Third Circuit

***Thompson v. Real Estate Mortgage Network*, ___ F.3d ___ (3d Cir. Apr. 3, 2014), 2014 WL 1317137, *available at* http://www.ca3.uscourts.gov/opinarch/123828p.pdf.**

The Third Circuit holds federal common law standard for successor liability should likewise apply to successor liability claims brought under the federal Fair Labor Standards Act (FLSA). This standard, first crafted by the Supreme Court in the context of the National Labor Relations Act, *Golden State Bottling Co., v. NLRB*, 414 U.S. 168, 181-5 (1973), and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-51 (1964), has been applied to other federal enactments such as Title VII of the Civil Rights Act of 1964 and ERISA. In holding that this federal common law standard of successor liability also applies to the FLSA, the Third Circuit joins the Seventh and Ninth Circuits on this issue.

Plaintiff was hired in June 2009 as mortgage underwriter by Security Atlantic Mortgage Company, which purported to be a "nationwide direct mortgage lender." Shortly after her hiring, she was assigned to a training class led by a representative of defendant Real Estate Mortgage Network (REMN), allegedly a "sister company" of Security Atlantic. In February 2010, plaintiff and many of her colleagues were asked to fill out job applications for REMN. From that point forward, plaintiff's paychecks were issued by REMN instead of Security Atlantic. Security Atlantic subsequently went out of business and was characterized by defendants as "defunct." Despite plaintiff's transfer to REMN, no changes occurred in her on-site operations, and her terms and conditions of employment and direct supervisors remained the same. Plaintiff continued to work for REMN until her resignation from employment on August 5, 2010.

The basis of plaintiff's lawsuit was that Security Atlantic and REMN had allegedly misrepresented to her, and to other mortgage underwriters, closers and HUD reviewers employed by the two companies, that the employees were exempt from overtime pay under the FLSA, and that the two companies failed to tender overtime pay for work those employees performed in excess of eight hours a day and forty hours per week. Plaintiff brought suit against the two companies as well as two individual defendants identified as co-owners of Security Atlantic. Plaintiff alleged that these two individuals were responsible for the day-to-day operation, hiring, firing, promotion, personnel matters, work schedules, pay policies and compensation decisions for both Security Atlantic and REMN.

Plaintiff filed a "class and collective action" under the FLSA and the New Jersey Wage and Hour law in federal district court on March 16, 2011, and later filed an amended complaint on January 27, 2012, alleging that all four defendants violated the FLSA by failing to properly compensate her for overtime worked in excess of forty hours per week and by misclassifying plaintiff as exempt from the overtime wage requirements of the FLSA. Plaintiff sought the hold REMN liable for Security Atlantic's alleged violations under theories of joint employer liability and successor employer liability. The district court dismissed plaintiff's amended complaint without prejudice on August 31, 2012, and plaintiff thereupon appealed.

On appeal, the Third Circuit first addressed the district court's dismissal of plaintiff's direct claims for overtime pay against Security Atlantic for the period June 2009 through February 2010, and her direct claim against REMN for the balance of her employment. "The District Court did not explain its reasoning for dismissal of these claims. Nor did defendants below mount a serious argument for such dismissal. Accordingly, we are left without the benefit of an articulated legal basis for the District Court's ruling." Because the "pleadings here put the corporate defendants on fair notice that the alleged violations began during [plaintiff's] employment with Security Atlantic and persisted throughout her relatively brief tenure with the two companies," the Court vacated the District Court's dismissal of plaintiff's direct claims against the two employers.

The Third Circuit then turned to plaintiff's attempt to hold REMN liable for Security Atlantic's FLSA violations under joint and successor employer

liability theories. Addressing the joint employer theory first, the Third Circuit relied on its own precedent to hold that plaintiff had pled sufficient facts to give rise to a viable joint employer claim. When assessing whether a "joint employer" relationship exists, the Third Circuit considers factors such as: the alleged employer's authority to hire and fire the relevant employees; the alleged employer's authority to promulgate work rules and assignments and to determine terms and conditions of employment; the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and, the alleged employer's actual control of employee records, such as payroll, insurance and taxes. The determination of a joint employer relationship depends on careful analysis of all the facts in the particular case. The facts and circumstances alleged by plaintiff were found to be sufficient to allow her joint employer claim to proceed.

The Third Circuit then turned to plaintiff's alternative theory that REMN was liable for Security Atlantic's alleged violations under a successor liability theory. Defendants argued that successor liability should be determined based on New Jersey law, which holds that successor corporations are legally distinct from their predecessors and do not assume any of the debts or liabilities of the prior entity except when the purchasing corporation expressly or impliedly agrees to assume such debts and liabilities, the transaction amounts to a consolidation or merger of the seller and purchaser, the purchasing corporation is merely a continuation of the selling corporation, or the transaction was entered into fraudulently in order to escape responsibility for debts and liabilities. Plaintiff argued that the federal common law standard for successor liability that had been developed in other areas of labor and employment law should apply to her FLSA claims. The federal common law standard, "which presents a lower bar to relief than most state jurisprudence, was designed to 'impose liabilities upon successors beyond the confines of the common law rule when necessary to protect important employment-related policies.'" The federal common law standard entails consideration of only the following factors: (1) continuity in operations and workforce of the successor and predecessor employers; (2) notice to the successor-employer of its predecessor's legal obligations; and, (3) the inability of a predecessor to provide adequate relief directly.

