



First Circuit

Ponte v. Steelcase Inc., ___ F. 3d ___ (1st Cir. Jan. 31, 2014), 2014 WL 341166, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-2011P-01A.pdf>

The United States District Court for the District of Massachusetts issued summary judgment on a Plaintiff's sexual harassment and retaliatory termination claims. On appeal, the First Circuit held: (1) the district court did not err in concluding that no reasonable juror could find that plaintiff was subjected to sexual harassment because she did not prove hostile work environment nor that the alleged conduct interfered with her performance; and (2) even if plaintiff had made a prima facie case of retaliation - which she did not because there was no causal nexus between her statements and her termination - she did not establish that the employer's legitimate, non-retaliatory reason for termination was a mere pretext.

Pierce v Cotuit Fire Dist., ___ F.3d ___ (1st Cir. Jan. 28, 2014), 2014 WL 291946, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-1428P-01A.pdf>

Plaintiff, a former captain of the Cotuit Massachusetts Fire Department, filed a Complaint against the Department, the Fire Chief, and the Board of Fire Commissioners, alleging political discrimination in violation of the First Amendment and [42 U.S.C. § 1983](#), retaliation in violation of the Massachusetts Whistleblower Act, and tortious interference with contract. The district court dismissed all claims and the First Circuit affirmed.

The First Circuit held that plaintiff failed to make a prima facie showing of political discrimination against the Board and, assuming that he did establish a prima facie against the Fire Chief, failed to prove that the articulated legitimate and non-discriminatory reasons were pretextual. The Court also concluded that Pierce failed to make a prima facie showing of retaliation and assuming he did, the Board offered legitimate reasons he did not

contest. With respect to the tortious interference claim, the First Circuit held that interference can be claimed against a third party not Pierce's own employer. However, the First Court opined that interference can be claimed against a supervisor, but the evidence on record was not sufficient to analyze whether the Fire Commissioners were supervisors. Notwithstanding, the Court held that assuming they were, the test of contractual interference was not met because Plaintiff did not prove "actual malice."

Pina v. Children's Place, ___ F.3d ___ (1st Cir. Jan. 27, 2014), 2014 WL 278513, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-1609P-01A.pdf>

Plaintiff alleged employment discrimination and retaliation base on her race. Plaintiff's first charge of discrimination was dismissed after the Massachusetts Commission concluded that she had engaged in a pattern of unprofessional behavior resulting in her termination. She filed a second discrimination charge alleging that The Children's Place failed to interview and re-hire her on the basis of race and in retaliation for her first charge. This second charge was likewise dismissed.

The First Circuit held that plaintiff failed to establish a prima facie case of discrimination and even assuming she did, she did not meet the burden of proving that the nondiscriminatory reasons for her termination were pretextual. The Court concluded that plaintiff also failed to meet her prima facie case of retaliation and did not show, as required, that the position to which she applied was vacant, nor that she was qualified for the position to which she applied. In addition, the Court held that she failed to establish the employer's knowledge of the first charge. Hence, she failed to present proof of a causal connection between her protected conduct and the adverse employment action.

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Fourth Circuit

***Summers v. Altarum Institute, Corp.*, 740 F.3d 325 (4th Cir. Jan. 23, 2014).**

Applying the recent amendments to the Americans with Disabilities Act (“ADA” or the “Act”), the Fourth Circuit held that a sufficiently severe temporary impairment caused by an injury can constitute a disability covered by the Act. On that basis, the Court reversed the district court’s dismissal of an ADA wrongful-discharge claim.

Plaintiff worked as a senior analyst for government contractor Altarum Institute. After Plaintiff fell and injured himself while on his way to work at a client’s offices, his doctors forbade him from putting any weight on his left leg for six weeks and estimated that he would not be able to walk normally for at least seven months. Plaintiff contacted Altarum about obtaining short-term disability benefits and allowing him to work from home as he recovered. The Altarum representative agreed to discuss accommodations that would allow the plaintiff to return to work, but suggested that he take short-term disability. Altarum’s insurance provider granted the short-term disability benefits; however, Altarum did not follow up on the plaintiff’s request to discuss how he might return to work. Thereafter, Altarum terminated plaintiff’s employment.

Plaintiff filed an ADA action asserting wrongful discharge and failure to accommodate. The district court granted Altarum’s motion to dismiss finding that, even though Plaintiff had “suffered a very serious injury,” this injury did not constitute a disability because it was temporary and expected to heal within a year. Plaintiff appealed only the wrongful-discharge ruling.

