Monthly Update for September

First Circuit

***Rivera-Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, __ F.3d __ (1st Cir. 2013), 2013 WL 4823392, *available at* http://media.ca1.uscourts.gov/pdf.opinions/12-2419P-01A.pdf**

The First Circuit addressed whether the District Court abused its discretion when it denied an extension of discovery deadline and entered summary judgment. The First Circuit held that it did not after concluding that Plaintiff did not act a diligently and had failed to establish excusable neglect. The First Circuit reiterated that "Courts - like the Deity- are more prone to help those who help themselves" and affirmed the summary judgment.

***Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*, __ F.3d __ (1st Cir. 2013), 2013 WL 5290017, *available at* http://media.ca1.uscourts.gov/pdf.opinions/12-1023P-01A.pdf**

The First Circuit determined that under USERRA the "escalator principle" and the "reasonable certainty" test applied to automatic and non-automatic promotions.

Plaintiff occupied the position of Active Pharmaceutical Ingredient ("API") Group Leader when he was called to active duty in the Navy. During his absence, Pfizer restructured the API Group Leader position into two separate classifications: API Team Leader and API Coordinator. Employees applied for positions and Pfizer interviewed them in order to classify them into one of these new positions. When Plaintiff returned, he was assigned to "special tasks" under the supervision of the API Manager. Though his salary and benefits were not altered, his job responsibilities were reduced. Plaintiff's allegations mostly revolve around the fact that he was not given the opportunity to apply to the API Team Leader position, for which he felt he was qualified. Defendant, on the other hand, argued that promotion was not automatic, but rather discretionary for which reason the "escalator principle" and the "reasonable certainty" test did not apply.

The First Circuit held that the proper inquiry should be not whether the promotion was automatic or discretionary, but whether it was reasonably certain that Plaintiff would have applied for and received the promotion had he not been in active duty status.

***Atwater v. Chester*, __ F.3d __ (1st Cir. 2013), 2013 WL 5290019, *available at* http://media.ca1.uscourts.gov/pdf.opinions/12-1920P-01A.pdf**

The First Circuit discussed the application of the *England* reservation to the facts of this case. It held that it did not apply given that the *England* reservation was ineffective and that Plaintiff's federal claims could have been litigated in the previous state-court case. Thus, the claims were barred by res judicata.

Plaintiff filed his complaint consisting of 3 state-law claims and 3 federal-law claims in both Massachusetts Superior Court and the U.S. District Court contesting an arbitration award. He first filed in state court and then in federal court. Both of his complaints included the other court's claims only for "completeness" and not their adjudication referencing the *England* reservation. He also noted his intention to seek a stay of the action in federal court pending the state court's determination on his state-law claims, for which reason the District Court entered an order of closure for statistical purposes. As such, when the Massachusetts Superior Court affirmed the arbitration award, Plaintiff reopened his federal complaint given his *England* reservation. Yet, the First Circuit noted that the right to reserve claims arises only when the District Court abstains under *Pullman*, and the District Court's closure order was not a *Pullman* abstention order. Furthermore, it reiterated that the First Circuit requires litigants to first file in federal court to secure an *England* reservation.

***Corporate Technologies, Inc. v. Harnett* , __ F.3d __ (1st Cir. 2013), 2013 WL 5303480, *available at* http://media.ca1.uscourts.gov/pdf.opinions/13-**

1706P-01A.pdf

The First Circuit determined whether the District Court abused its discretion by granting preliminary injunction. It determined it had not; thus the Court affirmed the injunction.

Plaintiff brought action against former employee and competitor alleging breach of employment agreement, specifically a non-solicitation agreement, and tortious interference. Plaintiff sought both monetary damages and injunctive relief. In analyzing Plaintiff's argument, which raised a distinction between actively soliciting and merely accepting business, the Court emphasized that initial contact can entail anything from a call to ascertaining the circumstances of a defendant's new employment to the placement of an order. It then determined that District Court's conclusion that Harnett likely engaged in solicitation was reasonable.

