EMPLOYMENT LAW UPDATE

2012 – 2013

Edward G. Phillips, Esq.
KRAMER RAYSON LLP
800 South Gay Street
First Tennessee Plaza, Suite 2500
Knoxville, Tennessee 37929
Telephone: (865)525-5134 Ext. 125
Fax: (865) 522-5723
E-mail: ephillips@kramer-rayson.com
Web: www.kramer-rayson.com

I. 2012-2013 SUPREME COURT TERM

A. HARASSMENT

An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the complainant.

Vance v. Ball State Univ., 133 S. Ct. 2434 (June 24, 2013).

Plaintiff, Maetta Vance, was the only African-American employee working in the food service department at Ball State University. In 2005, Vance began filing complaints about coworkers' offensive conduct with the University, including the use of racial epithets by Mrs. Davis, who worked as a lead person directing Vance's daily activities, but whose supervisory status was later questioned. In May 2006, Vance filed a complaint against Ball State with the Equal Employment Opportunity Commission (EEOC), alleging that her "supervisor," Ms. Davis, made her work through breaks. In October 2006, Vance filed another EEOC complaint alleging that Ball State retaliated against her for filing a claim by diminishing her work duties making her a "glorified salad girl," forcing her to work through breaks, denying her overtime hours, and disciplining her unequally.

Vance filed various federal and state discrimination claims with the United States District Court for the Southern District of Indiana. The district court dismissed all of Vance's claims on summary judgment and found that there was no basis for Ball State's liability on a hostile work environment claim based on race. Vance appealed the district court's findings that she did not establish a basis for employer liability for the hostile work environment claim or put forth sufficient facts to support the retaliation claim against Ball State in violation of Title VII.

The Seventh Circuit rejected Vance's argument that the harasser was her supervisor because she "had authority to tell her what to do." The Seventh Circuit, instead, held that because Davis did not have direct authority to hire, fire, demote, transfer or discipline Vance, she was not her supervisor. It held that Ball State was not liable for the co-worker harassment because Ball State did not act negligently; it investigated the plaintiff's complaint and took appropriate and effective remedial action.

In a 5-4 decision authored by Justice Alito, relying on the framework of *Faragher* and *Ellerth*, the Court affirmed the Seventh Circuit, holding that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take *tangible employment actions* against the victim. In *Ellerth* and *Faragher* the Court held different rules apply where the harassing employee is the plaintiff's "supervisor." In *Ellerth*, the Court held an employer is vicariously liable "when a supervisor takes a tangible employment action," which is described as "a significant change in employment status such as, hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Because a tangible employment decision "requires an official act of the enterprise," an employer will be held strictly liable.

The Court's decision in *Vance* effectively narrowed the definition of "supervisor" in the workplace, so that "supervisor" means only those with the ability to take tangible employment actions, and thus insulates employers from *respondeat superior* liability from the actions of those with authority to direct employees, but not to take a tangible employment action.

B. RETALIATION

Title VII's retaliation provision, and similarly worded "because of" statutes, require a plaintiff to prove causation under the heightened "but for" standard (i.e., that an employer would not have taken an adverse employment action *but for* an improper motive).

Univ. of Texas SW. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (June 24, 2013).

Dr. Nassar worked for several years as faculty member of the University of Texas Southwestern Medical Center (University). The University had an affiliation agreement with the nearby Parkland Hospital (Hospital), which required the Hospital to offer vacant staff positions to University faculty members. Nassar was a University faculty member and a Hospital staff physician, and was of Middle Eastern descent. Nassar claimed that his supervisor, Dr. Levine, was biased against him on the basis of religion and ethnic heritage. He complained to Dr. Fritz, Levine's supervisor, but nothing was done. After Nassar arranged to work full time at the Hospital without also being on the University's faculty, Nassar sent Fritz (and others) a letter stating that he was leaving because of Levine's harassment, which he claimed "stems from [Levine's] religious, social and cultural bias against Arabs and Muslims." After reading that letter, Fritz expressed consternation at Nassar's accusations, saying that Levine had been "publicly humiliated by the letter."

Upon learning that the Hospital had offered Nassar a staff physician position, Dr. Fritz protested to the Hospital, asserting that the offer was inconsistent with the affiliation agreement's requirement that all staff physicians be members of the University's faculty. The Hospital withdrew its offer.

Nassar filed suit against the University alleging two Title VII violations. First, he alleged Levine's racially and religiously motivated harassment had resulted in his constructive discharge from the University. Second, he claimed Fitz's efforts to prevent the Hospital from hiring him were in retaliation for complaining about Levine's harassment. The jury found for Nassar on both claims and awarded him $400,000 in back pay and $3 million in compensatory damages.[1] On appeal, the Fifth Circuit vacated the constructive discharge claim, finding that Nassar did not submit sufficient evidence to support that claim. The court affirmed the retaliation claim, reasoning that retaliation claims brought under §2000e-3(a) , like claims of status based discrimination under §2000e-2(m), require only a showing that retaliation was a *motivating factor* for the adverse employment action, rather than its *but-for cause*.

The Supreme Court granted *certiorari* to define the proper standard of causation for Title VII retaliation claims. The University argued that an employee should have to show that retaliation was the sole factor in an employer's negative employment action, while Nassar argued that an employee should have to prove only that retaliation was a motivating factor, but not necessarily the only one for the negative employee action.

In a 5-4 opinion, the Court held employee retaliation claims filed under Title VII of the Civil Rights Act of 1964 must be proved according to traditional principles of *but-for causation*, not the lessened "motivating factor" causation test stated in the 42 U.S.C. § 2000e–2(m) for status- based discrimination cases. Justice Kennedy explained that the "motivating factor" provision only applies to claims of "discrimination" — which, in this context, means only claims of discrimination based on race, sex, religion and natural origin, rather than retaliation.

The Court's analysis began by examining the common law background against which Title VII was enacted, and the Court concluded that it is "textbook tort law" that a plaintiff ordinarily must prove that the harm "would not have occurred in the absence of—that is, but for—the defendant's conduct." When analyzing the text of the retaliation provision, the Court held that it incorporated the but-for causation standard of the common law by requiring the finding that the employer acted "because" of the protected conduct. In *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), the Court previously interpreted the similar phrase "because of … age" in the Age Discrimination in Employment Act of 1967 (ADEA) to require but-for causation. The Court then recognized the lack of any "meaningful textual difference" between the text of the retaliation statute at issue and the text of the statute in *Gross.* Therefore, the Court held, "the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."

In unusually employer-friendly language, the Court explicitly noted that retaliation claims are made with increasing frequency, and the Court found that the "but-for" causation standard strikes the appropriate balance between protecting the rights of employees and protecting employers from frivolous and expensive claims. Again, as seen in *Vance,* this decision further insulates employers from liability because of the requirement in retaliation cases

[1] The District Court later reduced the compensatory damages to $300,000.

of the heightened requirement to prove but-for causation, instead of merely proving the retaliation was a “motivating factor,” as in status-based discrimination.

C. FAIR LABOR STANDARDS ACT COLLECTIVE ACTIONS

A purported collective action brought under section 216(b) of the Fair Labor Standards Act ("FLSA") becomes moot when the lone plaintiff receives a complete offer of judgment from the defendants under Rule 68 before any other potential plaintiffs have joined the case.

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (April 16, 2013).

Laura Symczyk worked as a Registered Nurse at a healthcare facility in Philadelphia for several months in 2007. In 2009, Symczyk initiated a putative collective action in the U.S. District Court for the Eastern District of Pennsylvania on behalf of herself and all similarly situated individuals against the facility owners, Genesis HealthCare (“Genesis”). Symczyk alleged that Genesis violated section 216(b) of the Fair Labor Standards Act by automatically deducting a 30-minute meal break from the pay of certain employees, including herself, regardless of whether the employees performed compensable work during their breaks. In February 2010, Genesis filed an answer and simultaneously served Symczyk with an offer of judgment under Federal Rule of Civil Procedure 68 for $7,500 to account for her alleged unpaid wages, plus “such reasonable attorneys’ fees, costs and expenses as the court may determine.” Symczyk did not dispute the adequacy of the offer, but declined to respond.

In March 2010, Genesis moved to dismiss Symczyk’s lawsuit for lack of subject matter jurisdiction, and the district court granted the motion in May 2010, finding that Genesis’s offer mooted the collective action, which no one other than Symczyk had yet joined. The court accepted Genesis’s argument that Symczyk effectively rejected its offer by failing to respond within the 14 days allowed under Rule 68, and that Symczyk, as the lone plaintiff, no longer had a personal stake or legal interest in the case necessary for the court’s subject matter jurisdiction. Symczyk appealed and the Third Circuit reversed, holding that Symczyk was entitled to move for conditional certification of her collective action (i.e., by showing similarly situated plaintiffs could opt in) before Genesis could moot the case through an offer of judgment.

The Supreme Court granted *certiorari* to determine whether a case becomes moot when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff’s claims. Justice Clarence Thomas delivered the opinion of the 5-4 majority.

Because the Third Circuit ruled the case moot, and Symczyk had not filed her own appeal to the Supreme Court, Thomas wrote the Justices were barred, “from questioning the Third Circuit on that point,” and the mootness issue was “not properly before us.” Moreover, Thomas said Symczyk had waived the mootness issue in the district court, in the Third Circuit, and in her reply to Genesis HealthCare's appeal to the Supreme Court. Next, the majority held that Symczyk has no remaining "personal interest" in representing the other workers who had failed to join in her lawsuit, and she had no other "continuing interest that would preserve her suit." The Thomas opinion concluded that the kind of "collective action" that Symczyk had tried to pursue cannot continue, "once the individual claim is satisfied." According to the majority, unless other workers had actually come forward to take part, nothing survived the settlement offer the employer made to her and she passed it up.

D. EMPLOYEE RETIREMENT INCOME SECURITY ACT

In a benefit reimbursement context, courts may not apply equitable defenses, such as unjust enrichment, to override clear plan terms, but courts may apply equitable defenses that the plan does not clearly override.

US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (April 16, 2013).

The Defendant, James McCutchen was seriously injured in an automobile accident. A benefit plan administered by a plan administrator for the Plaintiffs, US Airways, paid the Defendant $66,866 for his medical expenses. The Defendant then recovered $110,000 from the third parties involved in the accident. U.S. Airways then demanded reimbursement of the entire $66,866 that it had paid under the benefit plan without allowance for Mr. McCutchen's legal costs (which reduced his net recovery $66,000, which was $866 *less* than the amount US Airways demanded). US Airways sued Mr. McCutchen as the plan beneficiary for appropriate equitable relief pursuant to the Employment Retirement Income Security Act (ERISA) §502(a)(3), 29 U.S.C.S. §1132(a)(3)(B). The district court for the Western District of Pennsylvania ordered McCutchen to pay US Airways the $66,866 because under the plan language, a beneficiary was required to reimburse the plan for any amounts it paid out of any monies recovered from a third party. It gave no credit for McCutchen's attorney's fees.