The Fourth Circuit held that, under the ADA Amendments Act of 2008 (“ADAAA”) and the EEOC’s clarifying regulations, Plaintiff’s alleged impairment was not excluded from being a disability because it was a temporary condition. Plaintiff alleged that he suffered an actual disability under the Act, meeting the requirement of “a physical or mental impairment that substantially

limits one or more major life activities,” because his injury substantially limited his ability to walk. The ADAAA provides that the definition of disability “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by [its] terms.” Further, the term “substantially limits” is to be interpreted consistently with the liberalized purposes of the Act’s amendments. The EEOC’s regulations state that “substantially limits” is to be construed broadly in favor of expansive coverage and that the term was “not meant to be a demanding standard.” The regulations also expressly state that “effects of an impairment lasting or expected to last fewer than six months can be substantially limiting” for purposes of proving an actual disability.

The Fourth Circuit held that the plaintiff had alleged a disability under the Act sufficiently plausible to survive a Rule 12(b)(6) motion. According to the Fourth Circuit, the district court misapplied the ADA disability analysis when it reasoned that because the plaintiff could have worked in a wheelchair, he was not disabled. The Fourth Circuit explained: “A court must first establish whether a plaintiff is disabled by determining whether he suffers from a substantially limiting impairment. Only then may a court ask whether the plaintiff is capable of working with or without an accommodation.” Here, the plaintiff’s allegations that his accident left him unable to walk for seven months, and “likely” unable to walk for much longer without surgery and physical therapy, could constitute a disability.

The Fourth Circuit rejected Altarum’s argument that the EEOC regulations were not entitled to deference. Applying the familiar test established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court found the EEOC’s interpretation that a severe temporary impairment may constitute a disability under the Act was reasonable. The Court also rejected Altarum’s argument that Plaintiff’s impairment was not covered because it was caused by an injury. The Court ruled that “nothing about the ADAAA or its regulations suggests a distinction between impairments caused by temporary injuries and impairments caused by permanent conditions.”



Accordingly, the Fourth Circuit reversed the dismissal of the ADA wrongful-discharge claim and remanded the case for further proceedings.

***McCray v. Maryland Department of Transportation*, ___F.3d __ (4th Cir. Jan. 30, 2014), 2014 WL 323272, available at <http://www.ca4.uscourts.gov/Opinions/Published/131215.P.pdf>**

The Fourth Circuit reversed the district court's summary judgment dismissing a former employee's Title VII claim against the Maryland Department of Transportation ("MDOT") and Maryland Transit Administration ("MTA"), holding that the district court abused its discretion by entering summary judgment before the employee had a chance to conduct discovery. The Fourth Circuit ruled that the state agencies were not shielded by legislative immunity because plaintiff alleged discriminatory acts that took place before any legislative activity. However, the Fourth Circuit affirmed the district court's dismissal of the plaintiff's Americans with Disability Act ("ADA") and Age Discrimination in Employment Act ("ADEA") claims based on Eleventh Amendment immunity.

Plaintiff had worked for the MTA for nearly forty years before her position was eliminated for budgetary reasons. Plaintiff had been diagnosed with diabetes, and in 2007 she had fainted at work. After this incident, her supervisor began to question her ability to work. The supervisor's behavior continued even after the plaintiff provided him with documentation from her doctors and an independent medical examination confirmed her fitness to duty. In 2008, Plaintiff's main job was transferred to a consultant, leaving her with no significant work. Other employees in her unit were overwhelmed with work, but Plaintiff's requests for more responsibilities were denied. Thereafter, the supervisor informed Plaintiff that her position was eliminated because of budget cuts.

Plaintiff filed suit seeking relief under the ADA, ADEA, and Title VII. She alleged that her position was eliminated because of discriminatory animus due to her race, gender, age, and disability. Before

any meaningful discovery had taken place, the state agencies moved to dismiss on the ground that legislative immunity barred any claims because the position was eliminated pursuant to a state budget decision. Denying the plaintiff's Rule 56(d) motion for more time to conduct discovery, the district court converted the defendants' motion to a summary judgment motion and granted it based on legislative immunity.

