



## First Circuit

***Rodríguez-Vives v. Puerto Rico Firefighters Corps of Puerto Rico***, \_\_\_ F. 3d \_\_\_ (1st Cir. Feb. 18, 2014), 2014 WL 593673, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1587P-01A.pdf>

The First Circuit vacated and remanded the United States District Court for the District of Puerto Rico's decision granting the motion to dismiss Plaintiff's claims of sex discrimination and retaliation in violation of Title VII.

As part of a settlement of an earlier gender discrimination claim, Plaintiff worked as a firefighter for the Puerto Rico Firefighters Corps of the Commonwealth of Puerto Rico. She filed suit for post-settlement sex discrimination and retaliation. The district court granted Defendant's Motion to Dismiss. Plaintiff appealed only the retaliation dismissal. The First Circuit held that: (1) the settlement agreement reached in firefighter's prior action did not bar her retaliation claim because the alleged conduct arose after the date of the settlement; (2) Firefighter adequately alleged she opposed a practice made unlawful by Title VII even though her previous charge was not filed under Title VII and by the Equal Protection Clause of the United States Constitution because "nothing in language of the statute or common sense suggests that she was nevertheless required to mention Title VII in order to be protected from opposing the practices that Title VII renders unlawful" like retaliation; (3) Firefighter adequately alleged employment action sufficiently adverse to constitute retaliation –repeated unpleasant and inequitable treatment–because she had personal knowledge and sufficient detail of the facts to make them plausible.

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## Third Circuit

***International Union of Operating Engineers, Local Union No. 542 v. Allied Erecting & Dismantling Co.***, \_\_\_ Fed. Appx. \_\_\_ (3d Cir. Feb. 4, 2014), 2014 WL 407486, available at <http://www2.ca3.uscourts.gov/opinarch/132160np.pdf>

In a non-precedential opinion issued over a dissent, the Court addressed twin labor contracts that, by their terms, conceivably allowed the employer to extend their duration perpetually. The majority opinion and the dissent agreed that collective bargaining agreements of indefinite duration are contrary to federal labor law policy and terminable at the will of either party upon reasonable notice. The majority and dissent split on the application of contract interpretation principles in determining whether the specific contracts at issue were, in fact, of indefinite duration.

The contracts at issue were project labor agreements negotiated by the employer and union for work associated with the dismantling of a closed steel plant in Fairless Hills, Pennsylvania, pursuant to a contract between the employer and plant owner USX Corporation. The project labor agreements were to continue in effect until the dismantling project was completed. At the time of the decision, the dismantling project had been ongoing for at least twenty-one years, and the parties estimated that the project had approximately five more years to run. In addition, the project labor agreements contained a provision that allowed the employer to sole discretion to *extend* the agreements to other dismantling projects on a jobsite-by-jobsite basis. If the agreements were extended in this manner, their duration would likewise extend until those additional projects were terminated. The project labor agreements also contained standard severability clauses that called for the balance of the agreements to continue in full force and effect if any specific clause was found to be illegal.

In August 2011 – nineteen years into the Fairless Hills dismantling project – the union notified the employer that it intended to terminate the project labor agreements and negotiate successor



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agreements. The employer responded by filing a complaint with the National Labor Relations Board, alleging that the union's notice violated the National Labor Relations Act. The union thereupon filed a declaratory judgment action in federal court seeking to declare the project labor agreements terminable upon reasonable notice, and seeking to have the agreements deemed invalid under various contract law theories. The NLRB held its administrative proceedings in abeyance pending the federal court action. The district court held that the project labor agreements were of indefinite duration, and therefore inconsistent with federal labor law, on two ground (1) because the agreement would continue for the duration of the Fairless Hills dismantling project, the employer could unilaterally extend the contract indefinitely by stalling that project or contracting for additional work, and (2) the employer could continually extend the agreement to new projects, effectively extending the agreements in perpetuity.

On appeal, the majority and dissent agreed that "[l]abor contracts of indefinite duration contravene federal labor law and are terminable at will." However, "a [labor] contract may terminate upon a specified event rather than a predetermined date" and still be not be of indefinite duration. The majority and dissent likewise agreed that the provisions allowing the employer the sole discretion to extend the project labor agreements to new projects rendered the agreements indefinite. The extension provisions allowed the employer, "in its sole discretion, to extend the agreements to new projects. Even worse, at each new jobsite, the governing agreements would still contain this extension clause, permitting [the employer] to unilaterally extend the agreements to still other projects, *ad infinitum*."

It is here that the majority and dissent parted company. The majority rejected what it termed the district court's "hypothetical" concerns about the employer stalling or extending the Fairless Hills project. The project was being conducted pursuant to a contract with a third party that presumably would not tolerate stalling. Further, purely hypothetical concerns over stalling could invalidate any contract that terminates upon a specific event

rather than a specified date. There was no evidence that the employer actually was stalling, and the union conceded that one jobsite could not contain an infinite amount of work. "[W]e reject the District Court's approach, in which hypothetical stalling is a sufficient cause of indefiniteness. We also reject any notion that contracts which terminate upon completion of work at a particular jobsite are *per se* indeterminate."

The majority then determined that the provisions allowing the employer the sole discretion to extend the project labor agreements to new projects were severable, citing principles of contract interpretation and the severability clauses. With this modification, the agreements were deemed enforceable. "[T]hese provisions should be deemed unenforceable and severed pursuant to the severability clause. What remains of the agreements is not indefinite because it terminates upon the occurrence of a specified event – completion of the Fairless Hills project." The majority vacated the District Court decision and remanded for trial on the union's remaining contract law claims.

The dissent took issue with what it considered the majority's equating of "indefinite" with "infinite." Citing the twenty-one year duration of the Fairless Hills project, the inability of either party to give a definitive estimate of when the project would end, and federal policy favoring the right of parties to negotiate over terms and conditions of employment on a periodic basis, the dissent reasoned that the contract had no readily ascertainable duration and was therefore of impermissible indefinite duration. "In this instance, it is the laborers whose terms and conditions of employment are frozen indefinitely. In another instance, it may be the employer who becomes hostage to a collective bargaining agreement of indefinite duration, negotiated perhaps at a time when organized labor had the upper hand in bargaining. The point is neither labor nor the employer should be unable to negotiate the terms and conditions of employment on a periodic basis."



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***Louisiana Forestry Assoc., Inc. v. Secretary, United States Dep't of Labor*, \_\_\_ F.3d \_\_\_ (3d Cir. Feb. 5, 2014), 2014 WL 444157, available at [www2.ca3.uscourts.gov/opinarch/124030p-4.pdf](http://www2.ca3.uscourts.gov/opinarch/124030p-4.pdf)**

In this decision having nationwide implications, and creating a potential split with the Eleventh Circuit, the Third Circuit affirmed a district court decision granting summary judgment to the U.S. Departments of Labor and Homeland Security, their respective Secretaries, and the Assistant Secretary of the Labor Department's Labor Employment and Training Administration on a challenge to the Labor Department's 2011 Wage Rule. That rule governs the calculation of the minimum wage that U.S. employers must offer in order to recruit temporary foreign workers under the H-2B visa program governing unskilled, non-agricultural foreign laborers. The plaintiffs in the case were various employer associations whose members recruit H-2B workers and allegedly stood to face higher labor costs as a result of the Rule. Also participating in the case was a group of individuals and organizations representing foreign and U.S. workers impacted by the H-2B program that had been successful in challenging the Labor Department's earlier 2008 Wage Rule. That earlier case, like *Louisiana Forestry Assoc.*, was tried in the Eastern District of Pennsylvania.

