CHAPTER 21

Employment Law

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§ 21.1.1 Burden of Proof / Evidentiary Standards

***Audette v. Town of Plymouth, Mass., et al.*, 858 F.3d 13 (1st Cir. (Mass.) 2017).** Due to a work injury, Audette, a patrol officer, performed station duties instead of patrol duties. During her light-duty employment, the police department placed another patrol officer in a data entry position for his light duty. After the other officer completed his duties, the police department placed him as a station officer until he returned to patrol duty. The police department never appointed another officer to the data entry project for light duty. Shortly thereafter, Plaintiff requested to transfer to the data-entry position as a reasonable accommodation. The police department refused. Plaintiff filed failure to accommodate claims against the police department under the Americans with Disabilities Act (ADA) and state law for not assigning her to the data-entry position. The district court granted summary judgment for the police department because no genuine issue of material fact existed that she was not a qualified individual with a disability as she could not perform the requirements of a patrol officer. The First Circuit affirmed, but on different bases. When a person requests a transfer or complete reassignment of duties, the inquiry is whether they can fulfill the essential function of the desired, vacant position—not the original position. Additionally, the employer does not have to create a job, nor reestablish one that one no longer exists. Because the desired position was temporary, not vacant, and the police department already eliminated the position before Plaintiff requested the transfer, the appellate court affirmed summary judgment as Audette could not show any vacancies, which was her burden.

***Cherkaoui v. City of Quincy*, 877 F.3d 14 (1st Cir. (Mass.) 2017).** On January 9, 2010, Cherkaoui filed a discrimination charge with the EEOC against the City of Quincy (the City) and did not return to work for the academic year. Cherkaoui amended her charge multiple times over the next three years to include claims for disability discrimination, continuing discrimination and retaliation, and constructive discharge. On December 11, 2013, the EEOC issued Cherkaoui a right to sue letter. Cherkaoui filed a complaint with the district court, which she amended on June 27, 2014, alleging religion and disability discrimination, retaliation, and constructive discharge. The City moved for summary judgment, and the district court granted summary judgment for the City on all claims. Cherkaoui timely appealed. The First Circuit started with the discrimination claims. Although it was questionable whether Cherkaoui submitted sufficient evidence of an adverse action to sustain a prima facie case, the court held that her discrimination claims failed because she could not show by a preponderance of the evidence that the City's legitimate, nondiscriminatory reasons for any adverse action were pretextual. The City showed that any adverse action was due to her excessive tardiness, even after providing her with more time, and it presented evidence that it disciplined other employees for tardiness. The City also showed that adding a science component to her ELL class resulted directly from losing their science-content ELL teacher due to budgetary constraints. And the City showed the denial of some of her accommodation requests were nondiscriminatory, including the infeasibility of 24 hour notice, her transfer transfer request being outside the contract window, and there being no other vacancies available. The court found Cherkaoui did not point to any specific facts or evidence in the record demonstrating pretext and denied the discrimination claims. Regarding Cherkaoui's retaliation claims, the court assumed that the above adverse employment actions applied. However, most actions did not occur within the three- to four-month window of any alleged protected activity. As the City's IME request was the only one within the window, the City provided, as a nondiscriminatory reason, that it could ask for this information under the union contract and was merely exercising its right. The court held summary judgment was appropriate for her retaliation claims. Turning to the constructive discharge claims, the court held Cherkaoui's working conditions had not reached a level of unbearableness where a reasonable person would have resigned, even though she encountered several uncomfortable situations within her work place. The First Circuit affirmed the district court's ruling.

***Works v. Berryhill*, 686 F. App'x 192 (4th Cir. (Md.) 2017) (unpublished).** The plaintiff suffered from seizure disorder. She was unemployed for approximately ten years and received benefits from the Social Security Administration (SSA) during that time. SSA later hired her. One of her main responsibilities was using computers on the SSA site. While employed, she suffered two seizures and received all requested medical leave. In the middle of her probationary employment, she received negative reviews. Shortly after the review, she suffered another seizure and SSA terminated her within the same month. The stated reason for termination was her failure to complete assignments, which SSA attributed

to time spent doing personal tasks and socializing in the office, and not being present in the office. The plaintiff sued SSA for (1) disability discrimination; (2) failure to provide reasonable accommodations; and (3) retaliation for taking disability leave. The district court granted summary judgment in favor of SSA, concluding that the plaintiff's excessive absenteeism precluded her from demonstrating that she could perform the essential functions of the position. The Fourth Circuit affirmed, concluding that even though the plaintiff's seizure disorder was a "disability" within the meaning of the Rehabilitation Act, she lacked the "skills necessary" for the position and could not perform at least one essential function of her job, being present at work.

§ 21.1.2 Defining Disability

***Makinen v. City of New York*, 2018 WL 546409 (2d Cir. (N.Y.) Jan. 25, 2018) (unpublished).** Plaintiffs were New York City Police officers who were referred by their employer to an outpatient alcohol abuse treatment center. Plaintiffs filed suit in district court, alleging that they were not alcoholics and defendants thus had discriminated against them in violation of the New York City Human Rights Law (NYCHRL). After a trial, the jury returned a verdict in favor of plaintiffs. Defendants moved for a new trial, arguing that the jury had not been properly instructed that alcoholics are only disabled within the meaning of the NYCHRL if they are recovered and free from abuse, and the employer could not have unlawfully discriminated against plaintiffs based on a perception that they were *unrecovered* alcoholics. The district court denied the motion, and defendants appealed to the Second Circuit. In *Makinen v. City of New York*, 857 F.3d 491 (2d Cir. (N.Y.) 2017), the court found that plaintiffs could not bring disability discrimination claims under the NYCHRL based solely on a perception of untreated alcoholism. According to the Second Circuit, the NYCHRL only protects alcoholics if they have sought treatment and are not presently abusing alcohol, to ensure they have a fair chance at recovery. The Second Circuit subsequently upheld the dismissal of plaintiffs' federal discrimination claims under the Fair Labor Standards Act (FLSA) and Americans with Disabilities Act (ADA).

***Gavurnik v. Home Props., L.P.*, 227 F. Supp. 3d 410 (E.D. Pa. 2017).** Plaintiff worked as a service technician for defendant and suffered from vascular and musculoskeletal conditions, including Raynaud's Syndrome, rheumatoid arthritis, and bunions that affected his ability to walk and stand. However, plaintiff maintained that he could walk "as a normal person can." He requested an accommodation of wearing podiatric footwear, which was granted, and being exempted from mandatory overtime, which was denied. Beginning in April 2014, plaintiff received several disciplinary actions for various performance issues and was fired in September 2014. He subsequently filed suit, alleging violations of the Age Discriminaton in Employment Act (ADEA) and ADA. The district court found that plaintiff failed to establish that the proffered reasons for his termination were pretextual for purposes of his ADEA claim

and entered summary judgment for defendant. In analyzing plaintiff's ADA claim, the court examined his statement that he could walk "as a normal person can" and his satisfactory performance evaluations, and determined that he was not disabled under the ADA. The court also found that he was not regarded as disabled, because plaintiff could not show that defendant's employees made remarks about his condition, and defendant's mere awareness that he had been hospitalized for chest pain was insufficient.

***Hustvet v. Allina Health Sys.*, 2017 U.S. Dist. LEXIS 134455 (D. Minn. 2017).** Plaintiff worked as an Independent Living Specialist at defendant Allina Health System, a rehabilitation center supporting elderly individuals. Pursuant to its immunization policy, defendant requested that plaintiff receive a Mumps, Measles, Rubella vaccine for purposes of developing immunity to rubella. When she declined—claiming she had "many allergies and chemical sensitivities" which made submitting to an immunization a risk to her health—defendant terminated her employment for failure to comply with its immunization policy. Plaintiff filed suit, alleging disability discrimination in violation of the ADA. The district court held that plaintiff could not establish a *prima facie* case of disability discrimination because she had not generated a genuine issue of material fact as to whether she suffered a substantial impairment to any of her major life activities. Specifically, plaintiff failed to present evidence that her allergies and chemical sensitivities were tied to a genuine immune system disability or seizure disorder, the only disabilities that she advanced as justifications for why it was not safe for her to submit to the requested immunization.

§ 21.1.3 Reasonable Accommodations

***Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437 (5th Cir. (La.) 2017).** Plaintiff sued his employer and its client under the Americans with Disabilities Act (ADA), alleging his coworkers at the client's facility harassed him because of his stutter, which exacerbated his anxiety. The district court granted summary judgment to defendants on the failure to accommodate and hostile work environment claims, and plaintiff appealed. The Fifth Circuit observed that "a jury could find that the harassment [plaintiff] experienced . . . was sufficiently severe or pervasive to alter the terms and conditions of his employment." However, the court affirmed the dismissal of his claims, holding that he should have followed the rules in his employee handbook and complained to human resources *before* filing charges with the EEOC. According to plaintiff's EEOC complaint, coworkers referred to him as "bush hog" (a lawnmower brand reference) and mocked his stutter to his face. He allegedly complained to his supervisor about excessive noise in the office and asked to be moved to a quiet area "so [his] nerves would not affect [his] stuttering," but this request was denied. Eventually, work-related stress caused him to have a panic attack while driving; he crashed his car, was injured in the accident, and has not returned to work. The district court dismissed the accommodation claim because plaintiff did not (1) exhaust his administrative remedies and (2) show his employer knew about his disability. The Fifth Circuit rejected the first finding but agreed that

plaintiff's noise complaints were not sufficient to give the companies notice of his anxiety. Similarly, the district court dismissed the hostile work environment claim because plaintiff did not (1) show the harassment affected his employment or that the companies knew about his treatment, and (2) take prompt action to fix his treatment. The Fifth Circuit again rejected the first finding but agreed that plaintiff "unreasonably failed to take advantage" of internal "corrective opportunities" provided by the companies.

***Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384 (6th Cir. (Tenn.) 2017).** Plaintiff, a former customer service representative, brought claims under the ADA against AT&T following her termination. While employed, the plaintiff had accrued numerous unexcused absences but had also obtained several periods of disability leave for her depression and anxiety. Additionally, she had requested—but was not provided—flexible scheduling and intermittent breaks. Shortly before her termination, the plaintiff had stopped coming to work and her request for short-term disability leave was denied. AT&T discharged her while her appeal of that denial was pending. The Sixth Circuit acknowledged that the plaintiff had requested accommodations in the form of a flexible start time and modified breaks, but determined the plaintiff had failed to show such accommodations would have enabled her to perform the essential functions of her job. The court also held that the plaintiff's request for additional leave was not reasonable, given the plaintiff's history of taking several lengthy leaves, her condition not improving during those leaves, and her repeated failure to return on the dates her treatment providers had previously estimated. The timing of the plaintiff's discharge—while an appeal on her leave request was pending—did not create evidence of retaliation because she had accrued enough absences to justify discharge even if the leave request were granted. The Sixth Circuit concluded that the record evidence indicated absenteeism was the actual reason for her termination and affirmed summary judgment.

***Severson v. Heartland Woodcraft Inc.*, 872 F.3d 476 (7th Cir. (Wis.) 2017).** Plaintiff alleged that defendant, his former employer, violated the ADA by failing to provide him with a two- to three-month leave of absence after his leave allotment under the Family Medical Leave Act (FMLA) expired. The district court entered summary judgment in defendant's favor, and plaintiff appealed. The Seventh Circuit agreed with the district court, holding that the ADA only requires companies to "reasonably accommodate" workers when doing so would allow them to work. Plaintiff took FMLA leave in June 2013 after exacerbating a nagging back condition. After several months of no improvement, he scheduled back surgery that coincided with the final day of his leave. He asked defendant to extend his leave to accommodate a two- to three-month recovery time. Instead, defendant fired him, saying he could reapply for his position once healthy. Upon being cleared to work in December, plaintiff sued. In a unanimous opinion, the court found that "[a]n employee who needs long-term medical leave *cannot* work and thus is not a 'qualified individual' under the ADA." The ADA defines a "qualified individual" as a disabled person who, "with or without reasonable accommodation, can perform the

essential functions of the employment position." Relying on its reasoning in *Byrne v. Avon Prods., Inc*., 328 F.3d 379 (7th Cir. 2003), the court concluded that an employer need not excuse a disabled employee's long-term inability to perform these "essential functions." Consequently, the court took an aggressive, bright-line approach towards the question of when, in the context of leave, a disabled employee is no longer a "qualified individual": while a few days or even a few weeks of non-FMLA time to deal with an intermittent condition might be acceptable, a "multi-month leave of absence" is disqualifying and unreasonable under the ADA. The court also rejected the EEOC's "untenable" argument that the length of the leave does not matter, as that would create "an open-ended extension" of the FMLA's 12 week leave period. Unlike the FMLA, which recognizes that "employees will sometimes be unable to perform their job duties due to a serious health condition . . . the ADA applies only to those who can do the job."

***Alamillo v. BNSF Ry. Co.*, 869 F.3d 916 (9th Cir. (Cal.) 2017).** Plaintiff railroad employee brought action against defendant railroad, alleging discrimination in violation of California's Fair Employment Housing Act (FEHA). Plaintiff, who worked as a locomotive engineer for defendant, has obstructive sleep apnea (OSA). Plaintiff was terminated after failing to show up for work, despite defendant's multiple alleged attempts to contact him. Plaintiff sued defendant for disability discrimination, failure to accommodate his disability, and failure to engage in an interactive process with him to find a reasonable accommodation for his disability. The Ninth Circuit held that plaintiff's OSA was not a substantial motivating factor in defendant's decision to terminate him, as defendant had not possess knowledge of plaintiff's disability. The court further held that defendant's termination of plaintiff for recurrent absenteeism was not pretext for disability discrimination. While the director of labor relations and the general manager had mentioned plaintiff's OSA as the reason he could not hear the phone one day, which resulted in his being marked absent, plaintiff had history of attendance violations and could have taken steps to ensure he was not late. The court also noted that defendant's decision not to terminate plaintiff for prior misconduct was *not* a reasonable accommodation under FEHA, given that defendant already had switched plaintiff, at his request, to a job with regular hours to accommodate his OSA. "[G]iving an employee a 'second chance' to control his disability in the future" does not qualify as reasonable accommodation under California law.

***Carballo v. Comcast, Inc.*, 690 F. App'x 1006 (9th Cir. (Cal.) 2017).** Plaintiff, a systems technician at defendant cable company, was terminated after requesting an accommodation for his gout. Plaintiff filed one suit against his employer alleging disability discrimination and retaliation in violation of California's Fair Employment and Housing Act (FEHA) and a separate suit against his union alleging breach of duty. The Ninth Circuit upheld the district court's decision, finding that defendant had provided plaintiff with a reasonable accommodation when it permitted him to take days off from work. This allowed plaintiff to perform the essential functions of his job and precluded the need to reassign

him. The court also found that plaintiff failed to request any accommodations other than the one allowing him to take time off, undermining his claim that defendant had failed to engage in the interactive process. The court further observed that there was no evidence plaintiff had engaged in protected activity, as required to support his retaliation claim under FEHA. Defendant terminated plaintiff not for his disability but for continuing to operate an aerial lift after he loosened his leg harness, a safety violation unrelated to his disability.

***Ravel v. Hewlett-Packard Enter., Inc.*, 228 F. Supp. 3d 1086 (E.D. Cal. 2017).** Plaintiff with sciatica alleged that her requested accommodations of working at home or at a closer office were reasonable. She argued that defendant discriminated against her disability, failed to engage in an interactive process, and failed to provide her reasonable accommodations, in violation of the ADA and California's Fair Employment and Housing Act (FEHA). The district court found that plaintiff failed to allege that defendant carried out adverse employment actions towards her and thus did not state claims for disability discrimination or failure to provide reasonable accommodation, Defendant had denied plaintiff's request to work from home, and her disability leave involved a thirty-percent pay reduction. However, since even unpaid leave is considered "reasonable," the court did not view this accommodation as a "materially adverse employment action." The court also found that plaintiff did not state a claim for failure to engage in an interactive process under the ADA but *did* state a claim for failure to engage in an interactive process under FEHA. In addition, under FEHA, she stated claims for failure to prevent discrimination and harassment and for the intentional infliction of emotional distress. Thus, the court granted in part and denied in part defendant's motion to dismiss plaintiff's causes of action.

***McGill v. McDonald*, 237 F. Supp. 3d 1049 (D. Nev. 2017).** Plaintiff, a homosexual African American respiratory therapist, requested her defendant employer, the Department of Veteran Affairs, to create a new outpatient clinic to accommodate her disability. When defendant refused, plaintiff alleged that (1) she had been subjected to disability discrimination in violation of the Rehabilitation Act, and (2) defendant had retaliated against her for filing complaints about sexual orientation harassment, in violation of Title VII. The district court held that Plaintiff's request regarding the creation of a new outpatient clinic, to allow her to continue her duties at same pay rate and apart from other therapists who allegedly harassed her based on her sexual orientation, was not a reasonable accommodation request. Defendant could not allow plaintiff to carry out her duties outside the primary care facility. The court found that defendant had engaged in an interactive process with plaintiff, meeting with her to discuss the proposed accommodation. The court determined that defendant's denial of this proposal did not qualify as an "adverse action" and thus did not support her discrimination and retaliation claims under the Rehabilitation Act. The court granted defendant's motion for summary judgment.

***Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299 (10th Cir. (Kan.) 2017).** A diabetic employee, plaintiff brought disability claims against defendant, her former employer, alleging disability discrimination and failure to accommodate her disability in violation of the ADA. Because plaintiff had Type 1 diabetes and was insulin-dependent, she monitored her blood sugar levels throughout the day. She told her managers about her condition and that she may, at times, need to eat or drink something to correct her blood sugar levels. Throughout her employment, defendant permitted her to take breaks to eat or drink to raise her blood sugar levels as needed. In January 2010, plaintiff mistakenly left phone service on a customer's account after the customer cancelled service. This "cramming violation" violated defendant's Code of Business Conduct and was a terminable offense. Plaintiff was suspended and placed on a Last Chance Agreement. Two months later, she suffered a severe drop in blood sugar at work. Despite eating food and drinking juice, she could not stabilize her blood sugar. She subsequently suffered disorientation and confusion and was "unable to communicate with anyone." Plaintiff noticed that she was locked out of her computer and contacted her supervisor, who responded that another manager had been monitoring her calls and saw her hang up on at least two customers. Defendant terminated her employment for hanging up on two customers, a violation of defendant's Code of Business Conduct and the Last Chance Agreement. The Tenth Circuit affirmed the district court's grant of summary judgment, holding that the ADA does not require an employer to "excuse or overlook [plaintiff's] misconduct or reduce her discipline, since her conduct was related to her disability."

***EEOC v. BNSF Ry. Co.*, 853 F.3d 1150 (10th Cir. (Kan.) 2017).** Plaintiff, Kent Duty, applied to work as a locomotive electrician for defendant railroad company, Burlington Northern Santa Fe Railway Company (BNSF). Plaintiff had an impairment limiting his grip strength in one hand, and fearing that he would fall from ladders, defendant revoked his offer for employment. Plaintiff, along with the EEOC, sued defendant for employment discrimination under the ADA. The district court found that plaintiff was not disabled under the ADA and granted summary judgment to defendant. On appeal, plaintiff asserted that defendant mistakenly believed his impairment substantially limited him in "the major life activity of working." Defendant responded that it only considered plaintiff for the single job he applied for. The Tenth Circuit found that plaintiff could not show that defendant considered him unable to perform jobs other than the locomotive-electrician job at issue. Additionally, the court held that the medical exam given to him was a post-offer, pre-employment medical exam covered by 42 U.S.C. § 12112(d)(3). A (d)(3) claim requires the plaintiff to show that he is disabled, and because plaintiff failed to do so his claim failed.

***Henson v. AmeriGas Propane, Inc.*, 681 F. App'x 697 (10th Cir. (Okla.) 2017).** Plaintiff, Isaac Henson, worked as a delivery driver for defendant AmeriGas. While working, he injured the middle finger on his right hand. Following the accident, defendant tried to accommodate plaintiff's injury by assigning him light work duties as needed. However, his work performance began

deteriorating, including a number of reported safety violations and a suspension for insubordination. Plaintiff filed a complaint with the EEOC, asserting claims under the ADA and Oklahoma Workers' Compensation Act (OWCA). The district court granted summary judgment in favor of defendant, finding that defendant had provided a legitimate, nondiscriminatory reason for plaintiff's discharge which plaintiff could not prove was pretextual. Plaintiff appealed, basing his pretext argument on (1) temporal proximity (a month passed between finding out he would need surgery and his termination) and (2) the veracity of the individual infractions identified in his disciplinary reports. The Tenth Circuit did not find either argument persuasive and affirmed the district court. The court stated that that any suspiciousness in timing was belied by plaintiff's checkered work history. The manager's perception of an employee's performance is what is relevant, *not* the employee's subjective evaluation of his own performance.

***Punt v. Kelly Servs.*, 862 F.3d 1040 (10th Cir. (Colo.) 2017).** Defendant GE Controls Solutions entered into an agreement with defendant Kelly Services, a company that provides temporary-staffing services. Under the agreement, GE could ask Kelly to remove any of its temporary employees from their assignment at GE, for any reason. Plaintiff Kristin Punt, an at-will employee of Kelly, was assigned to a receptionist position at GE. While working in this position, she was diagnosed with breast cancer and told various GE and Kelly employees about her diagnosis. Following her diagnosis, plaintiff missed work and was late for work on a variety of occasions. While some absences or late arrivals were related to her medical condition, others were unexplained or not corroborated with necessary documentation from physicians. As a result of this, GE ended her temporary assignment, stating that being present at the front desk was an essential job function of a receptionist. Plaintiff filed suit against both GE and Kelly, alleging disability discrimination under the ADA and genetic information discrimination under the Genetic Information Nondiscrimination Act (GINA). The district court granted summary judgment in favor of defendants. On appeal, the Tenth Circuit started and ended its analysis with the third element of plaintiff's prima facie case: whether "she requested a plausibly reasonable accommodation." The court found she did not request a reasonably plausible accommodation, stating that an employee's request to be relieved from an essential function of her position is not, as a matter of law, a reasonable or even plausible accommodation. Further, plaintiff did not inform defendants about the expected duration of her impairment and was vague about how much time she was going to miss. The Tenth Circuit also affirmed summary judgment of plaintiff's GINA claim, stating that she did not attempt to present any evidence to support her claim or suggest defendants' legitimate nondiscriminatory reason was pretext for her termination.

***EEOC v. St. Joseph's Hosp*., 842 F.3d 1333 (11th Cir. (Fla.) 2016).** A disabled nurse sought a reasonable accommodation in the form of a reassignment to another unit. While the nurse was given the opportunity to apply for other jobs, she was required to compete with other internal applicants for the open positions. After awarding the open positions to other applications, her

employment was terminated. The Eleventh Circuit held that the ADA does not require reassignment without competition for, or preferential treatment of, the disabled. The court reasoned that because the ADA provides that accommodation "may" be reasonable, accommodation will be reasonable in some circumstances but not in others. Relying upon the Supreme Court's holding in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the court held that requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable "in the run of cases." "Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance." The court also found that the ADA was never intended to turn nondiscrimination into discrimination against the non-disabled.

§ 21.1.4 Regarded as Disabled

***Markett v. Five Guys Enters., LLC*, 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. July 21, 2017).** Defendant owns and operates burger restaurants throughout the country and also operates a website that enables customers to make online orders for delivery and pickup. Plaintiff, a legally blind female, accessed the website to order a cheeseburger with specific toppings. However, she could not complete her order because being blind made it impossible to navigate the website. Plaintiff sued defendant, alleging that the website violated Title III of the Americans with Disabilities Act (ADA) and her rights thereunder. Title III prohibits discrimination based on a disability in places of public accommodation. Defendant moved to dismiss her complaint, arguing that Title III governs access to goods and services available at "physical" locations, only. The district court disagreed, citing language from the ADA and its corresponding regulations defining discrimination as "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility . . . or accommodation . . . or would result in an undue burden." 42 U.S.C. 1282(b)(2)(A)(iii); 28 C.F.R. § 36.303. In her memorandum of law, Plaintiff had identified steps defendant could have taken to ensure that blind individuals had access to the same online benefits afforded to the general population. The court denied defendant's motion to dismiss and determined that plaintiff had stated a cognizable claim for discrimination under Title III.

§ 21.1.5 Interactive Process

***Ortiz-Martinez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599 (1st Cir. (P.R.) 2017).** After returning to work from a work injury, plaintiff provided her manager with a disability diagnosis note. However, the note did not indicate what specific accommodations were necessary to assist her, even after her employer, Fresenius Health Partners, PR, LLC, requested a revision of the note to provide specific recommendations. Defendant attempted engage in the accommodation

process with plaintiff, but she alleged that she never received defendant's calls or correspondence. Despite defendant's attempts to contact her, plaintiff filed a charge with the EEOC and the Department of Labor on or around July 2013. After meeting with both defendant and the union representative, defendant agreed to directly contact the doctor, who never responded. Again, defendant attempted to contact plaintiff to engage in the interactive process, but she never responded to these requests. Plaintiff sued defendant around August 6, 2013, for failure to accommodate. The district court dismissed plaintiff's claims for her failure to establish that she was disabled and that defendant did not reasonably accommodate her. Plaintiff appealed, and the First Circuit held that if an employee failed to cooperate in the interactive process, the employer cannot be held liable for a failure to accommodate. Sufficient evidence showed that defendant continually engaged in the interactive process in good faith, and plaintiff's failure "to make reasonable efforts to help [defendant] determine what specific accommodations are necessary" caused the breakdown in the interactive process. The court affirmed the district court's dismissal of plaintiff's disability claims as she was responsible for the breakdown in communications.