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Third Circuit

***Camesi, et al. v. University of Pittsburgh Medical Center, et al.* __ F.3d ___ (Sept. 4, 2013), 2013 WL 4734027, *available at* http://www2.ca3.uscourts.gov/opinarch/121446p.pdf**

In *Camesi*, the Third Circuit Court of Appeals once again addressed collective actions under the federal Fair Labor Standards Act (FLSA) 26 U.S.C. § 201, *et seq*. Confronted by named plaintiffs who voluntarily dismissed their individual claims with prejudice in order to obtain immediately appeal of a District Court order denying final certification of a collective action, the Third Circuit found that the named plaintiffs lacked final appealable orders. The Court then dismissed their appeals for lack of jurisdiction.

The FLSA contains a unique "opt-in" procedure for collective actions that differs markedly form the "opt-out" class action procedure prescribed under Federal Rule of Civil Procedure 23. Under the FLSA, an employee may bring action against an employer individually and collectively on behalf of other "similarly situated" employees. 29 U.S.C. § 216 (b). In order to become parties to such a collective action, however, the allegedly "similarly situated" employees must affirmatively opt into the case by filing with the district court individual written "consents" to participate.

The Third Circuit follows a two-step process for deciding whether an action may properly proceed as a collective action under the FLSA. The first step requires the district court to make a preliminary determination whether the named plaintiffs have made a "modest factual showing" that the other employees identified in their complaint are indeed "similarly situated." If so, the district court will "conditionally certify" the collective action for the purpose of facilitating notice to potential opt-in plaintiffs and conducting pretrial discovery. At the second stage, typically occurring upon the close of discovery, the court will then make a conclusive determination whether each plaintiff who has opted into the collective action is, in fact, similarly situated to the named plaintiffs. This second step is triggered typically by the named plaintiffs' motion for final certification, or by the defendant's motion for decertification.

The *Camesi* case involved the consolidation of two separate appeals involving employees employed by medical facilities who claimed that they were not paid for time worked during meal breaks. In each case, the District Court granted conditional certification, but later denied final certification for a collective action. Under Third Circuit precedent, the denial of final certification is deemed an interlocutory order and is not immediately appealable. However, the named plaintiffs in each case stipulated to the voluntary dismissal *with prejudice* of their respective individual claims, and

then sought to appeal the denial of final certification as a final order of the District Court.

Rejecting the named plaintiffs' tactic as an "impermissible attempt[ ] to manufacture finality," the *Camesi* Court reasoned:

> Appellants have attempted to short-circuit the procedure for appealing an interlocutory District Court order that is separate from, and unrelated to, the merits of their case. Appellants could have obtained appellate review of the decertification order by proceeding to final judgment on the merits of their individual claims. Or, Appellants could have asked the District Courts to certify their interlocutory orders for appeal. But Appellants instead sought to convert an interlocutory order into a final appealable order by obtaining dismissal under Rule 41. If we were to allow such a procedural sleight-of-hand to bring about finality here, there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action. This would greatly undermine the policy against piecemeal litigation embodied by [28 U.S.C. § 1291].

The named plaintiffs had cited Third Circuit precedent under which plaintiffs had voluntarily dismissed their sole remaining substantive claims against defendants in order to obtain immediate appeal from the dismissal of their other substantive claims. The *Camesi* Court distinguished those earlier cases. The plaintiffs there had obtained *judgment on the merits* of the majority of their claims, and had elected to surrender a remaining claim in order to obtain immediate appeal of those other merit-based determinations. But none of those cases "permit a plaintiff who has suffered an adverse decision *collateral* to the merits… to obtain review of that interlocutory ruling. That, of course, is exactly what happened here, where there was clearly no judgment on the merits."

One may question why the named plaintiffs would have voluntarily surrendered their individual claims in order to take an appeal on behalf of other allegedly "similarly situated" employees. The *Camesi* Court addressed that point:

> Appellants apparently believed that reversal of the District Courts' decertification orders on appeal would resurrect their individual claims once again at the district court level. However, this reflects a fundamental misunderstanding of the nature of a dismissal with prejudice. The claims that Appellants dismissed with prejudice are gone forever – they are not reviewable by this court and may not be recaptured at the district court level…As such, Appellants' individual claims are moot.

