Employment Law Update 2013

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Supreme Court 2012-2013 Term

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Vance v. Ball State Univ.

133 S. Ct. 2434 (June 24, 2013)

- Catering employee racially harassed by "catering specialist."
- Supreme Court defines "**supervisor**" in the context of a Title VII **workplace harassment case**.

"We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . ."

- Rejects EEOC standard: person with "ability to exercise significant direction over another's daily work."

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Vance v. Ball State Univ.

133 S. Ct. 2434 (June 24, 2013)

What constitutes "tangible employment actions"?

". . . a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different, or a decision causing a significant change in benefits."

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Univ. of Texas S.W. Med. Ctr. v. Nassar

133 S. Ct. 2517 (June 24, 2013)

For **retaliation** claims, Court rejects "motivating factor" causation standard, and holds . . .

"The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under §2000e-3(a) must establish that his or her protected activity was a **but-for cause** of the alleged adverse action by the employer."

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Univ. of Texas S.W. Med. Ctr. v. Nassar

133 S. Ct. 2517 (June 24, 2013)

What is "but-for" causation?

*The requirement that the employer took adverse action 'because of' [protected activity] meant that was **the reason that the employer decided to act**, or in other words that ... was the 'but for' cause of the employer's adverse decision.*

Who has the burden of proof?

- Under anti-retaliation provision of Title VII, Section 704(a), burden of proof is on **plaintiff**.

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Univ. of Texas S.W. Med. Ctr. v. Nassar

133 S. Ct. 2517 (June 24, 2013)

***Nassar* relies heavily on ADEA case: *Gross v. FBL Financial Services*, 557 U.S. 167 (U.S. 2009)**

Gross:

- ADEA language "***because*** of . . . age" means "but-for" causation standard; rejected the "motivating factor" causation standard from *Price Waterhouse*.
- Burden of proof on plaintiff.

Nassar:

- Title VII anti-retaliation provision also uses "***because***" so same "but-for" standard should apply.
- Burden of proof on plaintiff.

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Univ. of Texas S.W. Med. Ctr. v. Nassar

133 S. Ct. 2517 (June 24, 2013)

- Lesser "**motivating factor**" standard only applies to Title VII's **status-based** discrimination claims (i.e., race, gender, etc.).
- **How does *Nassar* affect litigation under other statutes?**
  - ADA (discrimination and retaliation) – ***but for***
  - Constitutional claims – ***but for***
  - Title VI and Title IX – ***but for***
  - NOTE: Some statutes expressly allocate burden of proof: Title VII, § 703 and USERRA – ***motivating factor***

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Genesis Healthcare Corp. v. Symczyk

133 S. Ct. 1523 (April 16, 2013).

A case becomes moot, and must therefore be dismissed, when the lone plaintiff in an uncertified collective action under the FLSA receives an offer of judgment that satisfies her claims in full, whether or not she accepts the offer.

- Plaintiff brought FLSA collective action – alleged GHC violated FLSA by treating 30 minutes of every shift as an unpaid meal break, even when an employee worked during that time.
- GHC made plaintiff an offer of judgment of $7,500 and "*reasonable attorneys fees and costs as determined by the court*."
- Plaintiff failed to respond to offer. Claimed she still had the right to file a motion to certify the class. GHC filed motion to dismiss because plaintiff's action was **moot**.

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Genesis Healthcare Corp. v. Symczyk

133 S. Ct. 1523 (April 16, 2013).

D. Ct. dismissed case as being moot; 3rd Circuit reversed, holding collective action was not moot.

Here's the catch: plaintiff conceded that the offer of judgment "mooted" her individual claim, so S. Ct. assumed "without deciding" the same.

Based on this assumption, S. Ct. dismissed the entire case

- *In the absence of any claimants opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action.*

So, what is this decision worth?