Noting that the Seventh and Ninth Circuit Courts of Appeals had "addressed the merits of this issue and concluded that application of the federal standard to claims under the FLSA is the logical extension of existing case law," the Third Circuit agreed with plaintiff's position. The Court quoted at length from the decision of Judge Posner in *Teed v. Thompson & Betts Power Solutions*, 711 F.3rd 763, 766-7 (7th Cir. 2013):

> The idea behind having a distinct federal standard applicable to federal labor and employment statutes is that these statutes are intended either to foster labor peace…or to protect workers' rights…and that in either type of case the imposition of successor liability will often be necessary to achieve statutory goals because the workers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them. This logic extends to suits to enforce the Fair Labor Standards Act…In the absence of successor liability, a violator of the Act could escape liability, or at least make relief much more difficult to obtain, by selling its assets without an assumption of liabilities by the buyer…and then dissolving…Moreover, there is an interest in legal predictability that is served by applying the same standard of successor liability…to all federal statutes that protect employees.

The Third Circuit found Judge Posner's analysis to be "well-reasoned, directly applicable, and in accordance with our own jurisprudence." Additionally, defendants provided "no compelling reason why the federal common law standard should not be applied…to this employment-related claim arising under a broad and worker-friendly federal statute."

Turing to the specific allegations of plaintiff's amended complaint, the Third Circuit found that plaintiff's allegation that all facets of the business at issue, including operations, staffing, office space, email addresses, employment conditions and work

in progress, remained the same after REMN took over Security Atlantic's operations in February 2010, was sufficient to demonstrate a plausible continuity in operations and workforce. With respect to the pre-transfer notice requirement, the Court found that plaintiff's allegation that the payroll practices of Security Atlantic remained unchanged when she was hired by REMN was sufficient at the pleading stage to set forth a plausible claim that REMN had notice of Security Atlantic's liability. And, with respect to the third factor, defendants' admission that Security Atlantic is now "defunct" was sufficient to establish that Security Atlantic was incapable of satisfying any award of damages. The Court therefore concluded that plaintiff had set forth a viable claim for successor liability under the FLSA.

Finally, noting that the FLSA imposes individual liability on "any person acting directly or indirectly in the interest of an employer in relation to an employee …", 29 U.S.C. § 203(d), the Court held that plaintiff had pled sufficient facts to make out a viable FLSA claim against the individual defendants.

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Fourth Circuit

***Freeman v. Dal-Tile Corporation*, __ F.3d __ (4th Cir. Apr. 29, 2014), 2014 WL 1678422, *available at* http://www.ca4.uscourts.gov/Opinions/Published/131481.P.pdf.**

For the first time in a published opinion, the Fourth Circuit adopted and applied a negligence standard to determine an employer's liability for third-party harassment under Title VII. The Fourth Circuit held that an employer is liable for third-party harassment if it "knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment." Using this standard, the Fourth Circuit reversed the district court's summary judgment on Plaintiff's hostile work environment claims, but affirmed summary judgment on Plaintiff's discriminatory discharge claim.

Plaintiff began working for Defendant Dal-Tile Corporation's predecessor in 2006, and later became a permanent Dal-Tile employee. During her tenure with Dal-Tile, Plaintiff reported to assistant manager Sara Wrenn. Over the next three years, Plaintiff interacted with Timothy Koester, an independent sales representative for a company that engaged in a significant amount of business with Dal-Tile. Koester repeatedly used the word "b****" around the office, talked openly about, and displayed naked pictures of, women with whom he had sexual encounters, and frequently made inappropriate sexual comments. Koester also referred to "black b****es." Plaintiff told Wrenn about Koester's comments. Wrenn responded that Koester was an "asshole," but did nothing more to remedy the objectionable conduct.

In 2009, Plaintiff reported Koester to human resources for his most recent reference to "black b****es." Plaintiff was promised that Koester would be banned from the facility permanently. The company lifted the ban, however, and instead prohibited Koester from communicating with Plaintiff. Plaintiff "was so upset about the prospect of being forced to interact with Koester," that she took medical leave and received treatment for depression and anxiety during that time. Although Plaintiff returned to work in November of 2009, she soon thereafter notified Dal-Tile that she was resigning, due to anxiety and depression.

Following her resignation, Plaintiff asserted claims against Dal-Tile for racial hostile work environment under 42 U.S.C. § 1981, racial and sexual hostile work environment under Title VII, and discriminatory discharge under § 1981. The district court granted summary judgment for Dal-Tile on the hostile work environment claims, holding that Plaintiff failed to present sufficient evidence that the harassment was objectively severe or pervasive and that Dal-Tile had actual or constructive knowledge

of the harassment. The district court also granted summary judgment for Dal-Tile on the discriminatory discharge claim.