The *Louisiana Forestry Assoc.* action had been commenced in the Western District of Louisiana. Venue was transferred to the Eastern District of Pennsylvania after the intervenors were granted leave to intervene on the ground of comity.

Under the Immigration and Naturalization Act (INA), authority to administer the H-2B program is vested in the Department of Homeland Security (DHS). The INA directs the DHS, upon the petition of an "importing employer," determine the "question of any alien as a non-immigrant" worker under the H-2B program "after consultation with appropriate agencies of the Government." 8 U.S.C. Sec. 1184(c)(1). The DHS, in turn, by regulation, designated the Department of Labor (DOL) as the agency from which it seeks "advice" in determining whether to grant H-2B visa petitions. 8 C.F.R. Sec. 214.2(h)(6)(iii). Under this regulation, the

petitioning employer must apply to the DOL for a "temporary labor certification" before filing a visa petition with the DHS. The "temporary labor certification" constitutes "advice" to the DHS on two of the statutory requirements for granting an H-2B visa: whether U.S. workers capable of performing temporary services or labor are available, and whether the alien's employment will adversely affect the wages and working conditions of similarly-employed U.S. workers. 8 C.F.R. Sec. 214.2(h)(6)(iii)(A).

To obtain a "temporary labor certification," an employer must apply to the DOL for a "prevailing wage determination" for the area of intended employment, submit a "work order" with the state workforce agency serving the geographic area of intended employment, and advertise the position in question at a wage equal to or higher than the prevailing wage determined by the DOL. The DOL will issue the "temporary labor certification" once these conditions are satisfied. 20 C.F.R. Sec. 655.10, Sec. 655.50(b). Only at this point may the employer submit an H-2B visa application to the DHS. 8 C.F.R. Sec. 214.2(h)(6)(iii)(C), (E).

A regulation promulgated by the DHS under the INA purports to endow the DOL with the authority to create procedures necessary for the issuance of "temporary labor certifications." 8 C.F.R. Sec. 214.2(h)(6)(iii)(D). This authority purports to include the power to adopt regulations for determining "the prevailing wage applicable to an application for temporary labor certification." *Id.*

It was pursuant to this DHS regulation that the DOL adopted the 2008 Wage Rule that the intervenors had successfully challenged, and the 2011 Wage Rule that the *Louisiana Forestry Assoc.* plaintiffs were now challenging. The 2011 Wage Rule adopted a wage calculation regime that tended to raise the level of "prevailing wages," and abandoned the four-tier structure contained in the 2008 Wage Rule that stratified wages based on the skill level required for the occupation. The 2011 Wage Rule also severely curtailed the use of employer surveys as a substitute for DOL prevailing wage determination procedures. The DOL estimated that the changes in the method for determining



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prevailing wages would result in a \$4.83 increase in the weighed hourly wage for H-2B and similarly-employed U.S. workers, and a total annual cost increase to H-2B employers of \$847.4 million.

The *Louisiana Forestry Assoc.* plaintiffs challenged the 2011 Wage Rule on several grounds: (1) that the DHS had unlawfully sub-delegated its authority over the H-2B program to the DOL; (2) that the DOL improperly exercised its rulemaking authority when it adopted the 2011 Wage Rule; and (3) that the DOL violated the INA by not including the four-tier structure from the 2008 Wage Rule in the 2011 Wage Rule.

On the sub-delegation issue, the *Louisiana Forestry Assoc.* Court applied the *Chevron* standard of deference, *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and found the DHS's granting of rule-making power to the DOL to be lawful. An agency sub-delegates its authority when it shifts to another party almost the entire determination whether a specific statutory authority has been satisfied, or abdicates its final reviewing authority. An agency's sub-delegation of its authority to an outside party is improper absent an affirmative showing of congressional authorization. But the *Louisiana Forestry Assoc.* Court contrasted such a sub-delegation with an agency merely receiving "legitimate outside party input," noting that Courts of Appeals had recognized three forms of such permissible outside input: establishing a reasonable condition for granting federal approval, fact gathering, and advice giving. The *Louisiana Forestry Assoc.* Court found that the limited rule-making power over prevailing wages granted to the DOL by the DHS fell into the first category of a reasonable condition for granting approval. Because there was a "reasonable connection" between the DHS's disposing of H-2B petitions and the DOL's decisions on "temporary labor certifications," and because it was "likewise reasonable" for the DHS to grant DOL limited rule-making power to govern the certification process, the granting of prevailing wage rule-making authority to the DOL by the DHS was lawful. The Court expressly declined to consider whether the DOL had express or implied authority under the INA or other legislation to promulgate rules

concerning the H-2B program.

In a footnote, the *Louisiana Forestry Assoc.* Court noted a potential conflict between its determination on the sub-delegation issue and the Eleventh Circuit's decision in *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11<sup>th</sup> Cir. 2013), which rejected the DOL's argument that it had been granted lawful rule-making power by the DHS. However, because *Bayou Lawn* had involved an appeal from a preliminary injunction, it was not a final decision on the merits of the issue. The *Louisiana Forestry Assoc.* Court also deemed itself "bound to defer to the DHS's interpretation of the statutes under which Congress has authorized it to administer the H-2B program."

As to the argument that the DOL had improperly exercised its rule-making authority by adopting the 2011 Wage Rule, the Court found that the DOL had complied with the rule-making notice requirements prescribed in Section 553 of the Administrative Procedure Act, 5 U.S.C. Sec. 553(b)(2) and (3); that the DOL adequately responded to significant and relevant public comments on the proposed Wage Rule and adequately explained its conclusions; that the DOL had not improperly established prevailing wage rates in order to "attract" U.S. workers to jobs that they presumably would not otherwise have taken; and, that in responding to public comments and in the discussion portion of the notice accompanying the final rule, the DOL adequately examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts it found and the rule-making choices it made.

Finally, the *Louisiana Forestry Assoc.* Court found that the DOL was not required by statute to use the four-tier methodology that had been contained in the overturned 2008 Wage Rule. The INA provision cited by plaintiffs applied only to the *skilled* non-agricultural employee H-1B visa program, and was not applicable to the H-2B visa program for unskilled non-agricultural workers.

