# Joint Employers, Medical Joints, and the Mark of the Beast: A Revelatory Year in Labor and Employment Law

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## I. EMPLOYMENT LAW IS INTERESTING!

*Wrestling with the Independent Contractor Issue*

Road Warrior Animal, King Kong Bundy, and Jimmy "Superfly" Snuka are among 51 former professional wrestlers and two referees who filed a 214-page complaint against the WWE wrestling organization. One of the many things they allege is that the WWE misclassified them as independent contractors to deprive them of legal protections. There are many claims related to concussions and the degenerative brain disease known as chronic traumatic encephalopathy (CTE). The complaint alleges that the WWE promoted risky moves, concealed concussion risks, and gave inadequate medical attention to wrestlers. The complaint also alleges RICO violations by the WWE and its chairman Vince McMahon. Although concussion/CTE lawsuits have been filed in many sports, the WWE characterizes its product as "sports entertainment" and to some extent choreographs and regulates the moves that allegedly led to the injuries. *See* Steven M. Sellers, *Pro Wrestlers' Concussion Case Poses New Legal Twists*, Daily Labor Rep. (BNA) No. 141, at A-3 (July 22, 2016) (discussing ***Laurinaitis v. World Wrestling Entertainment, Inc.***, No. 16-cv-01209 (D. Conn. filed July 18, 2016)).

*The Mark of the Beast and Law Professor Compensation*

The Sixth Circuit found that a law school dean did not retaliate against a law professor for his union organizing activities by giving him a $666 raise, invoking the biblical "mark of the beast." The court found that the facts indicated not that the dean wanted to impose the cursed number on the professor, but rather that the dean decided to give him a third-tier raise based on performance indicators. The number had been $727, a number of no apparent biblical significance, before the merit pool was reduced. ***Lifter v. Cleveland State Univ.***, No. 16-4084/16-4086, 2017 WL 4005116 (6th Cir. Sept. 12, 2017). The mark of the beast reared its ugly head in other cases in 2017. *See* ***EEOC v. Consol Energy, Inc.***, 860 F.3d 131 (4th Cir. 2017), *infra*.

*Try Hiring a 73-Year Old Next Time!*

A Massachusetts court of appeals upheld the decision of an administrative judge that a business discriminated against a 74-year-old custodian when it replaced him with a 68-year old employee. The court noted that the hearing

officer found that, while the business employed older individuals, "it drew the line at someone in his mid-seventies who was confronting sequential health issues." ***Massasoit Indus. Corp. v. Massachusetts Comm'n Against Discrimination***, 73 N.E.3d 333, 338 (Mass. Ct. App. 2017). The court also upheld the finding of disability discrimination.

*Sick Sandwiches and Nuclear Bombs*

***MikLin Enters., Inc. v. NLRB***, 861 F.3d 812 (8th Cir. 2017). Jimmy John's workers and a union campaigned for the employees to get paid sick leave. In support of the campaign, posters were placed on store bulletin boards showing a picture of a sandwich purportedly made by a healthy employee and a picture of one purportedly made by a sick employee. "SICK" and "HEALTHY" were in red letters and a larger font than surrounding text in white. Additional text on the poster stated: "CAN'T TELL THE DIFFERENCE?" "THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T GET PAID SICK DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK." "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST." The employer fired employees who coordinated the campaign and disciplined others who assisted. Unfair labor practice charges were filed. The Eighth Circuit reasoned that in the food industry allegations of unhealthy food are the "nuclear bomb" in a labor dispute. The Eighth Circuit, unlike the NLRB, found that this tactic was so harmful to the business's reputation and income and so disloyal that the conduct lost protection under section 7 of the NLRA under the standard of *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953), better known as *Jefferson Standard*.

*Putting on Your Best Face*

The Eighth Circuit held that a supervisor's comment about a desire for a "new face" when an outsider was hired for a position that plaintiff wanted was not direct evidence of age discrimination in ***Aulick v. Skybridge Americas, Inc.***, 860 F.3d 613 (8th Cir. 2017). "The comment about a 'New Face' was facially and contextually neutral when made to [plaintiff]. No reasonable fact finder could hold otherwise." *Aulick*, 860 F.3d at 620.