McCutchen appealed the decision to the Third Circuit claiming that US Airways, as the plan administrator, would be unjustly enriched if it were permitted to recover from him without any allowance for his attorneys' fees and expenses. The plain language in the benefit plan stated that the "beneficiary is required to reimburse the Plan for any amounts it has paid of any monies the beneficiary recovers from a third party." US Airways argued that "applying federal common law to override the benefit plan's controlling language" would be essentially "pioneering federal common law to apply limitations on an equitable claim." However, the Third Circuit vacated the district court's final judgment and concluded that, "in the absence of any indication in the language or structure of ERISA . . . Congress intended to limit the equitable relief available under § 502(a)(3) through the application of equitable defenses and principles that were typically available in equity." The Supreme Court granted *certiorari.*

Writing for the 5-4 majority, Justice Kagan vacated the Third Circuit and remanded. The Supreme Court held that equitable limitations did not apply to the benefit plan as a whole because the plan is a valid contract and the parties are only demanding what they bargained for under that contract. The Court noted, equitable principles of unjust enrichment are "beside the point when parties demand what they bargained for in a valid agreement," and when the contract/plan specifically allows reimbursement, equitable principles do not apply to limit that right. The Court held McCutchen's equitable rules cannot trump a reimbursement provision.

On the issue of attorneys' fees and the equitable "common fund" rule, the Court noted that the plan's terms were silent. In this circumstance, the plan would be required to share in the expense of obtaining the recovery. In other words, where the plan's terms do not address the issue, the common fund rule will operate to shift to the plan a share of the attorneys' fees spent in obtaining the recovery. However, if the plan by its express terms, eschews application of the common fund doctrine, such terms are enforceable.

The decision in *McCutchen* represents the majority of Circuits' view highlighting the importance of giving consistent and uniform effect to plan language generally trumps the role of equity in resolving actions brought under Section 502(a)(3), provided that the plan language is sufficiently clear. Insurance companies can be expected to modify their subrogation provisions to avoid the common fund rule.

E. ARBITRATOR MUST DECIDE VALIDITY OF NON-COMPETITION AGREEMENT

Oklahoma Supreme Court improperly enjoined an arbitration proceeding and usurped the authority of the arbitrator to decide the validity of the non-compete agreement.

Nitro-Lift Technologies v. Howard, 133. S. Ct. 500 (Nov. 26, 2012).

While employed by Nitro-Lift Technologies, L.L.C., two employees signed non-competition agreements. The agreements contained an arbitration provision providing that "any dispute" between Nitro-Lift and the employee "shall be settled by arbitration." A dispute arose when the employees resigned and began working for one of Nitro-Lift's competitors. In response, Nitro-Lift filed a demand for arbitration, seeking to enforce the non-competition agreement. Rather than agreeing to arbitrate, the former employees filed a lawsuit in Oklahoma state court asking the court to declare the noncompetition agreement null and void under Oklahoma law, and to enjoin the enforcement of the agreement. The state trial court dismissed the complaint, ruling that the arbitrator, and not a court, should determine whether the noncompetition agreement was valid.

On appeal, the Supreme Court of Oklahoma reversed the lower court, holding that the court and not the arbitrator could determine validity of the noncompetition agreement under Oklahoma law. Reaching the merits, the Supreme Court of Oklahoma ruled that the noncompetition agreement violated an Oklahoma statute and was therefore void and unenforceable as a matter of Oklahoma public policy.

Nitro-Lift filed a petition for *certiorari* to the U.S. Supreme Court. The Supreme Court unanimously granted the petition and vacated the decision of the Supreme Court of Oklahoma, without further briefing and without holding oral argument.

The Supreme Court first noted that the FAA applies in both federal and state courts. In reviewing its prior decisions applying the FAA, the Court reiterated that it is appropriate for courts to determine in the first instance the *validity of an arbitration clause* in a contract, but that it is for the *arbitrator* to determine the *validity of the contract itself*.

In *Nitro-Lift*, the parties did not dispute the validity of the arbitration provision. The Supreme Court therefore applied well-established FAA precedent and held that the validity of the noncompetition agreement was properly to be decided in the first instance by the arbitrator, not by the state court. The Court further held that the refusal of the Supreme Court of Oklahoma to follow the controlling FAA precedent, in favor of applying the Oklahoma statute, violated the Supremacy Clause of the United States Constitution. Quoting another of its recent arbitration rulings from earlier this year, the Supreme Court stated, “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”

Nitro-Lift illustrates a continuing, general trend in which the Supreme Court has upheld and enforced arbitration agreements according to their terms against attempts by some state and lower federal courts to limit the scope and application of such agreements.

F. DEFENSE OF MARRIAGE ACT (DOMA)

Defining marriage as a union “between one man and one woman” under DOMA Section 3 is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

United States v. Windsor, 133 S. Ct. 2675 (2013).

Section 3 of the federal Defense of Marriage Act (DOMA) provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage”

> means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

This past June 26, the United States Supreme Court, in a 5-4 decision written by Justice Kennedy, held that Section 3 “is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.” The decision involved the denial by the Internal Revenue Service (IRS), pursuant to Section 3, of the federal estate-tax marital deduction for amounts passing to the surviving spouse in a same-sex marriage. As a result of the Court’s striking down Section 3, the marital deduction became available to the decedent's estate.

The litigation giving rise to *Windsor* arose in the context of the federal estate tax. In 2009, after more than 44 years together, Edith Windsor inherited her wife Thea Spyer’s estate upon Spyer’s death. Windsor and Spyer were married in Ontario, Canada, in 2007. New York, where they lived, recognized the marriage as valid. But DOMA’s definitions prevented Windsor from being considered a “surviving spouse” for purposes of the marital exemption from the federal estate tax solely because she had married a woman. Windsor paid the $363,053 in estate taxes owed and then sued for a refund in federal court, challenging DOMA as unconstitutional. The lower courts ruled in her favor.

The Supreme Court likewise held DOMA’s federal definition of marriage invalid. The Court observed that the federal government had historically left the regulation and definition of marriage to the states. New York, by allowing same-sex couples to marry, had “conferred upon them a dignity and status of immense import.” DOMA, on the other hand, sought “to injure the very class New York seeks to protect,” violating the Constitution’s basic due process and equal protection principles.

Judge Scalia wrote a stinging dissent in which he first took the majority to task for being so “hungry” to tell everyone its view of the legal question at the heart of this case that it ignored that there was no “case or controversy.” Rather, as Scalia viewed it, Windsor had won below and cured her injury and the Government agreed entirely with the Windsor merits. *Both parties* asked that the lower court be *affirmed*. Both parties agreed this DOMA was unconstitutional. And on the merits, Justice Scalia took the majority to task for *its* one-sided characterization of the purportedly malicious motive of the Congress that had passed DOMA and the President who signed it. As Scalia put it, “It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.”

How does the *Windsor* decision affect labor and employment practitioners? For one, the Department of Labor has been quick to implement changes brought about by *Windsor*. In an August 9, 2013 e-mail to DOL staff, Labor Secretary Tom Perez indicated that “the Department of Labor has begun to coordinate with other federal agencies, including the Department of

Justice, to implement [*Windsor*] as swiftly and smoothly as possible." Pursuant to DOMA, and prior to the Supreme Court's decision in *Windsor*, the DOL previously did not require employers to grant same-sex married individuals FMLA leave to care for their spouses. Under *Windsor*, the DOL has removed references to DOMA from several guidance documents and affirmed the availability of spousal leave based on same-sex marriages under the FMLA. The e-mail from Secretary Perez to staff went on to provide that Perez has "directed Agency Heads within the Department to look for every opportunity to ensure that [the DOL is] implementing this decision in a way that provides the maximum protection for workers and their families."

Windsor's impact is not as clear or immediate for employers in states, like Tennessee, that do not recognize same-sex marriages—at least for now. *Windsor* invalidated only the part of DOMA (Section 3) that created a federal definition of marriage. It left intact Section 2, which allows individual states to refuse to recognize same-sex marriages validly performed in other states. Moreover, contrary to common misperception, the Constitution's Full Faith and Credit Clause does not compel any state to give legal effect to a marriage deemed contrary to its own public policy.

That a gay or lesbian couple in today's mobile workforce will relocate from a state in which they were validly married to a state in which their marriage is not recognized is undoubtedly foreseeable, if not likely. Indeed, Justice Scalia proffered this very hypothetical in dissent, noting the difficult questions that such a situation would trigger under federal law. Until other governing federal agencies issue further regulatory guidance—which is soon expected—risk-averse employers need to be aware of this uncertainty in determining whether federal employment benefits will extend to married same-sex couples.

II. 2013 – 2014 SUPREME COURT TERM

A. CAN STATE EMPLOYEE BRING § 1983 SUIT FOR AGE DISCRIMINATION

Does the existence of a specific route for the redress of age discrimination claims under the ADEA prevent local and state employees from seeking redress under the Equal Protection Clause and the Civil Rights Act?

Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012) *cert. granted*, 133 S. Ct. 1600, 185 L. Ed. 2d 575 (U.S. 2013).

Harvey Levin served in the Office of the Illinois Attorney General (OIAG) from 2000 to 2006; he was over sixty years old when he was fired. Levin claimed that his dismissal constituted age and sex discrimination, given that the successor to his role was a "female attorney in her thirties," but the OIAG disputed that it "replaced" Levin and asserted instead that he was terminated for poor performance.

In 2007, Levin sued the OIAG and numerous individual defendants in the U.S. District Court for the Northern District of Illinois for "age and sex discrimination under the ADEA, Title VII, and the Equal Protection Clause via 42 U.S.C. § 1983." This case illustrates the tension between Section 1983, which "authorizes suits to enforce individual rights under federal statutes as well as the Constitution," and claims brought under the Age Discrimination in Employment Act of 1967 (ADEA), which protects workers from age discrimination by their employers. In 1989, the Fourth Circuit held in *Zombro v. Baltimore City Police Department,* 868 F.2d 1364 (4th Cir. 1989) that the ADEA was the exclusive remedy in federal courts for age discrimination claims against state employers, precluding the plaintiff's equal protection claim via § 1983[2], and other Circuits followed the Fourth's lead, including the D.C., Fifth, Tenth, First, and Ninth. However, in *Levin v. Madigan,* the Seventh Circuit departed from its sister Circuits and held, "that the ADEA is not the exclusive remedy for age discrimination in employment claims."

As some background, the Seventh Circuit may have felt pushed towards this result after the Supreme Court's decision in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). In *Kimel*, the Court held that the ADEA contains a clear statement of Congress' intent to abrogate the states' immunity, but that the abrogation exceeds Congress' authority under the Fourteenth Amendment. Applying a rational basis test, the Court instructed that "states may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." The Seventh Circuit recognized that under *Kimel* "state employees suing under the ADEA are left without a damages remedy, as such claims are barred by Eleventh Amendment sovereign immunity."

