



Executive Order Prohibits Discrimination Based on Sexual Orientation and Gender Identity

On July 21, 2014, President Obama issued Executive Order 13672 (EO) prohibiting discrimination based on sexual orientation or gender identity for all federal employees and government contractors. The order amends two existing anti-discrimination executive orders: Executive Order 11478 (Equal Employment Opportunity in the Federal Government) and Executive Order 11246 (Equal Employment Opportunity). Specifically, the Executive Order adds gender identity and sexual orientation to the protected categories listed in the Executive Order 11246. It further amends Executive Order 11478, which requires the federal government to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, sexual orientation, handicap, or age, and to promote equal employment opportunity through a continuing affirmative program in each executive department and agency.

The amendment to Order 11478, which applies to federal employees, takes effect immediately. The amendments to Order 11246, which affect federal contractors and federally assisted construction contractors and subcontractor, who do over \$10,000 in government business in one year, will take effect early next year after the Department of Labor has time to create and distribute rules pursuant to the Order. The new EO will become effective on or after the U.S. Department of Labor (US DOL) issues a final rule. The US DOL is charged with preparing regulations within 90 days. The EO will apply only to new contracts entered into on or after DOL issues a final rule.

MONTHLY CIRCUIT UPDATES

First Circuit

Vázquez-Rivera v. Figueroa, ___ F.3d ___ (1st Cir. July 15, 2014), 2014 WL 3409704, available at <http://media.ca1.uscourts.gov/pdf.opinions/12-2439P-01A.pdf>

Plaintiff filed suit against his employer, the U.S.

Army, alleging that he was discriminated against on account of his disability, subjected to a hostile work environment, and was retaliated against, all in violation of the Rehabilitation Act. The U.S. District Court for the District of Puerto Rico dismissed Plaintiff's Complaint.

The U.S. Court of Appeals for the First Circuit affirmed the dismissal. The appellate court held that plaintiff was required to exhaust his administrative remedies before he could initiate a civil suit, but he had not timely filed his administrative claim. The court further found that plaintiff was not entitled to equitable tolling.

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Third Circuit

New Jersey Carpenters v. Tishman Constr. Corp. of New Jersey, ___ F.3d ___ (3d Cir. July 28, 2014), 2014 WL 3702591, available at <http://www2.ca3.uscourts.gov/opinarch/133005p.pdf>

The *New Jersey Carpenters* case raised the question whether the New Jersey Prevailing Wage Act, (NJPWA), *N.J.S.A.* 34:11-56.25, *et seq.*, is completely preempted by either the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq.*, or the Labor Management Relations Act, (LMRA), 29 U.S.C. §141, *et seq.*

The “complete preemption” doctrine is a jurisdictional concept. Other forms of preemption operate merely as federal-law defenses to state law claims. “Complete preemption” goes further and also confers federal subject matter jurisdiction over what otherwise would be purely a state law claim, even in the absence of a federal cause of action on the face of the complaint. The United States Supreme Court has recognized only three instances in which the “complete preemption” doctrine applies: (a) Section 301 of the LMRA, 29 U.S.C. §185, which provides



for exclusive federal jurisdiction over suits concerning alleged violations of contracts between employers and labor organizations, (b) Section 502(a) of ERISA, 29 U.S.C. §1132, which authorizes civil suits for ERISA violations, suits to enforce the terms of an ERISA benefit plan, and suits to provide other relief to a plan, its participants or its fiduciaries under ERISA, and (c) Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86, pertaining to rates of interest that may be charged by national banks.

The NJPWA requires laborers on certain public works projects in New Jersey to be paid the “prevailing wage,” defined as the “wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workers of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done.” *N.J.S.A.* 34:11-56.26(9). The prevailing wage for each locality is determined by the Commissioner of the New Jersey Department of Labor and Workforce Development every two years, and includes both hourly wage rate and hourly fringe benefit rate components.

The workers in *New Jersey Carpenters* were carpenters hired to work on the Revel Casino Project in Atlantic City, which they contended to be “public work” due to financial assistance the project received from the New Jersey Economic Development Authority in the form of incentives, tax exemptions, and tax reimbursements. The workers claimed that the subcontractor for whom they were employed failed to pay them the appropriate fringe benefit component of the prevailing local wage. The workers assigned their claims to the various employee benefit funds and trust funds that became the plaintiffs in the action. The plaintiffs, in turn, sought recovery from Tishman Construction Corp., the general contractor on the project.

When the plaintiffs brought suit in state court under the NJPWA and other New Jersey statutes, Tishman removed the case to federal district court, alleging that the plaintiffs’ claims were subject to “complete preemption” under Section 502(a) of ERISA and Section 301 of the LMRA. The federal district court agreed that the plaintiffs’ claims were completely

preempted under Section 502(a) of ERISA. The district court also found the plaintiffs’ claims to be expressly preempted by Section 514 of ERISA, 29 U.S.C. §1144, under which ERISA “supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” On appeal, the Third Circuit reversed.

A claim is “completely preempted” under Section 502(a) of ERISA only if (1) the plaintiff could have brought his or her claim under Section 502(a), and (2) no other independent legal duty supports the plaintiff’s claim. A legal duty is “independent” under the second prong if it not based on an obligation under an ERISA plan, or would exist whether or not an ERISA plan existed. Both prongs of this test must be met for “complete preemption” to arise.

The Third Circuit held that the second prong of the “complete preemption” test under Section 502(a) was not met in this case. The NJPWA created a legal duty to pay prevailing wages independent of any ERISA plan. No interpretation of any ERISA plan is needed to determine a prevailing wage claim. Further, the NJPWA is a law that regulates wages, as any shortfall in the hourly fringe benefit rate component can be made up through cash payment. ERISA does not displace state laws governing wages, and state actions to recover unpaid wages are not preempted by ERISA, “completely” or otherwise. Finally, it was irrelevant that one of the plaintiffs in the case was an ERISA plan; it is the nature of the legal claim, not the identity of the parties, which matters.