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## **Fifth Circuit**

***Vicknair v. Louisiana Dep't of Public Safety & Corrections*, \_\_\_ Fed. Appx. \_\_\_ (5th Cir. Feb. 4, 2014), 2014 WL 407567, available at <https://www.ca5.uscourts.gov/opinions%5Cunpub%5C13/13-30244.0.pdf>**

Plaintiff sued his employer under Title VII alleging retaliatory reassignment, retaliatory suspension and constructive discharge. The Fifth Circuit upheld summary judgment on plaintiff's retaliatory reassignment claim because plaintiff's lateral reassignment did not constitute an adverse employment action as there was no evidence of a reduction of salary or of a loss of standing with his fellow employees, a decrease in benefits, a loss of prestige, or a lessening of responsibilities. In addition, Plaintiff showed no causal link between the protected activity (plaintiff's involvement with a 2004 investigation) and his 2009 reassignment. Plaintiff's subjective belief that his reassignment was in retaliation for participation in the earlier investigation was not enough to establish the requisite causal link.

Likewise, the Fifth Circuit upheld summary judgment on plaintiff's claim for constructive discharge because plaintiff failed to exhaust administrative remedies. Plaintiff's EEOC complaint mentioned only retaliation and was not broad enough to put the company on notice of his constructive discharge claim. The Court noted that EEOC claims are construed broadly "but no further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge."

Finally, the Fifth Circuit upheld judgment as a matter of law on plaintiff's retaliatory suspension claim because plaintiff failed to put forth any evidence of a causal link between the decision maker who conveyed the decision to suspend and

terminate the plaintiff to a retaliatory motive.

***Villanueva v. U.S. Department of Labor*, \_\_\_ F.3d \_\_\_ (Feb. 12, 2014), 2014 WL 550817 available at <http://www.ca5.uscourts.gov/opinions/pub/12/12-60122-CV0.pdf>**

Villanueva filed a complaint under OSHA asserting that his employer had retaliated against him in violations of the Corporate Criminal Fraud Accountability Act of the Sarbanes-Oxley Act ("SOX") for blowing the whistle on an alleged scheme to violate Columbian tax law. Villanueva was a Columbian national who was employed in Columbia by an indirect affiliate of a Dutch company with an office in Houston. The Dutch company was covered by Section 806 of SOX (18 U.S.C. §1514(A)(a)) because its stock was publicly traded in the U.S.

The Department of Labor (the entity charged with the responsibility for receiving and investigating SOX whistleblower complaints to OSHA) dismissed the complaint because Villanueva was not a U.S. citizen and never worked in the United States for that company, and therefore it lacked jurisdiction over the complaint, and an administrative law judge agreed. On further appeal, the Department of Labor's Administrative Review Board concluded that it had jurisdiction but affirmed the dismissal of the case on the grounds that Section 806 does not apply extraterritorially where the alleged fraud or law violations did not involve U.S. law and there was no stated violation or impact on U.S. securities or financial disclosure laws. The Fifth Circuit affirmed, but did reach the issue of extraterritorial application of the applicable provision of SOX. Instead, the Fifth Circuit held that "Section 806 prohibits retaliation only if the employee provides information regarding conduct that he or she reasonably believes violates one of six enumerated categories of U.S. law." Villanueva did not provide information that he reasonably believed violated any of these six categories and therefore failed to show that he engaged in any protected whistleblowing activity.



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***Grimes v. BNSF Ry. Co.*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. Feb. 17, 2014), 2014 WL 593600, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-60382-CV0.pdf>**

Grimes was a railway employee working for BNSF, and was injured in an accident while working with two co-employees. Grimes initially reported that he could not recall what had happened. After further questioning, he admitted that the other employee was operating a train car even though he was not certified to do so. The company terminated all three employees after concluding they had violated work rules requiring honest answers in investigations.

The union appealed Grimes' termination to the Public Law Board, pursuant to the Railway Labor Act ("RLA"), which found that Grimes was dishonest but reinstated him without back pay. Grimes then sued alleging violations of 49 U.S.C. §20109(a), which prohibits a railroad carrier from discharging an employee due to the employee's good faith act of reporting a work-related personal injury. The district court "gave preclusive effect to the arbitral finding of fact . . . that Grimes had been dishonest" and therefore had not engaged in "protected activity" which requires reporting the incident in good faith, and granted BNSF's summary judgment motion.

The Fifth Circuit vacated and remanded. The Court noted that the Supreme Court precedent argued by Grimes does not always prohibit a court from giving preclusive effect to an arbitral finding. But, "the RLA makes the arbitral findings conclusive on the parties in the dispute governed by the RLA," i.e. the CBA claim that Grimes pursued with the PLB. While arbitral proceedings may have preclusive effect in subsequent litigation, it is within the discretion of the court to decide whether to apply it. Here, because the railroad conducted the investigation and the hearing, and the PLB only reviewed the record, the PLB's procedures "did not afford Grimes the basic procedural protections of a judicial forum" and "the procedures were not adequate for collateral estoppel to apply." The Court then determined that "remand is appropriate so that the district court can decide for itself whether there is a genuine issue of material fact for trial."

***Munoz. v. Seton Healthcare, Inc.*, \_\_\_ Fed. Appx. \_\_\_ (5<sup>th</sup> Cir. Feb. 18, 2014), 2014 WL 701509, available at [www.ca5.uscourts.gov/opinions%5Cunpub%5C13/13-50500.0.pdf](http://www.ca5.uscourts.gov/opinions%5Cunpub%5C13/13-50500.0.pdf)**

Plaintiff filed action against former employer alleging claims under the ADA, FMLA, Title VII, ADEA, and state law. Plaintiff had rheumatoid arthritis and autoimmune disease which rendered her disabled. Prior to her termination, she worked as a patient access representative in the outpatient admissions department of a hospital. She was transferred to the emergency department, where she complained that the more physically intensive duties aggravated her rheumatoid arthritis. She requested a transfer back to outpatient, which her supervisor refused. Plaintiff's doctor certified her as totally disabled and unable to work. Eventually plaintiff was terminated for not returning from employment after a ten-week FMLA leave.

The district court granted employer's motion for summary judgment on all claims, and the Fifth Circuit upheld. As to the ADA, Title VII and ADEA claims, the Fifth Circuit held that the decision to transfer plaintiff and the refusal to transfer her back related to purely lateral transfers, and therefore were not adverse employment actions because her pay, benefits and title remained the same. Her subjective preference for the outpatient department did not render her transfer adverse. At the time of her termination, plaintiff was completely disabled and unable to work and therefore was not qualified for the position and could not establish a prima facie case of discrimination with respect to her termination.

Plaintiff also alleged that the employer's refusal to transfer her back violated the hospital's duty to make reasonable accommodations under the ADA. The Fifth Circuit noted that the "ADA entitles disabled persons to reasonable accommodations but not to any particular job." The employer satisfied its duty under the ADA by giving plaintiff a face mask to protect her from airborne disease and permitting her to work shorter shifts.

Plaintiff's retaliation claim also failed because the



only evidence beyond her own subjective belief of retaliation was the timing of her termination in relation to her EEOC charge. The Court noted that where timing is the only evidence of retaliation, the “temporal proximity must be very close.” The termination occurred more than a year after the EEOC charge was filed, which the Court determined was not sufficiently close in time.