In *Levin*, the ADEA and Title VII claims were the center of litigation to determine those statutes' definitions of "employee" and "employer" and the defendants eventually won summary judgment on those claims by affirmatively showing that Levin was not a qualified employee. With regard to the § 1983 equal protection claims, the parties disagreed over two primary legal issues: (1) whether any of the defendants sued in their individual capacities were entitled to qualified immunity; and (2) whether the ADEA precluded age discrimination claims under § 1983. The district court held the defendants were not entitled to qualified immunity and the ADEA did not preclude age discrimination claims under § 1983. The Seventh Circuit affirmed.

The Seventh Circuit noted that "[w]hether the ADEA precludes a § 1983 equal protection claim is a matter of first impression in the Seventh Circuit." Noting that every other circuit to have considered the issue found that such preclusion did exist, the Seventh Circuit nonetheless conducted an independent review of the issue and came to the conclusion that this "close call" favored a finding of non-preclusion. The court's analysis included an in-depth look at Fi*tzgerald*

[2] The Fourth Circuit decided *Zombro* before the Supreme Court distinguished between constitutional and statutory preclusion in *Fitzgerald*.

v. Barnstable Sch. Comm., 129 S. Ct. 788, 797 (2009)[3], the Court's most recent decision on this issue, which held that Title IX did not preclude § 1983 equal protection claims based on gender. In 2009, *Fitzgerald* "drew a distinction between the enforcement of federal *statutory rights* under § 1983 and enforcement of federal *constitutional rights*." Writing for a unanimous Court, Justice Alito restated the familiar rule that congressional intent to preclude a § 1983 claim based on a *statutory* right may be "inferred from the statute's creation of a comprehensive enforcement scheme." However, Justice Alito noted that in cases in which the § 1983 claim alleges a *constitutional* violation, the lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. This is precisely how the Seventh Circuit focuses its analysis in *Levin.*

The court applied a multifactor "congressional intent" test to the ADEA and found nothing in the statute's text or legislative history clearly resolved the preclusion issue, which meant the court was required to infer intent from silence. However, contrary to the finding of other circuits, the Seventh did not find an implied limit on § 1983 claims.

First, the court emphasized that implied preclusion is "not favored and will not be presumed." Second, the court "readily distinguish[ed]" the ADEA's comprehensive remedial scheme from similar schemes in the federal statutes that the Supreme Court had found to preclude § 1983 constitutional claims by noting other statutes "were specifically designed to address constitutional issues." The ADEA, on the other hand, "provides a mechanism to enforce only the substantive rights created by the ADEA." The Seventh Circuit did not find the presumed congressional intent to "foreclose preexisting constitutional claims," found by its sister circuits based on the ADEA's extensive remedial scheme. Additionally, the court compared the rights and protections granted by the ADEA and the Constitution and found significant divergence in the types of potential defendants, actions prohibited, and workers protected. Levin's potential claims under the ADEA and § 1983 led the court to surmise that the ADEA is not the exclusive remedy for age discrimination in employment claims.

The Supreme Court granted *certiorari* to determine whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in six other circuits, that state and local government employees may avoid the federal ADEA's comprehensive remedial scheme by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

Since *Kimel*, state employers have operated under the assumption that the only vehicle for a federal age discrimination claim against the state is under the ADEA, and that such a claim

---

[3] The Court's 2009 *Fitzgerald* decision changed the standard for finding preclusion of § 1983 constitutional claims. It set a higher preclusion bar for § 1983 enforcement of constitutional rights, but it also recognized — for the first time — a difference between those claims and § 1983 claims for the vindication of *statutory* rights.

for damages against the state or its officials is barred by sovereign immunity. Now, that assumption may no longer be valid.

B. WHAT CONSTITUTES CLOTHES UNDER SECTION 203(o)

What constitutes "changing clothes" within the meaning of Section 203(o) of the Fair Labor Standards Act?

Sandifer v. U.S. Steel Corp., 678 F.3d 590 (7th Cir. 2012) *cert. granted*, 133 S. Ct. 1240, 185 L. Ed. 2d 177 (U.S. 2013).

A class of 800 current and former steelworkers of U.S. Steel's plant in Indiana filed a lawsuit claiming that the company violated the FLSA by failing to compensate them for time spent putting on and taking off their work clothes in the plant's locker room. The "clothes" worn by the steelworkers consisted of flame-retardant pants and jacket, gloves, boots, a hard hat, safety glasses, ear plugs and a "snood" or hood that covers the top of the head, chin and neck. In response to the steelworkers' claims, the company invoked section 203(o) of the FLSA and argued that the time spent "donning and doffing" their work clothes is not compensable because the collective bargaining agreement between U.S. Steel and the steelworkers' union does not require compensation for such time. In contrast, the plaintiff steelworkers argued that section 203(o) is inapplicable because their work clothes do not fall within the meaning of "changing clothes" because they constitute safety equipment and not clothes.

Section 203(o) of the Fair Labor Standards Act excludes from the definition of hours worked time spent "changing clothes or washing at the beginning or end of each workday" if it has been excluded "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement." Unfortunately, to complicate matters, the term "clothes" is not defined in the FLSA. As a result, courts and the U.S. Department of Labor have been unable to agree upon the meaning of "clothes."

The Seventh Circuit agreed with U.S. Steel's position in a thoughtful decision written by Judge Posner and ordered the dismissal of the collective action. The Seventh Circuit affirmed the district court's ruling that these protective items were clothes, but reversed the district court's ruling that donning and doffing activities excluded from compensation by section 3(o) of the FLSA could still be a compensable principal activity that starts or ends the continuous workday under the Portal-to-Portal Act of 1947. Judge Posner's opinion eschews to the DOL's "oscillation" in its interpretation of time spent changing clothes under section 3(o) and the Portal-to-Portal Act. Under the Clinton Administration, the DOL took a narrow view of what constituted clothes, but changed direction under the Bush Administration, taking a broad view of the term clothes and adding that clothes-changing time excluded by section 3(o) could not be a "principal activity" that starts the continuous workday. Then in another turn of direction, under the Obama Administration, the DOL reverted to the Clinton Administration's position on the definition of clothes and rejected the Bush Administration's position on "principal activities."

Additionally, in a 2010 Administrator's Interpretation, the DOL stated the section 3(o) exemption "does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job," and declared that the 2002 and 2007 DOL opinion letters to the contrary could no longer be relied upon by employers. The Seventh Circuit criticized the DOL, and reasoned that it could not give deference to "the gyrating agency letters on the subject."

On appeal, the Seventh Circuit held that the clothes at issue in this case – flame-retardant pants and jacket, work gloves, work boots, a hard hat, safety glasses, ear plugs, and a hood – are clothes under section 203(o), and therefore the time spent putting on and taking off such items is not compensable. Additionally, to the extent the hardhat, glasses, and earplugs were not technically "clothes," the court noted that putting on these items did not qualify as compensable "work" because the time spent in such activity took only a few seconds and was *de minimis.* Accordingly, U.S. Steel was not required to compensate its employees for the time spent changing into and out of work clothes.

In the plaintiffs' application to the Supreme Court for review, the steelworkers argued that the Court needed to hear the case in order to finally resolve the split among courts over the meaning of "clothes." The Court of Appeals for the Fourth, Sixth, Tenth and Eleventh Circuits adopted a broad definition of "clothes," holding that "clothes" includes anything that can be worn including accessories. While on the other end of the spectrum, the Court of Appeals for the Ninth Circuit adopted a narrow interpretation and excludes protective gear and equipment from the meaning of "clothes" under section 203(o).

The plaintiff also sought *certiorari* on the more compelling issue of whether clothes changing that is excluded as working time under § 203(o) can nevertheless be considered a principal activity that triggers the start of the continuous workday. Judge Posner held that it could not be a principal activity as a matter of law and his reasoning is sound. Thus, the walking time between changing clothes and getting to the workstation was not compensable under the Portal-to-Portal Act, 29 U.S.C. §§ 254(a) (which excludes time spent ""walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform.") This holding conflicts with the Sixth Circuit's holding in *Franklin v. Kellogg Co*., 619 F.3d 604, 618-19 (6th Cir. 2010), in which the court held that changing clothes was a principal activity even where it is excluded as working time by § 203(o). Unfortunately, the Supreme Court did not accept *certiorari* on this issue.

Surprisingly, on July 26, 2013, the U.S. Department of Labor (DOL) and Solicitor General filed an *amicus* brief in the U.S. Supreme Court in support of the *employer's* position. In the *amicus* brief supporting the employer's position, the DOL states that the "ordinary meaning" of the term "clothes" is "covering for the human body or garments in general."

The Supreme Court's decision will have some impact on the general question of whether time spent donning and doffing clothes at work is compensable, and the ruling will be most significant to employers who rely on section 203(o) and collective bargaining agreements to exclude donning and doffing activities from compensable time. Additionally, the Supreme Court opinion may expand upon the Court's analysis in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (U.S. 2012) regarding the weight which is to be given to Department of Labor vacillating interpretations or opinions, and the administrative steps the Department can and should take to provide clear guidance to employers which the Court can uphold. In that regard, expect the Court to criticize the DOL's political waffling.

C. WERE PRESIDENT'S NLRB RECESS APPOINTMENTS UNCONSTITUTIONAL?

Whether President Obama's January 2012 recess appointments to the National Labor Relations Board are valid, and more specifically, (1) whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; and (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is it limited to vacancies that first arose during that recess?

Noel Canning v. N.L.R.B., 705 F.3d 490 (D.C. Cir. 2013) *cert. granted*, 133 S. Ct. 2861 (U.S. 2013).

Noel Canning Corp., a Pepsi bottler in Yakima, Wash., appealed an adverse ruling by NLRB by contending that the Board did not have a quorum for the conduct of business on the operative date, February 8, 2012, because the President Obama's recess appointments on January 4, 2012, were invalid.

On January 25, 2013, the D.C. Circuit held that President Obama's January 4, 2012, recess appointments of Members Sharon Block, Terence Flynn, and Richard Griffin were unconstitutional and, as a result, the Board lacked a legitimate quorum to proceed since the recess appointments were made. The D.C. Circuit's decision casts doubt on hundreds of decisions issued by the Board since the recess appointments, including many significant precedent-departing decisions. The *Noel Canning* decision further implicates the president's recess appointment powers, generally.

In *Noel Canning*, the D.C. Circuit considered the "Recess Appointments Clause" in the U.S. Constitution and determined that it only authorized appointments during recesses between enumerated sessions of Congress ("intersession recess"), *i.e.*, after the Senate adjourns one session and before the Senate convenes the next session, because during that period the Senate is unavailable to act upon the president's nominations. The D.C. Circuit concluded that the Senate was not in intersession recess on January 4, 2012, and instead, on that date, the Senate was operating in *pro forma* sessions, meeting every third business day. In addition, and as required by the 20th Amendment to the Constitution, "Congress must assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January . . . [.]" Accordingly, on January 3, 2012, the Second Session of the 112th Congress began, simultaneously with the expiration of the First Session of the 112th Congress. Thus, President Obama's January 4, 2012, recess appointments took place during a brief "intrasession" recess, and after the Second Session of the 112th Congress was convened on January 3, 2012.