Although the district court did not address the issue, the Third Circuit also held that “complete preemption” did not arise under Section 301 of the LMRA. Such preemption arises only when a claim is substantially dependent upon the analysis of the terms of an agreement made between parties in a collective bargaining agreement. A claim is not preempted if it is independent of a collective bargaining agreement, and does not require interpreting or construing a collective bargaining agreement. The plaintiffs’ NJPWA claim did not require the construction or interpretation of a collective negotiations agreement. Even if the claim under a collective bargaining agreement and a claim under state law involve precisely the same set of



facts, as long as the state law claim can be resolved without interpreting the collective bargaining agreement itself, the claim is independent of the collective bargaining agreement and is not preempted. Further, Section 301 of the LMRA does not displace non-negotiable rights conferred on individual employees as a matter of state law.

Finding no support for “complete preemption,” the Third Circuit vacated the district court order dismissing the case, and remanded with directions to remand the matter back to state court due to lack of federal subject matter jurisdiction.

***Opalinski v. Robert Half International, Inc.*, ___ F.3d ___ (3d Cir. July 30, 2014), 2014 WL 3733685, available at <http://www2.ca3.uscourts.gov/opinarch/124444p.pdf>**

The Third Circuit joined the Sixth Circuit in holding that the question whether a contract allows for classwide arbitration is a question of substantive arbitrability that, absent clear contractual agreement to the contrary, is to be decided by the courts, not the arbitrator. The Third and Sixth Circuits are the only Courts of Appeals yet to address this issue.

The plaintiffs in *Robert Half* were employees who claimed that they had not been paid overtime compensation they were allegedly owed, and that they had allegedly been improperly classified as overtime-exempt under the Fair Labor Standards Act (FLSA). Each plaintiff was party to an individual employment contract that required the binding arbitration of all employment-related claims. They nonetheless brought a class action suit in federal court under the FLSA on behalf of themselves and all similarly-situated individuals. The defendant employer moved to compel the individual arbitration of the plaintiffs’ claims. The district court granted the motion to compel arbitration, but held that the propriety of individual versus class arbitration was for the arbitrator to determine. It then administratively terminated the case. Instead of appealing that district court order, the defendant proceeded with arbitration. After the arbitrator had issued a “partial” award allowing class-wide arbitration, the defendant returned to district court to have the “partial” award vacated. The district court

denied the motion to vacate, and the defendant appealed.

As a preliminary matter, the Third Circuit rejected the argument that the appeal was untimely. The plaintiffs argued that the defendant should have appealed from the initial district court order allowing the arbitrator to determine whether class arbitration was available. However, the initial order was not a final, appealable order because its administrative dismissals are not “final” orders, and because the district court “explicitly acknowledged the potential need for further litigation” on the same matter. The defendant’s appeal from the order denying its motion to vacate was therefore a timely appeal from a final order, and could proceed.

After disposing of a procedural waiver argument raised by the plaintiffs, the Third Circuit turned to the substantive issue of the case, which it defined as “whether, in the context of an otherwise silent contract, the availability of classwide arbitration is to be decided by a court rather than an arbitrator... We decide first whether the availability of classwide arbitration is a ‘question of arbitrability’... If yes, it is presumed that the issue is ‘for judicial determination unless the parties clearly and unmistakably provide otherwise.’”

Questions of arbitrability are limited to a narrow range of gateway issues, such as whether the parties are bound by a given arbitration clause, and whether an arbitration clause that is otherwise binding applies to a particular type of controversy. “The crucial consideration is the expectation of the contracting parties: We do not ‘forc[e] parties to arbitrate a matter that they may well not have agreed to arbitrate.’” In contrast, procedural issues that grow out of a dispute and procedural defenses, such as waiver and delay, are for the arbitrator to determine.

Neither the United States Supreme Court nor the Third Circuit had conclusively resolved the question whether the availability of class arbitration was a “question of arbitrability.” Addressing the issue squarely for the first time, the *Opalinski* Court held that “whether an agreement provides for classwide arbitration is a ‘question of arbitrability’ to be decided by the District Court.”



First, the *Opalinski* Court reasoned that the availability of class arbitration implicates the question of whose claims the arbitrator may resolve:

By seeking classwide arbitration...Opalinski and McCabe contend that their arbitration agreements empower the arbitrator to resolve not only their personal claims but the claims of additional individuals not currently parties to this action. The determination whether RHI must include absent individuals in its arbitrations with Opalinski or McCabe affects whose claims may be arbitrated and is thus a question of arbitrability to be decided by the court...Additionally, as Justice Alito warned in his concurrence in *Oxford Health {Plans LLL v. Sutter, U.S., 133 S.Ct. 2064, 2071-2 (2013)}*, courts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent.

Second, the *Opalinski* Court reasoned that the availability of class arbitration implicates the types of cases that can be submitted to arbitration under an arbitration clause. “{W}e read the Supreme Court as characterizing the permissibility of classwide arbitration not solely as a question of procedure or contract interpretation but as a substantive gateway dispute qualitatively separate from deciding an individual quarrel. Traditional individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the very type of controversy to be resolved.” The *Opalinski* Court rejected the argument that the availability of class arbitration was merely a procedural question, citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010), for the proposition that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”

The *Opalinski* Court quoted with approval the Sixth Circuit’s reasoning in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598-9 (6th Cir. 2013), which likewise held class-wide arbitration to be a “gateway question rather than a subsidiary one...whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail.”

Finally, having determined that the availability of class arbitration is question of arbitrability, the *Opalinski* Court found no evidence that the parties had “clearly and unmistakably” agreed to allow the arbitrator to decide the issue:

The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator...Silence or ambiguous contractual language is insufficient to rebut the presumption...Here, Opalinski and McCabe’s employment agreements provide for arbitration of any dispute or claim arising out of or relating to their employment but are silent as to the availability of class-wide arbitration or whether the question should be submitted to the arbitrator. Nothing else in the agreements or record suggests that the parties agreed to submit questions of arbitrability to the arbitrator. Thus, the strong presumption favoring judicial resolution of questions of arbitrability is not undone.

