



Monthly Update for November

First Circuit

Northern New England Telephone Operations LLC v. Local 2327, 735 F.3d 15 (1st Cir. Nov. 12, 2013), 2013 WL 5977148, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1167P-01A.pdf>

Employer challenged arbitral panel's award on the basis that the panel exceeded its scope of authority under the CBA's arbitration clause, and the panel adopted a manifestly unreasonable interpretation of the CBA's terms. After determining that the CBA's arbitration clause did not limit the panel's authority beyond the accepted standard, the First Circuit held that the panel's interpretation was neither implausible nor in excess of its authority. Thus, the Court affirmed.

Bonneau v. Plumbers and Pipefitters Local Union 51 Pension Trust Fund, __ F.3d __ (1st Cir. Nov. 15, 2013), 2013 WL 6037181, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1515P-01A.pdf>

Defendant, a union pension trust fund, merged four different local unions, including their plans and funds. Given that the "banked hour" provisions of each plan were different, Defendant gave the more generous "bank hours" provisions prospective and retrospective effect. With the intention of improving the Plan's financial health, Defendant was going to eliminate the retrospective effect of the Post-Merger Plan and the benefits it would have provided participants by way of amendment. Plaintiffs, a group of retired union employees, pursued a claim arguing that the amendment would violate ERISA's "anti-cutback" rule. The Court noted that ERISA does not ask whether the benefits were "earned," but rather whether they have "accrued." Finding that the benefits had accrued, the First Circuit held affirmed held that the anti-cutback rule applied.

Winslow v. Aroostook County, __ F.3d __ (1st Cir. Nov. 15, 2013), 2013 WL 6037175, available at <http://media.ca1.uscourts.gov/pdf/opinions/13-1319P-01A.pdf>

Plaintiff filed a retaliation claim after the Northern Maine Development Commission, Inc. (NMDC) failed to hire her when it became fiscal agent of the Workforce Investment Act (WIA) grant. Plaintiff was appointed in 2008 as Executive Director of the Local Area I Workforce Investment Board (LWIB), which was the WIA grant's recipient and fiscal agent at the time. Due to an investigation of the WIA grant during 2009, Plaintiff's job description was found not to be in compliance with federal program requirements. Although Plaintiff claimed to have been a whistleblower as to these requirements, the Court found that she was directed by her superior to communicate certain information. The Court also considered Maine's rule that a report is not whistleblowing if part of the job responsibilities includes making such reports, particularly when instructed to do so by a superior.

Submitted By:

José R. González-Nogueras and Sofiana Bird Jiménez
Graffam & Lausell
P. O. Box 366104
San Juan, Puerto Rico 00936-6104
jgonzalez@jgl.com

Fourth Circuit

Cosey v. Prudential Insurance Company of America, 735 F.3d 161 (4th Cir. Nov. 12, 2012), 2013 WL 5977151, available at <http://www.ca4.uscourts.gov/Opinions/Published/122360.P.pdf>

In *Cosey*, the Fourth Circuit reversed the district court's summary judgment for an employer and disability plan administrator, ruling that the language in the employer's long-term disability plan, which was subject to the Employee Retirement Income Security Act of 1974 (ERISA), did not confer discretionary decision making authority on the plan administrator. The Court held: (1) the language at issue in the long-term and short-term disability plans was ambiguous, and the plan administrator's decision denying benefits was subject to de novo judicial review; and (2) the



Monthly Update for November

district court erred in determining that the employer's plans required objective proof of disability in order for an employee to qualify for plan benefits. The Court thus vacated and remanded the matter to the district court.

After exhausting her administrative remedies, the plaintiff, who was denied short-term and long-term disability benefits, filed an action against her employer and the plan administrator. Applying an abuse-of-discretion standard to the denial of the long-term and short-term disability benefits, the district court granted summary judgment in favor of the plan administrator and employer. In the alternative, the district court ruled that even applying de novo review, summary judgment was warranted because the court found the plaintiff failed to meet the definition of disability under the benefit plans.