On appeal, the Fourth Circuit affirmed the district court's dismissal of the plaintiff's ADA and ADEA claims, though not on legislative immunity grounds. Rather, the Fourth Circuit held that the Eleventh Amendment barred these claims against the state agencies. The Fourth Circuit held, however, that the Eleventh Amendment did not bar the Title VII claim because Congress abrogated states' Eleventh Amendment immunity when it enacted Title VII, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976). Although the legislative immunity argument complicated the Court's consideration of the district court's denial of the Rule 56(d) motion, the Court ruled that Plaintiff should have had the opportunity to conduct discovery based on allegations that discriminatory actions took place before the legislative activity began.

Plaintiff alleged that she was subject to discriminatory adverse employment actions that made her position vulnerable to the budget cuts that eventually came. At the time of the summary judgment motion, Plaintiff had not had the opportunity to depose supervisors at MDOT or MTA. Additionally, Plaintiff had no information on how positions were chosen for termination, or why other positions were kept. The Court said that, without this information, it would be impossible for Plaintiff to make an argument that she was fired for discriminatory reasons. The Court emphasized that Rule 56(d) motions for more discovery are proper in cases like this one where the main issue is one of motive and most of the key evidence lies in the control of the moving party.

The Fourth Circuit explained that legislative immunity extends beyond legislators, that enacting a budget is a legislative act, and that eliminating a position is more likely to be "legislative" than the



hiring or firing of a particular employee. Further, legislative immunity extends to those that advise legislators and makes motive irrelevant: "Legislative immunity is a shield that protects despicable motives as much as it protects pure ones." The Court said that if the legislature had simply cut the plaintiff's position, that action would be shielded by legislative immunity. But in this case, Plaintiff alleged discriminatory actions that took place before any legislative action. Thus, granting summary judgment before the plaintiff had the chance to discover facts essential to her claim was error.

Cobra Natural Resources, LLC, v. Federal Mine Safety & Health Review Comm'n, __ F.3d __ (4th Cir. Jan. 27, 2014), 2014 WL 279841, available at <http://www.ca4.uscourts.gov/Opinions/Published/131406.P.pdf>

The Fourth Circuit dismissed a petition for review of a Federal Mine Safety and Health Review Commission (the "Commission") order that temporarily reinstated a coal mine employee pending the final order on his complaint, finding that the order was not reviewable under the collateral order doctrine.

The Mine Safety and Health Act of 1977 (the "Mine Act") includes a whistleblower provision that prohibits mine operators from discriminating against coal miners for making complaints "under or related to" the Mine Act, including safety complaints. Pursuant to the Mine Act, the Secretary of Labor receives a coal miner's discrimination complaint and conducts an investigation. If the Secretary determines the claim is not "frivolously brought," the Secretary applies to the Commission for an order to temporarily reinstate the employee, pending a final order on the complaint. A coal mine operator may appeal the Secretary's decision and request a hearing before an Administrative Law Judge ("ALJ"). The reinstatement order is subject to changes that occur at the mine, and a temporary reinstatement obligation can be "tolled" by the occurrence of certain events. If the Secretary determines that the operator has violated the whistleblower provision, the Secretary must file a

complaint with the Commission and the matter proceeds to a hearing and the issuance of a final order; if the Secretary's investigation shows that no violation occurred, the miner's temporary reinstatement ends.

In this case, a coal mine employee filed a complaint under the Mine Act alleging that Cobra had terminated his employment in retaliation for engaging in protected activity. The Secretary determined that the employee's claim was not frivolous and applied to the Commission for temporary reinstatement. Cobra requested a hearing on the application, asserting that the employee's complaint was frivolous and raising a tolling defense based on a multi-employee layoff. The ALJ determined that the miner was entitled to temporary reinstatement pending a final order and rejected Cobra's tolling argument. Cobra sought review of the ALJ's order and the Commission granted review, but the Commission affirmed the reinstatement order. Cobra filed a petition for review with the Fourth Circuit asserting jurisdiction under the collateral order doctrine.

The Fourth Circuit only addressed the jurisdictional issue and found that the reinstatement order did not meet the requirements of the collateral order doctrine because it did not conclusively determine a disputed question, the reinstatement issues were not sufficiently separate from the merits, and the coal operator's interests were not sufficiently important to give rise to collateral order jurisdiction. Judge Agee dissented, arguing that the Court had jurisdiction under the collateral order doctrine, and that the case should be remanded to the Commission for a new hearing before the ALJ.

