



Monthly Update for May

1st Circuit

***Acosta-Ramirez v. BPPR*, __ F.3d __ (2013) 2013 WL 1320411**

<http://www.ca1.uscourts.gov/pdf/opinions/12-1887P-01A.pdf>

Though Plaintiffs appealed from a summary judgment for Defendant, the Court clarifies that the case was jurisdictionally barred under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). The facts at hand involved the closing of Westernbank in 2010, an insolvent bank, and its former employees' complaint against the bank's successor (BPPR) for alleged unjust termination in violation of Puerto Rico Law 80 of 1976. However, when the FDIC sold Westernbank's deposits and loans under a Purchase and Assumption Agreement to the Banco Popular of Puerto Rico (BPPR), the FDIC retained liabilities regarding any employees' claims regarding their employment with Westernbank since it became the receiver. For these claims, the FDIC has an administrative claims process under FIRREA which, if not timely followed, create a jurisdictional bar. Additionally, the Court examined that even if the Plaintiffs only sued BPPR, one needs to see the substance and not the form of the claims, and in *Acosta-Ramirez* the claim was against the receivership. Therefore, since Plaintiffs did not follow the administrative claims process, the District Court did not have subject-matter jurisdiction. Thus, the case was vacated and remanded with instructions to dismiss it for lack of subject-matter jurisdiction.

***Medina-Rivera v. MVM, Inc.*, __ F.3d __ (2013) (2013 WL 1443906)**

<http://www.ca1.uscourts.gov/pdf/opinions/11-2419P-01A.pdf>

The Court revised the lower court's granting of summary judgment to Defendant regarding a sexual harassment and retaliation claim. The Court held that Plaintiff failed to state her claim as sexual harassment,

for Title VII does not ban harassment alone. Furthermore, Plaintiff's retaliation claim only offered conclusory statements and speculation. As such, the Court affirmed the judgment below in all respects.

***Rios-Pineiro v. U.S.*, __ F.3d __ (2013) (2013 WL 1502187)**

<http://www.ca1.uscourts.gov/pdf/opinions/12-1618P-01A.pdf>

In *Rios-Pineiro*, although Plaintiff's claim was brought under the Federal Torts Claims Act (FTCA), the principal issue at hand was whether collateral estoppel applied to a previous administrative decision of the Postal Service Board of Contract Appeals (PSBCA) regarding essential facts of the case. The Court held it did, given that such an adjudicative scheme was sufficient to trigger the doctrine of collateral estoppel. The effect of this decision was to prevent the re-litigation of facts already adjudicated by the PSBCA in Plaintiff's FTCA claim. Thus, the PSBCA evidence entered with the Motion for summary judgment, which was granted by the District Court, was correct.

***Johnson v. University of Puerto Rico*, __ F.3d __ (2013) (2013 WL 1668226)**

<http://www.ca1.uscourts.gov/pdf/opinions/12-1621P-01A.pdf>

In *Johnson*, Plaintiff alleged Defendant denied her tenure track position due to gender and national origin discrimination. The Court held that Defendant's Ph.D. requirement for tenure track position was reasonable and legitimate. Furthermore, the Court held that Plaintiff did not establish the requirement was a pretext for the discrimination. Instead, she merely argued that Defendant could have applied an exception provided for in the General Regulations. Yet, given the facts of the case, the exception was not applicable to Plaintiff.



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***Woodward v. Emulex Corp.*, __ F.3d __ (2013) (2013 WL 1668221)**

<http://www.ca1.uscourts.gov/pdf/opinions/12-1612P-01A.pdf>

The Court was requested to review two discovery-related orders and Plaintiff's age discrimination claim. It held that the District Court acted within its discretion regarding the discovery-related orders regarding the production of a duplicate of the requested documents and quash certain deposition notices when Plaintiff was obstructing their completion. In relation to Plaintiff's age discrimination claim, the Court used a reduction-of-workforce analysis. However, Plaintiff failed to establish that Defendant's reason for termination, a market shift, was a pretext. Additionally, Defendant's personnel decisions did not reveal a pattern of age discrimination. As such, the Court affirmed the District Court judgment on all issues.

***Senra v. Town of Smithfield*, __ F.3d __ (2013) 2013 WL 1849162**

<http://media.ca1.uscourts.gov/pdf/opinions/12-1600P-01A.pdf>

In *Senra*, the Court affirmed the District Court's finding that Plaintiff's rights to procedural due process were satisfied. Plaintiff's main allegation on appeal was that post-termination arbitration was not a procedurally adequate mechanism because the arbitrator could not address his constitutional and statutory claims. Though the Court found Plaintiff's claim against his post-termination arbitration without merit, it nevertheless reiterated that a termination proceeding does not need to address all possible claims that an employee may bring against his former employer to satisfy the Constitution's procedural due process requirements. On the contrary, it is satisfied when employee has a meaningful opportunity to respond to his employer's explanation for his termination. Additionally, it stated that the federal Due Process Clause does not incorporate the particular procedural structures enacted by state or local governments.

***Colon v. Tracey*, __ F.3d __ (2013) 2013 WL 2129439**

<http://media.ca1.uscourts.gov/pdf/opinions/12-1978P-01A.pdf>

The Court affirmed District Court's granting of summary judgment against Colon given that she neither established a prima facie case of retaliation nor showed that Defendant's stated rationales were pretextual. Plaintiff's retaliation claim rested on a change in her position, an alleged demotion, and a suspension. Particularly, the Court found that the change in her position did not amount to a materially adverse employment action and Appellee failed to show pretext in employer's decision. It was of the opinion that the mere proximity of the acts without any indication of discrimination or retaliation did not serve to establish pretext by Defendant.

***Clukey v. Town of Camden*, __ F.3d __ (2013) (2013 WL 2158654)**

<http://media.ca1.uscourts.gov/pdf/opinions/12-1555P-01A.pdf>

Clukey required the Court to determine for the first time whether the right to be recalled following a lay-off can be a constitutionally protected property interest. It held that it can. It also held that the existence of state law contract remedies and collectively bargained grievance procedures did not foreclose Plaintiff's §1983 claim. As such, it vacated and remanded the District Court's dismissal of the complaint.

***Ruiz-Sanchez v. Goodyear Tire & Rubber Co.*, __ F.3d __ (2013) (2013 WL 2364177)**

<http://media.ca1.uscourts.gov/pdf/opinions/12-1694P-01A.pdf>

In *Ruiz-Sanchez*, the Court was faced with an age discrimination claim and unjust termination claim under



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Puerto Rico statute (Law 80) when plant ceased operations. Plaintiff-Appellee challenged the dismissal of his Law 80 claim, which was found to be res judicata due to an extrajudicial compromise (a general release signed by Plaintiff accepting a severance package).

Given that the matter concerned the interpretation of the law's anti-waiver provision and if the general release was therefore null and void pursuant to Puerto Rico law, the Court was inclined to certify this question to the Supreme Court of Puerto Rico. Yet, it found that District Court bypassed the question regarding if Law 80 applied to this case, given that there exist exceptions. As such, the Court vacated Law 80's dismissal and remanded so that the parties may further develop the facts necessary to reach a decision as to whether Law 80 applies.

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3rd Circuit

<http://www.volokh.com/wp-content/uploads/2013/05/Third-Circuit-2013.5.16-Decision-Vacating-NLRB-Decision.pdf>

In *NLRB v. New Vista Nursing and Rehabilitation*, decided May 16, 2013, a panel of the Third Circuit Court of Appeals, by a 2-1 decision over a spirited dissent, joined the District of Columbia Court of Appeals¹ in holding that President Obama's recess appointments to the National Labor Relations Board were unconstitutional. Like the District of Columbia Circuit, the Third Circuit struck down a Board determination in which an unconstitutionally-appointed recess appointee was necessary for the existence of a quorum. Also like the District of Columbia Circuit, the Third Circuit held that the President's power to make recess appointments arises

only during "intersession" recesses that occur between sessions of the Senate, and not during so-called "intrasession" recesses. In reaching this determination, the Third Circuit engaged in a long, searching analysis of the Recess Appointments Clause of the United States Constitution. Further, the Third Circuit raised the issue *sua sponte*, addressing a specific appointee that no party had challenged previously.