## II. UNITED STATES SUPREME COURT CASES

### A. Employment Discrimination

***McLane Co., Inc. v. EEOC***, 137 S. Ct. 1159 (2017).

Facts: Claimant Ochoa had worked for defendant for eight years in a physically demanding job as a cigarette selector. Upon returning from three months of maternity leave, she was required to take a physical evaluation. Defendant required all employees in physically demanding jobs--new employees and employees returning from medical leave--to take the same physical evaluation. Ochoa failed three times and was fired. She then filed a sex discrimination charge under Title VII with the EEOC. The EEOC began an investigation and issued subpoenas, pursuant to 42 U.S.C. § 2000e-9, to defendant, seeking "pedigree information" including the names, social security numbers, addresses, and telephone numbers of the employees that were asked to take the evaluation. The EEOC learned that defendant used the physical evaluation on a nationwide basis and expanded the scope of its investigation to include potential age discrimination. Defendant twice refused to supply the information. The EEOC then filed two suits against defendant--one for defendant's sex discrimination charge and one for its own age discrimination charge. The district judge declined to enforce the subpoenas on the ground that the information sought was not relevant to the charges because the information sought would not help determine whether the evaluation was a discriminatory tool. The Ninth Circuit reversed, after reviewing the decision to quash the subpoenas, under a *de novo* standard of review. The Ninth Circuit panel followed circuit precedent in applying the de novo standard but also noted that other circuits seem to review for abuse of discretion. The Supreme Court granted a writ of certiorari.

Issue: Whether a court of appeals reviews a district court's decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion.

Holding and Rationale: The proper standard of review is for abuse of discretion. The Court reached this result based on two sets of considerations: (1) history of appellate practice on the issue: and (2) institutional capacity and administration of justice functional considerations regarding which judicial actor is better positioned to decide the issue. First, the longstanding practice of appellate courts is to review a district court's

decision to enforce or quash an administrative subpoena for abuse of discretion. The Court compared the EEOC's subpoena authority to that of the NLRB (whose subpoena power is incorporated in Title VII), and noted that every circuit to consider the question of the NLRB's authority to issue subpoenas has held that district courts' decisions on enforcement of an NLRB subpoena is subject to abuse-of-discretion review. Accordingly, Congress amended Title VII to authorize EEOC subpoenas against this uniform backdrop of deferential appellate review, and today every Court of Appeals that has decided the issue reviews a district court's decision whether to enforce an NLRB subpoena for abuse of discretion. Second, the Court cited "basic principles of institutional capacity" in support of deferential review. The determination of whether the evidence sought is relevant to the specific charge or whether the subpoena is unduly burdensome in light of the circumstances is well suited to a district judge's expertise. The inquiry is case-specific and not amenable to broad per se rules. Additionally, the Court noted that district courts have considerable experience in making similar decisions in other contexts. Thus, the district judge has the "institutional advantage." Furthermore, a deferential review streamlines the litigation process by removing from the appellate courts the duty of reviewing evidence and reconsidering facts. The efficiency consideration is particularly important in a "satellite" proceeding designed to facilitate the EEOC's investigation.

Having determined that the proper standard of review is abuse of discretion, the Court vacated the Ninth Circuit judgment and remanded for consideration under the appropriate standard. On remand the Ninth Circuit applied the abuse-of-discretion standard and still reversed the district court's decision, holding that the pedigree information was relevant to the EEOC's investigation. *EEOC v. McLane Co., Inc.*, 857 F.3d 813 (9th Cir. 2017).

## B. Employee Retirement Income Security Act (ERISA)

***Advocate Health Care Network v. Stapleton***, 137 S. Ct. 1652 (2017).

Facts: ERISA exempts "church plan[s]" from its regulation of employee benefit plans. 29 U.S.C. § 1003(b)(2). The petitioners were three church-affiliated nonprofits that run hospitals and healthcare facilities, which offer defined-benefit pension plans for employees. The plans were established by the hospitals, not a church, and they are managed by internal employee-