Probably not as much as employers wish. These facts are unlikely to be repeated as most lawyers are likely to challenge a claim that an unaccepted offer of judgment renders a case moot, and sign up multiple named plaintiffs to reduce cherry picking.

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US Airways, Inc. v. McCutchen

133 S. Ct. 1537 (2013)

- McCutchen, became totally disabled following a serious automobile accident.
- US Airways, the ERISA plan administrator, paid $66,866 for his medical expenses.
- McCutchen settled a lawsuit involving the automobile accident for $110,000, resulting in a net recovery after attorneys' fees and costs of less than $66,000.
- US Airways filed suit for "**appropriate equitable relief**" pursuant to ERISA Section 502(a)(3). The district court granted US Airways' motion for summary judgment and awarded it the full $66,866 reimbursement.
- The Third Circuit overturned the district court, remanded the case for further consideration, **and ordered the district court to consider the beneficiary's equitable defenses**.
- US Airways appealed the decision to the Supreme Court.

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US Airways, Inc. v. McCutchen

133 S. Ct. 1537 (2013)

Issue:

If ERISA entitles plan administrators to seek reimbursement from a beneficiary on **theories of equitable relief, can beneficiaries likewise claim traditional equitable defenses to limit or prevent reimbursement**?

No –the explicit terms of the plan govern and equitable defenses that would prevent reimbursement under the terms of the plan are prohibited.

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*.

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US Airways, Inc. v. McCutchen

133 S. Ct. 1537 (2013)

- However, Kagan J. (5-4) holds this particular subrogation clause is "silent on attorney's fees" and applied the equitable "common fund doctrine," i.e. "*someone who* ***recovers a common fund*** *for the benefit of persons other than himself is due a reasonable attorney's fee*."
- Scalia J.'s dissent criticizes Justice Kagan's approach because the Court granted *certiorari expressly presuming* the plan's terms gave it an absolute right to full reimbursement.
- **Takeaway:** giving consistent and uniform effect to ERISA plan language generally trumps the role of equity in resolving actions brought under Section 502(a)(3) based on an equitable lien by agreement, *provided* that the *plan language is sufficiently clear*.

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Nitro-Lift Technologies v. Howard

133. S. Ct. 500 (Nov. 26, 2012).

- **Non-competition agreements** with oil & gas workers contained arbitration clause.
- Oklahoma has **statute** that **prohibits non-competes** - *Okla. Stat. Tit. 15 § 219.*
- Oklahoma Supreme Court: the **entire contract is void, so no arbitration**.
- Nice try Oklahoma, but Supreme Court reverses *per curiam.*
  - FAA preempts state law.
  - FAA applies in state courts.
  - If arbitration provision valid, questions of contract validity, including state law issues, **go to the arbitrator**.
  - State legislatures and courts are not allowed to deviate from the FAA.

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United States v. Windsor

133 S. Ct. 2675 (2013)

- Not an employment case, but has a number of implications on the practice area.
- **Speyer** and **Windsor**, a **same-sex couple** from New York, married in Canada in 2007.
- New York considered marriage valid.
- Speyer died in 2009 in New York and left substantial estate to Windsor.
- Windsor did not qualify for **marital exemption** under federal estate tax because Defense of Marriage Act (DOMA) defined marriage as a "union between one man and one woman as husband and wife."
- District Court and 5th Circuit determined DOMA's definition violates the Fifth Amendment (due process and equal protection).

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United States v. Windsor

133 S. Ct. 2675 (2013)

Supreme Court affirmed; DOMA's definition of marriage is unconstitutional.

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates ***basic due process*** *and* ***equal protection*** *principles applicable to the Federal Government.*

DOMA is also unconstitutional as a ***deprivation of the liberty*** *of the person protected by the Fifth Amendment of the Constitution.*

But see J. Scalia's stinging dissent. There was no ***case or controversy****. Majority was simply "****hungry****" to give its opinion where* ***both litigants agreed*** that the ***lower court should be affirmed.***

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United States v. Windsor

133 S. Ct. 2675 (2013)

How does Windsor affect employers?