The underlying issue in *New Vista* was the employer's objection to the Board's certification of a union for the employer's Licensed Practical Nurses (LPNs). The employer argued that the LPNs were supervisors who were not lawfully entitled to unionize. Because certification determinations are not appealable, the employer sought to challenge the Board's determination by refusing to bargain with the union, thereby incurring an unfair practice charge that was litigated before a three-member "delegee group" of the Board. Under 29 U.S.C. Section 153 (b), the five-member Board may "delegate to any group of three or more members any or all the powers it may itself exercise." These delegee groups must maintain a membership of three in order to exercise the delegated authority of the Board. This is where matters became complicated.

On August 26, 2011, the three-member delegee group of the Board issued an order finding that the employer had committed an unfair practice by refusing to bargain with the LPN union. However, the order was not mailed to the parties until August 29, 2011. Significantly, one Member of the delegee group, Wilma Liebman, resigned from the Board on August 27, 2011. This caused the employer to argue that the unfair practice decision had not been "issued" until the date of mailing, that the delegee group consisted of only two members at the alleged date of issuance, and that the order was therefore *ultra vires*.

The employer subsequently moved for reconsideration on this ground. On December 30, 2011, the Board denied the employer's application. This, in turn, led the employer to file two additional reconsideration motions. The first argued that the delegee group that had considered the first reconsideration motion was improperly constituted because one of the panelists had



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been recused from the case. The second argued that one of the panelists on the December 30 delegee group was a recess appointee whose term had concluded at the end of senate's 2011 session, which the employer contended occurred on December 17, 2007.

When the second round of reconsideration motions was denied on March 15, 2012, the employer filed yet a third motion for reconsideration, reiterating its objection to the December 30 delegee group, and further arguing that the March 15 delegee group was also invalidly constituted because two of its three members were allegedly appointed invalidly under the Recess Appointment Clause while the Senate was not in recess.

In the interim, the Board had filed a petition for enforcement with the Third Circuit, which effectively was held in abeyance while the reconsideration applications were pending. The employer sought Third Circuit review after its third round of reconsideration motions had been denied. At that point, the two appeals were consolidated and permitted to proceed.

Thus, the employer's arguments in the case focused on whether Member Liebman's resignation two day prior to the mailing of the unfair practice order rendered that order *ultra vires*, and contended that the delegee panels that had heard its various reconsideration motions were not properly constituted due to the presence of allegedly invalid recess appointees, and of a recess appointee who's term had expired. The validity of the delegee group that had issued the original August 26, 2011, order had not been challenged by either party. Nonetheless, the Third Circuit panel majority raised the issue *sua sponte*.

Specifically, the majority noted that one member of the August 26, 2011, delegee group, Craig Becker, was himself a recess appointee who had been appointed on March 27, 2010, during a two-week intrasession "adjourning" of the senate. Reasoning that the three-member requirement of 29 U.S.C. Section 153 (b) was a jurisdictional requirement, the majority concluded that a challenge to Member Becker's recess appointment could "be raised by a party or by this court at any point in litigation as a jurisdictional defect." The majority's

analysis of the recess appointment power thus was premised on Member Becker's recess appointment.

Before addressing Becker's appointment, however, the majority addressed and rejected the employer's argument that Member Liebman's resignation prior to the mailing of the unfair practice order had rendered that order *ultra vires*. The date of the order itself, not the date of the ministerial act of mailing the order, controls. Member Liebman had been an active member on the date the order was signed and had been listed as a member having made the decision. Therefore, her subsequent resignation did not render the order *ultra vires*.

The majority then turned its attention to the recess appointment issue.

First, the majority considered and rejected an argument presented by an *amicus* that the definition of the word "recess" within the Recess Appointments Clause was a non-justiciable political question. The majority rejected the argument that the Recess Appointments Clause allocates to the President the right to determine whether a recess exists, finding no support in the text to that clause for such a conclusion. The majority also rejected the suggestion that there were no "judicially manageable standards" for defining a "recess of the Senate." The majority identified three potential definitions of a Senate recess and found that each of them constituted a judicially manageable standard. The majority concluded:

This task falls within the "province and duty of the judicial department to say what the law is." [citation omitted] This "duty will sometime involve the '[resolution] of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" [citation omitted] Thus, "the fact that the resolution of the merits of a case



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would have 'significant political overtones does not automatically invoke the political question doctrine.'" [citation omitted] That the issue presented here touches on political events of the day is not dispositive of whether this case presents a non-justiciable question.

After thus disposing of the justiciability argument, the majority then embarked on a detailed, lengthy, and thoughtful analysis of the Recess Appointments Clause, its specific language, the context in which it appears, its relationship to the general Appointments Clause, relevant writings of the Founders, colonial and early State constitutional practice, contemporary Parliamentary procedure in Great Britain, and historical practice pertaining to recess appointments. Particular weight was given to Federalist Number 67 (Alexander Hamilton), which explained that the Recess Appointments Clause is "nothing more than a supplement" to the general Appointment Clause that establishes "an auxiliary method of appointment, in cases to which the general method is inadequate." The recess appointment power was thus defined as an auxiliary, and not alternate, means of appointment, with the preferred process being senatorial advice and consent to presidential appointments.

The Recess Appointments Clause states that the "President shall have the power to fill up all vacancies that happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." U.S. Const. Art. II, Section 2, Clause 3. The phrase, "during the recess of the Senate," is susceptible to three possible meanings: (1) intersession breaks which occur during the period between the sessions of the Senate, when the Senate is by definition not in session and therefore unavailable; (2) breaks that occur during the session of the Senate (intrasession breaks) that are of significant duration; and, (3) any recess or adjournment of the Senate during which the Senate is unavailable to receive a nomination and act upon it. The employer argued for the first definition; the Board for the third.

Historically, until 1921, Presidents had generally adopted

the first definition of "recess," limiting their recess appointments to intersession recesses. Beginning in 1921, based upon an opinion issued by Attorney General Harry Daugherty, who served under President Harding, Presidents began to adopt the second definition, deeming themselves entitled to make recess appointments during intrasession breaks of significant duration, generally of at least ten days' length. It was not until 2012 that the President began to assert the third potential definition of "recess."

After engaging in lengthy, detailed and thoughtful analysis, the *New Vista* majority came to the conclusion that the first definition was most consistent with the Framers' intent that the recess appointment be an auxiliary, and not alternative, means of making presidential appointments, and most consistent with the sharing of the appointment power between the President and the Senate envisioned by the general Appointments Clause. "The 'main purpose' of the Recess Appointments Clause, therefore, is not - - as the Eleventh Circuit held and the Board argues - - only 'to enable the President to fill vacancies to ensure the proper functioning of our government' [citation omitted]. This formulation leaves out a crucial aspect of the clause's purpose: the preserve the Senate's advice and consent power by limiting the President's unilateral appointment power."

On this ground, the majority had little difficulty rejecting the Board's argument in favor of the third potential definition:

The problem with this definition is that the Senate fulfills these criteria whenever its members leave for the weekend, go home for the evening, or even take a break for lunch. In each of these instances, the Senators have no duty to attend, the Senate chamber is empty, and the body cannot receive messages from the President.

Defining recess in this way would eviscerate the divided-powers



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framework the two Appointments Clauses establish. If the Senate refused to confirm a president's nominees, then the president could circumvent the Senate's constitutional role simply by waiting until senators go home for the evening. The exception of the Recess Appointments Clause would swallow the rule of the [general] Appointments Clause.