The named plaintiffs also argued that they retained a personal stake in the outcome of the litigation, sufficient to prevent the entire action from being rendered moot, because of their alleged interest in representing others who opted into the collective action. The *Camesi* Court noted that "the issue of a named plaintiff's ability to maintain actions in a representative capacity in collective actions brought under the FLSA…is in a state of flux," and that it remains "unclear…whether the fact that individuals have already opted into [the named plaintiffs'] actions by filing written consents with the District Courts following conditional certification would permit [the named plaintiffs] to retain a justiciable interest in the litigation based on their representative capacities." However, the *Camesi* Court determined that it need not address that issue because the named plaintiffs' voluntary dismissal of their claims with prejudice "has not only extinguished [their] individual claims, but also any residual representational interest that they may have once had." The *Camesi* Court reasoned:

> This is so because it would be anomalous to conclude that Appellants are "similarly situated" to opt-in plaintiffs who, unlike Appellants, have actually retained their individual claims. Without any personal stake in the matter, Appellants should not be permitted to represent opt-in plaintiffs.

The *Camesi* Court left "for another day the difficult question of whether an interest in representing opt-in collective-action plaintiffs alone may satisfy the personal-stake requirement of Article III" of the United States Constitution.

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Fourth Circuit

***Bland v. Roberts*, ___ F.3d __ (4th Cir. Sept. 18, 2013), 2013 WL 5228033 *available at* http://www.ca4.uscourts.gov/Opinions/Published/121671.P.pdf**

In *Bland*, the Fourth Circuit Court of Appeals reversed the grant of summary judgment and held the First Amendment prohibited three Sheriff's deputies from being terminated because of their support of the Sheriff's electoral opponent. The Fourth Circuit also held there were genuine issues of material fact as to whether the deputies' lack of political allegiance to the Sheriff was a substantial basis for the non-reappointment to their positions. The Court affirmed the district court's ruling that the Sheriff was entitled to qualified immunity concerning the deputies' claims against the Sheriff in his individual capacity, and held that the Eleventh Amendment barred claims for monetary relief, but remanded for trial on the deputies' claims for reinstatement. Judge Ellen Lipton Hollander, United States District Judge for the District of Maryland sitting by designation, dissented from the majority's qualified immunity ruling.

After re-election, the Sheriff of Hampton, Virginia, reappointed 147 of his 159 full-time employees. Plaintiffs, six former employees of the Sheriff's office who were not reappointed, brought an action under 42 U.S.C. § 1983 alleging the Sheriff retaliated against them in violation of their First Amendment rights by not reappointing them because of their lack of political allegiance. The plaintiffs alleged both free association and free speech First Amendment claims.

The Sheriff moved for summary judgment and the district court granted the motion. The district court ruled the deputies failed to show that they engaged in protected speech. In ruling against the deputies on their claims of freedom of association, the district court found there was insufficient evidence to establish any causal relationship between their support for the Sheriff's opponent and their non-reappointment. The district court also ruled that even if the deputies had been able to establish First Amendment claims, the Eleventh Amendment barred the plaintiffs' official capacity claims against the Sheriff, and qualified immunity applied to the plaintiffs' individual capacity claims.

On appeal, the Fourth Circuit held that the district court properly granted summary judgment in favor of the Sheriff as to the claims of three of the plaintiffs because they did not forecast sufficient evidence that the Sheriff was aware of their support for his political opponent and or that their political disloyalty was a substantial basis for their non-reappointments. However, the Fourth Circuit held that three deputies had presented sufficient evidence to create a genuine issue of material fact as to whether they were retaliated against for exercising their First Amendment Rights to free speech and association.

First Amendment association rights of public employees are analyzed under the principles established by *Elrod v. Burns*, 427 U.S. 347 (1976),

and *Branti v. Finkel*, 445 U.S. 507 (1980). The First Amendment generally bars the firing of public employees solely for the reason that they were not affiliated with a particular party or candidate. There is an exception if the government decision maker can demonstrate that party affiliation or political allegiance is an appropriate requirement for the effective performance of the public office involved. The Fourth Circuit applies these principles in a two-part test set forth in *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990). First, the public employee must be in a position that involves government decision making on issues where there is room for political disagreement on goals or their implementation. Second, the employee must be in a position like a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation or political allegiance is an equally appropriate requirement. *Id*. at 141-42. If so, then the *Elrod-Branti* exception applies.

