



**First Circuit**

***Ortega-Candelaria v. Johnson & Johnson*, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. June 16, 2014), 2014 WL 2696725, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-1564P-01A.pdf>**

Plan participant employee sued his employer under the Employee Retirement Income Security Act (ERISA) alleging wrongful denial of long-term disability benefits, and requested a judgment ordering the reinstatement of those benefits as well as the retroactive payment of past benefits. The District Court for the District of Puerto Rico granted summary judgment for the defendant and held that, given the substantial record evidence supporting the defendants' determination, the decision to terminate plaintiff's benefits did not constitute an abuse of discretion and was neither arbitrary nor capricious. Upon appeal, the Courts of Appeals for the First Circuit affirmed the District Court's decision.

***Reyes-Pérez v. State Insurance Fund Corp.*, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. June 19, 2014), 2014 WL 2781821, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-1375P-01A.pdf>**

Former public employee presented action against State Insurance Fund Corporation (SIFC) alleging that his termination was motivated solely by his political association in violation of the First and Fourteenth Amendments. The defendants moved for summary judgment alleging that there was no evidence in the record that supported a prima facie case of political discrimination, and that even if plaintiff could make a prima facie showing, his claim fails under the *Mt. Healthy* doctrine, which requires proving by a preponderance of the evidence that the governmental agency would have taken the same action against the employee even in the absence of the protected conduct. The District Court concluded that defendants were entitled to summary judgment on the basis of their *Mt. Healthy* defense. The Court of Appeals for the First Circuit affirmed.

***Carrero-Ojeda v. Autoridad de Energía Eléctrica*, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. June 20, 2014), 2014 WL 2786536, available at <http://media.ca1.uscourts.gov/pdf.opinions/12-2133P-01A.pdf>**

The District Court for the District of Puerto Rico granted motion to dismiss action brought by a former employee alleging retaliation and interference pursuant to the Family and Medical Leave Act (FMLA). Specifically, the plaintiff alleged that, after she blew the whistle on wrongdoing in her office, her employer and her superiors retaliated against her and deprived her of benefits owed to her under the FMLA, ultimately terminating her employment. The Court of Appeals for the First Circuit affirmed the dismissal, and held: 1) plaintiff's complaint did not plausibly support a finding that her termination was causally connected to her requests for FMLA leave, thus her retaliation claim fails; 2) plaintiff cannot state a plausible FMLA interference claim; and 3) the district court did not abuse its discretion by not spelling out what should have been obvious based on its denial of plaintiff's motion to amend judgment.

***Hicks v. Napolitano*, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. June 20, 2014), 2014 WL 2793806, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-1741P-01A.pdf>**

African American woman filed civil action against the Secretary of Homeland Security claiming that the Secretary failed to promote her to the position of Housing Manager in the United States Coast Guard Housing Office at Air Station Cape Cod because of her race and gender. The United States District Court for the District of Massachusetts granted defendant's motion for summary judgment, and held that Hicks failed to generate a genuine issue of material fact with respect to the Secretary's non-discriminatory reason for choosing another candidate, which was, according to the Secretary, their performances in the interviews. On appeal, the First Circuit affirmed the District Court's dismissal and concurred that Hicks failed to create a genuine issue of material fact on the issue of pretext.

***Maine Association of Retirees v. Board of Trustees of the Maine Public Employees Retirement System*, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. June 27, 2014), 2014 WL 2915913, available at <http://media.ca1.uscourts.gov/pdf.opinions/13-1933P-01A.pdf>**



Maine Association of Retirees brought action against the Board of Trustees claiming that certain amendments to Maine's public employee retirement system violate the Contract and Takings Clauses of the United States Constitution. The District Court for the District of Maine granted summary judgment for the defendants. On appeal, the First Circuit affirmed the District Court's judgment and held that plaintiffs, regardless of whether they retired before or after the 1999 amendments, have no contractual entitlement to cost of living adjustment (COLA) benefits calculated under pre-2011 law, and therefore, the 2011 amendments did not violate the Contract Clause.

***Vázquez-Robles v. CommoLoCo, Inc.*, \_\_ F.3d \_\_ (1<sup>st</sup> Cir. June 27, 2014), 2014 WL 2915905, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1384P-01A.pdf>**

Ms. Vázquez brought civil action against her former employer alleging workplace discrimination under: the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213; Title VII of the Civil Rights Act of 1964, id. §§ 2000e to 2000e–17; and, local law. The plaintiff attempted to serve the summons and complaint by serving Prentice Hall Corporation System Puerto Rico, Inc. (Prentice). She believed Prentice was defendant's registered agent for service of process in Puerto Rico because the Department of State of Puerto Rico's website listed Prentice as the defendant's registered agent. The defendant denied that Prentice was its registered agent at the time, and there was no evidence that Prentice ever forwarded the papers to the defendant. When no answer was filed, the plaintiff moved for an entry of default. The District Court for the District of Puerto Rico later empaneled a jury which awarded the plaintiff \$935,000.00 in damages. On appeal, the First Circuit reversed and remanded the District Court's denial of defendant's motion to vacate the default judgment as void and held that the employer's Board of Directors legally removed Prentice as the corporation's registered agent, and that the defendant had no duty to correct the Department of State's mistake, which failed to update its website with defendant's new agent for service of process. The plaintiff could not rely solely on the website's information since the

website itself contains a disclaimer stating that the Department of State “does not guarantee the precision of the information presented.”

*Submitted by:*

**José R. González Nogueras, Esq.**  
**Mr. Gregory Figueroa**  
Jiménez, Graffam & Lausell  
PO Box 366104  
San Juan, Puerto Rico 00936-6104  
Email: [jgonzalez@jgl.com](mailto:jgonzalez@jgl.com)

**Third Circuit**

***Rosano v. Township of Teaneck*, \_\_ F.3d \_\_ (3d Cir. June 10, 2014), 2014 WL 2576962, available at [www2.ca3.uscourts.gov/opinarch/131263p.pdf](http://www2.ca3.uscourts.gov/opinarch/131263p.pdf)**

Eighty-eight former and current Teaneck Township police officers commenced an action under the Fair Labor Standards Act (FLSA) for unpaid overtime payments. The District Court granted summary judgment dismissing all of plaintiffs' claims. The Third Circuit affirmed, addressing two significant issues under the FLSA: (1) application of the public safety employee exception under 29 U.S.C. §207(k), and (2) whether an established custom and practice under a labor agreement of not compensating employees for time spent changing into and out of uniforms was lawful under 29 U.S.C. §203(o).

The FLSA generally requires employers to pay employees at overtime rates of one and one-half times the employee's regular rate of pay for all work in excess of forty hours per work week. 29 U.S.C. §207(a)(1). However, 29 U.S.C. §207(k) contains a partial exception for public employers that employ law enforcement or fire protection personnel. The partial exception has two components. First, in lieu of the standard seven-day work week, the public employer may establish a “work period” that may be a minimum of seven or as long as twenty-eight days in length. Second, in lieu of the standard forty hour threshold, overtime pay is required for all hours worked in excess of 212 hours in a twenty-eight day work period for fire protection employees, and in excess of 171 hours in a twenty-eight day work period for law enforcement employees. 29 C.F.R. §553.230(c). For work periods of less than twenty-



eight days, the respective overtime work hour thresholds are reduced proportionately. For work periods of the minimum duration of seven days, the overtime thresholds are 53 hours for fire protection and 43 hours for law enforcement. *Id.*

FLSA regulations define a “work period” as “any established and regularly recurring period of work.” 29 C.F.R. §553.224(a). Teaneck argued that two such “work periods” existed in its police department. Certain officers worked a “Six and Three” schedule consisting of six eight-hour tours followed by three days off—48 hours worked in a nine-day work period. Other officers worked a “Five and Two” schedule consisting of five eight-hour tours followed by two days off—40 hours worked in a seven-day work period.

Under the 207(k) exception, officers on the “Six and Three” schedule would not be entitled to overtime until they worked 55 hours within their nine-day work period, leaving an apparent cushion of seven hours between their contractual work week and the FLSA overtime threshold.” 29 C.F.R. §553.230(c). Officers on the “Five and Two” schedule would not be entitled to overtime under the FLSA until they worked 43 hours within their seven-day work period, leaving an apparent cushion of three hours between their contractual work week and the FLSA overtime threshold. The plaintiffs, however, argued that Teaneck was not entitled to take advantage of the 207(k) exception because Teaneck had never “intended” to adopt the exception. According to the plaintiffs, the mere existence of established and regularly recurring period of work is not sufficient; rather, the employer must demonstrate a specific intention to adopt the 207(k) exception.