***McGlone v. Phila. Gas Works*, 2017 WL 659926 (E.D. Pa. Jan. 19, 2017).** McGlone, a longtime Philadelphia Gas Works (PGW) employee, worked as a Service Specialist in the Field Services Department (FSD) and was required to perform service on utility appliances. On January 19, 2012, McGlone suffered a torn medial meniscus on the job. He did not work following the injury until May 21, 2012, at which time his physician released him to return to work with certain medical restrictions. Upon his return, McGlone was assigned to light-duty work, and subsequently was reassigned to the FSD but was told to perform only training duties. McGlone received clearance to perform more physical movements over the course of the next several months, but then underwent a procedure for a back injury. Shortly after retiring on September 12, 2012, McGlone submitted an application for Social Security Disability Benefits that listed injuries including the meniscus tear. The Social Security Administration concluded that he was disabled as of January 9, 2012. On June 15, 2015, McGlone filed a complaint against PGW alleging, *inter alia*, disability discrimination under the ADA, and PGW moved for summary judgment. The court found that there was no dispute that PGW engaged in a good-faith interactive process because McGlone was unable to show he complained about or indicated disapproval with any of his modified light-duty assignments. Accordingly, it entered summary judgment on his ADA claim.

***Cash v. Lockheed Martin Corp.*, 684 F. App'x 755 (10th Cir. (N.M.) 2017).** A former employee, Mr. Cash, who wore hearing aids to compensate for long-term hearing loss, brought an action against his former employer, alleging, among other claims, discrimination in violation of Americans with Disabilities Act (ADA). The Tenth Circuit affirmed summary judgment for the employer on all claims, including the ADA claims. The employee had recently received a written warning for performance issues, to which end Cash offered a note from his audiologist, consisting of strategies for successful communication

with Cash and anyone with hearing loss. Human resources and Cash's supervisor held a meeting with all employees to discuss the strategies. Cash's colleagues, while receptive to the strategies, generally believed Cash's "hearing was selective." Cash subsequently received a second written warning stating his performance remained unsatisfactory and was placed on a Performance Improvement Plan (PIP), which authorized termination at any time for not meeting the PIP's expectations. During the PIP period, Cash allegedly found evidence that co-workers had inflated their work-order numbers. He complained to his supervisor, but refused to provide specific details. He also subsequently complained that co-workers were yelling in his ears and mocking him. Several witnesses, however, stated these allegations were false. At the end of the PIP period, the company terminated Cash's employment.

On his failure to accommodate claim, the district court noted that Cash had made only one accommodation request via the audiologist's letter, and the employer complied with her recommendations by convening a meeting of Cash's coworkers and informing them of the listed strategies to facilitate communications with hearing impaired individuals. As for the hostile work environment issue, the court concluded that any harassment Cash endured was not sufficiently severe or pervasive to be actionable. Finally, regarding discriminatory discharge, the court found that the employer's decision to fire Cash for substandard performance was not a pretext for discrimination. The Tenth Circuit affirmed the district court's decision on all accounts. Cash did not show pretext by pointing to his co-workers allegedly inflating their work-order numbers. The work inflation was insufficient to show that the employer's explanation for terminating Cash's employment was unworthy of credibility.

§ 21.1.6 Miscellaneous

***Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 U.S. Dist. LEXIS 124960 (D. Conn. Aug. 8, 2017).** Plaintiff, a recreational therapist, accepted an offer made by defendant to fill its position as director of recreational therapy. During her initial screening, plaintiff disclosed that she used a synthetic form of medical marijuana to treat her post-traumatic stress disorder and was also considered a "qualified user" under Connecticut's Palliative Use of Marijuana Act (PUMA). PUMA provides that employers cannot refuse to hire, fire or penalize employees on the sole basis that they are "qualified users" of marijuana. Despite that, plaintiff's job offer was rescinded shortly after she tested positive for marijuana. After plaintiff commenced an action against her employer for violating PUMA, the employer filed a pre-answer motion to dismiss arguing that PUMA was preempted by three federal statutes, including the Americans with Disabilities Act (ADA). Defendant argued that the ADA expressly provides that employers can ban illegal drug use in the workplace and that PUMA protections conflict with federal law. The district court disagreed, determining that the ADA does not entitle employers to take adverse employment actions for drug use outside the workplace. Thus, the ADA language that defendant relied on did not preempt PUMA's anti-discrimination protections. As a result, the court denied plaintiff's

motion to dismiss on federal preemption grounds and sustained her private cause of action brought pursuant to PUMA's anti-discrimination provision.

***Stragapede v. City of Evanston, Ill.*, 865 F.3d 861 (7th Cir. (Ill.) 2017).** Plaintiff, a former city employee, sued the city for allegedly violating his rights under the Americans with Disabilities Act (ADA). Following a jury verdict in favor of plaintiff, the district court denied the city's motion for new trial, judgment as matter of law, and remittitur, and the city appealed. After suffering a traumatic brain injury in 2009, plaintiff claimed the city illegally fired him even though his doctor had him cleared to return to work and he had passed the city's three day work trial. Conversely, the city argued that the lingering effects from plaintiff's injury rendered him a "direct threat" to the health and safety of himself and others. After his return, he began exhibiting problematic behaviors; for example, he "spent two hours at a job site installing a meter but was unable to complete the task." The city placed plaintiff back on administrative leave and wrote to his doctor about these incidents. In response, the doctor speculated that plaintiff's brain injury may in fact prevent him from performing the "essential functions" of his job. The city fired plaintiff, and he brought his ADA lawsuit. The Seventh Circuit upheld the jury's $579,000 verdict: $225,000 in damages and $354,000 in backpay with interest, from the date he was fired until the date of judgment. Relying on Supreme Court precedent, the court found that a direct threat defense, a statutory defense to liability, is based solely on "medical or other objective evidence." In this case, such evidence was mixed, so it was up to the jury to weigh the conflicting evidence. While the court took the city at its word that "not just anyone" can do plaintiff's job, "the more focused inquiry is whether [plaintiff] could do it without significant risk to health or safety. It was reasonable for the jury to conclude that he could." The court noted that the doctor "hedged his opinion" about plaintiff's ability to work, as it was based entirely on secondhand information provided by the city. Thus, it "was not irrational" for the jury to give more weight to the doctor's initial, in-person determination that plaintiff was ready to return to work.

***Guenther v. Griffin Constr. Co.*, 846 F.3d 979 (8th Cir. (Ark.) 2017).** Employee Guenther requested and received three weeks' leave for treatment after receiving a prostate cancer diagnosis. The following year, Guenther discovered the cancer had spread and requested another three-week leave for radiation therapy. Griffin Construction fired Guenther and immediately cancelled his insurance policies. Guenther filed a timely charge with the EEOC alleging disability discrimination. Guenther died while his charge was pending. After receiving a right-to-sue letter, his estate sued on his behalf. The district court dismissed the claim, concluding that the claim abated under the Arkansas survival statute. The estate appealed, and the Eighth Circuit reversed. The court held that federal common law does not incorporate state law to determine whether an ADA claim for compensatory damages survives or abates upon the death of the aggrieved party. The court noted that state law should not be incorporated when doing so would frustrate specific objectives of federal programs and when the scheme in question evidences a distinct need for nationwide legal standards. The court

determined that the very nature of ADA claims makes it more likely that the aggrieved party may die before the case is complete, and Congress attempted to create a comprehensive national mandate with the federal government playing a central role in enforcing consistent standards. The court did not express a view on whether claims for punitive damages or claims under any other federal scheme warranted a uniform rule of survivorship.

***Casteel v. City of Crete*, 2017 U.S. Dist. LEXIS 134956 (D. Neb. 2017) (unpublished).** Jay Casteel, a journeyman lineman, advanced claims of disability discrimination and retaliation under the Americans with Disabilities Act (ADA) against his former employer, the City of Crete. Casteel sought compensatory damages as part of his ADA retaliation claim against the City. The district court observed, however, that the applicable statutory provisions provided only for the potential award of *equitable* remedies, including reinstatement and back-pay. Conversely, the district court noted the absence of a textual basis for an award of *legal* remedies, including for compensatory damages. Specifically, in holding that Casteel could not seek compensatory damages, the district court relied on the textual differences in the ADA's provision associated with intentional discrimination (which provides for compensatory damages) and that associated with retaliation (which does not). The district court also relied on Seventh Circuit authority supporting this reading of the ADA. Notably, the district court reached its decision despite several cases, including those from within the Eighth Circuit, in which a jury awarded compensatory damages to a prevailing plaintiff in a retaliation case under the ADA.

§ 21.2 Age Discrimination

§ 21.2.1 Burden of Proof / Evidentiary Issues / Damages

***Boyle v. Penn Dental Med.*, 689 F. App'x 140 (3d Cir. (Pa.) 2017).** Several of plaintiff Boyle's colleagues at Penn Dental raised concerns over her clinical work with Dr. Alisa Kauffman, Penn Dental's Clinical Director, who was responsible for overseeing the quality of care. Kauffman performed a quality assurance audit of Boyle's work and recommended that the Dean of the Penn School of Dental Medicine convene Penn Dental's Quality Committee. Kauffman, the dean, and the assistant dean met with Boyle and asked her to resign, and when she refused, they convened the Quality Committee and suspended her pending review. After reviewing Boyle's patients' charts, the committee agreed that her performance was substandard and recommended a six-month probationary period. During Boyle's suspension, other Penn Dental employees raised additional concerns about the quality of her work. The Quality Committee provided a second report that did not recommend remediation or probation, and Boyle was fired. Boyle filed suit in district court alleging violations, *inter alia*, of the ADEA, and the

court entered summary judgment for defendants. On appeal, the Third Circuit affirmed. It found that Boyle presented no direct evidence of discrimination and her circumstantial evidence failed to establish pretext because her proposed under-40 comparator was not similarly situated; he had been disciplined (but not fired) for productivity issues, not issues related to the quality of his care. Boyle also sought to introduce instances of other dentists over age 40 who were pushed out of Penn Dental, but had no personal knowledge of why they left.

***Welsh v. Fort Bend Indep. Sch. Dist.*, 860 F.3d 762 (5th Cir. (Tex.) 2017).** Plaintiff, a teacher, sued defendant school district for discrimination and retaliation under Title VII and the Age Discrimination in Employment Act (ADEA). The district court granted summary judgment in defendant's favor, finding that res judicata barred all of plaintiff's claims. On appeal, the Fifth Circuit unanimously vacated and remanded the decision, holding that plaintiff's discrimination and retaliation claims are not barred by the ruling of an earlier, since-dismissed lawsuit because they were unready for adjudication during the first case. Plaintiff originally filed a charge of discrimination and retaliation with the EEOC in August 2012. She amended that charge two years later, stating that the discrimination and retaliation were ongoing. The agency provided her with a right-to-sue letter in June 2014, and soon afterwards she brought her first lawsuit in Texas state court. In January 2015, the state court dismissed her state-law claims, agreeing with defendant that they were time-barred by a statute of limitations. Plaintiff responded that same month by filing another charge with the EEOC, alleging discrimination and retaliation for a series of incidents that had occurred from April 2014 to the end of that year. She received another right-to-sue letter from the agency and filed the instant case in federal court in May 2015, alleging violations of Title VII and the ADEA. The Fifth Circuit rejected defendant's argument that plaintiff was required to amend her earlier, state court lawsuit to include claims she asserted in her second lawsuit. "We specifically reject the idea that every time something happens after a lawsuit is filed the plaintiff must immediately amend or risk losing that claim forever. In the employment context, [defendant's] proposed rule would require a plaintiff to repeatedly amend her petition and then stay her initial lawsuit to file charges with the EEOC for conduct that arises during that lawsuit. Such a rule is not feasible where a plaintiff remains employed and is subject to discrimination maturing after the filing date." The court also noted that one of the three requirements for invoking res judicata under Texas law is that "the claims in the second action were raised or could have been raised in the first action." Here, plaintiff was not required to include claims in her first lawsuit that "were not yet mature" at the time she filed the lawsuit. Thus, the only claims in plaintiff's second lawsuit that are barred under res judicata are those that were mature at the time that she filed her Texas state court complaint. The court left it to the district court to assess, on remand, which of plaintiff's claims survive.

***Vaughan v. Anderson Reg'l Med. Ctr.*, 849 F.3d 588 (5th Cir. (Miss.) 2017).** Plaintiff, a nurse, sued her hospital employer under the Age Discrimination in Employment Act (ADEA), alleging retaliatory discharge for raising age

discrimination complaints. The district court dismissed plaintiff's claims for pain and suffering damages and punitive damages; however, noting a divergence of opinion among the circuits, it granted her leave to file an interlocutory appeal on whether the ADEA bars recovery of these damages. Citing *Dean v. American Securities Insurance Co.*, 559 F.2d 1036 (Former 5th Cir. (Ga.) 1977), the Fifth Circuit unanimously upheld the district court's decision. The court rejected plaintiff's argument that *Dean* was rendered inapplicable by a 1977 amendment to the FLSA, which "enlarged the remedies available for ADEA retaliation claims." Rather, the 1977 amendment "incorporated remedial language substantively identical to passages *already provided* in the ADEA" that the Fifth Circuit had interpreted in *Dean*; thus, there was no reason to revisit *Dean*. The Fifth Circuit denied plaintiff's petition for an en banc rehearing, and on October 2, 2017, the Supreme Court denied her petition for writ of certiorari.

***Aulick v. Skybridge Ams., Inc.*, 860 F.3d 613 (8th Cir. (Minn.) 2017).** Aulick was a 61-year-old, at-will, senior director of IT for Skybridge's fulfillment division. Skybridge also has a call center division, with which Aulick did not have experience. An external auditor recommended that Skybridge combine the fulfillment and call center IT departments. Aulick interviewed for the position, as did an external candidate with experience running a fulfillment and call center. Skybridge selected the external candidate. Skybridge stated that it did not select Aulick for the position because it wanted a "new face." Shortly thereafter, Skybridge eliminated Aulick's position. The record conflicted on who made the termination decision. After receiving a right-to-sue letter, Aulick sued alleging, inter alia, that Skybridge discriminated against him based on his age when it failed to promote him and when it terminated him. The district court granted summary judgment in favor of the employer. The Eighth Circuit affirmed, concluding that the "new face" comment was facially and contextually neutral and thus not direct evidence of discrimination. The court also determined that Aulick could not establish that the proffered legitimate, nondiscriminatory reason for terminating Aulick was pretext. Aulick argued that Skybridge's inability to identify the individual making the decision to terminate him constituted pretext. The Eighth Circuit disagreed, as substantial changes in the employer's proffered *reason* for its employment decision supports a finding of pretext, not differences in the person making the decision. The court noted that here, Skybridge's reason concerning Aulick's termination remained constant.

***Blake v. MJ Optical, Inc.*, 870 F.3d 820 (8th Cir. (Neb.) 2017).** MJ Optical employed Blake for over 40 years. Blake had known the vice president of MJ Optical, Marty Hagge, since he was an adolescent. The two had a good relationship for a majority of Blake's employment. In 1999, Marty began inappropriately touching and making sexual comments to Blake. Blake gave Marty a "dirty look" once in response. Marty also began making age-related comments to Blake. Blake never complained to Marty or anyone else at MJ Optical regarding these issues, as she believed reporting it was futile. Blake admitted to sometimes touching Marty and reciprocating statements of love. In 2013, Blake left a voicemail resigning from MJ Optical the day after having

a work-related confrontation with Marty. Blake claimed to fear Mary's anger, but noted that the president of MJ Optical (Marty's mother, Mary Hagge) had been a good boss. Blake sued for age and sex discrimination under Title VII, the ADEA, and Nebraska's comparable statutes. The district court granted summary judgment for MJ Optical. The Eighth Circuit affirmed. On Blake's sex and age discrimination claims, the court concluded that she failed to establish an adverse employment action. Blake argued that MJ Optical constructively discharged her because of Marty's conduct; however, the court noted that Blake did not give MJ Optical a reasonable chance to resolve the problem. The court also stated that Blake could not argue futility, because an employee has an obligation to be reasonable and not assume the worst. The court also rejected Blake's hostile work environment claim by assessing one of the four factors required for such claims: whether Blake proved that Marty's conduct was unwelcome. The court concluded that in the 15 years since the conduct began, Blake did not report it. The court also noted that although Blake's joking with Marty was not similar to Marty's conduct, it did nothing to convey that his conduct was unwelcome.

***Nash v. Optomec, Inc.*, 849 F.3d 780 (8th Cir. (Minn.) 2017).** Nash (54 years old) pursued an internship with Optomec to fulfill a requirement for his technical degree. Lees (49-year-old vice president of engineering at Optomec) offered Nash a full-time paid internship. After graduation, Nash applied for a full-time position. Despite concern from Lees and Wright (Optomec engineer, age 52) that Nash was not particularly skilled and required guidance, Lees hired Nash (then 55 years old) as an at-will employee. Less than six months later, Lees fired Nash. He told Nash that the decision was not performance related, rather, the company was going in a different direction. Nash requested an explanation of why he was fired under Minn. Stat. § 181.933, subd. 1. Optomec responded that Nash's performance was satisfactory for menial tasks, but that he ultimately did not possess the full breadth of skills required. After receiving a right-to-sue letter, Nash sued arguing that Optomec terminated his employment because of his age in violation of the Minnesota Human Rights Act (MHRA). The district court granted summary judgment for Optomec, which the Eighth Circuit affirmed. On appeal, Nash asserted numerous arguments for why Optomec's termination decision was pretext for discrimination, all of which the Eighth Circuit rejected. In addition, the court concluded that two well-established presumptions defeated Nash's claims: (1) the significance in Lees hiring and firing Nash within a relatively short period of time; and (2) that Lees was only five years younger than Nash when he made the decisions to hire and fire Nash.

***Johnston v. Mini Mart, Inc.*, 675 F. App'x 825 (10th Cir. (Wyo.) 2017).** Johnston worked for convenience store chain Mini Mart for several years. Most recently, as a district advisor overseeing twelve stores, his supervisors issued him performance evaluations stating he "met expectations." But, based on unannounced store visits, the results his stores received did not "reflect the true picture" because the stores' conditions were often in bad condition. For example, the defendant's division president found the conditions of one store "so bad that [he] walked out the door." The company warned Johnston to

improve the stores' condition or he would receive disciplinary action. Johnston ultimately received a series of disciplinary actions, based on subsequent store visits, and the defendant terminated his employment. After Johnston brought an age discrimination claim under the Age Discrimination in Employment Act (ADEA), the Tenth Circuit affirmed the district court's grant of summary judgment for the employer. The court rejected Johnston's pretext argument (Johnston argued the company's division president "doesn't fire advisors who are outside of the protected age group.") The court held this argument failed because Johnston did not point to any evidence that the division president evaluated younger district advisors differently or that younger advisors failed to comply with performance standards to the same extent he did.

§ 21.2.2 Reductions in Force / Restructuring

***Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. (Pa.) 2017).** On March 31, 2009, defendant Pittsburgh Glass Works (PGW) terminated around 100 salaried employees as part of a reduction in force (RIF). Individual unit directors received no training or written guidelines for implementing the RIF, conducted no disparate impact analysis, and had broad discretion in selecting employees for termination. Seven employees over age 50 were terminated from PGW's Manufacturing Technology division and filed charges with the EEOC. After receiving a Dismissal and Notice of Rights from the EEOC, they filed a putative ADEA collective action alleging disparate treatment and disparate impact. The district court conditionally certified a collective action of employees at least 50 years old who were terminated by the RIF, and the judge granted a motion to decertify the collective action based on factual dissimilarities between named and opt-in plaintiffs' claims. PGW then moved for summary judgment on each claim. The court found that the plaintiffs' disparate impact claim was not cognizable under the ADEA, and granted the motion. Plaintiffs appealed to the Third Circuit, who held that a disparate impact claim based on subgroups is cognizable under the ADEA based on a plain reading of the statute even when the older subgroup has been disproportionally impacted compared to another subgroup of individuals who are at least 40 years old.

§ 21.2.3 Miscellaneous

There were no qualifying decisions this year.

§ 21.3 Arbitration

§ 21.3.1 Claims Subject to Arbitration

***Watford v. Jefferson Cty. Pub. Sch.*, 870 F.3d 448, (6th Cir. (Ky.) 2017).** Plaintiff, a teacher for eleven years, was terminated by her employer, Jefferson

County Public Schools (JCPS). After her termination, she filed a grievance with Jefferson County Board of Education (JCBE) alleging that she was terminated because of her race, sex and age. Shortly thereafter, she filed a charge of discrimination with the EEOC. The Collective Bargaining Agreement (CBA) between JCBE and the Jefferson County Teachers Association (JCTA) required that the grievance procedure be held in abeyance while the EEOC charge was pending. Consequently, Plaintiff filed a second EEOC charge alleging that holding the arbitration in abeyance because she filed the first EEOC charge constituted unlawful retaliation. She also filed a charge with the EEOC against the JCTA. In the district court action, Plaintiff filed a motion for partial summary judgment alleging that both JCPS and JCTA retaliated against her by holding the arbitration in abeyance. The district court denied her motion, finding that there was no adverse employment action when the arbitration was held in abeyance. The Court also granted the cross-motions for summary judgment that were filed by the JCPS and JCTA on the retaliation counts. On appeal, the Sixth Circuit found that a provision in a CBA that requires a grievance – which is otherwise supposed to be "rapidly processed" – to be held in abeyance if the employee files charges elsewhere would dissuade a reasonable worker from making or supporting a charge of discrimination. The Court further found that the provision constituted an "employment practice" that interferes with the EEOC's information-gathering system and, therefore, runs afoul of Title VII and the ADEA. As a result, the district court's decision was reversed and remanded for further proceedings.

***McLeod v. Gen. Mills, Inc.*, 856 F.3d 1160 (8th Cir. (Minn.) 2017).** General Mills (GM) announced that it was terminating 850 employees and offered those employees severance packages in exchange for signing release agreements. Under the agreements, the employees released GM from all claims relating to their terminations, including ADEA claims. The agreements also included an individual arbitration provision. Thirty-three former-employees who signed the agreements sued GM under the ADEA. They alleged that their waivers were not "knowing and voluntary" and requested a declaratory judgment that the agreements do not waive their ADEA rights. GM moved to dismiss and compel arbitration on an individual basis, which the district court denied. Contrary to the former employees' assertion, the Eighth Circuit determined that the agreements did not require them to waive their right to be free from age discrimination—the right protected by 29 U.S.C. 626(f)(1). The court also rejected the former-employees' argument that the agreements required them to waive their right to bring a class action, as 29 U.S.C. 216(b) permits waiver of class actions in a valid arbitration agreement. Finally, the court concluded the declaratory judgment issue lacked an Article III case or controversy, because the relief former-employees sought (that the agreements do not waive their ADEA rights) involved a defense GM may or may not raise in a future proceeding (that the waiver was "knowing and voluntary"). The Eighth Circuit remanded for the district court to dismiss the former-employees' declaratory judgment claim and to grant GM's motion to compel individual arbitration of the remaining

ADEA claims. The court did not decide whether GM could assert the validity of the waiver in arbitration.

§ 21.3.2 Enforceability

***Steelworkers Pension Tr. v. Renco Grp., Inc.*, 694 F. App'x 69 (3d Cir. (Pa.) 2017).** When the Renco Group purchased RG Steel in 2011, RG Steel became part of the "Renco Controlled Group" because Renco possessed at least 80 percent of the voting power of shares of all classes of stock. Renco became jointly and severally liable for the ERISA withdrawal liability of any other member. RG Steel continued to make contributions to the Steelworkers Pension Trust (the Trust), a multiemployer pension plan, but became insolvent by late 2011. In January 2012, Renco transferred a 24.5 percent ownership interest in RG Steel, which the Trust alleges it did to remove the company from its controlled group and avoid withdrawal liability. Shortly thereafter, RG Steel filed for bankruptcy and ceased operations, triggering withdrawal liability. After the Trust submitted Proofs of Claim for withdrawal liability of $86 million, Renco demanded arbitration pursuant to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The Trust filed a complaint alleging Renco waived its right to arbitrate defenses to withdrawal liability by failing to timely request review of its liability determination, and seeking to set aside the ownership interest transfer as an attempt to evade withdrawal liability. The court dismissed the action and ordered the parties to arbitration, finding both claims were required to be arbitrated under ERISA and MPPAA. The Third Circuit affirmed, finding that the Trust's claim that Renco waived its right to arbitration to be a dispute over the sufficiency of notice under section 1399 of the MPPAA, and the claim regarding Renco's ownership transfer to fall under section 1392(c) of the MPPAA.

§ 21.4 Title VII

§ 21.4.1 Burden of Proof / Evidentiary Issues

***Collins v. Kimberly-Clark Pa., LLC*, 247 F. Supp. 3d 571 (3d Cir. (Pa.) 2017).** Plaintiff Muriel Collins, an African-American woman, alleged race discrimination, sex discrimination, and retaliation in violation of Title VII after being disciplined for refusing to comply with a subpoena issued in a labor arbitration proceeding. Collins refused to appear at arbitration as a witness for the company and received a five-day suspension for insubordination. Collins filed grievances relating to her suspension, and the Human Resources representative who conducted the investigation found that while no code of conduct violations occurred in conjunction with the subpoena, Collins provided false information during the investigation in violation of the code of conduct. As a result, Collins received a 15-day suspension, a demotion in pay,

and a final warning. Collins claimed this punishment was discriminatory and retaliatory, but a second Human Resources investigation found no evidence of discrimination or retaliation. Collins then misused company email and workplace safety reporting systems to complain about perceived discrimination, and was terminated. Collins filed a Title VII action alleging similarly situated non-African-American male employees had not received pay cuts or 15-day suspensions and that her position had been temporarily filled by a white male. The court granted Kimberly-Clark's Motion for Summary Judgment, concluding that Collins failed to make out a prima facie case of race or sex discrimination. Collins appealed, and the Third Circuit affirmed, finding that Collins failed to sustain her burden because she failed to identify legitimate comparators and offered no evidence relating to the subpoena or suspensions that raised an inference of discrimination.

***Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249 (3d Cir. (Del.) 2017).** The university hired plaintiff Carvalho-Grevious as an associate professor and department chair for a fixed term subject to reappointment. Before the election for the next term as department chair, her relationship with the dean became contentious, and she accused him of obstructing her reappointment. She then emailed the provost and alleged that the dean made discriminatory comments, which he denied. The dean rated plaintiff poorly in her formal evaluation, which she claimed was retaliation for her complaints about his harassment. Plaintiff requested that the dean be insulated from the chair election process, but the provost denied the request and she was not reelected. She filed a grievance with the Office of the Provost, but the provost declined to take further action because investigations into her claims did not yield evidence of violations. Plaintiff filed a complaint of sexual harassment, racial discrimination, and retaliation against the dean with the university HR department. Immediately thereafter, she learned that her term as department chair would be terminated early. In response, she filed an EEOC charge, claiming termination of her term as chair was retaliation for her complaints about the dean. After learning of this charge, the University replaced her renewable contract with a terminal one. Plaintiff filed a second EEOC charge alleging the University revoked the renewable contract as retaliation for her original charge. The provost recommended that plaintiff not be rehired at the conclusion of her terminal contract. Plaintiff filed a final EEOC charge, alleging that the decision was retaliation for her earlier EEOC charge.

After administrative exhaustion, plaintiff filed in district court alleging retaliation in violation of Title VII by the university and in violation of 42 U.S.C. § 1981 by the provost and dean. In granting summary judgment for the defendants, the court relied on *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 503 (2013), finding that under that decision's but-for causation standard, no reasonable jury could find plaintiff would have been retained as chairperson or kept her renewable contract but for her complaints. Plaintiff appealed to the Third Circuit, which clarified that while a Title VII retaliation plaintiff must prove but-for causation to prevail at trial,

evidence raising an inference that protected activity was the likely reason for an adverse employment action suffices at the prima facie stage. The court found that a reasonable fact-finder could determine that discrepancies between her treatment and the university's normal practices regarding an "at-risk" faculty member suggest pretext, and that her claims withstood summary judgment.

***Phillips v. UAW, et al.*, 854 F.3d 323 (6th Cir. (Mich.) 2017).** Plaintiff, a UAW local president for MGM Casino Detroit, asserted a Title VII claim against the UAW, asserting that she was subjected to offensive conduct by two UAW officials during her term as President. The district court held that that unions, acting as unions, and not acting as employers, are not liable under Title VII for hostile work environment claims and dismissed plaintiff's case. The Sixth Circuit analyzed plaintiff's complaints and determined that she could not make out a case of hostile work environment based on her allegations of harassment by the UAW officials. Thus, the court declined to determine whether Title VII applied in plaintiff's situation. The dissent noted that in Dowd v. Steelworkers of America, 253 F.3d 1093 (8th Cir. 2001), the Eighth Circuit ruled that unions acting as unions can be held liable under Title VII Disagreeing with the majority's analysis, the dissent felt that plaintiff had established a prima facie case of hostile work environment.

§ 21.4.2 Damages / Attorneys' Fees

***EEOC v. Bass Pro Outdoor World LLC*, 865 F.3d 216 (5th Cir. (Tex.) 2017).** In a per curiam opinion, the Fifth Circuit split 7 to 7 on whether to grant defendant's petition for an en banc rehearing. The split kept in place the court's earlier holding in *EEOC v. Bass Pro Outdoor World LLC*, 826 F.3d 791 (5th Cir. (Tex.) 2016), that the EEOC could pursue monetary damages against defendant for its alleged pattern of discrimination against black and Hispanic job applicants. In dissent, Circuit Judge E. Grady Jolly argued that the EEOC's "pattern and practice" lawsuit not only presents "critical manageability concerns" but dramatically expands the EEOC's litigation powers beyond the scope articulated in the Civil Rights Act. Circuit Judge Patrick E. Higginbotham responded that several district courts have taken on trials that included the same mixture of claims. "It is not our task to, nor should we, conduct pretrial in the court of appeals. But we reject the notion that this lawsuit cannot be managed and should be shut down at this early stage." Brought under sections 706 and 707 of Title VII, the lawsuit seeks individualized compensatory and punitive damages on behalf of 50,000 alleged victims. The EEOC is pursuing damages under Section 706 using the model of proof outlined in section 707: namely, section 706 allows complaining parties to recover damages, while section 707 covers alleged patterns or practices of discrimination and allows for the recovery of equitable relief. Defendant initially succeeded in having the district court dismiss the section 706 claim; however, the EEOC amended its complaint to include the names of over 200 black and Hispanic individuals who, in its view, exemplified a pattern or practice of discrimination. Judge Higginbotham observed that legislation often provides "overlapping remedies"

to combat discrimination, and that preventing the EEOC from seeking damages against patterns of discrimination "intentionally calculated to exclude protected minorities and perpetrated on a large scale" would be "perverse." Circuit Judge Edith H. Jones also filed a dissenting opinion that concurred with Judge Jolly's dissent, emphasizing that the court's response to defendant's petition is not a "binding opinion."

***Pineda v. JTCH Apartments. LLC*, 843 F.3d 1062 (5th Cir. (Tex.) 2016).** Plaintiff, who had lived in an apartment complex owned by defendant, sued for alleged violations of the Fair Labor Standards Act (FLSA). Plaintiff claimed that defendant (1) failed to pay him overtime for maintenance work he did on the building, and (2) retaliated against him for demanding overtime wages, serving him and his wife with an eviction notice three days after receiving the lawsuit summons. The jury awarded plaintiff $1,426.50 on his overtime wages claim and $3,775.50 on his retaliation claim, and the district court subsequently granted plaintiff's motions for nearly $77,000 in attorneys' fees and costs. On appeal, the Fifth Circuit not only upheld the jury's verdict but found that, as a general matter, employees suing under the FLSA can seek emotional damages. "During trial, [plaintiff] testified to experiencing marital discord, sleepless nights, and anxiety about where his family would live after [defendant] made what the jury found to be a retaliatory demand for back rent." According to the court, this was sufficient evidence for the jury to consider whether plaintiff was owed damages for the emotional distress caused by his and his wife's eviction. The district court had ruled that, in the Fifth Circuit, damages for emotional distress are not available in FLSA retaliation suits, relying on an appellate decision "stating that the remedies provision of the FLSA and the Age Discrimination in Employment Act [ADEA] should be interpreted consistently." Three days earlier, in *Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588 (5th Cir. (Miss.) 2017), a different Fifth Circuit panel had upheld longstanding precedent within the circuit that neither compensatory damages for pain and suffering nor punitive damages are available to plaintiffs suing under the ADEA. However, unlike the ADEA, the court noted that the FLSA does *not* require exhaustion of remedies before an agency, instead following "the path of tort law, authorizing immediate suits by employees to provide compensation and deterrence." Furthermore, while the ADEA incorporates certain provisions of the FLSA, "the FLSA does not incorporate the ADEA." The court also kept plaintiff's award of attorneys' fees in place, rejecting defendant's "bad faith" and "excessive demand" arguments that plaintiff had unfairly pursued litigation instead of taking a settlement offer. While the court chided the parties to resolve the case "in an expeditious, cost-sensitive manner," it found that defendant waived these arguments by failing to raise them before the district court. The court remanded the case for consideration of plaintiff's emotional distress claims.

***EEOC v. CRST Van Expedited, Inc.*, 2017 U.S. Dist. LEXIS 155136 (N.D. Iowa 2017).** The EEOC advanced this litigation—which has now spanned the better part of a decade—on behalf of multiple former long haul drivers. The plaintiffs collectively pursued numerous sexual harassment and retaliation

claims against defendant CRST Van Expedited, Inc. In a previous ruling, the district court dismissed sixty-seven claims due to the EEOC's failure to comply with pre-suit requirements, including its failure to investigate and attempt to conciliate. Pursuant to Title VII's fee-shifting provision, the EEOC awarded the defendant over $4 million in attorneys' fees associated with those dismissed claims. After the EEOC's appeal was heard by both the Eighth Circuit and the Supreme Court of the United States, the district court reheard the parties' arguments as to the attorneys' fee award on remand. The district court evaluated the previously dismissed claims to determine whether those claims were frivolous, unreasonable or groundless. Relying on Supreme Court precedent, the basis for the district court's inquiry was whether the claims lacked a sufficient basis in law or fact when they were brought. The district court then exhaustively analyzed each of the seventy-eight claims at issue, determining the claims advanced by nine individual plaintiffs were not frivolous. The district court reaffirmed its previously ruling as to the remaining claims. The district court accordingly reduced its previous attorneys' fee award to an approximate total of $1.8 million, representing a significant award to an employer under the application of Title VII's fee-shifting provision.

§ 21.4.3 Gender / Equal Pay Act

***Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. (N.Y.) 2017).** Christiansen brought an action against his advertising agency employer under Title VII setting forth claims for workplace harassment and discrimination. Christiansen, an openly homosexual male, alleged that his supervisor subjected him to a humiliating pattern of mistreatment which included being called "effeminate," being the subject of offensive caricature drawings, and otherwise being portrayed in a negative light. At trial, the district court granted employer's motion to dismiss Christiansen's claim on the grounds that sexual orientation discrimination is not protected under Title VII. The Second Circuit reversed. The court acknowledged that its own precedent dictated that discrimination based on one's sexual orientation did not give rise to a cognizable claim under Title VII. But here, the court found that Christiansen had identified instances in which his discrimination fell within the category of gender stereotyping claims that are protected by Title VII. The Second Circuit went on to explain that its prior precedent must be narrowly construed; the cases should not be read as limiting Title VII protections to gay, lesbian and bisexual individuals when gender stereotyping is sufficiently pled. In its decision, the court explained that if gay, lesbian or bisexual plaintiffs can show they were discriminated against for failing to comply with a gender stereotype, including the stereotype that men should be exclusively attracted to women, and vice versa, they have made out a viable sex discrimination claim under Title VII. In his concurrance, Chief Judge Katzmann referenced the new "legal landscape" that has taken shape since the Supreme Court ruled in *Obergefell v. Hodges, 135 S. Ct. 2584 (2015)* that same-sex couples have a constitutional due process right to marry. In doing so, he believes it may be time for the Second Circuit to revisit its own precedent to

ensure that its reading of Title VII is not in conflict with the Supreme Court's constitutional stance.

***Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. (N.Y.) 2017); *Zarda v. Altitude Express*, 2017 U.S. App. LEXIS 13127 (2d Cir. 2017).** Plaintiff, a skydiving instructor, sued his employer claiming that he was terminated because of his sexual orientation, in violation of Title VII. The district court granted summary judgment for the employer on the Title VII claim because, based on Second Circuit precedent, sexual orientation is not a class protected under Title VII. The court denied summary judgment, however, as to the state claims, concluding that an issue of fact existed as to whether plaintiff was discriminated against under the New York State Human Rights Law (NYSHRL). On appeal, plaintiff argued in favor of the Second Circuit overturning its adverse precedent and finding that discrimination based on "sex" as stated in Title VII included discrimination based on sexual orientation. The Second Circuit declined to review the issue because the three-judge panel lacked the power to overturn Second Circuit precedent. However, in April 2017, a Second Circuit judge requested a poll of the other Circuit judges as to whether they should rehear the case en banc and reevaluate the issue of whether sexual orientation is a protected class within the meaning of Title VII. The poll yielded a majority vote in favor of rehearing the case. Accordingly, in *Zarda v. Altitude Express*, 2017 U.S. App. LEXIS 13127 (2d Cir. 2017), the Court ordered rehearing of the appeal. A briefing schedule was set forth the parties and the *en banc* appeal was orally argued in September 2017.

***Berghorn v. Xerox Corp.*, 2017 WL 5479592 (N.D. Tex. 2017).** Plaintiff sued for denial of his unemployment compensation benefits under the Texas Unemployment Compensation Act. He subsequently amended his complaint to include a Title VII claim, alleging that he was discriminated against based on sexual orientation and gender stereotyping. His coworkers purportedly made "derisive" comments about his closeness to other men and inability to have children, which plaintiff believed were examples of sex discrimination rooted in traditional male gender stereotypes. While the district court dismissed plaintiff's sexual orientation claim, it denied defendant's motion to dismiss the gender stereotyping claim. The court instead gave plaintiff an opportunity to amend his pleadings, noting that "it is unclear at this juncture whether amendment as to this [stereotyping] claim would be futile." However, the court firmly rejected plaintiff's reliance on *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. (Ind.) 2017), which held that Title VII prohibits discrimination on the basis of sexual orientation. "[U]nless and until overruled by the Fifth Circuit or the Supreme Court, or Congress elects to extend Title VII protection to sexual orientation, the court cannot disregard Fifth Circuit precedent regardless of the age of the case." Finally, the court severed and remanded the state law claims to state court, with only the Title VII claims remaining in federal court.

***Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. (Ind.) 2017).** An en banc panel of the Seventh Circuit ruled 8 to 3 that Title VII prohibits discrimination on the basis of sexual orientation. Plaintiff, a former Indiana

professor, argued that but for her gender, defendant would have promoted her and kept her on staff. The majority agreed, finding that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." The opinion reversed the court's earlier disposition of the case from July 2016, which had upheld the district court's summary judgment dismissal of plaintiff's lawsuit. Despite a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act," the court had felt bound by its own precedent and declined to extend Title VII protections to sexual orientation. However, upon revisiting the case en banc, plaintiff's arguments persuaded the full court to overrule its contrary precedent. In doing so, it became the first U.S. federal appeals court to find that Title VII protections cover sexual orientation. The court could not rely on the fact that Congress has repeatedly considered and declined adding "sexual orientation" to the list of Title VII protected classes. Instead, the court cited several Supreme Court decisions, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that discrimination based on sexual stereotypes falls within Title VII's prohibition against sex discrimination. Here, plaintiff's openly gay status made her "the ultimate case of failure to conform to the [heterosexual] female stereotype." Defendant will not seek Supreme Court review of the decision. The matter has been remanded to the district court, which will now determine whether defendant's alleged treatment of plaintiff violated Title VII. Meanwhile, observers point out that the court's reasoning applies just as strongly to gender identity discrimination as it does to sexual orientation discrimination: in both situations, the discrimination would not have taken place but for a person's sex.

***Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. (Ala.) 2017).** Plaintiff filed suit for violations of the Pregnancy Discrimination Act (PDA) and Family and Medical Leave Act (FMLA). She had been fired from her job as a patrol officer eight days after returning from FMLA leave. On her first day back, plaintiff overheard her supervisor saying that she would find a way to write her up and get her fired. Plaintiff also overheard her supervisor complaining about the length of plaintiff's FMLA leave. She was then reassigned to a lesser-paying position that required her to work weekends. After returning from a second leave due to post-partum depression, plaintiff requested reassignment to duties that did not require her to wear a ballistic vest, which could cause breast infections that lead to an inability to breastfeed. Her request for an accommodation was denied. In finding that plaintiff had been discriminated against, the Eleventh Circuit ruled that breastfeeding was a pregnancy-related medical condition and was protected under the PDA. The court found that breastfeeding was a gender-specific condition because it "clearly imposes upon women a burden that male employees need not—indeed, could not—suffer."

***Tucker v. Fla. Dep't of Transp.*, 678 F. App'x 893 (11th Cir. (Fla.) 2017).** Plaintiff filed suit under Title VII and the Florida Civil Rights Act for sex discrimination and retaliation. She submitted a memorandum detailing that her supervisor made inappropriate comments, including telling plaintiff "My wife is more petite than you," "I need more than a pretty face—I need somebody who

can think," and "I have my harem here today." During her deposition, plaintiff testified that her supervisor stared at her breasts and bottom. The Eleventh Circuit upheld the district court's finding that the memorandum did not explicitly complain of sexual harassment, nor did the complained-of conduct give rise to an objective belief that any sexual harassment had occurred. Because plaintiff lodged her complaint after she was notified of her termination, the court found that she did not prove the decision to terminate was based upon her complaints.

***Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. (Ga.) 2017).** The employee filed a complaint against her employer alleging employment discrimination under Title VII because of her sexual orientation and gender non-conformity. Evans alleged that she was targeted for termination for failing to carry herself in a "traditional woman[ly] manner" and because it was "evident" that she identified with the male gender. After she lodged complains about violations of regulations and policies, her supervisor asked about her sexuality, which caused her to infer that her sexuality was the basis of her harassment. Following the Fifth Circuit's holding in *Blum v. Gulf Oil Corp.*, 597 F. 2d 936 (5th Cir. 1979), the court held that workplace discrimination based upon sexual orientation is not prohibited by Title VII. In reaching its decision, the court found that the Supreme Court's decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner*, 523 U.S. 75 (1998), which held that gender non-conformity and same-sex discrimination claims could be brought pursuant to Title VII, did not directly overrule the holding in *Blum*. Because the Supreme Court in *Price Waterhouse* and *Hopkins* did not address whether sexual orientation discrimination is prohibited by Title VII, the Eleventh Circuit declined to follow those rulings. A petition for certiorari was filed with the United States Supreme Court on September 7, 2017.

§ 21.4.4 Harassment / Reporting Harassment

***Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748 (7th Cir. (Wis.) 2017).** Plaintiff sued defendant for sexual harassment and retaliation under Title VII. She had been assigned to work for defendant by a staffing agency, which was not a party to the lawsuit. Plaintiff alleged that her supervisor at defendant's workplace sexually harassed her, calling her personal phone number and making sexually explicit comments to her in front of other employees. According to plaintiff, defendant took no serious action to address the allegations and instead fired her. The district court denied defendant's motion to compel arbitration under plaintiff's arbitration agreement with the staffing agency, and defendant appealed. The Seventh Circuit agreed that it cannot enforce the arbitration agreement. Since defendant did not have a written arbitration agreement in place with plaintiff, the question became whether it could "enforce against her the arbitration clause in her agreement with the staffing agency." Relying on Wisconsin state law, the court found that defendant lacked "a legal basis for compelling [plaintiff] to arbitrate her Title VII claim against [it]." Specifically, the court rejected defendant's equitable estoppel argument, noting that defendant "did not even know of the arbitration agreement and the staffing agency is not

a party to the dispute, which is not a contract dispute at all." Defendant also argued that arbitration should be compelled under the doctrine of agency, where plaintiff has alleged a co-employer or agency relationship through her written agreement with the staffing agency. However, the court found that defendant "waived" this argument by not having first raised it at the district court level.

***Marquez v. United Parcel Serv. Co.*, 2017 WL 2561089, (C.D. Cal. 2017).** After missing work for a long period of time, plaintiff alleged he was subject to "significant harassment and retaliation by a UPS supervisor." The district court first noted that there is a clear distinction between discrimination and harassment: an employee's supervisor could be personally liable for harassment, while the employer is liable for the supervisor's discriminatory personnel decisions. Here, when making the allegedly discriminatory comments, the court found that the supervisor was acting in his role as manager. The court was not convinced that all the comments, such as those regarding plaintiff's ability to do his job correctly or efficiently, constituted taunts or personal insults falling outside the scope of the supervisor's managerial function (namely, those relating to plaintiff's job performance). In addition, the supervisor's alleged accusation that plaintiff faked his injury did not fall within the supervisor's role, which defendant is not liable for. However, while the court found plaintiff's allegations to be factually deficient, it granted him an opportunity to cure these deficiencies by amending the pleading.

***Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678 (9th Cir. (Or.) 2017).** Mexican employee sued his former employer, alleging violations of Title VII and § 1981 that included a hostile work environment, disparate treatment, and retaliation. On appeal, the Ninth Circuit found that plaintiff had established a prima facie case of disparate treatment sufficient to survive defendant's motion for summary judgment. Specifically, plaintiff provided evidence that two non-Hispanic employees were treated more favorably than him; one was hardly reprimanded, even after several complaints were made about his hostile behavior. Also, these employees were not subject to the same lock-cutting intrusion into their work lockers as plaintiff's locker was subject to. The court further held that genuine issues of material fact existed as to whether defendant knew about coworkers' misconduct, which included making "repeated racially derogatory and humiliating remarks" in the workplace, but failed to take effective remedial action. Thus. the court denied defendant's motion to dismiss plaintiff's hostile work environment claim. Finally, the court found that genuine issues of material fact were shown as to whether defendant's act of breaking into plaintiff's locker during a workplace search was discriminatory, denying defendant's motion to dismiss plaintiff's disparate treatment claim.

§ 21.4.5 National Origin Discrimination

***Alamo v. Bliss*, 864 F.3d 541 (7th Cir. (Ill.) 2017).** Plaintiff, a Hispanic Chicago firefighter, brought Title VII claims against the city and § 1983 claims against his supervisor for various forms of national origin discrimination. The district

court granted defendants' motion to dismiss for plaintiff's failure to state a claim, and plaintiff appealed. The Seventh Circuit unanimously reversed the district court's decision. First, the court looked at "the totality of the circumstances" to conclude that plaintiff "sufficiently state[d] hostile work environment claims under both Title VII and § 1983." These circumstances, which persisted over a two year period, were motivated by plaintiff's national origin, and were largely ignored by plaintiff's supervisors despite his repeated complaints, included allegations of not just racial slurs but physical threats and altercations. Next, the court believed that dismissing plaintiff's disparate treatment claim at this stage of litigation would be "shortsighted." The complaint plausibly attributed the "piecemeal and onerous process" of his return from medical leave to his national origin, describing how other, non-Latino firefighters did not face the same obstacles. Finally, the court was satisfied that plaintiff's alleged "causal link" between his protected activity and subsequent adverse employment action should support his Title VII retaliation claim. The court admonished the district court for seeming to establish a "bright-line timing rule" to determine whether plaintiff's retaliation claim is viable. Here, the delay in retaliatory activity could not break the causal chain because plaintiff was on medical leave during the delay, and the city did not have its first opportunity to retaliate against him until his medical leave was about to expire.

***Abdel-Ghani v. Target Corp.*, 686 F. App'x 377 (8th Cir. (Minn.) 2017).** Target partnered with MarketSource, Inc. (Market) to implement the Target Mobile program Market hired Abdel-Ghani, a Palestinian immigrant. Abdel-Ghani alleged that Target employees called him racist names, he overheard one employee say, "[y]ou should be rounded up in one place and nuke[d]," and his sales manager told him to "go back home, go to your country." Abdel-Ghani's sales manager believed he was harassing her and acting inappropriately toward customers. The Market district manager terminated Abdel-Ghani's employment, citing issues with the sales manager, Target staff, and guests. Abdel-Ghani sued Target and Market alleging violations of Title VII and the Minnesota Human Rights Act. The district court adopted the magistrate judge's recommendation that Target was not Abdel-Ghani's employer or joint employer, and that Abdel-Ghani failed to establish a hostile work environment or termination based on national origin. The Eighth Circuit affirmed. For the hostile work environment claim, the court concluded that although "morally repulsive," the employee comments did not physically threaten, the one physically threatening comment was not said directly to Abdel-Ghani, and the comments did not interfere with his work performance. For the national origin discrimination claim, the court noted no direct evidence of discrimination, and Abdel-Ghani failed to establish a prima facie case of discrimination. The district manager did not make any remarks about Abdel-Ghani's national origin, and even if the court assumed the sales manager was involved in the termination decision, her single comment ("go back home, go to your country") was facially neutral as to national origin.

§ 21.4.6 Race Discrimination

Cable v. FCA US LLC*, 679 F. App'x 473 (7th Cir. 2017).** Plaintiff, an African American employee, sued defendant, the American subsidiary of Fiat Chrysler, under Title VII and § 1981. She alleged that defendant had subjected her to a hostile work environment because of her race. The district court granted defendant's motion for summary judgment, and plaintiff appealed. While the Seventh Circuit questioned the lower court's finding that the words and hostility directed at plaintiff were "not sufficiently pervasive or severe," the court concluded that defendant had sufficiently discovered and remedied the harassment when it occurred, freeing it from liability. Citing *Cole v. Bd. of Trustees of N. Ill. Univ.*, 838 F.3d 888 (7th Cir. (Ill.) 2016), plaintiff "did not present evidence that a supervisor engaged in this harassment, so she must show that [defendant] was 'negligent either in discovering or remedying the harassment.'" Plaintiff, the only African American on her seven person team, claimed that she was harassed on five different occasions over a period of 14 months because of her race. First, her team leader hung a black voodoo doll from his belt and refusing to remove it when she asked. After reporting this situation to her supervisor, the team leader stopped wearing the doll. Other incidents included etchings on various machines that plaintiff believed said "N," "NIG," or "bitch." A supervisor ordered the drawings and etchings removed and held anti-harassment training for the team. The court criticized the district court's view that "the impact of viewing the letters 'NIG' and 'N' is less severe than hearing or seeing the word 'n**' spelled out." Similarly, the court noted that even if a particular employee is not "singled out" for harassment, Title VII prohibits harassment that targets a protected employee's work area. However, even if the conduct was severe or pervasive enough to qualify as harassment, the court held that defendant was not negligent in its quick and meaningful responses to remedy the harassment.