The *Opalinski* Court remanded the matter to the district court for a determination whether the plaintiffs’ employment agreements allow for classwide arbitration.

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Fourth Circuit

***Nucor Corp. v. Brown*, __ F.3d__ (4th Cir. July 25, 2014), 2014 WL 3686145, available at <http://pacer.ca4.uscourts.gov/opinion.pdf/14154R1.P.pdf>**

In 2011, the district court certified two classes in a racial discrimination case: a class alleging disparate treatment and disparate impact claims, and a class alleging hostile work environment claims. The district court denied Defendants’ motion for



reconsideration of the certification order. Defendants then filed four motions for decertification. The district court granted, in part, the second motion for decertification, and decertified the disparate treatment class. The district court left intact the hostile work environment class. Defendants then filed two motions seeking decertification of the hostile work environment class. The district court denied both motions. Defendants then filed a petition for interlocutory review.

The Fourth Circuit noted that Federal Rule of Civil Procedure 23(f) permits review of decisions granting or denying class certification. However, an appeal from a certification order must be filed within fourteen days of a certification order. The clock begins to run when the order is entered and restarts only after the court rules on a timely motion to reconsider. The Fourth Circuit noted that a court's ruling on a subsequent certification motion will not reset the time for appeal so long as the later order does not alter the original order.

Defendants filed the fourth motion for decertification two years after the original certification order. The Fourth Circuit found that none of the district court's orders issued after the original order altered the status of the hostile work environment class. Accordingly, those orders were not orders granting or denying certification as to the hostile work environment class that would reset the appeal clock. Thus, the latest time to appeal the certification of the hostile work environment class was fourteen days after the ruling on the motion to reconsider the certification order, but Defendants' appeal was filed three years later. Acknowledging the "rigid and inflexible" nature of the Rule 23(f) deadline, the Fourth Circuit declined to render that deadline "toothless" by permitting the Defendants to file a motion to decertify a class at any time after the original certification order.

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Fifth Circuit

McCorkle v. Metropolitan Life Ins. Co., ___ F.3d ___ (5th Cir. 7/3/14), 2014 WL 3585501, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-30745-CV0.pdf>

The Fifth Circuit reviewed an ERISA administrator's determination of disqualification for death benefits as a consequence of suicide. In the eight years before his death, Harvey McCorkle worked for the same employer, and he began to complain of stress in a weeks leading up to his death. In January of 2010, he saw his physician, who ruled out depression and prescribed Lunesta for insomnia and anxiety. Three days later, he took the prescription, went to bed, woke up at some point in the night, and was found with a gunshot wound to his head in his driveway.

The police investigation concluded that Mr. McCorkle committed suicide, noting the medical exam of the bullet's path, the presence of one gun at the scene with one fired round in line with the barrel and hammer, as well as residue on his hand. However, there was no suicide note. The coroner listed the cause of death as suicide, and later declined to reclassify the death on his wife's theory that Mr. McCorkle was under the influence of Lunesta and therefore did not consciously and knowingly take his own life.

MetLife paid Ms. McCorkle the basic life insurance benefits, but denied the balance of benefits because Mr. McCorkle's death was the result of suicide. Ms. McCorkle appealed, arguing that even if her husband pulled the trigger on the gun that killed him, he did so while acting unaware of the consequences of what he was doing because of his prescription medication. MetLife stood by its original determinations and similar appeals by Ms. McCorkle were not successful.

After suit was initiated, the District Court found that it was more reasonable that Mr. McCorkle was under the influence of Lunesta and not acting of his own free will. The drug, the Court reasoned, took away his understanding that his act was one of self-destruction.



The Fifth Circuit began by noting that courts do not sit as courts of first impression for ERISA appeals, but instead sit as courts of review. As such, administrator decisions must be affirmed unless arbitrary or not supported by substantial evidence. On that basis, the Fifth Circuit reversed, noting that substantial evidence supported the determination that Mr. McCorkle committed suicide. In fact, as the Court noted, even if Ms. McCorkle's theory were accepted, the undisputed facts were that Mr. McCorkle's death resulted from his own non-accidental discharge of the gun that he owned, loaded, placed under his chin, and fired—thus, well within the definition of suicide that MetLife utilized. The Fifth Circuit dismissed the case.

***Orozco v. Plackis*, ___ F.3d ___ (5th Cir. 7/3/14), 2014 WL 3037943, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-50632-CV0.pdf>**

In this FLSA case, the Fifth Circuit addressed a franchisor's liability for the conduct of its franchisees. Mr. Orozco worked at a Craig O's Pizza and Pastaria, a franchised operation. After his employment ended, he filed suit against his employer alleging unpaid wages, and the claims were settled. Mr. Orozco then filed suit against the franchisor, alleging that it was responsible as his joint employer. After succeeding at the District Court in a jury trial, the franchisor appealed.

On appeal, the Fifth Circuit first focused on the economic realities test—one that evaluates whether the putative employer has the power to hire and fire, determine work schedules or rates of pay, and maintenance of employment records. The Court then noted that Plackis maintained none of Orozco's employment records and there was no evidence that Plackis had the power to hire or fire or that it set rates of pay.

Finally, the Fifth Circuit noted that the Franchise Agreement specifically provided that the franchisee retained control and responsibility for management and operation of the Franchise at all times, and that Franchisee would comply with all laws at all times. The Court noted that there may be instances where a franchisor is appropriately held liable for franchisee

FLSA violations, but that this was not such a case. The District Court's judgment was reversed and the case dismissed.