On appeal, the Fourth Circuit held that the district court erred in applying abuse-of- discretion review when examining the plan administrator's denial of benefits. Addressing first the long-term disability plan, the Fourth Circuit explained that the plan was subject to ERISA, which requires courts to conduct a de novo review of an administrator's decision unless the plan unambiguously gives the administrator discretion to determine eligibility. The Court held language requiring "proof satisfactory to the plan administrator" did not unambiguously confer discretionary decision-making authority on the plan administrator. The Court joined the First, Second, Third, Seventh, and Ninth Circuits in finding such language insufficient to confer discretionary authority; in contrast, the Eighth, Tenth, and Eleventh Circuits have held that such language is sufficient to confer discretionary authority.

The Fourth Circuit analyzed the short-term disability plan under North Carolina law and reached the same conclusion. The Court held that plan language requiring "satisfactory proof of continuing disability" was ambiguous because it could require either objectively satisfactory or subjectively satisfactory proof. Construing the ambiguous language in favor of the insured, as required by state law, the Court held that the plan

did not confer discretionary decision-making authority on the plan administrator. Thus, the district court erred in applying abuse-of-discretion review to the administrator's decision.

Finally, the Fourth Circuit held that the district court's grant of summary judgment was not saved by its alternative ruling that the employee failed to meet the definition of disability under the benefit plans. The Court rejected the plan administrator's argument that the district court's reference to de novo review permitted the Fourth Circuit to conduct its own de novo review of the denial of benefits. The Court found that the district court's ruling was based in part on the court's erroneous conclusion that the plans required the employee to present objective evidence of her disability. The Fourth Circuit vacated and remanded to the district court with the direction to review the employee's evidence de novo under the actual requirements of the long-term and short-term disability plans.

***Buchhagen v. ICF International, Inc.*, ___ Fed. Appx. ___ (4th Cir. Nov. 4, 2013), 2013 WL 5879106 available at <http://www.ca4.uscourts.gov/Opinions/Unpublished/131303.U.pdf>**

In *Buchhagen*, the Fourth Circuit affirmed the district court's dismissal of a 67-year-old employee's hostile work environment claim under the Age Discrimination in Employment Act, but reversed the dismissal of the employee's wrongful discharge and retaliation claims.

The Fourth Circuit explained that to establish a prima facie case for a hostile work environment claim, a plaintiff must allege facts showing: (1) the conduct was unwelcome; (2) it was based on the plaintiff's age; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) there was some basis for imposing liability on the employer. The plaintiff alleged that her supervisor "mockingly" yelled at her during one meeting, repeatedly harped on her mistakes, made snide comments, played favorites, and unfairly scrutinized her work. The Court held these facts fell "far short" of being severe or pervasive enough to establish an abusive



Monthly Update for November

environment. The Court noted that “[w]orkplaces are not always harmonious locales, and . . . bruised or wounded feelings will not . . . satisfy the severe or pervasive standard.” The Fourth Circuit thus affirmed the district court’s decision to dismiss the hostile environment claim.

However, the Fourth Circuit reversed the district court’s dismissal of the age discrimination and retaliation claims. In determining the complaint sufficiently stated an age discrimination claim, the Court noted allegations that the plaintiff’s supervisor had mentored younger employees and sent them to management training programs, but declined to do so for the plaintiff; the supervisor played favorites with younger employees; the supervisor moved responsibilities from the plaintiff to her younger and less experienced colleagues; the plaintiff was placed on a performance improvement plan, but younger employees making similar mistakes were not; and the plaintiff was replaced after her termination by a substantially younger employee. The Court acknowledged allegations in the complaint that the Court said cut against her claim: that the supervisor had hired the plaintiff to work for another company when the plaintiff was 64 years old; that the plaintiff was 67 when the defendant employer hired her; and that the plaintiff had negotiated a significantly higher salary than the one originally offered. The Fourth Circuit said these facts did not foreclose a claim for relief, and accepting the plaintiff’s factual allegations as true and drawing reasonable inferences in her favor, the Court held that she had stated a claim for wrongful discharge on the basis of her age.

The Fourth Circuit also held that the district court erred in dismissing the employee’s retaliatory discharge claim. To establish a prima facie case of retaliation, a plaintiff must show: (1) she engaged in protected activity; (2) an adverse employment action was taken against her; and (3) there was a causal link between the protected activity and the adverse action. In this case, the plaintiff was fired six days after complaining to the company’s human resources department that her supervisor’s actions were based on the plaintiff’s age. The Court held that the timing of the plaintiff’s discharge by itself satisfied the causation element necessary to state a

retaliation claim. Accordingly, the Fourth Circuit reversed and remanded for further proceedings on the wrongful discharge and retaliation claims.