The *New Vista* majority found the choice between the first and second potential definitions to be a closer call, but nonetheless concluded that the first definition was more consistent with the overall purpose of the two clauses. In this regard, the majority gave significant weight to the fact that a recess appointee serves until the end of the Senate's *next* session. The majority reasoned that a core purpose of the Recess Appointments Clause was to grant the Senate one opportunity to consider the recess appointee during its next following session. Because the Senate would not have to wait until its "next session" to consider an intrasession appointee, the "next session" language strongly indicated that the Framers had envisioned recess appointments being made only during the intersession recess.

The majority reasoned:

Under an intrasession definition, the Clause would no longer have an auxiliary role. The president would make the recess appointment during a break within a Senate session. But the Senate's reconvening and first subsequent adjournment - - whether that be for a long intrasession break or for the intersession break - - would have no immediate effect on the recess appointment because the appointment lasts until the "next session," as demarked by adjournments *sine die*. The

appointment would not expire until the Senate reconvened, adjourned *sine die*, reconvened and then adjourned *sine die* a second time. Thus, the appointment would continue even though the opportunity to undergo the ordinary, preferred process had come and gone. This shows that when the intrasession definition of recess is combined with durational provision, a fundamentally different relationship between the clauses is created: the intrasession definition makes the Recess Appointments Clause an additional rather than auxiliary method of appointing officers. The durational provision thus indicates the most natural reading of the Clause defines recess to mean intersession breaks only.

The majority found further support for its determination in "the Supreme Court's direction that 'the doctrine of separation of powers is a structural safeguard' which has as one of its "major features" the "[the establishment of] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." Defining the "recess of the Senate" as including only intersession breaks was a clear, easily identifiable standard that lacked the ambiguity inherent in the other two potential definitions.

Judge Greenaway wrote a long, strongly worded dissent in which he rejected the majority's reasoning and indicated that he would apply the Recess Appointment Clauses to all intrasession and intersession breaks of the senate. "The inclusion of intrasession recesses in the ambit of the Recess Appointments Clause is the interpretation most faithful to the text of the Constitution, the intent of the Framers, the purpose of recess appointments, and the traditional practice of both the President and the Senate."

The Third and District of Columbia Circuits have now



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held that the Recess Appointments Clause is limited to intersession appointments. The Eleventh Circuit¹ alone has upheld intrasession recess appointments. This split in the Circuits on a question of vital constitutional importance, as well as Judge Greenaway's dissent, all but guarantees that this matter will ultimately be taken up by the Supreme Court. In the meantime, the *New Vista* decision calls yet further into question the ability of the Board to take enforceable action given its current composition.

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4th Circuit

***Wilson v. Dollar General Corp.*, ___ F.3d ___, No. 12-573 (4th Cir. May 17, 2013)**

<http://www.ca4.uscourts.gov/Opinions/Published/121573.P.pdf>

In *Wilson*, the Fourth Circuit addressed a matter of first impression—whether a Chapter 13 debtor had standing to assert a cause of action exclusive of the authority vested in the bankruptcy trustee. After holding the plaintiff had standing, the Fourth Circuit affirmed the district court's determination that the defendant was entitled to summary judgment on the plaintiff's Americans with Disabilities Act ("ADA") claim.

The plaintiff suffered from a detached retina, and as a result, he was not able to perform his duties on the job.

Following his discharge from the defendant employer, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Thereafter, the plaintiff filed for Chapter 13 bankruptcy. Upon receipt of the right to sue from the EEOC, the plaintiff filed his ADA claim in district court alleging that his former employer failed to provide a reasonable accommodation for his disability.

On appeal, the defendant asserted that the plaintiff lacked standing to pursue the ADA claim. The Court disagreed and joined the Second, Third, Seventh, Tenth, and Eleventh Circuits in ruling that a Chapter 13 debtor has standing to bring a non-bankruptcy cause of action in his own name, including an employment discrimination action.

After holding that the plaintiff had standing to sue, the Court examined the facts presented to determine whether the plaintiff established a prima facie case of discrimination under the ADA. The defendant did not dispute the first two elements of the plaintiff's ADA claim, that (1) he had a disability within the meaning of the ADA; and (2) the defendant was on notice. Therefore, on appeal, the issue was whether the plaintiff satisfied the third element under the ADA, which required him to show that he was a qualified individual under the ADA, such that had he been given a reasonable accommodation, he could have "perform[ed] the essential functions of the employment position." The Court concluded it was clear from the record that no reasonable accommodation could have enabled the plaintiff to perform the essential functions of his position.

***Baldwin v. City of Greensboro*, ___ F.3d ___, No. 12-1722 (4th Cir. May 6, 2013)**

<http://www.ca4.uscourts.gov/Opinions/Published/121722.P.pdf>

In *Baldwin*, the Fourth Circuit affirmed the district court's grant of summary judgment for a municipality, ruling as a matter of first impression that the plaintiff's claims under the Uniform Services Employment and Reemployment



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Rights Act of 1994 (“USERRA”) were time barred under the four-year federal “catch-all” statute of limitations, 28 U.S.C. § 1658(a). The Court held that § 1658(a) applied to civil actions arising under USERRA, and USERRA’s successor statute, which eliminated the statute of limitations, did not apply retroactively to the plaintiff’s claims.

The plaintiff was a municipal waste manager who served as a chief warrant officer in the United States Coast Guard Reserves. He claimed his former employer discriminated against him when he left his position to enter active duty.

On appeal, the plaintiff argued that the four-year statute of limitations in § 1658(a) did not apply to his claims for three reasons: (1) USERRA clarified the Veteran’s Reemployment Rights Act of 1974 (“VRRRA”), and did not “arise under” an act of Congress enacted after the effective date of § 1658(a); (2) USERRA claims fall into the “otherwise provided by law” exception in § 1658(a), because restricting the time for filing claims would “potentially interfere with enforcement” of the statute; and (3) the Veterans’ Benefit and Improvement Act (“VBIA”), which was enacted in 2008, eliminated the statute of limitations on USERRA claims, and applied retroactively to bar all time limitations on his claims.

The Court rejected all three contentions. First, the Court determined that USERRA did more than “clarify” VRRRA and instead was implemented to “simplify” and “strengthen” the provisions on veterans’ employment and reemployment rights. The Court explained that VRRRA only provided injunctive relief; however, USERRA changed a claim that was solely equitable in nature into a legal claim. The Court noted the plaintiff sought a jury trial and liquidated damages, rights not available under VRRRA. Next, the Court explained USERRA itself does not explicitly state that no time limit applies. Accordingly, a USERRA claim cannot fall into the § 1658(a) exception for cases arising under statutes that prescribe a different statute of limitations (or none at all). For the plaintiff’s third argument, the Court applied a three-step analysis to determine whether the presumption against retroactivity should apply. The Court concluded that VBIA was not intended to apply retroactively because doing so would revive the plaintiff’s otherwise barred claim, and nothing in VBIA indicated congressional intent that it should apply to claims already barred by a statute of limitations.

The Court also rejected the plaintiff’s assertion that even if § 1658(a) applied to his claims, he nevertheless timely filed his claim because the statute of limitations had been tolled. The Fourth Circuit agreed with the district court that the plaintiff’s claim accrued when he signed the release providing for the termination of his employment with the City. The plaintiff asserted that his claim should be tolled during the time he spent on active duty with the Coast Guard and during the DOL investigation. Taking into account the time the plaintiff spent on active duty and the DOL’s investigation, the Court found the plaintiff’s claims would have expired a year and a half before he filed his USERRA claim. Additionally, the Court found the record lacked any evidence that the City had undermined the DOL’s investigation. Accordingly, the Court held the district court did not abuse its discretion in refusing to toll the statute of limitations.

***Crockett v. Mission Hospital, Inc.*, __ F.3d __, No. 12-1910 (4th Cir. May 30, 2013)**

<http://www.ca4.uscourts.gov/Opinions/Published/121910.P.pdf>

In *Crockett*, the Fourth Circuit affirmed the district court’s grant of summary judgment for the defendant on the plaintiff’s claims of a hostile work environment under Title VII. The Court held the defendant was entitled to raise an affirmative defense because the plaintiff failed to establish that she had suffered a tangible employment action, and that the undisputed facts showed the defendant had established the affirmative defense.