Analyzing Plaintiff's hostile work environment claims, the Fourth Circuit ruled that Plaintiff had shown sufficient evidence from which a reasonable jury could conclude that the harassment was (1) unwelcome; (2) based on Plaintiff's gender or race; and, (3) sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create and abusive atmosphere. The Fourth Circuit highlighted the submitted evidence, including Plaintiff's complaints of harassment to Wrenn, human resources, and Koester; both Wrenn and Koester witnessed Plaintiff cry in response to the harassment; Plaintiff received treatment for anxiety and depression; Koester's repeated use of "b****es" and "black b****es"; Koester's frequent discussions of his sexual encounters and display of naked photographs of women to other employees; Koester's "lewd" comments to other employees; and, Koester's statement to Plaintiff that he could not come into work because he was "f****ed up as a n****r's checkbook."

In holding that Plaintiff presented sufficient evidence to impute the harassing conduct to Dal-Tile, the Fourth Circuit applied a negligence standard to determine whether (1) Dal-Tile knew or should have known of the harassment; and (2) took prompt action to remedy the harassment. Based on the evidence that Wrenn was either present at the time Koester made certain harassing comments or that Plaintiff told Wrenn about the comments shortly thereafter, the court found that a reasonable jury could find that Wrenn knew, or at least should have known, about the alleged harassment occurring over the three year period and that a reasonable jury could find that Dal-Tile did not take prompt steps to remedy the harassment where it failed to take any effective action for three years, during which time it knew or should have known of the harassment. Thus, the Fourth Circuit reversed the summary judgment on Plaintiff's hostile work environment claims and remanded for further proceedings.

The Fourth Circuit affirmed summary judgment on the discriminatory discharge claim, concluding that there was not sufficient evidence that Dal-Tile made "the working conditions intolerable in an effort to induce [Plaintiff] to quit," or that Koester's harassment was still creating an objectively hostile environment at the time Plaintiff resigned. Rather, the Fourth Circuit found that Plaintiff voluntarily resigned from her employment after a time in which she had not had any communication or contact with Koester for months.

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Fifth Circuit

***Gregory Willis v. Cleco Corporation*, ___ F.3d ___ (5th Cir. Apr. 8, 2014), 2014 WL 1704129, available at http://www.ca5.uscourts.gov/opinions/pub/13/13-30217-CV0.pdf.**

Plaintiff Gregory Willis filed suit raising claims of racial discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. The district court granted summary judgment on all claims, and the plaintiff appealed.

Willis was a Senior HR Representative at Cleco and, two years before his termination, he reported a racially hostile conversation between two workers. He alleges that report served as the foundation for later discriminatory conduct by Cleco. Two weeks after his report, Willis emailed a group of Cleco employees about a co-worker's son's overdose on pills, and Willis's supervisors would later discipline him for it. Months later, Willis was put on a work improvement plan for, according to his supervisors, doing his job poorly and mismanaging some of his responsibilities. The next year, in a conversation with an acquaintance working at Cleco, Willis allegedly told the acquaintance that she should spend more time with other minorities and embrace her cultural heritage. That employee complained,

and Willis would later deny that the conversation ever took place. After the production of cell phone records showing a 35 minute call between the two on that day, Cleco credited the complaining employee's version of events, and terminated Willis's employment.

In the district court, summary judgment was granted on all claims. On appeal, Willis raised two primary issues: (1) a disputed issue of fact existed regarding motive for a retaliation claim, and (2) a disputed issue of fact existed regarding pretext on the termination claim. The Fifth Circuit addressed these arguments in turn.

First, the Court reversed the district court's ruling regarding retaliation. The Fifth Circuit noted that evidence in the record showed that Willis's boss told a co-worker he was looking for a reason to terminate Willis. The Fifth Circuit noted that if the jury believed the statement was made, it would support pretext in the context of retaliation claim and, therefore, summary judgment was not appropriate. Second, on wrongful termination, the Fifth Circuit noted that the district court's dismissal was premised on the lack of a prima facie case by Willis, and Willis's brief on appeal focused on the issue of pretext. Therefore, the Fifth Circuit found arguments related to a prima facie case were not adequately briefed and waived. Therefore, the district court's judgment in this regard was affirmed.

The Fifth Circuit also disposed of other issues related to Motions for Reconsideration and other arguments made by the parties. Judge Dennis dissented from the majority's opinion based upon the evidence.

***Sandra Kay Gilbert v. Patrick R. Donahoe*, ___ F.3d ___ (5th Cir. Apr. 30, 2014), 2014 WL 1379103, available at http://www.ca5.uscourts.gov/opinions/pub/13/13-40328-CV0.pdf.**

Sandra Gilbert worked at the United States Post Office, and a dispute arose from her repeated requests for leave on several occasions. Following a "due process" interview regarding Gilbert's requests for leave during busy periods, she filed an EEO complaint alleging age and disability discrimination. Then, Gilbert sought leave for the care of her husband; leave was initially denied, then granted; and she filed a grievance on that issue as well. Her grievances were denied, and the Union appealed them to the EEOC. Gilbert also filed suit against Donahoe, the U.S.P.S. Postmaster General, alleging violations of the FMLA. While suit was pending, Gilbert made another leave request, which was denied for lack of specificity. Gilbert added a claim to the suit under the Rehabilitation Act. Donahoe moved to dismiss all claims alleging a lack of jurisdiction and failure to state a claim. The district court granted the motion, reasoning that the Collective Bargaining Agreement between Gilbert's Union and the U.S.P.S. contained a mandatory grievance procedure that required Gilbert to make her claims through that procedure.