This was a question of first impression for the Third Circuit. However, the *Rosano* Court joined the First, Seventh, Eighth, Tenth and Eleventh Circuits in holding that a specific intention to adopt the 207(k) exception is not required. The *Rosano* Court based its holding on the text of 29 U.S.C. §207(k) itself, which contains no language requiring employers to express their intent to qualify for or operate under the exception. The *Rosano* Court reasoned:

As Teaneck correctly observes, the statute only requires the existence of a

qualifying work period. Nothing more. We will, therefore, decline to adopt a rule that requires employers to clear a hurdle not provided for in the statutory text. Accordingly, we hold that employers seeking to qualify for the §207(k) exemption need not express an intent to qualify for or operate under the exemption. Employers must only meet the factual criteria set forth in §207(k).

The *Rosano* Court also noted that every other federal Court of Appeals “to consider this issue [has] held that, in order for an employer to qualify for the [Section] 207(k) exemption, only a factual inquiry is involved and no notice or declaration of intent is required on the part of the employer.” Because it was undisputed that seven or nine day “work periods” actually existed in Teaneck, the *Rosano* Court concluded that Teaneck could lawfully utilize the Section 207(k) exception.

The *Rosano* Court also addressed clothes-changing time under 29 U.S.C. §203(o). This FLSA provision excludes time spent changing clothes or washing at the beginning or end of a work day from “hours worked” when such an exclusion is established either by the express terms of, or a custom and practice existing under, a bona fide collective bargaining agreement applicable to the employees in question. Such a custom and practice was found to exist in Teaneck. However, the *Rosano* Court was then called upon to apply the definition of “clothes” recently propounded by the United States Supreme Court in *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870 (2014), which distinguished “clothing” from wearable items that are not clothes, such as equipment and devices. Time spent changing clothes is not considered time worked under the FLSA, but time spent putting on and removing wearable items that are not clothes is considered time worked. When both clothes and wearable items that are not clothes are involved, courts must determine “whether the period at issue can, on the whole, be fairly characterized as ‘time spent in changing clothes or washing.’” *Sandifer*, 134 S.Ct. at 881 (emphasis in original).

Applying this standard, the *Rosano* Court analyzed



the twenty-seven items that the plaintiffs assigned to the Uniform Division change into at the beginning, and out of at the end, of the work day. Fourteen of the items constituted clothing, and thirteen of the items constituted wearable items that are not clothes. The *Rosano* Court then reasoned:

We recognize that the number in each category is close, but we cannot say that the “vast majority of the time in question” is spent picking up, for example, a nightstick, handcuffs, nameplate, medals, awards, and a flashlight, or maintaining a department identification card and notebook and pen. Clearly, picking up and maintaining those items is not the same as donning and doffing the clothing at issue here. Accordingly, the vast majority of the time in question is spent donning and doffing “clothes” for purposes of §203(o). Therefore, the entire period qualifies as time spent changing clothes or washing, and the time spent picking up or maintaining the other items need not be subtracted.

The Court therefore concluded that Teaneck’s officers were precluded from seeking compensation “for time spent doffing and donning their uniforms and safety equipment.”

***Gonzalez v. Waterfront Commission of the New York Harbor*, \_\_ F.3d \_\_ (3d Cir. June 17, 2014), 2014 WL 2724127, available at [www2.ca3.uscourts.gov/opinarch/132023p.pdf](http://www2.ca3.uscourts.gov/opinarch/132023p.pdf)**

This matter involved a detective employed by the Waterfront Commission of New York Harbor, a bi-state agency of New York and New Jersey, who offered a sworn affidavit in support of a co-worker’s unsuccessful lawsuit against the Waterfront Commission under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. After the termination of the co-worker’s lawsuit, the Waterfront Commission initiated disciplinary action against the detective for making what the Waterfront Commission considered to be false statements in his affidavit. The detective thereupon commenced action in the United States District Court for the District of New Jersey to

enjoin the Waterfront Commission from processing disciplinary charges or conducting a disciplinary hearing, on the ground that the Waterfront Commission’s action against him constituted unlawful retaliation under the ADA, Title VII, and the First Amendment. The District Court terminated the lawsuit based on the *Younger* abstention doctrine. On appeal, the Third Circuit affirmed.

The *Younger* abstention doctrine, first announced by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), and subsequently extended, instructs federal courts to decline requests to enjoin state criminal proceedings, and certain state civil and administrative proceedings, absent a showing of bad faith or intent to harass. While the *Gonzalez* appeal was pending, the United States Supreme Court decided *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), which more clearly defined the category of state civil and administrative proceedings to which *Younger* abstention applies. As the *Gonzalez* court explained:

[T]he Supreme Court’s recent decision in *Sprint* goes a long way toward erasing any uncertainties about *Younger*’s reach. *Sprint* provides a forceful reminder that abstention is not the presumptive course, but rather an exception to the general rule that federal courts must hear and decide cases within their jurisdiction. 134 S.Ct. at 588. According to the Court, *Younger* can overcome this general rule in only three “exceptional” classes of cases: (1) “state criminal prosecutions,” (2) “civil enforcement proceedings,” and (3) “civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Id.*

In the case of civil enforcement proceedings, such as the proceeding at issue in *Gonzalez*, abstention generally is appropriate only when the state civil enforcement proceeding is “akin to a criminal prosecution” in “important respects.”

In *Sprint*, the Court noted that quasi-criminal proceedings of this ilk share several distinguishing features. They “are characteristically initiated to



sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act.” *Sprint*, 134 S.Ct. at 592. “[A] state actor is routinely a party to the state proceedings and often initiates the action.” *Id.* And finally, they often begin with internal investigations that “culminat[e] in the filing of a formal complaint or charges.” *Id.*

The *Gonzalez* Court then reasoned:

[T]his case fits neatly within the quasi-criminal framework outlined in *Sprint*. *Gonzalez*’s troubles began when the Commission suspected that he had made several materially false statements in his June 4, 2012 affidavit. The Commission internally investigated the falsity of these statements and, after confirming them to be untruthful, lodged a formal Statement of Charges against *Gonzalez*. By filing this formal Statement of Charges, the Commission—an arm of the State of New Jersey—initiated the administrative disciplinary hearing to sanction *Gonzalez* for his “wrongful” conduct. This is a textbook example of a quasi-criminal action.

The disciplinary proceeding was designed to punish the detective for conduct that the Waterfront Commission deemed to be “contemptible,” and the penalty the detective faced if the charges were sustained is clear: Termination from employment.

Having determined that the Waterfront Commission’s disciplinary proceeding fell within the category of state enforcement proceedings eligible for *Younger* abstention, the *Gonzalez* Court then applied the three-part test articulated in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), to determine whether abstention was appropriate. The *Middlesex* factors include whether the state administrative hearing: (1) was judicial in nature; (2) implicated important state interests; and, (3) offered an adequate opportunity for *Gonzalez* to present his federal claims. The *Gonzalez* Court concluded that each of the *Middlesex* factors was satisfied.

***Hildebrand v. Allegheny County*, \_\_ F.3d \_\_ (3d Cir. June 27, 2014), 2014 WL 2898527, available at [www2.ca3.uscourts.gov/opinarch/131321p.pdf](http://www2.ca3.uscourts.gov/opinarch/131321p.pdf)**

The Third Circuit addressed three procedural issues of first impression the Circuit. First, the Third Circuit held that a state or local government employee may not pursue an age discrimination claim under 42 U.S.C. §1983, but must instead bring suit under the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq.

Second, the Third Circuit held that a plaintiff need not plead exhaustion of administrative remedies with the level of specificity required for the underlying cause of action under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). It is sufficient for the plaintiff to plead in general terms that the required administrative process has been completed.

Third, the Third Circuit held that the Intake Questionnaire currently in use by the Equal Employment Opportunity Commission (EEOC), when properly completed, constitutes a charge of discrimination. The importance of this holding is that a complainant who submits a fully completed Intake Questionnaire to the EEOC within 300 days of the last date of alleged discrimination will be deemed to have timely filed a charge with the EEOC and will not have a charge time-barred, even if the complainant had not submitted a formal charge of discrimination within the 300-day period.

*Submitted by:*

**Stephen E. Trimboli**

Trimboli & Prusinowski, L.L.C.

268 South Street

Morristown, New Jersey 07960

Phone: (973) 660-1095, x. 180

[striboli@trimprulaw.com](mailto:striboli@trimprulaw.com)

**Fourth Circuit**

***In re: Norfolk Southern Railway Company*, \_\_ F.3d \_\_ (4th Cir. June 23, 2014), 2014 WL 2809069, available at <http://www.ca4.uscourts.gov/Opinions/Published/132112.P.pdf>**



Norfolk Southern Railway Company appealed the district court's remand of a Federal Employers' Liability Act ("FELA") claim. Norfolk also petitioned for a writ of mandamus. The Fourth Circuit concluded that it lacked jurisdiction to review the district court's order. Thus, it dismissed the appeal and also denied mandamus relief.