***EEOC v. AutoZone, Inc.*, 860 F.3d 564 (7th Cir. (Ill.) 2017).** An African American employee worked as a sales manager for defendant from 2008 to 2012. During this period, he was transferred among several Chicago area stores. In July 2012, he was transferred out of a store on Kedzie Avenue, which had a mostly Hispanic clientele. He subsequently resigned and filed a complaint with the EEOC, accusing defendant of racial discrimination in violation of Title VII. Specifically, he alleged the transfer was part of an effort to make the Kedzie store "predominantly Hispanic." The EEOC sued defendant on the employee's behalf for violating 42 U.S.C. § 2000e-2(a)(2), which prohibits an employer from segregating an employee "in any way which would deprive or tend to deprive [him] of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." The district court held that the transfer was not an "adverse employment action" and granted summary judgment for defendant, and the EEOC appealed. The Seventh Circuit affirmed the district court's decision, finding that the transfer did not rise to the level of unlawful discrimination.

"The evidence does not permit a reasonable jury to find that [the employee's] lateral transfer deprived or even *tended* to deprive him of any employment opportunity or otherwise adversely affected his employment status." According to the court, the employee's pay and benefits would have remained the same following his transfer. The EEOC warned that a ruling in favor of defendant would write into subsection (a)(2) a requirement that a victim of discrimination suffer economic loss. The court rejected this position and attacked the EEOC's view that because the transfer was a violation of Title VII in itself, the EEOC did not need to provide evidence of the transfer's negative impact on the employee.

***EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843 (7th Cir. (Wis.) 2017).** The lawsuit underlying the case involved two of defendant's former employees, who were terminated soon after being hired in 2011. They filed a complaint with the EEOC, arguing that, because of their race, defendant had obstructed them from taking a test to advance to higher positions. The EEOC issued a right to sue letter in 2012, but a federal judge threw out their claims in 2014 due to insufficient evidence of racial harassment. The EEOC then claimed that it found additional evidence indicating defendant's racial discrimination went much further than what the former employees alleged. The district court granted EEOC's petition to enforce a subpoena for defendant's records, finding that the document request was in line with the EEOC's public interest role in preventing employment discrimination under Title VII. The Seventh Circuit agreed, holding that the termination of a private lawsuit against defendant did not bar the EEOC from investigating the allegations. As "the master of its case," the EEOC could independently examine whether the employees' complaints were indicative of companywide discrimination. The court observed that Title VII lays out "minimal" requirements for filing a charge and what a charge must include. "[W]hile a valid charge is a requirement for beginning an EEOC investigation, nothing in Title VII supports a ruling that the EEOC's authority is then limited by the actions of the charging individual." The question of how private actions affect EEOC investigations was an issue of first impression for the court. However, a split has developed: the Fifth Circuit has held that the EEOC's investigative authority ends once it issues a right to sue letter, whereas the Ninth Circuit has held that the EEOC can continue a broader investigation even after issuing a letter. The court sided with the Ninth Circuit, holding that because the EEOC properly filed its charges of racial discrimination against defendant, it was authorized under federal law to conduct its own investigation. The court explicitly rejected the Fifth Circuit's decision for its potentially "disturbing" policy implications, which "would give . . . undue incentive to employers to purchase a stipulated dismissal with prejudice in order to prevent the EEOC from pursuing a larger public interest." The court also affirmed the district court's holding that the information sought by the EEOC in its subpoena was relevant to its investigation.

***Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017).** Cooper locked out union employees after negotiations failed to renew the collective bargaining agreement (CBA). Union workers picketed outside Cooper's plant

during the lockout. Cooper used replacement workers to continue operations, many of whom were black. Runion, a locked-out employee, participated in the picket line. He shouted comments regarding fried chicken and watermelon directed at replacement workers inside a Cooper van traveling across the picket line. Runion did not make physical movements or gestures. There was no evidence demonstrating that the replacement workers heard Runion's comments. Cooper discharged Runion for his statements. The union filed a grievance alleging that Cooper violated the CBA by discharging Runion. An arbitrator found just cause for Cooper to fire Runion, but an administrative law judge (ALJ) disagreed, concluding that Cooper violated the National Labor Relations Act (NLRA). The National Labor Relations Board (Board) upheld the ALJ's determination and ordered Cooper to reinstate Runion with back pay. The Eighth Circuit denied Cooper's petition for review and enforced the Board's order. Cooper argued that it was legally obligated under Title VII to apply its lawful policy prohibiting harassment to racist statements, even on a picket line. The court agreed that Cooper could enforce its policy; however, it noted that Title VII does not legally obligate Cooper to fire Runion. Rather, prompt remedial action reasonably calculated to end harassment is required, and a warning could suffice.

***Jackson v. The Education and Employment Ministry*, 686 F. App'x 577 (10th Cir. 2017).** Two African American Plaintiffs previously worked on the executive team for Defendant, The Education and Employment Mistry (TEEM), a nonprofit organization dedicated to breaking cycles of poverty and incarceration. Plaintiff former-employees were terminated during Defendant's period of economic hardship and subsequent restructuring. Plaintiff's filed five claims for relief against Defendant, including claims for discriminatory discharge in violation of § 1981 and the equal protection clauses of the Oklahoma and the United States constitutions, conspiracy to interfere with their civil rights in contravention of § 1985, neglect to prevent interference with their civil rights under § 1986, and state law claims for breach of contract and breach of fiduciary duties. The Oklahoma District Court granted summary judgment in favor of Defendant on all claims. On appeal, Plaintiffs argued the district court erred by granting summary judgment on its § 1981 and § 1985 claims. The 10th Circuit held that summary judgment was proper because the Plaintiffs failed to present more than mere conjecture to support their claim for pretext. The plaintiffs made no showing the organizational changes were motivated by intentional discrimination; after all, three members of the new four-member executive team were black.

***McCoy v. Wyoming*, 683 F. App'x 662 (10th Cir. (Wyo.) 2017).** Plaintiff Freddie McCoy, an African American, worked as a corrections officer for the state of Wyoming. Plaintiff claimed he was erroneously disciplined for a work violation; a year later, he resigned and filed a charge with the EEOC. A few months after resigning, plaintiff reapplied with the Wyoming Department of Corrections (WDOC) but was not given a job. Plaintiff claimed that defendant's failure to reemploy him after he resigned and filed a discrimination charge was

racial discrimination under Title VII. Proceeding pro se, he brought a claims under Title VII and § 1983 against defendant. The district court granted defendant's motion to dismiss, concluding plaintiff's Title VII claim alleged insufficient conclusory allegations and his § 1983 claim was barred by Eleventh Amendment immunity. On appeal, the Tenth Circuit found that plaintiff did not explain how his complaint plausibly stated Title VII discrimination and retaliation claims. Instead, he merely recited the applicable standard of review and requested reversal. The Tenth Circuit held this was insufficient to invoke appellate review, for even a pro se appellant must attempt to articulate his reasons for reversal.

§ 21.4.7 Retaliation Claims

***Paradisis v. Englewood Hosp. Med. Ctr.*, 680 F. App'x 131 (3d Cir. (N.J.) 2017).** Plaintiff was terminated as a per diem nurse after failing to make herself available to work on a holiday. She filed a union grievance and showed that she had in fact been sick, and was reinstated. Upon her reinstatement, she demanded additional training, some of which she received and some of which she did not. After plaintiff returned to work, other nurses raised concerns about aspects of her job performance, and she received a verbal warning. She also filed a grievance alleging inadequate training, which was denied but resulted in the hospital's scheduling an additional eight hours of training. Plaintiff filed an EEOC charge alleging that she was disciplined in retaliation for demanding additional training, and her union representative initiated a new grievance for unjust discipline and retaliation for filing her previous grievance. She received a performance review that ranked her "successful" in every category but one, where she received a "needs improvement." Plaintiff subsequently failed to attend a training session that she requested, and was never scheduled to work again. She filed a claim in district court alleging discrimination on the basis of national origin and skin color, as well as retaliation for demanding training and filing grievances. The court entered summary judgment for the hospital on all counts, and plaintiff appealed. The Third Circuit agreed that the hospital's decision not to provide some training, and its issuance of a verbal warning and mixed performance review, did not constitute adverse actions. It further found that because her grievances were unrelated to discrimination claims, they did not constitute protected activity under Title VII and could not support a retaliation claim.

***Villa v. CavaMezze Grill, LLC,* 858 F.3d 896 (4th Cir. (Va.) 2017).** Plaintiff was a manager for one of defendant's restaurants. She informed defendant's Director of Operations that one employee told her that she had been sexually harassed at work, and that she suspected another employee might also have been harassed. Defendant investigated the claims. Both of the women denied being harassed, and the former employee denied telling plaintiff that she had been harassed. Defendant determined that plaintiff had made a false report and terminated her. Plaintiff said she was sorry but did not deny fabricating the report. She then filed suit alleging Title VII retaliation. During a deposition,

the former employee admitted that she had told plaintiff that she was sexually harassed, but had lied to plaintiff about it. Defendant moved for summary judgment, contending that even if it had incorrectly determined that plaintiff fabricated her story, because the decision undisputedly was based on its belief that plaintiff had lied, the termination did not constitute Title VII retaliation.

The district court granted summary judgement for defendant. The Fourth Circuit affirmed this decision on the basis that "Title VII retaliation claims require proof that the *desire to retaliate* was the but-for cause of the challenged action." The court concluded that the "opposition clause" does not protect the making of a false allegation. Because at the time it decided to terminate plaintiff's employment, defendant in good faith believed that plaintiff had fabricated the complaint, which is not "protected activity," defendant's reason for terminating plaintiff was "necessarily *not* retaliatory." The court rejected plaintiff's argument that the same logic that applies to the "participation clause," which protects false statements made in bad faith, should apply to claims brought under the "opposition clause." The court also rejected plaintiff's argument that there was a genuine issue of fact regarding the reasonableness of defendant's investigation into whether plaintiff fabricated the complaint. Recognizing that evidence of an "obviously inadequate investigation into the employee's conduct could tend to show that claimed employee misconduct was actually a pretext for prohibited animus," Here, plaintiff had conceded that defendant's reason for termination was not pretextual.

***Burton v. Bd. of Regents of the Univ. of Wis. Sys.*, 851 F.3d 690 (7th Cir. (Wis.) 2017).** Plaintiff, a tenured associate professor, sued defendants, a state university's board of regents and three university employees, alleging retaliation in violation of Title VII and Title IX. The district court granted defendants' motion for summary judgment and denied plaintiff's motion for reconsideration. On appeal, the Seventh Circuit unanimously upheld the district court's decision, finding that plaintiff failed to show that 1) she was the victim of a materially adverse employment action, and 2) such action would not have occurred but for her protected activity. In October 2012, a student complained to plaintiff that another professor had given her a note during class with the professor's phone number written on it, as well as the message to "call [him] tonight." Plaintiff reported the note to several faculty members, including her department chair. The chair spoke with the professor, who claimed the note was part of a "breach experiment" in which he displayed social norms to his class by conspicuously violating them. The next week, the chair circulated a memo directing that student complaints about faculty members be made directly to him, and not shared with anyone outside the department. Plaintiff believed that the memo and other conduct by school officials comprised a pattern of retaliation and discrimination against her, though she later dropped her discrimination claims. While the court found that plaintiff's report was protected activity under both Title VII and Title IX, the alleged mistreatment she subsequently endured did not cause her harm. For example, the chair's memo was not adverse because it did not "expressly denounce[] the way [she] handled the situation." Furthermore,

during the period after she made her report, when her supervisors were allegedly retaliating against her, the court observed that she "was granted tenure by a unanimous vote and the university held a public ceremony celebrating [her] receipt of a grant from AT&T."

***Mourning v. Ternes Packaging, Ind., Inc.*, 868 F.3d 568 (7th Cir. (Ind.) 2017).** Plaintiff sued defendant, her former employer, alleging sex discrimination in violation of Title VII and retaliation in violation of the Family and Medical Leave Act (FMLA). The district court granted summary judgment in favor of defendant, and plaintiff appealed. The Seventh Circuit affirmed the district court's judgment, finding that plaintiff had presented insufficient evidence to support her claims or show the reasons for her firing were pretextual. In early 2013, plaintiff took leave under the FMLA to treat a brain disease. During this leave, eight of her subordinates submitted an "internal complaint" alleging that plaintiff "intimidated and publicly humiliated them, acted unpredictably, and generally micro-managed her team." When she returned to work and was shown the complaint, she penned a rebuttal and filed her own complaint against the staff. A subsequent internal investigation concluded that plaintiff had exhibited "unprofessional conduct" and "fail[ed] to satisfy customer expectations." Defendant fired plaintiff and promoted another female order administrator to take her place. Soon afterwards, plaintiff filed her lawsuit. The court noted that she based her Title VII claim on a comparison to a former manager, who allegedly "acted more egregiously than she did" but was given chances to improve and, later, allowed to resign. "For [the manager] to be an adequate comparator, however, [plaintiff] would need to show that he was treated more favorably than she was by the same decisionmaker." However, she failed to indicate whether complaints against the manager were ever brought to the decisionmaker's attention, "and the current materials manager testified that she did not think so." Similarly, disposing of her FMLA claim, the court wrote that plaintiff "could not identify anyone in the office who she believed had an issue with her taking leave or with her medical condition," offering no evidence that defendant retaliated against her based on her leave.

§ 21.4.8 Religion

***EEOC v. Consol Energy*, 860 F.3d 131 (4th Cir. (W. Va.) 2017).** Butcher was an employee of Consol for over 40 years and a devout evangelical Christian. When Consol changed from a manual check in and out system to a biometric hand-scanner, he informed human resources that his religious beliefs prevented him from using the scanner to monitor his hours. He then requested a religious accommodation, based on his belief that using the scanner would brand him with the Mark of the Beast. Butcher provided letters from his pastor and support for his beliefs in biblical text. He met with several representatives of the employer and asked to use the manual clocking in system. Consol refused to provide a religious accommodation, providing letters from the makers of the scanner and their own interpretation of the biblical text to support the refusal. Meanwhile, Consol accommodated other employees with hand injuries, allowing them to

use other cost-free methods to track their hours. Consol informed him that he either could use the scanner or be terminated. In response, the plaintiff retired.

The EEOC brought an enforcement action against Consol on his behalf, alleging that Consol violated Title VII by failing to accommodate Butcher and constructively discharging him. The district court found for the EEOC. The Fourth Circuit affirmed the district court. As to the religious accommodation, the court explained that whether an employee's religious beliefs are mistaken is irrelevant. All that is considered is the employee's sincerity of belief. Here, the plaintiff showed that he held sincere religious beliefs through his letter and various meetings with the defendant. As to the constructive discharge, the court reasoned that giving an employee the choice to violate sincerely held religious beliefs or quit constitutes a constructive discharge. The court also formally abandoned the "deliberateness" requirement of constructive discharge – i.e. that an employer must intend to cause the employee to quit. All that is required for a claim of constructive discharge is a showing that a reasonable person under the same circumstances would have resigned.

§ 21.4.9 Miscellaneous

***Gonzalez v. Velez*, 864 F.3d 45 (1st Cir. (P.R.) 2017).** Gonzalez and Franco, employees of the Department of Army Civilian Police, alleged co-workers and supervisors discriminated against them. After speaking with the Army's EEOC office, they had 15 days to file a complaint. Although Gonzalez failed to file, Franco filed a complaint. On June 11, 2007, the Army EEOC concluded "no employment harm" occurred because Franco experienced no loss of pay or pay grade and notified Franco he had to appeal with the EEOC in 30 days or federal court in ninety days. On March 17, 2008, Gonzalez and Franco sued numerous supervisors and coworkers, alleging violations of their First, Fourth, Fifth, and Fourteenth Amendment rights, RICO violations, and damages under the Bivens doctrine. The defendants moved to dismiss all of their claims, and six years later, the district court granted the defendants' motion to dismiss holding the claims were precluded under relevant laws and the remaining defendants have absolute or qualified immunity. Gonzalez and Franco timely appealed. As Gonzalez and Franco exhausted no claims under the Civil Service Reform Act (CSRA) and failed to timely file under Title VII, the First Circuit held that the district court lacked jurisdiction to hear their claims. The court further held that a *Bivens* remedy was improper because no *Bivens* remedy was provided in a similar, prior context and there were alternative (CSRA and Title VII) remedies available to Gonzalez and Franco that they failed to exhaust. For these reasons, the First Circuit affirmed the district court's decision.

***Shultz v. Congregation Shearith Isr.*, 867 F.3d 298 (2d Cir. (N.Y.) 2017).** Plaintiff was employed as the Program Director of Congregation Shearith Israel. Before taking time off to get married and go on her honeymoon, plaintiff informed her employer that she was pregnant. Upon returning, employer informed plaintiff that her position was being eliminated as part of a restructuring and she would be terminated, effective three weeks from then.

Plaintiff immediately retained counsel, who notified employer that plaintiff would not sign a severance agreement and release. Two weeks later, employer presented plaintiff with a writing that purported to reinstate her position and rescind her termination. Plaintiff nonetheless filed suit, alleging that she was the victim of sex discrimination in violation of Title VII. The district court dismissed her claims, finding that a notice of termination is not an "adverse employment action" if it is rescinded before taking effect. Plaintiff appealed and the Second Circuit reversed. The court found that a subsequent rescission does not change the fact that a notice of termination is an adverse employment action. The court qualified its holding by noting that there may be instances in which the time lapse between a notice of termination and a subsequent rescission is so short as to be *de minimis* and not actionable, but that the time lapse in this case was not *de minimis*. The court further noted that rescission of a notice of termination is relevant to an analysis of damages insofar as an employer may toll the running of back pay damages by making an unconditional offer to reinstate an employee to her previous job or one that is substantially equivalent.

***Williams v. Pa. Human Relations Comm'n*, 870 F.3d 294 (3d Cir. (Pa.) 2017).** Plaintiff Williams, an African-American woman, alleged that her supervisors at the Pennsylvania Human Relations Commission (the Commission) subjected her to harassment that created a hostile work environment and resulted in her constructive discharge from the Commission. She filed suit against the Commission under Title VII and also included claims against her supervisors, alleging that they violated her rights under Title VII and the ADA and were liable for damages under 42 U.S.C. § 1983. The district court entered summary judgment in favor of all defendants, and on appeal, the Third Circuit addressed for the first time whether violations of Title VII and the ADA may be brought through Section 1983. The court reasoned that because Title VII and the ADA involve tailored administrative schemes while Section 1983 allows plaintiffs to file immediately in federal court, allowing Title VII and ADA claims under Section 1983 would frustrate congressional intent and is not permitted.

***EEOC v. BDO USA, LLP*, 856 F.3d 356 (5th Cir. (Tex.) 2017), *withdrawn and superseded*, 2017 WL 5494237 (5th Cir. (Tex.) 2017).** An Asian American woman alleged that defendant, her former employer, had subjected her and other female employees to gender discrimination, retaliation, and a hostile work environment in violation of Title VII and the Equal Pay Act. The EEOC brought a subpoena enforcement action against defendant in federal district court, seeking production of information relating to its investigation of the woman's allegations. The district court, relying on the guidance of a magistrate judge, found that 278 withheld documents in defendant's "privilege log" were covered by attorney-client privilege and that an in camera review of the documents was unnecessary to determine whether they were privileged. The district court subsequently granted defendant's request for a protective order, which 1) blocked the EEOC from interviewing defendant's employees about their conversations with defendant's attorneys and 2) required the EEOC to return evidence that had memorialized those conversations. On appeal, the

Fifth Circuit vacated and remanded the district court's opinion, finding that it had relied on an incorrect, overly broad definition of attorney-client privilege. "[T]he district court erred when inverting the burden of proof, requiring that the EEOC prove that [defendant] improperly asserted the attorney-client privilege as to its withheld documents, and concluding that all communications between a corporation's employees and its counsel are *per se* privileged." With respect to the privilege log, the court emphasized that the district court must analyze each entry's description to determine whether it presents sufficient information to support a privilege claim. Similarly, the court found that the district court applied an incorrect legal standard when it granted the protective order, though it stopped short of holding that the order was "unwarranted." Instead, the court directed the district court to reconsider defendant's request for protection under the proper legal standard.

***Vital v. Nat'l Oilwell Varco, LP*, 685 Fed. App'x 355 (5th Cir. (Tex.) 2017).** Plaintiffs, eight black employees, sued defendant under Title VII for alleged harassment and retaliatory employment actions based on race. Plaintiffs brought the lawsuit in 2012, claiming (1) their coworkers and supervisors used racial slurs and epithets, (2) racist graffiti existed in the workplace, and (3) they suffered from unwarranted suspicion. The district court granted in part and denied in part defendant's motion for summary judgment, and a subsequent jury trial returned a verdict for defendant. The district court entered judgment in favor of defendant on all claims, and plaintiffs appealed. The Fifth Circuit unanimously rejected plaintiffs' arguments that because the trial court proceedings were fundamentally mishandled, the jury verdict should be overturned. According to plaintiffs, the district court should have granted a new trial after defense counsel called plaintiffs' counsel the "Hydra of Lerna" and "racist" during closing arguments. With respect to these comments, the court found that defense counsel "was analogizing Plaintiffs' theory of the case to a hydra and arguing that it had morphed and expanded over the course of the trial. Likewise, it does not appear that [defense counsel] called Plaintiffs' counsel racist, but rather argued that Plaintiffs' theory of the case was racist. Tellingly, an objection was not made when the statements were made." The court also declined to find that the district court abused its discretion when it included a complaint from *Bryant v. FMC Technologies Inc.*, determining that defendant "was entitled to present the jury with evidence supportive of its fabrication defense . . . such as the fact that plaintiffs did not complain of seeing physical nooses in the workplace until after they had become aware of the facts of the *FMC* case." Finally, the court agreed with the district court's grant of summary judgment on four wrongful termination claims due to a lack of evidence. The Supreme Court denied plaintiffs' petition for writ of certiorari on October 30, 2017.

***Hale v Johnson*, 845 F.3d 224 (6th Cir. (Tenn.) 2016).** An employee of the Tennessee Valley Authority alleged that he was discharged in violation of the Americans with Disabilities Act and the Rehabilitation Act after he failed a pulmonary function test, which was required by the TVA for employees to

maintain medical clearance. The district court denied the TVA's motion to dismiss for lack of subject matter jurisdiction and the case was certified for interlocutory appeal. On appeal, the Sixth Circuit rejected the TVA's argument that the national security exemption from Title VII applied to the Rehabilitation Act. Although the Rehabilitation Act incorporated certain provisions from Title VII, there was no explicit reference to the exemption and no legislative history or case law support to extend it to Rehabilitation Act claims. The court also rejected the TVA's argument that Department of the Navy v. Egan, 484 U.S. 518 (1988), which precludes judicial review of security clearance decisions, should be extended to preclude review of physical-fitness judgments.

***Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. (Minn.) 2017).** Essentia employed Tovar and offered health insurance benefits. Tovar's son, a beneficiary to those benefits, was diagnosed with gender dysphoria. Health professionals determined that necessary treatment included medication and gender reassignment surgery. Tovar sought coverage under the health plan, which denied coverage. Tovar sued Essentia, alleging sex discrimination against her son in violation of Title VII and the Minnesota Human Rights Act. Tovar also sued the health plan, which we do not discuss here. The district court granted Essentia's motion to dismiss, concluding that Tovar did not have statutory standing. The Eighth Circuit affirmed. The court determined that for a plaintiff to have statutory standing under Title VII, the plaintiff must fall within the class Congress authorized to sue under the statute. Title VII prohibits employer discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's sex. The Eighth Circuit concluded that Tovar did not allege that Essentia discriminated against her because of her sex. Rather, Tovar argued that Essentia discriminated against her because of her son's sex. The court held that Title VII does not extend to such discrimination.

***Harris v. S. Admin. Servs.*, 2017 U.S. Dist. LEXIS 174926 (E.D. Ark. 2017).** Sharia Harris, a *pro se* plaintiff, filed suit against defendant Southern Administrative Services, alleging employment discrimination and retaliation in violation of Title VII and the ADA. Defendant moved to dismiss on the grounds Harris's claims were time-barred. Specifically, defendant claimed Harris's failure to file her lawsuit within 90 days of receiving a right-to-sue letter from the EEOC was grounds for dismissal. The district court noted that the EEOC had actually mailed two letters to Harris's current address. And the district court reiterated the longstanding principle that a properly addressed, stamped, and mailed letter is presumed to have been received. But the wrinkle in the case that extends beyond this principle is that the first letter contained a handwritten notation reading "re-issued on 4/25/17 not received," suggesting Harris had requested the EEOC to re-send her right- to-sue letter. The court held that this evidence did not represent grounds to toll the 90-day limitations period; otherwise, plaintiffs could evade the limitations requirements by "seeking additional Notices of Right to Sue whenever they pleased."