- The **EEOC to focus** on "**coverage** of **lesbian, gay, bisexual** and **transgender** individuals under Title VII's **sex discrimination** provisions, as they may apply." *EEOC Strategic Enforcement Plan*, December 18, 2012, available at http://www.eeoc.gov/eeoc/plan/sep.cfm.
- Family & Medical Leave Act: "**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**." U.S. Dep't of Labor Fact Sheet, August 2013, available at http://www.dol.gov/whd/regs/compliance/whdfs28f.htm.
- Coverage for spouses under benefit plans subject to ERISA may be impacted as well.

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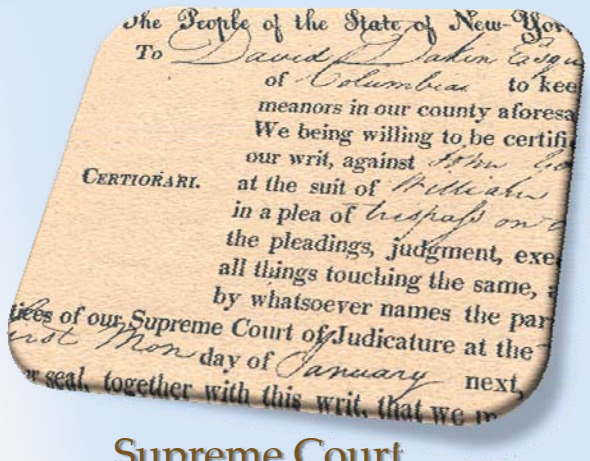

Supreme Court 2013-2014 Term

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Levin v. Madigan

692 F.3d 607 (7th Cir. 2012) *cert. granted,* 133 S. Ct. 1600 (U.S. 2013)

- **60 year-old attorney** in "OIAG" brought ***age discrimination*** claim against ***state*** and ***numerous individuals*** under the *ADEA* and *§ 1983*.
- The 4th, 5th, 1st, 9th, 10th and D.C. circuits have held that state employees cannot seek relief for age discrimination under § 1983, because the ADEA's ***comprehensive provisions*** provide the ***exclusive remedy*** for such claims.
- The 7th Circuit disagreed, relying on S. Ct.'s *Fitzgerald v. Barnstable Sch. Comm.* and *Kimel v. Fla. Bd. of Regents*.
- ***Fitzgerald*** held: § 1983 **constitutional gender discrimination** claims were not displaced by Title IX. ***Kimel*** held: Congress had not abrogated state immunity by passing the ADEA; (2) states can discriminate on the basis of age, but only under the deferential *rational basis* test.

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Levin v. Madigan

692 F.3d 607 (7th Cir. 2012) *cert. granted,* 133 S. Ct. 1600 (U.S. 2013)

- Post *Kimel*, **state employees may not sue** the **state** in **federal court** for **money damages** under the ADEA.
- But *Levin* holds that the ADEA does ***not*** preclude § 1983 **constitutional (equal protection) age discrimination claims** against the **state** or **state officials** in their **individual** capacity.
- **Rationale:** (1) ADEA does not regulate **constitutional** rights; (2) ADEA **silent** on on **displacing** § 1983 **constitutional** claims; and (3) § 1983 has ***broader reach***, allows ***suits against individuals*** and allows a ***monetary remedy against the state*** in federal court, albeit at a lower constitutional ***rational basis*** standard.

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Levin v. Madigan

UPDATE

Oral argument was held on **Monday, October 7**. Justices expressed skepticism – and dissatisfaction with both parties – as to whether the main issue was properly before them. 7th Circuit ruled using "**pendant appellate jurisdiction**." There is some debate as to what extent courts entertaining interlocutory appeals may use such jurisdiction to reach and resolve issues that are not themselves immediately appealable.