The D.C. Circuit went on to hold that the Recess Appointments Clause also limited the vacancies that could be filled to those "Vacancies that may *happen during **the Recess*** of the Senate." U.S. Const. Art. II, § 2, cl. 3. This restriction, said the court, limited the vacancies that can be filled by recess appointment to that that happen, or "arise" during the Recess. The court held that none of the vacancies filled by the President on January 4, 2012, *arose* during the intrasession recess of the Senate, relied upon by the President, much less during an intersession recess contemplated by the Recess Appointment Clause. The two vacancies that arose on August 27, 2010 and August 27, 2011, arose during an intrasession recess – not "the (intersession) Recess." The third vacancy that occurred on January 3, 2012, did not occur during an intersession recess because the Senate did not take a recess between the first and second sessions of the 112th Congress. Moreover, said the court, "the filling of the vacancy that happens during a recess must be done *during the **same** recess* on which the vacancy arose."

Noel Canning could significantly shape current labor law by invalidating hundreds of Board decisions. In *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court held that the NLRB could not legally render decisions or otherwise act without a quorum of at least three members. If the Supreme Court agrees with the D.C. Circuit that the President's recess appointments were constitutionally infirm, the 200 or more decisions issued by the Board from January 4, 2012, to present will be invalid based on the holding in *New Process Steel.* The group of Board decisions that may be nullified under New Process Steel includes several high-profile, controversial decisions concerning social media, employer confidentiality rules, off-duty employee access to employer property, dues check-offs, and employee discipline. This will likely only impact the employers whose actual cases were decided by the Board during the relevant period. As for the controversial holdings, expect the Board to "ratify" the earlier decisions now that it has a full composition of members approved by Congress.

D. SCOPE OF SOX WHISTLEBLOWER PROTECTION

Do the whistleblower protections in Sarbanes-Oxley apply to employees of privately held contractors doing work for public companies?

Lawson v. FMR, LLC, 670 F.3d 61 (1st Cir. 2012), *cert. granted* 133 S. Ct. 2387 (U.S. 2013).

The Supreme Court will decide whether the whistleblower protections of the Sarbanes-Oxley Act ("SOX") apply to employees of privately held contractors and subcontractors of public companies. FMR is a publicly traded company. Plaintiffs Jackie Lawson and Jonathan Zang were employees of FMR's privately held subcontractors. The privately held subcontractors are contracted to advise and manage mutual funds and are subject to the Investment Advisers Act of 1940. After allegedly being retaliated against for reporting mistakes and misconduct involving the mutual funds, Plaintiffs brought suit against FMR claiming that it had violated Section 806 of SOX, 18 U.S.C. § 1514A, which prohibits publicly traded companies from discriminating against an employee for lawfully engaging in certain protected activity. FMR moved to dismiss on the ground that the plaintiffs were not covered employees and, therefore, had not engaged in protected activity. The district court denied FMR's motions to dismiss, holding that SOX is not limited to employees of publicly traded companies, but rather also protects the employees of such companies' contractors and subcontractors. The First Circuit disagreed and reversed. The Supreme Court granted the plaintiffs' petition for certiorari and will clarify whether employees of private companies contracted or subcontracted by public companies are covered under SOX. Notably, although the Solicitor General had opposed Supreme Court review as premature, the government agrees with plaintiffs that the First Circuit erred in holding that employees of privately-held contractors and subcontractors of public companies are not protected, under SOX, from retaliation.

E. UNION NEUTRALITY AGREEMENT UNDER SIEGE

Can Unions continue a major organizing practice: striking *quid pro quo* deals with management before trying to organize non-union workers?

Unite Here Local 355 v. Mulhall, 667 F.3d 1211 (11th Cir. 2012), *cert. granted* 133 S. Ct. 2849 (U.S. 2013).

This case is a frontal assault on so-called "neutrality agreements," a favorite organizing tool of unions. The Supreme Court will decide whether an employer violates Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, by agreeing to provide names and contact information on its employees, grant the union limited access to its property, and recognize the union upon a showing of majority support -- *in exchange for* the union's agreement to support a ballot initiative on gaming and, if the employees selected the union, its agreement not to picket, boycott, or impose any other economic pressure upon the employer's business. The circuits are split on this question: the Third and Fourth allow these sorts of ground rules for union organizing; whereas under the facts presented here, the Eleventh Circuit did not.

Section 302 of LMRA makes it illegal for an employer "to pay, lend, or deliver, any money or *thing of value*…to any labor organization." Here, UNITE HERE Local 355 ("Unite") entered into a memorandum of agreement with a company doing business as Mardi Gras Gaming

("Mardi Gras"). Among other things, Mardi Gras agreed to grant Unite access to non-public work areas, give Unite a list of employees and their contact information, and remain neutral during Unite's organizing efforts. In exchange, Unite agreed to financially support a local gaming ballot initiative, for which Unite eventually spent $100,000. Unite also agreed to not picket, boycott, or impose other economic pressure on the employer's business. Mardi Gras employee Martin Mulhall filed a complaint seeking to enjoin enforcement of the agreement claiming that the things Mardi Gras promised were "things of value" under § 302.

The district court dismissed Mulhall's complaint. But the Eleventh Circuit reversed. It held that providing access to employees, a list of employees with contact information and an agreement to remain neutral *could be* considered "payment" of a "thing of value" within the meaning of § 302 where the employer offers the assistance with the intention of improperly influencing a union. In that case, the purpose of § 302—curbing bribery and extortion—are implicated. The court held, "Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." Here, said the court, the jury could find that the assistance was a "thing of value," the evidence of which is the $100,000 the union spent on the ballot initiative.

The Third and Fourth Circuits have upheld neutrality agreements, ruling that setting similar ground rules for union organizing does not violate Section 302. In opposing Mardi Gras' petition for certiorari, the government took the position that employers and unions may set "ground rules" without running afoul of Section 302, and that the Eleventh Circuit "went astray in concluding that the legitimacy of such agreements turns on an inquiry into the parties' intent." The Supreme Court's decision could resolve this circuit split.

F. ARE SEVERANCE PAYMENTS UNDER A RIF "WAGES" SUBJECT TO FICA?

Do severance payments made to an employee upon the employee's involuntary separation qualify as "wages" under the Federal Insurance Contributions Act?

United States v. Quality Stores, Inc., 693 F.3d 605 (6th Cir. 2012), *cert. granted*, 2013 U.S. LEXIS 5128 (U.S. Oct. 1, 2013).

As some background, the Federal Insurance Contributions Act (FICA) imposes taxes on both employers and employees. These taxes are used to fund Social Security and Medicare benefits. The taxes are on "wages" paid by an employer or received by an employee "with respect to employment." 26 U.S.C. §§ 3101(a) and (b), 3111(a) and (b). With certain exceptions, "wages" are defined as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." Id. § 3121(a).

In 2001, Quality Stores filed for bankruptcy and began to wind down its operations. Before and after filing for bankruptcy, Quality Stores established severance plans under which executives and employees were guaranteed severance payments in the event their jobs were eliminated. Upon terminating all of its employees, Quality Stores made approximately $1 million in severance payments.

Quality Stores withheld and paid taxes on the severance payments, but it later sued for a refund, arguing that the payments were not "wages" and therefore were not subject to FICA. Quality Stores argued that the severance payments were "supplemental unemployment compensation benefits," which are defined under 26 U.S.C. § 3402(o) as "amounts which are paid to an employee . . . because of an employee's involuntary separation from employment . . . resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions . . . ." Quality Stores argued that supplemental-unemployment-compensation benefits are not wages as defined in FICA, and therefore are not subject to FICA.

The Bankruptcy Court and Sixth Circuit agreed with Quality Stores and ordered a refund. This result conflicts with a decision of the Federal Circuit, which held in *CSX Corp. v. United States*, 518 F.3d 1328, 1345 (Fed. Cir. 2008), that supplemental unemployment-compensation benefits are taxable under FICA.

On October 1, 2013, the Supreme Court granted certiorari to resolve the split between the Sixth Circuit and the Federal Circuit on whether severance payments made to an employee upon the employee's involuntary separation qualify as "wages" under FICA. This decision is important as it is likely to clarify for employers the tax consequences of severance payments made to employees who are laid off as a result of reductions in force or similar events. If affirmed, employers may be eligible for significant FICA tax refunds based on reduction in force severance payments paid out during the past recession.

III. 2012-2013 SIXTH CIRCUIT

A. THE ADA

***Cardenas-Meade v. Pfizer, Inc.*, 510 F. App'x 367 (6th Cir. 2013)**

Cardenas-Meade ("Meade") claimed that she was treated in a discriminatory manner by her supervisors after she confided in them about her marital problems. The employee failed a training program exam and immediately went on medical leave due to severe anxiety and depression resulting from the test. During the leave, her personal psychologist was communicating regularly with Pfizer's medical director. In April 2008, her psychiatrist released her to return to work subject to accommodations that required her to be transferred to less stressful supervision. Pfizer declined and she remained on leave until May 14, 2008, when Pfizer learned she was working for a competitor.

The Sixth Circuit found that Meade failed to prove that she was disabled under the pre-amendment ADA because the limits on her non-work activities were merely a short-term temporary result of the anxiety and depression triggered by actions leading up to and during her failed examination.

Meade alleged that Pfizer had retaliated against her by not returning her to work in April under different supervisors. Her protected activities by that time included taking FMLA leave, making an internal complaint of gender discrimination, and filing an EEOC charge alleging disability and gender discrimination. The Sixth Circuit rejected her retaliation claim. The medical director who ordered her to continue on leave was following her doctor's recommendations, and was unaware of her protected activity. The court held that Pfizer was under no obligation to return her to work for different supervisors. Finally, Meade was terminated for a legitimate reason: working for a competitor in violation of company policy. The employee failed to establish that this valid reason is pretextual.

Here is the take away. Employees should expect to be summarily terminated when their employers learn that they are working for a competitor. One wonders why it took a lawsuit for this plaintiff or her lawyer to figure that out.

***Keith v. County of Oakland*, 2013 U.S. App. LEXIS 595 (January 10, 2013).**

This case involves a deaf plaintiff, Keith, who was rejected for a lifeguard position at the County's wave pool. The Sixth Circuit reversed summary judgment in favor of the County, finding a dispute of material fact as to whether Keith was otherwise qualified, whether his disability could be accommodated, and whether the County failed to engage in the interactive process. Keith has been deaf since birth, and uses sign language to communicate, but can detect some noises through his cochlear implant, such as alarms, whistles, and people calling for him. Keith successfully completed the County's junior lifeguard and lifeguard training programs to become certified as a lifeguard. He used an interpreter to communicate the verbal instructions for both training courses. After Keith received his lifeguard certification, he applied to be a lifeguard at the County's wave pool. Keith was offered the position pending his pre-employment physical examination.