***Pittman v. Am. Airlines, Inc.*, 692 F. App'x 549 (10th Cir. (Okla.) 2017).** Ms. Pittman, an African American with dyslexia, hearing problems, and a learning disability, worked for defendant airline for many years as a building cleaner. In 2012, employer outsourced all the building-cleaner positions, but negotiated with its union to allow those holding outsourced building-cleaner jobs to move into maintenance support positions. Consequently, Ms. Pittman, and others, applied for jobs as hazardous waste maintenance workers. To be eligible for that position, the applicant was required to know how to safely clean up chemical spills by accessing an online database and reading the cleanup-instructions for specific chemicals. After 180 days in the position, the applicants were required to pass a test to demonstrate their competence. During the test-preparation period, Ms. Pittman complained that she was not being adequately prepared for the test "because she was a black woman." She did not seek accommodation for dyslexia or hearing problems. Ms. Pittman received at least two weeks' notice of her test date. The test was administered orally but she was still required to read and understand the online clean-up instructions. She did not pass the test. Ordinarily, an employee who failed the test would return to her prior job, but because Ms. Pittman's prior job had been outsourced, she could not return to it and her employment was terminated. The collective bargaining agreement between Ms. Pittman's union and the employer required employees to bid for jobs by seniority. Notwithstanding this rule, the union and the employer arranged for another position suitable for Ms. Pittman. She began working at the new position on January 21, 2014.

Ms. Pittman subsequently sued her employer, alleging it discriminated and retaliated against her because of her race, gender, and disability. The district court granted summary judgment in favor of employer on all claims. Ms. Pittman appealed, pursuing only her race and ADA retaliation claims. The Tenth Circuit affirmed summary judgment on the disability retaliation claim because Ms. Pittman never participated in protected activities. Any requests for oral testing or other accommodations were not tied to a disability. Her reliance on a vague doctor's note written over ten years prior is not sufficiently direct and specific to constitute notification of a disability. On the race retaliation claim, even though Ms. Pittman stated she was inadequately prepared "because she was a black woman," she failed to show a causal connection between the protected activity and the adverse action.

§ 21.5 Retaliation

§ 21.5.1 Protected Activity

There were no qualifying decisions this year.

§ 21.5.2 What Is a Sufficient Adverse Job Action to Support a Retaliation Claim?

***Rodriguez v. City of Doral Juan Carlos Bermudez*, 863 F.3d 1343 (11th Cir. (Fla.) 2017).** Plaintiff, a police officer, alleged that the City of Doral and its mayor arranged for his termination because he supported the mayor's purported political enemy. Plaintiff claimed that he was targeted for discipline and eventually fired without reason based upon this friendship. After he received a letter of termination, plaintiff was allowed to resign. He filed suit under 42 U.S.C. § 1983, alleging that his First Amendment rights were violated by the retaliatory discipline and firing. The Eleventh Circuit held that a public employee may not be fired because of his political association or beliefs unless the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. The City did not dispute that it could not meet this requirement, but denied that plaintiff had been terminated. The Eleventh Circuit held, for the first time, that a resignation is presumed voluntary unless the employee points to sufficient evidence to establish that the resignation was involuntarily extracted. The court identified two scenarios that warrant a finding of involuntary resignation: (1) where the employer forces the resignation by coercion or duress; or (2) where the employer obtains the resignation by deceiving or misrepresenting a material fact to the employee. The court found that plaintiff's resignation minutes after receiving the termination letter was not voluntary.

§ 21.5.3 Retaliatory Intent

***Marshall v. The Rawlings Co.*, 854 F.3d 368 (6th Cir. (Ky.) 2017).** In a matter of first impression, the Sixth Circuit found that the "cat's paw theory," a situation where a biased supervisor, who lacks decision-making power uses the formal decision-maker as a "dupe" in a scheme to trigger a discriminatory employment action, was applicable in a case arising under the Family and Medical Leave Act (FMLA). Plaintiff asserted that her direct supervisors made negative comments about her FMLA leave and took adverse actions against her based on her leave. They also recommended that she be demoted, and eventually recommended that she be terminated. The court first held that the "cats' paw" theory applied in FMLA cases, noting that the Supreme Court and other federal courts had routinely applied the theory in discrimination cases. The court then found that the theory survived more than one layer of supervision, where the ultimate decision-maker did not engage in their own investigation of the underlying issues supporting the adverse decisions, but merely relied on information from the biased supervisor. Finding that there were contested issues of fact of whether the supervisors unlawfully biased the decision-maker's termination decision, the court reversed the lower court's grant of summary judgment as to plaintiff's FMLA retaliation and ADA discrimination claims. The court upheld the dismissal of plaintiff's FMLA interference and intentional infliction of

emotional distress claims, finding that plaintiff had not established evidence to support either claim.

***Mervine v. Plant Eng'g Servs., LLC*, 859 F.3d 519 (8th Cir. (Minn.) 2017).** Plant Engineering hired Mervine as a plant manager in May 2012. In January 2013, Mervine interviewed for and accepted a site manager position at the site of one of Plant Engineering's clients. In late 2013, he began having problems with a project manager. In January 2014, Plant Engineering began planning for contract negotiations with the client. During a conference call, Mervine expressed concern that a proposed rate increase was illegal double-billing. His supervisor responded angrily and ended the call. In the days following the call, employees began reaching out to Plant Engineering's human resources representative, complaining about Mervine's professionalism and employee morale at the site. As a result, human resources conducted an investigation of Mervine, interviewing 22 employees, including managers and supervisors. Human resources did not ask employees questions soliciting negative comments about Mervine. Most employees reported concern with his management style. Plant Engineering terminated Mervine's employment on February 20, 2014. Mervine sued Plant Engineering, claiming it violated the Minnesota Whistleblower Act by terminating him in retaliation for the statement he made during the conference call. The district court granted summary judgment for Plant Engineering, which the Eighth Circuit affirmed. Mervine argued that the brief period between his protected activity and termination supports an inference of causation. The Eighth Circuit assumed that his activity was protected and noted that close temporal proximity between protected activity and termination may raise an inference of causation, but generally more is required. The court concluded that several employees complained about Mervine in the days following his protected statement and these complaints undermined any causal relationship between his remarks and his termination. Thus, Mervine did not make out a prima facie case of retaliation.

§ 21.6 Wage Hour Issues

§ 21.6.1 Exemptions

***Eren v. Gulluoglu LLC*, 2017 U.S. Dist. LEXIS 161802 (E.D.N.Y. Sept. 30, 2017) (unpublished).** Plaintiffs were employees of a Turkish bakery in New York who were responsible for making baklava, breads, cakes and other Turkish foods. Their employers failed to pay them overtime, after which plaintiffs commenced a lawsuit alleging violations of the Fair Labor Standards Act (FLSA) and New York Labor Law. The employers moved for summary judgment, arguing that plaintiffs fell within the FLSA's "creative professionals" exemption and thus were not entitled to overtime. The district court denied the motion,

finding that the exemption is to be narrowly construed against employers. The court looked to guidance issued by the Department of Labor regarding whether chefs qualify for the exemption. Here, plaintiffs did not qualify for it because defendants did not sell their food in "five-star or gourmet establishments" and plaintiffs did not have the autonomy to design "unique dishes and menu items." The court further noted that talent alone does not bring an employee within the exemption; that talent must be used for an innovative and imaginative task in order for the exemption to apply.

§ 21.6.2 Joint Employment

***Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. (Md.) 2017).** Plaintiffs were employed by J.I. General Contractors (J.I.), a now-defunct drywall installation subcontractor. J.I. and plaintiffs worked almost exclusively for Commercial Interiors (Commercial), a general contracting company. Plaintiffs sued Commercial and J.I. (defendants) for unpaid overtime wages under the theory that the defendants were joint employers for the purposes of the FLSA. The district court held that defendants were not joint employers because they were in a typical contractor-subcontractor relationship. The Fourth Circuit reversed the district court's holding and articulated a new test for determining whether entities constitute joint employers for purposes of the FLSA. The court determined that joint employment exists when "(1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly the essential terms and conditions of a worker's employment and (2) the two entities combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor." Applying a six-factor test, the court concluded that defendants were joint employers because plaintiffs performed nearly all their work on job sites for Commercial's benefit; Commercial provided the tools, materials, and uniforms for work; Commercial supervised plaintiffs; Commercial required plaintiffs to attend meetings; and Commercial rented a house for plaintiffs.

***Hall v. DIRECTTV, LLC*, 846 F.3d 757 (4th Cir. (Md.) 2017) (unpublished).** Plaintiffs were satellite television technicians hired through DIRECTTV's provider network. The network is a pyramid where DIRECTV contracts with Home Service Providers and Secondary Service Providers to control and manage technicians. DirectSat, one of three "independent" Home Service Providers, served as a "middle-manager" between DIRECTTV and individual technicians. DirectSat implemented and enforced DIRECTV's hiring criteria for technicians, relayed scheduling decisions from DIRECTV to technicians using DIRECTV's centralized work-assignment systems, and supervised the technicians. DirectSat also maintained a "contractor file" that was "regulated and audited by DIRECTV." Plaintiffs sued DIRECTV for FLSA violations, alleging that DIRECTV and DirectSat were joint employers. Defendants moved

to dismiss the complaint. The district court held that plaintiff's complaint did not plausibly state a claim of joint employer liability.

The Fourth Circuit reversed the district court and applied the newly articulated *Salinas* test to a different industry to determine joint employer status.[1] Applying the six factors for the first part of the *Salinas* test, the Fourth Circuit determined that plaintiff's factual allegations plausibly established a joint employer relationship: (1) defendants operated a "fissured employment scheme, governed by a web of provider agreements"; (2) DIRECTV was the principal and only client for many of the lower-level subcontractors; (3) DIRECTV controlled nearly every aspect of plaintiffs' job duties; (4) DIRECTV made the work schedules; (5) DIRECTV required plaintiffs to wear uniforms and display the company logo on their vehicles; and (6) the companies shared authority over hiring, firing and compensation. For the second part of the *Salinas* test, using the economic realities test, the court found that plaintiffs were employees and not independent contractors. Under this test, the court concluded that defendants influenced almost every aspect of plaintiffs' work and provided all materials for the DIRECTV jobs.

§ 21.6.3 Miscellaneous

***Amaral Bros., Inc. v. Dep't of Labor*, 325 Conn. 72 (April 4, 2017).** Section 31-60(b) of the Connecticut General Statute directs the Labor Commissioner to adopt regulations that enforce the State's minimum wage laws. One such adopted regulation entitles employers to a "tip credit", which permits employers to include a certain percentage of gratuities received by bartenders and "traditional waitstaff" in the restaurant industry towards the calculation of their minimum wage. In *Amaral Bros.*, the Supreme Court of Connecticut analyzed regulation § 31-62-E2[c] of the Department of Labor to determine whether pizza delivery drivers are "employees of the restaurant industry" as contemplated by the regulation. After thoroughly analyzing the relevant tip credit laws since 1950 and the legislative intent, the Court concluded that drivers are not "service employees" who are subject to the tip credit. The Court concluded that its analysis "reveal[ed] that legislators considering amendment to the statutes consistently have suggested that the mandatory tip credit applied specifically to waitstaff" and that the regulation, which limits tip credits to waitstaff is not inconsistent with Section 31-60(b). A petition for a writ of certiorari regarding the tip credit issue is pending before the U.S. Supreme Court.

***Karlson v. Action Process Serv. & Private Investigations, LLC*, 860 F.3d 1089 (8th Cir. (Ark.) 2017).** Karlson served legal process for Action Process Service & Private Investigations (APS). Seven years later, he sued APS to recover alleged unpaid overtime wages under the Fair Labor Standards Act (FLSA). At the close of evidence, the district court denied Karlson's motion for judgment as a matter of law (JMOL) and decided, without objection from the parties, to submit the

1. See Section 15.7.2 for the full summary of the *Salinas* test.

employee/independent contractor issue of law to the jury. The jury instruction provided six factors for the jury to consider. The jury found that Karlson was not an employee. Karlson filed a renewed JMOL motion. The district court denied the motion, adopted the jury's conclusion, and entered judgment in favor of APS. Karlson appealed, arguing, inter alia, that the undisputed facts showed that he was an employee. The Eighth Circuit first noted that the ultimate question of whether Karlson was an employee was a question of law. Next, the court stated that if a district court submits an ultimate FLSA issue of law to the jury with the parties' consent and then adopts the jury's verdict, an appellate court must affirm if the evidence, viewed most favorably to the jury's verdict, is sufficient to support that verdict. The court determined that under this sufficiency of the evidence standard, a reasonable jury could conclude that Karlson was an independent contractor. The court rejected Karlson's contention that it should independently analyze the economic reality factors because (1) neither the jury nor the district court made specific findings relating to those factors; (2) Karlson proposed that the ultimate legal issue be submitted to the jury; and (3) Karlson did not object to the jury instruction or the general verdict form. Applying the deferential standard, the Eighth Circuit affirmed the district court.

***Gamble v. Minn. State-Operated Servs.*, 2017 U.S. Dist. LEXIS 159797 (D. Minn. 2017).** Five incarcerated individuals who voluntarily participated in a vocational work program for detainees filed suit alleging a variety of statutory and constitutional violations against Minnesota State-Operated Services (MSOP), including violations of the Fair Labor Standards Act (FLSA). Plaintiffs alleged MSOP withheld up to 50 percent of their wages, resulting in a violation of the FLSA's minimum wage requirement. MSOP argued plaintiffs were independent contractors, not employees, and moved to dismiss the minimum wage claims on the grounds they were not entitled to protection under the FLSA. The district court noted that plaintiffs had alleged they were required to pay for various items out of pocket, including work clothing, shoes, medical care, and medical supplies. The district court also relied on the plaintiffs' allegations that MSOP's withholdings were used to help defray the costs associated with several of its programs. These facts together resulted in the court's conclusion that plaintiffs may be considered employees under the FLSA, and therefore that MSOP's motion to dismiss must be denied.

§ 21.7 FMLA

***Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. (N.Y.) 2017).** Woods was a substance abuse counselor at START, a non-profit that operates clinics which provide treatment to thousands of narcotic-addicted patients each day. Starting in 2011, START began giving Woods poor performance reviews. START informed Woods that she was not achieving "required outcomes" and needed "enhanced training." The training she received did not remedy her work-performance issues and she was ultimately

terminated for, among other things, failing to maintain up-to-date notes on the patients she counseled. Woods commenced an action against START alleging that her termination was in retaliation for taking FMLA-protected leave. During her performance review period, Woods was hospitalized twice for her anemia: the first time in August 2011 for six days, and the second time in April 2012 for seven days. Each hospitalization period was protected by the FMLA, and she returned to work shortly after being discharged from the hospital in each instance.

At trial in district court, the jury was instructed that the plaintiff had to show "but for" causation to prevail on her FMLA retaliation claim. Stated another way, plaintiff had to show that the exercise of her FMLA rights was the "but for" cause of the employer's discharge. After receiving this instruction, the jury deliberated and returned a verdict in favor of START. Woods appealed the verdict to the Second Circuit, arguing *inter alia* that the district court applied the wrong causation standard when instructing the jury on her FMLA claim. Woods argued that she only needed to establish that her taking FMLA leave was a "motivating factor" and not the "but for" cause of her termination. Since the FMLA is silent as to a causation standard, the court looked to the Department of Labor's (DOL) regulations for guidance. The DOL regulation the court found persuasive was one stating that FMLA leave cannot be used as a "negative factor" in employment actions. The court considered this regulation more aligned with the "motivating factor" test than the "but for" test. As a result, the court vacated the judgment and remanded the case back to the district court based on what it considered an improper jury instruction.

***Saleem v. Corp. Transp. Group, Ltd.*, 854 F.3d 131 (2d Cir. (N.Y.) 2017).** Plaintiffs were a group of black-car drivers who owned and operated black-car franchises. The defendants were operators of a black-car dispatch and sold the black-car franchises to individual plaintiff drivers. Pursuant to the franchise agreement, the drivers were not employees or agents of the franchisor. Although the agreement did not prohibit drivers from working for competing companies at the same time, it did require drivers to abide by company policy. A number of plaintiff drivers commenced an action, alleging that defendants violated the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL) by improperly classifying plaintiffs as independent contractors so as to avoid paying them overtime, as required under the two laws if plaintiffs were listed as employees. The Second Circuit affirmed the district court's decision that plaintiffs were properly classified as independent contractors. Specifically, the court applied the "economic reality" test, which required it to review the totality of the circumstances and the relationship between the parties to determine whether plaintiffs should be deemed employees or independent contractors. The court applied a number of "economic reality" factors, including plaintiffs' affiliation with defendants, whether plaintiffs had additional opportunities for entrepreneurship, the degree of control exercised by defendant over plaintiffs, plaintiffs' skill and independent initiative necessary to complete their work, and how integral was plaintiffs' work to defendant's business. Weighing these

factors, the Second Circuit concluded that plaintiffs were not employees subject to overtime salary under the FLSA.

***Maliandi v. Montclair State Univ.*, 845 F.3d 77 (3d Cir. (N.J.) 2017).** Plaintiff Maliandi, a university employee, took medical leave in 2013. Despite her compliance with relevant policies and procedures, she allegedly was denied reinstatement in her original position upon her return to work. After refusing to accept an inferior position, she was terminated. She sued the university alleging violations of state law and the FMLA. The university moved to dismiss for lack of subject matter jurisdiction, claiming Eleventh Amendment immunity from suit, but the district court denied the motion. The Third Circuit reversed, finding that the university is an arm of the state: "status under state law" and autonomy factors weighed in favor of immunity, while only funding factors weighed against.

***Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. (Tex.) 2017).** Plaintiff, a video editor at a television station, sued the station for discriminating against him based on his disability, in violation of the ADA and FMLA. The district court found that plaintiff had established a prima facie case of discrimination but had failed to present sufficient evidence that the reasons provided for his firing were pretextual. On appeal, the Fifth Circuit unanimously reversed the district court's decision and remanded the case for further proceedings. As a result of childhood bone cancer, plaintiff has to use crutches to get around. Video editors at the station split their time between editing scripts and working in electronic digital recording (EDR). Plaintiff's direct supervisors testified that they limited his hours in the EDR room because it is "tight in spots" and felt he would have a difficult time navigating the space. Regardless, plaintiff "took it upon himself to stay up-to-date on [EDR] changes," making up the time while other editors were on break. In 2014, he informed his supervisors that he would need to take leave for two surgeries; that same year, the station was directed by its parent company to eliminate two video editor positions. The station decided to fire plaintiff and Parrish Murphy; however, "[b]efore the decision was made, Murphy had been individually informed of his inadequate performance per KHOU policy and had been given the opportunity to improve; [plaintiff] was not given equivalent forewarning or opportunity to improve his performance." Plaintiff's supervisors later provided inconsistent justifications for his termination, saying that he "actively avoided taking on EDR work" yet also maintaining that the decision to fire him had "nothing at all" to do with his work ethic. For the court, these statements and others called into question "the explanations for firing [plaintiff] and are thus probative of their truth." In addition, "unlike other employees, [plaintiff] was actually prevented from doing EDR work by his employer, a limitation that was ultimately used as a basis for his termination." Finally, because plaintiff's arguments regarding pretext applied just as equally to the FMLA, the court ruled that "the district court erred in granting summary judgment on [plaintiff's] FMLA claim" along with his ADA claim.

Waag v. Sotera Def. Solutions, Inc., 857 F.3d 179 (4th Cir. (Va.) 2017). The U.S. Army selected Sotera as one of the non-exclusive prime contractors for their Next Gen project. Plaintiff became the Program Manager (PM) for the project. Shortly thereafter, he injured his hand in an accident at home and was unable to return to work for several months. He was able to cover a portion of his salary by using "paid time off" and short-term disability benefits. During his absence, another employee assumed the PM position. Shortly after plaintiff began his leave, federal budget sequestration resulted in substantial cuts to federal spending and funding for government contracts was not available. Due to these budget cuts, Sotera reduced the PM position to a part-time position. When plaintiff returned, he had a new supervisor and a new position. The salary for plaintiff's new job was identical and he had similar work to perform. Later that year, plaintiff's unit saw a drastic decrease in work due to sequestration. Sotera laid off plaintiff and other senior managers. Plaintiff sued Sotera alleging three FMLA violations: (1) that Sotera violated the FMLA by not restoring him to the same position when he returned from leave; (2) the new job he was placed in was not an equivalent position; and (3) Sotera terminated him for taking medical leave. The district court granted summary judgement to Sotera, and the Fourth Circuit affirmed. As to the first issue, the Fourth Circuit focused on the plain language of the FMLA provision and concluded that "the FMLA does not require an employer to restore an employee returning from leave to his previous position no matter what." An employer may either restore the employee to the same position or provide an equivalent position. As to the second issue, the court held that plaintiff's second job was an equivalent position because it had the same salary, bonus eligibility, benefits and title, and involved the same basic work and skills. As to the third issue, court concluded that temporal proximity alone was not enough to show that reasons for the layoff were pretextual.

Mullendore v. City of Belding, **872 F.3d 322 (6th Cir. (Mich.) 2017).** Plaintiff was hired as the City Manager of the City of Belding, Michigan in April 2013. She had her contract renewed several times, including in November 2014, when it was approved for a one year extension to expire in April 2016. In December 2014, shortly before she was terminated, a new city council member sent an email indicating that he wanted plaintiff's employment terminated as a result of political discontent. Plaintiff came into possession of that email. Shortly thereafter, she sent the city council a memo entitled "Personal Medical Issue," indicating she had injured her ankle, needed surgery, and would be off work for less than two weeks. Thereafter, she would work from home for twelve weeks because she could not climb the steps to City Hall. At the next city council meeting, a vote was taken to terminate plaintiff's employment. She was not in attendance, and afterwards filed suit alleging violations of the FMLA by the City and the Council.

The district court granted defendants' motion for summary judgment, determining that a reasonable jury could not find that plaintiff gave notice of her intent to take medical leave. The district court found that her memo was a request for an accommodation, and not a formal request for FMLA leave. It was

also noted that plaintiff declined FMLA paperwork because she asserted that she would be working from home after a few days off. The district court also found that a reasonable factfinder could not conclude that defendants' proffered reason for the termination (political controversy and distraction) was not the real reason. The Sixth Circuit affirmed, finding that even if there was a genuine issue of fact, plaintiff could not prove that she was terminated because she was on FMLA leave. Defendants articulated a legitimate reason for terminating her employment and she could not establish pretext. Thus, she could not prevail on an interference claim.

***Wink v. Miller Compressing Co.*, 845 F.3d 821 (7th Cir. (Wis.) 2017).** Plaintiff sued defendant, her former employer, alleging violations of the FMLA, non-payment of wages in violation of a Wisconsin statute, and breach of contract. A three-day jury trial ended with a verdict in plaintiff's favor on three of her four claims. The district court denied defendant's motion for judgment as matter of law, and the parties cross-appealed. Plaintiff had worked at defendant's recycling company for over a decade when, in July 2011, she was granted periodic FMLA leave to care for her autistic son. When he was expelled from daycare for aggressive behavior, plaintiff asked permission to work from home two days a week. Defendant initially said yes but, several months later, changed its remote work policy. Plaintiff's supervisor eventually gave her "an ultimatum," requiring her to show up at the office the following Monday. "Because [plaintiff] had to return home to take care of her child, not having been able to obtain day care for him over the weekend," she was informed it would be her last day with the company. On appeal, the Seventh Circuit supported the jury's inference that plaintiff's supervisors "had no compelling reason to fire her" and instead were angry that she had exercised her FMLA right to leave work to care for her child. According to the court, the jury rightly found that she was pushed out of her position without cause or advance notice and that she should have been entitled, under Wisconsin law, to either 1) three weeks' advance notice of termination, or 2) three weeks of paid wages. In addition, the FMLA entitles a winning plaintiff to an award of attorneys' fees. The jury reduced plaintiff's fees by 20 percent because one of her FMLA claims failed. However, the court found that this claim was similar enough to her successful FMLA claim to merit the full fee award. "The two FMLA breaches are very similar, so it was prudent for the lawyers to press both in order to reduce the likelihood of a total defeat. And . . . the marginal cost of presenting the interference claim to the jury was slight." The court remanded the ruling with directions to award plaintiff her full attorneys' fees.

***Perez v. El Tequila, LLC*, 847 F.3d 1247 (10th Cir. (Okla.) 2017).** The Tenth Circuit affirmed the district court's grant of summary judgment for employees, holding the employer's violations of the FLSA were "willful" and extending the statute of limitations for FLSA claims from two years to three years. The employer took affirmative steps to create the false appearance that it complied with the FLSA, including adjusting records to suggest that workers were properly paid, withholding documents, misrepresenting how employees were paid, and

instructing employees to do the same. Accordingly, a reasonable jury could not conclude that the employer's violations were merely negligent.

***Jones v. Gulf Coast Health Care of Del.*, 854 F.3d 1261 (11th Cir. (Fla.) 2017).** Plaintiff, an employee of a long-term-care nursing facility, took leave pursuant to the FMLA for approximately ten weeks. The day before he was scheduled to return to work, Plaintiff's doctor advised him that he was unable to do so. Plaintiff requested that his employer allow him to return for light duty, but the employer refused. He then requested and was granted an additional 30 days leave. Upon his return to work, plaintiff was fired because his employer believed he was capable of returning to work at an earlier time. Plaintiff sued for FMLA retaliation, which required him to show that (1) he engaged in statutorily protected activity, (2) he suffered an adverse employment decision, and (3) the decision was causally related to the protected activity. The parties disagreed as to whether plaintiff satisfied the third element, causation. In the Eleventh Circuit, an employee can establish causation by demonstrating close temporal proximity between protected conduct and an adverse employment action. In an issue of first impression, the Eleventh Circuit held that "temporal proximity, for the purpose of establishing the causation prong of a prima facie case of FMLA retaliation, should be measured from the last day of an employee's FMLA leave until the adverse employment action at issue occurs." Because factual issues remained as to whether the reasons given for plaintiff's termination were pretextual, the Eleventh Circuit reversed the district court's decision in part and remanded the case for further proceedings.

