



Monthly Update for May

1st Circuit – May 2012

Crowther v. Consolidated Rail Corp., 680 F.3d 95 (2012)

<http://www.ca1.uscourts.gov/pdf.opinions/11-1578P-01A.pdf>

This case required the Court to evaluate the timeliness and quantum of evidence needed in a consolidated negligence action under the Federal Employer's Liability Act (FELA). It also answered whether the collateral source rule did or did not preclude admission of evidence that employee received disability benefit in the plaintiff-appellant's circumstances.

Regarding the timeliness of the claims, the First Circuit repeated that FELA claims must be brought within a three-year period of knowledge of the injury as possibly being work-related. In the case's circumstances, the Court held that the plaintiff had presented his claim outside the time period permitted, given his various medical notes recorded more than three years before his claim was brought. In addition, the plaintiff-appellant argued that a FELA claim required not much more than a scintilla of evidence in plaintiff's favor on a disputed point. The Court's response was short: nothing but sympathy could obscure the apparent untimeliness of his claim.

The First Circuit also held that the employee's evidence was insufficient for a jury to find that the employer failed: to provide adequate tools and to conduct ergonomic studies of job's activities. The plaintiff-appellant argued that both these aspects resulted in his injuries. Yet, the Court found that there was no evidence of persistent failure to provide adequate equipment over time nor did the plaintiff-appellant show how the ergonomic studies would reasonably have made a difference in the employee's treatment.

As to the collateral source rule, the First Circuit concluded that the admission of evidence that the employee received disability benefits came from the plaintiff himself. It had been brought in as an avowal of the intentional malingering defendant's sought to show. For this reason, the above evidence was admitted.

Had it not been part of the plaintiff's claims and evidence, it would have been rejected.

Jones v. Walgreens Co., 679 F.3d 9 (2012)

<http://www.ca1.uscourts.gov/pdf.opinions/11-1917P-01A.pdf>

In *Jones*, the Court decided whether Walgreens' termination of a store manager due to no longer being able to perform the essential functions of her position as a result of an injury was discriminatory.

Because of her dismissal, Jones filed claims of: disability discrimination in violation of the Americans with Disabilities Act (ADA); unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964; and both their analogous Massachusetts General Laws. Since the state laws mentioned and the federal laws invoked are identical in form, both were discussed as if being one.

Walgreens alleged it decided to terminate the employee relying on the employee's physician's note. In this note, the doctor stated what Jones could or could not do. The Court then analyzed if, in fact, Jones could perform her essential duties with or without reasonable accommodation, but held that she could not even with reasonable accommodations. Thus, the ADA claim was dismissed. As to Jones' argument that Walgreen failed to have an interactive process with her regarding possible accommodations, the First Circuit was not convinced. It held that Walgreens was not under a legally-imposed obligation to go further than it did or engage in a more demanding interactive process to accommodate the plaintiff-appellant. The employer's duty to accommodate does not arise unless the employee is able to perform the essential functions of the job with an accommodation.

As to the retaliation violation claim, the Court held that the plaintiff-appellant did not meet her burden of proof. Particularly, she failed to show pretext or retaliation animus in the employer's explanation for her termination.



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***Escobar-Noble v. Luxury Hotels Intern. Of Puerto Rico, Inc.*, 680 F.3d 118 (2012)**

<http://www.ca1.uscourts.gov/pdf/opinions/11-1506P-01A.pdf>

In *Escobar-Noble* the Court faced the question as to whether the Court or an arbitrator should decide a claim where an otherwise applicable arbitration clause is unenforceable. The Court held that the task was for an arbitrator. The First Circuit vacated and remanded with instructions to enter order compelling arbitration and either staying or dismissing action.

Here, the plaintiff-appellant brought actions against his former employer alleging retaliation in violation of Title VII and the Age Discrimination in Employment Act (ADEA), as well as Puerto Rico statutory claims for termination without just cause and retaliatory termination.

Although the case's subject is on dismissal, it nevertheless exposed a conflict between the arbitration clauses found in the former employee's contract and the Puerto Rico laws for termination without just cause and retaliatory termination regarding when a claim can be presented. The employee's contracts, in this situation there were two, had arbitration clauses that permitted a claim to be made within one year of dismissal. The appellant originally challenged the enforceability of that clause on various grounds, but on appeal he only argued that it should be unenforceable, for it imposed a one-year limitations period.

5th Circuit – May 2012

Harrison v. Corrections Corp. of Amer. (5/9/2012):

Posture—Dorian Harrison appeals the district court's grant of summary judgment in favor of Corrections Corporation of America (CCA) on his claims of race discrimination and retaliation. **AFFIRMED**; **Holding**—the Fifth Circuit only recognizes ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating as actionable adverse employment actions. A review of the record reveals no evidence that Harrison was subjected to an ultimate employment decision of this sort. There is evidence in the record showing that Harrison was subjected to a racial slur by a CCA employee and that he overheard racial comments in his workplace prior to this incident, but these do not constitute actionable adverse employment actions because they are not the equivalent of the ultimate employment decisions listed above.