Initially, the Court examined the deputies' claims that the Sheriff violated their free association rights. The Court easily determined that there can be legitimate disagreement over the goals and implementation of goals of a sheriff's office. Thus, the deputies' association claims depended on the second part of the *Stott* test -- whether they were in positions where party affiliation or political allegiance was an appropriate requirement. The Court emphasized that the "specific duties of the public employees . . . must be the focus of the *Elrod-Branti* inquiry." In this case, the deputies were "uniformed jailers" and had only limited, not "general" arrest powers. The Court analyzed the roles and duties of the deputies to determine whether their positions involved government decision making on issues where there was room for political disagreement and held that the Sheriff had not shown that that political allegiance was an appropriate requirement for the jailers' performance of their jobs.

The Fourth Circuit applies the same causation analysis for free speech claims and free association claims. The plaintiff bears the initial burden of proving that his exercise of his First Amendment rights was a "substantial" or "motivating" factor in the decision to terminate him. If the plaintiff satisfies that burden, the defendant must show that he would have made the same employment decision absent the protected expression.

The Fourth Circuit held there was sufficient evidence to create a genuine issue of material fact whether the deputies' lack of political allegiance was a substantial basis for the Sheriff's decision not to reappoint them. The Fourth Circuit's opinion is noteworthy for its extended discussion of Facebook as a means of political expression. The Fourth Circuit rejected the district court's conclusion that "merely liking" a Facebook page was not protected speech. One deputy "liked" the Facebook page of the Sheriff's opponent and another posted a message of support on the page. The Sheriff had addressed his employees and specifically expressed disapproval with the support some employees were giving his opponent on Facebook. This evidence, along with evidence that the Sheriff had confrontations with two of the deputies where the deputies' versions of the incidents differed from the Sheriff's versions, was sufficient to create an issue of fact whether the three deputies' lack of political allegiance to the Sheriff was a substantial motivation for his decision not to reappoint them.

The Fourth Circuit analyzed the deputies' First Amendment free speech claims under the balancing test set forth in *McVey v. Stacy*, 157 F. 3d 271 (4th Cir. 1998). For a public employee to establish that an adverse employment action violated his First Amendment free speech rights, the employee must establish: (1) the employee was speaking as a citizen upon a matter of public concern; (2) the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) the employee's speech was a substantial factor in the termination decision. *Id.* at 277-78. In conducting the balancing test, the Court explained that it must consider the context in which the speech was made, including the employee's role and the extent to which the speech impaired the efficiency of the workplace.

Analyzing the free speech claims, the Court explained in great detail how the deputy's "liking"

the Sheriff's opponent's Facebook page constituted speech. The Court said that when the deputy visited the Facebook page and clicked the "like" button, this conduct communicated the deputy's approval of the candidate and support of the campaign. The Court explained a Facebook "like" was "the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech." The Court said that "liking" the Campaign Page was both "pure speech" and also "symbolic expression" with the distribution of the "universally understood 'thumbs up' symbol." The Court concluded that the deputy was speaking as a private citizen on a matter of public concern, even though the content of the speech related to the deputy's job. Finally, the Court found no evidence in the record that the deputy's Facebook support of the Sheriff's opponent did anything in particular to disrupt the workplace. Having already concluded that the deputy had offered sufficient evidence that the Sheriff's action was substantially motivated by the deputy's First Amendment free association conduct, the Court likewise concluded that the deputy had presented sufficient evidence in support of his free speech claim.

The Court also concluded that two other deputies presented sufficient evidence in support of their free speech claims. One deputy posted on the opponent's Facebook page, and the other displayed the opponent's bumper sticker on his car and made a negative comment regarding the Sheriff's campaign material at a polling place. The Sheriff did not deny that the polling place comment was the reason he did not reappoint the one deputy, and, as noted above, there was evidence that the Sheriff has specifically expressed disapproval of the Facebook postings.

The deputies had sued the Sheriff in both his official and individual capacities, and the Sheriff argued that the Eleventh Amendment precluded the official capacity claims. The Fourth Circuit held that the Eleventh Amendment barred any official capacity claim for monetary relief, because the Sheriff was an arm of the State. However, the Court also held that the deputies' claim for reinstatement could proceed under the *Ex parte Young* exception. Reinstatement is a form of prospective injunctive relief for ongoing violations of federal law, and such a claim is not a suit against the State for Eleventh Amendment purposes.