§ 21.8 Terminations / Settlement

***Mei Xing Yu v. Hasaki Rest., Inc.*, 874 F.3d 94 (2d Cir. (N.Y.) 2017).** In accordance with the directive made by the district court, Hasaki Restaurant petitioned to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), for the Second Circuit to resolve the issue of whether court approval was required to settle a Fair Labor Standards Act (FLSA) claim where plaintiff accepted defendant's Rule 68 offer of judgment. The Second Circuit granted Hasaki leave to pursue the interlocutory appeal to resolve a circuit split among the district courts over this issue. The petition arose out of an action commenced by a sushi chef against her employer for alleged FLSA violations. To settle the case, plaintiff agreed to accept defendant's rule 68 offer of judgment. After its review of the settlement terms, the district court directed the parties to submit letters detailing why the settlement was "fair and reasonable." As such, the district court invoked the rule that had been adopted by the Second Circuit in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015)—which requires court approval of stipulated settlements that involve FLSA claims—and, in doing so, declared that *Cheeks* applies to Rule 68 settlements. In its holding, the district court also acknowledged that the trial level courts of the Second Circuit were split on the Rule 68 settlement issue. To resolve the split, the trial

court certified the order for interlocutory review and stayed the underlying case pending the appeal.

§ 21.9 Uniformed Services Employment

There were no qualifying decisions this year.

§ 21.10 Miscellaneous

§ 21.10.1 Benefits / ERISA / COBRA

***Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).** In three consolidated cases that arose out of the Third, Seventh and Ninth Circuits, the Supreme Court unanimously ruled that the religious exemption provision of the Employee Retirement Income Security Act (ERISA) extends to benefit plans maintained by church affiliates, regardless of whether an actual church established the plan. A trio of hospitals had argued that a 1980 amendment to ERISA clarified that a church affiliated organization, not just a church itself, could maintain a "church plan" and still be exempt from the law's benefit plan requirements. The hospitals were being sued by employees who feared the vulnerability of their retirement plans without ERISA's protections. The parties had disputed whether the 1980 amendment dropped the requirement that a plan had to have been created or "established" by a church to be eligible for the exemption. The Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corp., the three federal agencies that oversee ERISA, have each interpreted the provision in line with the court's holding for the past few decades.

***Prime Healthcare Servs.-Landmark LLC v. United Nurses and Allied Prof'ls, Local 5067*, 848 F.3d 41 (1st Cir. (R.I.) 2017).** In the midst of purchasing Landmark Medical Center (Landmark), Prime Healthcare Services (Prime) agreed to take over a collective bargaining agreement (CBA) between Landmark and a local union (Union). In June 2013, the insurer announced it would terminate Landmark's benefit retirement plan for failure to maintain the minimum funding requirements. The Union filed a grievance stating Landmark violated the pension provision in the CBA. Landmark denied the grievance, and the Union demanded arbitration. The Providence Superior Court later authorized Landmark to execute the pension termination agreement. In May 2014, Prime filed an action to stay arbitration in the district court. In June 2014, the Union filed another grievance against Prime for not honoring the prior CBA and refusing to submit the prior grievance to arbitration. In January 2016, the district court awarded summary judgment for Prime because it held ERISA

preempted the Union's claims. The First Circuit evaluated whether the court (substantive arbitrability) or the arbitrator (procedural arbitrability) should decide if the Union could bring its ERISA claim. Prime argued the subject matter was not suitable for arbitration, stating that Title IV of ERISA provides the exclusive means to terminate a benefit pension plan. The appellate court reiterated that pertinent inquiry is not whether the Union can bring the claim; rather, whether the court or the arbitrator decides whether the Union can bring its claim. The First Circuit noted, even if ERISA was the exclusive means to terminate a plan, an arbitrator could make this initial decision of whether the Union can bring the claim, and it is immaterial whether the arbitrator might reach an incorrect conclusion. The court vacated the district court's ruling and remanded with instructions to grant the Union's motion to compel arbitration.

***Rodriguez-Lopez v. Triple-S Vida, Inc.*, 850 F.3d 14 (1st Cir. (P.R.) 2017).** Triple-S Vida, Inc. (Triple S) took over an employer benefits plan, but the plan was not amended to reflect this replacement. Triple S approved plaintiff's claim for long-term mental illness disability benefits for a maximum of 24 months, while the physical disability claim was under further review. Sometime after her mental illness claim expired, Triple-S denied all benefits after second opinion evaluations showed she could do other light-duty jobs. Plaintiff internally appealed this decision, but Triple-S maintained its denial of benefits. Plaintiff sued, alleging an ERISA violation. The district court awarded summary judgment to Triple-S, holding that it had discretionary authority to determine benefits eligibility under an arbitrary and capricious standard of review. Plaintiff appealed, arguing the district court applied the incorrect standard of review. Denial of benefits is to be reviewed under the de novo standard, unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan. If adequate notice of this right is given, then the arbitrary and capricious standard applies. Because the authority was provided to the prior insurer and not to Triple-S, the First Circuit held Triple-S lacked authority to make these decisions, even as successor to the prior insurer. The language did not grant discretionary authority to any named fiduciary, did not include Triple-S as a named fiduciary under the plan, and did not properly designate Triple-S as a delegate for a fiduciary with discretionary authority. Because the plan did not confer discretionary authority upon Triple-S, de novo review applied. The First Circuit vacated the judgment and remanded for reconsideration.

***Vendura v. Boxer*, 845 F.3d 477 (1st Cir. (Mass.) 2017).** After seven years of working for TRW, Inc. (TRW), Vendura went on medical leave in June 2000. Soon thereafter, Northrop Grumman Space and Mission Systems Corporation (NGSMSC), which purchased TRW, attempted to terminate Vendura. In 2003, Vendura and NGSMC signed a settlement agreement that kept Vendura employed at NGSMSC until his long-term disability ended. In October 2012, Vendura's insurer notified him that his eligibility for long-term disability would end on February 2013. Vendura's pension benefits were based on "years of benefit service," which under Section 2.2 subsection (a) of the benefits plan (the Plan),

include years that a participant receives compensation "for the performance of services." A person could also accrue years of benefit service when absent from work under varying circumstances. Subsection (b) provides for additional years of benefit service for up to one year when absent from work because of injury or occupational disease during employment for which he receives worker's compensation benefits. Subsection (c) provides additional years of benefit service based on an absence without pay form work due to a disability and for which he may receive long-term disability benefits. In 1999, NGSMSC amended subsection (c) to keep the same language but limited the grant to five years of benefit service for any absence starting after January 1, 2000, for an employee with more than five years of vested service. In April 2013, Vendura filed a claim for pension benefits with the "Administrative Committee" for the NGSMSC Plan, arguing he had twenty years of benefit service and was entitled to a lump sum payment of benefits. The Administrative Committee denied his claims, stating he only had twelve years of benefit service and was not entitled to a lump sum distribution. Vendura internally appealed, but the Administrative Committee maintained their position. Vendura sued in district court under ERISA and breach of the settlement agreement. The defendants moved for summary judgment, and the district court granted their summary judgment motion, holding: (1) the settlement agreement by itself did not create any right of accrual of benefit service beyond what was provided in the Plan; (2) the sixty month cap was not arbitrary; and (3) Vendura could not have a lump sum distribution. Vendura appealed. The First Circuit found the settlement agreement did not enlarge Vendura's right to anything more than what he was entitled to under the Plan. Turning to Vendura's claim of twenty years of benefit service, the found strong support for the Administrative Committee's reading. The first line of every subsection sets out the criteria for the entitlement to accrue years of benefit service. Further, compared with the second half of subsections (b) and (c), subsection (c) provides a grant of benefit service related to long-term disability benefits. Lastly, the court held that the Administrative Committee reasonably construed the Plan in denying a lump sum of benefits, as Vendura failed to timely request the same in the three months prior to him retiring while he was receiving service. The First Circuit affirmed the district court's opinion in its entirety.

***Osberg v. Foot Locker, Inc.*, 862 F.3d 198 (2d. Cir. (N.Y.) 2017).** Defendants appealed from a district court ruling that they had violated ERISA sections 102 and 404(a). The district court found that, in 1996, defendants had failed to adequately disclose to its employees that the switch from a defined benefit pension plan to a cash balance benefit plan would temporarily freeze benefits for thousands of employees despite their continued payments towards their plans. On appeal, defendants did not deny that that their actions violated ERISA; rather, they argued that the district court erred in granting relief to all class members because (1) the statute of limitations had tolled as to certain class members; (2) there was no finding that that each employee had relied upon defendants' deceptions; (3) there was no finding that each member of the class understood

their benefits were cut; and (4) the universal award caused overpayment to certain class members. The Second Circuit rejected the defendants' positions, concluding (1) the statute of limitations did not begin to run when each employee cashed out of the plan at retirement because the average employee would not have been able to conclude and understand that his or her benefits were subject to "wear-away" based on the complexity of and misrepresentations in the plan; (2) it was not required to find detrimental reliance by each class member; (3) based on their testimony, since defendants gave participants the false impression that their benefits would be fully reflected in growing account balances, there could not have been a finding that participants should have reasonably understood that they were losing benefits; and (4) even if there was a possibility of overpayment to certain class members, the district court did not abuse its discretion in awarding a judgment to the entire class. Consequently, defendants were found liable to the class in an amount over $100 million.

***Nat'l Elevator Indus. Health Benefit Plan Bd. of Trs. v. McLaughlin*, 674 F. App'x 189 (3d Cir. (N.J.) 2017).** The National Elevator Industry Health Benefit Plan Board of Trustees (the Plan) sought reimbursement after McLaughlin, who had been injured in an accident and received benefits for medical costs, received a settlement from a third party stemming from the accident. The district court entered summary judgment for the Plan based on a provision retaining its right to reimbursement out of any recovery, and the Plan then sent a letter to the court explaining that it wished to file a lien against McLaughlin, but the court's order and judgment failed to include a sum certain. The court ordered that judgment in the amount of $45,347.89, the apparently undisputed amount of the claim, be entered in favor of the Plan. McLaughlin appealed, challenging the court's entry of a "new order for judgment" notwithstanding the previous "final order" of the court, and arguing that ERISA does not permit entry of a money judgment. The Third Circuit held that the entry of judgment represented the monetization of a lien, rather than a personal judgment, and was therefore a valid equitable remedy under ERISA.

***Ret. Comm. of DAK Ams. LLC v. Brewer*, 867 F.3d 471 (4th Cir. (N.C.) 2017).** The plan administrator and plan fiduciary brought an action under ERISA against plan participants to recover alleged overpayments of pension benefits. Defendants filed counterclaims alleging that they were entitled to retain the disputed funds. DAK had amended their retirement plan to add a lump sum benefit option. The plan administrators sent a letter about the new lump sum benefit, but the lump sum amount stated in the letter was incorrectly calculated. Some plan participants acted on this incorrect information and elected to receive the lump sum, resulting in an overpayment. To establish a right to equitable restitution, plaintiffs must show that the funds (1) are specifically identifiable property; (2) belong in good conscience to the plan; and (3) are within defendants' possession and control. There was no dispute as to elements one and three. At issue was whether the funds belonged in good conscience to the plan given the language of the plan and the amendment. The district court held that the overpayment must be returned to the plan and entered summary judgment

against defendants. The Fourth Circuit affirmed, finding that the language of the amendment provided plan participants with the right to elect a lump sum that was the actuarial equivalent to the benefit payable at normal retirement, not the incorrectly calculated amount. The court also found that equitable estoppel was inapplicable because it cannot be used to require payment that is contrary to the language of the plan. Therefore, given the plain language of the amendment, summary judgement was proper.

***Trujillo v. Landmark Media Enter., LLC*, 689 F. App'x 176 (4th Cir. (Va.) 2017) (unpublished).** Plaintiff was the Director of Benefits and Safety for Dominion Enterprises (Dominion). Dominion added plaintiff to the signatory authority for Dominion's 401(k) plan and the retirement plan for Dominion's parent company, Landmark Media Enterprises (Landmark). As part of a May 2015 audit, plaintiff discovered that the asset management company was not properly vesting participants in the Landmark retirement plan and that certain employee contributions were not being properly segregated from payroll. Plaintiff informed the CFO and Vice President of Human Resources of these errors. In September 2015, one month before the deadline for filing the IRS Form 5500, the CFO replaced the firm it had initially retained to conduct the audits with a new firm and transferred management of the benefits plan audits from the benefits department to the finance and accounting staff. In October 2015, plaintiff finalized efforts to complete the Form 5500. He attached information detailing how the errors in retirement plains violated ERISA to the Form 5500. He was fired less than a week later.

Plaintiff filed a complaint alleging "that he was terminated in retaliation for giving information regarding the ERISA violations in the course of the plan audits." Defendants moved to dismiss for failure to state a claim. The district court granted defendants' motion because plaintiff failed to allege that he testified or gave information in "any inquiry or proceeding" as defined in *King v. Marriot International Inc.*, 337 F.3d 421 (4th Cir. 2004). The Fourth Circuit reversed, explaining that "the fact that a plaintiff's claim does not fall within the four corners of our prior case law…does not justify dismissal under Rule 12(b)(6)." These dismissals "are especially disfavored in cases where the complaint sets forth a novel legal theory." The Fourth Circuit remanded the case for more factual development as to whether plaintiff testified or gave information during an "inquiry or proceeding."

***Ohio v. United States*, 849 F.3d 313 (6th Cir. (Ohio) 2017).** Ohio and several state instrumentalities sued the United States, arguing that the mandatory payment scheme under the Affordable Care Act's Transitional Reinsurance Program (the Program) applied only to private employers. The Program is an attempt to combat volatility in the individual marketplace by collecting payments from group health plan issuers and distributing those payments to health insurance issuers who cover high-risk individuals. The district court granted the United States' motion for summary judgment, finding that the Program applies to state and local government employees and the application of the Program against the State does not violate the Tenth Amendment. On appeal, the Sixth

Circuit affirmed. It rejected the State's argument that the phrase "group health plans" in the statute does not encompass plans offered to state employees by noting that the Act adopted the Public Health Service Act's definition of the phrase which includes state and local government employers, and provisions in ERISA also support this reading. Moreover, the Court found that it was not improper to define "group health plans" through cross-referencing the other statutes mentioned above which indicate Congress's "plain statement" that the Program applies to State employers.

***Reese v. CNH Indus.*, 854 F.3d 877 (6th Cir. (Mich.) 2017), *rev'd*, 2018 WL 942419 (2018).** In these consolidated case, the Sixth Circuit issued three decisions concerning whether retirees were entitled to lifetime healthcare benefits. In *Cole*, the court issued a superseding opinion overturning its 2008 decision that *Meritor* retirees had the right to lifetime healthcare benefits. Finding that the *Yard-Man* line of cases had been abrogated by the Supreme Court, it reviewed the case under the Supreme Court's *Tackett* decision, which held that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." In the subsequent *Tackett III* decision, the Supreme Court held that collective bargaining agreements (CBAs) relating to retiree healthcare benefits should be read according to ordinary contract principles, and "when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties." The court found that the language of the parties' CBA stating that retiree healthcare benefits "shall be continued" was unambiguous, and only vested healthcare benefits for retirees for the life of the CBA.

In *Kelsey-Hayes*, the Sixth Circuit again relied on the *Tackett* cases, finding that the agreement was ambiguous as to lifetime benefits. The parties' bargaining history contained sufficient evidence to determine that they intended and understood the language to provide lifetime healthcare benefits for retirees. Likewise, in *Reese*, the court found that extrinsic evidence, including the fact that the company calculated the costs of retiree benefits based on the employee's expected lifespan and the fact that company representatives told employees that retirees would have healthcare benefits for their lifetime, supported a finding that employees had vested lifetime benefits. Upon granting certiorari, the Supreme Court reversed and remanded *Reese*, finding that (1) under ordinary principles of contract law, the expired CBA did *not* create a vested right to lifetime healthcare benefits, and (2) a court cannot create an ambiguity in the CBA by declining to apply the CBA's general durational clause to healthcare benefits and then inferring vesting.

***Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576 (6th Cir. (Ohio) 2016).** A manufacturer, its president and an hourly employee filed a class action suit alleging that a multiemployer welfare benefit plan and its trustees violated ERISA, the Affordable Care Act (ACA) and § 302 of the Labor Management Relations Act (LMRA), arguing that the plan did not comply with ACA requirements on annual and lifetime benefit caps. The Sixth Circuit affirmed the dismissal of the various ERISA claims on lack of standing because plaintiffs

failed to show a concrete injury. Although plaintiffs argued that the benefit caps existed, they did not show that they suffered harm. The court also found that to the extent plaintiffs were alleging they suffered an injury by remitting money towards a non-compliant plan, they failed to state a claim under ERISA. Next, the court assumed that 29 U.S.C. § 1149 provided a cause of action for false statements of fact, but held that plaintiffs failed to satisfy their heightened pleading requirement of identifying the false statements with specificity. Affirming dismissal of the LMRA claim, the court relied on *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993), finding that plaintiffs could not bring a claim requiring the plan to be administered in accordance with § 302(c)(5). Finally, the court held that the contract claims were preempted by ERISA.

***Milby v. MCMC LLC*, 844 F.3d 605 (6th Cir. (Ky.) 2016).** An ERISA plan participant filed a claim in state court against a third-party medical reviewer after it rendered an opinion that was relied upon by the plan when denying the participant's claim for long-term disability benefits. The participant alleged the reviewer was per se negligent for practicing medicine without a license. The case was removed to federal court under ERISA and dismissed under Rule 12(b)(6). Affirming, the Sixth Circuit found the participant's claims to be preempted. The reviewer was indisputably part of the ERISA benefit claim process even though the reviewer could not be a proper party in an ERISA lawsuit. The court also found that the complaint relied solely on ERISA to establish the duty required for the negligence claim. Thus, the claim was completely preempted.

***WestRock RKT Co. v. Pace Indus. Union-Mgmt. Pension Fund*, 856 F.3d 1320 (11th Cir. (Ga.) 2017).** Employer challenged actions taken by defendant pension fund's Board of Trustees under two ERISA sections. Employer was a long-time contributor to the fund, which was in critical status due to its dire financial condition. Employer challenged the Board's amendment to the plan to include a provision requiring an employer that withdraws from the fund to pay a portion of the fund's accumulated funding deficiency. The Eleventh Circuit held that § 1082 relieves employers from an automatic payment but does not prohibit a charge based on accumulated funding deficiencies in all scenarios. The court also rejected employer's argument that § 1451(e) governs any and all liability that a plan may impose on a withdrawing employer. The court rejected this argument and held that Congress did not intend for "withdrawal liability" under subsection (e) to be the only payments a withdrawing employer could face.

§ 21.10.2 Hostile Work Environment

***Castleberry v. STI Grp.*, 863 F.3d 259 (3d Cir. (Pa.) 2017).** Plaintiffs Castleberry and Brown were hired by STI Group as general laborers, and supervised by managers from both STI Group and Chesapeake Energy Corporation. They alleged that, on several occasions, they arrived at work to find that someone had anonymously written "don't be black on the right of way" on sign-in sheets. They also alleged that while working on a fence-removal project, a supervisor

told Castleberry and his coworkers not to "n*****-rig" the fence or they would be fired. Plaintiffs reported this incident to their supervisor, and were fired two weeks later without explanation. Castleberry and Brown brought suit against STI and Chesapeake alleging, *inter alia*, harassment in violation of 42 U.S.C. § 1981. The district court granted a motion to dismiss the harassment claim, reasoning that the facts pled did not support a finding that the conduct was "pervasive and regular." On appeal, the Third Circuit noted inconsistency in circuit precedent regarding the proper standard for stating a harassment claim under 42 U.S.C. § 1981, and clarified that a plaintiff must plead that the discrimination creating a hostile work environment was "severe *or* pervasive." The court recognized that while determining whether a one-time incident is sufficiently severe to state a claim is a context-specific inquiry, a single incident may suffice to state a claim, and reversed the dismissal.

§ 21.10.3 Jurisdiction

There were no qualifying decisions this year.

§ 21.10.4 Protected Speech

***NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2d Cir. 2017).** Pier Sixty, LLC was a catering company in New York City. A Pier Sixty supervisor reprimanded employees for socializing, after which an employee posted the following message on Facebook about the supervisor: "Bob is such a NASTY MOTHERF**KER don't know how to talk to people!!!!!! F**k his mother and his entire f**king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!" After learning of the message, Pier Sixty terminated employee two days before a union election. Employee filed a charge with the National Labor Relations Board (NLRB), which alleged that Pier Sixty violated the National Labor Relations Act (NLRA) by terminating him in retaliation for concerted protected activities. An Administrative Law Judge found in favor of employee, and a three-member panel of the NLRB affirmed.

Pier Sixty petitioned for review of the NLRB's determination by the Second Circuit, arguing that employee's conduct was so opprobrious that it lost the protection of the NLRA. The Second Circuit disagreed. The court reasoned that even though the employee's posting contained vulgar attacks on his supervisor and his family, the subject matter of the message included protected speech about management's allegedly disrespectful treatment of employees and an upcoming union election. This conclusion was based on the totality of the circumstances, including that: (1) in the same time period, management had leveled threats against employees who might vote for unionization and prevented employees from discussing the union; (2) other employees who had used similar language were not punished, much less terminated; and (3) employee's comments did not amount to a "public outburst" since they were posted on Facebook and not uttered in view of customers, and employee took the post down three days after realizing it was viewable by the public and not only his Facebook

"friends." Nonetheless, the court cautioned that "this case seems to us to sit at the outer-bounds of protected, union-related comments."

***Linkletter v. W & S. Fin. Grp., Inc.*, 851 F.3d 632 (6th Cir. (Ohio) 2017).** Plaintiff applied for a job with the employer defendant and was offered a position, which was later rescinded by defendant after plaintiff signed a petition in support of a woman's shelter that was in a dispute with defendant. Plaintiff sued under § 3617 of the Fair Housing Act (FHA), alleging her actions in signing a petition against defendant employer "encouraged the residents of the women's shelter in their rights granted by § 3604, involving discrimination in the rental or sale of housing" and that the employer's decision to rescind her offer was "interference" with this encouragement. The district court dismissed the case for failure to state a claim. The Sixth Circuit reversed, holding that the FHA is "broad and inclusive" and that "rescission of an employment contract can qualify as 'interference' within the meaning of the statute." This is particularly the case where an employer's conduct left plaintiff with a "distinct and palpable" injury, i.e. loss of employment. Further, the court pointed out that HUD has interpreted the FHA's use of the word "interference" to include employment disputes. There was no dispute over the fact that the shelter was in litigation with the employer and plaintiff signed the petition to "encourage" the women in the shelter. Defendant argued that even if plaintiff's employment was rescinded for signing the petition, "the underlying dispute with the women's shelter was motivated by economics rather than by sex discrimination." But the court rejected this argument, stating that a violation of the FHA can be shown either by proof of discriminatory animus or by proof of disparate impact or effect. Here, "[defendant's] actions against the shelter as alleged in the complaint only affected one class of people—women." The court also held that the existence of "economic (or religious or moral) motivations does not protect the defendant[] from housing discrimination claims when their actions had a clear discriminatory effect." "As a non-houser that has allegedly denied housing rights to women, [defendant] falls within the scope of the [FHA]."

***Gaines v. Wardynski*, 871 F.3d 1203 (11th Cir. (Ala.) 2017).** Plaintiff, a teacher, claimed she was denied a promotion as a result of her father's criticism of the school board and superintendent. The Eleventh Circuit held that the superintendent was entitled to qualified immunity for denying the teacher's promotion unless she could show that the superintendent's conduct violated clearly established federal statutory or constitutional rights of which a reasonable person would have known. Qualified immunity does not protect those who knew or reasonably should have known that his actions would have violated plaintiff's federal rights. To determine whether the superintendent should have known he was violating plaintiff's rights, the court considered whether the superintendent had fair warning that his conduct violated a clearly established constitutional right. The court noted that it is particularly difficult to overcome qualified immunity in the context of First Amendment cases. After reviewing relevant cases, the court held that it was not clearly established that it would violate an employee's free speech rights to take adverse action because her father

had engaged in protected speech. Applying a similar test, the court also found that plaintiff's right to association with her father was not violated when her employer took adverse action against her because it was not clearly established that taking such action was a violation of the employee's First Amendment right.

§ 21.10.5 Statute of Limitations

***Stamper v. Duval Cnty. Sch. Bd.*, 863 F.3d 1336 (11th Cir. (Fla.) 2017).** The EEOC vacated an employee's two-year-old dismissal of the employee's administrative charge and issued a new notice of right to sue. The employee originally filed race and disability discrimination claims with the EEOC in 2007. In 2009, the claims were dismissed and the EEOC provided the employee with her notice of right to sue within 90 days. The employee, however, failed to file suit. In 2011, after the employee filed a request for reconsideration, the EEOC vacated the dismissal and issued a new notice to sue. The Eleventh Circuit found that while 29 C.F.R. § 1601.19(b) permitted the EEOC to reconsider a decision to dismiss, the effect of the decision to reconsider depends upon when the EEOC issues notice of intent to reconsider. Thus, if the EEOC issues a notice of intent to reconsider within 90 days of the receipt of the final no-cause determination, the issuance of notice revokes the party's right to bring suit within 90 days as long as suit has not yet been filed. In that instance, the 90-day to period to file suit shall begin to run anew upon notice of the receipt of determination. Where the 90-day period to file suit expired before notice of intent to reconsider was received, the original 90-day period is not revoked and cannot be revived by a subsequent notice of intent to reconsider.