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Fifth Circuit

***Clinton Williams v. Liberty Mutual Ins. Co.*, ___ F.3d ___ (5th Cir. Jan. 28, 2014), 2014 WL 321839, available at <http://www.ca5.uscourts.gov/opinions/pub/11/11-60818-CV0.pdf>**

Clinton Williams was injured in Mississippi while working for an Alabama general contractor. The contractor's insurer, Liberty Mutual Insurance, did not timely begin paying workers' compensation benefits to Mr. Williams. Mr. Williams pursued workers' compensation claims in both Alabama and Mississippi proceedings, and ultimately, Liberty Mutual conceded its liability to pay the benefits to Mr. Williams. Mr. Williams then filed suit in Mississippi State Court for Liberty Mutual's alleged intentional bad faith refusal to pay workers' compensation timely. Liberty Mutual removed the case and moved to dismiss it.

Under Mississippi law, a worker may recover damages in tort from a workers' compensation insurer for bad faith refusal to pay benefits, the rationale being that the action arises from an independent tort outside the scope of the worker's employment. In Alabama, however, such a claim is not available, unless the conduct of the insurer rises to the level of "outrage," which requires proof beyond bad faith refusal to pay. There is no dispute that Mississippi choice of law rules governed to determine which substantive law would control Mr. Williams' claims.

The Fifth Circuit found (and the parties agreed) that the issue of law in the case was substantive, not procedural, so the next question was whether Mr. Williams' claim for damages was best characterized as a tort or contract action. Relying upon Mississippi Supreme Court jurisprudence, the Fifth Circuit found that the conduct alleged by Mr. Williams was an independent tort and that Mississippi applies the Restatement Second in determining choice of law in tort matters. Notwithstanding the various factors set forth by the Restatement Second, the Court noted that Mississippi courts apply the law of the place of the injury unless another State has more significant

relationship to the action. Consequently, the Court ruled that Mississippi law has the most significant relationship to the tort action and Mississippi substantive law governs the dispute. Therefore, the Fifth Circuit reversed the district court's dismissal of Mr. Williams' complaint, and remanded the case for further proceedings.

***Nadiya Williams-Boldware v. Denton County, Texas*, ___ F.3d ___ (5th Cir. Jan. 31, 2014), 2014 WL 349749, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-40044-CV0.pdf>**

Nadiya Williams-Boldware was a prosecutor in the Denton County D.A.'s office. She alleged that she had been exposed to remarks regarding "white pointy hats," "boom boxes," and, after she complained, comments from others in the office that she was a "troublemaker." In the district court, claims against the individual defendants and the D.A.'s office were dismissed via motion practice, but the case proceeded to trial on the hostile work environment claim against Denton County alone. The jury found in favor of Ms. Williams-Boldware on the hostile work environment claim and awarded her damages of \$510,000.

On appeal, the Court did not address the issue of whether the conduct in question was sufficiently severe or pervasive to create a hostile work environment. Instead, the Court noted the Denton County's response to Ms. Williams-Boldware's initial complaint "could not have been more prompt." The Court noted that the district attorney and first assistant were involved in an investigation less than twenty-four hours after the complaint was lodged. Ms. Williams-Boldware requested a meeting with the alleged harasser; that request was granted immediately; and the alleged harasser was reprimanded and required to attend diversity training. Finally, additional administrative changes were made in the office in an attempt to avoid future concerns of harassment, and there was no evidence of persistent racial harassment after the remedial acts noted above. Therefore, the evidence did not support a hostile work environment claim against Denton County.



As to the individual defendants, the Court affirmed the district court's dismissal of them. The Fifth Circuit noted that the complaint was conclusory and speculative; it simply lacked the specificity necessary to overcome a qualified immunity defense for the public officials named in the suit. Therefore, the Court affirmed that portion of the district court's decision.

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Sixth Circuit

***Deleon v. Kalamazoo County Road Commission*, 739 F.3d 914 (6th Cir. Jan. 14, 2014).**

The Sixth Circuit reversed summary judgment in favor of an employer who argued that there was no adverse employment action after an employee was involuntarily transferred to a position that he had previously applied for, but was denied, and then later transferred.

The employee had applied for the position of Equipment and Facilities Superintendent, but did not receive the position. Nine months later, he was involuntarily transferred to that position, which the employer argued was a lateral move.

In reversing, the court recognized that a transfer may constitute an adverse action "so long as the particular circumstances present give rise to some level of objective intolerability." In this case, the working conditions of the new position were more arduous and dirtier than the prior position. The majority reasoned that a genuine issue of material fact as to whether the transfer was materially adverse to a reasonable person precluded summary judgment. The majority also rejected the contention

that, because the employee had previously applied for the position, a later transfer to that position could not be considered an adverse employment action. Judge Sutton dissented and characterized the transfer as voluntary and stated that there was no adverse employment action.