The Fifth Circuit began by noting that a Union may agree with an employer to submit an employee's claims to mandatory, exclusive arbitration, but only if the CBA "clearly and unmistakably requires it." Here, the CBA provided that use of the grievance procedure was mandatory and included within its scope "a dispute, difference, disagreement, or a complaint between the parties related to wages, hours, and conditions of employment." The Fifth Circuit then found that portions of the CBA referenced the FMLA and Rehabilitation Act, but the CBA did so differently. For the Rehabilitation Act, the CBA specifically stated it was incorporating the statute into the CBA. Therefore, that claim was barred. However, for the FMLA, the CBA only provided policies for use in implementing the FMLA, but it did not specifically incorporate the statute. Therefore, the FMLA claim was not barred.

The Court also addressed arguments that the district court did not have subject matter jurisdiction over the FMLA claims, but it rejected those arguments. The Fifth Circuit found that regardless of the ultimate merit (or lack thereof) of the FMLA claims, the Court had jurisdiction over claims arising out of the FMLA and that Gilbert had standing to pursue her claims. The Court did, however, find that claims for injunctive relief were mooted by Gilbert's retirement.

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Sixth Circuit

***Russell v. Citigroup, Inc.*, ___ F.3d ___ (6th Cir. Apr. 4, 2014), 2014 WL 1327868, *available at* http://www.ca6.uscourts.gov/opinions.pdf/14a0061p-06.pdf.**

Plaintiff agreed to arbitrate "all employment-related disputes" with the defendant. The issue, according to the Court: "Does that mean he must arbitrate a case already pending in court when he signed the agreement?"

During plaintiff's employment from 2004 to 2009, he signed a standard contract to arbitrate all disputes. The contract covered individual claims, but not class actions. In January 2012, the plaintiff, no longer an employee, filed a class action claim alleging the defendant did not pay employees for time spent logging in and out of their computers at the beginning and end of each day. The company did not seek arbitration because the agreement he had signed did not include class actions. While the lawsuit was still in progress, plaintiff re-applied to work for the defendant. When he was rehired in January 2013, he again signed an agreement to arbitrate his disputes, which agreement had been modified to include class action claims. Plaintiff did not consult with his lawyers before signing the new agreement. And, Defendant's outside counsel in the lawsuit did not know that Plaintiff had been rehired or signed a new agreement to arbitrate until about a month after he resumed working for the Defendant.

Relying on the new agreement, Defendant sought to compel arbitration of the class action. The district court held that the second arbitration agreement did not cover lawsuits filed before it had been signed. On appeal, the Sixth Circuit affirmed: "The text [of the agreement] suggests that the agreement does not evict pending lawsuits from court." It explained that the scope of the agreement covers disputes that "arise between [Russell] and Citi." "The use of the present tense 'arise'," according to the Court, "rather than the past tense 'arose' or present-perfect 'have arisen' suggests that the contract governs only disputes that begin – that arise – in the present or future" and "[t]he present tense usually does not refer to the past." Further, the Court explained, the plaintiff's state of mind was such that he expected the agreement to apply to future suits and his behavior in signing the contract without consulting his lawyer would make little sense if he understood the contract to cover the pending case. Similarly, the defendant's actions suggest that it did not expect the new agreement to cover the pending lawsuit because it – knowing that the plaintiff was represented by counsel in the lawsuit – sent the new arbitration agreement directly to him, not his lawyers. Finally, because the arbitration agreement left no doubt as to its scope, the Court rejected as moot the defendant's argument that the Federal Arbitration Act requires courts to resolve "any doubts concerning the scope of arbitrable issues…in favor of arbitration."

***Teamsters Local Union 480 v. United Parcel Service, Inc.*, ___ F.3d ___ (6th Cir. April 4, 2014), 2014 WL 1328134, *available at* http://www.ca6.uscourts.gov/opinions.pdf/14a0062p-06.pdf.**

Plaintiff sought a declaratory judgment to enforce a settlement agreement with the Defendant. The parties' collective bargaining agreement consisted of two documents: (1) a National Masters Agreement effective from December 19, 2007 through July 31, 2013; and (2) a Supplemental Agreement to the National Agreement effective from the ratification date through July 31, 2013. Together these agreements provide extensive grievance procedures to resolve disputes. Prior to June 2010, Plaintiff filed numerous grievances concerning Defendant's methods in assigning work opportunities for shifters. The parties resolved some of the grievances in a settlement agreement on June 16, 2010. In the settlement agreement, Defendant agreed to alter its method of assigning work

opportunities to shifters and Plaintiff agreed to withdraw certain grievances with prejudice. Seeking declaratory relief, Plaintiff alleged that Defendant breached the settlement agreement. The United States District Court for the Middle District of Tennessee dismissed the case for lack of subject-matter jurisdiction.