***ConocoPhillips, Inc. v. Local 13-0555 of the United Steelworkers International Union*, 741 F.3d 627 (5<sup>th</sup> Cir. Jan. 30, 2014), available at <http://www.ca5.uscourts.gov/opinions/pub/12/12-31225-CV0.pdf>**

Terminated employee’s union initiated arbitration against ConocoPhillips for wrongful termination. ConocoPhillips contested the arbitrability of the dispute because the employee had been discharged for substance abuse and pursuant to the CBA; the dispute was not arbitrable except as to the issue of chain of custody. The arbitrator determined that he had authority to determine the arbitrability of other issues bearing on the employee’s discharge, and that the discharge was wrongful.

The Fifth Circuit affirmed the district court’s vacatur of the arbitral award against ConocoPhillips. The Fifth Circuit agreed with the district court that the parties did not give the arbitrator the power to determine whether employee’s discharge was arbitrable as there was no “clear and unmistakable evidence” that the parties agreed to arbitrate arbitrability. The CBA did not expressly submit the question of arbitrability to the arbitrator and ConocoPhillips’ conduct during the arbitration hearing and in its brief did not demonstrate that it “readily submitted the question” of arbitrability to the arbitrator. Thus, arbitrability was a question for the courts to decide.

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## Sixth Circuit

***Shazor v. Prof'l Transit Mgmt, et al*, \_\_\_ F.3d \_\_\_ (6<sup>th</sup> Cir. Feb. 19, 2014), 2014 WL 627406, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0034p-06.pdf>**

In 2006, Plaintiff Marilyn Shazor was hired to work for Defendant Professional Transit Management (“PTM”) as the Chief Operating Officer (“COO”) of the Southwest Ohio Regional Transit Authority (“SORTA”), which is one of the transit authorities to which PTM provides management services. Plaintiff is an African-American woman and a graduate of West Point and the University of Michigan Business School. However, she had no prior experience in transportation.

As COO, Plaintiff reported to the Chief Executive Officer (“CEO”) of SORTA, Michael Setzer. Setzer was one of two co-founders of PTM. Two years after she was hired, Plaintiff was promoted to the position of CEO of SORTA and replaced Setzer, although he stayed on for a short period of time to help with her transition.

Early on in her tenure as CEO, PTM’s executives began to question her loyalty. They were concerned that she refused to attend certain educational programs, they suspected that she and SORTA’s Board Chairperson were conspiring to have SORTA hire Plaintiff directly, and they felt that Plaintiff was prohibiting SORTA employees from consulting with PTM.

These frustrations were expressed in a series of emails between Setzer and PTM’s one-time president, Will Scott. PTM’s other co-founder, Defendant Thomas Hock, was also included on some, but not all, of those emails. In the emails, Plaintiff was referred to as a “prima donna”, disloyal, disrespectful and a “helluva bitch”.

In late August, 2009, Hock took over as Plaintiff’s supervisor and Setzer was assigned to different duties. In early 2010, the union that represents SORTA’s bus drivers filed petitions to organize SORTA’s certain employees. PTM decided to retain a third-party consultant, Management Performance



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International, Inc. ("MPI"), to advise on these matters. Plaintiff testified that she had no involvement in selecting MPI.

SORTA's Board became concerned about the involvement of MPI because of its perceived anti-labor bias. Several Board members wanted Hock to act as a labor consultant instead. However, Plaintiff told the Board that Hock did not have time. Hock later testified that this was a lie.

In August, 2010, SORTA's Board's labor management committee met with Hock and discussed the retention of MPI. During that meeting, Plaintiff again stated that she did not select MPI; her staff did. Hock told the committee that Plaintiff was not telling the truth when she said that he was not available to consult regarding the union campaign.

One week later, Hock terminated Plaintiff based on the two purported lies that Plaintiff told: (1) that she was not involved in hiring MPI; and (2) that he was not available to advise SORTA. Before terminating her, Hock had one conversation with SORTA's general counsel to determine what Plaintiff had told the Board. The general counsel apparently told Hock that Plaintiff refused to hire him or PTM to advise on union issues.

A Hispanic woman was subsequently chosen to replace Plaintiff as CEO of SORTA.

Shortly thereafter, Plaintiff filed an EEOC Charge. After the EEOC declined to pursue the charge, she filed suit in the U.S. District Court for the Southern District of Ohio alleging race and gender discrimination in violation of state and federal law, defamation, libel, slander, and tortious interference with a business relationship. The district court granted Defendants' Motion for Summary Judgment on Plaintiff's state and federal discrimination claims and declined supplemental jurisdiction on the state law tort claims. Plaintiff appealed.

On appeal, the Sixth Circuit found that there were several complex issues of law and fact involved in the determination of whether Setzer's and Scott's emails constituted direct evidence of discrimination

as neither of them fired Plaintiff. Therefore, the "cat's paw" theory would have to apply. However, for that theory to apply, Setzer and Scott would have to qualify as supervisors and it was unclear if they did. In addition, it was unclear whether the emails show that Setzer and Scott intended to cause Plaintiff to be terminated for discriminatory reasons. While "one helluva bitch" reveals a sexist animus, the other emails are "more veiled". Furthermore, the emails were sent a year or more before Plaintiff was fired - longer than the usual span of time to support an inference of causation.

The Court, however, did not have to answer these questions because it found that Plaintiff presented sufficient circumstantial evidence of discrimination to survive summary judgment.

Because it was undisputed that Plaintiff was a member of a protected class, was discharged and was qualified for the position, the only issue regarding whether she could make a prima facie case of discrimination based on circumstantial evidence was whether she was replaced by someone outside of her protected class.

The Court found the racial differences to be clear. Plaintiff was African-American and her replacement was Hispanic. However, the replacement was a woman. Nonetheless, with regards to the gender claim, the Court addressed the fact that Plaintiff's was asserting a "sex-plus" case. In other words, her gender claim could not be "untangled" from her race claim. In "sex-plus" cases, "plaintiffs are required to show unfavorable treatment as compared to a matching subcategory of the opposite sex."

In the Court's opinion, race and sex "do not exist in isolation". "African-American women are subjected to unique stereotypes that neither African-American men nor white women must endure. And Title VII does not permit plaintiffs to fall between two stools when their claim rests on multiple protected grounds." Ultimately, the Court found that Plaintiff had established a prima facie case of both race and gender discrimination because she proffered evidence of distasteful emails from PTM executives.

The Court also found that Plaintiff sufficiently



rebutted Defendants' explanation for her termination by establishing that there was a genuine issue of fact as to whether her statements to the SORTA Board were lies. A jury could find that she was telling the truth and Hock was not.

Finally, the Sixth Circuit ruled that the honest belief doctrine does not apply to the facts of this case and, therefore, does not protect Hock's decision, because his investigation into Plaintiff's two purported lies consisted of speaking only with one person (SORTA's general counsel). That sole conversation did not establish "sufficient particularized facts about the truth behind Plaintiff's statements, let alone her motive."

The Court, therefore, reversed the grant of summary judgment and remanded for further proceedings.