***Johnson v. Heckmann Water Resources (CVR), Inc.*, ___ F.3d ___ (5th Cir. 7/14/14), 2014 WL 3408250, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-40824-CV0.pdf>**

The Fifth Circuit affirmed the dismissal of a plaintiff's FLSA claims based upon the employer's definition of "workweek" when calculating wages due. Kevin Johnson was a non-exempt employee working twelve-hour shifts for seven consecutive days, beginning every other Thursday. CVR paid its employees bi-weekly and used a Monday through Sunday "workweek" to calculate overtime.

By using a Monday to Sunday workweek, Mr. Johnson would work 42 hours a week for each week in a two week period for which he was paid regular wages for forty hours and overtime pay for two hours. Mr. Johnson filed suit, taking the position that his workweek should be set to begin on a Thursday, which would have resulted in him working 84 hours in one week, with no hours in the next, and which would have triggered entitlement to 44 hours of overtime in each pay period. The District Court granted summary judgment to CVR.

On appeal, the Fifth Circuit noted that there is no requirement that workweeks begin and end at any particular times. Instead, the DOL's regulations say that a workweek may begin on any day at any time, as long as it does so for an establishment as a whole or for groups of employees. The Fifth Circuit cited a DOL opinion letter that allowed an employer to set a workweek at a time more advantageous to it, so long as it was set in advance and consistent for all employees. So, the Fifth Circuit held that an employer has the authority to set the workweek, so long as it is a fixed and regularly occurring period of 168 hours. Thus, the Fifth circuit affirmed the District Court's dismissal.

***Tolbert v. RBC Capital Markets Corp.*, ___ F.3d**



___ (5th Cir. 7/14/14), 2014 WL 3408230, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-20213-CV0.pdf>

In this ERISA case, the plaintiffs participated in a wealth accumulation plan during their employment with RBC. When they left their jobs with RBC, portions of their accounts were forfeited. The plaintiffs alleged that the forfeiture was prohibited by ERISA, and the case focused on whether the plans at issue were ERISA plans. The District Court concluded that the wealth accumulation plans were *not* pension plans within the meaning of ERISA, and the plaintiffs appealed.

The Fifth Circuit began with an analysis of the wealth accumulation plan's terms, noting that it was intended to be a nonqualified, deferred compensation plan, one which as administered by a committee of RBC's executives. The plan contemplated three types of deferred compensation, and the company would make matching and other voluntary contributions on a periodic basis. The Court treated the issue as a question of law because no factual issues were in dispute, and it found that the plan would be considered an ERISA plan if it was either designed to provide retirement income or results in deferral of income to period extending to the termination of employment or beyond.

On the first inquiry, the Fifth Circuit agreed with RBC that the primary purpose of the plan was to allow employees to share in company growth, not to provide retirement income. But, on the second point, the Court pointed to language in the plan that made clear its intent to provide income on a deferred basis, including upon or after separation of employment. Therefore, the Fifth Circuit reversed and remanded for further proceedings.

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Sixth Circuit

Killion v. KeHE Distributors, LLC., ___ F.3d ___ (6th Cir. July 30, 2014), 2014 WL 3733686, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0166p-06.pdf>

Four former employees of KeHE Distributors, LLC (“KeHE”) filed suit after they were discharged as part of a restructuring alleging that KeHE failed to pay them overtime wages as required by the Fair Labor Standards Act (“FLSA”). The district court granted the plaintiffs’ request to certify a collective action, but limited it to only employees who had not signed separation agreements in which they waived the right to participate in such an action. The plaintiffs sought an interlocutory appeal of that order. While the interlocutory appeal was pending, the district court granted summary judgment for KeHE finding that all of the plaintiffs were outside sales employees who were exempt from the overtime and minimum wage requirements of the FLSA. A second appeal followed.

In reviewing the district court’s ruling that the plaintiffs were outside salespersons and, therefore, not entitled to overtime, the Sixth Circuit asked two questions: (1) do the plaintiffs make sales, and (2) if so, is making sales their primary duty?

The Court found that a genuine issue of material fact exists as to whether the plaintiffs actually made sales for KeHE during their employment because KeHE’s customer development team establishes the initial relationship with stores, the business development team negotiates the distribution contracts and the account-management team negotiates with the store the list of products from KeHE’s catalog that are authorized for sale at each location. Account managers also help the stores develop a marketing plan that designates shelf space, identifies which products are to be placed on the shelves and lays out in-store advertising plans. Plaintiffs were “sales representatives” who served as the on-the-ground contact for each individual store and were responsible for meeting KeHE’s delivery trucks, overseeing the unloading of product, stocking the products on the store shelves, placing orders for more products when the inventory is depleted and transporting damaged products back to KeHE. The



Court stated that “[t]he fact that the plaintiffs hit the order buttons on their electronic devices, in other words, is not enough to magically transform their jobs from inventory management to ‘sales’.”

The Sixth Circuit also found that a genuine issue of material fact exists as to the whether making sales was the employees’ primary duty because the plaintiffs produced evidence showing that: (1) the vast majority of their time was spent stocking and cleaning shelves; (2) their compensation was primarily based on stocking shelves and store maintenance; and (3) even if these activities were considered “promotional work” within the meaning of 29 C.F.R. § 541.503, the work could be seen to be in furtherance of sales made by the account managers instead of the plaintiffs. Whether promotional work is exempt depends on whether the work is performed incidental to and in conjunction with an employee’s *own* outside sales or solicitations (emphasis in original).

The Sixth Circuit further held that the district court erred in refusing to consider the “Drivers who sell” regulation, 29 C.F.R. § 541.504, and its factors that should be considered in determining if a driver has a primary duty of making sales. The Court ordered the district court to consider this regulation on remand and “entertain evidence regarding as many of the nine factors identified in 29 C.F.R. § 541.504(b) as it determines are relevant to this case.”