The Sixth Circuit reviewed (*de novo*) both the dismissal for lack of subject-matter jurisdiction and the district court's conclusion on the arbitrability of the dispute and affirmed. First, the Court concluded that the district court *had* jurisdiction under section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Noting that the dispute centered on interpretations of contracts, the Sixth Circuit explained that the LMRA gives federal courts subject-matter jurisdiction regarding "suits for violation of contracts between an employer and a labor organization representing employees."

Second, however, the Court held that Defendant's breach of the settlement agreement constituted a violation of the CBA and therefore Plaintiffs must use the CBA's grievance process before seeking judicial relief. Plaintiff and Defendant entered into a CBA, which provides that "any controversy, complaint, misunderstanding or dispute" that concerns "interpretation, application or observance" of the CBA is a "grievance" and will be handled under the CBA's grievance procedures. The Court determined that the dispute was a "grievance" under the CBA since both parties agreed that the settlement agreement entailed interpreting and applying the CBA. Further, the Court noted that Plaintiff argued that Defendant's breach of the settlement agreement "constitutes a violation of the arbitration provision of the CBA."

***Pierson v. Quad/Graphics Printing Corp.*, ___ F.3d ___ (6th Cir. Apr. 18, 2014), 2014 WL 1499880, *available at* http://www.ca6.uscourts.gov/opinions.pdf/14a0079p-06.pdf.**

In 2010, Defendant acquired a rival company, and as part of the acquisition it assumed control of the facility where Plaintiff was employed as the Plant Facilities Manager. Plaintiff had thirty-nine years of experience in the industry and had seven years of experience in the specialty printing processes performed at his facility. He was never disciplined, reprimanded, or warned about performance deficiencies; nor had he received a negative performance review in the seven years at the facility. On August 19, 2011, Defendant instructed its Regional Facilities Managers to identify positions under their supervision that could be eliminated. Plaintiff's Regional Facilities Manager identified him as one whose position could be eliminated and an Energy Manager at another facility could assume his duties. On August 22, 2011, Plaintiff's Regional Facilities Manager spoke to the Human Resources Manager at Plaintiff's plant and informed her that Plaintiff would be terminated citing his "failure to be a team player." Defendant terminated Plaintiff on August 23, 2011, at sixty-two years of age. His Regional Facilities Manager made no mention to Plaintiff that his termination was a result of poor work performance or other performance issues, instead mentioning it was part of a work force reduction.

Plaintiff's forty-seven year old replacement maintained his position as an Energy Manger while assuming Plaintiff's duties, including managing the infrastructure and preparing environmental reports. He soon began spending a majority of his time (between three to five days per week) at Plaintiff's old facility before transferring his office space there completely, devoting significant time to Plaintiff's former duties. Plaintiff filed suit alleging age discrimination and retaliation under the Age Discrimination in Employment Act. Defendant filed a motion for summary judgment, which the United States District Court for the Middle District of Tennessee granted because Plaintiff could not establish a *prima facie* case of age discrimination. Plaintiff appealed only the district court's summary judgment on the ADEA claim.

The Sixth Circuit remanded the case back to the district court. It focused solely on the fourth element of the *prima facie* case – whether "the employer gave the job to a younger employee" – because the parties did not dispute the first three elements. Noting that an employer "replaces" an employee when it reassigns an existing employee to assume

the discharged employee's duties in a way that "fundamentally changes the nature of his employment," the Court concluded that a reasonable jury could conclude that Plaintiff was replaced by a younger employee. Further, the Court concluded that there was ample evidence in the record to suggest that Defendant's reason for terminating Plaintiff was a pretext in that Plaintiff presented evidence of the decision-maker's "shifting justifications" offered during discovery. The decision-maker initially determined simply that Plaintiff's facility no longer needed his position, but later he told another that Plaintiff was not a "team player." Consequently, the Court concluded that Plaintiff presented "sufficient evidence to create a genuine dispute of material fact regarding several elements of his age-discrimination claims."

***United Steel v. Kelsey-Hayes Co.*, ___ F.3d ___ (6th Cir. Apr. 22, 2014), 2014 WL 1585794, *available at* http://www.ca6.uscourts.gov/opinions.pdf/14a0084p-06.pdf.**

In *United Steel, et al. v. Kelsey-Hayes Co.*, the plaintiffs represented retired employees who worked for the defendant Kelsey-Hayes Co. until July 2006, when its plant in Jackson, Michigan was shut down. Each had retired under one of three negotiated CBAs in 1995, 1999, and 2003, which contained identical language that the defendant would establish a health insurance plan "either through a self-insured plan or under a group insurance policy or policies insured by an insurance company." Before and after the plant closed, the defendant provided group insurance plans for the retirees. However, in 2011 things changed when TRW Automotive (who had purchased defendant) sent a letter to retirees indicating it was discontinuing the group health care coverage in 2012 and instead would provide them with Health Reimbursement Accounts. TRW planned to provide contributions of $15,000 in 2012 and $4,800 in 2013. The idea was that retirees could use the HRA's to purchase their own coverage. TRW and Kelsey-Hayes failed to contribute any funding to the HRAs beyond 2013. The plaintiffs sued, alleging a breach of the CBAs in violation of the Labor Management Relations Act and ERISA, and the United States District Court for the Eastern District of Michigan granted the plaintiffs' motion for summary judgment, issued a permanent injunction, and ordered the defendants to reinstate the health coverage that had been in effect up until 2012.