The Court agreed with the Sheriff and the district court's ruling that the Sheriff was entitled to qualified immunity on the deputies' individual capacity claims. The majority found that in 2009 it was not clearly established whether the deputies held positions subject to dismissal for supporting the Sheriff's opponents. The majority pointed out that the Fourth Circuit sent "very mixed signals" in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997 (en banc), and a later opinion in *Knight v. Vernon*, 214 F.2d 544 (4th Cir. 2000), did not clearly establish that a sheriff could not terminate his deputies for political reasons regardless of their positions. Accordingly, in 2009 a reasonable sheriff could believe that he had the right not to reappoint his sworn deputies for political reasons. The majority affirmed the dismissal of the individual capacity claims.

Judge Hollander dissented from qualified immunity finding. Judge Hollander said that the law was clearly established in 2009 that a sheriff could not fire a deputy with the job duties of a jailer for political reasons.

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Fifth Circuit

Feist v. State of Louisiana*, ___ F.3d ___ (5th Cir. Sept. 26, 2013), 2013 WL 5178846, *available at* *http://www.ca5.uscourts.gov/opinions/pub/12/12-31065-CV0.wpd.pdf

Plaintiff filed suit under the Americans With

Disabilities Act claiming that her employer failed to provide a reasonable accommodation when it refused to grant her request for free on-site parking. The district court granted the employer's summary judgment on the basis that, although the ADA required the employer to provide reasonable accommodations, free on-site parking space was not a reasonable accommodation because it bore no relationship to the essential functions of the employee's job. The Fifth Circuit reversed, holding that under the ADA, a requested accommodation is not unreasonable simply because it bears no relationship to one's essential job functions.

Equal Employment Opportunity Commission v. Boh Brothers Construction Company*, ___ F.3d ___ (5th Cir. Sept. 29, 2013), 2013 WL 5420320, *available at http://www.ca5.uscourts.gov/opinions/pub/11/11-30770-CV1.wpd.pdf

Deciding an issue of first impression, the en banc Fifth Circuit held that an employee can rely on evidence of gender-stereotyping to support a claim of same-sex discrimination under Title VII.

In *Boh*, a male employee was verbally and physically harassed by the male superintendent of his work crew because the supervisor apparently did not think that the worker was "manly" enough. A three judge panel of the Court of Appeals reversed the jury verdict, concluding that harassment based on a perceived failure to conform to a gender stereotype did not constitute harassment "because of sex," as required for a same-sex discrimination claim under Title VII. On rehearing en banc, the Court affirmed the jury's finding of same-sex discrimination against the worker, holding that a plaintiff may prove same-sex harassment "because of sex" by presenting evidence of harassment based on a perceived failure to conform to gender-stereotypes. The en banc court noted that the focus of the inquiry is whether the harasser considered the victim to deviate from a gender stereotype, not whether the victim does in fact fail to conform to the stereotype.

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Sixth Circuit

***Jackson v. Sedgwick Claims Management Service*, ___ F.3d ___ (6th Cir. Sept. 24, 2013), 2013 WL 5311293, *available at* http://www.ca6.uscourts.gov/opinions.pdf/13a0282p-06.pdf**

In a landmark decision, the *en banc* United States Court of Appeals for the Sixth Circuit ruled in that employers no longer need to worry about facing federal civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO) for disputing a claim for worker's compensation benefits.

The *Jackson* Court overruled a 2012 panel's decision that allowed the plaintiffs to sue their employer, worker's compensation claims administrator, and their medical expert under RICO, alleging that the defendants conspired to deny their worker's compensation claims. At issue was the nature of the plaintiff's alleged loss. Under RICO, a plaintiff can only sue for "an injur[y] to his business or property," which doesn't include a personal injury. The 2012 panel ruled that the plaintiffs had such a property interest in their hypothetical benefits, even if the benefits were based on a personal injury claim.

The *en banc* court overruled the 2012 panel, reasoning that the plaintiffs didn't have the requisite property interest in their benefits. Instead, the court wrote, the plaintiffs' losses "are simply a shortcoming in the compensation they believed they

were entitled to receive for a personal injury. They are not different from the losses the plaintiffs would experience if they had to bring a civil action to redress their personal injuries and did not obtain the compensation from that action they expected to receive." The proper arena for such a claim is the Michigan administrative worker's compensation system, the court reasoned, and allowing the plaintiffs to sue in federal court would allow federal law to supplant a state statutory scheme that "reflects a complex set of bargains between employers and employees." While Congress has the ultimate power to enact a remedy that can supplant state law, Congress didn't do so in passing the civil RICO statute, the court ruled.