The Court then addressed the question of whether the district court improperly excluded from the collective action employees who signed separation agreements that included waivers of the right to participate in a class or collective action. The Court distinguished the cases cited by KeHE in which other Circuits upheld the validity of arbitration agreements containing collective action waivers. Instead, the Court relied on *Boaz v. FedEx Customer Information Services, Inc.*, 725 F.3d 603 (6th Cir. 2013) in which “the court clearly said that ‘an employment agreement cannot be utilized to deprive employees of their statutory FLSA rights’” (internal citations and quotation marks omitted). Unlike the cases cited by KeHE, because this case does not involve an arbitration agreement, according to the Court, there is no federal policy that outweighs the policy articulated in the FLSA as

explained by *Boaz*. The Court, therefore, reversed the district court’s determination regarding the limitation on the members of the collective action.

Finally, the Court affirmed the district court’s decision to strike the report of the plaintiffs’ expert witness on the basis that the expert was attempting to define legal terms, which is not permissible.

***Burdett-Foster v. Blue Cross Blue Shield of Michigan*, ___ F.3d ___ (6th Cir. July 29, 2014), 2014 WL 3719111, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0572n-06.pdf>**

Plaintiff was terminated by Blue Care Network (BCN), a wholly owned subsidiary of Blue Cross Blue Shield of Michigan (BCBS), after working there for eleven years. Plaintiff was a bargaining unit employee subject to a collective bargaining agreement (CBA) between BCN and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

In 2011, the African-American plaintiff was diagnosed with depression. She was granted a two month leave of absence. When she returned to work she sought permission to use the bathroom frequently because of a side effect of her medication. BCN agreed to the accommodation on a trial basis. However, she testified that her supervisor followed her to the bathroom daily and followed her around the building.

Upon returning from her leave, the UAW asked BCN to provide the plaintiff with training so that she could assist her more senior coworkers in performing backup telephone duties when needed to address the high volume of customer calls. Plaintiff became very upset upon learning that she would receive this training. She complained to a director that she did not want to answer phones. Shortly thereafter, she told her managers that she could not complete the training due to problems with her vocal cords. She also provided a doctor’s note to that effect.

Because phone duties comprised 5-15% of her daily job function, BCN told her that she would need to submit to a fitness for duty evaluation. She cancelled



the appointment on short notice once, but later attended and was diagnosed with “hoarseness/dysphonia.” A physician recommended a procedure using a camera and strobe light to capture her vocal cords in motion. She scheduled the procedure, but then cancelled without notice. The procedure was rescheduled and plaintiff cancelled it again without notice.

BCN subsequently placed the plaintiff on a 5-day disciplinary suspension due to insubordination by rescheduling, cancelling and/or not showing for appointments. Then, she again failed to show up for another scheduled appointment because she had fainted at her home, gone to the emergency room and been diagnosed with syncope, depression, and dehydration. Ultimately, she was granted another 6-week leave of absence.

While on leave, the plaintiff was asked to complete speech therapy. She attended only one session because her insurance company denied authorization. She also cancelled her appointment with the physician for the camera and strobe light procedure claiming that it was scheduled for a Friday, which was against her religion. That was the first time she mentioned her religion as causing a conflict. BCN asked the plaintiff to meet in person and explain her concerns. The plaintiff responded that she would meet with them once she returned to work upon the expiration of her leave. BCN asked for a written explanation sooner than that. She failed to respond. When BCN met with her upon her return to work, she refused to explain her religious objections claiming it was private. She then received another 5-day suspension and was told she had to complete a fitness-for-duty examination and the strobe light procedure before returning.

On the day before she was to return to work, the plaintiff’s therapist contacted BCN’s third-party administrator and recommended that the plaintiff not return to work. The plaintiff, however, did not ask for or receive additional short-term disability leave. When the plaintiff failed to return to work for more than 3 consecutive working days without providing notice, she was terminated pursuant to the CBA. She subsequently filed suit alleging race discrimination and retaliation under Title VII and Michigan law and

unlawful discrimination/hostile work environment under the ADA. After BCBS moved for summary judgment, she voluntarily dismissed her race discrimination claims, but argued that genuine issues of material fact existed on the remaining claims. The Court disagreed and granted BCBS’s motion. The plaintiff appealed.

On appeal, the Sixth Circuit held that the plaintiff’s failure to accommodate claim under the ADA failed because she was granted the only accommodation she ever requested: the ability to take frequent bathroom breaks. Although she asserted that she requested a change of supervisor as an accommodation, the Court held that the undisputed evidence established that she was not qualified for any other positions that were open at the time and, therefore, was not entitled to a transfer even if she had requested one.

The Sixth Circuit also affirmed the district court’s ruling on the plaintiff’s claim for discrimination under the ADA finding that BCBS had a legitimate, nondiscriminatory business reason for terminating her employment: her 7-day consecutive unexcused absences, which termination complied with the CBA. The plaintiff was unable to name any nondisabled employee who was not terminated for the same conduct. She also could not show pretext.

Finally, the Court also affirmed the dismissal of the plaintiff’s retaliation claim under Title VII because she could not establish a causal connection between any alleged protective activity and her termination.

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Seventh Circuit



Stephanie Sue Carlson v. CSX Transportation, Inc., ___ F.3d ___ (7th Cir. July 10, 2014), 2014 WL 3361072, available at, <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-10/C:13-1944:J:Hamilton:aut:T:fnOp:N:1378195:S:0>

Plaintiff brought sex discrimination and retaliation claims under Title VII against her employer, a railway company. The Seventh Circuit reversed the district court's dismissal of the sex discrimination claim after finding that the complaint addressed which job positions she sought and was denied and that she attributed the denial to sex discrimination. The Court concluded that the district court erred by relying on summary judgment decisions to evaluate a motion to dismiss, thereby applying an elevated standard. Thus, the Court held that plaintiff had alleged enough to survive the pleading stage.