The Sixth Circuit held that the implementation of the HRAs breached the CBA because they were not what the parties bargained for originally. It concluded that the CBAs established a vested right to lifetime health care benefits, and the unilateral implementation of HRAs – an entirely different form of benefits – breached the CBAs. Compensating the plaintiffs monetarily will not remedy the breaches of the CBAs, according to the Court, and the appropriate remedy is to require the defendants to do what they agreed to in the CBAs – that is, provide a group health plan. The Court rejected each of the defendants' arguments. First, rejecting the argument that HRAs provided better coverage then the group plans, the Court concluded that this "better" or "worse" argument was immaterial as a legal matter. Second, the defendant argued that, since the plaintiffs did not challenge earlier changes in group plans, they had waived their ability to challenge the change to HRAs. The Sixth Circuit disagreed, concluding that prior changes to the group coverage did not violate the CBAs because in each case one group plan was replaced with another. Finally, the defendants argued that section (h) of the health care supplement gave them the right to unilaterally modify the plaintiff's retirement benefits. The Court concluded, however, that this language applied to current employees and, therefore, was immaterial.

***Equal Employment Opportunity Commission v. Ford Motor Co.*, ___ F.3d ___ (6th Cir. Apr. 22, 2014), 2014 WL 1584674, *available at* http://www.ca6.uscourts.gov/opinions.pdf/14a0082p-06.pdf.**

EEOC v. Ford Motor Co. presents the issue of whether a telecommuting arrangement could be a reasonable accommodation under the Americans with Disabilities Act for an employee with a "debilitating disability."

In 2003, Defendant hired Harris as a resale steel

buyer. This position was responsible for handling emergency supply issues and required the individual be available to interact with members of the resale team, suppliers, and other members of the company. Between 2004 and 2008, Harris received a performance rating of "excellent plus." Throughout her tenure, Harris suffered from Irritable Bowel Syndrome (IBS). Over time her symptoms worsened and caused her to take FMLA leave. Due to the absences, her performance began to slip. In February 2009, Harris requested that she be allowed to telecommute on an as needed basis as an accommodation for her disability. Although other resale buyers were permitted to telecommute one day per week, Defendant concluded that this would not work for Harris's job and offered to move her office closer to the restroom or find her a different position in the company that would allow telecommuting. Harris rejected these options. In April 2009, she filed a charge of discrimination with the EEOC. In July 2009, Harris was placed on a 30-day Performance Enhancement Plan; and, at the conclusion of the plan, Defendant terminated her for failure to meet any of the identified objectives. The EEOC sued on Harris's behalf alleging, among other things, that Defendant failed to accommodate her disability. The U.S. District Court for the Eastern District of Michigan granted Defendant summary judgment.

The Sixth Circuit reversed and remanded, focusing on whether Harris was "otherwise qualified" for the position, despite her disability. According to the Court, the defendant had the burden to prove that there was a physical presence requirement that was an essential function of the plaintiff's position. Noting the importance of technology and how the law must respond to the "advance of technology in the employment context," the Court explained that the workplace is anywhere the employee can perform the essential functions of her duties. The defendant argued that face-to-face interaction is extremely important to the facilitation of group problem solving, and that telecommuting was insufficient to meet the requirements and demands of the position. Disagreeing, the Court was not persuaded that positions that entail a great deal of teamwork are "inherently unsuitable" for telecommuting possibilities. And, although courts often defer to the business judgment of employers in making these determinations, it noted that, even when Harris was present, the "vast majority" of interactions of her interaction with her counterparts occurred via conference call. Furthermore, her position "is not one that actually *requires* face-to-face interactions," according to the Court. Though Defendant presented evidence that physical attendance was an essential function, there was enough evidence to create a "genuine dispute" as to the conclusion.

The Court then examined whether the two alternative accommodations offered by Defendant were reasonable. Recognizing that it is up to the employer to choose accommodations from among reasonable options, the option of being closer to the bathrooms was not reasonable under the circumstances. And, because reassignment to another position is only a viable option if the only other way to accommodate an employee's disability would create an undue hardship, Defendant was not entitled to force the employee to accept another job because the employee's proposed telecommuting arrangement was reasonable. Thus, the Court held that there was a genuine issue of material fact regarding "whether [the employee could] perform all of her job duties from a remote location."