Submitted by:

Paul Sun and Diane Rupprecht
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
Telephone: 919.865-7000
Paul.sun@elliswinters.com

Fifth Circuit

***Tagore v. United States*, 735 F.3d 324 (5th Cir. Nov. 13, 2013), available at <http://www.ca5.uscourts.gov/opinions/pub/12/12-20214-CV0.pdf>**

Plaintiff, a Sikh employee for the IRS, was refused permission to wear a kirpan (a Sikh ceremonial sword) with a blade long enough to be considered a “dangerous weapon” under federal law inside a federal building where she worked. When plaintiff attempted to report to work, she was denied entry and the IRS declared her AWOL, stopped her salary, and eventually terminated her. Plaintiff brought action against the United States and various federal agencies, alleging violations of her religious rights under Title VII and Religious Freedom Restoration Act (RFRA). The district court granted summary judgment for the government holding that plaintiff did not create a triable issue of fact that her sincere religious beliefs required her to wear a kirpan with a 3-inch, rather than the statutorily permitted 2.5-inch blade.

The Fifth Circuit affirmed the summary judgment on plaintiff’s Title VII claim, but reversed and remanded for further proceedings on her RFRA claim. The Court noted that whether a plaintiff has a sincerely held belief is a matter of individual credibility and there was ample evidence to create a genuine issue of material fact as to the sincerity of plaintiff’s practice of wearing a kirpan with a 3-inch blade. As to Plaintiff’s Title VII claim, the Court held that even assuming plaintiff could establish a sincerely held religious belief, the IRS’s failure to accommodate plaintiff did not violate Title VII as a



Monthly Update for November

matter of law because (1) the IRS does not control decision regarding federal building security and therefore cannot be deemed legally responsible for discriminating against plaintiff; (2) requiring the IRS to override other agencies' security decisions would place the IRS in the position of violating federal law and an "employer need not accommodate an employee's religious practice by violating other laws"; and (3) the requested accommodations amounted to more than "de minimis" costs on the employer. As to plaintiff's RFRA claim, the Court held that additional proceedings were necessary to determine as a matter of fact whether plaintiff held a sincere religious belief in wearing a kirpan at all time, and, if so, whether the government had proven that its actions furthered a compelling government interest with the least restrictive means.

***Royal v. CCC & R Tres Arboles, L.L.C.*, ___ F.3d ___ (5th Cir. Nov. 21, 2013), 2013 WL 6122099, available at <http://www.ca5.uscourts.gov/opinions/pub/12/12-11022-CV0.pdf>**

Plaintiff worked at an apartment complex for only four days, during which time she was regularly visited by two male coworkers who hovered over her in a small office and sniffed her in a sexually suggestive manner, in addition to other instances of objectionable conduct. Plaintiff complained to her supervisors about this behavior and was terminated the same day. The district court granted employer's motion for summary judgment as to plaintiff's Title VII hostile work environment claim and retaliation claim. Plaintiff raised only the retaliation claim on appeal.

The Fifth Circuit reversed the grant of summary judgment to defendant on the retaliation claim, and held that plaintiff had shown genuine issues of disputed material facts whether the described conduct created a hostile work environment in violation of Title VII, and, if so, whether her complaint about that conduct was causally related to her termination. The Fifth Circuit reasoned that a reasonable jury could conclude that the described conduct was harassment based on sex and was pervasive, noting that the compressed 4-day time

period of the objectionable conduct made the conduct pervasive. While lack of physical conduct is a factor to consider in a claim of harassment based on sex, it is not dispositive, and a reasonable jury could find that coworkers created a hostile work environment despite having no physical contact with plaintiff. Concluding that the plaintiff could show that the complained of behavior constituted sexual harassment, the court then addressed whether plaintiff had shown a causal link between her complaint of harassment and her termination. The fact that the plaintiff was fired the same day that she complained of the harassment, and the supervisor who terminated her was aware of the complained about behavior supported a causal link. The district court judgment was vacated and the case was remanded for further proceedings.