The Seventh Circuit also reversed the district court's dismissal of plaintiff's retaliation claim. The Court refused to adopt a bright-line timing rule to decide whether a retaliation claim is plausible or whether it should go to a jury. As a result, the Seventh Circuit held that plaintiff's retaliation claims are plausible and survive the pleading stage.

The district court also held that defendant acted in compliance with the collective bargaining agreement and as a result, and thus the Railway Labor Act precluded her claim. The Seventh Circuit held that, if a collective bargaining agreement simply prohibits employers from doing something, such as discriminating against its employees, or merely allows arbitration of some types of claim, a claim under an independent law, such as Title VII, which covers the same subject matter, is not precluded. Thus, because plaintiff had alleged a claim under Title VII, an independent law, the claim is not precluded by the RLA.

Orton-Bell v. Indiana, ___ F.3d ___ (7th Cir. July 21, 2014), 2014 WL 3566338, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-21/C:13-1235:J:Manion:aut:T:fnOp:N:1384201:S:0>

Plaintiff worked as a substance abuse counselor at a maximum security prison in Indiana. During her employment, she complained to her supervisors about the constant sexual comments directed at her and the fact that night shift employees were having sex on her desk, but her supervisors did not do anything to correct the situation. Plaintiff and the Major in Charge of Custody were fired after the superintendent discovered that they were having an affair. Both appealed their terminations and the prison settled the Major's appeal, allowed him to continue working for the prison as a contractor, and permitted him to keep most of his benefits. Plaintiff was not given the same opportunity. Plaintiff brought suit alleging Title VII claims of discrimination, retaliation, and hostile work environment.

The district court granted summary judgment and the Seventh Circuit reversed in part and affirmed in part. The appellate court found that, while plaintiff could not establish that her supervisors disregarded her complaints about employees having sex on her desk because she was a woman, there was sufficient evidence to show that the sexual comments directed at her were pervasive, offensive, and based on her sex. The Court also found that defendant's disparate treatment of the Major's and plaintiff's offense supported the discrimination claim. The Court affirmed the summary judgment on the retaliation claim.

Williette Price v. Board of Education of the City of Chicago and Barbara Byrd-Bennett, ___ F.3d ___ (7th Cir. July 2, 2014), 2014 WL 2958440, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-02/C:13-2007:J:Williams:aut:T:fnOp:N:1373593:S:0>

The Seventh Circuit affirmed the district court's dismissal of plaintiff's claims because plaintiff failed to identify any protected property interest that could give rise to a due process claim. Plaintiff was part of a massive economic layoff of Chicago Public Schools ("CPS") teachers in 2010. At the time, plaintiff was a tenured teacher. Plaintiff alleged that defendants violated the Due Process Clause when CPS laid-off plaintiff and other similarly situated tenured teachers without considering them for any



open positions that they were qualified to fill. After citing to Illinois Supreme Court cases and statutes, the Seventh Circuit held tenured teachers do not have a protected property interest in getting rehired or in filling vacant positions for which they are qualified both before and after being laid-off. As a result, the Seventh Circuit concluded that plaintiff failed to identify a property interest protected by the Due Process Clause and affirmed the district court's dismissal for failure to state a claim.

***Reeves v. Jewel Food Stores, Inc.*, ___ F.3d ___ (7th Cir. July 17, 2014), 2014 WL 3513118, available at media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-17/C:13-3782;J:Kanne;aut:T:fnOp:N:1382415;S:0**

Plaintiff, who had Down syndrome, was terminated by defendant for cursing at another employee in violation of defendant's policy. Plaintiff's parents and legal guardians filed suit alleging defendant failed to accommodate plaintiff's disability. After a prior theft incident, plaintiff's mother had requested that defendant bring in a job coach to help accommodate. After being told by defendant that a job coach was not necessary, plaintiff's mother did not suggest alternative accommodations or express a fear that plaintiff would have additional, more serious, behavior problems.

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of defendant. The court held that a tentative request for an accommodation to address minor theft does not imply a request for an accommodation for inappropriate verbal outbursts that violate the employer's anti-harassment policy. The Seventh Circuit concluded that plaintiff failed to allege the reasonable accommodations sought would have prevented the behavior, the cursing in front of customers, for which plaintiff was terminated.

***Matthews v. Waukesha County*, ___ F.3d ___ (7th Cir. July 22, 2014), 2014 WL 3600379, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-22/C:13-1839;J:Rovner;aut:T:fnOp:N:1385252;S:0>**

Plaintiff, who is African-American, applied for the

Economic Support Supervisor position for Defendant County. Defendant's Senior Human Resources Analyst, who was not aware of the applicant's racial backgrounds, sorted the applications into four categories depending on the extent and relevance of each applicant's previous employment. Plaintiff, who was placed in the group comprising those with the least qualifications, was not chosen for the job. Plaintiff claimed that the hiring process was discriminatory on the basis of race.

The district court granted summary judgment in favor of defendant. The Seventh Circuit affirmed, holding that plaintiff did not present any evidence showing that defendant's use of categories was pretext for discrimination.

***Tank v. T-Mobile USA, Inc.*, ___ F.3d ___ (7th Cir. July 10, 2014), 2014 WL 3360476, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-10/C:13-1912;J:Williams;aut:T:fnOp:N:1377894;S:0>**

Plaintiff, who was born in India, was a vice president for Defendant T-Mobile. Defendant fired plaintiff after the conclusions of an intra-company investigation showed that plaintiff had violated company policy. Plaintiff filed a complaint against defendant alleging race and national origin-based discrimination and retaliation, and claimed that he was paid less than comparable non-Indian employees. The district court found that plaintiff failed to create an inference of discrimination, that plaintiff failed to show that defendant's reasons for terminating his employment were pre-textual, and that plaintiff's pay discrimination claim failed because he failed to establish that the comparator employees used in his argument were similarly situated.