Consequently, Harrison did not establish a prima facie case of race discrimination. Harrison's original petition asserted that two actions constituted unlawful retaliation: he claimed (1) he was reprimanded for actions for which other CCA employees were not reprimanded, and (2) he was transferred from the maintenance department. The Court concluded that a reasonable employee would not find either of these actions materially adverse. Therefore, Harrison did not establish a prima facie case of retaliation.; **URL**—

<http://www.ca5.uscourts.gov/opinions/unpub/11/11-20464.0.wpd.pdf>

Lushute v. State of La, DSS (5/25/2012): **Posture**—Martha Lushute appeals the dismissal of her claims for retaliation for taking intermittent leave under the Family Medical Leave Act on summary judgment. **AFFIRMED**;

Holding—Two discriminatory actions by the defendant are alleged: a “needs improvement” performance rating in April 2008 and a change in her work schedule in May 2009 from a four day/forty hour week to a five day/forty hour week. As to the poor performance rating, the Court affirmed the finding that plaintiff could not overcome the defendant's same decision defense. As to the change in Lushute's work schedule, the Court found that the change was not an adverse employment action. The change in Lushute's work schedule, basically a shift change, from a four day week to a five day week with no change in total



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hours or compensation, is not an ultimate employment decision. DSS treated other workers similarly, switching them from a four to five day work week when they were unable to adequately manage their case loads. This action would not have dissuaded a reasonable worker from making or supporting a charge of discrimination;

URL—

<http://www.ca5.uscourts.gov/opinions/unpub/12/12-30013.0.wpd.pdf>

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6th Circuit – May 2012

Sixth Circuit Finds that Employer Had the Right to Terminate Employee Due to Its “Honest Belief” That He Committed Disability Fraud While on FMLA Leave

Seeger v. Cincinnati Bell Telephone Co., ___ F.3d ___, 2012 WL 1592670 (6th Cir. May 8, 2012)

The plaintiff was employed by the defendant for over 28 years. During his last year of employment, he suffered a herniated disc. He commenced a leave of absence, which was approved as FMLA leave and paid disability leave under the employer's disability plan. Under that plan, the employer had the right to access to his medical records and to require him to work in a light-duty position tailored to his needs and medical restrictions, if he was medically able to do so.

After the plaintiff had been out for almost three weeks doing physical therapy, the manager of the defendant's medical department, a registered nurse with over thirty-five years of experience, wrote to the plaintiff's physician stating that since surgery was not imminent, the defendant could provide “part-time sedentary telephone work” for him as temporary restricted duty. She explained that employees on restricted duty are not

are not required to work full time and such work may involve as few as two hours a day.

Shortly thereafter, the plaintiff reported to his physician that he had difficulty changing positions, getting in and out of a chair and walking. Based on those symptoms, his physician took him off of work completely. The plaintiff, therefore, continued to receive paid leave and was not required to perform light-duty work.

Four days later, the plaintiff and his wife were seen at a festival in downtown Cincinnati for approximately ninety minutes, during which time the plaintiff admittedly walked a total of ten blocks and consumed one or two beers. There, they had separate encounters with several co-workers two of whom witnessed him walking, seemingly unimpaired, through the crowd. Another employee noted that the plaintiff “appeared to be in a lot of pain”. Yet another said that the plaintiff told him that his back was bothering him so he had to go home.

When the defendant's manager called the plaintiff shortly thereafter, he reported that he still suffered from shooting pain and that he had good and bad days. At his appointment the next day, he complained of numbness and difficulty walking. Two weeks later, the plaintiff was released to return to work without restrictions and resumed his full time position.

In the meantime, upon learning that the plaintiff had been at the festival, the defendant began an investigation and independent review of the plaintiff's medical records, disability file and employment history. As a result of that investigation, the employer decided to suspend the plaintiff's employment and held a meeting with him about it. At that meeting, which was held approximately 2 weeks after the plaintiff returned to work full-time, the plaintiff was asked why he could attend the festival, but not perform light-duty work under the paid-leave policy. He explained that his physician told him he could not perform the work and defended the allegations of disability fraud.



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Nonetheless, at the conclusion of the meeting, his employment was suspended pending completion of the investigation. He was also asked to submit any additional information that might be relevant.

In response, the plaintiff submitted a note from his doctor and his own statement defending his attendance at the festival for “about an hour” and explaining how it is different from working even light-duty.

After considering this response and further review of his medical file, his supervisor concluded that he had “over-reported” his symptoms in order to avoid light-duty work and terminated his employment on the grounds of disability fraud, a violation of the code of conduct.

The plaintiff then filed suit alleging, among other things, that the defendant interfered with his rights under the FMLA and retaliated against him for asserting those rights. The defendant moved for summary judgment and prevailed. The trial court held that even though the plaintiff established a prima facie case of retaliatory discharge, the defendant articulated a legitimate nondiscriminatory “honest” reason for terminating him and that he failed to show that it was pretextual in nature.

On appeal, the Sixth Circuit agreed. It also confirmed the trial court’s finding that although the plaintiff attempted to state both an FMLA interference and retaliation claim, he received all of the FMLA leave to which he was entitled and was reinstated to his prior position upon his release to return to work. Consequently, the defendant “did not shortchange his leave time, deny reinstatement, or otherwise interfere with his substantive FMLA rights.”

With regards to his retaliation claim, the Sixth Circuit also agreed that although the plaintiff stated a prima facie case, the defendant had a legitimate reason for terminating him. Specifically, it had an “honest belief” that he committed disability fraud, which the plaintiff could overcome only by showing “more than a dispute over the facts upon which the discharge was based.”

The Court further held that “the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse

Furthermore, the falsity of a defendant’s reason for terminating a plaintiff cannot establish pretext as a matter of law under the honest belief rule. As long as the employer held an honest belief in its proffered reason, the employee cannot establish pretext even if the employer’s reason is ultimately found to be mistaken, foolish, trivial, or baseless.”