At the outset of his physical examination, the County's physician immediately exclaimed that "He's deaf; he can't be a lifeguard." Further, the physician stated that he could not act independently as a lifeguard but approved his employment as a lifeguard if his deafness was "*constantly accommodated.*" The County turned to its third party aquatic safety and risk management consultants. Without meeting with Keith, they expressed concern over his being a lifeguard. They suggested that a job-task analysis be done to determine if Keith could perform the job without accommodations. However, the court noted that these consultants had no education, training or experience with the ability of deaf people to work as lifeguards and did not research the issue. Ultimately, the consultants did not conduct the suggested evaluation and, without speaking further to Keith, revoked the offer.

Keith filed a complaint alleging violations of the ADA and the Rehabilitation Act. He argued that he was "otherwise qualified" for the position. He argued that he could perform the tasks required for the job as a majority of them are completely visual and verbal communication is ineffective in a noisy water park. The only accommodation he requested was an interpreter during staff meetings and classroom instruction, which he argued was a reasonable accommodation. He also introduced testimony of three experts with training in the ability of deaf people to act as lifeguards. All three uniformly testified that the ability to hear is unnecessary to perform the essential duties of a lifeguard. Further, Keith argued that the County failed to make an individualized inquiry regarding his ability to perform the job or whether he could be reasonably accommodated.

The district court dismissed Keith's ADA complaint. The Sixth Circuit reversed. First, the court held that the doctor, who had no expertise in deafness or lifeguard responsibilities, and the risk consultants, who had no such expertise either, both failed to make an individualized inquiry because they did not speak to or allow Keith to demonstrate his abilities. Further, the court held that the County could not escape liability by relying on the advice of its doctor or the risk consultants; especially when the County, which actually witnessed his skills, had supported the hiring until relying on the opinions of those third parties.

The Sixth Circuit held that based on the evidence, particularly the expert testimony, a jury could reasonably find that Keith was otherwise qualified for the job based on visual alertness, not hearing. As for reasonable accommodations, the court held that reasonable minds could differ as to whether Keith could perform the essential functions of a lifeguard with minor visual adjustments in the procedures around the pool and the use of an interpreter during staff meetings and classroom training. Further, the Sixth Circuit found that the County did not establish that these accommodations would impose an undue hardship on the operation of the wave pool.

Finally, the court held that the County failed to conduct an individualized inquiry into whether deafness would prevent Keith from performing his duties as a lifeguard. The court reasoned, "Because it strikes us as incongruent with the underlying objective of the ADA for an employer to make an individualized inquiry only to defer to the opinions and advice of those who have not, we direct the district court to consider these questions on remand."

Here is the takeaway – tough case. Most employers believe that they are safe in rejecting a candidate who is disqualified by the doctor conducting their pre-employment medical examinations. This case required the employer to **look behind** the thoroughness or basis for the doctor's opinion. That places a heavy burden on employers and injects uncertainty in ADA failure to hire cases.

***White v. Standard Ins. Co*., 2013 U.S. App. LEXIS 13368, 2013 WL 3242297 (6th Cir. 2013)**

White was employed as a customer service representative. Due to a non-work-related back injury, later diagnosed as sciatica, White took short-term disability leave. She returned to work part-time, and later received long-term disability benefits. However, upon returning to work, White was unable to work a full day and had numerous absences due to back pain. Standard ultimately terminated her employment but advised her that her position would remain open for a period of time, should she be able to return to work.

White claimed that Standard discriminated and retaliated against her in violation of the ADA. The Sixth Circuit rejected White's ADA claim because Standard sufficiently established that *full-time work* was an *essential function of her position*. According to the court, Standard had no duty to convert a temporary accommodation into a regular part-time position. Further, the court found that White had not engaged in any protected activity to support a retaliation claim. Specifically, the court rejected her argument that inquiries regarding the nature of her health insurance benefits were protected activity under the ADA.

B. TITLE VII

***Waldo v. Consumers Energy Co*., 12-1518, 2013 WL 4038747 (6th Cir. Aug. 9, 2013)**

Waldo, the only female electrical line worker employed by CEC, claimed she was regularly subjected to sexual harassment by her male co-workers. The conduct included displaying sexually explicit materials in the workplace, relieving themselves in front of her, and requesting that she "pee like a man." On one occasion, they locked her in a "porta-potty," and on another they directed her to clean up her male co-workers' tobacco spit. They also frequently ridiculed her for carrying a purse, ostracized and ignored her on job sites, and called her derogatory gender specific names. Waldo's complaints to her supervisor proved useless as he stated that he did not believe in training women to be electrical line workers and intended to "wash her out" of the program. Waldo then took her concerns to an HR manager; however, a formal investigation was never conducted. CEC's only response was to organize a diversity and inclusion fair. Ultimately Waldo was terminated following a negative evaluation. She filed suit and alleged sex discrimination, hostile work environment, and retaliation under Title VII.

Sound like an employer's nightmare? It was. Following an (almost inexplicable) jury verdict in favor of *employer*, Waldo moved for new trial. The district court granted a motion with respect to the hostile work environment claim. The second jury returned verdict in favor of Waldo and awarded her **$400,000** in compensatory damages and **$7.5 million** in punitive damages. The district court granted CEC's motion to remit damages pursuant to statutory cap ($300,000 total), but denied CEC's renewed motion for judgment as a matter of law, and subsequently awarded the employee **$685,506.25** in *attorney fees* and *costs*. CEC appealed.

Judge Karen Nelson Moore wrote the majority opinion; Judge Sutton concurred in part and dissented in part. Judge Moore had no difficulty in affirming the district court on both the merits and the fee request. Under the totality of the circumstances, this claim clearly met the standard for a gender-based hostile work environment. The court correctly rejected CEC's argument that many of the instances of harassment cited by Waldo were non-sexual conduct. The gender-based harassment, including sexually explicit materials, gender demeaning language, throwing Waldo's purse out of the crew truck and ostracizing the only female line worker in the company was more than sufficient to connect gender to the other non-sexual harassment.

Judge Moore then went on to hold that the district court did not abuse its discretion in awarding Waldo's counsel all requested attorney's fees, at the hefty rate of $400/hour, including fees for losing the first jury trial and losing on seven of eight theories were reasonable and recoverable. This included such normally non-refundable expenses for "focus groups, mock trials, jury-selection services, and mediation" which the court found were within the district court's discretion to award.

Judge Sutton concurred on the merits. As for the fees and costs, he wrote, "I join all sections of the majority's opinion save one: its decision to uphold the district court's award of $684,506 in attorney's fees - all but $1,000 of the fees requested by Waldo's attorney without any additional reduction for time or rate, including for all work incurred to *lose* the first jury trial, all work incurred to *lose* six of the seven claims (four of them state law claims), and for all work incurred to win $300,000 in the second jury trial. One can be forgiven for thinking that Waldo's two attorneys, not Waldo, were the true winners. This is good work if you can get it." The above emphasis was that of Judge Sutton.

C. THE ADEA

***Hale v. ABF Freight Sys.*, 503 F. App'x 323 (6th Cir. 2012)**

Hale worked as an operations supervisor at ABF Chattanooga terminal for over twelve years. Beginning in 2009, Hale was reprimanded several times for work-related mistakes. During that time, Hale's manager, Laney, asked several times when he was planning on retiring. After disregarding instructions from Laney and sending a driver out without approval, Hale was terminated. He sued contending that he was terminated and subjected to a hostile work environment because of his age, in violation ADEA and THRA.

The record reflected a dreadful relationship between Hale and Laney. Between February 2009 and Hale's termination in October 2009, Laney sent Hale numerous emails pointing out the errors Hale had made in the most direct of terms. Laney said, "I am continuing to be amazed that you are ignoring instructions." She criticized him for the smallest of errors, said he had "absolutely handled [one matter] wrong." She scolded him for failing to inform her of a vacation day and called him a liar. On one occasion, she told him that she was going to lay off one supervisor and asked him when he planned to retire. In what ended up being the nail in the coffin, Hale's co-worker testified that Laney said, referring to Hale, "He is going to leave here when he is 62. I am going to see to it. He has been here long enough, and he is going to go on his social security." Hale was fired on October 5, 2009, for an action that he and his co-worker testified was an accepted practice before and after Hale's termination.

This case is reminiscent of the WW II slogan, "Loose lips sink ships." The Sixth Circuit reversed the summary dismissal of Hale's age discrimination claim, finding at least one piece of evidence to be direct evidence of discrimination. The court observed, "Direct evidence … proves the existence of a fact without requiring any inferences." Isolated discriminatory remarks by non-decision makers are not indicative of age discrimination. The court held that "Laney's inquiries into Hale's retirement plans are not direct evidence of age discrimination because they do not require the conclusion that Hale was terminated because of his age." The inquiries were "circumstantial evidence that, in connection with other evidence, allow an inference that Laney terminated Hale because of his age," but "these inquires do not 'prove the existence of a fact without requiring any inferences.'" Thus, they cannot be considered direct evidence.

However, the court held that Laney's comments that "He is going to leave here when he is 62. I am going to see to it. He has been here long enough, and he is going to go on his social security," met all the conditions for direct evidence. The court noted, "Laney was Hale's immediate supervisor, had decision-making authority over his employment, clearly connected his age to her plans to terminate him, and did in fact terminate him." The court held not only was there direct evidence of age discrimination, there was abundant other circumstantial evidence to establish a *prima facie* case and clear evidence of pretext. Indeed, the record reflects that the conduct for which Hale was criticized, disciplined and eventually terminated was common and accepted practice before and after his termination.

However, the court rejected Hale's hostile work environment claim. Hale claimed that the emails, which Laney sent to him, e.g. "you have let me down," "you were clueless," and "I continue to have the same problems with you over and over," constituted a hostile work environment. This conduct, said the court, clearly does not arise to a hostile work environment. "Conversations between an employee and his superiors about his performance does not constitute harassment simply because they cause the employee distress." While the tone of Laney's remarks "certainly may have been frustrating and discouraging, they were part of 'the ordinary tribulations of the workplace' that do not amount to the sort of 'extreme' conduct required to effect a 'change in the terms and conditions of employment.'" *Citing Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

***Blizzard v. Marion Tech. College*, 698 F.3d 275 (6th Cir. 2012)**

Blizzard, an associate account payable clerk, sued the College and her supervisor, Nutter, for age discrimination and retaliation under the ADEA. Toward the end of Blizzard's employment, the College implemented a new computer software system. It was undisputed that Blizzard had difficulty with the new system. She alleged that other younger employees received special treatment including more training time on the company's new computer system. The College contended that Blizzard's employment problems began when she fell behind in learning to use the new software system. Ultimately, she was terminated after numerous documented errors relating to inability to adapt to the new software system and a "below expectations" performance appraisal.