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## **Seventh Circuit**

***Andrews v. CBOCS West, Inc.*, \_\_\_ F.3d \_\_\_ (7th Cir. Feb. 14, 2014), 2014 WL 575893, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-14/C:12-3399:J:Sykes:aut:T:fnOp:N:1291695:S:0>**

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of defendants as to plaintiff's race and age discrimination claims. Plaintiff, a server at defendant restaurant, intended to transfer to a different location. The transfer never materialized and after being absent from work for more than three weeks, defendant's computer system automatically listed plaintiff as "terminated." Plaintiff assumed she was fired and did not contact defendant to clarify her employment status. The district court entered summary judgment in favor of defendant. The Seventh Circuit upheld this decision, finding that plaintiff failed to establish an adverse

employment action when the facts in the record undisputedly reflect that plaintiff voluntarily quit and plaintiff did not allege constructive discharge.

***Phillips v. Continental Tire the Americas*, \_\_\_ F.3d \_\_\_ (7th Cir. Feb. 14, 2014), 2014 WL 572339, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-14/C:13-2199:J:Tinder:aut:T:fnOp:N:1291561:S:0>**

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of defendants in plaintiff's retaliatory discharge claim. Plaintiff's employment was terminated because she refused to submit to a drug test as a prerequisite for filing a workers compensation claim. Plaintiff, an employee of defendant, initiated a workers' compensation claim after his fingers went numb at work. Plaintiff was informed that he would have to submit to a drug test pursuant to defendant's policy. Plaintiff refused and his employment was terminated. The district court granted defendant's motion for summary judgment. The Seventh Circuit affirmed, holding that that the company does not apply the drug test rule in a disparate or discriminatory manner.

***Adams v. City of Indianapolis*, \_\_\_ F/3d \_\_\_ (7th Cir. Feb. 4, 2014), 2014 WL 406772, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-04/C:13-3422:J:Sykes:aut:T:fnOp:N:1284868:S:0>**

The Seventh Circuit upheld the district court's dismissal of plaintiffs' disparate impact claims, but on different grounds. Plaintiffs are black police officers and firefighters who sought promotions between 2007 and 2009 and claim that the promotion process used by the City has a disparate impact and is intentionally discriminatory. Subsequently, some plaintiffs, who sought promotions between 2010 and 2011, filed a second lawsuit alleging that the promotion process used by the City has a disparate impact. The district court granted defendant's motion for summary judgment on the grounds that plaintiffs' allegations of intentional discrimination defeat a disparate-impact claim. The district court also held that plaintiffs'



second lawsuit was barred on res judicata grounds. The Seventh Circuit upheld the district court's dismissal of the disparate impact claims, but on different grounds. The Court held that allegations of intentional discrimination do not necessarily defeat a disparate impact claim. However, since plaintiffs did not provide any factual allegations showing that the City's testing process causes a significant disparity between black and white applicants, the Court held that plaintiffs' claims are factually insufficient and were properly dismissed. The Seventh Circuit affirmed the district court's decision to deny plaintiffs' motion to amend because it was untimely. Finally, the Seventh Circuit held that plaintiffs' second suit was properly dismissed on preclusion grounds.

***Wilson v. Cook County*, \_\_\_ F.3d \_\_\_ (7<sup>th</sup> Cir. Feb. 10, 2014), 2014 WL 503673, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-10/C:13-1464:J:Griesbach:aut:T:fnOp:N:1287965:S:0>**

The Seventh Circuit upheld the district court's grant of summary judgment in favor of defendant as to plaintiff's Title VII, Equal Protection, and Due Process claims. Plaintiff was offered a job at the Oak Forest Hospital by an employee in exchange for sexual favors. Not only did the employee not have authority to offer plaintiff the position, the position did not exist. The district court held that plaintiff did not have a Title VII claim because she could not establish an employment relationship. The Court disagreed, finding that a prospective employment relationship is sufficient. However, the Court affirmed the district court's grant of summary judgment holding that plaintiff must have been passed over for a job that actually existed in order to claim that an "unlawful employment practice" has occurred under 42 U.S.C. § 2000e-2(a)(1).

***Chaib v. State of Indiana*, \_\_\_ F.3d \_\_\_ (7<sup>th</sup> Cir. Feb. 24, 2014), 2014 WL 685274, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-24/C:13-1680:J:Kapala:aut:T:fnOp:N:1295548:S:0>**

The Seventh Circuit upheld the district court's grant of summary judgment as to plaintiff's Title VII claims. Plaintiff was a corrections officer at the Indiana Department of Corrections. She alleged that she was subjected to discrimination and a hostile work environment due to her gender and national origin. She also claimed that her employer retaliated against her. The district court granted defendant's motion for summary judgment. The Seventh Circuit affirmed on the grounds that each of her claims lacked a genuine issue of material fact. The Court found that her "disparate impact" claim failed because she failed to show that she suffered a materially adverse employment action or that she was treated less favorably than similarly situated employees. The Court found that her hostile work environment claim failed because no reasonable jury could find that her employer was negligent in how it addressed the complaints that she raised. Finally, the Court found that her retaliation claim failed because the adverse employment actions addressed by plaintiff were not connected to her complaints.

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## **Eighth Circuit**

***Ellis v. Houston*, 742 F.3d 307 (8<sup>th</sup> Cir. Feb. 3, 2014), available at <http://media.ca8.uscourts.gov/opndir/14/02/122178P.pdf>**

Five African American officers who worked in the Nebraska State Penitentiary sued their former supervisors under 42 U.S.C. §§ 1981 and 1983 for racial harassment and retaliation. The Eighth Circuit partially reversed summary judgment and remanded. The five plaintiffs were the only African Americans among the 95 guards working on the first shift despite the fact that 30 percent of the prison population was black. For several months all five of the African American employees were subjected to persistent racial harassment including demoralizing racist taunts and jokes, which were permitted and



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joined in by their supervisors. The supervisors made insulting racial remarks and failed to stop or reprimand similar conduct by other guards.

The harassment included being accosted by drug dog handlers stationed at the entrance of the prison; regular to offensive statements referring to the group as “the gang,” the “home boys,” or “the back of the bus;” an ongoing stream of racial jokes and remarks such as “it smells like fried chicken,” stating that the black officers must be happy with “watermelon on the menu,” or stating “it’s dark in the corner” if any of the plaintiffs happened to gather at one end of the cafeteria; and remarks like “if the lights went out all you would see is white teeth.”

After enduring racist harassment for months, the black officers reported it to authorities in the Nebraska prison system. Thereafter, the five supervisors retaliated against the employees by increasing workloads and assigning them undesirable jobs. After raising their concerns about the harassment to prison officials, two of the five plaintiffs were transferred to less significant penal institutions with fewer overtime possibilities.

The Eighth Circuit reversed summary judgment on the plaintiffs’ hostile work environment claims, holding that one of the defendant supervisors, Sergeant Miles, created a racially hostile work environment. In reversing summary judgment, the Eighth Circuit discussed the legal requirement that a court review the allegations of hostility and harassment as a whole and in context, rather than as isolated or discrete events. The Eighth Circuit criticized the district court for focusing on only discrete events, holding, “Our court has previously pointed out, however, that when a pattern of discriminatory conduct is alleged, specific individual acts should be viewed as illustrative rather than as isolated incidents. Attentiveness to context helps to assess the objective severity of the conduct.” The Eighth Circuit held each of the five plaintiffs experienced a subjectively and objectively hostile work environment.