The Seventh Circuit affirmed, finding that the timing of defendant's investigation was not suspicious, that plaintiff failed to show that defendant departed from company policy when conducting the investigation, and that plaintiff's argument that defendant is liable for a human resources director's discriminatory remark is waived on appeal because it was not raised before the district court. Additionally, the Court upheld summary judgment on plaintiff's retaliation



and pay discrimination claims because the comparator employees that plaintiff used for each claim were not similarly situated.

Hutt v. AbbVie Products, LLC, ___ F.3d ___ (7th Cir. July 7, 2014), 2014 WL 3033126, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D07-07/C:13-1481:J:Tinder:aut:T:fnOp:N:1375750:S:0>

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of defendant on plaintiff's ADEA claims and on her Indiana state law claim.

Plaintiff worked for ten years as a sales representative for defendant. From April 2008 to April 2010, plaintiff was intermittently placed on warning status for not completing reports on time and for behavior issues. During this time, plaintiff did not receive bonus payments even though she ranked higher than employees who did. In February 2009, plaintiff filed an EEOC charge alleging age discrimination and retaliation. A couple months later, one of plaintiff's supervisors angrily confronted plaintiff about her EEOC charge.

The district court granted defendant's motion for summary judgment on the grounds that plaintiff failed to identify any similarly situated comparator employees as part of her prima facie case of discrimination and retaliation. It also found that since plaintiff was ineligible for bonus payments while she was on warning status, she could not bring forth a claim under the Indiana Wage Payment Statute. The Seventh Circuit affirmed, finding that plaintiff presented no evidence that defendant took an adverse employment action against her due to her age, or that they had even referenced her age. Rather, plaintiff relied on the fact that she was one of the oldest representatives to be placed on warning status. The Court found that this did not prove discriminatory intent. The Court also affirmed the grant of summary judgment on her retaliation claim. While the Court acknowledged that plaintiff's encounter with her supervisor following her EEOC charge was troubling, it held that plaintiff was unable to link the confrontation with the adverse employment action taken by defendant. Finally the Court held that

plaintiff's claim that she was unlawfully deprived of her bonus payments when defendant placed her on warning status in bad faith was waived on appeal since she did not develop this argument in her district court brief.

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Eighth Circuit

Waldoch v. Medtronic, Inc., ___ F.3d ___ (8th Cir. July 9, 2014), 2014 WL 3264187, available at <http://media.ca8.uscourts.gov/opndir/14/07/132543P.pdf>

Rodney Waldoch ("Waldoch") filed suit against his former employer, Medtronic Inc. ("Medtronic") alleging improper denial of benefits under a long-term disability plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). Waldoch, a Senior Buyer-Planner for Medtronic, was hired in 2001 and terminated in 2008. Waldoch has Type I Diabetes Mellitus. During his employment at Medtronic, Waldoch struggled to balance his health needs with the demands of his job. He suffered from a variety of medical conditions related to his diabetes that were exacerbated by stress. In 2007, Waldoch's doctor noted that recent layoffs at work had increased Waldoch's stress level and this affected his ability to cope with his disease. Waldoch's performance at work declined and he was terminated in 2008.

Medtronic's long-term disability ("LTD") plan provided benefits for one year if a participant was unable to perform the essential functions of their regular occupation ("own occupation benefit"), and after that, the plan provided benefits if a participant was totally disabled and unable to work at any occupation ("any occupation benefit"). Medtronic, as the plan administrator, had complete and total



discretionary authority to interpret and administer the plan. Medtronic contracted with Hartford-Comprehensive Employee Benefits Service Company (“Hartford”) for help with plan administration. Hartford provided recommendations based on claim submissions but had no authority to make final claim determinations.

Waldoch filed a claim for LTD benefits in July 2009. Waldoch submitted evidence from his doctor that stated Waldoch could not engage in predictable ongoing activity, of any type, without disruption by variation in his blood sugar. Waldoch’s initial claim was denied and he appealed the decision. After additional evidence was produced, Medtronic determined that Waldoch was entitled to own occupation benefits. After more investigation, Hartford recommended that Waldoch’s any occupation benefits be denied, and Medtronic agreed.

Waldoch exhausted his administrative remedies and filed suit. The District Court granted summary judgment to Medtronic. Waldoch appealed, and claimed the District Court applied the wrong standard of review. The 8th Circuit affirmed the District Court’s decision and stated that the abuse-of-discretion standard applied and Medtronic did not abuse its discretion in denying Waldoch LTD any occupation benefits.

Waldoch contended that procedural irregularities, such as Hartford being the final decisions maker regarding benefits and Medtronic not conducting a meaningful review of his claim, rendered the abuse-of-discretion standard inappropriate. The 8th Circuit found that Medtronic was the final decision maker, because Hartford initially recommended that Medtronic deny Waldoch’s own occupation benefit, but Medtronic decided to award him the benefit anyway. Additionally, there was evidence showing that Medtronic did review Hartford’s decision regarding Waldoch’s any occupation benefit, thus satisfying Medtronic’s obligation to conduct a meaningful review and to render a final decision. Therefore, the abuse-of-discretion standard was appropriate and Medtronic did not abuse its discretion.

***Fiero v. CSG Sys., Inc.*, __ F. 3d __ (8th Cir. July**

17, 2014), 2014 WL 3511780, available at <http://media.ca8.uscourts.gov/opndir/14/07/133287P.pdf>

Wendy Fiero (“Fiero”) was a business analyst for CSG from 2006 until 2009. In late 2009, CSG eliminated Fiero’s position and offered her a job on the analysis and design team. In her new position, Fiero was required to have more technical skills. After six weeks in the new position, Fiero had a performance review because she was not meeting CSG expectations. Fiero admitted that she had less technical experience than other members of her team. At the same time, John Hadland, another member of the analysis and design team, was reviewed for poor performance. Hadland’s performance improved but Fiero’s did not. Fiero had another review in September, six months after her previous review, because she was still not meeting CSG’s expectations. A month later, Fiero received another verbal warning. Fiero then complained that she was being unfairly scrutinized compared to her male coworkers. However, she admitted that her performance was not “up to par.” Fiero was eventually put on a performance improvement plan but she failed to improve and she was terminated.