***Neely v. PSEG Texas, Ltd. P'ship*, 735 F.3d 242 (5th Cir. Nov. 6, 2013), available at <http://www.ca5.uscourts.gov/opinions/pub/12/12-51074-CV0.pdf>**

Plaintiff was suspended and ultimately terminated after a series of verbal altercations with his supervisors. After Plaintiff was diagnosed with major depressive disorder and generalized anxiety disorder severe without psychosis, he sued that employer alleging among other things violations of the ADA. During trial, plaintiff objected to two jury interrogatories, which asked whether plaintiff was "a qualified individual with a disability." Plaintiff argued that the district court erred in submitting the question, "Was a Plaintiff a qualified individual with a disability?" as a predicate to a finding of discrimination regarding his termination claim and his failure to accommodate claims under the ADA. He argued that the inclusion of the words "with a disability" is contrary to the ADA as amended by the ADA Amendments Act of 2008 ("ADAAA").

The Fifth Circuit affirmed the district court's submission of the two jury interrogatories. The Court rejected claimant's argument that to require a finding of "disability" as a predicate to the determination of whether he was terminated on the basis of this actual or perceived impairment is in direct conflict with the purpose of the Congressional



Monthly Update for November

changes to the ADA in enacting the ADAAA. The Court reasoned that "[a]lthough the text of the ADAAA expresses Congress's intention to broaden the definition and coverage of the term 'disability,' it in no way eliminated the term from the ADA or the need to prove a disability on a claim of disability discrimination." The Court held that while the ADAAA makes it easier to prove a disability, it does not absolve a party from proving one. Even though Congress, in enacting the ADAAA intended to expand the coverage of the ADA through simplification of the analysis of "disability" and increased focus on whether there was discrimination in the adverse-employment action, a claimant must still prove a disability.

Submitted by:

Nina Wessel English
Gordon, Arata, McCollam,
Duplantis & Eagan, LLC
201 St. Charles Ave. 40th Floor
New Orleans, Louisiana 70170-4000
Direct: (504) 569-1857
nenglish@gordonarata.com

Sixth Circuit

***Perez v. Postal Officers Association*, ___ F.3d ___ (6th Cir. Nov. 27, 2013), 2013 WL 6183857 available at <http://www.ca6.uscourts.gov/opinions.pdf/13a0334p-06.pdf>**

In *Perez*, the Sixth Circuit was charged with determining when a union member has "exhausted" his internal union remedies under Sections 401 and 402 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), which regulate union elections and authorize the Secretary of Labor to bring suit to enforce these provisions. Before the Secretary can commence an enforcement action, a member of the union must exhaust – or attempt to exhaust – his internal union remedies, then file an administrative complaint with the Secretary. The complaining union member has just "one calendar month" to file his administrative complaint, measured from the latest of two dates: (1) the date he "exhausted" his internal union remedies; or (2) the date three months after the

member invoked his internal union remedies "without obtaining a final decision."

The Secretary of Labor argued that a union member exhausts his union remedies when he *receives* the union's final decision. The Postal Officers Association asserted that a member's one-month limitations period runs from the date the union *sends out* its final decision. Agreeing with the Postal Officers Association, the U.S. District Court for the Northern District of Ohio dismissed the complaint. The Sixth Circuit reversed and remanded.

In *Perez*, the Postal Officers Association held an election to choose six officers, including its President. The President was ousted in favor of the then First Vice President. Convinced the election was tainted, the President protested to the Union's Election Chair by letter dated September 12, 2011. The Election Chair denied the protest by letter dated October 12, 2011. The President appealed to the Executive Board, which issued a final decision by certified mail on December 9, 2011, affirming the initial decision. The President received the Executive Board's final decision on December 14, 2011. He filed an administrative complaint with the U.S. Department of Labor on January 13, 2012. The Secretary of Labor filed suit, alleging that the Postal Officers Association violated the LMRDA during the union elections.

Explaining that the LMRDA was enacted to safeguard "union democracy," the Sixth Circuit concluded that the statute as a whole, together with applicable federal regulations, demonstrates that a member has not "exhausted" the union's procedures "until he has 'obtained a final decision'." According to the Court, "obtain a final decision" means having physical control over it. Consequently, the Court held, "a complaining member does not 'obtain a final decision' – and thus 'exhaust' his internal union remedies – until the date he receives the decision."