Several Justices openly suggested that the case should simply be dismissed or sent back to lower courts to clean up the mess.

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Sandifer v. U.S. Steel Corp.

678 F.3d 590 (7th Cir. 2012) *cert. granted,* 133 S. Ct. 1240 (U.S. 2013)

- Section 203(o) of the FLSA **excludes** from the **definition** of **hours worked** the time spent "**changing clothes** or **washing** at the beginning or end of each workday" that is **excluded** "by the **express terms** of or by **custom or practice** under a bona fide collective-bargaining agreement."
- Class employees claim FLSA violations because they were **not paid for time spent donning and doffing flame-retardant work clothing** and **protective gear**. Also raised continuous workday claim for walking time.
- U.S. Steel invoked Section 203(o) as its defense.
- Class employees rebuttal: we are not "changing clothes" –we are putting on "protective equipment."
- 4th, 6th, 10th, and 11th Circuits adopted a broad definition of "clothes," holding that "clothes" includes anything that can be worn including accessories. 9th Circuit disagrees – "clothes" doesn't include "protective gear."
- Supreme Court will resolve circuit split.

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Sandifer v. U.S. Steel Corp.

678 F.3d 590 (7th Cir. 2012) *cert. granted,* 133 S. Ct. 1240 (U.S. 2013)

- There is **another circuit split** on which the court **declined** to grant *certiorari*.
- *Sandifer* holds that donning and doffing clothing excluded by § 203(o) is **not** a **primary duty** as a matter of law and does not trigger the continuous workday rule.
- In *Franklin v. Kellogg, Co.*, the 6th Cir. held that **despite** the time being excluded by § 203(o), donning and doffing clothes at work **constituted a primary duty**, marking the start/end of the workday.
- Sixth Circuit, the **walking** and **waiting** time after donning and before doffing uniforms is compensable per the **continuous workday rule**. Not so in Seventh Circuit.

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Sandifer v. U.S. Steel Corp.

678 F.3d 590 (7th Cir. 2012) *cert. granted,* 133 S. Ct. 1240 (U.S. 2013)

The special protective gear worn by steelworkers.

OF NOTE:

Chief Justice John Roberts may have a particular interest in this case. He was raised in Indiana and his father, the late John Roberts Sr., was an executive with Bethlehem Steel Corp., once the nation's second largest steel producer. Bethlehem filed for bankruptcy in 2001 and was dissolved soon thereafter.

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Noel Canning v. N.L.R.B.

705 F.3d 490 (D.C. Cir. 2013) *cert. granted*, 133 S. Ct. 2861 (U.S. 2013)

- Article II, Section 2 of the U.S. Constitution states: *The President shall have Power to fill up all Vacancies that may happen **during the Recess of the Senate**, by granting Commissions which shall expire at the End of their next Session.*
- On January 4, 2012 President Obama made three recess appointments to the NLRB while the Senate was technically in session, but was operating *pro forma* (*i.e.*, meeting every 3rd day).
- D.C. Circuit: Constitution only authorizes appointments during recesses **between** enumerated sessions of Congress (**inter**session recess) – not recesses **during** a session of Congress (**intra**session recess).
- Further: only those vacancies that **arise during** the **intersession recess** can be filled, and not those merely **existing** during the recess.

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Noel Canning v. N.L.R.B.

705 F.3d 490 (D.C. Cir. 2013) *cert. granted*, 133 S. Ct. 2861 (U.S. 2013)

- NLRB must have **3-member quorum** to issue decisions. *New Process Steel*, 130 S. Ct. 2635 (U.S. 2010).
- Because the President's recess appointments were not valid, the NLRB did not have authority to act.
- Could invalidate some **200 or more decisions** issued by the quorum-less NLRB from January 4, 2012 forward.
- 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.