***McClain v. Eaton Corp. Disability Plan*, ___ F.3d ___ (6th Cir. Jan. 24, 2014), 2014 WL 259695, available at**

<http://www.ca6.uscourts.gov/opinions.pdf/14a0019p-06.pdf>

The Sixth Circuit affirmed the denial of a claim for long term disability benefits, ruling that it was rational for the plan administrator to conclude that the participant was not disabled from performing "any" work, where the administrative record demonstrated that she was able to perform "some" work.

A participant received long term disability benefits for 24 months under a Plan provision that defined disability as being unable to perform the essential functions of the participant's job or a suitable alternative position with the company. After 24 months, the Plan switched from an "own occupation" standard to an "any occupation" standard. Because the participant's treating physician concluded that the participant could perform part-time work, the administrator informed the participant that she was no longer considered disabled under the terms of the Plan. Subsequent appeals were denied, but the appeal denials did not indicate that the participant could perform part-time work. They did, however, refer to medical evidence showing that the participant could perform some work with restrictions.

Applying the arbitrary and capricious standard of review, the court rejected the participant's argument that the plan administrator was limited to the reason in the initial denial, which was based on the physician's determination that she could perform part-time work. The Sixth Circuit rejected this argument, concluding that the plan administrator did not switch reasons for the claim denial. Instead, it concluded that at all stages of the administrative



process, the claim was denied because the participant was unable to show she was disabled. The court found that the administrator put forth alternative reasons, supported by the administrative record, that the participant was able to return to sedentary work, either at a full-time or a part-time schedule, and therefore did not meet the definition of a disability.

The court also rejected the participant's argument that the part-time jobs she could perform would place her below poverty level. The Court was "not convinced that the part-time jobs proposed by the [Transferable Skills Assessment] constitute wages at a mere 'pittance,' such as to qualify Plaintiff as disabled." Accordingly, the court held "[i]t is reasonable to conclude that an ability to do some work means one is not unable to do 'any work.'"

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Seventh Circuit

***Beverly Ballard v. Chicago Park District*, ___ F.3d ___ (7th Cir. Jan. 28, 2014), 2014 WL 294550, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D01-28/C:13-1445:J:Flaum:aut:T:fnOp:N:1281302:S:0>**

Affirming the district court's denial of summary judgment, the Court noted that where the care takes place has no bearing on whether the employee receives FMLA protections.

Plaintiff lived with her terminally ill mother and served as her primary caregiver. Plaintiff arranged a six-day trip to Las Vegas for her mother as part of her end-of-life hospice planning. While in Las Vegas, Plaintiff continued to assist her mother with the same basic health needs. Following the trip, Plaintiff was eventually terminated for unauthorized absences accrued during her trip.

Despite contrary opinions from the Ninth and First Circuit, the Seventh Circuit held the FMLA's text does not restrict care to a particular place or geographical location. The court noted the other circuit cases failed to explain why certain services provided to a family member at home should be considered "care," but those same services provided away from home should not be.

***Stacy Alexander and Kim Rogers v Casino Queen, Inc.*, 739 F.3d 972 (7th Cir. Jan. 8, 2014), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D01-08/C:12-3696:J:Flaum:aut:T:fnOp:N:1269523:S:0>**

The Seventh Circuit affirmed the district court's entry of summary judgment as to the hostile work environment claim but reversed the district court's entry of summary judgment as to the race discrimination and retaliation claims and remanded for further proceedings.

Plaintiffs, African-American cocktail waitresses at defendant's casino, alleged race discrimination, retaliation, and a hostile work environment under Title VII based on allegations regarding floor reassignment, discipline and privileges. The district court held plaintiffs did not prove an adverse employment action and that doomed their race discrimination and retaliation claims.

On appeal, the Seventh Circuit rejected the district court's conclusion and found that reassignments to floor positions in less lucrative areas constituted adverse employment action because tips compromised 40-73% of plaintiffs' compensation. The Seventh Circuit concluded the plaintiffs' had established race discrimination and retaliation sufficient to survive summary judgment. Finally, the Seventh Circuit affirmed the district court's summary judgment on the hostile work environment claim because plaintiffs failed to show enough facts to prove their work environment was objectively offensive because their work was not physically threatening nor was it openly racist, nor did it unreasonably interfere with plaintiffs' performance.