When the plaintiff was facing discipline for talking on her cell phone during her shift at the hospital, her supervisor called her into a meeting and locked the door. According to the plaintiff, he persuaded her to pull up her shirt and lift her bra to show that she was not “wired” with a recording device before he would discuss her discipline. The supervisor then pulled her close and asked for a kiss, promising to drop any disciplinary charges. The plaintiff suggested a hug instead, but ended up being kissed by her supervisor. Shortly thereafter, the plaintiff had a meeting with the director of her department and an HR representative, in which she was told that her supervisor had reported her continued



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cell phone misuse and that she had flashed him by lifting her shirt so that he would not report the misuse. At this meeting, the plaintiff stated that her supervisor had done something “horrific” to her and was trying to cover it up. However, she did not provide any details. The plaintiff was suspended pending the conclusion of the investigation.

The defendant conducted an investigation, including meeting with the plaintiff’s supervisor and with coworkers to find out about the incident. Additionally, HR representatives met with the plaintiff and asked if the incident involved the supervisor making sexual advances to her. The plaintiff nodded yes, but failed to provide any details. At this time, the plaintiff was provided with a copy of the defendant’s sexual harassment policy and advised of the process to report a claim of harassment and discrimination. After the investigation, HR representatives met with the plaintiff and explained the investigation failed to substantiate her claims of misconduct and she was allowed to return to work. The plaintiff returned to work and filed an EEOC charge detailing the alleged harassment. Thereafter, the defendant terminated the plaintiff’s employment for tape recording her interactions with and treatment of patients in violation of the Health Insurance Portability and Accountability Act (“HIPAA”). The plaintiff challenged the hospital’s decision to suspend her, not the termination decision.

As the Court explained, to establish a hostile work environment based on sexual harassment, a plaintiff must prove: (1) the conduct was unwelcome; (2) it was based on the plaintiff’s sex; (3) it was sufficiently severe or pervasive to alter the plaintiff’s conditions of employment; and (4) it was imputable on some factual basis to the employer. The district court acknowledged that the parties agreed the plaintiff’s forecast of the evidence regarding the supervisor’s conduct was sufficient to meet first two elements. As to the third element, the district court held that the plaintiff had presented sufficient evidence to raise a question of material fact as to whether the supervisor’s conduct was sufficiently severe. With respect to the fourth element, the district court concluded that the plaintiff had not suffered a tangible employment action as a result of the alleged harassment, and the defendant was entitled to present evidence of an affirmative defense.

According to the Fourth Circuit, the district court correctly

rejected the plaintiff’s contention that she had established a tangible employment action based on her seven-day suspension. The plaintiff did not tell anyone at the time of her suspension that her supervisor engaged in sexually harassing conduct. Also, the plaintiff, at the time of her suspension, had been given a final warning related to her improper use of cell phones, and the suspension followed another allegation of unauthorized phone usage. The Court also found that the plaintiff failed to present any forecast of evidence that she suffered any pecuniary loss because of her suspension.

Having determined that the plaintiff did not establish that she had suffered a tangible employment action, the Court agreed with the district court that the hospital was entitled to raise an affirmative defense. The Court determined that the defendant satisfied both elements of its affirmative defense: (1) that it exercised reasonable care to prevent and correct promptly sexually harassing behavior; and (2) that the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” The Court explained that the defendant met its burden because it had “a fully-functioning anti-harassment policy” and had conducted a prompt and thorough investigation. Furthermore, the Court pointed out that the evidence was uncontroverted that the defendant met with the plaintiff on numerous occasions in an attempt to correct any harassment situation and counseled the plaintiff in the procedure for filing a formal complaint. Accordingly, the Court held that the defendant could not be held vicariously liable.

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6th Circuit

Sixth Circuit Denies Class Certification to Group of Women Alleging that Cintas' Hiring Practices Resulted in Gender Discrimination

Davis v. Cintas Corp., ___ F.3d ___, 2013 WL 2343302 (6th Cir. May 30, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0154p-06.pdf>

In 2004, a group of Cintas Corporation employees filed a class action in the United States District Court for the Northern District of California alleging that Cintas' hiring practices resulted in gender discrimination in violation of 42 U.S.C. § 1981 and the California Unfair Business Practices Act. They later amended their complaint to add a Title VII claim, a claim under California's Fair Employment and Housing Act and two additional plaintiffs. The parties then agreed to transfer the case to the Eastern District of Michigan and to consolidate it with another hiring-discrimination case that was pending against Cintas in that court.

After Cintas moved for summary judgment on one of the claims of an individual California plaintiff and to limit the Michigan case's purported nationwide class to the State of Michigan, counsel in the California case sought leave to add Tanesha Davis and another woman as named plaintiffs. While the motions were pending, the plaintiffs in both cases moved to certify a class of all females who unsuccessfully applied for a particular job at any time on or after June 12, 1999. Before addressing the class certification motion, the district court granted leave to add Davis and the other woman as plaintiffs, granted summary judgment for Cintas on the California plaintiff's claim, and limited the Michigan claims to Michigan.

Later, the district court denied class certification. All remaining plaintiffs, except for Davis, dismissed their individual claims and all class claims, except for the gender-discrimination claim. Davis maintained her individual claim, but Cintas moved for—and was

granted—summary judgment on that issue. Davis appealed, individually and on behalf of the gender-discrimination class.

The Sixth Circuit found that the instant case was similar “in many ways” to *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), in which the plaintiffs sought to certify a class on behalf of 1.5 million alleging that Wal-Mart systematically discriminated against women in pay and promotion decisions. In *Dukes*, the Court found that class certification was inappropriate because the plaintiffs could not establish commonality within the meaning of Rule 23(a)(2).

Under that framework, the Sixth Circuit affirmed the district court's ruling that Davis was unable to establish the commonality necessary to support class certification because “she could not show that a number of women, who failed to obtain employment at many places, over a long time, under a largely subjective hiring system, shared a common question of law or fact.” The Court also affirmed the district court's determination that class certification was improper under Rule 23(b)(2) because Davis sought front pay and back pay, which would require individualized determinations of damages inappropriate for a Rule 23(b)(2) class action.

The Court then addressed Davis' individual claims. It found that the district court correctly dismissed her 2004-disparate treatment claim because she failed to produce evidence to establish that Cintas' hiring decisions were pretextual and based on gender rather than ability to perform the necessary job functions. The Court, however, reached a different result as to her 2003-disparate treatment claim. It ruled that she sufficiently stated a question of fact regarding pretext on that claim because although Cintas argued that it based its decision on Davis' stated dislike for “up-selling” and the fact that she was applying for other jobs, the evidence showed that the decisionmaker was advancing men who were less qualified to later stages of the screening process than it advanced Davis.

Finally, the Sixth Circuit addressed Davis' claims that Cintas' hiring practices had a disparate impact on female



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applicants. The Court ruled that she failed to meet 42 USC § 2000e2(k)(1)(B)(i)'s requirement that she identify one specific step of Cintas' "Meticulous Hiring Process" as a particular employment practice that causes a disparate impact, rather than pointing to a group of steps that share a common characteristic.

Sixth Circuit Overturns Grant of Summary Judgment in the Employer's Favor Due to Questions of Fact Regarding Notice Requirements Under the FMLA.

Wiseman v. Awreys Bakeries, LLC, ___ Fed.Appx. ___, 2013 WL 2233886 (6th Cir. May 22, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0511n-06.pdf>

Plaintiff Douglas Wiseman injured himself at work the day that he returned from a different injury-related medical leave. When he suffered the new injury, he asked to visit the health clinic and file an accident report. The Defendant denied both requests and told him to finish his day performing light duty work.