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Lawson v. FMR, LLC

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

- Plaintiffs, two **mutual fund investment advisors**, blew the whistle on a publicly-traded mutual fund which contracted with their immediate employer **who was not publicly traded**.
- 1st Circuit held that Sarbanes-Oxley's whistleblower protection is **limited to employees of publicly traded companies** and thus excludes employees of a **publicly traded company's privately held subcontractors**.
- If the Supreme Court reverses, and holds that whistleblower protection extends employees of **privately held contractors** the scope of SOX will be **expanded exponentially**.

27

Unite Here Local 355 v. Mulhall

667 F.3d 1211 (11th Cir. 2012), *cert. granted* 133 S. Ct. 2849 (U.S. 2013)

- Limited ***assault*** on ***neutrality agreements***.
- §302 of LMRA makes it illegal for an employer "to pay, lend, or deliver, any money or **thing of value** . . . to any labor organization."
- Mardi Gras Gaming signed a **neutrality agreement** giving Union access to non-public work areas, a list of employees with contact info, and agreed to remain neutral during organizing efforts.
- In **exchange**, Union agreed to financially **support a local gaming ballot initiative** that would benefit MGM – Union spent $100,000!
- Were the things promised by MGM a "thing of value"?
- 11 Circuit: neutrality and other forms of assistance can "become illegal payments if **used as valuable consideration in a scheme to corrupt a union** or to extort a benefit from an employer."
- 3rd and 4th Circuits have upheld neutrality agreements – Supreme Court should resolve circuit split.

28

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).

- Employers must pay FICA taxes on "wages."
- Quality Stores went out of business and terminated all employees – it made over **$1 million in FICA taxes**, on severance payments, but sought a refund.
- Do **severance payments** made as part of an **involuntary separation** qualify as "wages" under FICA?
- 6th Circuit: **severance payments** are **not "wages"** and Quality Stores is owed a tax refund.
- There is a circuit split (Fed. Cir. has ruled otherwise) so Supreme Court decision should provide some clarity.

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RECENT DECISIONS

30

Cardenas-Meade v. Pfizer, Inc.,

510 F. App'x 367 (6th Cir. 2013)

- **Pharmaceutical** sales rep **failed training exam** –developed **short-term situational depression** as a result.
- Was granted a leave, but Pfizer found out she was working for competitor (in violation of Pfizer policy) and fired her.
- Brought disability discrimination and retaliation claims.
- Plaintiff's depression was not a disability under pre-ADAA because evidence showed it was only **"short-term, temporary"**
- **No retaliation** because Pfizer **only fired her after learning** she was **working for a competitor – legitimate nondiscriminatory reason**
- No evidence of pretext.
- Apparently it wasn't self-evident to plaintiff that you should **expect to be fired** for **working for a competitor**.

31

Keith v. County of Oakland

2013 U.S. App. LEXIS 595 (6th Cir. 2013)

- **Deaf applicant** offered **lifeguard** job, but County **rescinded offer** after its **physician** and **risk management firm** advised against it.
- D. Ct.: granted MSJ because even if "more could have been done" in the **interactive process**, Keith could not show that he could perform the essential functions with or without RA.
- 6th Cir.: County did **not** engage in an "**individualized inquiry**" regarding Keith's ability to be a lifeguard – as opposed to relying on "**general assessments**" that "**deaf people cannot be lifeguards**."
- REMANDED to decide whether "this **particular deaf person**" rather than "**deaf people in general**" could perform the **essential functions** of the specific lifeguard position. **Tough case**.

32

White v. Standard Ins. Co.

2013 U.S. App. LEXIS 13368 (6th Cir. 2013)

- **White**, a **customer service rep**, injured her **lower back – medical restriction not to work more than 4 hours per day**.
- White had difficulty even working 4 hours per day for 8 weeks. Finally terminated – sued for ADA discrimination.
- D. Ct. granted MSJ.
- 6th Cir.: Affirmed - **working full-time** is an essential function of this job. White could not perform essential function with an accommodation.
- White's request to continue working part-time—when she had been unable to perform the functions of her position while working part-time for weeks—was **not** a request for a **reasonable accommodation**. **SFI not required to create** a **new part-time position where** none previously existed.