In 2010, a Norfolk employee was injured on the job. The employee applied for and received benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). In 2013, the employee filed suit in state court under FELA, alleging negligence against Norfolk. Norfolk removed the case to federal court, arguing that the LHWCA covered the employee's injury and barred any recovery under FELA. Norfolk further argued that whether the LHWCA covered the employee's injury was a federal question.

The employee moved to remand the case to state court, arguing that Congress eliminated federal district court jurisdiction with regard to LHWCA claims. In support of this position, the employee argued that LHWCA claims must be adjudicated first by the Department of Labor, with review by the Benefits Review Board and then the United States Court of Appeals. The employee also argued that his FELA claim was not removable under 28 U.S.C. § 1445(a), which bars the removal of FELA claims brought in state court. Norfolk moved to dismiss the employee's complaint in federal district court, arguing that the LHWCA was the employee's exclusive remedy.

The district court granted the employee's motion for remand and denied as moot Norfolk's motion to dismiss. The district court did not determine whether the employee's claim fell within the LHWCA or whether the LHWCA barred recovery under FELA; rather, the district court concluded that, because § 1445(a) prohibits removal of FELA claims filed in state court, the employee's FELA claim must be remanded. Norfolk appealed and filed its petition for mandamus.

On appeal, the Fourth Circuit first acknowledged the strong policy against appellate review of district

court orders "remanding a case to the State court from which it was removed." 28 U.S.C. § 1447(d). The court noted, however, that § 1447(d) only restricts review of remand orders that are based on the grounds in § 1447(c). Section 1447(c) allows the district court to remand (1) if the district court lacks subject matter jurisdiction; or, (2) if a defect in removal other than lack of subject matter jurisdiction was timely raised by motion after the notice of removal was filed.

Examining the first basis for remand under § 1447(c), the Fourth Circuit noted that the removal bar under § 1445(a) would not deprive the district court of subject matter jurisdiction, as federal and state courts have concurrent jurisdiction over FELA claims. Thus, the question before the Fourth Circuit became whether "nonremoveability based on § 1445(a) is a defect 'other than lack of subject matter jurisdiction' within the meaning of § 1447(c)." The Fourth Circuit ruled that "defect" referred to a failure to comply with the removal requirements in 28 U.S.C. §§ 1441-1453, which necessarily includes § 1445(a). The Fourth Circuit further found that the employee timely raised the defect in his motion following Norfolk's notice of removal. Accordingly, the Fourth Circuit concluded that it lacked jurisdiction to review the district court's remand order.

Absent jurisdiction to review the remand order, the Fourth Circuit concluded that it also lacked authority to grant mandamus relief. Additionally, the Fourth Circuit concluded that it would be improper to grant mandamus relief because Norfolk had failed to show a clear barrier to remanding the case to state court. Therefore, the Fourth Circuit concluded that Norfolk failed to show a "clear and indisputable" right to issuance of the writ.

*Submitted by:*

**Paul Sun**

**Emily Reardon**

ELLIS & WINTERS LLP

Post Office Box 33550

Raleigh, North Carolina 27636

Telephone: 919.865-7000

[Paul.sun@elliswinters.com](mailto:Paul.sun@elliswinters.com)



**Fifth Circuit**

***Smith v. Regional Transit Authority*, \_\_ F.3d \_\_ (5<sup>th</sup> Cir. June 23, 2014), 2014 WL 2853584, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-30647-CV0.pdf>**

Forty former employees of the New Orleans Public Service, Inc. (NOPSI) and Regional Transit Management of Southeast Louisiana, Inc. (RTA) filed suit under ERISA regarding medical benefits.

In 1983, the New Orleans transit system was operated by NOPSI, a private company, but later converted to a public system owned by RTA and operated by Transit Management of Southeast Louisiana, Inc. (“TMSEL”). All employees of NOPSI became employees of TMSEL. At the time of acquisition, the City of New Orleans had a preexisting agreement that provided for “fair and equitable agreements” for employee benefits. RTA and TMSEL, as successors to NOPSI, agreed to continue the same benefits. NOPSI, TMSEL and RTA also entered into an additional Employee and Retiree Pension and Welfare Benefit Plan (the “Plan”), which specifically recognized the agreed continued benefits obligation. In March 2006, however, the Plan stopped providing Medicare premiums and deductible reimbursement to retirees and began charging premiums for medical insurance.

In response to Plaintiffs’ ERISA suit, Defendants filed a Rule 12(b)(1) motion, arguing that the court lacked subject matter jurisdiction because the Plan was a “government plan” exempt from ERISA. On appeal, the Fifth Circuit vacated the district court’s dismissal and remanded for consideration under a Rule 12(b)(6). Although recognizing that *Shirley v. Maxicare, Tex., Inc.*, 921 F.2d 565, 567 (5<sup>th</sup> Cir. 1991), held that the government plan exemption implicates subject matter jurisdiction such that claims concerning government plans should be dismissed, more recent Supreme Court and en banc precedent makes *Shirley* inapplicable. Citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the Fifth Circuit reinforced the Supreme Court’s instruction that courts should avoid conflating the question of subject matter jurisdiction with a

determination of whether the plaintiff has stated a valid claim for relief. Because nothing in ERISA “clearly states” that the governmental plan exemption is jurisdictional, the Court properly exercised subject matter jurisdiction unless it could be shown that the plaintiff’s claim was “so insubstantial [or] implausible...as to not involve a federal controversy.”

The Court indicated that the proper procedural mechanism to address the issue was a motion under either Rule 12(b)(6) or Rule 56. Because Rule 12(b)(1) employs a different procedural approach (i.e., the Court may weigh the evidence and resolve factual disputes), the Court vacated the order and remanded for consideration using the proper procedural vehicle.

***Rogers v. Bromac Title Services, L.L.C.*, \_\_ F.3d \_\_ (5<sup>th</sup> Cir. June 18, 2014), 2014 WL 2766163, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-31097-CV0.pdf>**

Plaintiff filed suit under the Jury System Improvement Act, 28 U.S.C. §1875, claiming that her termination was in retaliation for her grand jury service.

Plaintiff served on a grand jury, which caused her to miss a total of eight Fridays and eight other days of work. During that same period, she was involved in two incidents that her employer identified as leading to her termination for unprofessional behavior. First, in an August 31, 2011 meeting, she opened her talk by asking: “Raise your hand if you have had unprotected sex.” Second, in a meeting on April 18, 2012, she said: “You guys know you are always welcome to call me after hours on or weekends. I always answer my phone unless I’m drinking.”

In ruling on cross motions for summary judgment, the district court found the JSIA’s language to be similar to that of the ADEA interpreted by Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). Consequently, it applied the “but-for” standard and dismissed the claim. Plaintiff appealed, arguing that the district court misapplied the “but-for” causation standard by holding that she had to prove that her jury service was the only



reason for termination and that it failed to properly apply the burden shifting framework of *McDonnell Douglas*.

Addressing this matter of first impression in the Fifth Circuit, the court affirmed dismissal, holding that the “but-for” causation standards applies to a JSIA claim. The court then determined that the district court properly applied this standard because, contrary to Plaintiff’s assertions, the district court did not interpret the but-for standard to require [her] to show that any illegal motivation was unaccompanied by a legitimate reason.” Rather, the court looked to Plaintiff’s own admission that she believed the termination was motivated by salary reduction efforts and the employer’s stated reason was not mere pretext.

***Davoodi v. Austin Independent School Dist.*, \_\_ F.3d \_\_ (5<sup>th</sup> Cir. June 16, 2014), 2014 WL 2714355, available at <http://www.ca5.uscourts.gov/opinions/pub/13/13-50824.0.pdf>**

Plaintiff filed suit alleging national origin discrimination, retaliation and intentional infliction of emotional distress, attaching and incorporating by reference his EEOC charge. Defendants removed based on federal question and thereafter filed a motion to dismiss all claims other than the state law discrimination claim. After Plaintiff failed to respond, the district court granted the motion and *sua sponte* dismissed all claims, including the state law discrimination claims.

On appeal, Plaintiff argued that the district court lacked subject matter jurisdiction and improperly dismissed the state law claims. The Fifth Circuit found that removal was proper based on Plaintiff’s incorporation of the EEOC charge into the complaint. As a result of these federal claims, the district court properly exercised jurisdiction over the case. Rejecting Defendants’ argument that Plaintiff waived his right to challenge the dismissal by not filing a Rule 59(e) motion, the Court clarified that Fifth Circuit precedent does not require a party to file a Rule 59(e) motion before appealing the improper *sua sponte* dismissal of its claim.