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Seventh Circuit

***Marga Baker v. Macon Resources, Inc.*, ___ F.3d ___ (7th Cir. Apr. 25, 2014), 2014 WL 1646457, *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D04-25/C:13-3324:J:PerCuriam:aut:T:fnOp:N:1334397:S:0.**

The Seventh Circuit reversed and remanded the district court's summary judgment for defendants in an age-discrimination lawsuit. Plaintiff worked for

defendant for 19 years as a caregiver for people with disabilities. After an investigation into reports of abuse, the Inspector General recommended defendant address the failure of plaintiff and two other employees to comply with a state law requiring them to report suspected abuse. Following defendant's own review, defendant concluded that all three had failed to report the abuse. As a result, the defendant fired the 56 year-old plaintiff and another 61 year-old caregiver, but chose only a three-day suspension for the 39 year-old employee.

The district court granted summary judgment to defendant concluding plaintiff and the 39-year old employee were not similarly situated because the 39 year-old neglected to report only "suspicions" of abuse, whereas plaintiff was fired for failing to report abuse she actually witnessed. The Seventh Circuit found the company's reporting policy draws no distinction in imposing a duty to report among those who "witness" abuse and those who are "told of" or have "reason to believe" it occurred. As a result, the Seventh Circuit reversed the summary judgment for defendants because it found a jury could reasonably find that plaintiff and 39 year-old are sufficiently similar to establish a prima facie case of age discrimination.

***Tina Gosey v. Aurora Medical Center*, ___ F.3d ___ (7th Cir. Apr. 11, 2014), 2014 WL 1399924, *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D04-11/C:13-3375:J:PerCuriam:aut:T:fnOp:N:1325349:S:0.**

The Seventh Circuit affirmed the district court's summary judgment for defendants on her claims of harassment and failure to promote, but vacated and remanded the summary judgment with respect to plaintiff's claims of discriminatory and retaliatory discharge.

In 2009, after working for defendant for approximately one year, plaintiff applied for and was denied a promotion. Several months after being denied the promotion, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and Wisconsin Department of Workforce Development. Two months later, the plaintiff was terminated from her job. The Seventh Circuit found plaintiff failed to introduce any direct evidence that race played a part in the promotion decision, and that plaintiff's claim failed under the indirect method because the evidence that defendant hired someone more qualified was undisputed. The Seventh Circuit found that plaintiff satisfied her prima facie burden, and that defendant's stated reason for firing her could be pre-textual. As a result, the Seventh Circuit vacated and remanded the district court's grant of summary judgment with respect to the claims of discriminatory and retaliatory discharge.

***Kendall Reid and Bradley Sears v. Neighborhood Assistance Corporation of America*, ___ F.3d ___ (7th Cir. Apr. 1, 2014), 2014 WL 1303452, *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D04-01/C:13-1768:J:Manion:aut:T:fnOp:N:1317838:S:0.**

Plaintiffs were at-will employees who worked as mortgage consultants for defendant at its Chicago office. Defendant had a policy of shredding client documents after they were scanned into the secure digital system in order to protect confidential client information. After a Director of the corporation visited the Chicago office and discovered that almost the entire office was in violation of the policy, defendants terminated three employees, including plaintiffs.

Plaintiffs filed suit alleging that they were terminated in retaliation for making protected complaints, including complaints that defendants paid its employees less than minimum wage and had illegal business practice. The district court granted Defendant summary judgment, and the Seventh Circuit affirmed. The Court found that the timing between the complaints and the termination could not support an inference of retaliatory intent and that the reasons proffered by defendants for plaintiffs' termination were not pre-textual.

***Victoria Harper v. Fulton County, Illinois*, ___ F.3d ___ (7th Cir. Apr. 8, 2014), 2014 WL 1363996, *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D04-08/C:13-2553:J:Manion:aut:T:fnOp:N:1321864:S:0.**

Plaintiff was the County Treasurer for Fulton County, Illinois. In 2010, the all-male Finance Committee recommended against increasing plaintiff's salary, but recommended to increase the salary of the County Clerk, who was a male. Plaintiff sued, claiming that the decision to deny her pay raises was the result of sex discrimination.

Plaintiff sought to establish her claims through both the direct and indirect methods of establishing discrimination. The Seventh Circuit affirmed summary judgment for defendant after finding that plaintiff's claims failed under both the direct and indirect methods. As for the direct method, the Court found that the testimony of other female employees failed to establish that the Finance Committee's recommendation was based on plaintiff's gender. For the indirect method, the Court found that plaintiff failed to establish that any of the reasons that defendant gave for denying her pay raises were pre-textual.

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Eighth Circuit

***Gilster v. Primebank*, ___ F.3d ___ (8th Cir. Apr. 4, 2014), 2014 WL 1356814, *available at* http://media.ca8.uscourts.gov/opndir/14/04/123064P.pdf.**

Mindy Gilster worked as a Credit Administrator at Primebank's branch in Sioux City, Iowa, beginning in December 2007. Gilster filed an internal sexual harassment complaint in July 2009, alleging continuing sexual harassment by her supervisor, Joseph Strub. Primebank investigated Gilster's complaint and disciplined Strub. Gilster began complaining of retaliation by Strub in late July 2009; and, those complaints continued and intensified until Primebank fired her in February 2011. Gilster was fired just three days after filing a second charge of discrimination with the Iowa Human Rights Commission.