Although the plaintiff argued that the defendant’s investigation was insufficient, the Sixth Circuit disagreed and reiterated the rule that “an ‘optimal’ investigation—i.e., interviewing the employee and some or all of his witnesses—is not a prerequisite to application of the honest belief rule.” Because the plaintiff failed to show that the defendant’s “reasonably informed and considered decision” and decision-making process before terminating him was “unworthy of credence” the Court held that his claim failed as a matter of law.

Sixth Circuit Confirms That Workplace Harassment Based on Sexual Orientation Is Not Unlawful Even When Conduct Amounts to Bullying

Kalich v. AT&T Mobility, LLC, __ F.3d __, 2012 WL 1623193 (6th Cir. May 10, 2012)

On May 10, the Sixth Circuit held that a male employee could not prevail on a sexual harassment claim against his employer, AT&T, based on his allegation that his male supervisor repeatedly subjected him to inappropriate comments in the workplace. Specifically, he claimed that his supervisor said things to him such as “I like your glasses - you should change your name to Virginia or Margaret” and “Do you not eat? You look like a girl.” The supervisor also called the employee a necrophiliac and said in front of others that the employee had sex with dead people.

The employee alleged that the supervisor made these comments because he knew or suspected that the employee was homosexual and was trying to “bring him out of the closet.”

As the Court stated, to establish a claim for unlawful hostile work environment sexual harassment, the plaintiff employee must prove that “but for the fact of his sex, he would not have been the object of harassment.”



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In addition, to prove “same sex harassment” (i.e., male on male), the plaintiff must show that the alleged harasser: (1) made sexual advances or acted out of a sexual desire for the plaintiff; (2) was motivated by a general hostility towards the presence of men in the workplace; or (3) treated women more favorably than men in the workplace.

In this case, the Court found the supervisor’s conduct to be “crude, bullying and despicable,” but not unlawful. There was no evidence that the plaintiff employee was singled out or treated differently than other employees because of his gender. The supervisor never made any sexual advances toward him or indicated a sexual interest in him, and the supervisor did not have a general hostility to men in the workplace. Instead, he was generally rude and disrespectful of all of the employees he supervised.

In addition, as the Court confirmed, harassment or discrimination based on a person’s sexual orientation or perceived sexual orientation is not currently actionable under either Michigan or federal law. Therefore, any comments made about someone’s actual or perceived sexual orientation cannot serve as the basis for a sexual harassment claim.

Circuit Rules that Employers Do Not Have to Accommodate a Disabled Employee’s Commute To and From Work

Regan v. Faurecia Automotive Seating, Inc., ___ F.3d ___, 2012 WL 1623206 (6th Cir. May 10, 2012)

The plaintiff was hired as a full-time employee in 2006. At that time, she lived 24 miles from the employer’s facility. In 2008, she and her husband moved 79 miles away. She testified that her commute was between 2 and 4 hours. In 1997, before she started working for the defendant, she began suffering from narcolepsy.

From 2006 to 2008, the plaintiff’s normal work hours were from 6 a.m. to 3 p.m. In late 2008, they were changed for productivity purposes to 7 a.m. to 4 p.m. Before the effective date of the change, she told her supervisor that the new hours would not work for her because she gets tired more quickly driving in heavier traffic and the traffic would be heavier around those hours. She, therefore, asked to continue to work from 6 a.m. to 3 p.m. or from 7 a.m. to 3 p.m. without taking a lunch. Her supervisor denied her request and told her that she could either apply for leave under the FMLA or quit.

The plaintiff got a note from her doctor stating that “it [was] in her medical interest to minimize her drive time to and from work” and that “a work schedule of 6 a.m. to 3 p.m. is recommended.”

However, the defendant never received this letter and the plaintiff never filled out the FMLA paperwork.

The plaintiff then told human resources of her concerns. Again, she was told to apply for FMLA leave or quit and that if the FMLA paperwork showed that she had a medical condition affecting her ability to work, they could discuss possible accommodations.

The plaintiff got a note from her doctor stating that “it [was] in her medical interest to minimize her drive time to and from work” and that “a work schedule of 6 a.m. to 3 p.m. is recommended.” However, the defendant never received this letter and the plaintiff never filled out the FMLA paperwork.

After not getting a response to her doctor’s note, the plaintiff submitted her resignation stating that the change in her hours would have a “tremendous consequence” on her narcolepsy. She then filed suit alleging that the defendant’s refusal to allow her to alter her schedule violated the Americans with Disabilities Act (“ADA”) and the Michigan Persons with Disabilities Civil Rights Act (“PWDCRA”) because the defendant failed to provide her with a reasonable accommodation for her disability. She also alleged that she was discriminated against because of her gender in violation of Title VII and the Michigan Elliott-Larsen Civil Rights Act (“ELCRA”)

The district court granted summary judgment in the defendant’s favor finding that the plaintiff did not suffer from a disability and, even if she did, the employer was not required to alter her work schedule. The court also found that she failed to state a prima facie case of gender discrimination because she did not demonstrate that she suffered an adverse employment action or that she was treated differently than similarly-situated male employees. On appeal, the Sixth Circuit agreed finding that she failed to present evidence that her request for an altered schedule was a required reasonable accommodation. Specifically, she did not establish that working earlier in the day would provide her with a commute with lighter traffic. Furthermore, the Court held that the ADA does not require an employer to accommodate an employee’s commute nor was the defendant required to accommodate her request to commute during more convenient hours. Therefore, her request was not a reasonable accommodation and the defendant did not violate the ADA or PWDCRA.