33

Waldo v. Consumers Energy Co.

726 F.3d 802 (6th Cir. Aug. 9, 2013)

- Sexual harassment with bad facts for CEC.
- Defense verdict – new trial on **hostile work environment**.
- Second trial - **$7.9 million** in compensatory and punitive damages - later remitted to the Title VII statutory damages cap of $300,000.
- Main issue on appeal: **excessive attorneys fees** and **costs**?
- Affirmed lead counsel's request for **$400/hour**.
- Affirmed all costs for "**focus groups, mock trials, jury-selection services**, and **mediation** . . . Because such services **conferred** a **benefit on the prevailing party** by helping to **produce a favorable result**."
- Total: **$680,000** in fees and costs . . . but only $300K judgment
- **Dissent:** D. Ct. abused discretion. **"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."**

34

Hale v. ABF Freight Sys.

503 Fed. App'x 323 (6th Cir. 2012)

- **Age discrimination/hostile work environment** case – ABF said Hale was terminated for poor performance. D. Ct. → granted MSJ.
- 6th Cir.: reversed D. Ct. on age claim.
- Supervisor's statements were **direct evidence** of discrimination - **unequivocally** linking Hale's **age** to **decision to terminate**
  - **"He's going to leave here at 62, and I'll see to it." "He's been here long enough and he ought to go on Social Security."**
- Even if there is a **documented performance problem**, a manager can snatch defeat from jaws of victory by unwise prejudicial statements.
- Affirmed SJ on HWE – supervisor **criticism over performance** does **not** amount to hostile, offensive work environment.

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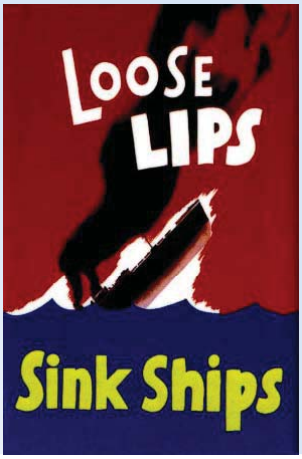
Hale v. ABF Freight Sys.

503 Fed. App'x 323 (6th Cir. 2012)

The old war-time adage is true for today's employers:



36

Blizzard v. Marion Tech. College

698 F.3d 275 (6th Cir. 2012)

- College fired **Blizzard** for **poor job performance**.
- Blizzard sued College for **age discrimination** and **retaliation**.
- D. Ct. → granted summary judgment to College.
- Blizzard must show that age was the "but-for" cause of termination. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).
- Legitimate nondiscriminatory reasons: mistake-prone, absent, and uncooperative.
- Even if immediate supervisor made age-related comments, **Blizzard must show those comments were related to the decisions to terminate**.
- Retaliation claim: **negative employment evaluation** does not constitute a **materially adverse action** . . . unless it impacts wages or advancement
- MSJ Affirmed as to both claims. Blizzard left out in the cold.

37

Marsh v. Assoc. Estates Realty

2013 U.S. App. LEXIS 7177 (6th Cir. 2013)

ADEA Claim – MSJ Affirmed

- Stray Remarks

1) "*Old Rosie.*"
2) "*You're slipping, you're getting old.*"
3) Asked whether Marsh was "*too old to get down there*" when Marsh needed to load paper in a photocopier.

- Made at termination:

4) "*I think you're just getting a little too old for your job.*"

- The stray remarks were **not direct evidence of discrimination** because they were **unrelated** to her **termination** and were not made by the **decision maker**.
- The *remark at termination* made by messenger – *not decisionmaker*.
- Failed to show that reasons for terminating her — her repeated poor performance-testing scores (out of 12 evaluations, Marsh met expectations only once) and policy violations— were pretextual.