A jury returned a verdict in favor of Gilster on her claims of sexual harassment and retaliation, awarding her more than $900,000. Primebank moved for a new trial based, in part, on plaintiff's counsel's closing argument. Specifically, Gilster's attorney referenced her own experience of being sexually harassed and not reporting the harassment out of fear for retaliation. The attorney also vouched for her client's honesty and referenced other past clients she had who were also subject to unlawful retaliation. Primebank objected during the argument but the trial judge overruled the objections. The judge, while recognizing that the argument was improper, denied the motion for new trial because Primebank did not show that it was prejudiced.

On appeal of the trial court's denial of its motion for new trial, the court reversed, holding that the inappropriate closing argument required for a new trial. The Eighth Circuit disagreed with the trial court's finding of lack of prejudice, holding that Primebank was prejudiced for three specific reasons. First, the comments were significant, they were not "minor aberrations made in passing." Second, the trial court did not adequately cure the inappropriate comments because it overruled Primebank's timely and proper objections. Third, the significant size of the jury's award suggested that Gilster's counsel's argument had a prejudicial impact.

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Ninth Circuit

***Stockwell v. City and County of San Francisco*, __ F.3d ___ (9th Cir. Apr. 24, 2014), 2014 WL 1623736, *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/04/24/12-15070.pdf.**

In this case, the Ninth Circuit clarifies the commonality requirements in a motion for class certification, holding that the courts are not to base commonality determinations on the merits of the class' claims.

The San Francisco Police Department ("SFPD") administered a promotional examination for members of its police department to qualify for promotional consideration. In 1998, a number of police officers over the age of 40 performed well enough on the examination to qualify for consideration for promotion to the position of Assistant Inspector, and were placed on a promotional list for consideration (the "Q-35 List"). In 2005, the Chief of Police announced that the SFPD would no longer promote Assistant Inspectors from the Q-35 list, and that it would administer a new examination to create a list of eligible officers.

The officers on the Q-35 list filed an action alleging disparate impact discrimination based on age, and a pattern and practice of discrimination, and under California's Fair Employment and Housing Act ("FEHA"). The officers sought class certification under the FEHA for their disparate impact claim, and the district court denied the officers' motion in this regard for lack of commonality based on the conclusion that the officers' statistical proof did not ultimately show a disparate impact. The Ninth Circuit reversed the district court's denial of class certification, holding that the district court erred when it based its commonality analysis on the merits of the class's claims, rather than on the existence of common questions of law and fact. Because the officers had presented a common question of whether the SFPD's policy had an impermissible disparate impact on the basis of age, the denial of class certification for lack of commonality was in error.

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Eleventh Circuit

***Paylor v. Hartford Fire Ins. Co.*, ___ F. 3d ___ (11th Cir. Apr. 8, 2014), 20014 WL 363544, *available at* http://www.ca11.uscourts.gov/opinions/ops/201312696.pdf.**

The Court affirmed the district court's decision that the plaintiff's knowing and voluntary execution of a severance agreement settled claims based on past employer conduct. While the employee claimed she only signed the agreement because her stress level was unmanageable, the district court looked at the totality of circumstances and determined the release was knowing and voluntary. As such, the employer was entitled to judgment as a matter of law, and the agreement was valid.

At issue was a question regarding waiver of an employee's prospective FMLA rights. The Court concluded that the FMLA prohibition of prospective waiver only bars employee waiver of FMLA rights for actions that have not yet happened. In *Paylor*, the action the employee took issue with happened before execution of the Severance Agreement. Therefore, prospective waiver was not at issue and the district court decision was affirmed.

***Mazzeo v. Color Resolutions In't, LLC*, ___ F. 3d ___ (11th Cir. Mar. 31, 2014), 20014 WL 1274070, *available at* http://www.ca11.uscourts.gov/opinions/ops/201210250.pdf.**

The Court vacated the district court's summary judgment in favor of the employer regarding claims under ADA, ADEA, and Florida Civil Rights Act, and remanded for further proceedings.

At issue were the amendments to the ADA, and

whether the employee submitted sufficient evidence on his disability claims under the ADA and the Florida Civil Rights Act to make a prima facie case. The employee suffered from a herniated disc, which caused pain to his lower back, affecting major life activities including his ability to walk, bend, sleep, and lift more than ten pounds; the pain increased from prolonged sitting and standing. The Eleventh Circuit found that Plaintiff sufficiently pled a disability.

Reversing the ADEA ruling, the Court found that the district court erroneously applied the *prima facie* standard governing reduction-in-force cases. The Eleventh Circuit explained that, whether the RIF or standard version applied depends on the employee's ability to present evidence that he was replaced by a younger individual rather than having his position eliminated. In this case, plaintiff claimed that he was replaced because some of his responsibilities were delegated to another employee, in addition to the other employee's own responsibilities. Considering the evidence in light most favorable to the employee, the Court concluded that his position was not eliminated, and a reasonable jury could find that he was replaced by consolidating his position with another.

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