The Sixth Circuit also upheld the district court’s ruling that the plaintiff failed to show that she suffered an adverse employment action because the defendant’s denial of



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her request also did not constitute constructive discharge because a reasonable person would not find her new hours were intolerable. As a result, the district court's grant of summary judgment was affirmed.

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7th Circuit – May 2012

Exelon Generation Co., LLC v. Local 15 (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0K9D6S.pdf>

Court Denies Petition For Rehearing En Banc, But Finding A Disturbing Result, Recommends Amendments To The Nuclear Regulatory Commission's Regulations, Or Encourages Action By Congress

The Seventh Circuit denied Petitioner Exelon GenCo's petition for a rehearing en banc, finding that to grant Exelon's petition would be to exceed its judicial powers. Though satisfied that the denial of the petition was sound, the Court noted a disturbing result of the denial, and encouraged Congress and the Nuclear Regulatory Commission ("NRC") to take appropriate action.

Exelon, as an operator of nuclear facilities, must obey stringent federal requirements before allowing an employee to have "unescorted access" to the nuclear facility. However, Exelon is also party to a collective bargaining agreement that provides for binding arbitration of disputes regarding "working conditions." This includes whether an employee is granted access authorization. Exelon terminated two employees and revoked their access authorization (one for failing a drug and alcohol test and both for lying about substance abuse) after determining that they were untrustworthy. Both employees filed grievances, seeking, inter alia, reinstatement of their clearances. Exelon filed for a declaratory judgment, claiming that NRC regulations prohibit arbitrators from restoring unescorted access clearance.

In a previous decision, the Seventh Circuit disagreed. CITE. Here, however, the Court noted that currently, the government has no role in granting, revoking, or reinstating unescorted access privileges, which in the Court's opinion, is

"strange and dangerous." Further, the Court points out that the "split the difference" trend in arbitration awards may lead to partial awards restoring clearance, despite substance abuse problems or untruthful tendencies. Instead, the Seventh Circuit suggests several alternatives. First, the NRC could amend its regulations to forbid collective bargaining agreements that grant arbitrators the power over security clearance disputes. Second, the NRC or Congress could establish an administrative review process allowing an employer the right to review of a labor arbitrator's decision and an employee the right to review a potentially wrongful revocation.

Unescorted access decisions from nonunionized nuclear facilities would also be subject to administrative review. Third, the NRC could amend its regulations prohibiting "split the difference" awards.

Hunt v. DaVita, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0LPYII.pdf>

Court Affirms Summary Judgment For Defendant, Finding That Both Defendant's Decision To Terminate Plaintiff After Her Leave Expired And Defendant's Leave Policy Were Not Retaliatory

The Seventh Circuit affirmed summary judgment for Defendant DaVita, Inc., on Plaintiff's workers' compensation retaliation claim. In doing so, the Court held first that Plaintiff offered no evidence that the relevant decisionmaker in her termination had knowledge of her potential workers' compensation claim, and second that the established company policy, applied consistently across the company, was not retaliatory on its face.

Virginia Hunt, Plaintiff, underwent bypass surgery that required a significant amount of time off work in August 2009. Pursuant to an established and consistently applied company leave policy, Hunt was terminated after six months of leave. DaVita had in place a Family Medical Leave Act policy, which afforded Hunt three months of leave and a Non-Work-Related Medical Leave of Absence Policy that gave her another three months of leave. After Hunt's six months of leave she had still not been cleared by her doctor to return to work and was notified that she would be terminated on February 28, 2010. Hunt had worked for DaVita for nineteen years prior to her bypass surgery and while on leave she received treatment for carpal tunnel syndrome.



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After her termination, DaVita told Hunt that she was eligible for re-hire when she was medically cleared to work again. Hunt was not cleared to return to work by her doctor until May 5, 2010.

Hunt also filed a worker's compensation claim for her carpal tunnel syndrome on March 19, 2010, several weeks after DaVita had terminated her employment. The court held that Hunt offered no actual evidence suggesting that Kathy Velasquez, a senior disability specialist with DaVita in Denver, Colorado who was responsible for Hunt's termination, or anyone else involved in the decision had any knowledge of Hunt's intended worker's compensation claim. Without this evidence, Hunt's retaliation claim failed as a matter of law.

Hunt also alleged that DaVita's leave policy was retaliatory on its face. The Court held that DaVita's policy "does not distinguish between employees on leave because of compensable work-related illnesses and injuries and employees on leave for other medical reasons." The Court went on to state that Hunt failed to explain how a policy applied in such a neutral fashion to hundreds of employees a year without exception could be described as retaliatory. The Court noted that employers are allowed to terminate at-will employees who do not return to work after their medical leave has expired, and the claim Hunt put forth was that DaVita's current leave policy should be a policy of "indefinite retention" giving leave to an employee for as long as medically necessary. Therefore, the Court held that summary judgment was properly entered by the district court.

Cortezano v. Salin Bank & Trust Co. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0MERWE.pdf>

Seventh Circuit Affirms Summary Judgment For Defendant On National Origin Discrimination Claim, Declining To Hold Whether Discrimination Based On A Spouse Or Partner's Protected Characteristic Is Actionable Under Title VII

The Seventh Circuit affirmed summary judgment in favor of Defendant Salin Bank & Trust Co., Defendant, on Plaintiff Kristi Cortezano's Title VII national origin discrimination and state law claims. The Court held that an individual's status as an alien who lacks permission to be in this country is not a protected class under Title VII and, therefore, Plaintiff had no claim for relief.