The district court granted summary judgment. The Sixth Circuit affirmed. Although a six-and-a-half year age difference between Blizzard and an employee who replaced her was not the best evidence to create an inference of age discrimination, it was sufficient to create an issue of material fact at the summary judgment stage. However, the College proffered nondiscriminatory reasons for Blizzard's termination, namely, performance failures using new software and a disinclination to learn how to use the software. Blizzard's pretext argument was defeated by the application of the "modified honest belief rule," which provides that "for an employer to avoid a finding that its claimed nondiscriminatory reason was pretextual, the employer must be able to establish its reasonable reliance on particularized facts that were before it at the time the decision was made."

Here, Blizzard failed to overcome the honest belief rule because she failed to show that the College did not honestly believe in the proffered non-discriminatory reason for the adverse employment action. Moreover, the age-related comments to which Blizzard pointed were unrelated to the decision to dismiss her from her employment. Thus, she could not prove that given reason for her termination was pretextual. Thus, Blizzard was left out in the cold.

***Marsh v. Associated Estates Realty Corp.*, 2013 U.S. App. LEXIS 7177 (6th Cir. Apr. 5, 2013)**

Rosemary Marsh, a leasing consultant, was sixty-years-old when hired. Pam Carson was the property manager who hired her. Marsh subsequently left Associated to pursue other employment opportunities, but returned and was rehired at sixty-one-years-old. In 2007, Carson was promoted and Amy Horn ("Horn") became the property manager responsible for the day-to-day activities of the property where Marsh worked. Thus, Horn was Marsh's immediate supervisor. Throughout her employment, Marsh received several low evaluations. After one such poor evaluation, Miria Rabideau, the regional vice president of Associated Michigan, contacted Carol Screngi, the human resources manager for the company to express her concerns about Marsh's performance and violations of company policy. Screngi recommended that Rabideau and Carson place Marsh on final probation and provide her with a performance improvement plan ("PIP"). Once Rabideau approved the plan, Carson relayed the message to Horn, who met with Marsh to present her with the PIP. The form stated that Marsh was on final probation, identified areas that needed improvement and indicated that her inability to achieve these objectives would result in "additional action up to and including termination."

Marsh subsequently received more low evaluations and her co-workers complained to Horn that Marsh was violating company policy. Horn reported the evaluation scores and the co-worker complaints to Carson. Carson then recommended that Marsh's employment be terminated; Rabideau and Screngi both agreed. Carson directed Horn to fire Marsh. Horn met with Marsh to advise her of her termination. Marsh alleged that during the meeting, Horn said something to the effect of "I think you're getting a little too old for your job."

Moreover, Marsh stated that Horn made other age-related comments during her supervision. For instance, she called Marsh an "old Rose," made statements to the effect of "you're slipping, you're getting old" when someone forgot something, and asked Marsh "whether she was too old to get down there" when Marsh had to put paper in the bottom drawer of the copier. Marsh sued Associated under the ADEA. The district court held that Marsh had not presented any *direct* evidence of age discrimination and could not present sufficient *circumstantial* evidence of such discrimination, nor could she present evidence of pretext. Marsh appealed to the Sixth Circuit.

The Sixth Circuit affirmed the district court's holding that the four allegedly discriminatory comments by Horn did **not** constitute **direct evidence** of age discrimination. Specifically, the court held that three of the comments were not made in connection with the decision to fire Marsh, thus they are not direct evidence of discrimination, as a reasonable juror could not infer from them that Horn's alleged ridicule of older employees led her to fire Marsh. Notably, the court held that Horn was not a decision-maker with respect to Marsh's termination. Thus, even though one of the statements was made during the conversation when Marsh was fired, it cannot constitute direct evidence of age discrimination. The court rejected Marsh's argument that Horn was a decision-maker, noting that nothing in the record indicates that Horn had any input in the decision to fire Marsh. The court focused on the fact that Horn "merely passed along independently generated reports of Marsh's inadequate performance, and that individuals higher up in the chain of command, including Rabideau, Carson, and Screngi, made the ultimate decision to fire Marsh." In other words, Carson recommended Marsh's termination and Rabideau ultimately approved the decision; Horn was merely the messenger.

Thus, because the one statement that was made in connection with the termination was not made by the decision-maker, but by someone down the chain of command, Marsh had no direct evidence of age discrimination. Additionally, the court held that the articulated reason for Marsh's termination, low evaluation scores and several violations of company policy, were legitimate nondiscriminatory reasons and Marsh did not successfully rebut those reasons by demonstrating that they were pretextual.

D. THE FLSA

White v. Baptist Mem'l Health Care Corp., 699 F.3d 869 (6th Cir. 2012)

White, a nurse at Baptist, filed a collective action under the FLSA claiming that Baptist had automatically applied a 30-minute unpaid meal break. She claimed that her meal breaks were partially or entirely interrupted on a regular basis and sought compensation for all of her 30-minute meal breaks during the FLSA look-back period. The Baptist employee handbook stated that employees working six or more hours received an unpaid meal break that was automatically deducted from their paychecks. The handbook provided, however, that if an employee's meal break "was interrupted or missed because of a work related reason, the employee would be compensated." Baptist employees were instructed to record all time spent performing work during the meal break in an "*exception log*," whether the meal was partially or entirely interrupted. White signed acknowledging this procedure. On a few occasions, White followed the procedure, recording interrupted meal breaks in the exception log. When she did, she was compensated for her time. At some point, White "stopped reporting her missed meal breaks in the log despite Baptist's instructions." White told her supervisor and human resources from time to time that she was "not getting a meal break," but did not tell them that she was not being compensated. She had no record of when her meal breaks were interrupted, either entirely or partially, for which she was not compensated. She also did not use Baptist's procedure to correct payroll errors. When she used the procedure, her errors were "handled immediately," but she did not use it for interrupted meal breaks.

The district court granted Baptist's motion for summary judgment and decertified the conditional class. The Sixth Circuit affirmed. The court held that White's FLSA claim failed because Baptist had no reason to know it was not compensating her for working during her meal breaks. Baptist had provided a procedure for employees to report interrupted meal breaks and directed White to use it. When White did so, she was compensated. The court held, "When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA." White stopped using the procedure and complained to her supervisors that she was not getting a meal break, but never told them, or human resources, that she was not following the procedure and was not being compensated. For the foregoing reasons, the court rejected White's FLSA claim. The court affirmed the decertification of the class. Once White's individual claim was dismissed, she could not represent others whom she alleged were similarly situated to her.

E. THE FMLA

***Jaszczyszyn v. Advantage Health Physician Network*, 504 F. App'x 440 (6th Cir. 2012)**

Due to pain from a back injury, Jaszczyszyn ("Jasz") used FMLA leave time. Her supervisor advised her of the notice requirements to utilize leave time, which she routinely disregarded. About five weeks into Jasz's FMLA leave, and while her second request for leave was pending approval, several co-workers saw pictures posted on her Facebook page showing her over an eight-hour period at a local beer festival. They brought the matter up with their supervisor. Jasz had previously submitted a medical certification, which represented she was "*completely incapacitated*." Moreover, she had made similar statements in her requests for FMLA leave. After reviewing the matter internally, Advantage managers set up a meeting with Jasz. Her managers discussed Jasz's lack of communication with the company during her leave and her failure to follow the FMLA notice requirements. They focused, however, on the pictures from the festival, which they believed were inconsistent with her prior statements and those of her physician. Jasz did not agree with their characterization of the pictures. She defended herself by arguing "no one had told her it was prohibited." She had no explanation or response when asked to explain the discrepancy between complete incapacitation and the pictures. She did offer, however, that, "she was in pain during the festival and just was not showing it."

Jasz alleged that Advantage interfered with her FMLA rights and that she was terminated in retaliation for exercising those rights. As to the interference claim, the Sixth Circuit found that before the appropriate paperwork had been completed for approval of Jasz's second FMLA request, Advantage had allowed her to take time off. That is, the employer treated it as being taken pursuant to FMLA. Therefore, the employee was given all the leave to which she was entitled, and her interference claim failed.

Likewise, Jasz's retaliation claim failed. She failed to show a causal connection between protected FMLA activity and her termination. Moreover, Advantage considered workplace [FMLA] fraud to be a "serious issue" and its termination on that ground constituted a legitimate non-discriminatory reason for her termination. As for pretext, Advantage's investigation was adequate and turned largely on Jasz's own behavior in the interview. She did not refute

Advantage's honest belief that her behavior in the photo was inconsistent with her claim of "total disability." Thus, the honest belief rule blocked Jasz's pretext contentions.

***Kinds v. Ohio Bell Tel. Co.,* 2013 U.S. App. LEXIS 15324 (6th Cir. July 29, 2013)**

Kinds was involved in a mentally and physically abusive relationship with her live-in boyfriend that involved death threats and assault which resulted in her hospitalization. Kinds explained her situation to her employer and requested time off from work to find a new place to live. Kinds did not have any vacation time and did not then qualify for time under the FMLA because she had not worked at Ohio Bell the requisite number of hours. Regardless, her supervisors granted her one week of discretionary leave. The day after she qualified for FMLA leave, Kinds applied for leave and was subsequently out of work for two months. A portion of the time Kinds was out was approved by the company's third party administrator under Ohio Bell's short-term disability plan. However, the first three weeks of her leave was not covered by short-term disability due to Kinds' failure to submit medical records for that timeframe. The company requested that Kinds submit an FMLA medical certification (for the first three weeks of her leave) within fifteen days of her receipt of the certification form, pursuant to applicable FMLA regulations. Kinds failed to ever submit the requested form – clearly because she had not been seen by a physician during the first three weeks of her leave. Ohio Bell therefore denied her FMLA leave request and terminated her for the unexcused absences.

The district court granted summary judgment on Kinds' FMLA interference claim. The Sixth Circuit affirmed. The court held that Ohio Bell properly requested the medical certification. When Kinds could not produce one within the fifteen (15) days allowed by the FMLA regulation as the company had instructed, those absences were not protected by the FMLA. Indeed, Ohio Bell ended up giving Kinds more than 15 days to submit the certification, but she failed to do so. The court held that Ohio Bell was well within its rights to declare the leave not FMLA protected and to terminate Kinds for the unexcused absence.

The court rejected Kinds' argument that because Ohio Bell had not asked for the certification initially, it violated FMLA regulations by requesting it when the insurance carrier denied her short-term disability benefits for the first part of her leave. The court held that that the decision by the insurance carrier alone justified Ohio Bell's request for the medical certification.

Here's the takeaway. Ohio Bell made this case harder on itself by not requesting the medical certification at the outset of the leave. There is no downside, from an employer's standpoint, to requiring the certificate at the outset of any FMLA-covered leave.