***Allen v. Coil Tubing Services, L.L.C.*, \_\_ F.3d \_\_ (5<sup>th</sup> Cir. June 13, 2014), 2014 WL 2695490, available at <http://www.ca5.uscourts.gov/opinions/pub/12/12-20194-CV0.pdf>**

Plaintiffs filed suit against their employer Coil Tubing Services (“CTS”) alleging that they worked more than 40 hours per week and were denied overtime in violation of the FLSA. CTS, an oil well servicing company, operates six geographic districts under a single Department of Transportation number, and the districts solicit and accept projects outside of their respective boundaries. The parties filed summary judgment motions on the issue of whether the Motor Carrier Act exemption allowing employers not to pay overtime to employees engaged in safety-affecting interstate activities applies to the FLSA claim. The district court initially denied the motion based on a district-by-district analysis, but on rehearing, vacated its original order and granted in part the motion using a company-wide analysis to find that the MCA exemption applied to many of the plaintiffs.

After granting permission for an interlocutory appeal pursuant to 28 U.S.C. §1292(b), the Fifth Circuit addressed the MCA exemption and held that a company-wide analysis is appropriate because Fifth Circuit precedent forecloses an employee-by-employee analysis and the arguments did not support a district-by-district analysis.

***Sawyer v. E.I. DuPont de Nemours & Co.*, \_\_ F.3d \_\_ (5<sup>th</sup> Cir. June 11, 2014), 2014 WL 2609855, available at <http://www.ca5.uscourts.gov/opinions/pub/11/11-40454-CV2.pdf>**

In February 2002, E.I. DuPont de Nemours and Company’s (“DuPont”) announced its intention to spin off a segment of its operation at a facility in Texas into a wholly-owned subsidiary, DuPont Textiles and Interiors, Inc. (“DTI”). Many (but not all) employees at that facility were covered by a collective bargaining agreement. DuPont and the Union reached an agreement wherein the employees could choose between staying with DuPont but transferring to a different unit of the facility or remaining with their unit and becoming DTI employees.



Sixty-three former employees filed suit alleging that DuPont fraudulently induced them to terminate their employment with DuPont and accept employment with DTI. Specifically, they claimed that DuPont represented that DTI would remain a part of DuPont and would not be sold to a third party, and that their pension, pay, and benefits would remain the same. Then, months after their elections became final, DuPont announced that it was negotiating the sale of DTI. On May 1, 2004, DuPont sold DTI to Koch Industries, after which appellants claim their pensions, pay, and benefits materially changed for the worse.

In April 2012, the Fifth Circuit issued an opinion concluding that, under its *Erie* guess, the Texas Supreme Court would hold that both the covered and non-covered employees were at-will employees, and that under Texas law at-will employees could not sue their employers for fraud based on the loss of their employment. The Fifth Circuit vacated that opinion in July 2012 and certified the questions to the Texas Supreme Court. The Texas Supreme Court responded in April 2014. Based on the Texas Supreme Court's answers to the certified questions, the Fifth Circuit affirmed the dismissal of the case, holding: "The non-covered employees are at-will employees who, under Texas law, may not bring fraud claims for the termination of their employment. And while the CBA altered the covered employees' at-will status, they too cannot bring fraud actions because their remedies are limited to those provided in the CBA."

*Submitted by:*

**Donna Phillips Currault**

Gordon, Arata, McCollam,

Duplantis & Eagan, LLC

201 St. Charles Ave. 40<sup>th</sup> Floor

New Orleans, LA 70170-4000

Phone: (504) 582-1111

Email: [dcurrault@gordonarata.com](mailto:dcurrault@gordonarata.com)

### Sixth Circuit

***Hoven v. Walgreen Co.*, 751 F.3d 778 (6<sup>th</sup> Cir. June 2, 2014), available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0115p-06.pdf>**

A former pharmacist and at-will employee who was terminated after he drew his concealed weapon and fired it multiple times during an attempted robbery filed suit alleging that he was terminated in violation of public policy for exercising his rights of self-defense, defense of others, and to carry a concealed weapon. The district court granted the employer's motion for judgment on the pleadings.

On appeal, the Sixth Circuit affirmed. The court considered whether the pharmacist was discharged "for exercising a right conferred by a well-established legislative enactment," one of the three types of situations where courts have found a termination violated Michigan public policy. The court considered and rejected each of the sources of public policy relied upon by the pharmacist.

First, the court found that constitutional provisions could not be the source of a public policy claim against a private employer. Second, the court found that a Michigan criminal jury instruction regarding the use of deadly force in self-defense was without merit because the instructions were the product of a state bar committee and not a legislative body. Third, the court found that although two Michigan statutes related to self-defense, they did not confer a general right to engage in self-defense. Instead, they only provided a right to a rebuttable presumption regarding the use of deadly force or to argue a defense to criminal prosecution. Fourth, the statute providing a penalty for carrying a weapon in violation of the statute did not provide a right to carry a weapon. Instead, it demonstrated that the right to carry a weapon is limited.

Fifth, the court rejected the pharmacist's reliance on the regime for licensing concealed weapons. The statute states that employers cannot prohibit employee from applying for licenses or carrying a pistol in compliance with the act. But, it also contains a provision stating that it "does not prohibit an employer from prohibiting an employee from carrying a concealed pistol in the course of his or her employment with that employer." The court found that the statute, "strikes a balance between the rights of employees to apply for and carry concealed weapons and the interests of employers in not



having concealed weapons in the workplace.”

The court also rejected the pharmacist’s claim that the statute was unconstitutional. Even if the court struck the portion alleged to be unconstitutional, the revised statute would still not provide a basis for a public policy claim because it would not provide a right to carry a concealed weapon on an employer’s premises without fear of retaliation.

***Bright v. Gallia County, Ohio*, \_\_ F.3d \_\_ (6<sup>th</sup> Cir. June 3, 2014), 2014 WL 2457629, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0116p-06.pdf>**

A former criminal defense attorney who was terminated from employment filed suit against a county court judge and others. In response to an “emphatic and forceful motion,” the judge had removed the attorney from all cases before him and filed a grievance against the attorney with the Office of Disciplinary Counsel of the Supreme Court of Ohio. The attorney’s employer then terminated him because he could not practice before the judge.

The Sixth Circuit reversed the denial of the judge’s motion to dismiss on the basis of absolute judicial immunity. The court noted that the judge’s actions fell short of expectations, but they were judicial in nature because the judge took action in the criminal cases over which the attorney had been appointed. Thus, the actions were protected.

Addressing the attorney’s constitutional claims against his employer, the Sixth Circuit held that the actions taken by the attorney, which consisted of filing motion and criticizing the judge’s handling of proceedings, were not protected by the First Amendment. The court also affirmed dismissal of the attorney’s equal protection, due process and state law tort claims.

***Freeze v. City of Decherd*, \_\_ F.3d \_\_ (6<sup>th</sup> Cir. June 4, 2014), 2014 WL 2483577, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0117p-06.pdf>**

The Sixth Circuit concluded that two police officers possessed a property interest in their continued

employment, reversing and remanding the district court’s dismissal of their due process claims. There were two pieces of legislation that were relevant to the due process claim. First, a “Personnel Resolution” designated every city worker as an at-will employee. A second resolution adopted the Police Department Policies and Procedures Manual (“Police Resolution”). The Police Resolution stated that discipline “shall be for cause.” It also stated that all resolutions that conflict with the Police Resolution were repealed to the extent of the conflict.

The Sixth Circuit found that the Police Resolution met the heightened standard for handbooks to constitute a contract under Tennessee law. It found that the Resolution contained unequivocal language demonstrating the City’s intent to be bound because it included a provision stating that it trumped other conflicting agreements pertaining to police-officer employment. The court also relied upon language prohibiting termination absent good cause. Finally, it concluded that nothing in the rest of the handbook altered the requirement that discipline, including termination, “shall be for cause.”

***Montell v. Diversified Clinical Services*, \_\_ F.3d \_\_ (6<sup>th</sup> Cir. June 27, 2014), 2014 WL 2898525, available at <http://www.ca6.uscourts.gov/opinions.pdf/14a0135p-06.pdf>**

A female employee who was on a performance improvement plan filed a sexual harassment complaint against her supervisor. The following day, the supervisor told her that she should resign or be fired. The employee resigned.

In response to defendant’s motion, the district court dismissed all claims. On appeal, the Sixth Circuit reversed dismissal of the retaliation claim only.