38

White v. Baptist Mem'l Health Care

699 F.3d 869 (6th Cir. 2013)

FLSA Collective Claim – MSJ Affirmed – Class Decertified

- **Nurse** claimed she was **not compensated** for **meal breaks.**
- Per policy, if she **worked** during her meal break, she had to **record that time** in an "**exception log"** to be **compensated**.
- Did not record all missed meal breaks.
- Occasionally complained about "not getting a break," but she never told them that she was **not compensated** for the missed breaks.

- HELD: When employer establishes a **reasonable process** for an employee to **report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process.**
- TAKEAWAY: importance of timekeeping-reporting policy and procedures**.**

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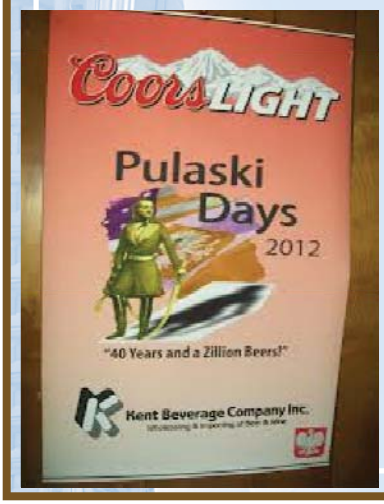
Jaszczyszyn v. Advantage Health

504 Fed. Appx. 440 (6th Cir. 2012)

FMLA Claim – MSJ Affirmed



- "Jasz" took FMLA leave for **back issues** claiming she would be "**completely incapacitated.**"
- While on leave, Jasz attended "**Pulaski Days**," a local heritage festival with a group of friends.
- Jasz posted pictures on her Facebook page at **three** different **Polish Beer Halls** over an eight-hour time span.
- Over that same weekend, Jasz left Advantage **voicemails** indicating that she was **in pain** and would **not be attending work** on Monday morning.

40

Jaszczyszyn v. Advantage Health

504 Fed. Appx. 440 (6th Cir. 2012)

We can only imagine the pictures.

"When asked to explain the discrepancy between her claim of complete incapacitation and her activity in the photos, she did not have a response and was often silent, occasionally saying that **she was in pain at the festival and just was not showing it.**"

Not surprisingly, Plaintiff was terminated for abusing FMLA leave.

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Jaszczyszyn v. Advantage Health

504 Fed. Appx. 440 (6th Cir. 2012)

FMLA Claim – MSJ Affirmed

- Brought FMLA **interference** and **retaliation** claims.
- **Interference**: because Plaintiff was granted her first request for leave — and paid for all of the time she had taken off prior to her termination — she could not sustain her interference claim.
- **Retaliation**: Company rightfully considered workplace FMLA fraud to be a serious issue, and its termination of Jasz because of her alleged dishonesty constituted a non-retaliatory basis for her discharge. No pretext evidence.

Takeaway:

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Kinds v. Ohio Bell Telephone Co.

724 F.3d 648 (6th Cir. 2013)

FMLA Interference Claim – MSJ Affirmed

- Kinds took a **nine-week** leave and applied for short-term disability (STD) benefits
- Portion of Kinds' STD claim was granted by third-party admin, but **first three weeks** were **denied**. Ohio Bell's leave policy required her to submit FMLA medical certification for the portion of leave in which she was not granted short-term disability benefits.
- Because Kinds failed to provide the requisite forms in a timely manner, Ohio Bell terminated her.

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Kinds v. Ohio Bell Telephone Co.

724 F.3d 648 (6th Cir. 2013)

- Kinds sued for FMLA **interference** solely on the alleged **failure of Ohio Bell** to **timely request medical certification**.
- The 6th Circuit denied her claim because Ohio Bell "*was not required [by FMLA] to promptly exercise its right to request a medical certification when Kinds first gave notice of her need for leave.*"
- Ohio Bell had "**reason to question** the **appropriateness of her leave** after [the third-party admin] denied short-term disability benefits for the full period requested by Kinds."
- TAKEAWAY: FMLA permits an employer to request medical certification — even **after** the requisite regulatory five-business day period following employee's notification— if it suspects that the reason for an employee's leave or its duration may not be appropriate. Avoid the issue by **always** asking for the certification at beginning of FMLA-qualifying leave.