***Kimberly Spurling v C&M Fine Pack, Inc.*, 739 F.3d 1055 (7th Cir. Jan. 13, 2014), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D01-13/C:13-1708:J:Kanne:aut:T:fnOp:N:1272346:S:0>**

The Seventh Circuit affirmed summary judgment dismissing Plaintiff's FMLA claim but reversed of summary judgment on the ADA claim and remanded for further proceedings.

Plaintiff received several disciplinary warnings for falling asleep at work. After meeting with management, plaintiff received a letter notifying her that she was suspended pending determination of the level of discipline. Plaintiff then met with her physician who diagnosed her with a disability covered under the ADA. Plaintiff informed defendant of the diagnosis and was terminated a few days later. The district court held that termination occurred when plaintiff received the initial letter from defendant before she met with her physician. As a result, the ADA claim failed because defendant could not have discriminated against plaintiff as it had terminated her before having any knowledge of her condition.

The Seventh Circuit rejected the district court's holding and found that plaintiff was terminated after informing defendant of her covered condition. The court further found that defendant failed to engage in the interactive process to find a reasonable accommodation because defendant failed to contact plaintiff's doctor to determine severity of plaintiff's ADA claim or how defendant might be able to provide reasonable accommodations.

As to the FMLA claim, the district court held that, since defendant was unaware of the qualifying condition, it could not be liable for firing her under the FMLA. The Seventh Circuit affirmed the district court's holding because plaintiff failed to provide defendant with sufficient information to notify them she had a serious health condition that required FMLA protection. The court found that because plaintiff in the past attributed her sleep issues to medication, her email asserting she needed

time off to determine why she was falling asleep was insufficient to put defendant on notice that she had a serious medical condition that required FMLA leave.

***Gaines v. K-Five Construction Corporation*, ___ F.3d ___ (7th Cir. Jan. 1, 2014), 2014 WL 28601, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D01-03/C:12-2249:J:Darrow:aut:T:fnOp:N:1267488:S:0>**

The Seventh Circuit reversed the district court's grant of summary judgment and remanded the case for further proceedings.

Plaintiff worked as a truck driver for defendant for five years. Defendant fired plaintiff after he refused to drive a truck that he deemed unsafe and after he falsely attributed a statement to defendant's mechanic in his Daily Driver's Report. Plaintiff filed suit alleging that he was fired because of his national origin and/or because he complained about safety issues.

The district court granted summary judgment dismissing the case after finding that plaintiff's refusal and delays in driving the truck were not protected activities because they were not based on an objectively reasonable belief that the truck was unsafe. The Seventh Circuit upheld the district court's grant of summary judgment for the Title VII claim. However, the Seventh Circuit reversed the district court's grant of summary judgment on the ground that plaintiff has presented a genuine issue of material fact as to whether his refusals to drive the truck and his Daily Driver's Report were protected under the Surface Transportation Assistance Act.

***Margarita Zayas v. Rockford Memorial Hospital*, ___ F.3d ___ (7th Cir. Jan. 30, 2014), 2014 WL 325260, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D01-30/C:13-2555:J:Cudahy:aut:T:fnOp:N:1282801:S:0>**



The Seventh Circuit affirmed the district court's entry of summary judgment in favor of defendant because there was insufficient evidence to find plaintiff's termination was based on anything other than her misconduct in sending the disrespectful emails despite warnings from her supervisor.

Plaintiff, a 55-year-old Puerto Rican woman who worked as an ultrasound tech, was terminated after sending her supervisor a series of disrespectful emails, despite plaintiff's supervisor's warning. Plaintiff brought a national origin discrimination claim, a hostile work environment claim and an age discrimination claim.

The Seventh Circuit found the paper trail of emails and disregarding her supervisor's written warning indicated that plaintiff was not meeting her employer's expectations at the time of termination. Additionally, plaintiff failed to show a similarly situated employee who engaged in similarly unprofessional conduct who was not disciplined for it. Furthermore, despite citing numerous hostile incidents, none of them was related to plaintiff's national origin, nor were these incidents objectively severe enough to survive summary judgment.

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Eighth Circuit

Rester v. Stephens Media, LLC, 739 F.3d 1127 (8th Cir. Jan. 13, 2014).

Plaintiff Leretta Rester filed a Title VII suit against her former employers alleging sex discrimination, hostile work environment, constructive discharge and retaliation after a confrontation with her supervisor.