While working as a Bank Sales Manager for Defendant, Plaintiff's husband assisted her husband, an undocumented alien from Mexico, with opening a personal and business account for his car detailing and repair shop at Salin Bank. When her husband's repair shop ultimately failed, he returned to Mexico to sort out his citizenship status. Intending to attend proceedings in Mexico to help her husband obtain U.S. citizenship, Plaintiff informed her supervisor, Stacy Novotny, of the situation, including her husband's unauthorized status. Novotny and a Salin Bank security officer, Mike Hubbs, met with Plaintiff in February 2008. Hubbs informed both Plaintiff and Novotny of his concerns that fraudulent documents were used to open accounts at the bank. He then filed an internal report alerting his supervisors that Plaintiff allowed her husband, an undocumented alien, to open accounts with fraudulent information at the bank. At the next schedule meeting, Plaintiff brought her attorney. However, Defendant would not allow her attorney into the meeting. Plaintiff then stated she would not participate in the meeting without her attorney. As Plaintiff began to walk away, a Salin Bank representative yelled that if she walked away she was abandoning her job. That afternoon Defendant terminated Plaintiff.

In affirming the lower court's grant of summary judgment, the Seventh Circuit noted that it has not yet decided whether discrimination based on the race or national origin of a complainant's spouse or partner falls within the protections of Title VII, and left this question for another day. Regardless, the Court held that here, Plaintiff's claim was predicated upon her husband's undocumented alien status and therefore, an unquestionably unprotected characteristic.

The Court stated that the actions taken by Hubbs on behalf of Defendant in this case clearly show an intention to disassociate itself with assisting undocumented aliens, and Plaintiff's termination came as a result of her husband's unlawful status, not because of his country of origin. Moreover, the Court held that discrimination based on one's status as an immigrant might have once been thought to have been included in the category of "national origin", however in a previous Seventh Circuit opinion, the Court held that the term "national origin" was based on one's ancestry, rather than on one's immigration status or citizenship.



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The Court next reviewed Plaintiff's state law claims. With regards to her claim of intentional infliction of emotion distress, Plaintiff presented evidence that Hubbs shouted and called Plaintiff and her husband names during a private meeting. The Court held that despite Hubbs' unprofessional behavior, the actions taken were isolated, brief, and in a private setting. In addressing Plaintiff's defamation and blacklisting claims, the Court found Plaintiff's evidence, a single email containing minutes from a meeting during which Hubbs warned other banks that Plaintiff's termination was the result of her opening fraudulent accounts, to be inadmissible hearsay. Therefore, the Court affirmed the district court's grant of summary judgment on this claim as well.

National Labor Relations Board v. KSM Industries, Inc.
(7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO002U1N.pdf>

Seventh Circuit Enforces NLRB Award Of Backpay To Forty-Two Employees Who Went On Strike

The Seventh Circuit enforced the NLRB's finding for thirty-one employees that Defendant KSM Industries violated §§ 8(a)(3) and 8(a)(1) of the NLRA when it denied or delayed the recall of certain employees after their participation in an unfair labor practices strike. The Seventh Circuit also granted the Board's petition for enforcement for eleven additional employees that KSM challenged the Board's finding on for lack of substantial evidence.

In 1997, KSM failed to reinstate its strikers after the employees' union made an unconditional offer to return to work. In 2001, the Board held that this action violated the NLRA and ordered backpay as a remedy. However, at the time, the Board only had two sitting members, one short required to act. In September 2010, the Board, with the necessary number of members, issued an order requiring KSM to compensate forty-two former striking employees with backpay set at \$383,461.11 in the aggregate. KSM appeals the award with regard to 11 employees.

The Seventh Circuit first held that KSM was not denied due process due to a quick decision being made because the court lacked authority to reach the merits of KSM's argument since KSM did not raise it before the Board.

There Court held that there were no extraordinary circumstances to excuse the failure to previously raise this argument, and regardless, the argument would fail on its merits.

KSM argued that five employees abandoned their jobs to gain access to their 401(k) funds, and thus, are not entitled to backpay. The Court noted that below, the Administrative Law Judge made no findings supporting KSM's argument, and in tandem with its credibility determinations, did not find an unequivocal intent on the part of the employees to abandon their position. Properly deferring to the ALJ, the Court agreed, finding no substantial evidence to support a conclusion to the contrary.

KSM contends that the remaining employees either failed to adequately search for interim employment, voluntarily resigned from interim employment without reasonable justification, or were terminated from two interim positions, thus necessitating cutoff from the backpay away. The Court declined to accept any of KSM's arguments. The Court commented that an employee need not engage in any interim job search if circumstances warrant optimism about the possibility of reinstatement. The Board held that such circumstances existed here, and the Court agreed. The Court next found that the employer has the burden to prove that comparable jobs were available in the relevant geographic area. KSM failed to meet its burden.

As noted by the Court, the comparison is not between companies, but rather between the functions of the job itself. With regards to KSM's claims that various employees voluntarily quit their interim positions, the Court dismissed KSM's argument, instead finding reasonable justification for the employees' actions (including hazardous or harsh working conditions, and switching from one position to another to gain access to a superior retirement package). The Court then turned to KSM's argument that being twice terminated from interim positions amounts to "deliberate and gross misconduct," thus warranting a backpay limitation. The Court again deferred to the ALJ's finding that KSM failed to. Finally, the Court upheld the Board's decision that KSM recall workers based on seniority, rather than based on merit (which KSM desired) as it offers the best and most feasible route to restoring the status quo. Therefore, the Seventh Circuit enforced the Board's order in its entirety.