According to the Plaintiff, the next morning he was again denied the right to go to the clinic and file an accident report. However, he contacted a union representative who accompanied him to the clinic and then told the Defendant that he could not work. He claims that the Defendant allowed him to go home, told him that he would receive a new schedule the following week.

The Defendant contended this account and claimed that it told the Plaintiff to go to the clinic, but he never did nor did he say he needed to see his own doctor. The Defendant also claimed that the Plaintiff remained scheduled to work the entire week and failed to report or document his absences.

It was undisputed, however, that the following day, the Plaintiff went to his doctor and got a note confirming that he should be off work, but the note did not describe the nature of his back injury. The Plaintiff called a co-worker

each of the next four business days to ask if he had been scheduled to work, he never called the Defendant to explain his absences.

Four days after his injury, the Defendant learned that the Plaintiff had not been coming to work after he left a voicemail for the Defendants' Benefit and Human Resources Manager. The Manager called the Plaintiff and left him messages and sent him a letter notifying him that the Defendant would lose his seniority unless he provided satisfactory reasons for his absences within 2 days because he was considered him a no-call no-show under the union's collective bargaining agreement.

Within that deadline, the Plaintiff called the Defendant and explained that he saw his doctor and got a note. The next day, the Defendant sent him another letter stating that his voicemail was not sufficient because it failed to provide an explanation for his absences and he still had not provided documentation. The Plaintiff then missed every subsequent day of work that week, despite the fact that the employer left him daily messages requesting that he report to work as scheduled. At the end of that week, the Plaintiff delivered his doctor's note to the Defendant. The Defendant responded by letter stating that the note did not satisfactorily explain the reasons for the absence and that a more detailed explanation was needed.

Four weeks later, the Plaintiff faxed another doctor's note that cleared the Plaintiff to return to work 11 days *earlier*. The day after the fax, the Defendant terminated Plaintiff's employment.

After the Plaintiff filed an FMLA suit, the employer moved for and was granted summary judgment. The Defendant argued that it could not classify the Plaintiff's absences as FMLA-qualifying or request a certification from his health care provider because it lacked "sufficient detailed information suggesting he had a serious health condition." The district court determined that the Defendant's letters to the Plaintiff constituted requests for medical certifications from his health care provider under the FMLA.

On appeal, the Sixth Circuit held that it could not affirm



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the district court's decision because the Defendant conceded that it did not request a medical certification from the Plaintiff at any time. The Court also ruled that viewing the evidence in the light most favorable to the Plaintiff, genuine issues of material fact remained as to: (1) whether he timely provided FMLA-qualifying notice to the Defendant; (2) the seriousness of his health condition; and (3) regarding whether the Defendant was justified in terminating him for failing to return to work for 11 days after he had been released to return by his doctor since the Plaintiff testified that he returned the day after he received the release letter and sent it to the Defendant as soon as he got it.

Employee Who Voluntarily Resigned After Returning from FMLA Leave Could Not Prevail on Claim Based on the Employer's Refusal to Allow Rescission of the Resignation

Miles v. Nashville Elec. Serv., ___ Fed.Appx. ___, 2013 WL 1908922 (6th Cir. May 9, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0466n-06.pdf>

Plaintiff Bilqis Miles ("Miles") sued her former employer for FMLA interference when it refused to reinstate her after she submitted a resignation letter upon returning from an FMLA leave caused by a psychotic breakdown for which she was hospitalized. She submitted her resignation letter the day that her leave ended. Three days later, she asked to rescind it. In her suit, she claimed that the Defendant should have determined whether she was requesting further medical leave following her return to work. The district court granted summary judgment to the Defendant finding that the evidence demonstrated that she voluntarily quit her job and that the employer had no duty under the FMLA to second-guess her decision.

On appeal, the Plaintiff argued that the Defendant should have inquired further into whether she did not want to come back or whether continued FMLA leave would have been appropriate. She claimed that her statements "could

quite plausibly be interpreted to mean that her decision to come back was premature, that she was not ready to return, that she was questioning her own decision to return the previous day."

The Sixth Circuit rejected the Plaintiff's argument because the evidence did not support it. All of the evidence indicated that she wanted to resign "– not take more medical leave - and that she came to this decision absent any coercion." Therefore, there was no genuine dispute regarding the fact that the resignation was voluntary.

The Court further held that her behavior was not so erratic or bizarre as to indicate current psychosis or hallucinations that could have apprised the Defendant that she was incapacitated and may have needed additional FMLA leave. As a result, the Defendant did not have a duty to inquire further as to whether the Plaintiff was requesting leave for a potentially FMLA-qualifying reason.

Finally, the Court determined that after the Plaintiff resigned, she was no longer an "eligible employee" entitled to rights and benefits under the FMLA. The Defendant, therefore, had no duty to allow her to rescind her resignation.

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7th Circuit

Terri Basden v. Professional Transportation, Inc., No. 11-2880 (7th Cir. 2013)



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<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D05-08/C:11-2880;J:Coleman;aut:T:fnOp:N:1131984;S:0>

Court Affirms Summary Judgment on Plaintiff's ADA Failure to Accommodate and FMLA Interference Claims

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ADA failure to accommodate and FMLA interference claims. The defendant had a policy permitting suspension after seven absences and termination after eight, making no distinction for absences for medical reasons. The policy also permitted an employee with at least one year of tenure to request a 30-day leave of absence. The plaintiff was suspended after her seventh absence, all of which were for medical reasons. When she requested a 30-day leave of absence, as she had only been employed by the defendant for 50 weeks, her request was denied, and her employment was terminated after she failed to return from her suspension. While the Court acknowledged that the defendant's failure to engage in the interactive process could not be deemed appropriate, such failure in and of itself does not support a claim under the ADA. Finding then that the plaintiff had failed to establish that she was "qualified" under the ADA for an accommodation, the Court affirmed summary judgment on the plaintiff's ADA claim. Turning to the plaintiff's FMLA interference claim, the Court held that as the plaintiff had not been employed by the defendant for a full year, she was not protected by the FMLA.

Keith Dookeran v. County of Cook, Illinois, No. 11-3197 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D05-03/C:11-3197;J:Sykes;aut:T:fnOp:N:1129982;S:0>

Court Holds That As Illinois Human Rights Act Does Not Prohibit State Court From Hearing Federal Claims, Plaintiff's Claims Were Properly Dismissed As

He Had A Full And Fair Opportunity To Litigate His Claims In Related State Court Proceedings

The Seventh Circuit affirmed the district court's dismissal of the plaintiff's Title VII claims finding that they were barred by res judicata. The Court focused its analysis on whether the plaintiff had a full and fair opportunity to litigate his federal claims in previous state court proceedings that arose from the same set of circumstances. Prior to and during the plaintiff's proceedings in state court, Illinois courts were in conflict as to whether the Illinois Human Rights Act prohibited state courts from hearing federal civil rights claims. Following the plaintiff's case, the Illinois Supreme Court resolved this conflict, holding that "it is clear that a federal civil rights claim may be brought in Illinois circuit court along with a related administrative-review action, and a party's failure to do so will therefore raise the potential for claim preclusion." The Seventh Circuit held that the plaintiff had a full and fair opportunity to litigate his claims because he could have appealed to the Illinois Supreme Court for an authoritative interpretation of the IHRA's jurisdictional provision, rather than rely on one side of the conflicting case law. Accordingly, the Court affirmed the district court's dismissal of the plaintiff's claims. In his dissent, Judge Hamilton explained that the plaintiff did not have a full and fair opportunity because at the time of his proceedings, before the Illinois Supreme Court resolved the issue, the plaintiff faced a "solid wall of appellate precedent holding that Illinois trial courts had no jurisdiction over federal claims of discrimination," and requiring a plaintiff in a Title VII case to challenge these decisions in the Illinois Supreme Court as his only recourse is "untenable."