On one occasion, she had a disagreement with her supervisor at which point he slammed his hands on the desk, screamed and cursed at her. Rester rolled

her chair back, stood up and stated she needed to leave, but her supervisor put his hands on her three times and physically prevented her from leaving until she likewise started wailing, cursing, screaming and hollering. Following the event, Rester returned to work and her supervisor apologized. Nine days later, Rester reported the incident to the head of the company along with human resources. She told them she "loved her job and wanted to keep working". No disciplinary action was taken against the supervisor. Shortly thereafter Rester gave her two weeks' notice. Although she was asked to reconsider given her supervisor's imminent retirement, she declined.

The district court summarily dismissed Rester's Title VII claims, and the Eighth Circuit affirmed. As to the sex discrimination claim, the Court held that she was not terminated, did not lose pay or benefits, and her job duties did not change. Likewise, there was no evidence in the record that she was treated differently because of her sex. As to the hostile work environment claim, the Court held, "This singular incident, while most unfortunate, does not meet the standard required. The incident related to a workplace disagreement and the conduct does not denote a sexist connotation." Further, the Court noted the conduct did not permeate the workplace. The Court then held that as the hostile work environment claim fails, her constructive discharge claim must also fail as does her retaliation claim.

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Ninth Circuit

Maida Dzakula v. John M. McHugh, Secretary of the Army, ___ F.3d ___ (9th Cir. Jan. 14, 2014), 2014 WL 128605, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/15/11-16404.pdf>



The opinion previously filed on December 11, 2013 and published at 737 F.3d 633 was amended to reflect evidence not disputed by the parties.

This case is an appeal in which the plaintiff former employee had filed for Chapter 7 bankruptcy protection and failed to list her employment discrimination action on the bankruptcy schedules. The panel held that the district court applied the correct legal rule, properly weighed the factors set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001), and did not otherwise err in concluding that plaintiff's omission on her bankruptcy schedule was neither inadvertent nor mistaken. Accordingly, judicial estoppel barred her employment discrimination action.

Aircraft Service International, Inc. v. International Brotherhood of Teamsters ALF CIO Local 117 et al., ___ F.3d ___ (9th Cir. Jan. 10, 2014), 2014 WL 92236, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/13/12-36026%20web%20corrected.pdf>

This case is an appeal from the United States District Court for the Western District of Washington arising from plaintiff employer indefinitely suspending one of its employees for alleged "inappropriate behavior" eventually resulting in defendant's decision to strike at Sea-Tac after spending approximately two weeks trying to gain the reinstatement of that employee. The district court issued a temporary restraining order prohibiting defendant from striking. In upholding the district court's issuance of the preliminary injunction, the panel discussed the Railway Labor Act and Norris-LaGuardia Act.

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Tenth Circuit

***Cillo, et al v. City of Greenwood Village*, 739 F.3d 451 (10th Cir. Dec. 31, 2014).**

The City of Greenwood Village, Colorado fired Police Sergeant Patrick Cillo and two other union members over an unlawful entry that violated the Fourth Amendment, but gave the only non-union member a written warning. City the Police Chief's earlier comments critical of the union, Cillo alleged the City's real motive for firing him was opposition to the union chapter he helped to form and lead. Cillo and his union sued the City and three individual defendants, the Police Chief, a Lieutenant and the City Manager under 42 U.S.C. Section 1983. The district court granted summary judgment for Defendants on all claims.

The First Amendment protects the right of a public employee to join and participate in a labor union. *Morfin v. Albuquerque Pub. Sch.*, 906 F.2d 1434, 1438 (10th Cir. 1990). Although "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union," the employer may not retaliate against an employee for engaging in union activity, including "threat[ening] reprisal or force." Public employee claims for retaliation based on protected First Amendment activity are subject to a four-part test derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), which requires the plaintiff to establish three factors: (1) his First Amendment activity involved a matter of public concern; (2) his interests in the protected activity outweighed the employer's interest in regulating it; and (3) the protected activity was a substantial motivating factor in the employer's decision to take adverse action against him. "If the employee establishes these three factors, he wins unless (4) the employer establishes it would have taken the same action in the absence of the protected [activity]."