benefits committees. Current and former employees filed class actions alleging that their employers' pension plans did not come within the exemption because they were not established by a church. The district courts agreed with the employees' position, and three circuits affirmed.
Issue: Whether a church must have originally established a plan for it to qualify for the church plan exemption.
Holding and Rationale: No. The issue is resolved by construing the relationship between two statutory subsections of 29 U.S.C. § 1002(33): (A) which provides that a church plan is established and maintained by a church; and (C)(i) which provides that such a plan includes a plan "maintained by [a principal purpose] organization." The parties agreed that a church plan need not be maintained by a church, but they disagreed about whether it must be established by a church. The employees argued that the later-enacted (C)(i) altered only the "maintained" requirement of (A), while the hospitals argued that the effect of (C)(i) is to bring all plans maintained by principal-purpose organizations within the definition of a church plan. As a matter of statutory interpretation, the Court held that the hospitals offered the better interpretation. Thus, in effect, the later-enacted phrase stands in for the earlier-enacted one, and the church-establishment condition drops out. The Court considered the two interpretations using both canons of statutory interpretation and extra-statutory sources. The Court held that "a plan maintained by a principal-purpose organization . . . qualifies as a 'church plan,' regardless of who established it." *Id.* at 1663.

Concurring, Justice Sotomayor agreed with the majority's statutory interpretation but expressed concern that "scores of employees" who work for organizations that look and operate like secular organizations might be denied ERISA's protections. *Id.* (Sotomayor, J., concurring).

### C. Civil Service Reform Act

***Perry v. Merit Systems Protection Bd.***, 137 S. Ct. 1975 (2017).
Issue: What is the proper forum for judicial review when a "mixed case" asserting claims under the Civil Service Reform Act of 1978 and federal antidiscrimination laws is dismissed on jurisdictional grounds by the Merit System Protection Board.
Holding: The proper review forum is the federal district court, as was the

case in *Kloeckner v. Solis*, 568 U.S. 41 (2012), where the dismissal was on procedural grounds. The Court held as follows:

> (1) the Federal Circuit is the proper review forum when the MSPB disposes of complaints arising solely under the CSRA; and (2) in mixed cases, such as [this case], in which the employee (or former employee) complains of serious adverse action prompted, in whole or in part, by the employing agency's violation of federal antidiscrimination laws, the district court is the proper forum for judicial review.

*Perry*, 137 S. Ct. at 1988.

### D. Pending

Cases on whether section 7 of the National Labor Relations Act is violated by mandatory arbitration agreements that prohibit class claims: The Supreme Court granted certiorari in three cases and consolidated them. The NLRB has taken the position that a mandatory arbitration clause that prohibits bringing class or collective claims violates employees' right under Section 7 of the NLRA to engage in concerted activity for mutual aid or protection. The Seventh Circuit adhered to the Board's rationale and decision in ***Lewis v. Epic Sys. Corp.***, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (No. 16-285), and thus created a circuit split between the Seventh and the Fifth, which first decided the issue in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and later adhered to that holding in ***Murphy Oil USA, Inc. v. NLRB***, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017) (No. 16-307). The Seventh Circuit reasoned in *Lewis* that "collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.' . . . Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power." *Lewis*, 823 F.3d at 1153. The Seventh Circuit also rejected the argument that the Federal Arbitration Act (FAA) trumps the NLRA and thus saves a mandatory arbitration agreement that bans class or collective actions. Differing from the Fifth Circuit in *D.R. Horton*, the Seventh Circuit found no conflict between the NLRA and the FAA: "Because the NLRA renders [the] arbitration provision illegal, the FAA does not mandate its enforcement." *Lewis*, 823 F.3d at 1159. The

Eighth Circuit joined the position of the Fifth Circuit in ***Cellular Sales of Mo., LLC v. NLRB***, 824 F.3d 772 (8th Cir. 2016), while the Ninth Circuit and the Sixth Circuit joined the position of the Seventh Circuit in ***Morris v. Ernst & Young, LLP***, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (No. 16-300) and ***NLRB v. Alternative Entertainment, Inc.***, 858 F.3d 393 (6th Cir. 2017).

The Department of Justice switched sides in the cases pending before the Court, rejecting the position of the NLRB that a mandatory arbitration agreement that prohibits assertion of class claims violates the NLRA. *See* Lawrence E. Dubè, Ben Penn & Hassan A. Kanu, *Justice Department Switches Sides in High Court Arbitration Fight*, Daily Lab. Rep. (BNA) No. 115, at AA-1 (June 16, 2017). In a September 2016 filing, the Obama DOJ had supported the NLRB's position before the Court. *Id.* The NLRB is maintaining its position that such agreements violate the NLRA. *See* Hassan A. Kanu & Lawrence E. Dubé, *Labor Board Takes On Justice Department in Supreme Court*, Daily Lab. Rep. (BNA) (Aug. 9, 2017).