§ 21.10.6 Unfair Labor Practices / National Labor Relations Act

***NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017).** Employer petitioned for review of a National Labor Relations Board (NLRB) order issued by Lafe Solomon, accusing employer of violating the National Labor Relations Act. Specifically, the order claimed that employer committed unfair labor practices by unilaterally discontinuing longevity payments to unit employees after the parties' collective bargaining agreement expired. The D.C. Circuit granted employer's petition, denied NLRB's cross-application, and vacated the order. Certiorari was granted on the question of whether Solomon improperly served as acting NLRB general counsel while awaiting senate confirmation to a permanent appointment. President Barack Obama had nominated Solomon in January 2011 to permanently fill the position, a "PAS position" that may be filled only by an individual nominated by the president and confirmed by the senate. The Supreme Court upheld the D.C. Circuit's decision 6 to 2, finding that most of Solomon's three year tenure violated the Federal Vacancies Reform Act (FVRA). The court determined that subsection (b)(1) of the FVRA prevents an individual from serving as both the acting officer and PAS nominee, except under very narrow circumstances. The court rejected NLRB's argument that the prohibition

is limited to first assistants performing acting service. The ruling, which limits the president's power to make temporary appointments for top agency posts, ultimately will have a greater impact on the executive branch than labor law. This is partly because the D.C. Circuit had declined to find that every action taken by Solomon, or any regional director on his behalf, was void. Rather, employers would have had to raise the FVRA issue surrounding Solomon's appointment during their proceedings before the NLRB to have standing to argue that any subsequent decision is voidable.

***Quality Health Servs. of P.R., Inc. v. NLRB*, 873 F.3d 375 (1st Cir. (P.R.) 2017).** A union filed charges against the hospital alleging violations of sections 8(a)(1) and (5) of the NLRA by unilaterally subcontracting work, prohibiting employees from discussing the subcontracting, and unilaterally terminating respiratory therapy technicians. The ALJ found the hospital violated section 8(a)(1) by implementing a rule that prohibited employees from discussing the hospital's subcontracting plans, and violated both sections by unilaterally contracting with a private company and terminating all respiratory therapy technicians in favor of workers from the respiratory therapy management department. The hospital appealed, and the Board agreed with the ALJ. The hospital petitioned for review. First, by inviting the union to discuss the subcontracting decision's impact post-decision, the First Circuit found the hospital did not provide adequate notice and opportunity to bargain on the hospital's decision to subcontract. The hospital argued it never had to bargain because it had an "established past practice of subcontracting," but there was insufficient evidence of this practice, and intermittent use of subcontracted employees cannot establish past practices to avoid the duty to bargain. Second, the court found substantial evidence the hospital did not bargain to an impasse regarding its termination decision and decision to subcontract their work to new per diem employees because the union noted that it would continue negotiations. Additionally, the parties continued to negotiate after termination of the respiratory therapy technicians. The court found insufficient evidence of union delaying tactics or economic exigencies that would absolve the hospital from bargaining to impasse. For these reasons, the First Circuit held the hospital violated sections 8(a)(1) and (5) of the NLRA, denied the petition for review, and granted the Board's cross-petition for enforcement.

***Whole Foods Mkt. Grp., Inc. v. NLRB*, 691 Fed. Appx. 49 (2d. Cir. (N.Y.) 2017).** The Second Circuit analyzed whether Whole Foods' strict no-recording policies violated Section 8(a)(1) of the National Labor Relations Act (NLRA), which provides that it is "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section [7]." Section 7 guarantees employees the right "to engage in . . . concerted activates for the purpose of collective bargaining or other mutual aid or protection." Pursuant to Whole Foods' policy, employees were prohibited from video recording at work without management approval. The Second Circuit affirmed the decision of the NLRB that employee rights were infringed upon by the no-recording policy. Per the Court, the linchpin of its analysis

was whether "employees would reasonably construe the language [of the policy] to prohibit recording" this is otherwise protected by Section 7. *Id*. at 50 (internal quotations omitted). The Court, applying the *Lutheran Heritage* test, reasoned that an employee's right to record, "in certain instances, can be a protected Section 7 activity." As cited by the Court, and by way of example, Whole Foods' policy as written would prevent an employee from recording images of employee picketing, documenting unsafe workplace conditions or documenting inconsistent application of work rules, all of which fall within the rights guaranteed by section 7.

***Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017).** Despite having signed an employment agreement that contained a class and collective action waiver, an employee brought class and collective Fair Labor Standards Act (FLSA) claims against his employer in Mississippi federal court. Employer sought to enforce the waiver by filing a bid to strike the claims; in response, employee filed charges with NLRB saying that employer had interfered with the exercise of his employee rights. After employer settled employee's FLSA lawsuit, NLRB issued its own complaint, alleging that employer had violated the National Labor Relations Act (NLRA) by requiring job applicants to sign class and collective action waivers and by seeking to enforce the waivers. A divided Fifth Circuit granted employer's petition for review and found that the use of class and collective action waivers was not an unfair labor practice. Writing for the majority, Circuit Judge Jennifer Walker Elrod relied on the court's holding in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013): "[t]he use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. While Section 7 guarantees the right of employees "to engage in . . . concerted activities for the purpose of . . . mutual aid and protection," this right does not extend to participation in class and collective actions. However, unlike in *Horton*, the waiver at issue in *Convergys* did not appear in an arbitration agreement; consequently, the court maintained that *Horton* "was based on [its] interpretation of Section 7 and [its] reasoning was not limited to interpretation and application of the [Federal Arbitration Act (FAA)]."

Circuit Judge Patrick E. Higginbotham dissented, arguing that the court had never found a class and collective action waiver to be permissible in the absence of an arbitration agreement. "Without being contained in an arbitration agreement and thus shielded by the protective force of the [FAA] a bare class and collective action waiver violates [the NLRA]." In the wake of *Horton*, the Second, Fifth, and Eighth Circuits have rejected NLRB's position that such waivers violate the NLRA. Conversely, the Sixth, Seventh, and Ninth Circuits have adopted NLRB's position.

***Creative Vision Res., LLC v. NLRB*, 872 F.3d 274 (5th Cir. 2017).** A split NLRB panel issued an order finding that defendant, a garbage truck staffing provider, violated the National Labor Relations Act (NLRA). Specifically, after defendant became a "perfectly clear" successor to a prior entity, it failed to recognize and bargain with the incumbent union and instead unilaterally imposed its own terms and conditions of employment. The order required

defendant to bargain with the union, retroactively restore the previous terms and conditions of employment, and compensate the workers for any differences in pay. Defendant petitioned for review and NLRB sought enforcement of order. The Fifth Circuit unanimously denied defendant's petition, finding that defendant's announcement of new terms was "untimely." The announcement occurred on June 2, 2011, the same day that the employees were formally hired and defendant's operations commenced. In *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972), the Supreme Court held that where it is "perfectly clear" a successor entity plans to retain all of the predecessor's employees in a work unit, the successor must bargain with an existing union before imposing new terms of employment. Under NLRB precedent, an employer can avoid "perfectly clear" status if it "clearly announce[s] its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees." Here, defendant had reached out to its predecessor's employees in May 2011, included tax forms with the employment applications, did not conduct interviews or check references, and began operations on June 2, 2011, entirely with said employees. That day, before the employees began work, a supervisor unveiled a change in pay terms. The court agreed with NLRB that this sudden change came "too late" to remove defendant from the "perfectly clear" exception.

***LogistiCare Solutions, Inc. v. NLRB*, 866 F.3d 715 (5th Cir. 2017).** The Fifth Circuit held that a medical transport service company did not violate the NLRA by forcing employees and job applicants to waive their right to participate in class or collective actions against the company. The case stems from a 2014 NLRB filing against the company's inclusion and enforcement of the waiver. The court rejected NLRB's position that "a reasonable employee could construe the waiver as prohibiting board charges because laypeople in prior cases have referred to actions before the board as 'lawsuits' or 'suits,'" finding such anecdotal evidence to have "little probative value." Circuit Judge Patrick E. Higginbotham would have supported NLRB's finding that an employee could have reasonably interpreted the waiver's language to restrict his rights in filing unfair labor practice charges with the NLRB, but wrote that *Convergys* (see above) forecloses this argument.

***Nevada v. Dep't of Labor*, 2017 WL 3837230 (E.D. Tex. 2017).** Nevada and 20 other states, as well as dozens of business groups, sued the Department of Labor (DOL) in the district court, challenging a rule that would have increased the minimum salary level for executive, administrative, and professional workers to be exempt from overtime requirements under the Fair Labor Standards Act (FLSA). The rule, introduced toward the end of Barack Obama's presidency, would have broadened existing overtime pay regulations to cover nearly 4 million more people, doubling the minimum annual salary threshold required to qualify for FLSA's so-called "white collar exemption" from $23,660 to $47,476. In November 2016, days before the rule was scheduled to take effect, District Judge Amos L. Mazzant issued a nationwide preliminary injunction that barred implementation and enforcement of the rule. The Obama administration

appealed the preliminary injunction to the Fifth Circuit, seeking to fast-track the proceedings before Donald Trump's inauguration. After the change in administration, DOL filed a reply brief informing the Fifth Circuit that it was not going to implement the rule as initially adopted. However, DOL asked the Fifth Circuit to affirm the agency's authority to include a minimum salary level as part of the white collar exemption test. Judge Mazzant's November 2016 ruling included language that called into question whether DOL even had the authority to set a minimum salary level for white collar employees. While this issue was pending, on August 31, 2017, Judge Mazzant granted summary judgment to plaintiffs, finding that DOL had exceeded its authority in crafting a rule that "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." "If Congress was ambiguous about what specifically constituted an employee subject to the . . . exemption, Congress was clear that the determination should involve at least a consideration of an employee's duties." Importantly, Judge Mazzant acknowledged that he was bound by Fifth Circuit precedent recognizing DOL's authority to implement a minimum salary requirement. Several days later, DOL filed an unopposed motion to dismiss its appeal of the preliminary injunction; since the district court had entered a final judgment on the merits, the preliminary injunction had become moot. DOL instead has appealed Judge Mazzant's most recent ruling; it also intends to ask the Fifth Circuit to hold the appeal in abeyance while the agency goes through a new rulemaking process to determine what the minimum salary level should be.

***T-Mobile USA v. NLRB*, 865 F.3d 265 (5th Cir. 2017).** Employer petitioned for review of NLRB's April 2016 order, which found that certain workplace rules appearing in the employee handbooks of employer and employer's affiliate violated the National Labor Relations Act (NLRA). NLRB cross-appealed for enforcement of its order, arguing that the rules discouraged employees from unionizing or engaging in other concerted activities. The Fifth Circuit held that NLRB had incorrectly deemed three lawful rules as unlawful: 1) a positive work environment policy, 2) a commitment-to-integrity policy that prohibited arguing, fighting, or failing to treat others with respect, and 3) an acceptable-use policy that prohibited employees from accessing electronic information without approval. However, the court upheld the illegality of a fourth rule banning all recordings in the workplace. In 2015, an administrative law judge ruled that the commitment-to-integrity and acceptable-use policies were illegal. NLRB expanded the judge's decision, finding that the positive work environment policy and workplace recording ban violated the NLRA as well. According to the court, "NLRB erred by interpreting the rule[s] as to how the reasonable employee *could*, rather than *would*, interpret these policies." First, a reasonable employee would interpret the positive workplace conduct policy "to express a universally accepted guide for conduct in a responsible workplace," such as requiring professional conduct and polite communications. Second, regarding the commitment-to-integrity policy, a reasonable employee would still be able to debate union activity or working conditions "without inappropriately 'arguing

or fighting,' 'failing to treat others with respect,' or 'failing to demonstrate appropriate teamwork.'" Third, NLRB ignored the context of the acceptable-use policy, which only prohibited employees from sharing *nonpublic* proprietary business information. Finally, the court did reject employer's justifications for the workplace recording ban, finding that the rule on its face "forbids certain forms of clearly protected activity." The court also noted that NLRB can enforce its order with respect to 11 other policies it found to be illegal under the NLRA, which employer did not appeal.

***Ohio Edison Co. v. NLRB*, 847 F.3d 806 (6th Cir. 2017).** The Ohio Edison Company (the Company) implemented several significant cuts that affected its employees. One of these was a change to the Company's employee-recognition program, which made it so employees would receive a service award every ten years instead of every five. During a meeting in which the Company announced these changes to the union, a union representative expressed general dissatisfaction with the cuts without mentioning any of the specific changes. The union representative subsequently filed an unfair labor practice charge against the Company, arguing that the Company violated its duty to bargain in good faith by making unilateral changes to the various programs. The Board found that the union representative's comments during the meeting amounted to a request to bargain about the employee-recognition program. On appeal, the Sixth Circuit reversed, finding that the comments merely expressed disapproval and the threat to file a charge was not a request to bargain. It looked to the surrounding circumstances of the representative's complaint during the meeting, finding that the Company announced several changes which had more substantial effects on employees and that the change to the employee-recognition program amounted to less than four dollars per member per year. Moreover, the parties never bargained over this program since its inception four decades ago. As a result, the Court held that a reasonable person could not find that the comments were clearly a request to bargain.

***Flight Options, LLC v. Int'l Bhd. of Teamsters, Local 1108*, 863 F.3d 529 (6th Cir. (Ohio) 2017).** The Union represented the pilots of two merged airlines, Flight Options and Flexjet. Flight Options had a collective bargaining agreement (CBA) already in place since 2010, while Flexjet's pilots were recently unionized and not yet a party to the CBA. The Union sought to bring both groups of pilots under a new, joint CBA. The Union argued that the creation of an integrated seniority list (ISL) is exclusively a Union matter, so that the airlines must accept the Union's ISL. The airlines argued instead that they should have been allowed to participate in negotiating the ISL. The district court entered a preliminary injunction against the airlines, ordering that they accept the Union's ISL because the 2010 CBA governed the creation of the ISL when Flight Options acquired another carrier.

On appeal, the airlines argued that the dispute was "minor" under the Railway Labor Act (RLA) because it dealt with the interpretation of a particular provision in an existing CBA and was therefore subject to exclusive grievance arbitration. A dispute is found to be "minor" if the action is "arguably justified"

by the terms of the parties' CBA. The Union argued that the dispute was "major" under the RLA because it seeks to create contractual rights, not enforce them, and is therefore subject to federal-court jurisdiction. The Sixth Circuit affirmed in part, finding that the 2010 CBA did not "arguably justify" the airlines' claim that they had a right to participate in the Union's ISL process. Therefore, the dispute was major. The Sixth Circuit also found that the district court enjoined properly the airlines to follow the express terms of the CBA regarding the ISL, but the CBA stated that if the airlines refuse to accept the Union's ISL, the Union may invoke an expedited arbitration proceeding. As a result, the Sixth Circuit ordered that the injunction be modified as such.

***United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty., Ky.*, 842 F.3d 407 (6th Cir. (Ky.) 2016).** A labor organization brought an action against Hardin County, Kentucky, asserting the County's ordinances that included right-to-work, hiring-hall, and dues check off provisions were preempted by the NLRA. The district court granted summary judgment for the labor union. The Sixth Circuit reversed in part and affirmed in part. While it is true that section 14(b) of the NLRA requires federal pre-emption of conflicting state labor laws, the question was whether the exceptions to preemption in section 14(b) that allow a "state" to take specific actions, e.g. passing right-to-work laws, include the actions of political sub-divisions of the state such as counties and cities. Reversing the district court's decision, the Sixth Circuit ruled that a political subdivision's ordinances fall within actions of a "state" and thus are within section 14(b)'s exception to federal preemption of state law. The ordinance was also not subject to field preemption because the court ruled that Congress would not have intended to implicitly preempt state law by regulating this industry where it explicitly excepted right to work laws from preemption in section 14(b) of the NLRA. The Sixth Circuit did affirm the district court's rulings regarding the hiring-hall and dues check off provisions, as they did not fall within the ambit of a section 14(b) exception to federal preemption.

***Int'l Union of Operating Eng'rs Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. (Wis.) 2017).** Two labor union plaintiffs sued Wisconsin officials, arguing that the state's right to work law violated the Fifth Amendment and was preempted by the NLRA. The law prohibits agreements that require union membership as a condition of employment and mandate "fair share fees" from nonmembers. The district court granted judgment on the pleadings in favor of the state officials, and plaintiffs appealed. The Seventh Circuit upheld the law, finding that plaintiffs had failed to "provide any compelling reason" for the court to revisit *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. (Ind.) 2014), which upheld a similar right to work statute in Indiana. On appeal, plaintiffs had claimed that *Sweeney* was wrongly decided, pointing to a strong dissent from Circuit Chief Judge Diane Wood and the close vote to deny rehearing the case en banc. The court rejected these arguments, writing that those two circumstances, by themselves, are not enough for the court to rethink such a recent decision. Likewise, the court found that plaintiffs' Fifth Amendment argument was overbroad. Despite

disagreements around the takings clause, the court felt that "*state courts* can provide an adequate route for seeking just compensation . . . and thus must be utilized, when available, before seeking relief in federal court."

***Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017).**[2] Cooper locked out union employees after negotiations failed to renew the collective bargaining agreement (CBA). Union workers picketed outside Cooper's plant during the lockout. Cooper used replacement workers to continue operations, many of whom were black. Runion, a locked-out employee, participated in the picket line. He shouted comments regarding fried chicken and watermelon directed at replacement workers inside a Cooper van traveling across the picket line. Runion did not make physical movements or gestures. There was no evidence demonstrating that the replacement workers heard Runion's comments. Cooper discharged Runion for his statements. The union filed a grievance alleging that Cooper violated the CBA by discharging Runion. An arbitrator found just cause for Cooper to fire Runion, but an administrative law judge (ALJ) disagreed, concluding that Cooper violated the NLRA. The NLRB upheld the ALJ's determination and ordered Cooper to reinstate Runion with back pay. The Eighth Circuit denied Cooper's petition for review and enforced the NLRB's order. The Eighth Circuit applied the objective *Clear Pines Moulding* test that a firing for picket-line misconduct is an unfair labor practice unless the alleged misconduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the NLRA. The court concluded that Cooper committed an unfair labor practice. Runion's comments were not directed at any one person; not on display for an extended period of time; not violent; not overt or implied threats; not accompanied by any threatening behavior or physical acts of intimidation; and merely a package of verbal barbs thrown out during the picket line exchange.

***Aguila v. Corporate Caterers IV, Inc.*, 683 F. App'x 746 (11th Cir. (Fla.) 2017).** The court held that there is no claim for relief under section 203(m) of the Fair Labor Standards Act (FLSA), where there is no allegation that the employer does not pay the minimum wage. The plaintiffs had filed suit to collect unpaid tips and liquidated damages from their employers. The employer moved to dismiss the claim arguing that the FLSA does not provide a private cause of action for an employee to sue for withheld tips. The district court found that the FLSA only applies when an employee is owed unpaid minimum wages or unpaid overtime compensation. The district court further explained that an employer is only prohibited from retaining an employee's tips if the employer pays the employee less than the federal minimum wage. The Eleventh Circuit affirmed the ruling finding that the employees' failure to allege that they were paid less than minimum was fatal to their claims for relief under FLSA section 203(m).

2. For additional analysis of this case, see § 21.4.5.

***Rodriguez v. Gold Star, Inc.*, 858 F.3d 1368 (11th Cir. (Fla.) 2017).** Plaintiff filed suit against his former employer under the FLSA, claiming that he was not paid the overtime premium for the hours he worked beyond forty hours. Plaintiff, a valet parker, argued that he was covered under the FLSA because his employer was subject to enterprise coverage under the "handling" clause of the enterprise coverage prong. Specifically, he alleged that the cars he parked and handled were materials within the meaning of the section 203(s)(1)(A)(i). The Eleventh Circuit explained that an item is a "material" if: (1) it fits the ordinary definition of materials in the context of its use, and (2) it has a significant connection with the employer's business. The court rejected the employee's argument and found that the cars are not necessary to do the job; rather, they are the goods which are serviced by the employee. Because the cars were goods, the ultimate consumer exception under the FLSA did not apply.

§ 21.10.7 Admissibility of Evidence

***McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017).** The EEOC brought two actions against employer in an Arizona district court, seeking to enforce a subpoena issued in connection with the agency's investigation of a former employee's Title VII gender discrimination claim. Employer, a grocery distributor, required both new employees and employees returning from medical leave to take a physical evaluation. While employer disclosed some information, it refused to disclose "pedigree information" of employees who had taken the evaluation: their names, Social Security numbers, last known addresses, and telephone numbers. The district court entered an order granting in part and denying in part EEOC's enforcement request, finding that the EEOC had not shown the pedigree information to be relevant, at least at that stage of the agency's investigation. On appeal, the Ninth Circuit reversed in part, vacated in part, and remanded, ruling the information to be relevant to EEOC's investigation. Certiorari was granted on "whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion." The Supreme Court held 7 to 1 that the Ninth Circuit incorrectly used the de novo standard of review. However, the court declined to rule as to whether the Ninth Circuit's reversal of the district court was the correct decision, vacating and remanding the judgment for reexamination under the more deferential abuse of discretion standard. In addition, the court made clear that "[a] district court deciding whether evidence is 'relevant' under Title VII need not defer to the EEOC's decision on that score; it must simply answer the question cognizant of the agency's broad authority to seek and obtain evidence." The court's holding will make it more difficult for the losing party to overturn the trial court's ruling on appeal; thus, challenges to EEOC information requests will take on increased importance at the district court level.

§ 21.10.8 Determination of Employee Status

***O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. (Me.) 2017).** Certain categories of workers are specifically excluded from being considered employees, including exempted workers who work in "canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of: (1) agricultural produce; (2) meat and fish products; and (3) perishable foods." The plaintiffs, delivery drivers in this industry, claimed they did not fall within the exemption because as there was no comma between shipment or distribution, essentially reading the phrase as "packing for shipment" and "packing for distribution." The employer argued that "distribution" was an entirely different category, and the delivery drivers essentially "distributed" goods via delivery. The district court sided with the employer, holding "distribution" was a stand-alone term. After finding no case precedent on the issue, the appellate court evaluated the text. The employer argued that the court should give meaning to each word (i.e., the terms "shipment" and "distribution" are not redundant), and the Chicago Manual on Style and Maine Legislative Drafting Manuals supported its reading. The delivery drivers pointed to a similar statute to support their reading and argued that "shipment" and "distribution" are the only non-gerund words in the statute, which shows they are objects of the of word "packing." The First Circuit held that the statute was ambiguous even after an analysis of the statute's text and legislative history. Ultimately, the court resorted to the default rule of construction under Maine law, which provided that the statute should be liberally construed to further the "beneficent purposes for which they are enacted" (i.e., to provide everyone overtime). Thus, the First Circuit narrowly read the statute to exclude the delivery drivers from the exemption, leaving them overtime eligible, and reversed the district court's grant of partial summary judgment.

§ 21.10.9 Punitive Damages

There were no qualifying decisions this year.

§ 21.10.10 Miscellaneous

***BNSF Ry. Co. v. Tyrrell et al.*, 137 S. Ct. 1549 (2017).** The Supreme Court reversed a ruling by the Supreme Court of Montana, holding that the Federal Employers Liability Act (FELA) does not authorize a state court to exercise personal jurisdiction over a railroad purely on the ground that the railroad does some business in the state. FELA protects railroad workers injured on the job, who can sue the railroad for money damages. However, in an 8 to 1 vote, the court agreed with the railroad that such lawsuits must be brought in the state where the railroad is incorporated or headquartered. The decision extends the holding of *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), in which the court ruled that the due process clause forbids a state court from exercising general personal jurisdiction over a defendant that is not "at home" in the forum state.

Based on this outcome, large national employers will have greater control over which jurisdictions they might face lawsuits from injured employees.

***Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975 (2017).** Plaintiff, a former Census Bureau worker, filed a lawsuit with the Merit Systems Protection Board (MSPB) claiming he was forced into early retirement. Plaintiff's case was a "mixed case" that both challenged an adverse employment action taken against him under the Civil Service Reform Act (CSRA) and alleged race, age, and disability discrimination. Based on a prior settlement agreement plaintiff had signed with the Bureau, an MSPB administrative judge presumed that plaintiff's retirement was voluntary and dismissed his case for lack of jurisdiction. After the MSPB affirmed this dismissal, the D.C. Circuit transferred his appeal to the Federal Circuit. Plaintiff contested this transfer, arguing that because his case involved discrimination claims the district court was the proper venue for appeal. Certiorari was granted on whether, when a complaint presents and the MSPB dismisses a mixed case, "the employee must resort to the Federal Circuit for review of any civil-service issue, reserving claims under federal antidiscrimination law for discrete district court adjudication." The Supreme Court held 7 to 2 that such a case should be appealed to a district court and *not* to the Federal Circuit. Citing *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), the court found that "[plaintiff's] comprehension of the complex statutory text . . . best serves '[t]he CSRA's objective of creating an integrated scheme of review[, which] would be seriously undermined' by 'parallel litigation regarding the same agency action.'" Consequently, the court rejected the government's proposal to split review of jurisdictional dismissals of mixed cases between the Federal Circuit and district court, finding that such a process would be overly complicated and potentially "unworkable." The court also relied heavily on *Kloeckner v. Solis*, 568 U.S. 41 (2012), which established that MSPB cases dismissed on procedural grounds, like those dismissed on the merits, should be appealed to district court.