After being placed on the performance improvement plan, but before she was discharged, Fiero filed a charge of gender discrimination with the EEOC. After she was terminated, Fiero filed a gender discrimination suit against CSG. The District Court granted summary judgment in favor of CSG. On appeal, the Eighth Circuit affirmed the decision.

The Eighth Circuit assumed that Fiero established a prima facie case of gender discrimination. However, CSG identified a legitimate nondiscriminatory reason for terminating her; Fiero had substantial performance-related problems. The burden then shifted back to Fiero to show that CSG’s justification was pre-textual. Fiero pointed to Hadland to show that other male members of her team had similar performance related problems but they were not disciplined or discharged. However, Fiero failed to show that Hadland was similarly situated. Hadland had a bad performance review, but then significantly improved his performance and no further action was needed. Additionally, Fiero conceded that Hadland



had better technical skills. Therefore, Fiero failed to show that CSG's reason for her termination was pretext for gender discrimination.

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Ninth Circuit

***Ambat v. City & Cnty. of San Francisco*, ___ F.3d ___ (9th Cir. July 2, 2014), 2014 WL 2959634, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/02/11-16746.pdf>**

Current and former deputies of the San Francisco Sheriff's Department ("SFSD") brought a challenge under Title VII to the City and County of San Francisco's (the "County") policy prohibiting male deputies from supervising female inmates in SFSD's jails. The district court concluded that the policy did not violate Title VII's prohibition on sex discrimination because it fell within the statute's "bona fide occupational qualification" exception, and granted summary judgment in favor of the County. On appeal, the Ninth Circuit reversed.

Applying the two-part analysis set forth in *Breiner v. Nevada Dep't of Corrections*, 610 F.3d 1202 (9th Cir. 2010), the court found that the bases asserted by the County for this rule (to prevent sexual misconduct between male guards and female inmates, protecting female privacy and jail security) did not satisfy the *Breiner* test. The court stated that while the justifications offered by the County in support of the policy were important, the County had not met its burden of showing that excluding male deputies because of their sex is a legitimate proxy for determining whether a deputy actually has a particular qualification. More specifically, the court found that the SFSD did not show that it had a substantial basis for believing that all or nearly all male deputies were likely to engage in sexual misconduct with female inmates. Rather, the court found there were other, practical ways that the SFSD

could satisfy its concerns by individual testing whether a deputy has or does not have a propensity to perpetrate sexual misconduct, including psychological testing. Because there was a genuine issue of material fact as to whether there was a practical way to differentiate an unqualified from a qualified applicant instead of rendering all male deputies ineligible on the basis of sex, summary judgment in the County's favor was improper.

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Eleventh Circuit

***Booth v. Pasco Cty.*, ___ F.3d ___ (11th Cir. July 3, 2014), 2014 WL 3031177, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201213389.pdf>**

While working as an emergency-service worker, Plaintiff Booth filed a grievance against his supervisor and named Plaintiff Brown as a witness. Booth was previously warned he would be transferred if he filed a grievance, and he was transferred after filing the grievance. Brown then filed his own grievance after he was threatened by the supervisor. Plaintiffs complained to the county, and sought union assistance, but found no help. They then filed EEOC charges.

The union sent around a memo about Plaintiffs' discrimination charges, which ended up on a station bulletin board with the Plaintiffs' names highlighted. The memo also mentioned that the claims may result in increased union member fees for legal expenses. Plaintiffs were then shunned from their coworkers, denied vacations, available overtime, and shift swaps. Plaintiffs filed additional EEOC charges about the memo and harassment, and later filed suit. A newspaper article about the lawsuit was posted to the station bulletin board, and Booth ripped it up. Someone retrieved the ripped article, taped it



together, and re-posted it, as well as posting it on the station computer wallpaper. Booth then filed a grievance, which was deemed untimely. Four months later, the County reprimanded the captains for “doing nothing” about the situation.

In the litigation, Plaintiffs filed affidavits claiming that they feared for their safety at work. The County Risk Manager testified she believed the affidavits meant the Plaintiffs’ fear rendered them unable to perform duties. They were ordered for a fitness-for-duty examination. They were told they could return to work when they passed.

At trial, the jury returned verdicts against both defendants. Subsequently, the County moved for judgment as a matter of law, claiming there was insufficient evidence of retaliatory motive, and the district court granted the motion. However, the district court denied the union’s similar motion. The court then denied Plaintiffs’ motion for a new trial against the County, as well as the union’s same motion. The Eleventh Circuit heard all issues on appeal.

Reversing the district court’s entry of judgment in favor of the County, the Eleventh Circuit ordered judgment be entered against the County on the verdicts as returned, but affirmed on all other matters. The Eleventh Circuit discussed the claims against the County and noted that Title VII retaliation requires proof that desire to retaliate is but-for cause for action. The court reasoned that the question is not whether the County’s legitimate safety concern is well-grounded, but whether it motivated the County. Concluding the jury could find the County’s action was retaliatory, the Eleventh Circuit found that while there was evidence that the County’s employees may have believed their actions, they ordered the examinations without speaking to Plaintiffs or supervisors. Also, the County failed to investigate the potential factual basis for Plaintiffs’ statements.

With regard to the Union, the jury found the union retaliated against Plaintiffs by naming them in the memo and editorializing about ramifications to union members. The union claimed liability violates the First Amendment free speech. Reasoning that the union’s memorandum could be “viewed as part and

parcel of a course of retaliation that included not only speech but conduct,” the Eleventh Circuit agreed with the district court that the union’s speech was a “call for reprisal” and “threat of further retaliation” by intentionally inviting members to retaliate against Plaintiffs.

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