***Somers v. Digital Realty Trust Inc.***, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017).
Issue: Whether a prerequisite to asserting a whistleblower claim under the Dodd-Frank Act is first disclosing the information to the Securities and Exchange Commission (SEC).
Holding and Rationale: The Ninth Circuit held that protection extends to those who report suspected violations internally or to the SEC. The Ninth Circuit based this holding on statutory interpretation and deference to the SEC regulation. "The regulation accurately reflects congressional intent that DFA protect employees whether they blow the whistle internally, as in many instances, or they report directly to the SEC." *Somers*, 850 F.3d at 1051.

The Fifth Circuit had applied the formal definition of whistleblower to limit the scope of the anti-retaliation provision to those who report to the SEC in *Asadi v. G.E. Energy (USA)*, 720 F.3d 620 (5th Cir. 2013). The Second Circuit had reached the opposite result in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), giving *Chevron* deference to the SEC regulation, which extends protection to those who report suspected violations, whether internally or to the SEC. 17 C.F.R. § 240.21F-2.

***Janus v. AFSCME Council***, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138

S. Ct. 54 (2017).
Facts: The Illinois Public Relations Act permits a union representing public employees to collect fair share fees from non-member employees whom it represents in collective bargaining. The Governor filed an action challenging the law on First Amendment free speech grounds. The district court dismissed the Governor's complaint for lack of standing, but public employees intervened, seeking to have the controlling precedent overruled—*Abood v. Detroit Board of Educ*., 431 U.S. 209 (1977).
Posture: The last time the Supreme Court heard a case raising this issue, the Court affirmed the lower court, adhering to *Abood*, by an evenly divided vote 4-4. *See Friedrich's v. Calif Teachers Ass'n*, 136 S. Ct. 1083 (2016). Since that time, Justice Gorsuch has joined the Court.

***Encino Motorcars v. Navarro***, 845 F.3d 925 (9th Cir.), *cert. granted*, 138 S. Ct. 54 (2017).
Issue: Whether service advisors fall under FLSA overtime compensation exemption provision which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A).
The case was remanded by the Supreme Court to the Ninth Circuit in 2016 for reconsideration without giving *Chevron* deference to the Department of Labor's interpretive regulation.
Holding and Rationale of the Ninth Circuit: No. Giving no weight to the DOL's interpretation, the Ninth Circuit reasoned that the most natural construction of the statute is that Congress did not intend to exempt service advisors and, even if the language were ambiguous, the legislative history supported the proposition that Congress intended to exempt only salespersons selling cars, parts salespersons servicing cars, and mechanics servicing cars.

***Artis v. District of Columbia***, 135 A.3d 334 (D.C. Cir. 2016), *cert. granted*, 137 S. Ct. 1202 (2017).
Facts: Plaintiff filed suit alleging that her termination from D.C.'s Department of Health violated Title VII of the Civil Rights Act and that the federal district court had supplemental jurisdiction to hear claims based on the D.C. Whistleblower Act, False Claims Act, and a common law claim for wrongful termination against public policy. At the time plaintiff filed in federal court, there were more than two years remaining on the applicable

state statute of limitations. The federal court granted the defendant's motion for judgment on the pleadings as to the Title VII claim, dismissing the sole federal claim as facially deficient. The court also dismissed the remaining claims arising under D.C. law, on the ground that it now lacked jurisdiction to hear the claims. Fifty-nine (59) days after dismissal from federal court, plaintiff filed her remaining claims in the D.C. Superior Court. The trial judge dismissed the claims, finding that the plaintiff exceeded the 30-day period available under 28 U.S.C. §1367(d) to re-file her claims in state court after an unsuccessful federal filing. Under the court's interpretation, §1367(d) does not suspend state statutes of limitation at the time of the filing in district court, but rather it creates a 30-day period to file after a federal court dismissal.

Issue: What the word "tolled" means under 28 U.S.C. §1367(d). Does it effectively mean the same thing as a "suspension" (like a "clock that is stopped and then restarted") or is it a "grace period" ("allowing claims that would have otherwise become barred to be pursued in state court if refiled no later than 30 days after federal court dismissal")?