Otto May Jr. v. Chrysler Group, Nos. 11-3000 & 11-3109 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D05-14/C:11-3109;J:PerCuriam;aut:T:fnOp:N:1135350;S:0>

Court Holds That Punitive Damages Are Not



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Appropriate In Title VII Discrimination Case When Defendant Took Action to Remedy The Harassment

The Seventh Circuit affirmed the district court's ruling to vacate a jury's award of punitive damages. In this case, the plaintiff faced severe and persistent harassment that, at times, even escalated to death threats. After being presented with evidence that the defendant's initial response to the harassment was ineffective and half-hearted (for example, holding one meeting in the first year and interviewing only the plaintiff), the jury awarded the plaintiff \$3.5 million in punitive damages, which was subsequently vacated by the district court. The Seventh Circuit agreed with the district court, noting that punitive damages can only be recovered if the plaintiff shows that the defendant acted with malice or reckless indifference to the plaintiff's federally protected rights. The Court explained that although the defendant's actions were not the most helpful, it did in fact respond to the harassment. The defendant's efforts included offering the plaintiff a different parking spot and hiring a forensics expert to investigate the derogatory notes left for the plaintiff. Ultimately, the Court reasoned that while the defendant could have done more, its actions failed to demonstrate a reckless disregard for the plaintiff's rights necessary to support an award of punitive damages.

Omar Hakim v. Accenture United States Pension Plan, et al., No. 11-3438 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D05-23/C:11-3438:J:Manion:aut:T:fnOp:N:1140434:S:0>

Court Holds In ERISA Action That Release Signed By An Employee Knowingly And Voluntarily Is Valid And Enforceable

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ERISA claim. This case involved a plaintiff who was promoted to a position that caused him to lose eligibility to participate in the defendant's pension plan, was subsequently terminated in a reduction in force, and

signed a release waiving any and all claims in exchange for a severance package. Five years after his employment was terminated, the plaintiff sought additional pension benefits from the defendant, arguing that the notice of the amendment to the pension plan which caused his ineligibility was inadequate and violated ERISA's notice requirements. The Seventh Circuit found that the plaintiff had constructive knowledge at the time of the signing of the release and could have contested the issue at that time. In fact, the Court found that the plaintiff received notice of the change to the plan multiple times, including his receipt of a statement of his benefits when he was promoted, which explicitly stated that his promotion would make him ineligible for the pension plan. The Court noted that the language in the statement was not especially technical or hard to find in the document. The Court also held, and the plaintiff admitted, that the plaintiff knowingly and voluntarily signed the release of claims. The Court found that the release was not overly technical or excessively lengthy and it even advised the plaintiff to consult an attorney, which he chose not to do. Accordingly, the Court held that the release was valid and affirmed summary judgment for the defendant.

Candace Harbaugh v. Board of Education of the City of Chicago, No. 11-3277 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D05-17/C:11-3277:J:Sykes:aut:T:fnOp:N:1137302:S:0>

Court Holds That Time In A Full-Time Substitute Teaching Position May Not Be Used To Satisfy The Illinois School Code's Requirement Of Four Years Of Probationary Tenure Track Teaching Before Becoming Tenured

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's due process claim. This case involved a teacher who contended that her year as a full-time substitute teacher should be counted as a year of a probationary tenure track teaching position. The Court noted that a teacher



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only has a constitutionally protected property interest in her job if she is tenured, which requires four years of successful probationary teaching. The plaintiff was terminated just before she finished her fourth year as a probationary teacher and argued that her year as a full-time substitute should be counted toward the four year requirement. The Court disagreed and held that a full-time substitute teacher is not the same as a full-time probationary tenure track teacher. The Court noted the substantial differences in requirements of probationary tenure track teachers and substitute teachers; namely that probationary teachers are appointed by the school principal whereas substitute teachers are assigned by human resources and that probationary teachers are subject to a more rigorous system of evaluation. The Court stated that Illinois law clearly delineates the differences between the two positions and concluded that the plaintiff did not achieve tenure, and thus did not have a constitutionally protected property interest in continued employment to support her due process claim.

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8th Circuit

Olsen v Capital Region Medical Center, No. 12-2113
(8th Cir. May 7, 2013) (ADA, ADEA - Seizures).

<http://media.ca8.uscourts.gov/opendir/13/05/122113P.pdf>

Andrea Olsen (“Olsen”) was employed in 1993 by Capital Region Medical Center (“CRMC”) as a Mammography Technician. In this role, she was responsible for following protocols and safety standards while operating radiographic equipment and performing procedures, and tending to the patients’ physical and psychological needs

during the process. Olsen was diagnosed with epilepsy and suffered her first seizure in 2004. She had 14 seizures while performing her job duties from June 2008 to August 2010 at CRMC. The seizures caused her to lose orientation and muscle control, resulting in falls and injuries while on the job. On one occurrence, a patient was under her care when she suffered a very long seizure and had to be wheeled away on a stretcher to the ER. That patient was “very shaken”. Another patient witnessing a seizure also complained of patient safety.

CRMC made numerous accommodations to attempt to eliminate environmental triggers. Olsen continued to have seizures despite the accommodations, and was placed on unpaid administrative leave. Prior to her administrative leave, a younger, less experienced technician was hired to supplement the staff. Eventually, when Olsen changed medications and CRMC was told her seizures were under control, it offered her job back at the same rate of pay with full benefits, which Olsen rejected. CRMC then terminated her.

Olsen sued CRMC for age discrimination (at one point during her employment, a supervisor left her a note asking if she had plans to work full-time or part-time because she was nearing retirement age), disability discrimination and retaliation. The Eight Circuit Court of Appeals affirmed summary judgment of all the claims in CRMC’s favor. The Court held that Olsen is without question “disabled” because her seizures, while occurring, incapacitate her and prevent her from performing her job duties. However, the Court held she is not a “qualified individual” under either the ADA or ADEA because even with the accommodations made by CRMC, she still suffered from numerous seizures on the job. An essential function of her position was insuring patient safety, and the record was clear that she could not insure patient safety while having a seizure: “[t]he hospital need not subject its patients to potential physical and emotional trauma to comply with its duties under the...ADA”.

Butler v. Sivyer Steel Corporation, No. 12-2432 (8th Cir. May 8, 2013) (Title VII - Race).

<http://www.gpo.gov/fdsys/pkg/USCOURTS-ca8-12-02432/pdf/USCOURTS-ca8-12-02432-0.pdf>

George Butler (“Butler”) alleged race discrimination against his employer, Sivyer Steel Corporation (“Sivyer”). Sivyer’s Human Resource Manager, Thomas



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Belowske ("Belowske"), conducted an investigation and determined that Butler threatened to cause bodily harm upon a coworker and touched the coworker in a threatening manner. Butler was terminated as a result of the investigation. Butler alleged that the investigation was racially biased because Belowske believed the Caucasian coworker's version of the events over his. The Eight Circuit Court of Appeals upheld summary judgment for the employer, noting that Belowske fired Butler after hiring him only 11 months prior, a "circumstance giving rise to a strong inference that discrimination did not occur".

Kramer v. National Credit Systems, No. 12-1956 (8th Cir. May 28, 2013) (Independent Contractor Status).

<http://media.ca8.uscourts.gov/opndir/13/05/121956P.pdf>

Roger Kramer ("Kramer") alleged that National Credit Systems ("NCS") caused interruption to his business from spam emails that flooded his server. Kramer specifically alleged that William Stolars, a salesman, sent them on NCS' behalf. Stolars admitted he sent the emails. However, NCS' position was that Stolars was an independent contractor and not an employee, and thus, it was not liable for his actions. The district court agreed.

The Eighth Circuit upheld the decision, stating that while no single factor is determinative, whether the hiring party has the right to control the means of performance is of "primary consideration". After some evidentiary disputes regarding the "most persuasive evidence", the Court held that while the factors point in both directions, the primary consideration favors an independent contractor arrangement. Although NCS distributed a sales manual for its independent contractors to use with specific directions about how to sell its services, and an owner of NCS called the salespersons five times a week, this did not outweigh the evidence that the individuals ultimately were allowed, by contract, to be "free of Company direction and control" and "shall determine [their] own hours, days, and methods of selling National Credit Systems' services".