The Eighth Circuit pointed out that even when non-supervisory coworkers engaged in the racially

hostile conduct, supervisors were present, laughing and did not object to the misconduct. The court held that such behavior must be considered as part of the overall context of a hostile environment claim. The Eighth Circuit went on to declare that “The individual remarks cited in the black officers’ complaint and revealed in the discovery process were not uttered in a vacuum, but became understood as part of a broader pattern and practice of racial harassment targeted at the first shift’s black officers.” The court went on to note, “Participation by a supervisor can magnify the impact of harassment.”

The Eighth Circuit also reversed summary judgment on one plaintiff’s retaliation claim. The Eighth Circuit held that “‘papering’ [Plaintiff Ellis’s] record with reports for trivial or unsubstantiated allegations” was sufficient to establish a materially adverse employment action, when considered in context—including giving Ellis additional work tasks, “running” him across the prison without a break and singling Ellis out for more work when other employees were available. The Eighth Circuit upheld dismissal of the four other plaintiffs’ retaliation claims for failure to provide sufficient evidence of a materially adverse action.

Finally, the Eighth Circuit held that the supervisors were not entitled to qualified immunity because “[a] reasonable prison supervisor would have understood that permitting and participating in racially derisive remarks and assigning inferior work assignments would violate the black officers’ rights under §§ 1981 and 1983.”

***Dorris v. TXD Servs., LP*, \_\_\_ F.3d. \_\_\_ (8th Cir. Feb. 27, 2014), 2014 WL 747476, available at <http://media.ca8.uscourts.gov/opndir/14/02/123096P.pdf>**

Jonathan Dorris began working for TXD Services in 2007. In April 2007, Dorris learned he would be serving in Operation Iraqi Freedom and would require extended military leave. Dorris reported for duty on October 1, 2007 and served on active duty in Iraq for approximately 12 months beginning in January 2008.



Dorris received a letter in October 2007 stating his employment had terminated while he was on military leave. In February 2008, while Dorris was on military leave, TXD sold substantially all its assets to Foxxe Energy Holdings, LLC, which took over TXD's operations without interruption. The sale contract included as an exhibit "a listing of all personnel currently employed by TXD to operate the Equipment, their job titles and descriptions, and current salaries." TXD did not include Dorris's name on the list. Dorris returned from military leave in December 2008, but was not offered a position at Foxxe. Foxxe hired all of Dorris's coworkers who were included on the list of personnel at the time of the sale.

The district court granted summary judgment for TXD. The Eighth Circuit upheld the district court's ruling on two grounds, but reversed on a third ground. The Eighth Circuit agreed that TXD's termination of Dorris had no legal effect, because USERRA only requires an employer to reemploy an employee upon return from leave. Thus, terminating Dorris while on leave was not, by itself, a violation of USERRA—the potential violation would be failing to reemploy Dorris after he returned from leave and was able to work. The Eighth Circuit also agreed that "TXD did not violate its duty to reemploy Dorris because it went out of business while he was on leave." However, the Eighth Circuit reversed and remanded, holding that a jury could find TXD violated USERRA by failing to include Dorris on the list of employees provided to prospective employer Foxxe.

The Eighth Circuit concluded that 38 U.S.C. § 4316(b)(1) applied to the situation. That provision of USERRA includes an "equal-but-not-preferential-treatment" standard for how to treat employees who are on leave. § 4316(b)(1) prohibits an employer from basing an employee's rights to "benefits not determined by seniority" on how the employer characterizes the employee's status during a period of service. Therefore, determining that an employee is not entitled to some employment "benefit" because the employee was terminated while on leave would violate USERRA, because an employee cannot be deprived of any "benefit" strictly based on how the employer characterizes the

employment relationship while the employee is on leave.

The Eighth Circuit held that being placed on the list of employees TXD provided to Foxxe could be considered a "benefit not determined by seniority." Its holding was predicated on USERRA's broad definition of "benefits," including "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice." 38 U.S.C. § 4303(2).

The Eighth Circuit then held that a jury could find TXD excluded Dorris from the list because of his military leave status, in violation of USERRA. The Eighth Circuit held that Dorris has the burden of proof to establish, at trial, that TXD's failure to place him on the list was motivated by his military status, and that Dorris presented enough evidence to survive summary judgment on that issue. Accordingly, the burden of proof then shifted to TXD to establish that the same action would have been taken in the absence of military service—a burden TXD failed to meet on summary judgment.

***AuBuchon v. Geithner*, \_\_\_ F.3d. \_\_\_ (8th Cir. Feb. 26, 2014), 2014 WL 715634, available at <http://media.ca8.uscourts.gov/opndir/14/02/123991P.pdf>**

Gary AuBuchon, a white male, sued Timothy Geithner, in his capacity as the Secretary of the Treasury, for retaliation under Title VII based on his employment with and separation from the Internal Revenue Service (IRS). The Eighth Circuit affirmed summary judgment for the employer.

In March 2007, AuBuchon applied for a promotion but the IRS awarded the promotion to an African-American female. AuBuchon filed a complaint with the Equal Employment Opportunity Commission (EEOC) in December 2007, alleging racial and gender discrimination for the alleged failure to promote. Over the course of the following two years, AuBuchon asserted that the IRS unlawfully retaliated against him for making this EEOC complaint, ultimately leading to his involuntary



retirement.

AuBuchon predicated his retaliation claim on three separate adverse actions: (1) the IRS's subsequent failure to promote AuBuchon after filing his EEOC charge; (2) a pattern of other actions including accusing him of sexual harassment; and (3) AuBuchon's constructive discharge from the IRS. The Eighth Circuit upheld summary judgment on all three alleged adverse actions.

First, there was no promotional opportunity for which AuBuchon was qualified and applied. Second, AuBuchon's claims that the IRS engaged in reckless allegations of sexual harassment, acceleration of work deadlines, an increase in workload, and insufficient performance reviews, do not constitute a material adverse employment action because none of the actions resulted in any injury or harm to AuBuchon. Finally, AuBuchon failed to present sufficient evidence on constructive discharge for the same reasons that he failed to establish that a jury could find he suffered adverse employment action. The Eighth Circuit reiterated that the standard for proving constructive discharge is higher than the standard for establishing a materially adverse employment action under *Burlington Northern*.

***Barnhardt v. Open Harvest Co-op.*, 742 F.3d 365 (8th Cir. Feb. 7, 2014), available at <http://media.ca8.uscourts.gov/opndir/14/02/132254P.pdf>**

Jacqueline Barnhardt appealed the district court's dismissal of her ERISA claims on summary judgment, and the Eighth Circuit affirmed. Barnhardt predicated her ERISA interference claims on (1) Open Harvest's failure to pay her short term disability benefits for one month and (2) her termination, which resulted in her not receiving benefits.