***CSX Transp., Inc. v. Healey*, 861 F.3d 276 (1st Cir. (Mass.) 2017).** The Railroad Unemployment Insurance Act (RUIA) preempts certain state laws, including laws that provide "sickness benefits under a sickness law of any State." Interstate carriers filed a declaratory judgment that Massachusetts Earned Sick Time Law (MESTL) is preempted by RUIA and the Railway Labor Act (RLA). The district court granted summary judgment for the plaintiff carrier, holding that RUIA preempted MESTL in its entirety as applied to the plaintiffs. Subsequently, the First Circuit held that RUIA preempted all benefits relating to sickness benefits enacted by the states. The court noted that any payments under RUIA should not occur if the employer was already paying the employee under a sick pay plan and that states should be reimbursed for any portion of sickness benefits paid to employees for taking into consideration their interstate railroad work. The court also held no presumptions against preemption sufficiently prevented the preemption grant in the RUIA and held that RUIA preempted at least subsection (c)(2) of the MESTL. The attorney general asked the appellate court to evaluate if other parts of the MESTL may be severed and applied to interstate retail carriers in Massachusetts. This question was not evaluated at the

district court level, so the First Circuit remanded the case to the district court to determine if another section – other than subsection (c)(2) of the MESTL – is preempted by RUIA.

***Griffin v. Sirva*, *Inc.*, 858 F.3d 69 (2d Cir. (N.Y.) 2017).** Allied Van Lines, Inc. was a nationwide moving company and a subsidiary of Sirva, Inc. Astro Moving & Storage Co., Inc., was one of Allied's local agents in New York. The contract between Allied and Astro required Astro to automatically bar from employment anyone who had been convicted of a sexual offense, forcing Astro to terminate two employees. Those employees filed suit, alleging that defendants violated New York State Human Rights Law (NYSHRL) § 296 for discrimination based on their criminal convictions. The district court granted the defendants' motion to dismiss, noting that the cited statute only prohibits discriminatory practices or aiding and abetting *by employers,* and Allied and Sirva did not employ plaintiffs. Plaintiffs appealed to the Second Circuit, which certified three questions to the New York State Court of Appeals. The first question was: "Does Section 296(15) of the [NYSHRL], prohibiting discrimination in employment on the basis of a criminal conviction, limit liability to an aggrieved party's 'employer'?" The Court of Appeals answered in the affirmative: the NYSHRL refers to the Correction Law, which makes various references to "employers." The court explained that since the NYSHRL does not contain an explicit definition of "employer," common law controls, such that whether one is an "employer" under the NYSHRL depends on its role in "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct." The court further stated that the greatest emphasis should be placed on the last factor.

***Crosby v. University of Kentucky,* 863 F.3d 545 (6th Cir. (Ky.) 2017).** A tenured professor at the University's College of Public Health sued various University officials under 42 U.S.C. § 1983, alleging that his removal as Chair of the Department of Behavioral Health amounted to an actionable deprivation of his protected property and liberty interests without due process of law. In June 2015, the University's Office of Institutional Equity and Equal Opportunity (OIEEO) investigated reports of plaintiff's inappropriate behavior and submitted a report of its investigation to the University's General Counsel. The report stated that the investigator observed "a disproportionate number of negative remarks . . . regarding [plaintiff's] behavior," such as being "volatile," "explosive," "disrespectful," "very condescending," and "out of control." The report recommended that plaintiff be removed from his Chair position. In July 2015, the University's administration agreed with the report and terminated plaintiff's Chair appointment. Plaintiff demanded an evidentiary hearing before an impartial Faculty Hearing Panel, among other administrative proceedings under "Governing Regulations" cited by plaintiff. Instead, the University offered him an appellate process involving two senior faculty members to make an independent assessment of his department. Plaintiff rejected that proposal, and proceeded with his lawsuit. The district court granted the University's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), and the Sixth

Circuit affirmed. Noting that Sixth Circuit case law establishes that "tenured university professors do not have a constitutionally protected property interest in administrative posts," the Sixth Circuit explained that a property interest can arise where the administrative position itself is a tenure-track appointment or where a professor has received an express guarantee that he will not be removed from the position except for cause. Neither circumstance existed in this case. It rejected plaintiff's argument that the University's governing regulation establishing the four-year appointment – but without mentioning removal – was an express guarantee creating a property interest in the Chair position. The Sixth Circuit also rejected plaintiff's argument that he had been deprived of a liberty interest in his reputation and good name. Specifically, plaintiff did not suffer an actionable adverse action because he remained employed as a tenured professor, and he has not been foreclosed from his chosen profession despite the fact that the stigmatizing allegations made against him may have rendered him less attractive to other employers.

***Allen v. City of Chi.*, 865 F.3d 936 (7th Cir. (Ill.) 2017).** Fifty-two current and former employees of the Chicago police department's bureau of organized crime filed a collective action against the city, alleging that the bureau did not compensate them for work they performed off-duty on their bureau-issued mobile electronic devices (Blackberries), in violation of the Fair Labor Standards Act (FLSA). After a bench trial, the district court entered judgment in bureau's favor, and plaintiffs appealed. The Seventh Circuit affirmed the decision, finding that (1) there was no uniform policy in place preventing plaintiffs from requesting payment for unscheduled overtime work, and (2) the bureau was unaware plaintiffs were not being paid for this work. The bureau had its officers on set schedules, but the nature of their work occasionally required after-hours duties. To get paid for overtime, officers were to submit "time due slips" to their supervisors providing a short explanation of what nonscheduled work was done. Supervisors then approved the time and sent the slips to payroll to be processed. The court rejected plaintiffs' contention that the bureau "actually or constructively knew" overtime was being underreported, or that they were being pressured to underreport. Even though plaintiffs' supervisors were sometimes aware of this off-duty Blackberry work, "[r]easonable diligence did not . . . require the employer to investigate further." The court was troubled by a 2010 general order announcing that employees would not be paid for BlackBerry work except under certain circumstances, language that ran "flatly contrary" to the bureau's FLSA obligations. Some plaintiffs also claimed that they declined to submit time due slips "because of the Bureau's culture or out of concern for their positions." However, these claims were countered by evidence that "[s]ome officers did submit slips for BlackBerry work, and the Bureau paid them." While the court found the phrasing in the general order "unfortunate," it was not "left with the definite and firm conviction that a mistake ha[d] been committed" by the district court.

CANADA

§ 21.11 Notice and Damages

§ 21.11.1 Bad Faith and Consequential Damages

***Styles v. Alta. Inv. Mgmt. Corp.*, 2017 ABCA 1.** The Alberta Court of Appeal overturned a trial judgment by the Court of Queen's Bench, which had granted the Plaintiff, a former employee of the Defendant, damages for the loss of a long-term incentive plan (LTIP) bonus payment that had not yet vested as of the date the plaintiff was terminated from employment. The trial judge had found that the Plaintiff was entitled to recover damages for loss of his LTIP incentive payment on the basis that it was an unreasonable and bad faith exercise of the Defendant's discretion to terminate the Plaintiff without cause near the end of the vesting period for his LTIP incentive such that the Plaintiff did not satisfy the active employment requirement. The Court of Appeal found the trial judge had erred in finding that a discretion had been exercised either in respect of failing to pay out the LTIP when the employee was not employed as of the vesting date (which discretion was not provided for in the LTIP plan) or in the decision to terminate (which the Court noted was not an exercise of "discretion" *per se*, because an employer does not need a reason to terminate an employee without cause). The Court of Appeal also took issue with the trial judge's finding that there was a "common law duty of reasonable exercise of discretionary contractual power," based on the Supreme Court of Canada's decision in *Bhasin v. Hrynew*. Instead, the Court noted that the Supreme Court of Canada had only recognized an "organizing principle of good faith" in contract law, which fell short of requiring an employer to have a good faith reason or justification for termination, let alone a more general idea that a party to a contract must exercise its "discretion" to enforce the terms of the contract in a certain fashion. The Court held that expanding the organizing principle of good faith in contract law to a general principle of "reasonable exercise of discretion" by the trial judge was inappropriate, and added that "the proposed 'common law duty of reasonable exercise of discretionary contractual power' […] should be firmly rejected." The Court dismissed the Plaintiff's action.

***North v. Metaswitch Networks Corp.*, 2017 ONCA 790.** The Ontario Court of Appeal ruled that a severability clause in an employment contract could not save a termination provision in an employment contract where the entire provision was void for being contrary to statute. North's employment with Metaswitch was terminated without cause. North's employment agreement contained a clause

purporting to limit his entitlements upon termination; however, the language of the clause violated the minimum requirements of the *Employment Standards Act, 2000* (Ontario) as it calculated the notice and severance payments owed to North by reference to his "Base Salary" only and not to all his "wages" as defined under the statute. Notwithstanding this violation, Metaswitch argued, and the lower court agreed, that the clause was saved by a severability provision contained in the agreement which allowed the offending part of the clause to be removed and the remaining (lawful) part to remain. The Ontario Court of Appeal overturned the lower court and found that the entire clause, as drafted, was voided by virtue of the fact it violated the statute. Accordingly, there was nothing to which the severability clause could be applied. In the result, North was entitled to receive termination pay based on common law reasonable notice.

§ 21.11.2 Punitive Damages

There were no qualifying decisions this year.

§ 21.12 Costs

§ 21.12.1 Quantum

There were no qualifying decisions this year.

§ 21.12.2 Special Costs

There were no qualifying decisions this year.

§ 21.13 Human Rights

§ 21.13.1 Disability

***Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30.** Stewart drove a loader in a mine operated by Elk Valley. Stewart was subject to Elk Valley's Alcohol, Illegal Drugs & Medical Policy (Policy) which required that employees disclose a dependency or addiction issue before a workplace incident occurred. If they did, they would be offered treatment. If they did not, and they were involved in an incident, they would be terminated. Stewart was involved a workplace accident. Following the accident, he tested positive for drugs. Stewart later acknowledged that he used cocaine on his days off and stated he thought that he was addicted to cocaine. Stewart argued that his termination was discriminatory under the

Alberta *Human Rights, Citizenship and Multiculturalism Act.* The Alberta Human Rights Tribunal dismissed the complaint, upholding the termination on the basis that Stewart's termination was for breaching the Policy and not as a result of his addiction. The decision was affirmed by the Alberta Court of Queen's Bench and by the Alberta Court of Appeal, and appealed to the Supreme Court of Canada (SCC). The SCC dismissed the appeal. The majority of the SCC held that Stewart could not establish *prima facie* discrimination in his termination because his protected characteristic – drug addiction – was not a factor in his termination. Rather, the SCC accepted that the termination flowed from the breach of the Policy and not from his addiction. In doing so, the SCC held that Stewart's addiction did not prevent him from complying with the Policy as there was evidence that he knew he should not take drugs before working, he had the ability to decide not to take them and that he had the capacity to disclose his drug use to Elk Valley. The SCC concluded that, on this evidentiary record, the factor of denial as a feature of drug addiction was irrelevant to this case. Gascon J. dissented on the basis that the drug addiction was a factor in the drug use and the drug use led to his termination, which was sufficient to establish *prima facie* discrimination. Automatic termination in such circumstances meant Stewart was the subject of unlawful discrimination, and Elk Valley had not established that accommodating Stewart would cause it undue hardship.

***Suncor Energy Inc. v. Unifor Local 707A*, 2017 ABCA 313.** The Alberta Court of Appeal agreed with the Court of Queen's Bench in granting judicial review of a Board of Arbitration (the Board) decision which had found that the employer had not adequately justified the imposition of its random drug and alcohol testing policy. The Board had upheld a union grievance alleging Suncor's random drug and alcohol testing policy was a violation of the privacy rights of the employees and had not been adequately justified in accordance with the principles set down in *CEP Local 30 v. Irving Pulp & Paper*, 2013 SCC 34 (*Irving*). The majority of the Board had found that, although the workplace was a dangerous and safety-sensitive workplace, the employer had failed to demonstrate a problem with drugs and alcohol abuse at the workplace and that random testing was a proportionate response, in accordance with *Irving*. On judicial review, the Court of Queen's Bench noted that Suncor had produced evidence that over 95 percent of the positive tests at the workplace after safety incidents or "near misses" involved unionized employees. The Court found that although not all evidence about the pervasiveness of drug and alcohol issues at the workplace was particularized to unionized workers, it was unreasonable for the Board to refuse to consider evidence that related to the workplace as a whole as opposed to *just* the members of the bargaining unit. *Irving* does not require proof of a drug and alcohol problem solely within the bargaining unit; a general "workplace" problem with alcohol and drugs could suffice. The Court concluded the Tribunal's evidentiary findings were unreasonable and remitted the matter back to the Board for rehearing. The Court of Appeal agreed with the

Court of Queen's Bench. The fact that the Board's jurisdiction is to determine matters within the bargaining unit covered by the collective agreement did not determine what evidence was relevant to determining whether there was a general problem of substance abuse in the workplace. The Board blinded itself to logically relevant evidence and unreasonably criticized Suncor for presenting evidence that was not particularized to unionized employees. The arbitrary distinction between evidence relating to bargaining unit members and to the workplace as a whole was inappropriate. These errors were compounded by unexplained findings as to why union expert witnesses' testimony was preferred over the evidence of Suncor's witnesses. The Court of Appeal upheld the order to remit the matter back to the Board.

***Amalgamated Transit Union, Local 113 v. Toronto Transit Comm'n*, 2017 ONSC 2078.** The Ontario Superior Court of Justice refused an application for an interlocutory injunction brought by the Amalgamated Transit Union, Local 113 (the Union), which sought to enjoin the Toronto Transit Commission (TTC) from implementing random drug and alcohol testing of members of the Union until after a grievance arbitration challenging that policy had been completed. The TTC had implemented a "Fitness for Duty Policy" in 2008, which took effect in 2010. It required that all employees and managers be mentally and physically fit for their duties without, among other things, being under the influence of drugs or alcohol. The policy also contained provisions for the treatment and return to work of employees with substance abuse disorders. Before the policy took effect, the Union grieved the policy, which remained ongoing after six years. Then, in 2011, the TTC amended the policy to require random drug and alcohol testing for employees in safety-sensitive positions and in certain designated managerial and executive positions, including the Chief Executive Officer. Under the program, 20 percent of TTC employees over the course of a year are randomly selected to undergo alcohol breathalyzer test and an oral fluid drug test. Several years after being added to the policy, the testing was scheduled to commence, at which point the Union applied for an interlocutory injunction. In applying the *RJR-MacDonald* injunction test, the Superior Court found that although there was a serious issue to be tried, the Union failed to demonstrate irreparable harm. The various forms of harm it claimed were irreparable (breaches of privacy, psychological harm, negative effects from false positives, and unjust dismissal) were all matters for which the Union could seek damages that would be sufficient compensation for the harm suffered. Although this was sufficient to refuse the injunction, the Court went on to note that, with respect to the balance of convenience test, if the random alcohol and drug testing was permitted to proceed the testing would increase the likelihood that an employee prone to using drugs or alcohol while working (or working while impaired) will either be detected through testing or be deterred, and that this would enhance public safety. As such, the balance of convenience favoured the TTC's position and the injunction was refused.

§ 21.13.2 Sexual Orientation

There were no qualifying decisions this year.

§ 21.13.3 Government Programs

There were no qualifying decisions this year.

§ 21.13.4 Accommodation

***Bottiglia v Ottawa Catholic Sch, Bd.*, 2017 ONSC 2517 (Div. Ct.).** The Divisional Court refused to judicially review an Ontario Human Rights Tribunal decision supporting the ability of employers to seek an independent medical examination (IME) under certain circumstances. A school superintendent was on lengthy sick leave for anxiety and stress. After more than two years, the employee's psychiatrist indicated that he could shortly return to work on a graduated basis, but that it would be a lengthy work-hardening process during which the employee likely could not conduct his full duties. The employer school board was concerned that the return to work plan was inappropriate and premature, and likely motivated by the end of the employee's paid sick leave rather than any improved condition. As such, the employer requested that he undergo an IME to determine his full psychiatric diagnosis, limitations and restrictions. The employee refused, resigned from his position, and filed a complaint with the Ontario Human Rights Tribunal.

The Tribunal found that the school board had acted reasonably and fulfilled its duty to accommodate the employee, and the Divisional Court upheld this decision. The Court held that an employee's duty to accommodate may permit, or even require, the employer to ask for a second medical opinion where the employer has a reasonable and bona fide reason to question the adequacy and reliability of the information provided by its employee's medical expert. Due to legitimate concerns about the original medical documentation, the employer had acted within its statutory duty and was not required to first seek further information from the reporting psychiatrist. No substantive duty to accommodate had arisen based on the employee's refusal to attend the IME and failure to participate in the accommodation process. While an IME cannot be used to second-guess a well-founded medical opinion, it can be sought where the information provided by a medical professional reasonably could be considered questionable. The Court of Appeal supported the Divisional Court's reasoning, dismissing the employee's motion to further appeal the matter.

***Skinner v Bd. of Trs. of the Canadian Elevator Indus. Welfare Trust Fund*, 2017 CanLII 3240 (NS HRC).** A Nova Scotia Human Rights Board of Inquiry considered a discrimination complaint based on the refusal to cover a medical marijuana prescription under the employee's benefits coverage. The complainant suffered from chronic pain from a past work injury and was treated with

conventional medication for several years. When these became ineffective, he obtained the appropriate prescription and license for medical marijuana, which he found effective. He obtained coverage under his employer's motor vehicle insurer but when this coverage ran out, he sought the same from the insurer that provided employee health benefits, but this insurer refused, stating that medical marijuana was not approved under the *Food and Drugs Act*. The complainant filed a complaint, alleging discrimination in the provision of services on account of physical and mental disability. In conducting its analysis, the Board first determined the purpose of the plan in all circumstances, which it stated was to maximize the benefits available to beneficiaries without compromising the plan's financial viability. It then compared how benefits were generally allocated to beneficiaries and found that, unlike most beneficiaries, the complainant's request for a medically-necessary drug, prescribed by his physician, was rejected without explanation. This, despite the fact that the plan text contemplated coverage of "medically necessary" prescribed drugs not explicitly listed in the plan, on special request. There was therefore *prima facie* discrimination, and as the insurer could not provide a non-discriminatory justification for their decision, the Board found that the insurer's refusal to exercise its discretion to extend coverage for medical marijuana was discriminatory.

***Ananda v. Humber Coll. Inst. of Tech. & Advanced Learning*, 2017 HRTO 611.** The Human Rights Tribunal ruled against an applicant in respect of two Applications alleging discrimination on the basis of family status (elder care). The Applicant was a fourth-year nursing student who alleged he was discriminated against in the course of his clinical placement and in not granting him an extension to the six-year period within which he was required to complete his nursing program. He alleged the clinical instructor discriminated against him based on age because he was older than other program participants and the instructor asked questions about when the Applicant was intending to retire. The Tribunal found that the clinical instructor had merely had a general discussion with students about how long a nursing career lasts, which was a normal topic of discussion. It rejected any allegation that the Applicant had been singled out because of age. With respect to family status and elder care, the Tribunal restated its approach in *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590, and clarified that the Applicant must demonstrate that "a rule or requirement had an adverse effect on her or him because of requirements or needs relating to or arising out of the parent-child relationship" and added that "in order to constitute a 'need' or 'requirement' relating to or arising out of the parent-child relationship, it is not sufficient that there just be any negative impact, but that the negative impact must result in real disadvantage to the applicant, arising from the parent-child relationship and the responsibilities that flow from that relationship." It found the Applicant had failed to meet that standard because he had failed to demonstrate how the care needs of his mother, who he was responsible for, were of a sufficient extent to create any real disadvantage

to the Applicant. He had failed to provide adequate medical evidence or documentation establishing the extent of her care needs, she did not give evidence in the proceeding, and the Applicant did not establish that the challenges he faced in relation to her care needs were greater than the challenges faced by other students, whether in relation to elder-care or child-care responsibilities. The fact that caring for his mother may have made it more difficult for the Applicant to participate in the various programs in a "more fulsome way" did not constitute adverse impact.

§ 21.14 Contracts

§ 21.14.1 Calculation of Reasonable Notice

***Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158.** Wood worked for Fred Deeley Imports Ltd. ("Deeley"), a distributor of Harvey-Davidson motorcycle products, for eight years and four months. She was terminated when Deeley was purchased by Harvey-Davidson. Deeley provided Wood with thirteen weeks' advance notice during which she was paid her regular salary and benefits. On termination, it provided her with an additional eight weeks' salary and a pro-rated amount of bonus. Although the total amounts paid by Deeley exceeded the minimums required under the *Employment Standards Act, 2000* (Ontario) (the *ESA*), Wood sued on the basis she was owed common law reasonable notice. Deeley relied on Wood's employment agreement, which provided that Wood's employment could be terminated by providing her two weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment. The agreement went on to say that the Company shall not be obliged to make any payments to her other than those provided in the agreement. Wood alleged that the employment agreement was not enforceable because she signed the agreement one day after starting employment, and because on termination without cause it provided for less than the minimum required under the *ESA*. Deeley countered that the clause complied with the *ESA*. The court held that the agreement was not unenforceable on account of being signed one day after starting employment since it mirrored the terms she had agreed to prior to starting. However, the court held the agreement was unenforceable on the basis that it failed to provide for benefit continuation as required under the *ESA* and therefore constituted an unlawful attempt to contract out of the minimum entitlements required by statute. The court also found that by purporting to allow the entire termination entitlement to be satisfied by providing Wood with advance notice, the employment agreement failed to comply with the severance pay requirements of the *ESA* which must be paid out (i.e., cannot be satisfied through providing advance notice). This served as an additional basis to find the termination clause in the employment agreement unenforceable. Accordingly,

Wood was entitled to damages for breach of the duty to provide common law reasonable notice, which was fixed at nine months.

§ 21.14.2 Changes to Contractual Terms—Constructive Dismissal

***Ass'n of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55.** The Supreme Court of Canada ruled on an issue involving the appropriate exercise of management rights in a unionized workplace, as well as a constitutional challenge with respect to a workplace policy. The matter had begun as a grievance by a group representing lawyers working in a Quebec regional office of the Immigration Law Directorate. For years, the employer, the Department of Justice, had a policy of using a standby shift system to deal with urgent immigration matters that arose during evenings and weekends. This standby list was on a volunteer basis and lawyers on standby were compensated with paid leave for on-call time, whether they ended up working or not. A subsequent collective agreement changed this policy so that only lawyers who were actually called in would be compensated. The result was a sharp decrease in volunteers and all necessary shifts were no longer covered, so the employer issued a directive making standby duty mandatory for all lawyers. The lawyers grieved this directive.

The labour arbitrator held that the employer directive violated the management rights clause of the collective agreement and also the employees' constitutional rights to liberty under Section 7 of the Canadian Charter of Rights and Freedoms. The Federal Court of Appeal overturned this decision, ruling that the directive violated neither. The Supreme Court split the difference, agreeing that the directive did not rise to the level of violating constitutional rights. An employer requirement to be on standby for a limited portion of after-work time does not "implicate the type of fundamental personal choices that are protected within the scope of s. 7." However, the Supreme Court held that the directive did violate the collective agreement, specifically the provision requiring the employer to "act reasonably, fairly and in good faith in administering the Agreement". The Court applied the standard established in *KVP*, a seminal management rights decision, that arbitrators must apply their labour expertise, consider all the circumstances, and determine whether a workplace rule struck a reasonable balance between management and employees' interests. In this case, the arbitrator had determined that the employer directive was neither reasonable nor fair. The Court found that this conclusion fell within the range of acceptable, possible outcomes, and therefore should be given deference.

§ 21.14.3 Fixed vs. Indefinite Term Employment

There were no qualifying decisions this year.

§ 21.14.4 Codes of Conduct

***Canada (Attorney General) v. Bodnar*, 2017 FCA 171.** The Federal Court of Appeal overturned a decision of the Public Service Labour Relations and Employment Board (the "Board") on judicial review, holding that the mere fact that disability-related absences are included in an attendance management policy was not discriminatory in the absence of adverse treatment. The Board had upheld a grievance brought by employees of the Correctional Service of Canada who alleged that their employer's practice of recording non-culpable absences related to, *inter alia*, personal illnesses or family emergencies, constituted discrimination on the basis of disability and/or family status. The attendance management policy required that these non-culpable absences be tracked and, where a concern arose or the average absenteeism was exceeded, supervisors would make inquiries of the employee in question to verify the legitimacy of the absences. Employees were entitled to have union representation present during any meetings to verify the legitimacy of absences, and there were no adverse consequences for any non-culpable absences verified. The Board found the inclusion of absences relating to disability and family status in the attendance management process constituted *prima facie* discrimination on the basis of those grounds. The Federal Court of Appeal disagreed. It found that the Board had improperly applied the test because it failed to require the grievors to demonstrate adverse treatment before making a finding of *prima facie* discrimination. The Board had determined that the mere inclusion of absences that related to disability and family status in the calculation of average absences and the employee's total number of absences was, on its own, *prima facie* discriminatory. However, as no negative consequences flowed from including these absences in calculating the relevant figures, and the employer continued to accommodate those absences in accordance with the law, there was no adversity caused by the employer's action. The Federal Court of Appeal therefore set aside the decision and remitted the matter back to the Board.

§ 21.14.5 Pensions

There were no qualifying decisions this year.

§ 21.15 Definition of Employee

§ 21.15.1 Determination of Employee Status

There were no qualifying decisions this year.

§ 21.16 Torts in Employment

§ 21.16.1 Duty and Standard of Care

There were no qualifying decisions this year.

§ 21.16.2 Negligent Infliction of Mental Distress

There were no qualifying decisions this year.

§ 21.17 Wage Hour Issues

There were no qualifying decisions this year.