The Sixth Circuit found that there was sufficient evidence that the employee had a good faith, reasonable belief that she was reporting unlawful harassment and that whether she actually held a good faith belief was a question of credibility for the jury. Addressing causation, the court noted that temporal proximity can be enough to establish causation but added that the employee was not



relying on temporal proximity alone. The court concluded that the employee satisfied the “but for” test from the Supreme Court’s *University of Tex. Sw. Med. Ctr. v. Nassar* decision. It determined that the employer was not following a decision path previously decided. The employer’s deviation from the performance improvement plan “do not accord with either the timing of the termination previously contemplated or with the manner in which that decision was being made.” Instead, the court found the deviation was evidence of retaliation. Finally, the court concluded that the employee established pretext because there was contradictory evidence undermining the conclusion that termination was inevitable after the performance improvement plan.

Submitted by:

**Brian M. Schwartz**

Miller, Canfield, Paddock & Stone, P.L.C.

150 W. Jefferson, Suite 2500

Detroit, Michigan 48226

Phone: 248.267.3202

[schwartzb@millercanfield.com](mailto:schwartzb@millercanfield.com)

### Seventh Circuit

***Gienapp v. Harbor Crest*, \_\_ F.3d \_\_ (7th Cir. June 24, 2014), 2014 WL 2854816, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D06-24/C:14-1053;J:Easterbrook:aut:T:fnOp:N:1368747;S:0>**

The Seventh Circuit reversed the district court’s summary judgment in favor of defendant and granted summary judgment for plaintiff. Defendant granted FMLA leave to plaintiff, whose daughter was diagnosed with cancer. Plaintiff’s FMLA form did not provide the leave’s expected duration. Defendant terminated plaintiff’s employment. The district court held that plaintiff forfeited her FMLA rights by failing to inform defendant of the expected duration of the leave. The Seventh Circuit reversed finding that plaintiff’s case involved “unforeseeable” leave where employees are not required to provide their employers with an anticipated duration of the leave, but instead are required to comply with their employer’s policy. Defendant only required plaintiff to provide monthly updates, which she did. The Court also held

that the full statutory definition of “son or daughter” does not exclude a child of an employee just because the child is emancipated, married, and an adult. In addition, where plaintiff cared for her grandchildren so that her daughter’s husband could care for her daughter, the Court also held that the statute does not state that an employee must be a “primary” caregiver in order to be entitled to FMLA leave.

***Whitfield v. International Truck and Engine Corporation*, \_\_ F.3d \_\_ (7th Cir. June 6, 2014), 2014 WL 2547772, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D06-06/C:13-1876;J:Cudahy:aut:T:fnOp:N:1359095;S:0>**

The Seventh Circuit affirmed the district court’s decision to exclude evidence that was untimely, but reversed the court’s holding that plaintiff’s evidence was insufficient to prove discrimination. Plaintiff, who was African-American, sued alleging failure to hire under 42 U.S.C. §1981 and discrimination in violation of Title VII.

The Seventh Circuit found that under the direct method of proof, the district court erred in holding that there was no evidence of discrimination when it concluded that plaintiff’s personnel file had “black” written on it for affirmative action purposes. The Court also found that the district court misapplied the law by giving weight to the fact that defendant hired another African American electrician at the time that plaintiff’s application was pending. The Court also found that the district court’s holding that plaintiff failed to establish discrimination under the indirect method was in error. The Seventh Circuit affirmed the district court’s decision to exclude evidence that was untimely.

***Kvopil v. Chippewa County*, \_\_ F.3d \_\_ (7th Cir. June 9, 2014), 2014 WL 2581258, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D06-09/C:13-2658;J:St Eve:aut:T:fnOp:N:1360184;S:0>**

The Seventh Circuit affirmed the district court’s grant of summary judgment for defendant. Plaintiff, a seasonal worker employed by a county, made



numerous threats to the county employees and, following a written warning, was discharged. Plaintiff sued, alleging that he was improperly terminated, and the district court granted summary judgment for defendant.

On appeal, plaintiff argued he had a property interest in continued employment with the county because a county ordinance that outlined recommended disciplinary procedures stated an employee may be disciplined for “just cause.” The Seventh Circuit affirmed the district court’s decision and found that the county ordinance did not create a property interest in continued employment and that plaintiff had sufficient notice he was an at will employee because the employee handbook he received clearly stated so.

***Huang v. Continental Casualty Co.*, \_\_ F.3d \_\_ (7th Cir. June 13, 2014), 2014 WL 2619689, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D06-13/C:12-1300:J:Rovner:aut:T:fnOp:N:1362837:S:0>**

The Seventh Circuit affirmed the district court’s summary judgment for defendant. Plaintiff, who is Chinese, refused to be on call for his job 24-hours a day for one-weekend a month, and after more than four months and numerous warnings, he was discharged. Plaintiff sued, alleging discrimination based on his race and national origin and retaliation for filing a complaint against his supervisor. The district court granted summary judgment for defendant.

The Seventh Circuit affirmed and found that plaintiff presented no evidence of any discrimination and, by refusing to be on call—even though such requirement was not on a formal job description—plaintiff failed to meet the legitimate expectations of his employer; therefore, plaintiff failed to establish a prima facie case.

***Garofalo v. Village of Hazel Crest*, \_\_ F.3d \_\_ (7th Cir. June 12, 2014), 2014 WL 2609895, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D06-12/C:12-1681:J:Tinder:aut:T:fnOp:N:1362131:S:0>**

The Seventh Circuit affirmed the district court’s summary judgment in favor of defendant. Plaintiffs were two white police sergeants who were being considered for a deputy police chief position. Plaintiffs filed suit claiming that defendant discriminated against them because defendant ultimately selected an African-American officer whom they claimed was less qualified. The district court granted summary judgment in favor of defendant because plaintiffs failed to present evidence that showed that they had a significant chance of being selected to fill the position. The Seventh Circuit affirmed, finding that there was no evidence to permit a reasonable jury to find unlawful discrimination. Under the indirect method of proof, the Court also found that defendant offered legitimate reasons for deciding not to promote plaintiffs and plaintiffs failed to offer evidence that would offset defendant’s explanation and permit a finding of pretext.

***Nichols v. Michigan City Plant Planning Department*, \_\_ F.3d \_\_ (7th Cir. June 19, 2014), 2014 WL 2766776, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D06-19/C:13-2893:J:Williams:aut:T:fnOp:N:1366210:S:0>**

The Seventh Circuit affirmed the district court’s summary judgment in favor of defendant. Plaintiff, who is an African American male, worked as a temporary custodian for defendant and reported to the school principal that another white female harassed. Shortly thereafter, plaintiff’s supervisors told plaintiff that the custodian position would be filled with a permanent employee.

Plaintiff filed suit, claiming that defendant required him to work in a hostile work environment and that defendant fired him because of his race. The district court granted summary judgment for defendant. The Seventh Circuit affirmed, finding that plaintiff failed to present sufficient evidence to show that he was subjected to conduct that was so severe or pervasive that it altered the conditions of the employment relationship. While plaintiff cited six instances of harassment during a two week period, including being called a racial slur, the Court found that these



instances did not rise to the level of actionable conduct. The Seventh Circuit also affirmed summary judgment as to plaintiff's racial discrimination claim based on defendant's evidence that plaintiff acted strangely on the day he was fired and that defendant's decision to fill plaintiff's position with a permanent employee had nothing to do with his harassment claim.

*Submitted By:*

**Ruth I. Major**

**Eunice M. Chun**

**Renee C. Fell**

**Austin J. Wightman**

The Law Offices of Ruth I. Major, P.C.

30 W. Monroe Street, Suite 1650

Chicago, Illinois 60603

Telephone: 312.893.7544

### **Eighth Circuit**

*Ames v. Nationwide Mut. Ins. Co.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 26, 2014), 2014 WL 2884081, available at <http://media.ca8.uscourts.gov/opndir/14/06/123780P.pdf>

Angela Ames petitioned for rehearing of the Eighth Circuit's March 13, 2014 decision affirming summary judgment. Ames raised two new arguments in the petition for rehearing. First, Ames argued that the Supreme Court's decision in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), supersedes circuit precedent such as *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493 (8th Cir. 1995), which the panel's March 13 decision relied upon. Ames argued that *Suders* stands for the proposition that a plaintiff alleging constructive discharge in violation of Title VII based on an "official act" of a supervisor need not give the employer a reasonable opportunity to address and ameliorate the conditions that she claimed constituted a constructive discharge. The Eighth Circuit refused to address Ames's argument as untimely.

Second, Ames argued that the panel's March 13 decision failed to consider a second theory available in providing constructive discharge, as set forth by the Seventh Circuit in *EEOC v. University of*

*Chicago Hospitals*, 276 F.3d 326, 332 (7th Cir. 2002). The Eighth Circuit issued an amended opinion addressing *University of Chicago Hospitals*.