First, Open Harvest failed to pay Barnhardt benefits for August because it understood she did not perform any work in the month of August and therefore was not entitled to benefits under the plan. Barnhardt called in sick on August 1 and was terminated on August 2. Open Harvest denied

benefit payment because it understood she did not perform any work in the month of August. "Open Harvest's outside financial advisor informed Nygren that Barnhardt's benefits would continue for the month of August only if Barnhardt remained an 'active employee.' Based on this guidance and the fact that Barnhardt did not work at all during August, [Open Harvest] concluded that Barnhardt would not be entitled to short-term disability coverage for the month of August."

The Eighth Circuit held that this was a reasonable interpretation of the policy and, even though it may have been incorrect, it was sufficient to constitute "a legitimate, non-discriminatory justification for its failure to pay." The burden of production shifted to Barnhardt to show that Open Harvest's justification was pretext, but she presented no evidence to do so. Thus, a jury could not find that Open Harvest acted with specific intent to interfere with her ERISA rights.

Second, the Eighth Circuit held that Barnhardt failed to provide sufficient evidence that her termination was motivated by intent to interfere with her ERISA rights. Open Harvest presented evidence of many, serious concerns with Barnhardt's performance, including her tardiness, unreasonably long lunch breaks, inappropriate comments to other employees, excessive delegation of her responsibilities, public criticism of Open Harvest management, and lagging membership in the cooperative. Barnhardt failed to show any evidence that would allow a jury to conclude these concerns were pretext for retaliation.

***Battles v. Thompson Hospitality Servs. LLC*, \_\_\_ Fed Appx. \_\_\_ (8th Cir. Feb. 20, 2014), 2014 WL 642404, available at <http://media.ca8.uscourts.gov/opndir/14/02/132250U.pdf>**

In a brief, per curiam opinion, the Eighth Circuit upheld summary judgment against a pro se employee alleging age discrimination and retaliation. The court held that the plaintiff failed to present sufficient evidence to rebut the employer's proffered legitimate, non-discriminatory reason for her termination and failed to present sufficient evidence of a hostile work environment.



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## **Ninth Circuit**

***Escriba v. Foster Poultry Farms, Inc.*, \_\_ F.3d \_\_ (9th Cir. Feb. 25, 2014), 2014 WL 715547 available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/02/25/11-17608.pdf>**

Escriba was a long-time employee of Foster Poultry Farms (Foster Farms) in California. Escriba requested a two-week period of vacation and additional unpaid leave to care for her ailing father in Guatemala. During her conversations with her supervisor regarding her leave request, Escriba asked strictly for vacation time and not “family leave.” Her request for two weeks of vacation time was approved but her request for two weeks of unpaid leave was not. When Escriba failed to return to Foster Farms after her two weeks of approved vacation, her employment was ultimately terminated for her failure to comply with the company’s “three day no-show, no-call rule.” Escriba brought claims against Foster Farms for, among other things, interference with her rights under the FMLA. After a jury trial, the jury ultimately returned a verdict in favor of Foster Farms, and Escriba appealed, challenging the district court’s rulings on her motions for summary judgment, judgment as a matter of law, and the jury’s verdict. The Ninth Circuit affirmed the district court’s rulings and the jury’s verdict, holding that the district court did not err in denying Escriba’s motion for summary judgment and judgment as a matter of law because an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection. Because there was substantial evidence to support the jury’s conclusion that Escriba affirmatively declined to use any FMLA leave, the verdict in Foster Farms’ favor on Escriba’s FMLA interference claim was affirmed.

***Rea v. Michaels Stores*, \_\_ F.3d \_\_ (9th Cir. Feb. 18, 2014), 2014 WL 607322, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/02/18/14-55008.pdf>**

The Plaintiffs, employees of Michaels Stores (“Michaels”), brought an action on behalf of Michaels’ California store managers alleging that Michaels had improperly classified the managers as exempt from overtime. Michaels removed the case within 30 days to federal district court under the Class Action Fairness Act (“CAFA”). The district court remanded the case back to state court, finding the \$5 million amount-in-controversy requirement was not met, because Plaintiffs had expressly disclaimed any recovery for the class in excess of \$4,999,999.99. After the Supreme Court’s Holding in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (March 19, 2013) that such damages waivers are ineffective to defeat removal under CAFA, Michaels removed again under CAFA. The district court remanded again, on the basis that Michaels had failed to remove within the 30-day time limit, and alternatively that Michaels had failed to carry its burden to establish the amount in controversy. Michaels appealed. The Ninth Circuit reversed, and held that Michaels’ second removal was timely given that the presence of the damage waiver meant that the 30-day removal period was never triggered until those waivers were found invalid by the U.S. Supreme Court in *Knowles*. The Ninth Circuit also found that the \$5 million amount-in-controversy requirement was met, as Michaels submitted evidence of settlement discussions between the parties where Plaintiffs valued their claims in excess of \$5 million, and also where Michaels submitted evidence that the store managers in the class worked in excess of 45 hours a week, which would have entitled them to more than \$5 million if they prevailed. The Ninth Circuit also declined to consider the state court’s subsequent certification of the class in its determination, holding that those post-filing developments did not defeat jurisdiction if jurisdiction was properly invoked at the time of filing of the removal.



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## **Tenth Circuit**

***Kramer v. Wasatch Co. Sheriff's Office*, \_\_\_ F.3d \_\_\_ (10th Cir. Feb. 2, 2014), 2014 WL 702111, available at <http://www.ca10.uscourts.gov/opinions/12/12-4058.pdf>**

Applying *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013), Tenth Circuit reversed summary judgment in harassment case where manager's authority qualified him as "supervisor" but no tangible employment action occurred; although Plaintiff failed to directly report harassment culminating in rape, Defendant County failed to take reasonable care to prevent and correct harassment and Plaintiff did not unreasonably fail to make direct report.

Plaintiff Camille Kramer, a bailiff at the Wasatch County Utah Sheriff's Office, complained to the Sheriff that she experienced harassment in the form of comments about her breasts, offensive material on office computers, and graphic sexual conversations. In response, the Sheriff held a meeting in which he demonstrated harassing behavior on Ms. Kramer and instructed employees, "don't do that."

Later, the Bailiff supervisor, Sergeant Benson, allegedly made repeated requests to Kramer for a foot rub, and texted her repeatedly, asking about where she was. When Kramer went to his house on the pretext of performing house-cleaning (her side job), he raped her. Sergeant Benson also denied her request to take a road test qualifying her for other duties, and denied her requests for leave. He also prepared and showed her a poor performance evaluation, but never actually issued it. Kramer did not report Sergeant Benson's conduct because she believed he had power to control her career.

After Kramer's leave related to a car accident, she finally disclosed that Sergeant Benson had sexually assaulted her. She also reported that she was pregnant, and that she had been involved in a sexual relationship with a co-worker. The Sheriff initiated an investigation into what he referred to as "some sex" or "sexual misconduct" between Kramer and Sergeant Benson which, he explained, is "a violation of our policy and procedure, . . . especially if it's on-duty." The investigator focused primarily on whether Kramer had engaged in sexual relations while her partner (a firefighter) was on duty. When interviewing Kramer, he indicated that nobody would believe her about Sergeant Benson and suggested that she should resign. However, he reported the rape allegation to the Sheriff, who turned the investigation over to a State office and took no further internal action except to suspend Kramer's certification for six months due to her violation of company policy with respect to the firefighter. Sergeant Benson resigned, and Kramer never returned to the County.