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Smith v. Bray (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0VOOGF.pdf>

Seventh Circuit Affirms District Court's Grant Of Summary Judgment For Individual Defendant On Retaliation Claim

The Seventh Circuit affirmed the district court's grant of summary judgment for Defendant Denise Bray on Plaintiff Darrel Smith's § 1981 retaliation claim. Plaintiff initially sued Equistar Chemicals, LP for race discrimination and retaliation. However, Equistar Chemicals declared bankruptcy, leaving Plaintiff with the only option to bring the claims against his former supervisor, James Bianchetta, and the human resources manager, Denise Bray. Bianchetta settled with Plaintiff and therefore the only claims remaining are against Bray.

Plaintiff claimed that Bray not ignored complaints about racist harassment but also convinced her bosses to fire him. Plaintiff, an African American, claimed that his supervisor and coworkers made derogatory statements with regards to his race. Plaintiff complained to Bray, who was required to, at the very least, notify corporate human resources of any allegations of racial harassment. Bray did not recall having this conversation, nor did she discipline any of the individuals who partook in the discriminatory behavior. Plaintiff's work environment deteriorated to the point where Plaintiff required medical leave. Plaintiff's supervisor informed him that he believed Plaintiff was "faking it" and that he and Bray said Plaintiff was fired. Bray declined to speak with Plaintiff about his alleged termination. Plaintiff then applied for was denied short term disability leave through a third party provider. During his appeal for short term disability leave, approximately six weeks after the altercation with his supervisor, Plaintiff was terminated for absences in violation of company policy and procedure. The Seventh Circuit noted that this case presented a question of first impression with regard to the second element of prima facie retaliation cases based on direct evidence: "whether the subordinate with a retaliatory motive may be individually liable under § 1981 for causing the employer to retaliate against another employee." The Court answered this question in the affirmative by stating that the same standards govern

intentional discrimination under § 1981 and § 1983. The Court applied the cat's paw theory to this case, finding that Plaintiff had presented enough evidence to create a genuine issue of fact to whether or not Bray intentionally assisted in causing the adverse employment action against him. The Court reasoned that Bray was very much involved in every stage of Plaintiff's workplace controversies and played a large role in the controversies themselves.

Despite finding that Plaintiff had satisfied the second element of the his prima facie case, the Court agreed with the district court that there was not sufficient information to show Bray acted with a retaliatory motive and caused his termination. The Court reasoned that Bray not speaking with Plaintiff, Bray's failure to investigate Plaintiff's complaints, and the fact that Plaintiff's termination occurred at a time near his discrimination complaints, even compiled with other evidence, was not enough to present an issue of fact as to whether Bray intended to retaliate against Smith and caused his termination. Therefore, the Seventh Circuit affirmed summary judgment for Defendant.

Sandfifer v. United States Steel Corporation (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0WFZEP.pdf>

Seventh Circuit Dismisses FLSA Collective Action Claim, Commenting That Finding Donning, Doffing and Travel Time Compensable Might Not Yield A Positive Result For Certain Employees

The Seventh Circuit affirmed the dismissal of the FLSA collective action claims, holding that in this case, donning and doffing and travel time are not compensable under the Fair Labor Standards Act. The district judge, after holding that under these circumstances the FLSA does not require clothes-changing time to be compensable, certified for interlocutory appeal the question of whether travel time is compensable under the statute.

Plaintiffs claimed that Defendant U.S. Steel violated the FLSA because they failed to compensate them for the time spent putting on and taking off work clothes in the locker room at the U.S. Steel plant, and for the time walking from the locker room to their work stations and back again at the end of the day.



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The work clothes in this case are made up of flame-retardant pants and jacket, work gloves, metatarsal boots, a hard hat, safety glasses, ear plugs, and a "snood" (hood that covers the top of their head, chin, and neck). Since the clothes would not be covered under the FLSA, Plaintiffs argue that the outfit is made up of personal protective equipment.

The Court first holds that the district court was correct in ruling that given the terms of the collective bargaining agreement, U.S. Steel was not required to compensate employees for changing time. The CBA stated that time spent changing was not compensable, despite the argument by Plaintiffs that the dress was made up of safety equipment. The Court likened the dress of the U.S. Steel employees to that of steel workers who are not paid for changing time because that would take away from the high wages they are being paid when they are actually mining steel.

The Court also held that the travel time Plaintiffs spent walking from the locker room to their workstations and back was not compensable because of the Portal-to-Portal Act, 29 U.S.C. § 254 (a), which exempts activities such as this from being compensable. The Court made a similar claim with compensating travel time as they did with clothes changing by stating that workers would not benefit in the long run if compensated for such activities because the employer would be paying the same wage, but getting less work in return. Therefore, the Court reasoned, the wage would have to be renegotiated in the next collective bargaining agreement to make it more economical for the employer. As a result of these findings, the Court ordered dismissal of the case.

Kidwell v. Eisenhauer (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0X2HFQ.pdf>

Seventh Circuit Affirms The District Court Grant Of Summary Judgment In Favor Of Defendant For § 1983 Retaliation Claim

The Seventh Circuit affirmed the district court's grant for summary judgment for Defendant finding that Plaintiff failed to establish his prima facie case for retaliation under § 1983.