Submitted by:

Scott R. Eldridge
Miller, Canfield, Paddock & Stone, P.L.C.
One Michigan Ave., Suite 900
Lansing, Michigan 48933



Monthly Update for November

Direct: (517) 483-4918
eldridge@millercanfield.com

Seventh Circuit

Titan Tire Corporation of Freeport, Inc. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, 734 F.3d 708 (7th Cir. Nov. 1, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D11-01/C:12-1152;J:Manion:aut:T:fnOp:N:1233682:S:0>

The Seventh Circuit reversed an arbitration award ordering a former employer to continue paying a union president and benefit representative and remanded the case for further proceedings.

Plaintiff purchased a tire manufacturing facility and subsequently entered into a labor agreement that required it to pay the union president's and benefit representative's salaries. Plaintiff initially paid the salaries but ceased after determining that such payments violated the LMRA. Defendant filed a grievance claim and the arbitrator ordered plaintiff to resume payments. The district court upheld the arbitration award because the president and benefits representative were exempt from the LMRA prohibitions "by reason of" their former employment with plaintiff. The Seventh Circuit reversed the district court's ruling because the labor agreement violated the plain language of the LMRA and the president's and benefit representative's salaries were not "vested rights" earned by reason of their former employment with plaintiff. The court recognized that judicial review of arbitration awards is extremely limited and that courts should "not review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement," but held that if the award directs a party to do something illegal in violation of a statute, then the arbitrator's decision "violates public policy" and the Court is "obliged to refrain from enforcing it."

Brumfield v. City of Chicago, 735 F.3d 619 (7th

Cir. Nov. 6, 2013), available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D11-06/C:11-3836;J:Sykes:aut:T:fnOp:N:1236304:S:0>

Plaintiff, a police officer, was ordered by defendant to have several psychological evaluations and was suspended pending each evaluation. Each evaluation cleared her to return to duty, but defendant nonetheless terminated her. Plaintiff sued, alleging the suspensions and subsequent discharge violated Title II of the ADA. The district court held that suing under Title II was appropriate, but that plaintiff nonetheless failed to state a claim. While that issue was on appeal, plaintiff filed another lawsuit alleging violations of Title I of the ADA. The district court dismissed the Title I claim as barred by *res judicata*. The Seventh Circuit consolidated the appeals and affirmed the district court's rulings because Title II did not cover employment discrimination claims for public employees and plaintiff waived her Title I claim by failing to address *res judicata* on appeal.

Cerentano v. UMWA Health and Retirement Funds, ___ F.3d ___ (7th Cir. Nov. 22, 2013), 2013 WL 6144759, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D11-22/C:13-2037;J:Flaum:aut:T:fnOp:N:1246543:S:0>

Plaintiff was a coal miner who suffered fifteen work related injuries between 1978 and 2000, with six of them causing partial disability. Plaintiff was later rendered totally disabled by a non-work-related car accident. He applied for and was approved to receive social security benefits. He also applied for pension benefits under the United Mine Workers of America 1974 Pension Trust Plan, which mandated receipt of social security benefits as a prerequisite to eligibility. The plan trustees found no causal link between plaintiff's mine related injuries and the social security benefits and denied plaintiff's application. Plaintiff challenged under ERISA but the district court agreed with the trustees and granted summary judgment for defendant. The Seventh Circuit reversed the district court's decision and found that the trustees should have considered



Monthly Update for November

plaintiff's work related injuries in reaching its decision since the injuries contributed to the ALJ's decision to award social security benefits.

NECA-IBEW Rockford Local Union 364 Health and Welfare Fund. v. A&A Drug Company, ___ F.3d ___ (7th Cir. Nov. 25, 2013), 2013 WL 6154162, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D11-25/C:12-3070:J:PerCuriam:aut:T:fnOp:N:1247304:S:0>

The Seventh Circuit affirmed the district court's dismissal of plaintiff's claim. Plaintiff is a trust fund that provides health benefits to members of a local union. The Fund is governed by a board of trustees who negotiated a prescription drug benefit agreement with Defendant. Subsequent to this Local Agreement, Defendant negotiated another prescription drug benefit agreement with the national union, with which the local union is affiliated, which mandated arbitration of disputes. The National Agreement allowed local unions to opt into the agreement by signing a participation agreement or electing one of the National Agreement pricing options. Plaintiff sued, alleging the invoiced price levels were not justified under the Local Agreement. Defendant filed a motion to dismiss, arguing the National Agreement governs and under those terms the dispute must be arbitrated. Plaintiff contended they never actually knew they received benefits under the National Agreement and they never voted to adopt the National Agreement, so Plaintiff cannot be bound to the National Agreement.