***Diaz v. Mich. Dep't of Corr.,* 703 F.3d 956 (6th Cir. 2013)**

State employees may have found a way to bring an FMLA self-care action in federal court, at least a claim for equitable relief in the form of reinstatement. In *Nevada Department of Human Resources v Hibbs,* the Supreme Court held that a state employee may recover monetary damage in federal court for a state's failure to comply with the *family-care provisions* of the FMLA. However, in *Coleman v. Court of Appeals of Md.*, the Supreme Court held that Congress had failed to properly abrogate the state's Eleventh Amendment sovereign immunity for suits in federal court for money damages under the FMLA *self-care provisions*. To avoid this result, plaintiffs Diaz and Boden sued a number of state officials under § 1983 in their official and individual capacities for damages and equitable relief (reinstatement) relying upon the self-care provisions of the FMLA. The district court granted summary judgment on both the monetary and equitable claims against the individual defendants in both their official and individual capacities. The plaintiffs appealed.

The Sixth Circuit held that the plaintiffs could not avoid the holding of *Coleman* by suing state officials in their individual capacities for monetary damages in federal court to enforce the self-care provisions of the FMLA. Public officials cannot be held individually liable under the FMLA because of the Acts' text and remedial framework. Moreover, the plaintiffs do not have the right to sue state official for monetary damages for alleged violation of the self-care provisions of the FMLA under the holding of *Coleman*. Without the right to bring suit against state offices for monetary damages under the FMLA self-care provisions, the plaintiffs had no statute that could be enforced under Section 1983. The court also held that the comprehensive remedial scheme of the FMLA with respect to monetary damages make it clear that Congress intended to exclude other remedies. The FMLA therefore precludes resort to Section 1983 to sue in federal court for money damages for violation of the FMLA self-care provisions.

Turning on a dime, however, the court reversed the district court and held the state employees could sue public officials in their *official capacity* for equitable relief through the *Ex parte Young* doctrine. *Ex parte Young* allows individual state employees to be sued in their official capacity for prospective relief to end a continuing violation of federal law. With little explanation, the court held that the FMLA's remedial scheme for equitable relief "did not create intricate procedures" like those that … prevented the court from allowing a claim to proceed under *Ex parte Young*.

Equal Employment Opportunity Commission v. Peoplemark, Inc., 2013 U.S. App. LEXIS 20408 (6th Cir. 2013).

Peoplemark uses an application for employment that requires the applicant to indicate whether he or she has a felony record. Further, Peoplemark conducts an independent investigation into the criminal record of all applicants. Plaintiff is an African American woman with two felony convictions who applied to Peoplemark's Grand Rapids Office. Peoplemark refused to refer Scott for employment. Scott alleged that her application was denied because of her race and her felony record. The EEOC began an investigation and found that it had reason to believe that Peoplemark had violated Title VII based on its belief that Peoplemark had a blanket policy of rejecting felon applicants; a policy which the EEOC has long claimed has a disparate impact on African Americans. The EEOC filed an action on behalf of Scott and a class of similarly situated persons, which ultimately grew to 286 individual class members.

The EEOC conducted an extensive administrative investigation on Peoplemark and had access to virtually all of Peoplemark's personnel documents. Throughout discovery, Peoplemark produced over 176,000 documents; several of which indicated that Peoplemark did **not** have a companywide policy of refusing employment to people with felony records. For instance, the documents indicated that some of the class members did not have felony convictions, and other class members were referred for employment by Peoplemark, despite their felony convictions. At some point during discovery, the EEOC disavowed the theory of a blanket discriminatory policy and argued that its claim was that Peoplemark's "*consideration* of felony convictions when assessing applications had a disparate impact on African Americans."

Ultimately, the parties agreed to voluntarily dismiss the case with prejudice in 2010. The dismissal provided that Peoplemark would be the prevailing party for purposes of determining fees under §706(k) of Title VII. The magistrate judge recommended that Peoplemark be awarded $751,942.48 which included $219,350.70 in attorney's fees, $526, 172.00 in expert witness fees and $6,419.78 in other expenses. The magistrate judge found that "the complaint turned out to be without foundation from the beginning." Further, the magistrate judge recommended that the EEOC be held to the gravamen of its complaint, that Peoplemark had a companywide policy of refusing to refer felons to employment opportunities and that this policy had a disparate impact on African Americans. Finally, the magistrate judge recommended that the EEOC should have known the case was groundless not later than October 1, 2009, which gave the EEOC one month to review the documents produced by Peoplemark. Moreover, the magistrate judge added that it was unreasonable for the EEOC to continue litigation after it knew that it could not present an expert report.

The district judge reviewed and adopted the magistrate judge's report and recommendation. The district court rejected the EEOC's argument that it could prove its case as pleaded without showing a companywide policy of discrimination. The court held that all of Peoplemark's expert fees should be awarded because they were out-of-pocket expenses normally paid by the parties and were directly related to the disparate-impact theory. The EEOC appealed the decision and argued that an award of fees was inappropriate. In the alternative, the EEOC argued that the court abused its discretion when it fixed an October 1, 2009 award date for attorney's fees and imposed the cost of the company's expert fees. Finally the EEOC argued that the court erred when it failed to find Peoplemark's expert's documentation inadequate and expert fees excessive.

The Sixth Circuit held that the lower court did not abuse its discretion when it found that the EEOC could not prove its case as pleaded. Specifically the court held that when discovery indicated that no companywide policy of denying employment opportunities to felons existed, it was unreasonable to continue to litigate the EEOC's pleaded claim.

Under the Supreme Court's ruling in *Christianburg,* a prevailing defendant in a Title VII action may be awarded attorney fees if the plaintiff's claim was "frivolous, unreasonable, or groundless, or…the plaintiff continued to litigate after it clearly became so." Because the EEOC should have known its claim was groundless after reviewing the documents produced in discovery, yet continued to litigate, the award of attorney's fees and expert fees was not unreasonable. Here, the only claim pleaded, that there was a blanket policy of discrimination, could not be proved; thus, it was frivolous, unreasonable or groundless, and the attorney's fees were appropriately awarded.

The Sixth Circuit found that the court was within its discretion to award the entirety of the expert fees incurred by Peoplemark. Section 2000e-5(k) permits a court to award the prevailing party in a Title VII action "a reasonable attorney's fee (including expert fees)." That is, expert fees are a subset of attorney's fees. Therefore, because the district court was within reason to award attorney's fees under *Christianburg*, the district court also was reasonable in imposing expert fees. The court analyzed the award of expert fees in two different time periods. First, the Sixth Circuit held that the district court did not abuse its discretion when it awarded attorney's fees from October 1, 2009 (when the EEOC should have known that their claim was fruitless) until the end of litigation. Specifically, the court held that once discovery established that no companywide discriminatory policy existed, the grant of attorney's fees was appropriate and therefore the grant of expert fees was similarly appropriate for that time frame. Next, the court analyzed the award of expert fees for the period of time before October 1, 2009. The court noted that "there is nothing in the statute as written that requires temporal concurrence between expert and attorney's fees." The court explained that experts often work independently of attorneys and may have different deadlines. Further, the court noted that experts cannot wait to see if a case will become frivolous before they begin their work. Thus, the court held that "so long as the prevailing party acted reasonably in hiring the expert, the fees incurred were reasonable, the work conducted was reasonable, and the standard from *Christianburg* permits an award of expert fees, a court should be permitted to award a prevailing party's expert fees independent of limitations on the award of attorney's fees."

F. TENNESSEE COURT OF APPEALS

Ferguson v. Middle Tennessee State University, **2013 Tenn. App. LEXIS 221 (March 28, 2013).**

Ferguson, who was of Japanese American ancestry, worked in the maintenance department at Middle Tennessee State University (MTSU). Dana Byrd ("Byrd") was his supervisor. Ferguson sustained injuries from various workplace incidents and general wear and tear. These injuries resulted in certain medical restrictions on Ferguson's work assignments. Byrd knew of these medical restrictions. Ferguson alleged that his supervisor unlawfully discriminated against him because of his Japanese heritage by assigning him work that violated his medical restrictions

While recovering from a surgery after a work related injury, Ferguson filed an EEOC charge of discrimination on the basis of race and national origin. Only a few days after returning to work, Ferguson filed his first lawsuit against MTSU, which alleged that Byrd had discriminated against him on the basis of race and national origin. Ferguson continued to report to work after filing the lawsuit and continued to perform tasks that he "believed were contrary to his medical restrictions." Sometime later, Ferguson developed more physical problems that resulted in him falling down the stairs at work and injuring himself. After this injury, Ferguson filed a second lawsuit against MTSU which alleged that MTSU retaliated against him for engaging in protected activity; that is, filing his EEOC complaint and the first lawsuit. That complaint stated that after he returned to work, Byrd frequently assigned him tasks that she knew were outside his medical restrictions.

The Chancery Court for Rutherford County consolidated the two lawsuits against MTSU. Subsequently, Ferguson amended his complaint to allege malicious harassment. The jury found in favor of MTSU on Ferguson's claims of discrimination and malicious harassment. However, the jury found in favor of Ferguson on his claim of retaliation for engaging in protected activity, and awarded Ferguson **$3 million in compensatory damages**. The trial court then denied MTSU's motion which alleged that Ferguson failed to prove that Byrd, his sole supervisor, had knowledge of Ferguson's protected activity, holding that a reasonable jury could have reached its conclusion based on substantial evidence. MTSU appealed the trial court's decision.

The Court of Appeals reversed and dismissed. The decision, authored by Judge Holly Kirby, focused on the knowledge element of a retaliation claim. Ferguson argued that the excerpts of Byrd's deposition which were read to the jury proved that Byrd knew that he had filed an EEOC claim and a lawsuit. The court agreed with Ferguson, but noted that that deposition testimony does not establish *when* she knew about the protected activity. Thus, it does not establish that Byrd engaged in adverse employment actions after finding out about his protected activities. Further, the court rejected Ferguson's argument that he proved his claim with circumstantial evidence of the temporal proximity of the protected acts and the adverse actions, as knowledge by the supervisor is a prerequisite to such an inference. Finally, Ferguson argued that because **other members** of MTSU's staff knew of his protected activities, there was "corporate knowledge" sufficient to satisfy the knowledge element of a retaliation claim. The court rejected the "view that 'general corporate knowledge' is sufficient foundation for a claim of retaliation in employment for engaging in protected activity." The court stated that the decision maker, the individual who took the adverse job action against the plaintiff, must have had knowledge of the plaintiff's protected activity at the time of the adverse job action. The court held that the plaintiff did not meet this standard, as he did not discuss the EEOC charge or related lawsuit with his supervisor or anyone else.

Ultimately the Court of Appeals held that "to prevail on his claim of retaliation, Ferguson was required to submit to the jury material evidence, either direct or circumstantial, from which a reasonable trier of fact could infer that Byrd knew, when she assigned Ferguson the work in question, that Ferguson filed an EEOC complaint or that Ferguson had filed an employment discrimination lawsuit." Because Ferguson presented no material evidence at trial of his supervisor's knowledge at the relevant time, his retaliation claim failed.