Plaintiff Kenneth Kidwell was a police officer for the city of Danville, Illinois for sixteen years. In 2007, Plaintiff developed a relationship with a confidential informant who was later arrested. Plaintiff talked to the judge about lowering the informant's sentence because he was helping him out with an important investigation. In response the State's Attorney's Office complained to Defendant Larry Thomason, the Director of Danville's Public Safety Department. Afterwards Thomason launched an investigation that resulted in the Department's policy being changed to forbid such communications. In 2008, Plaintiff made a presentation discussing what had occurred, his displeasure with why the investigation had ceased, and the prospect of the union holding no-confidence vote against the police department administration and the mayor. Again in 2008, Plaintiff approached Defendant Bob Richard, a deputy director of the police department about an internal investigation and Plaintiff made an inappropriate remark that lead to him receiving a written reprimand. After multiple, similar incidents occurred into 2009, Thomason filed charges seeking to discharge Plaintiff for insubordination. An arbitrator took the case and found that there was no just cause for termination, rather, a seven day suspension was warranted. Plaintiff remained employed by the police, but his exact status was unknown at the time of the Seventh Circuit opinion.

The court held that Plaintiff's retaliation claim failed on the third element, finding that his protected speech was not at least a motivating factor in the alleged retaliatory employment actions taken against him. The Court first held that none of the employment actions Plaintiff complained about followed right after or "close on the heels" of his purportedly protected speech. As a result, the Court held the timing of the events did not give rise to any inference that Plaintiff's speech was a motivating factor in any employment actions taken against him. The Court went on to hold that Plaintiff did not present enough evidence to establish that any protections afforded to him under the Uniform Police Officers' Disciplinary Act were violated. The Court stated that his questioning was not part of a formal investigation and simply a showing of a policy violation is not enough. In order to prevail, Plaintiff had to point to a false explanation for Defendant's deviation from policy rather than simply an error or oddity.



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Therefore, the Court affirmed the district court's grant of summary judgment for the Defendant.

Schaefer-LaRose v. Eli Lilly & Co. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/IO0XW5X0.pdf>

Seventh Circuit Holds That Pharmaceutical Sales Representatives Are Properly Categorized Under The Administrative Exception To The FLSA, Thus, Are Not Entitled To Overtime

The Seventh Circuit reviewed two district court opinions that came out in opposition with one another. Both cases were consolidated and reviewed by the Court. Finding that pharmaceutical sales representatives employed by Defendants in both cases are exempt administrative workers, the Court affirmed the judgment in one case, and reversed the judgment in other, directing the court to enter judgment in favor of Defendant.

In both cases, Plaintiffs claimed that during their tenure as pharmaceutical sales representatives for Eli Lilly and Abbot Laboratories, they were misclassified as exempt employees and denied overtime in violation of the Fair Labor Standards Act. Both Defendants argued that the administrative exemption and outside sales exemption removed sales representatives from the overtime benefits of the FLSA.

The Court first held that Plaintiffs were salary employees, which qualifies them for the first prong of the administrative exception. Next, the Court held that Plaintiffs are representatives of the company to the professional community, therefore satisfying the second prong of the exception. Moreover, the Court determined that "the work done by the pharmaceutical sales representatives properly is characterized as administrative." The representatives in this case are the public face of their employer, they do not produce products, but rather work to increase market share. Furthermore, Plaintiffs in this case were required to "exercise a significant measure of discretion and independent judgment, despite the constraints placed on them" and therefore satisfy the third prong of the administrative exception. Despite call plans or other set schedules, Plaintiffs in this case exercised significant autonomy ranging from what they were going to do to the manner in which they would perform their jobs.

Therefore, Plaintiffs in both consolidated cases are properly classified as administrative workers. As a result, the Seventh Circuit held in favor of both Defendants-Companies, holding that Plaintiffs are not entitled to overtime.

Ahmad Jajeh v. County of Cook (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/JA00JLWO.pdf>

Seventh Circuit Affirms Summary Judgment for Defendant on Retaliation and Hostile-Work-Environment Claims on their Merits

The Seventh Circuit affirmed summary judgment for Defendant on Plaintiff's Title VII claims. The Court found insufficient evidence of harassment based on Plaintiff's religion or national origin, and a lack of causation or pretext to support his retaliation claim.

Plaintiff Ahmad Jajeh was laid off from his job as a physician in the Cook County hospitals in 2007 along with over 200 other physicians as part of extensive budget cuts across Cook County. Plaintiff filed suit pursuant to Title VII, alleging retaliation and discrimination based on religion and national origin, in addition to a hostile-work-environment claim. The district court granted Defendant Cook County's motion for summary judgment as to each of the claims, and Plaintiff appealed as to the retaliation and hostile-work-environment claims.

Though Plaintiff did not specifically mention the words "hostile work environment" until his response to Defendant's motion for summary judgment, the Court held that the claim was properly raised. Plaintiff's complaint did not expressly state that he was subjected to a hostile work environment, but it repeatedly alleged that he was subject to severe harassment because of his religion and national origin, which the court found sufficient to give Defendant fair notice of the claims against it. However, the Court found in favor of Defendant on the merits of the claim as it found no basis for employer liability. As Plaintiff admitted his harasser a coworker, the Court held that Plaintiff was required to establish negligence by Defendant in either discovering or remedying the harassment. However, the Court found that Plaintiff's complaints to Defendant



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failed to even hint that the harassment was related to his religion or national origin. Thus, Defendant had no notice and could not be held liable on the hostile-work-environment claim.