Holding and Rationale: The D.C. Circuit, agreeing with other circuits that have decided the issue (Second, Third, and Eleventh), concluded that the "grace period" approach reflects the legislative history and intent, conforms with the general presumption against preemption of state law, and is consistent with the court's prior interpretation of the statute. The purpose of the act that created the 30-day period was to "'prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court.'" *Artis*, 135 A.3d at 338 (quoting H.R. Rep. No. 101-734, 2d Sess., p.30 (1990)). The court was convinced that §1367(d) was meant to incorporate the American Law Institute's recommendation that the law should provide litigants with relief from time bar to actions as long as the state claim was filed in federal court at a time when it would not have been barred in state court and then was re-filed in state court within 30 days of the federal dismissal. The court also found that the "grace period" interpretation better accommodates federalism concerns, as it results in significantly less impact on local statutes of limitations than the "suspension" approach. The "grace period" approach is also more in line with the presumption against federal preemption, in that it is a more narrow interpretation of § 1367(d). Finally, the court cited an earlier case, *Stevens v. ARCO Management of Wash. D.C., Inc.*, 751 A.2d 995 (D.C. Cir. 2000), where the court stated that

"application of § 1367(d)'s thirty day extension to the 'local statute of limitations' was necessary to satisfy the statute's purpose of allowing litigants to '*economically* resolve related matters in a single forum' and 'increase the *administrative efficiency* of the civil litigation process.'" *Artis*, 135 A.3d at 339 (quoting *Stevens*, 751 A.2d at 996 & 1002) (emphasis in original). The court affirmed the ruling of the trial court and dismissed the plaintiff's claims for failing to comply with the applicable statute of limitations.

***Hamer v. Neighborhood Housing Servs. of Chicago,*** 835 F.3d 761 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 1203 (2017).

Facts: Plaintiff filed suit against her former employer, alleging violations of the ADEA and Title VII of the Civil Rights Act. The district court granted summary judgment in favor of the defendants. Plaintiff's deadline to file her notice of appeal was October 14, 2015. On October 8, plaintiff's counsel filed a motion to extend the deadline for filing the notice of appeal. The district court granted the motion and extended the deadline to December 14, 2015. Plaintiff filed her notice of appeal within the time permitted by the district court's order, but exceeding the extension allowable under Federal Rules of Appellate Procedure Rule 4(a)(5)(C), which prohibits from exceeding "30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Plaintiff asserted that the district court extended her time to file her notice of appeal pursuant to 28 U.S.C. § 2107(c), which allows a district court to extend the time for appeal upon a showing of excusable neglect or good cause. She also asserted that Rule 4(a)(5)(C) does not apply since "the district court did not consider it when granting the extension" and that the defendants waived their timeliness challenge by not raising it initially.

Issue: Whether the district court could grant an extension longer than that permitted by the Federal Rules of Appellate Procedure.

Holding and Rationale: No. The Seventh Circuit held that Rule 4(a)(5)(C) is "the vehicle by which § 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." *Hamer*, 835 F.3d at 763. The court dismissed the plaintiff's claim for lack of jurisdiction, stating that although the plaintiff relied on the lower court's erroneous extension of the deadline, the circuit court "simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements." *Id.*

## III. "HOT" ISSUES

### A. Discrimination Based on Sexual Orientation

In 2015, the EEOC asserted in a federal sector case that sexual orientation discrimination violates Title VII's prohibition of sex discrimination. *Baldwin v. Foxx*, Appeal No. 0120133080, EEOC DOC 0120133080 (E.E.O.C.), 2015 WL 4397641 (July 15, 2015). In 2016, the EEOC took the next step, filing its first two lawsuits taking that position. *See* https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm. In both cases, the EEOC argued that gay male employees were subjected to hostile work environments based on sexual orientation. One of those lawsuits, against IFCO Systems, was settled for $202,200 and equitable relief. *See* Press Release (June 28, 2016), at https://www.eeoc.gov/eeoc/newsroom/release/6-28-16.cfm.

***Hively v. Ivy Tech Community College***, 853 F.3d 339 (7th Cir. 2017) *rev'g* 830 F.3d 698 (7th Cir. 2016).

Facts: Plaintiff, who was openly lesbian, was a part-time adjunct professor at the defendant community college. She applied for a full-time position at least six times over a period of years and was not hired. She filed a charge with the EEOC alleging that she was not hired because of her sexual orientation.