44

Diaz v. Mich. Dept. Corrections

703 F.3d 956 (6th Cir. 2013)

FMLA self-care Claim

- Federal lawsuit for **for money damages** against **state** under FMLA self-care provisions barred by **doctrine of sovereign immunity**.
- FMLA: plain language of FMLA's **remedial provisions** shows Congress **intended to excluded other remedies**, thus a §1983 suit to enforce FMLA **money damages** was precluded.
- However, claim for **reinstatement** was an **equitable claim**, prospective in nature, appropriate for an *Ex Parte Young* action, so it was appropriate for D. Ct. to consider reinstatement claim in suit against **state officials** in **official capacity**.

45

EEOC v. Peoplemark, Inc.

2013 U.S. App. LEXIS 20408 (6th Cir. 2013)

- **Temp service employer** asked all **applicants** whether they had a **felony record** and conducted an **independent investigation** into the criminal records of all applicants.
- Scott, an African American with a felony conviction, submitted an application and was not referred for employment. She filed a charge of discrimination with the EEOC.
- The EEOC filed suit on behalf of Scott and a class of similarly situated persons alleging that Peoplemark had violated Title VII because its alleged "**companywide policy**" of rejecting felon applicants had a **disparate impact** on **African Americans**.
- A review of more than 18,000 documents showed that Peoplemark had referred felons to job opportunities.

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EEOC v. Peoplemark, Inc.

2013 U.S. App. LEXIS 20408 (6th Cir. 2013)

- Additional discovery revealed that there was **no company policy** to exclude felons and the case was dismissed.
- The district court awarded Peoplemark **$751,942.48** in **fees and costs**, including attorney's fees from October 1, 2009. The award also included Peoplemark's expert fees (exceeding $500,000).

  "It was certainly unreasonable to continue this burdensome litigation" after October 1 because the Commission should have known that the claim was groundless by that date . . . it had over a month to review document discovery to find the phantom policy.

- The Sixth Circuit affirmed the award.

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Tennessee Court of Appeals

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Ferguson v. MTSU

2013 Tenn. App. LEXIS 221 (Tenn. Ct. App. 2013)

MIDDLE TENNESSEE STATE UNIVERSITY

- **Ferguson** claimed supervisor **Byrd** was assigning him "work outside medical restrictions."
- Filed EEOC charge against MTSU for Byrd's alleged **race/national origin discrimination** (Japanese ancestry) and **retaliation**.
- Ferguson sued MTSU for race/national origin discrimination and retaliation.
- Jury awarded **$3 million** in compensatory damages on **retaliation** claim.
- Issue on appeal: knowledge requirement – did Byrd know about the EEOC charge and lawsuit?
- NO - Byrd alone caused the adverse action. No evidence Byrd had **knowledge of protected activity**, even though other members of the administration did.
- Court of Appeals: **general corporate knowledge is not enough; plaintiff must show that the decisionmaker, the one who took the adverse action, had knowledge of the protected activity at the time of the adverse action**

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- Huge verdict vacated – case dismissed

Sneed v. The City of Red Bank

2013 Tenn. App. LEXIS 426 (Tenn. Ct. App. 2013)

- City of Red Bank fired Police Chief Sneed. He sued in chancery court under THRA (age) and TPPA (retaliatory discharge).
- Red Bank moved to transfer suit to circuit court and strike jury demand pursuant to the GTLA.
- Ct. of Appeals held: GTLA protections apply to THRA and TPPA suits against municipalities.
- Result: Case transferred to circuit court to be **heard non-jury**.

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