In *University of Chicago Hospitals*, the Seventh Circuit held that there are two ways for an employee to prove constructive discharge. One way is proof of unbearable working conditions; the other is that "[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to constructive discharge." Ames argued that she could prove constructive discharge under the latter theory. The Eighth Circuit noted that it had not yet recognized the second form of constructive discharge and ultimately affirmed summary judgment, holding that Ames could not prove that it was reasonable for her to conclude that she would have been fired if she continued her employment.

*Kmak v. Am. Century Companies, Inc.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 5, 2014), 2014 WL 2524587, available at <http://media.ca8.uscourts.gov/opndir/14/06/131530P.pdf>

Thomas Kmak alleged his former employer, American Century, breached the implied covenant of good faith and fair dealing with respect to stocks he owned in the company. Kmak alleged American Century called his stocks for repurchase in retaliation for testifying in arbitration after Kmak was no longer employed by the company.

Several years after his employment with American Century ended, Kmak's former employer initiated arbitration proceedings against JPMorgan to resolve a dispute. Kmak was subpoenaed to testify by JPMorgan, which did not subpoena any other current or former employee of American Century who held stock in the company. Kmak provided sworn testimony which, allegedly, was not helpful to American Century's position. Very shortly after the arbitration resolved, American Century notified Kmak it was calling his shares for repurchase. As a result, Kmak did not receive either of the two stock dividends issued in 2011, which would have totaled more than \$540,000. To Kmak's knowledge, American Century did not exercise its call rights



with respect to any other shareholder.

Under Missouri law, a plaintiff must prove the defendant's action violated public policy or a statute to prove breach of the implied covenant of good faith and fair dealing. Kmak alleged American Century retaliated against him for providing truthful testimony in a quasi-judicial proceeding, which violates Missouri's established public policy. The Eighth Circuit also held that Kmak had a reasonable expectation that American Century would not act in violation of public policy with respect to his shares. Thus, Kmak's complaint stated a claim.

***Nord v. Walsh Cnty.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 26, 2014), 2014 WL 2884049, available at <http://media.ca8.uscourts.gov/opndir/14/06/123249P.pdf>**

Ron Nord, deputy sheriff, brought § 1983 action against county and its sheriff alleging, inter alia, violations of his First Amendment rights. In 2010, Nord entered the sheriff election, running against Lauren Wild, the sheriff and Nord's boss. On November 2, 2010, Wild was reelected. The day following the election, Wild terminated Nord in accordance with an "unwritten rule" that deputy sheriffs who run against the sheriff will be fired and for certain statements Nord made during the campaign. Nord alleged that he was fired in retaliation for the statements he made along the campaign trail that were protected by the First Amendment. Wild conceded, and it was undisputed, that Nord's speech was protected by the First Amendment. The district court denied the sheriff's motion for summary judgment based on qualified immunity. The Eighth Circuit reversed.

The district court denied summary judgment and did not reach the *Pickering/Connick* balancing test (for certain cases asserting First Amendment violations) because Wild failed to establish that Nord's speech disrupted the workplace. The Eighth Circuit took issue with that conclusion because Nord was never in the "workplace" after the conclusion of the November 2010 sheriff's election. The Eighth Circuit held, as a matter of law, that the sheriff was entitled to terminate Nord in order to avoid potential future "disruption of the office and the destruction

of working relationships."

The Eighth Circuit appeared to resolve a factual dispute in Wild's favor by accepting Wild's assertion that at least some of the purportedly protected speech was "false," holding "the Supreme Court continuously emphasizes the diminished value of false factual statements." The Eighth Circuit went on to hold that Nord's statements were not of such public concern so as to override the sheriff's interest in maintaining the "reputation" of his workplace, and, consequently, that the court was required to apply the *Pickering/Connick* balancing test.

The Eighth Circuit applied the *Pickering/Connick* balancing test and found that the test weighed in favor of granting qualified immunity. Specifically, the Eighth Circuit concluded: "(1) that at least some of Nord's campaign speech does not merit First Amendment protection;" (2) that even if Nord's speech was fully protected by the Constitution, Wild could have reasonably believed that the speech would be damaging to the workplace; and, (3) Wild was justified in firing Nord, even if his judgment was mistaken, primarily because he received advice from the county attorney and human resources supporting his decision to terminate.

Judge Shepherd dissented, opining that the two-step *Pickering/Connick* balancing test was unwarranted given that Wild conceded he terminated Nord for exercising his First Amendment rights, and the majority accepted that concession.

***Clay v. Credit Bureau Enterprises, Inc.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 6, 2014), 2014 WL 2535297, available at <http://media.ca8.uscourts.gov/opndir/14/06/123207P.pdf>**

Rachel Clay brought suit against her employer, Credit Bureau Enterprises, Inc., under 42 U.S.C. § 1981, alleging claims of race discrimination, hostile work environment, retaliation, and constructive discharge. The Eighth Circuit affirmed summary judgment on all claims.

The appellate court held Clay could not prove that her workplace was objectively offensive. The



incidents Clay alleged were infrequent, not severe, not humiliating and did not interfere with her work. The Eighth Circuit also summarily affirmed summary judgment on Clay's race discrimination and retaliation claims predicated on constructive discharge. The Eighth Circuit briefly indicated that Clay could not prove she was constructively discharged for the same reasons that she could not prove she was subjected to a hostile environment.

***Young v. Builders Steel Co.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 9, 2014), 2014 WL 2565835, available at <http://media.ca8.uscourts.gov/opndir/14/06/131556P.pdf>**

Michael Young worked for Builders Steel Co. from 2009 through 2011 and was the only African American employed by the company during that time. The Eighth Circuit held that a plaintiff must demonstrate evidence giving rise to an inference of discrimination, and that the same evidence can prove an inference of discrimination/retaliation as well as pretext.

Young proffered three arguments that he would present to the jury at trial, but the Eighth Circuit held that each failed for lack of sufficient evidence. First, Young could not establish that similarly-situated employees were more favorably treated because the employees he identified performed job tasks that Young was unable to perform. Second, there was no evidence that Builders Steel failed to follow its own policies. Third, Young failed to show how Builders Steel's proffered explanations were unworthy of belief.

***E.E.O.C. v. Audrain Health Care, Inc.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 30, 2014), 2014 WL 2922212, available at <http://media.ca8.uscourts.gov/opndir/14/06/131720P.pdf>**

The EEOC pursued a claim on behalf of David Lunceford, alleging Audrain Health Care, Inc. failed to transfer Lunceford to another position because of his sex. Lunceford was a male nurse and alleged Audrain failed to transfer him to a vacant operating room nurse position because of his sex.

The Eighth Circuit affirmed dismissal on summary

judgment because Lunceford could not prove to a jury that he made "every reasonable attempt to convey" his interest in the position he was not transferred to. The Eighth Circuit based its holding on the undisputed facts that Lunceford did not apply for the position, that he only had one conversation expressing potential interest in the job, and that he indicated he was no longer interested in the position shortly after that conversation.

***Malloy v. U.S. Postal Serv.*, \_\_\_ F.3d \_\_\_ (8th Cir. June 30, 2014), 2014 WL 2922307, available at <http://media.ca8.uscourts.gov/opndir/14/06/131764P.pdf>**

Melissa Malloy filed suit against her employer, the United States Postal Service, for violation of the Family and Medical Leave Act (FMLA). Malloy sought FMLA on December 17 and was terminated for absenteeism on December 29. Malloy was absent without excuse on December 27, ultimately causing her termination. The primary evidence Malloy relied upon was the close temporal proximity between her FMLA leave and termination.

The Eighth Circuit affirmed summary judgment because Malloy lacked sufficient evidence to prove her termination was motivated by her FMLA leave. In particular, Malloy was frequently absent throughout her employment and was aware that absenteeism could result in termination; and, Malloy had taken FMLA several times throughout her employment but not suffered any illegal treatment on any of the prior occasions.

*Submitted by:*

**Brian T. Rochel**

Of Counsel

SCHAEFER HALLEEN, LLC

400 South Fourth Street, Suite 202

Minneapolis, MN 55415

Main: 612-294-2600

Email: [brochel@schaeferhalleen.com](mailto:brochel@schaeferhalleen.com)



## Ninth Circuit

***Davis v. Nordstrom, Inc.*, \_\_ F.3d \_\_ (9th Cir. June 23, 2014), 2014 WL 2808139, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/23/12-17403.pdf>**

Following the United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Nordstrom, Inc. ("Nordstrom") revised its employee arbitration policy in its employee handbook. These revisions precluded Nordstrom employees from bringing most class action lawsuits. Specifically, the handbook provided that employees were required to arbitrate their disputes with Nordstrom, and also required Nordstrom to provide employees with 30 days written notice of any substantive changes to the arbitration provision to "allow employees time to consider the changes and decide whether or not to continue employment subject to the changes." To comply with the notice provision, Nordstrom sent letters to its employees, including Davis, informing them of the change to its arbitration policy, and provided them with copies of its revised policy.