The Seventh Circuit became the first circuit to hold that discrimination based on sexual orientation is discrimination because of sex in violation of Title VII. The en banc decision reversed a panel decision.

Panel Decision:

The panel lamented that it was bound by circuit precedent to reject the argument that sexual orientation discrimination is covered sex discrimination: "Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The

agency tasked with enforcing Title VII does not condone it, (see *Baldwin*), . . .; many of the federal courts to consider the matter have stated that they do not condone it . . . ; and this court undoubtedly does not condone it . . . . But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent . . . ." *Hively*, 830 F. 3d at 718.

En Banc decision: 853 F.3d 339 (7th Cir. 2017):

On rehearing en banc, the Seventh Circuit reversed, holding that discrimination on the basis of sexual orientation is a form of sex discrimination, covered by Title VII. The court discounted the usual arguments about failed legislative efforts to amend Title VII to include sexual orientation. The court explained that many inferences are possible from those unsuccessful attempts to amend, and the court had no idea what inference to draw. The court relied on *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a Supreme Court decision holding that Title VII covers same-sex sexual harassment, to illustrate the principle that the prospect that the enacting Congress "may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books." *Hively*, 853 F. 3d at 345. The court listed several types of discrimination recognized by the Supreme Court over the years which may have surprised members of the 88th Congress that enacted Title VII.

Plaintiff offered two approaches in support of her contention that sex discrimination includes discrimination on the basis of sexual orientation: first, a "comparative" method, in which the operative question is whether, all else remaining the same, would changing the plaintiff's sex have resulted in the same treatment. *Hively*, 853 F.3d at 345. Second, an "associational" method, based on *Loving v. Virginia*, 388 U.S. 1 (1967), and a line of related cases as protecting the plaintiff's right to intimately associate with a person of the same sex. *Hively*, 853 F.3d at 345. The court found that regardless of which analytical approach was taken, both lead to a conclusion that sex discrimination occurred. Under the comparative method, the court reasoned that had the plaintiff been a man who was married to, or even dating, a woman, there would have been no adverse effect on her employment status. The court further explained that plaintiff presented the ultimate case of failing to conform to gender stereotypes and that there is no functional distinction between a "gender non-conformity" claim, recognized

in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and a claim based on sexual orientation discrimination. A policy that discriminates on the basis of sexual orientation is based on assumptions about the proper behavior for someone of a given sex--something that has repeatedly been held to be sex discrimination. *Hively*, 853 F.3d at 346-47.

The court addressed the associational argument by analogy to Title VII race discrimination cases, where courts have held that plaintiffs who were fired because of an interracial marriage were in fact discriminated against because of their race. In *Loving*, the Supreme Court found that changing the race of one partner would make a difference in the legality of the conduct and so, the law rested on "distinctions drawn according to race" which were unjustifiable and racially discriminatory. The Seventh Circuit held that the same was true for this case – if the sex of one partner was changed, the outcome would be different. As a result, "the discrimination rests on distinctions drawn according to sex." *Hively*, 853 F.3d at 349. Finally, under the associational cases, the court said that its decision was to be considered against the broader backdrop of sexual orientation discrimination cases outside of the employment context, citing cases like *Lawrence v. Texas*, 539 U.S. 558 (2003), *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Seventh Circuit summarized that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively*, 853 F. 3d at 350. The court overruled its precedent in light of the logic of Supreme Court decisions on sexual orientation from the past decade and the common-sense reality that it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex. *Id.* at 351.

An Eleventh Circuit panel ruled that it was bound by Eleventh Circuit precedent to hold that sexual orientation discrimination is not actionable under Title VII in ***Evans v. Georgia Regional Hosp.***, 850 F.3d 1248, 1255 (11th Cir. 2017) (citing *Blum v. Gulf Oil Corp.*, 597 F. 2d 936 (5th Cir. 1979)), *cert. denied*, No. 17-370, 2017 WL 4012214 (Dec. 11, 2017). The Eleventh Circuit denied rehearing en banc in *Evans*, and the Supreme Court denied cert.

