rebecca O'Bar, and Doug Wortman were all hired to serve as supervisors and managers of a lumber store. They were classified as executives and exempt from overtime pay. Madden assembled shelves, received merchandise, performed data entry, and worked in the yard. O'Bar assembled shelves, worked in the yard, and in shipping and receiving. Wortman waited on customers, helped load trucks, and directed truck drivers where to make deliveries.

To qualify for an executive exemption, Lumber One must show, among other things, that the plaintiffs were involved in making personnel decisions. At trial, the owner of Lumber One testified that none of the plaintiffs hired or fired other employees, and that Wortman was the only plaintiff who provided recommendations about hiring that were given particular weight. Additionally, Wortman directed other employees. As a result, the Eighth Circuit reversed the district court's judgment with regard to Wortman and concluded that he was an executive employee exempt from FLSA overtime pay.

***Northwestern Univ. Employer & Coll. Athletes Players Ass'n (Capa) Petitioner*, 13-RC-121359 (N.L.R.B. Mar. 26, 2014), 2014 WL 1246914, available at <http://www.nlrb.gov/search/all/13-rc-121359>**

The College Athletes Players Association asserted that football players who receive scholarships from Northwestern University are employees within the meaning of the National Labor Relations Act, and

should be able to choose whether or not they will be represented for collective-bargaining purposes. Northwestern University took the position that the football players are students, not employees (or in the alternative, are temporary employees, ineligible for collective bargaining). The Region 13 Director found that Northwestern football players who receive grant-in-aid scholarships are employees, and ordered a secret ballot election.

Northwestern football players on scholarship receive approximately \$61,000 per year for their tuition, fees, room, board, and books. They must abide by special rules or they may lose their scholarship. Freshman and sophomores are required to live on campus, players must get permission to obtain employment, and players must submit specific information about any car they drive. Football players dedicate a large amount of time, year-round, to football-related activities. The football program generated \$235 million in total revenue from 2003-2012.

The Regional Director found that football players receiving scholarships to perform football-related services were performing under a contract-for-hire, in return for compensation, and are therefore subject to the control of Northwestern University and employees within the meaning of the National Labor Relations Act. The findings concluded that the scholarships are clearly tied to the football player's performance, because the scholarship can be cancelled if the player voluntarily quits the team. The location, duration, and manner in which the players carry out their football duties are under the direction of the football coaches. As a result, the Regional Director concluded football players who receive scholarships are employees under the common law definition of "employee".

Northwestern University is expected to appeal.

Submitted By:

Corie Tarara and Caitlin Gadel
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd. Ste 500
Minneapolis, MN 55439
Phone: 952-896-1700
ctarara@seatonlaw.com



Ninth Circuit

***Baumann v. Chase Investment Services Corp.*, ___ F.3d ___ (9th Cir. Mar. 13, 2014), 2014 WL 983587, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/13/12-55644.pdf>**

Plaintiff sued his employer, Chase Investment Services Corporation, under the Private Attorney General Act in California superior court, alleging that Chase had failed to pay him and other “aggrieved parties” (Chase financial advisors) for overtime, provide for meal breaks, allow rest periods, and timely reimburse expenses. The panel held that the district court could not exercise jurisdiction over this removed California Private Attorney General action under the Class Action Fairness Act. The panel concluded that California Private Attorney General Act actions are not sufficiently similar to Rule 23 class actions to establish the original jurisdiction of a federal court under the Class Action Fairness Act. The panel also noted that because plaintiff’s portion of the recovery would be less than \$75,000, there was also no diversity jurisdiction under 28 U.S.C. § 1332(a).

Submitted by:

Lisa A. Amato
WYSE KADISH LLP
621 SW Morrison St., Suite 1300
Portland, Oregon 97205
Phone: 503.228.8448
laa@wysekadish.com

Eleventh Circuit

***Simpson v. Sanderson Farms, Inc.*, 744 F. 3d 702 (11th Cir. Mar. 7, 2014).**

Former employees of a poultry processing plant appealed a dismissal of a putative class action brought under the Racketeer Influenced and Corrupt Organizations Act (RICO). Two questions present involved whether plaintiffs established sufficient facts as to whether: (1) the employees were actually injured and (2) the alleged RICO violations were a proximate cause of their injuries. The employees asserted injuries in the form of depressed wages,

and alleged proximate cause by claiming that the employer falsely attested that undocumented, alien employees presented genuine work-authorization forms and identification documents.

In affirming the lower court’s decision to dismiss the claim, the Eleventh Circuit found that the wage documents presented by the employees actually showed they received increasing wages in the plant. Further, as the employees asserted the fact of injury could be shown through the labor market, the Court found that without actually pleading facts regarding market data, the allegations, as stated, failed to support a claim.