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10th Circuit

ADA: *Koessel v. Sublette County Sheriff's Dept., (10th Cir., May 14, 2013)*

<http://www.gpo.gov/fdsys/pkg/USCOURTS-ca10-11-08099/pdf/USCOURTS-ca10-11-08099-0.pdf>

Because Plaintiff's evidence of ability to perform basic job duties was insufficient to dispute neuropsychologist's detailed assessment that he could not handle stressful situations, Plaintiff was not qualified to perform essential functions, and summary judgment was affirmed for failure to establish *prima facie* ADA violation.

Plaintiff Koessel, a patrol officer in the County Sheriff's Department, suffered a stroke in December 2007. He was placed on administrative leave, where he received treatment. He returned to the Sheriff's Office part-time in April 2008, in a temporary office job conducting vehicle registration checks and approving field reports. In August of 2008 he was cleared to return full-time, and was allowed to make limited traffic stops. However, after co-workers reported that he had memory problems, lost his temper and had blood-pressure problems, he was returned to performing only back-up duties. In April 2009 he was placed on administrative leave and ordered to undergo an examination by a neurologist, to whom the Sheriff sent a letter expressing his concerns about Koessel's memory lapses and blood pressure problems. The neurologist reported that he could work but had cognitive functioning problems, and recommended examination by a neuropsychologist.

The neuropsychologist found that Koessel's symptoms (including crying, fatigue and light-headedness) could interfere with the performance of some of his duties, and recommended placement in a low-stress position without public contact. In May of 2009 he was placed in a temporary office position, but in June he was informed that the position had been de-funded and he was again placed on administrative leave. He was terminated in August of 2009, based on the psychologist's indication



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that he was not fit to perform certain of his duties, and the Department's conclusion that he was not qualified for any substitute position.

Koessel brought claims for violation of the Americans with Disabilities Act, breach of contract, and violation of his rights under the Fifth and Fourteenth Amendment to procedural and substantive due process. The district court held that Koessel could not make out a prima facie case for violation of the ADA, because he was unable to perform the essential functions of his job with or without reasonable accommodation. The court found that he had failed to present any evidence contradicting the neuropsychologist's assessment that he should not be placed in a position where he could be exposed to extreme stress—a restriction that disqualified him from patrol duty.

The Tenth Circuit affirmed. The Court reiterated that the plaintiff bears the burden to show his qualification for a job, and that a job function is "essential" if it is fundamental to a position and all employees in the position must perform it. On appeal, the plaintiff disputed the neuropsychologist's assessment that he could not perform the essential functions of his job, arguing that: (1) his personal physician cleared him to return to work full time in August 2008; (2) he performed 35 traffic stops without incident after returning to work and before he was placed on administrative leave; (3) he drove a patrol vehicle 40 miles each way on his commute without incident between his return to work and his termination; (4) the neurologist found no physical reason Koessel could not perform his job; and (5) the neuropsychologist said Koessel's performance on standard psychological tests was unchanged from his performance before his stroke. But the Court found this evidence insufficient to dispute the neuropsychologist's analysis, which was based on a prior examination, input from co-workers, and a detailed consideration of Koessel's job description. The Court emphasized that "Employers may set standards for exceptional situations if the need to perform in an emergency is a realistic component of a job." Although Koessel had shown that he could make routine traffic stops after his return, he had not successfully dealt with high-stress situations, and presented no evidence that he was capable of doing so.

Second, the Court determined that the Department had not failed to provide reasonable accommodation for Koessel's disability, because Koessel identified no other available position for which he was qualified. The Court rejected his argument that the Department failed to accommodate him in his temporary position, finding no evidence that it was intended to be permanent or that the Department had the funding to make it permanent. Accordingly, summary judgment was affirmed on both of Koessel's ADA theories. The case demonstrates the value of a thorough doctor's examination based on company input and analysis of the employee's job description, and the necessity for plaintiffs to rebut such examinations with specificity in order to establish that they are qualified for their position.

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11th Circuit

OPIS Mgmt. Res. LLC, et al v. Sec., FL Agency for Health Care Admin. (April 9, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201212593.pdf>

In *OPIS Mgt. v. Sec., FL Agency for Health Care Admin.*, the Court affirmed the district court's decision that Florida statute was preempted by HIPPA, as the Florida statute provided nursing home residents less protection than required by federal law.

Plaintiffs in the case were operators and managers of skilled nursing facilities in Florida. The facilities, in operation, received requests from spouses and attorneys-in-fact of deceased nursing home residents for release of medical records. The facilities refused to disclose the



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records, and cited to HIPPA. As a result, Defendants issued citations to the facilities for violating Florida law by refusing to release the records, citing to Fla. Stat. 400.145.

Specifically, Fla. Stat. 400.145 provides for the release of medical records of deceased residents of nursing homes to certain individuals. In holding that the statute was preempted by HIPPA, the Court found that the Florida statute failed to accomplish HIPPA's goal of keeping an individual's protected health information confidential.

DuChateau v. Camp, Dresser & McKee, Inc. (April 9, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201210838.pdf>

In *DuChateau v. Camp*, the Court affirmed the district court's grant of summary judgment, finding that a jury verdict against plaintiff's claim of retaliation estopped plaintiff from relitigating the issue as to whether she suffered an adverse employment action.

Plaintiff DuChateau brought a claim against her former employer claiming that the employer discriminated against her when she became pregnant, and specifically when the employer removed her from a project and failed to restore her to the project after she gave birth and returned to work. The district court granted partial summary judgment in favor of Defendant regarding Plaintiff's claims for pregnancy discrimination under the Florida Civil Rights Act, and interference with her rights under FMLA. At trial regarding Plaintiff's FMLA retaliation claim, the jury found the Plaintiff did not suffer an adverse action when she was removed from the project.

At issue was whether direct estoppel bars a claim of pregnancy discrimination under state law when a jury found at trial that the plaintiff suffered no adverse employment action regarding her claim of retaliation for exercising her right to maternity leave under FMLA. The Court, in holding that the claim was estopped, noted that, as the jury's resolved the common issue as to whether

there was adverse action, the decision was binding on the untried claim of pregnancy discrimination. Therefore, there was no need for further trial.

Morales v. Zenith Ins. Co. (April 15, 2013)

<http://docs.justia.com/cases/federal/appellate-courts/ca11/12-11755/12-11755-2013-04-15.pdf>

In *Morales v. Zenith*, the Court certified certain questions to the Florida Supreme Court regarding a breach of insurance contract claim.

The case stems from an issue involving Santana Morales, who was crushed to death by a palm tree while working as a landscaper for Lawns Nurse and Irrigation Designs. Lawns maintained an insurance policy with Zenith at the time of Morales' death, which contained two types of coverage: Workers' Compensation Insurance, and Employers Liability Insurance. Under the policy, Zenith was obligated to pay workers' compensation benefits on Lawns' behalf to Morales' family because Morales' death occurred during his employment. Morales' estate then filed a wrongful death action against Lawns, and Zenith agreed to defend Lawns in the action under the Employers' Liability Insurance provision.

Zenith continued to pay workers' compensation benefits to the Estate, and the parties eventually signed a Release as it relates to the workers' compensation benefits. The jury found in favor of the Estate and awarded the Estate damages. The Estate then brought an action against Zenith for breach of insurance policy and failure to pay the judgment entered against Lawns. The district court granted summary judgment in favor of Zenith and found that the workers' compensation exclusion in the policy barred Zenith's coverage of the Estate's tort judgment against the employer. The district court further noted that Florida law provides workers' compensation benefits as the exclusive remedy for an employee injury caused by an employer's negligence, and the Estate's tort claim triggered an obligation imposed by Florida's Workers' Compensation Act, thus the judgment issued in the lawsuit fell within the policy exclusion in the



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Employer's Liability Insurance provision.