The district court held Plaintiff had assumed the National Agreement because Plaintiff had accepted the benefits of the agreement. Specifically, the local union's trustees had knowledge of the terms and differences between the two agreements and had knowledge the local union was receiving benefits available only under the terms of the National Agreement. The court held "by knowing that the local union received the benefits of the National Agreement and never repudiating those benefits, the trustees ratified the National Agreement." The Seventh Circuit held Plaintiff was bound to the

terms of the National Agreement and its arbitration provisions and affirmed the district court's ruling to dismiss Plaintiff's claims.

Thomas Blanchar v. Standard Insurance Company, ___ F.3d ___ (7th Cir. Nov. 27, 2013), 2013 WL 6182978, available at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D11-27/C:12-2745:J:Bauer:aut:T:fnOp:N:1248954:S:0>

The Seventh Circuit affirmed the district court's grant of summary judgment for defendant. Plaintiff worked as the Director of Institutional Sales / Product Manager for Defendant. Plaintiff sued Defendant claiming he was entitled to overtime compensation for the hours he worked in excess of forty hours per week under the FLSA. Defendant brought a motion for summary judgment contending that Plaintiff qualifies as bona fide administrative employee and is exempt from the overtime requirements of the FLSA.

The court held since Plaintiff was involved in advising salespeople and promoting sales of financial plans, "that his duties and responsibilities satisfy the directly related prong of the administrative exemption." Additionally, the court found that though Plaintiff lacked final decision making authority, "his work involved a great deal of discretion and independent judgment" and thus qualified Plaintiff under the administrative employee exemption. The Seventh Circuit affirmed the district court's grant of summary judgment for defendant because the Plaintiff qualified as an exempt administrative employee and was not entitled to overtime pay under FLSA.

Submitted By:

Ruth I. Major

Austin Wightman

Jesse Ryder

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

30 W. Monroe Street, Suite 1650

Chicago, Illinois 60603

Telephone: 312.893.7544



Monthly Update for November

Eighth Circuit

***Sayger v. Riceland Foods, Inc.*, __ F.3d __ (8th Cir. Nov. 18, 2013), 2013 WL 6050746, available at <http://media.ca8.uscourts.gov/opndir/13/11/123301P.pdf>**

Plaintiff, a Caucasian male, was hired by Defendant in 1999 as a maintenance worker. In 2009, he heard a supervisor frequently use highly offensive language with respect to black employees (such as saying they “stunk” and calling them “niggers”); he asked the supervisor to stop because he believed that black employees were offended by the remarks. Later that year, two other white coworkers spoke to Defendant’s HR Manager about the offensive remarks. As a part of that investigation, Plaintiff was interviewed and confirmed the offensive remarks were made. The two white coworkers were terminated a month following the interview and Plaintiff received a “Layoff Notice” three months after that. Plaintiff later testified in a jury trial against Defendant and the supervisor, resulting in a favorable verdict against the Defendant. In his own case, Plaintiff testified he was treated “worse” after the internal investigation and others testified that they had never heard of a maintenance worker being laid off for “cost reduction” (as the employer alleged) because maintenance workers are “essential to the production”. The jury returned a verdict for the Plaintiff awarding compensatory damages and back pay in an amount over \$60,000.

The Eighth Circuit held that a non-minority may bring a § 1981 claim if he was discriminated or retaliated against for attempting to “vindicate the rights of minorities” as to allow it to stand unchallenged would “give impetus to the perpetuation of racial restrictions”. In an issue of first impression, the Court held that Plaintiff’s serving as a witness in an internal investigation was “conduct vindicating the rights of minorities”: “If employees who give evidence or respond to questions during internal inquiries into alleged discrimination are not protected from retaliation, it would impede any internal efforts to address discrimination.” The Court also determined that the evidence was sufficient for the jury to find retaliation. Finally, the Court noted the Title VII

appeal was untimely.