The District granted summary judgment on Kramer's Title VII Harassment claim, applying the *Faragher/Ellerth* defense. The Tenth Circuit applied the Supreme Court's recent clarification of the "supervisor" test announced in *Vance v. Ball State Univ.*, which explained that an employee need not be empowered to take tangible employment actions directly to qualify as a supervisor, but a manager who works closely with subordinates and has the power to recommend or otherwise substantially influence tangible employment actions, and who can thus indirectly effectuate them, also qualifies as a "supervisor" under Title VII. *Id.* at 2452. The Tenth Circuit held that there were fact questions as to whether Sergeant Benson had the power to recommend and influence tangible employment actions against Kramer, and whether under apparent authority principles, Kramer was reasonable in believing Sergeant Benson had such powers even if he in fact did not. Sergeant Benson was Kramer's direct manager; he was the sole person responsible for writing her performance evaluations, which could cause her to be promoted, demoted, or fired; the County characterized Sergeant Benson as Kramer's supervisor; and



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although it was undisputed that the Sheriff was officially the only person who could fire employees, Sergeant Benson could recommend to the Sheriff that any of his supervisees be fired, and Benson's responsibility to "document noteworthy . . . behaviors of employees" was explicitly defined by the County as potentially affecting his subordinates' "job advancement, rewards, discipline and discharge." The Court concluded that, under Vance, "[w]here a harasser is empowered to effect significant changes in employment status indirectly through recommendations, performance evaluations, and the like, and where the person with final decision-making power does not work directly with the plaintiff, the harasser may be a "supervisor" under Title VII."

Accordingly, Kramer raised a genuine issue of fact as to whether the Wasatch County Sheriff's Department effectively delegated to Sergeant Benson the power to cause tangible employment actions regarding Kramer by providing for reliance on recommendations from sergeants such as Benson when making decisions regarding firing, promotion, demotion, and reassignment. Kramer was not required to establish that the Sheriff would follow Sergeant Benson's recommendations blindly. "Even if the Sheriff undertook some independent analysis when considering employment decisions recommended by Sergeant Benson, Sergeant Benson would qualify as a supervisor so long as his recommendations were among the proximate causes of the Sheriff's decision-making."

Next, the Court held that none of the actions alleged by Kramer against Sergeant Benson constituted tangible employment actions: (1) the rape; (2) a bad performance evaluation that was never submitted; (3) Sergeant Benson denying her vacation days; and (4) Sergeant Benson refusing to give her road training and assigning her to the magnetometer full-time. Thus, the Court held that the *Faragher/ Ellerth* defense applied, if the Defendant could establish that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. However,

the Court held that the Sheriff's Department had failed to establish either prong.

As to the first prong, the Court held that the district court improperly required the Plaintiff to establish that the County failed to exercise reasonable care; rather, the burden is on the Defendant to establish that it exercised reasonable care. The Court rejected the County's argument that the Sheriff responded to sexual harassment "of which he became aware." The Sheriff had reported Kramer's affair with the firefighter, resulting in the suspension of her certification. The Sheriff admitted he told the investigator that he wanted Kramer to resign to protect the reputation of the fireman and the Sheriff's Department. Kramer never returned to work for the County because the County's response confirmed her suspicion that complaining was a bad idea. As the Court explained, "[r]esponses to complaints that encourage the plaintiff to drop the complaint or otherwise penalize the plaintiff certainly do not prove an employer's reasonableness as a matter of law." "More specifically, investigations targeting the victim for unrelated misconduct are especially contraindicative of reasonably calculated efforts to promptly correct sexual harassment."

Second, the Court held that Kramer's failure to complain formally to the Sheriff was not dispositive of the affirmative defense's second prong. Kramer had testified that on numerous occasions Sergeant Benson sexually harassed or assaulted her and subsequently told her to "be quiet" and "not say anything" or it would be "a career ender." The Court held that this evidence demonstrates a persistent theme: Sergeant Benson was an intimidating person with job-related power over Ms. Kramer who would sexually harass her and then threaten that she would lose her job if she complained. Ms. Kramer's fear that Sergeant Benson would make good on his threats was not per se unreasonable, given that he did in fact take adverse job actions against her at work – denying her leave time, threatening her with a bad performance evaluation, and giving her long shifts performing undesirable tasks. Even if these actions rise to the level of a tangible employment action, the Court held that "a reasonable employee could well find . . . a combination of threats and actions taken



with the design of imposing both economic and psychological harm sufficient to dissuade him or her from making or supporting a charge of discrimination.” Thus, the Court reversed summary judgment on the Title VII harassment claim, providing helpful guidance in the application of the evolving and complicated Faragher/Ellerth defense.

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## **Eleventh Circuit**

***Martinez v. Carnival Corp.*, \_\_\_ F. 3d \_\_\_ (11th Cir. Feb. 24, 2014), 2014 WL 687879, available at <http://www.ca11.uscourts.gov/opinions/ops/201215164.pdf>**

In *Martinez*, the Eleventh Circuit affirmed the trial court's order compelling arbitration of claims of a mason employee under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA). By way of background, Carnival employee and Honduran citizen Melvin Martinez suffered a back injury while aboard the ship, and required surgery – which was performed by the company's selected physician off the vessel. After surgery, Mr. Martinez continued to experience pain, and brought a claim against Carnival, under the Jones Act in Florida state court, alleging that the physician negligently performed surgery, in addition to unseaworthiness, and failure to provide adequate maintenance and cure. Mr. Martinez' claim was based on the premise that the Jones Act's negligence claims did not fall within his employment contract, and thus, did not require arbitration under the Seafarer's Agreement, which covered the terms of his employment with Carnival. Specifically, the Seafarer's Agreement stated that it should cover “any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, or Seafarer's service on the vessel, shall be referred to

and finally resolved by arbitration.” Mr. Martinez' contended that the Agreement terminated before the dispute arose, as the Agreement states it should “automatically terminate without notice immediately upon Seafarer's unscheduled disembarkation of the assigned vessel...” The case was then removed by Carnival to federal court.

Unpersuaded by Carnival's assertion that the Eleventh Circuit lacked jurisdiction to hear the appeal of the order, because the district court's order was non-appealable by interlocutory order, the Eleventh Circuit looked to the Federal Arbitration Act, which holds that a party may appeal “a final decision with respect to an arbitration,” to find it had jurisdiction to hear the matter. Notably, the Eleventh Circuit found that the district court not only administratively closed the case, but denied all pending motions as moot, which was the equivalent of a functionally final and appealable decision.

In affirming the trial court's order compelling arbitration, the Eleventh Circuit acknowledged that the Seafarer's Agreement terminated when Martinez disembarked the ship, but that the arbitration clause was ambiguous as to whether it survived the termination of the Agreement. Looking to the plain language of the Agreement, the Eleventh Circuit concluded that the parties contemplated some circumstances wherein the arbitration clause would survive the termination of the Agreement. Therefore, the Court held that the district court did not err in its order to compel arbitration – noting a federal policy favoring arbitration of labor disputes.

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