The Tenth Circuit concluded that Cillo survived summary judgment as to the first three factors. The Court focused primarily on the third factor, finding that disparate discipline was assigned to similarly-



situated Union and non-Union employees. In another incident, officers had committed a similar unlawful entry and used unlawful force, but none of the officers was disciplined. The Court held that a reasonable jury could conclude that his Union activity was a substantial motivating factor in his termination. The Court was also persuaded by the temporal proximity between his termination and the recent growth of Union membership to the point that it was expected to exceed membership of the Fraternal Order of Police. Additionally, some in Police management had denied promotion of Union members on grounds that they lacked loyalty, and the Chief expressed negative opinions about unions. The case reiterates the importance of comparing treatment of similarly situated employees in retaliation cases as well as discrimination cases.

***Smothers v. Solvay Chemicals Inc.*, 740 F.3d 530 (10th Cir. Jan. 21, 2014).**

Plaintiff Steven Smothers sued his former employer Solvay Chemical, Inc., alleging discrimination on the basis of his medical disability in violation of the Americans with Disabilities Act.

Smothers had worked for eighteen years before being terminated because of a safety violation and a dispute with a co-worker. He had a degenerative disc disease for which he received several surgeries and which caused him chronic neck pain. He obtained FMLA leave for intermittent absences, while receiving praise for his work quality. However, his managers and co-workers complained about his absences, and his Superintendent pressured him to change from a graveyard to day shift where others could cover his absences, which Smothers refused. Smothers subsequently applied for a promotion and was told he was rejected due to his absences. While repairing an acid pump after acid had spilled, Smothers refused to obtain a "line break" permit, which ensures that employees follow necessary safety practices, or lock out the pump valve. A co-worker accused him of poor safety practices during the repair, accusing him of hypocrisy because he had previously reported other employees for safety violations. Smothers argued with him, and the co-worker then reported him.

Smothers was investigated and his employment was terminated for violating safety rule and arguing with his co-worker.

Smothers alleged that the company's true motivation was retaliation for taking medical leave. The district court granted summary judgment on plaintiff's FMLA and ADA claims and on a state law claim for breach of implied contract. The Tenth Circuit reversed the district court on the FMLA and ADA claims.

With respect to the FMLA claim, Smothers presented evidence that other employees who violated the Company's safety policies were not terminated, including an employee who committed a similar lock out violation. The Tenth Circuit found the evidence showed that: (1) Solvay treated Mr. Smothers differently from similarly situated employees who committed comparable safety violations; (2) Solvay's investigation into Mr. Smothers' quarrel with his co-worker was inadequate; and (3) Solvay managers previously took negative action against Mr. Smothers because of his FMLA-protected absences. Together this evidence created a triable issue of fact whether Smothers' FMLA leave was a substantial motivation in Solvay's decision to fire him.

With respect to Smothers' ADA claim, the Court held that Smothers' medical condition required multiple surgeries over several years, that numerous medical treatments failed to resolve his condition or eliminate his severe pain, and that Smothers consistently complained of an inability to sleep, which was sufficient to allow a reasonable jury to conclude that Smothers' sleep was substantially limited, satisfying the first prima facie element. The Court found that the same evidence of pretext in the FMLA claim was also sufficient to defeat summary judgment on the ADA claim. The case again demonstrates the importance of applying discipline consistently for similar policy violations.



Eleventh Circuit

***Melech v. Life Ins. Co. of North America, et al.*,
739 F. 3d 663 (11th Cir. Jan. 6, 2014).**

Hertz provides its employees with an welfare benefit plan was administered by Life Insurance Company of North America (“LINA”) and governed by ERISA. Ms. Melech’s employment with Hertz ended in May 2007, after her treating physician determined that her degenerative disc disease precluded her from working. Ms. Melech submitted a claim for long-term disability benefits under the policy, and SSA benefits. LINA denied her claim, and she appealed through an administrative process. After SSA granted her application for benefits, she informed LINA of the same but it continued to deny her coverage.

Melech brought an ERISA action in October 2010, claiming that LINA violated ERISA requirements, and especially due to their decision to ignore the SSA process/information. The district court granted summary judgment in favor of LINA, finding that it made a decision based on the information it had at the time. The 11th Circuit agreed, in part, that LINA did not have the same information available to the SSA at the time of the last denial, and therefore vacated and remanded the case to LINA for consideration based on the new information. The Court noted that SSA produces more than just money, and their evaluation can be helpful to LINA. In fact, the Court found that LINA should have considered the evidence that was generated by SSA, because LINA plays an active role in SSA benefits. Therefore, the 11th Circuit remanded with instructions for LINA to make a decision regarding Melech’s claims with the “full benefit” of the information from the SSA investigation.

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