***Hurley v. Kent of Naples*, ___ F. 3d ___ (11th Cir. Mar. 20, 2014), 2014 WL 1088293, available at <http://www.ca11.uscourts.gov/opinions/ops/201310298.pdf>**

In *Hurley v. Kent of Naples, et. al.*, the former CEO, Patrick Hurley, brought claims against the employer for alleged violations of the Family and Medical Leave Act (FMLA). After working for the company for 7 years, Hurley sent an email to the CEO of the employer’s parent company, Gil Neuman, regarding Hurley’s vacation schedule for the next two years – which included 11 weeks of vacation. Neuman denied the request. In response, Hurley clarified that the dates were not a request, but rather, that he was advised by health professionals of a need to avail himself to vacation time. Hurley claimed that, after this email, he disclosed his medical condition – depression, anxiety, and panic attacks – to Neuman, and Neuman refuted this occurrence. Neuman then terminated Hurley’s employment or insubordinate behavior.

After terminated, Hurley filled out an FMLA form, but did not designate he was incapacitated. At trial, Hurley requested damages for back wage, liquidated damages, and front pay, based on wrongful termination. Also at trial, Hurley testified he picked the days without input from a healthcare professional, and the days overlapped with holiday weekends. While the employer conceded Hurley had a chronic serious health condition, it alleged in a motion for judgment as a matter of law that there was no evidence that the leave requested was for a



period of incapacity. The Eleventh Circuit agreed and found the district court erred by denying the motion because Hurley's request did not qualify for leave under the FMLA. Specifically, the court agreed with Hurley that he provided the employer with sufficient notice, but found that the reason for leave did not qualify under the FMLA as the Act only protects leave for periods of incapacity, and the leave was not for this purpose.

***Walthour v. Chipio Windshield Repair, LLC*, ___ F. 3d ___ (11th Cir. Mar. 21, 2014), 2014 WL 1099286, available at <http://www.ca11.uscourts.gov/opinions/ops/201311309.pdf>**

Former employees appealed the district court's order compelling arbitration and dismissal of their putative collection action against their employer sounding in claims of violations of the Fair Labor Standards Act (FLSA) for unpaid wages. At issue was whether an arbitration agreement waiving an employee's ability to bring a collective action under the Fair Labor Standards Act is enforceable under the Federal Arbitration Act, which governs validity of an arbitration agreement. The employees took the position that the right to file a collective action under the FLSA was non-waivable, while the employer asserted that the arbitration agreement precluded action outside arbitration.

Recognizing that the burden rests upon the plaintiffs to show Congress intended to preclude a collection action waiver in an arbitration agreement, the Court held that nothing in the FLSA text, legislative history, purposes, and relevant Supreme Court decisions showed "contrary congressional command" to preclude enforcement of the arbitration agreements and collective action waivers. As such, the Eleventh Circuit affirmed the district court's order compelling arbitration and dismissed the plaintiffs' complaint.

***Samson v. Federal Express Corp.*, ___ F. 3d ___ (11th Cir. Mar. 26, 2014), 2014 WL 1226847, available at <http://www.ca11.uscourts.gov/opinions/ops/201214145.pdf>**

Former employee appealed the district court's summary judgment in favor of FedEx dismissing his

claim of disability discrimination under the Americans with Disabilities Act (ADA) and the Florida Civil Rights Act (FCRA). Plaintiff, a Type-1 insulin dependent diabetic and experienced vehicle mechanic, was offered employment as a technician with FedEx. His job offer, however, was conditioned on passing a Department of Transportation medical examination required for commercial vehicle drivers in interstate commerce. When Samson failed the medical examination due to his diabetes, FedEx withdrew his job offer on the basis that he did not qualify for the position.

Samson filed suit alleging that FedEx's imposition of the requirement for a technician to obtain a DOT medical card even though he was not a commercial truck driver violated the ADA and FCRA as the policy screened out people with disabilities. In reversing the district court's summary judgment in favor of FedEx, the Eleventh Circuit found that reasonable juror could conclude that the requirements of test-driving were not an essential function of the job, and that the test-driving at issue did not constitute transporting property or passengers in interstate commerce to obligate Samson to obtain DOT medical certification.

Submitted by:

Cathleen Scott, Esq.

Lindsey Wagner, Esq.

CATHLEEN SCOTT & ASSOCIATES, P.A.

250 South Central Boulevard Suite 104-A

Jupiter, Florida 33458

Phone: (561) 653-0008