Later, Nordstrom employee Faine Davis ("Davis") brought a class action lawsuit alleging that Nordstrom violated various state and federal employment laws. Nordstrom moved to compel arbitration before the district court. The district court denied Nordstrom's motion, holding that Davis and Nordstrom did not enter into a valid arbitration agreement when the policy was revised. Nordstrom appealed, and the Ninth Circuit reversed the district court's decision.

The Ninth Circuit held that a valid arbitration agreement existed, finding that the handbook Davis received when she began work established the ground rules of her employment, including that Davis and Nordstrom would arbitrate certain disputes. Because Davis had accepted employment on that basis, she agreed to be bound by Nordstrom's arbitration policies. The court also found that Nordstrom complied with the 30-day notice requirement under its policy when it provided the revised terms to its employees and did not seek to

enforce those terms for at least 30 days thereafter. The court also noted that during the 30-day period after Davis received the new policy, she did not object or otherwise quit her job, indicating her acceptance of the new terms. Finding no requirement under California law to specifically inform employees that their continued employment constitutes acceptance of new terms, the court held that a valid and enforceable arbitration agreement existed, and reversed the district court's decision on that basis. The court declined to consider whether the agreement was unconscionable as the district court did not reach that issue in deciding Nordstrom's motion to compel.

*Submitted by:*

**Megan Starich**  
Miller Nash LLP  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101  
Direct: 206.777.7428  
Email: [Megan.Starich@MillerNash.com](mailto:Megan.Starich@MillerNash.com)

## Eleventh Circuit

***Wetherbee v. Southern Nuclear Operating Co.*, \_\_ F.3d \_\_ (11<sup>th</sup> Cir. June 11, 2014), 2014 WL 2599914, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201310305.pdf>**

Prospective employee appealed district court's summary judgment dismissal of claims under the Americans with Disabilities Act, § 12112(d)(3)(C), and alleged misuse of information obtained during a medical evaluation. The Eleventh Circuit had previously affirmed in part summary judgment, but remanded for the district court to address the ADA claim.

Wetherbee applied and received a conditional job offer for a systems engineer position with the employer. The employer required passage of a medical evaluation. During the evaluation, Wetherbee informed the company he suffered from bipolar disorder, but records showed he did not take medicine to control, was not seeing a psychiatrist, and had not experienced episodes for over six years. The employer's medical team determined he could



only be hired if he met compliance with a medication regime and restriction from working on “safety sensitive systems and equipment” for one year. However, the position itself required work on safety sensitive systems and equipment, and therefore, the employer rescinded the offer.

On appeal, the court addressed whether § 12112(d)(3)(C) required Wetherbee to prove that he was disabled. In affirming the district court, the Eleventh Circuit held that an individual seeking relief under the ADA must demonstrate he is a qualified individual with a disability, and declined to extend its prior holdings—that disability status is not an element of §12112(d)(2) and (d)(4)(A) claims regarding prohibitions of medical examinations to determine whether an applicant has a disability and/or confidentiality of those exams—to claims under §12112(d)(3)(C), which permit medical exams as a condition of employment when the results are used in accordance with the subchapter. Reasoning that a claim under §12112(d)(3)(C) turns on whether there is discrimination on the basis of a disability, and this discrimination cannot occur unless Wetherbee is disabled, the Eleventh Circuit concluded that a showing of disability is crucial to the claim.

***Hubbard v. Clayton Co. Sch. Dist.*, \_ F.3d \_ (11<sup>th</sup> Cir. June 27, 2014), 2014 WL 2915909, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201312130.pdf>**

*Hubbard v. Clayton Co. Sch. Dist., et. al.* involves a former School District employee’s appeal of summary judgment in favor of the District. Hubbard claimed retaliation in violation of First Amendment rights due to his public statements regarding an accreditation investigation of the School District.

When employed, Hubbard was scheduled to be an assistant principal for the following school year, but his duties did not include talking to the press. However, he did hold the position of president of a private, non-profit professional organization (“GAE”) representing public educators, and in that capacity was charged to be the voice for the organization. While acting in capacity of president for GAE, he made comments to the press about the

School District’s accreditation issue. Less than a month later, the School Board voted to discontinue any employee leave that was not allowed by Board Policy—which included Hubbard and three other employees. While the other three employees were allowed to return to employment with the District, Hubbard was not. Hubbard submitted a resignation, but later tried to rescind it when he learned of the other employees’ arrangements.

The district court entered summary judgment in favor of the District, finding that Hubbard spoke pursuant to official duties for the School District and, therefore, had no First Amendment protections. On appeal, the Eleventh Circuit vacated and remanded the decision, siding with Hubbard that his speech was made in capacity of GAE, not the District; therefore, the District had no interest in controlling his speech.

***In re Managed Care*, \_ F.3d \_ (11<sup>th</sup> Cir. June 18, 2014), 2014 WL 2748101, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201214013.pdf>**

District court’s finding of contempt for violation of terms of a prior Settlement Agreement from a 12-year underlying litigation claim affirmed. The Agreement in question was previously approved by the Southern District of Florida in 2005 after multi-district litigation. Following the settlement in that case, other physicians and physician associates, including Appellants, filed multiple lawsuits in 2009 in Central District of California. At question on appeal was whether Appellants were in contempt and the imposition of sanctions for violation of an injunction regarding Appellants’ ERISA claims. Affirming the district court’s ruling of contempt, the Eleventh Circuit remanded the case to determine which of the plaintiffs’ ERISA claims were permissible, and to reevaluate sanctions.

***Brannon v. Finklestein*, \_ F.3d \_ (11<sup>th</sup> Cir. June 18, 2014), 2014 WL 2748152, available at <http://media.ca11.uscourts.gov/opinions/pub/files/200313011.pdf>**



Plaintiff appealed summary judgment dismissal of claims of retaliation based on constitutionally protected testimony about a state judge.

Brannon was employed as a forensic psychologist for the Broward County Public Defender's office, working for the Public Defender, Finklestein. In 2007, Brannon testified regarding charges against Judge Aleman, and allegations that she mistreated a criminal defendant. He testified Judge Aleman was not hostile toward him as a witness. Public Defender Finklestein testified that he was disappointed upon learning of Brannon's testimony.

The Public Defender's office began to send Brannon less work. In 2009, Finklestein sent an email to an assistant stating that Brannon would professionally suffer "death by 1000 invisible cuts. Withering on the vine, pinner and wriggling on the wall with no target or issue or martyrdom for him to seek sanctuary." Finklestein then ordered Brannon removed from expert selection.

Vacating the district court's grant of summary judgment, the Eleventh Circuit held a reasonable fact-finder could conclude that Finklestein was subjectively motivated to reduce Brannon's hours, and did so, because of his testimony. The court affirmed Finklestein's qualified immunity as to the claims brought against him in his individual capacity.

***Jarvela v. Crete Carrier Corp.*, \_\_ F.3d \_\_ (11<sup>th</sup> Cir. June 18, 2014), 2014 WL 2750112, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201311601.pdf>**

The Eleventh Circuit addressed summary judgment dismissal of ADA and FMLA claims. Jarvela, a commercial truck driver who suffered from alcoholism, was terminated based on company policy. The employer's policy prohibited the company from employing anyone who was diagnosed with alcoholism within the past five years. The employer claimed this was a safety-based rule due to business necessity.

After Jarvela was diagnosed with alcoholism, Crete

dismissed him, citing regulations from the Department of Transportation as well as the company's policies. In affirming the district court's decision in favor of the employer, the Eleventh Circuit held Jarvela was not entitled to drive a truck under the DOT regulations, and that his FMLA claim failed because the employer had a reason other than the FMLA leave to terminate Jarvela.

***Adams v. Austal, U.S.A., L.L.C.*, \_\_ F.3d \_\_ (11<sup>th</sup> Cir. June 17, 2014), 2014 WL 2726171, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201211507.pdf>**

Twenty-four African-American current and former shipyard employees of Austal brought claims of racial harassment and hostile work environment based on vulgar racial graffiti, nooses, displays of Confederate flags, and racial slurs. For years, Austal had cleaned the graffiti from the restroom until it decided to paint the walls black. After, the graffiti nearly stopped.

On appeal, the Eleventh Circuit addressed whether an employee could rely on evidence of racial harassment of which the employee was not personally aware to prove that the work environment was objectively hostile. Affirming the summary judgment in favor of Austal, the Eleventh Circuit held that an employee in a hostile work environment claim cannot complain about harassment of which they were unaware to prove the environment was objectively hostile.