Following oral argument, the Eleventh Circuit certified the following questions to the Florida Supreme Court: (A) Does the Estate have standing to bring a breach of contract claim against Zenith under the Employer Liability Policy? (B) If so, does the provision in the Employer Liability Policy which excludes from coverage "any obligation imposed by workers' compensation...law" operate to exclude coverage of the Estate's claim against Zenith for tort judgment? (C) If the Estate's claim was not barred by the Workers' Compensation exclusion, does the release in the Workers' Compensation settlement agreement otherwise prohibit the Estate's collection of the tort judgment?

National Labor Relations Board v. Hartman and Tyner, Inc., et al (April 16, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201214508.pdf>

In *NLRB v. Hartman*, the Eleventh Circuit held that the district court did not abuse its discretion when it concluded that the temporary reinstatement of six (6) discharged employees was not a "just and proper" form of relief requested by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA).

The case stems from a labor dispute involving an administrative complaint filed by the NLRB against Hartman and Tyner d/b/a Mardi Gras Casino. In the complaint, NLRB claimed Mardi Gras engaged in unfair labor practices when it unlawfully discharged employees involved in a union organization campaign on behalf of a union. In doing so, the NLRB exercised its power within the NLRA to petition a federal district court for temporary relief or restraining order pending the resolution of the administrative proceedings, which included temporary reinstatement. In its decision, the Eleventh Circuit reiterated that injunctive relief is proper when there is reasonable cause to believe the alleged unfair labor practices have occurred, and the injunctive relief is just and proper. In finding no abuse of discretion of the

district court's decision that temporary reinstatement was not just and proper, the Eleventh Circuit found the district court's finding were supported, and did not ignore key evidence. In holding, the Eleventh Circuit noted that, while it has declined to delineate a list of factors to determine when an action is just and proper, previous observations have included when "organizational efforts are highly susceptible to being extinguished by unfair labor practices, when unions and employees have already suffered substantial damage from probable labor violations, and when the violations reasonably found to have been committed will be repeated absent injunction." The Court found none of those things occurred in this case. Rather, the Court found that the district court's decision that the union's organizational efforts were not highly susceptible to being extinguished by unfair labor practices based on the facts that union's campaign had already grown cold, and the NLRB had a four (4) month delay in bringing the petition. Thus, there was insufficient evidence to warrant temporary reinstatement.

American Federation of State, County, and Municipal Emp'ees Counsel 79 vs. Scott, (May 29, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201212908.pdf>

In *American Federation of State, County, and Municipal Emp'ees Counsel 79 vs. Scott*, the 11th Circuit remanded the issue involving "suspiciousness" drug testing to the district court and held that the State of Florida must meet the burden to demonstrate important special needs on a job-category-by-category basis for testing.

The underlying case dealt with a Florida Governor Rick Scott's Executive Order mandating two types of "suspicionless" drug testing: 1.) random testing of all employees at state agencies within the Governor of Florida's control; and 2.) pre-employment testing of all applicants to state agencies within the Governor of Florida's control. Previously, the district court had found that the Executive Order mandating the two types of testing was unconstitutional as to state employees. Upon



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review, the 11th Circuit opined that because the U.S. Supreme Court case law required the trial court to balance governmental interests in suspicionless searches against each particular job categories expectation of privacy, that the State must overcome the burden to show a job-category-by-category basis for testing.

***Owusu-Ansah v. The Coca-Cola Co.*, (May 8, 2013)**

<http://www.ca11.uscourts.gov/opinions/ops/201113663.pdf>

In *Owusu-Ansah v. The Coca-Cola Co.*, the 11th Circuit held that an employer's requirement that a plaintiff undergo a psychiatric/psychological fitness-for-duty evaluation did not violate the Americans with Disabilities Act, as it was job-related, and consistent with business necessity.

The case stemmed from a Coca-Cola employee who was placed by the company on paid leave and required by the company to undergo such an evaluation. This placement was the outcome of the employee's execution of an employment questionnaire, in which he wrote "candid discussion about work environment" in the section of "barriers to success & proposed resolutions," and following his follow-up communications with employee's manager about mistreatment by employee's managers at the company in which the employee stated "someone is going to pay for this." After employee's statement, the manager took concern that a threat had been made to the company, and he reported it to his supervisors, who recommended the employee to a psychologist. The employee met with the psychologist, who concluded there was a "strong possibility that he was delusional." The employee was then placed on leave, but had follow-up assessments with the psychologist. Once the employee was eventually cleared by the psychologist for work, he brought the instant Complaint, claiming violations of 42 USC 12112(d)(4)(A) of the Americans with Disabilities Act. After oral argument, the 11th Circuit affirmed the district court's holding in favor of Coca-Cola, and looked to 10th Circuit case law to reiterate that such evaluation was "job related" because "an employee's ability to handle

reasonably well with others are essential functions of any position." In this situation, the 11th Circuit concluded that Coca-Cola had a reasonable, objective concern about the employee's mental state, which affected job performance and potentially threatened the safety of other employees, and thus did not violate the ADA.

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[http://www.cadc.uscourts.gov/internet/opinions.nsf/5A1A6E0FFB5A980D85257B44004DF52C/\\$file/11-7127-1429152.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/5A1A6E0FFB5A980D85257B44004DF52C/$file/11-7127-1429152.pdf)

In *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (2013), the District of Columbia Circuit emphasized that a supervisor's use of the "n-word" in referring to an African-American employee is absolutely unacceptable. In *Ayissi-Etoh*, the plaintiff was a member of Fannie Mae's Internal Audit Department who received a promotion along with eleven other individuals in connection with the restructuring of the department. Of the twelve promoted employees, only the plaintiff did not receive a significant salary increase upon his promotion. The plaintiff alleged that when he asked a manager why he did not receive a raise, he was told: "For a young black man smart like you, we are happy to have your expertise; I think I'm already paying you a lot of money." Later, the vice president of the plaintiff's department allegedly concluded an argument with the plaintiff by yelling, "Get out of my office _____," using a highly-offensive racial slur. While the vice president denied making the statement, an outside firm hired by Fannie Mae to investigate the incident found it "highly likely" that the statement had been made, and the



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vice president's employment was immediately terminated as a result of that finding. The plaintiff brought claims under 42 U.S.C. § 1981 for Fannie Mae's refusal to give him a raise, and hostile work environment and retaliation claims under Title VII.

On the hostile work environment claim, the District Court explained that the U.S. Supreme Court in *Faragher v. City of Boca Raton* had set forth a demanding standard for judging hostile work environment claims in order to ensure that Title VII does not become a general workplace civility code. The District Court then ruled that while the vice president's comment was "distasteful," a single utterance can rarely form the basis for a hostile work environment. Accordingly, the District Court granted summary judgment for Fannie Mae on the hostile work environment claim.

On appeal, the D.C. Circuit saw things differently. The unanimous panel first noted that the racial epithet alone "might well" have been enough to establish a hostile work environment. The court explained that that epithet was not an isolated incident, however, because it was preceded by the supervisor's "young black man" statement and followed by the plaintiff having to continue working with the vice president for nearly three months before the vice president was fired as a result of Fannie Mae's investigation. Under those circumstances, the court held that summary judgment on the hostile work environment claim was improper.

In a concurring opinion, Circuit Judge Brett Kavanaugh expressed his view that the use of the "n-word" by a supervisor suffices by itself to establish a hostile work environment. Judge Kavanaugh explained that under the Supreme Court's *Faragher* decision, conduct must be "sufficiently severe *or* pervasive," not both, to constitute a hostile work environment. Judge Kavanaugh argued that while there may be "close cases at the margins" regarding which verbal insults and epithets may be severe enough to by themselves create a hostile work environment, the epithet used by the vice president was "pure anathema to African-Americans" and "probably the most offensive word in English." Accordingly, Judge Kavanaugh expressed his understanding that a supervisor's use of the

"n-word" in referring to an employee is alone enough to create a hostile work environment.

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