***Williams v. CSX Transp. Co., Inc.*, ___ Fed. Appx. ___ (6th Cir. Sept. 19, 2013), 2013 WL 5288977, *available at* http://www.ca6.uscourts.gov/opinions.pdf/13a0842n-06.pdf**

Plaintiff, an African-American female, alleged that her employer violated Title VII by discriminating against her, retaliating against her and subjecting her to a sexually and racially hostile work environment. She claimed that she was treated differently from male employees, confronted on one occasion with racist and sexist remarks by a co-worker, and continually exposed to pornography left out in the open in her workplace.

The district court granted summary judgment to the employer on the discrimination, retaliation and sexually hostile work environment claims. With regards to the sex claim, the court determined that the plaintiff failed to exhaust her administrative remedies because her Charge of Discrimination with the EEOC did not contain sufficient allegations of a hostile work environment. The court, however, permitted the plaintiff to proceed to trial on her racially hostile work environment claim, but then granted judgment as a matter of law at the close of her case in chief finding that she failed to establish that she was subjected to "severe and pervasive" conduct of a racial nature.

The plaintiff appealed the district court's judgments on her sexually hostile work environment claim and her racially hostile work environment claim. In 2011, the Sixth Circuit affirmed the lower court's determination on the race claim, but reversed the judgment on the sex claim finding that the plaintiff had not failed to exhaust her administrative remedies.

On remand, the district court excluded the workplace pornography from consideration in the sex claim finding that it was "unconnected to the claims stated in her EEOC forms." The court found then found that that there was no genuine issue of material fact as to whether the employer created a sexually hostile work environment because (1) the co-worker's conduct was not pervasive or severe enough and (2) no reasonable jury could find that the plaintiff's other examples of adverse treatment were based on her sex.

On appeal, the plaintiff argued that the lower court erred in excluding allegations regarding pornography and that a reasonably jury could find that she was subjected to a sexually hostile work environment. The Sixth Circuit disagreed and affirmed the trial court's determination that "no reasonable jury could find that the conduct alleged by Williams was sufficiently severe or pervasive to support her sexually hostile environment claim." The Court found that all of the cases cited by the plaintiff in which courts found a genuine question of material fact as to sexually hostile environment featured not only sometimes-visible pornography in the workplace, but additional conduct more severe or pervasive than in the present case. The plaintiff failed to cite any case in which the mere presence of visible pornography in the workplace combined with a single confrontation involving sexist remarks constituted a sexually hostile work environment.

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Monthly Update for September

Seventh Circuit

***Perez v. Thorntons, Inc.*, No. 12-3669, ___ F. 3d ___ (7th Cir. Sept. 30, 2013), 2013 WL 5420979, *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D09-30/C:12-3669:J:Hamilton:aut:T:fnOp:N:1213503:S:0**

The Seventh Circuit notes: "All employees, not only perfect employees, are protected by Title VII. Plaintiff Norma Perez was in all likelihood far from a perfect employee." Perez worked for Thorntons (a gas station/convenience store) as a retail store manager. After Perez discounted herself some candy bars to the tune of approximately $100, she was fired. However, months earlier, a male supervisor performed a similar act and was only warned, not fired. Perez sued Thorntons, alleging Title VII gender and national origin discrimination. The district court granted summary judgment for Thortons, holding that if she discounted the candy without permission, her behavior was wrongful and a jury may find her firing was not tainted by unlawful bias.

The Seventh Circuit Court of Appeals reversed, noting that a jury could also find that her wrongdoing for which she was fired was comparable to the wrongdoing of her non-Hispanic male supervisor who was warned and not terminated, as she was. Accordingly, the Court held that it was for the jury to determine why Thortons terminated her (a Hispanic) for similar wrongdoing as her supervisor, a non-Hispanic, who was only disciplined.