*Submitted by:*

**Cathleen Scott, Esq.**

**Lindsey Wagner, Esq.**

CATHLEEN SCOTT & ASSOCIATES, P.A.

250 South Central Boulevard Suite 104-A  
Jupiter, Florida 33458

Phone: (561) 653-0008

[LWagner@csapalaw.com](mailto:LWagner@csapalaw.com)

***District of Columbia***

***U.S. Dept. of Homeland Sec. U.S. Cust. & Border Protec. v. Fed. Lab. Rel. Auth.*, 751 F.3d 665 (D.C.**



**Cir. June 3, 2014), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/FB5A61AD27CBDF685257CEC004E700E/\\$file/12-1457-1495754.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/FB5A61AD27CBDF685257CEC004E700E/$file/12-1457-1495754.pdf)**

The National Treasury Employees Union (NTEU) negotiated an agreement with DHS Customs and Border Protection that provided certain rights for its members when being interviewed by the agency's Office of Inspector General, treating OIG as an agency representative. Among those rights were advance notice of the interview, having the interview conducted at the worksite, and receiving particular forms.

DHS objected that OIG's procedures are not negotiable, so the Union appealed to the Federal Labor Relations Authority (FLRA), which found them a proper subject for negotiation. The D.C. Circuit agreed with DHS, holding that it is one thing to extend to OIG interviews the *Weingarten* right to have a union representative present when facing potential discipline, but quite another to force OIG to conduct its interviews in a particular manner. The intent of the Inspector General Act for OIGs to decide independently when and how to investigate supersedes the rights of employees to bargain over their working conditions, given that OIG is not a representative of agency management. This in no way limits the negotiability of how non-OIG investigations are conducted by management.

***Wilson v. Cox*, \_\_ F.3d \_\_ (D.C. Cir. June 3, 2014), 2014 WL 2457632, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/917E054B068C2E8285257CEC004E7027/\\$file/12-5070-1495758.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/917E054B068C2E8285257CEC004E7027/$file/12-5070-1495758.pdf)**

Plaintiff worked as a security guard at a military retirement home where he also resided. The head of security described him as a "very good employee." A new COO abolished the program allowing residents to do some work, telling them that they moved to the home not to work, but to retire. The COO told an EEO Counselor the guards were not doing their job properly, being found from time to time having fallen asleep. The COO later testified he eliminated the program to save money, have a better-trained workforce, and to align with another

facility that lacked the program.

The Court of Appeals reversed summary judgment on the Age Discrimination in Employment Act (ADEA) claim, finding two of the COO's statements to be direct evidence of discrimination: the coming to retire, not work comment and the assertion about guards being found sleeping. Both were deemed to reflect negative stereotypes of the sort the ADEA was meant to prevent being relied upon for employment decisions. As well, the former statement was not true and the latter was at most supported by a single incident of a guard sleeping. The plaintiff also asserted that as a preference-eligible veteran he had a property interest in the job and so his summary termination violated his due process rights. That claim was remanded to the District Court.

***Mendoza v. Perez*, \_\_ F.3d \_\_ (D.C. Cir. June 13, 2014), 2014 WL 2619844, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/7539D3F22FF9CC3385257CF60050AB38/\\$file/13-5118-1497417.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7539D3F22FF9CC3385257CF60050AB38/$file/13-5118-1497417.pdf)**

Plaintiffs were foreign-born herders of sheep, goats, and cattle who had obtained authorization to work in the U.S. and so were classified as U.S. workers for purposes of immigration law. The H-2A allows industry to use internationals to perform agricultural work upon certification from the Department of Labor (DOL) that there are insufficient qualified and willing U.S. workers and hiring foreign works will not negatively impact the wages and working conditions of U.S. workers.

DOL issued Training and Employment Guidance Letters in 2011 setting up special rules for herders of cattle, sheep, and goats—but did so without the notice and comment procedures applicable under the Administrative Procedure Act (APA). DOL justified the rules by the unique nature of herding: requiring long periods of isolation and 24/7 availability to protect animals.

Plaintiffs complained the result was an influx of international herders, suppressing wages, worsening working conditions, and leaving the plaintiffs unable to find employment. Industry intervened on



behalf of the government, arguing the plaintiffs lacked standing. The Court, however, ruled the plaintiffs to be a group intended to be protected by the immigration law and suffering real harm. For example, related jobs in one state would pay less than half the hourly wage under the special H-2A rules than if DOL had not issued the 2011 Guidance Letters.

The fact that DOL might have come to the same result if it had followed the APA was irrelevant to the standing analysis, as was the fact earlier policies may have caused similar harm. The appellate court next took the admittedly unusual step of proceeding to the merits without the benefit of the district court having done so, finding the case to turn on questions of law and that a remand followed by another appeal would be wasteful. The Court held the Guidance Letters to be legislative in nature—changing the regulatory scheme—and so not subject to any exceptions to the APA obligations of notice and comment. The case was remanded to fashion a remedy in light of the Court’s ruling that the DOL Letters were invalid rulemaking.

***Natl. Treas. Employees Union v. Fed. Lab. Rel. Auth.*, \_\_ F.3d \_\_ (D.C. Cir. June 17, 2014), 2014 WL 2721170, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/73A470D67C669D9185257CFA004EB98D/\\$file/12-1199-1497934.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/73A470D67C669D9185257CFA004EB98D/$file/12-1199-1497934.pdf)**

The Federal Labor Relations Authority was upheld in ruling it was not unfair labor practice for IRS to exclude union representatives from suitability interviews of IRS employees where the interview was conducted by OPM rather than IRS staff.

*Weingarten* provides for such a right when a meeting that may lead to discipline is with an agency “representative.” But, in this situation, the OPM suitability investigators were not sufficiently under IRS control for them to be considered representatives of the Treasury Department. IRS had allowed union representation when it was conducting the interviews, but its delegated authority had lapsed and so OPM was itself conducting them now. The fact that the interviews are usually at IRS, during work hours, mandatory,

and a tool used for the benefit of management, were all insufficient to convert the OPM staff conducting them into IRS representatives, for they were not under agency control. Because “representative of the agency” is an ambiguous phrase, the Court found itself obligated to accept FLRA’s interpretation as within the range of permissible readings of the law.

***Sheble v. Huerta*, \_\_ F.3d \_\_ (D.C. Cir. June 24, 2014), 2014 WL 2853719, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/0851FAE2E9BD3B3A85257D01004D7732/\\$file/13-1136-1499098.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/0851FAE2E9BD3B3A85257D01004D7732/$file/13-1136-1499098.pdf)**

Petitioner was a Delegated Pilot Examiner for the FAA. A national assessment tagged him as one of the six highest-risk pilot examiners, given his volume of exams matched by a high passage rate. An evaluation of him identified four seriously deficient areas. Re-evaluation by multiple reviewers after remediation training noted continued problems. The listing of five reasons for the cancellation of his appointment met the specificity requirement for such an action. The fact that one of his multiple reviewers was engaged to someone who more than 10 years earlier accused him of running a “ticket mill,” a phrase the reviewer also used in her evaluation, did not constitute an objectionable conflict of interest, particularly given the overwhelming and unanimous findings of inadequacies.

***Stephens v. Pension Ben. Guar. Corp.*, \_\_ F.3d \_\_ (D.C. Cir. June 24, 2014), 2014 WL 2853720, available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/FD149BE138F90BE685257D01004D7756/\\$file/13-5129-1499103.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/FD149BE138F90BE685257D01004D7756/$file/13-5129-1499103.pdf)**

U.S. Airways pilots filed a class action over a 45-day delay in payment of their lump sum retirement benefits. One potential class member exhausted the company’s internal appeal procedures before filing suit. The Court held they could all be members of the same class because there was no requirement that the other pilots have exhausted internal appeals before filing suit.

ERISA requires that retirements given in a lump



sum be the “actuarial equivalent” of the annuity benefit. 29 U.S.C. § 1054(c)(3). The Court joined the Third, Fourth, Fifth, Ninth, and Tenth Circuits in holding that exhaustion of internal remedies is unnecessary when enforcing statutory (versus contractual) rights. Whether the 45-day delay violated the Court’s earlier finding that a sum could not be indefinitely held after the actuarial equivalent determination is one requiring interpretation of the statute, not the plan terms. The case, now 14 years old, was remanded for that determination.

*Submitted by:*

**David Schleicher**

Schleicher Law Firm, PLLC

National Capital Region:

1629 K St. NW, Ste. 300

Washington, DC 20006

Waco ~ Washington, DC ~ Houston

Phone: (800) 892-1506

[davids@thislawfirm.com](mailto:davids@thislawfirm.com)