***Sneed v. The City of Red Bank*, 2013 Tenn. App. LEXIS 426 (Tenn. Ct. App. June 27, 2013).**

Sneed was discharged as Police Chief for the city of Red Bank, a Tennessee municipality. He sued in chancery court under the Tennessee Human Rights Act ("THRA") for age discrimination, and under the Tennessee Police Protection Act ("TPPA") for retaliatory discharge. He requested a jury trial on both claims. Red Bank moved to transfer the case to circuit court and to strike the jury demand pursuant to the Tennessee Governmental Tort Liability Act ("GTLA"). The trial court held that the GTLA did not preclude a jury trial on the THRA claim. The Court of Appeals granted an interlocutory appeal and reversed. The court held that the GTLA applies to suits against municipalities under the THRA and TPPA. Thus, those cases must be tried by the circuit court judge without a jury.

U.S. Department of Labor Employee Benefits Security Administration
Washington, DC 20210

TECHNICAL RELEASE 2013-04

DATE: SEPTEMBER 18, 2013

SUBJECT: GUIDANCE TO EMPLOYEE BENEFIT PLANS ON THE DEFINITION OF "SPOUSE" AND "MARRIAGE" UNDER ERISA AND THE SUPREME COURT'S DECISION IN UNITED STATES V. WINDSOR.

I. INTRODUCTION

On June 26, 2013, the Supreme Court of the United States ruled, in *United States v. Windsor*, that section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. Section 3 provides that, in any Federal statute, the term "marriage" means a legal union between one man and one woman as husband and wife, and that "spouse" refers only to a person of the opposite sex who is a husband or a wife. The Supreme Court concluded that section 3 of DOMA "undermines both the public and private significance of state-sanctioned same sex marriages" and found that "no legitimate purpose" overcomes Section 3's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect[.]" The President has directed the Attorney General to work with other members of the Cabinet to review all relevant federal statutes to ensure the Supreme Court's decision, including its implications for federal benefits and obligations, is implemented swiftly and smoothly. Following consultation with the Department of Justice, the Department of the Treasury and other appropriate federal executive agencies, the Department of Labor (Department) is issuing this Technical Release to provide guidance to employee benefit plans, plan sponsors, plan fiduciaries, and plan participants and beneficiaries on the meaning of "spouse" and "marriage" as these terms appear in the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), and the Internal Revenue Code that the Department interprets.[1]

II. GUIDANCE

In general, where the Secretary of Labor has authority to issue regulations, rulings, opinions, and exemptions in title I of ERISA and the Internal Revenue Code, as well as in the Department's regulations at chapter XXV of Title 29 of the Code of Federal Regulations, the term "spouse" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages.[2] Similarly, the term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state law. This is the most natural reading of those terms; it is consistent with *Windsor*, in which the plaintiff was seeking tax benefits under a statute that used the term "spouse"; and a narrower interpretation would not further the purposes of the relevant statutes and regulations.

---

[1] Reorganization Plan No. 4 of 1978 transferred the authority to interpret certain provisions of title I of ERISA that have parallel language in the Internal Revenue Code from the Secretary of Labor to the Secretary of the Treasury. At the same time, the authority to interpret certain provisions, such as section 4975 of the Internal Revenue Code, which parallels provisions in ERISA, was transferred to the Secretary of Labor. 5 U.S.C. App. 237 (2006). In addition, under 26 U.S.C. 414(p)(3), the Secretary of Labor has rulemaking authority for certain other provisions of the Code that use the term "spouse."

[2] This definition of the term "spouse" also applies as the term is used in 5 U.S.C. § 8477(a)(4)(F).

For purposes of this guidance, the term "state" means any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Northern Mariana Islands, any other territory or possession of the United States, and any foreign jurisdiction having the legal authority to sanction marriages.

The terms "spouse" and "marriage," however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law. The foregoing sentence applies to individuals who are in these relationships with an individual of the opposite sex or same sex.

A rule that recognizes marriages that are valid in the state in which they were celebrated, regardless of the married couple's state of domicile, provides a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries.

A rule for employee benefit plans based on state of domicile would raise significant challenges for employers that operate or have employees (or former employees) in more than one state or whose employees move to another state while entitled to benefits. Furthermore, substantial financial and administrative burdens would be placed on those employers, as well as the administrators of employee benefit plans. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee, former employee, or spouse moved to a state with different marriage recognition rules. To administer employee benefit plans, employers (or plan administrators) would need to inquire whether each employee receiving plan benefits was married and, if so, whether the employee's spouse was the same sex or opposite sex from the employee. In addition, the employers or plan administrators would need to continually track the state of domicile of all same-sex married employees and former employees and their spouses. For all of these reasons, plan administration would grow increasingly complex, administrators of employee benefit plans would have to be retrained, and systems reworked, to comply with an unprecedented and complex system that divides married employees according to their sexual orientation. In many cases, the tracking of employee and spouse domiciles would be less than perfectly accurate or timely and would result in errors or delays.

Such a system would be burdensome for employers and would likely result in errors, confusion, and inconsistency for employers, individual employees, and the government. In addition, given the interconnectedness of statutory provisions affecting employee benefit plans, recognition of marriage based on domicile could prevent qualification for tax exemption, lead to loss of vested rights if spouses move, and complicate benefits determinations if spouses live in different states. All of these problems are avoided by the adoption of a rule that recognizes marriages that are valid in the state in which they were celebrated. That approach is consistent with the core intent underlying ERISA of promoting uniform requirements for employee benefit plans. In addition, Congress requires that the Department, the Department of Treasury/Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS) coordinate policies with respect to the Health Insurance Portability and Accountability Act (HIPAA), which has parallel provisions in ERISA, the Code and the Public Health Service Act. HIPAA § 104. The Departments operate under a Memorandum of Understanding that implements section 104 of HIPAA, and subsequent amendments, and provides that requirements over which two or more Secretaries have responsibility (''shared provisions'') must be administered so as to have the same effect at all times. HIPAA section 104 also requires the coordination of policies relating to enforcing the shared provisions in order to avoid duplication of enforcement efforts and to assign priorities in enforcement. Congress also provided that, whenever the Departments of Treasury and Labor are required to carry out provisions relating to the same subject matter under ERISA, they shall consult with each other in order to, among other things, reduce conflicting requirements. ERISA § 3004(a); 29 U.S.C. § 1204(a). The Department has coordinated with Treasury/IRS and HHS in developing this Technical Release, and agreed with those agencies that recognition of "spouses" and "marriages" based on the validity of the marriage in the state of celebration, rather than based on the married couple's state of domicile, promotes uniformity in administration of employee benefit plans and affords the most protection to same-sex couples.

III. For Further Information

The terms "spouse" and "marriage" appear in numerous provisions of title I of ERISA and the Department's regulations. In addition to the above general guidance, the Department's Employee Benefits Security Administration (EBSA) intends to issue future guidance addressing specific provisions of ERISA and its regulations. Additional information will be made available at www.dol.gov/ebsa.

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(August 2013)

Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. *See also* Fact Sheet 28A: Employee Protections under the FMLA, and Fact Sheet 28M: The Military Family Leave Provisions under the FMLA.

Eligible employees are entitled to take up to 12 workweeks of FMLA leave in a 12-month period for any of the reasons listed below. *See* Fact Sheet 28: The Family and Medical Leave Act - Overview.

- **The birth of a child and to bond with the newborn child within one year of birth.**

  An employee's entitlement to FMLA leave for birth and bonding expires 12 months after the date of birth. Both mothers and fathers have the same right to take FMLA leave for the birth of a child. Birth and bonding leave must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave (*e.g.*, allowing a parent to return to work on a part-time schedule for 10 weeks).

- **The placement with the employee of a child for adoption or foster care and to bond with the newly placed child within one year of placement.**

  FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be entitled to FMLA leave to attend counseling sessions, appear in court, consult with his or her attorney or the birth parent's representative, submit to a physical examination, or travel to another country to complete an adoption before the actual date of placement. FMLA leave to bond with a child after placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave. An employee's entitlement to FMLA leave for the placement of a child for adoption or foster care expires 12 months after the placement.

- **A serious health condition that makes the employee unable to perform the functions of his or her job.**

  An employee is "unable to perform the functions of the position" where the health care provider finds that the employee:
    1) is unable to work at all; or
    2) is unable to perform any one of the essential functions of the employee's position.

An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

- **To care for the employee's spouse, son, daughter, or parent who has a serious health condition.**

An employee must be needed to provide care for his or her spouse, son, daughter, or parent because of the family member's serious health condition in order for the employee to take FMLA leave. An employee may be needed to provide care to the family member, for example:

- when the family member is unable to care for his or her own medical, safety or other needs, because of the serious health condition or needs help in being transported to the doctor; or
- to provide psychological comfort and reassurance to the family member with a serious health condition.

Spouse: Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including "common law" marriage and same-sex marriage.

Parent: Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a child. This term does not include parents "in law."

Son or daughter: Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

In Loco Parentis: The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for or financially support a child. Employees who have no biological or legal relationship with a child may, nonetheless, stand in loco parentis to the child and be entitled to FMLA leave. Similarly, an employee may take leave to care for someone who, although having no legal or biological relationship to the employee when the employee was a child, stood in loco parentis to the employee when the employee was a child, even if they have no legal or biological relationship.

See also Administrator's Interpretation No. 21010-3; Fact Sheet #28B: FMLA leave for birth, bonding, or to care for a child with a serious health condition on the basis of an "in loco parentis" relationship; and Fact Sheet 28C: FMLA leave to care for a parent with a serious health condition on the basis of an in loco parentis relationship.

- **Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty.**

Qualifying exigencies are situations arising from the military deployment of an employee's spouse, son, daughter, or parent to a foreign country. Qualifying exigencies for which an employee may take FMLA leave include making alternative child care arrangements for a child of the military member when the deployment of the military member necessitates a change in the existing child care arrangement; attending certain military ceremonies and briefings; taking leave to spend time with a military member on Rest and Recuperation leave during deployment; or making financial or legal arrangements to address a covered military member's absence; or certain activities related to care of the parent of the military member while the military member is on covered active duty. *See* Fact Sheet 28M(c): Qualifying Exigency leave under the FMLA. An employee may take qualifying exigency leave for the deployment of a son or daughter of any age.

An eligible employee may also take up to **26 workweeks** of FMLA leave in a single 12-month period:

- **To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (military caregiver leave).**

  Eligible family members of both current servicemembers and certain veterans are entitled to military caregiver leave. *See* Fact Sheet 28M(a): Military Caregiver Leave for a Current Servicemember under the FMLA, and Fact Sheet 28M(b): Military Caregiver Leave for a Veteran under the FMLA.

ENFORCEMENT

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA. *See* Fact Sheet 77B: Protections for Individuals under the FMLA. The Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress. If you believe that your rights under the FMLA have been violated, you may file a complaint with the Wage and Hour Division or file a private lawsuit against your employer in court.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov **and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us