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Eighth Circuit

***Wright v. St. Vincent Health System*, No. 12-3162, __ F. 3d ___ (8th Cir. Sept. 18, 2013), 2013 WL 5225215, *available at* http://media.ca8.uscourts.gov/opndir/13/09/123162P.pdf**

Plaintiff Janice Wright ("Wright") worked the night shift as an operating room surgical technologist for St. Vincent Health System hospital alongside another employee, Nancy Bell (an African-American). Bell suffered an injury and missed months of work; other employees stopped taking her shift, leaving Wright alone on the night shift. Wright's performance declined and she was disciplined for not completing her duties. Wright did not take criticism well and although she testified the supervisor was angry, her supervisor testified that she in fact was belligerent and insubordinate and told him to fire her. Wright complained to the hospital's Employee Relations Coordinator that she was being treated unfairly and harassed due to racial discrimination; he asked to meet with her to take her statement and to give her necessary paperwork, which she never did. Thereafter, Wright was terminated and her attorney sent a letter to the hospital alleging discrimination. Wright failed to appeal her termination or any other disciplinary actions through the hospital's grievance process. She then sued the hospital alleging racial discrimination and retaliation. The district court conducted a two-day bench trial and found in favor of the hospital on all claims.

The Eighth Circuit affirmed, holding that the district court reviewed two permissible views of the evidence and its choice between them cannot be clearly erroneous. Although the timing of her alleged complaint and termination was "incredibly suspicious," it was not enough. The Court also noted that a district court's credibility determinations, like that of a jury, are "virtually unassailable" on appeal. Importantly, the Court clarified the Eighth Circuit model jury instructions, stating that the same causation standard applies in parallel Title VII and § 1981 racial discrimination claims. As to Wright's claim that she was subjected

to disparate terms and conditions of employment based on her race, the Court held that the hospital's profit motive and desire for greater productivity better explained the allocation of responsibility to her.

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Eleventh Circuit

***Carter v. City of Melbourne*, ___ F. 3d ___ (11th Cir. Sept. 23, 2013), 2013 WL 5305341, *available at* http://www.ca11.uscourts.gov/opinions/ops/201215337.pdf**

In *Carter*, the 11th Circuit affirmed the trial court's grant of summary judgment to the Defendants regarding Plaintiff's 42 U.S.C. §1983 claim attacking plaintiff's termination from the police department for violating department policies. In affirming the trial court, the 11th Circuit held that Carter was unable to show that the decisions about which he complained were made by a final policy maker for the City to allow for municipal liability. The 11th Circuit further held that Carter's First Amendment claim was unsuccessful because he was unable to show that either his speech and/or complaints was the reason for the Department's decision to investigate, though the court did hold that his speech constituted a matter of public concern, as a police officer.

***Kidd v. Mando American Corp.*, ___ F. 3d ___ (11th Cir. Sept. 27, 2013), 2013 WL 5382138, *available at* http://www.ca11.uscourts.gov/opinions/ops/201212090.pdf**

In *Kidd v. Mando American Corp.*, the 11th Circuit vacated the trial court's summary judgment in favor of the employer on Kidd's claims of gender, racial and national origin discrimination, hostile work environment and unlawful retaliation. While the trial court concluded that Kidd was unable to make a prima facie case for the employment discrimination, the 11th Circuit held otherwise. The 11th Circuit noted there was a question as to whether Kidd was successful in showing that the employer's reason for hiring a Korean male to replace her was pretextual, and remanded the matter to the trial court for consideration of whether Kidd presented admissible evidence necessary to establish a genuine dispute as to pretext.

***Dawkins v. Fulton County Gov't*, ___ F. 3d ___ (11th Cir. Sept. 30, 2013), 2013 WL 5422977, *available at* http://www.ca11.uscourts.gov/opinions/ops/201211951.pdf**

In *Dawkins*, the 11th Circuit avoided deciding whether federal common law of equitable estoppels applied to a Plaintiff's Family and Medical Leave Act (FMLA) retaliation claim. Specifically, Dawkins alleged that her employer violated the FMLA when it demoted her from a 90 day assignment after she left work to care for an ill uncle. At issue was whether the employer could dispute her FMLA eligibility after her manager approved her FMLA request for leave, and whether Dawkins could successfully assert a claim that federal common law equitable estoppel applied to the FMLA. Because the 11th Circuit found that, even if the federal equitable estoppel could apply to the FMLA, Dawkins failed to establish a prima facie case for equitable estoppel.

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