Because the Court reached a decision on those grounds, it declined to address whether Plaintiff's unsworn declaration submitted in response to Defendant's motion for summary judgment satisfied revised Federal Rule of Civil Procedure 56(c)(4). The district court previously excluded the declaration because it was not sworn and subscribed under penalty of perjury. Plaintiff contended that the declaration complied with revised Rule 56(c)(4) even if it would not have complied with former Rule 56(e), which had required sworn affidavits, but the Seventh Circuit decided not to address this issue of first impression.

As to the retaliation claim, the Court held that Plaintiff failed to satisfy either the direct or indirect method to prove a Title VII retaliation claim. The Court found that Plaintiff established neither direct nor circumstantial evidence sufficient to establish a causal link between an adverse employment action and statutorily protected expression in order to satisfy the direct method. Because the county-wide budget cuts provided a legitimate, nondiscriminatory explanation for Plaintiff's discharge, the Court bypassed the issue of whether Plaintiff first established a prima facie case and instead focused on the question of pretext. Finding no pretextual reason for Plaintiff's discharge, the Court affirmed summary judgment in favor of Defendant.

Council 31 v. Pat Quinn (7th Cir. 2012)

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

Seventh Circuit Affirms District Court's Dismissal Of Claims And Denial Of Plaintiff's Motion For A Preliminary Injunction, Finding That Sovereign Immunity Bars The Court From Mandating Payment From The State Treasury To Benefit A Specific Entity

The Seventh Circuit affirmed the district court's denial of Council 31's motion for a preliminary injunction and dismissed Council 31's equal protection claim.

Plaintiff Council 31 brought suit against Defendant Governor Quinn after the State instituted a pay freeze that would affect 30,000 Council 31 members across 14 state agencies. Council 31 argued that there were other viable alternatives that the state elected not to pursue. Plaintiff sought a preliminary injunction mandating that the state pay wage increases to union members as they became due. The district court denied the motion, holding that the 11th Amendment barred the court from entering a preliminary injunction.

The Seventh Circuit noted that Plaintiff's injunction sought payments to be made out of the state's treasury. In its demand, the Court commented, Plaintiff ignored a previous decision by the Seventh Circuit that held the 11th Amendment bars claims for injunctive relief when the religious sought would require direct payment from the state's treasury for an indirect benefit to a specific entity. The Court went on to hold that the injunction would have more than a mere ancillary effect on the state's treasury. As such, the Court held that none of the three exceptions to sovereign immunity would apply to allow the Court to grant Plaintiff the injunctive relief.

Furthermore, the Court found that the Emergency Rules containing the pay freeze provision did not constitute an unconstitutional impairment of the collective bargaining agreement. The Court reasoned that whether the State prevails in their state court claim for breach of contract will depend on the court's application of the Illinois Public Sector Relations Act, and not the court's construction of the Rules. Therefore, the Court held that the Emergency Rules did not foreclose a remedy for breach of contract. As no impairment of a contractual obligation existed, the Court affirmed the dismissal of Plaintiff's Contracts Clause claim for failure to state a cognizable claim.

Finally, the Court addressed Plaintiff's Equal Protection claim. In doing so, it found that the State demonstrated a "legitimate government purpose" that the State was hit with a fiscal crisis that would have caused them to run out of money, and the only way to prevent further crises was to institute some cost-saving measures.



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9th Circuit – May 2012

Wood v. City of San Diego, 9th Cir, May 9, 2012.

Title VII, Sex Discrimination, Retirement Plans

Wood, a retired female employee of the City of San Diego, alleged that the surviving spouse benefit in the City's retirement system discriminated on the basis of sex in violation of Title VII. First, the plaintiff alleged a disparate impact claim because the City, on average, pays more to married retirees who select the surviving spouse benefit than it does to single retirees, and female retirees are more likely to be single. Second, the plaintiff alleged a disparate treatment claim on the theory that the City knew male employees stood to gain more from the surviving spouse benefit but did not correct the imbalance.

The Ninth Circuit affirmed the dismissal of the disparate treatment claim because the plaintiff had not alleged discriminatory intent. Quoting earlier Ninth Circuit precedent, the court stated: "It is insufficient for a plaintiff alleging discrimination under the disparate treatment theory to show the employer was merely aware of the adverse consequences the policy would have on protected group."

The Ninth Circuit affirmed the dismissal the disparate impact claim on the grounds the plaintiff lacked standing because she could not show injury-in-fact. When the plaintiff retired, she received a monthly pension amount plus the option of a guaranteed refund of survivor contributions. There would be no way of knowing whether, had Wood been married, her hypothetical spouse would have outlived her, and if so, by how much. If she outlived her hypothetical spouse, the survivor benefit would have no value.

Schechner v. KPIX-TV, 9th Cir, May 29, 2012.

Age Discrimination

The plaintiffs were two television news reporters, ages 66 and 47, who were laid off because of a decision to reduce overall costs. They sued for age discrimination under the California Fair Employment and Housing Act. The district court granted summary judgment for the employer, holding that the plaintiffs failed to establish a prima facie case under *McDonnell Douglas* because their statistical evidence did not account for variables related to the employer's proffered non-discriminatory reasons for laying off the plaintiffs. The Ninth Circuit affirmed on other grounds. The Ninth Circuit held that the plaintiffs' statistical evidence was sufficient at the prima facie stage, emphasizing that "the requisite degree of proof necessary to establish a prima facie case on summary judgment is minimal and does not even rise to the level of a preponderance of the evidence." The court instead focused on the third stage of the *McDonnell Douglas* test, holding that the plaintiffs had not raised triable issues that the employer's proffered reasons for laying them off were pretextual.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/05/29/11-15294.pdf>

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