Submitted By:

Corie Tarara
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd. Ste 500
Minneapolis, MN 55439
Phone: (952) 896-1700
ctarara@seatonlaw.com

Ninth Circuit

***Rivera v. Peri & Sons Farms*, 735 F.3d892 (9th Cir. Nov. 13, 2013), 2013 WL 5992255, available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/11/13/11-17365.pdf>**

Plaintiffs, Victor Rivera and twenty-three other Mexican citizens lawfully admitted immigrant farmworkers, brought a putative class action against their employer, a Nevada corporation that produces, harvests and packages onions, alleging claims for minimum wage violations under the FLSA, breach of contract, state wage and hour law violations, and minimum wage violations under state law. Defendant hired the workers through the H-2A program of the DOL. The farmworkers incurred expenses related to their employment, including a hiring or recruitment fee to be considered for employment, obtaining their H-2A visas from the United States Consulate in Mexico, necessary fees and lodging while obtaining their visas, and fee to obtain Form I-94 from the United States Citizenship and Immigration Services, and they also purchased protective gloves required for the performance of their jobs and incurred expenses traveling from defendant’s farm back to their homes in Mexico. The farmworkers claimed that these expenses were primarily for defendant’s benefit but that the company did not properly reimburse them.

Among other issues, the court held that the employer must reimburse immigrant workers during the first week of work for inbound travel and their immigration expenses to the extent that such expenses lowered their compensation below the minimum wage. The court also ruled that the more general FLSA regulations promulgated by DOL



Monthly Update for November

rather than specific regulations governing the H-2A program controlled whether and when employers had to reimburse employees for inbound travel and immigration expenses.

Submitted by:

Lisa A. Amato

WYSE KADISH LLP

621 SW Morrison St., Suite 1300

Portland, Oregon 97205

Phone: 503.228.8448

laa@wysekadish.com

Tenth Circuit

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. Oct. 1, 2013), available at <http://www.ca10.uscourts.gov/opinions/11/11-5110.pdf>**

The EEOC has requested *en banc* review by the Tenth Circuit of the decision in this matter, arguing that the decision “created a new, heightened standard for assessing notice to the employer.”

Abercrombie & Fitch maintains a dress code called the “Look Policy,” which prohibits the wearing of head coverings and black clothing. Samantha Elauf applied for a position as a sales-floor Model and obtained an interview. She wore a black headscarf (“hijab”) to the interview. Neither the interviewer (an assistant manager) nor Elauf discussed her religion or the hijab. However, although the interviewer found her to be qualified, the district manager said that she “should not be hired because she wore a headscarf -- a clothing item that was inconsistent with the Look Policy.” The EEOC brought suit under Title VII for violation of the duty of religious accommodation under Title VII. The district court granted the EEOC’s motion for summary judgment, and A&F appealed.

The Tenth Circuit reversed, and instead granted summary judgment for A&F, finding that there was no material issue of fact on the central point: “Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and (because she

felt religiously obliged to wear it) that she would need an accommodation for the practice, because of a conflict between it and Abercrombie’s clothing policy.” The Tenth Circuit applied the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) test to require the employee at the prima facie stage to show that “he or she informed his or her employer of this belief.” In order to impute to knowledge of the employee’s religious practice to the employer, “notice would need to be based on an employer’s particularized, *actual* knowledge of the key facts that trigger its duty to accommodate.” Although the EEOC argued that knowledge was obvious from the interviewer’s personal observation, the Court held that “[G]iven Title VII’s conception of religion as a uniquely personal and individual matter, Ms. Cooke’s knowledge that Ms. Elauf elected to wear a hijab would be far from sufficient information to provide her with the requisite notice that would trigger an employer’s duty to accommodate.” The Court also pointed out that Title VII itself prohibits an employer from inquiring about whether an observed practice is based in religious belief.

The dissent pointed out that the applicant likely failed to inform A&F that she wore the hijab for religious reasons, and that she would need an accommodation from the “Look Policy,” because she did not know about the policy.

The Tenth Circuit’s decision was especially interesting because it came shortly after the EEOC had settled two cases against A&F based on the application of its Look Policy to applicants wearing hijabs. In the consolidated settlement, A&F agreed to inform applicants that accommodations to its “Look Policy” may be available; and incorporate “headscarf scenarios” into all managers’ training.

Submitted by:

Jim Moss

PAYNE & FEARS LLP

222 South Main Street, Suite 552

Salt Lake City, UT 84101

Phone: 385.202.2680

jrm@paynefears.com