A Second Circuit panel ruled that it was bound by circuit precedent holding that sexual orientation discrimination is not actionable as sex discrimination in ***Christiansen v. Omnicom Group, Inc.***, 852 F. 3d 195 (2d

Cir. 2017). However, the Second Circuit panel held that the plaintiff had plausibly pled a claim of gender stereotyping pursuant to *Price Waterhouse*. The Second Circuit denied rehearing en banc on June 28, 2017. However, the Second Circuit granted rehearing en banc in another case raising the issue, ***Zarda v. Altitude Express,*** 855 F. 3d 76 (2d Cir. 2017) (holding that panel could not overturn circuit precedent that sexual orientation discrimination is not actionable under Title VII), *reh'g en banc granted* May 25, 2017.

The Department of Justice filed an amicus brief on July 26 in the *Zarda* rehearing in which the DOJ took the position that sexual orientation is not covered as sex discrimination by Title VII. *See* Jon Steingart & Patrick Dorrian, *Justice Dept. Bucks EEOC, Says Sexual Orientation Not Protected*, Daily Lab. Rep. (BNA) No. 143, at 6 (July 27, 2017). This position puts the DOJ at odds with the EEOC. The DOJ brief does argue that sexual orientation is covered under the sex stereotyping theory of sex discrimination. *Id.*

EEOC Acting Chair Victoria Lipnic stated that the EEOC will maintain its position notwithstanding the DOJ position and a coming majority on the five-member EEOC. She said, "This is an approved and voted-on position." *See* Jay-Anne B. Casuga, *EEOC Will Hold Ground on Sexual Orientation Protection*, Daily Lab. Rep. (BNA) No. 148, at 4 (Aug. 3, 2017). However, there is a possibility that the EEOC could change its position when Commissioner Lipnic steps down as the acting chair, and nominees Janet Dhillon and Daniel Gade are confirmed. *See* Jacquie Lee, *EEOC Outlook 2018: Will Agency Shift Priorities on Gay Rights*, Daily Lab. Rep. (BNA) No. 1 at 4 (Jan. 2, 2018).

## B. Who Is an Employer/Employee?

This issue is being raised under many employment laws and in many different contexts.

### *1. National Labor Relations Act*

In 2015 the NLRB announced a test for joint employer status that was

more likely to find joint employer status in the *Browning-Ferris* decision, 362 N.L.R.B. No. 186 (2015). However, the NLRB overturned the *Browning-Ferris* decision in Dec. 2017 in *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017).

The *Hy-Brand* test: Joint employer status will be found if the putative joint employer has exercised joint control over essential employment terms (rather than merely reserved the right to exercise control), exercised control that is immediate and direct (rather than indirect). Control that is "limited and routine" will not result in a finding of joint employer status. Applying the new standard, the Board found that "the joint control described above was actually exercised, not merely reserved, and that it had a direct and immediate impact on . . . . employees."

The now-overruled *Browning–Ferris* test: Two or more entities were joint employers if they were both employers under common law and "shared or codetermined matters governing essential terms and conditions of employment." Upon a finding of a common law employment relationship, the inquiry turned on whether a putative joint employer possessed sufficient control over essential terms and conditions of employment to permit meaningful collective bargaining. The Board required only that a joint employer possess authority over terms and conditions of employment, regardless of whether it exercised that authority. The Board recognized situations in which indirect control by the employer through intermediaries would establish joint-employer status.

After the Board decided *Hy-Brand*, overturning *Browning-Ferris*, the D.C. Circuit, on motion of the Board, remanded the *Browning-Ferris* case to the Board on Dec. 22, 2017. *See* Lawrence E. Dubè, *Browning-Ferris Joint Employer Case Goes Back to Labor Board*, Daily Lab. Rep. (BNA) No. 245, at 5 (Dec. 22, 2017). The Teamsters filed a motion on Jan. 4 seeking reconsideration of the remand, contending that the Board's *Hy-Brand* decision was defective. *See* Josh Eidelson & Hassan A. Kanu, *Union Moves to Keep Joint Employer Case in Federal Court*, Daily Lab. Rep. (BNA) No. 3, at 5 (Jan. 4, 2018). The union argued that Board Member William Emmanuel should have recused himself because his former law firm represented Browning-Ferris. Furthermore, the union argued that the case was an improper vehicle to overturn *Browning-Ferris* because the Board

decided the case on the basis of single-employer status. The union also argued that the court granted the motion to remand before anyone had a chance to oppose the motion.

Franchisors as Joint Employers with Franchisees: The NLRB General Counsel issued thirteen unfair labor practice complaints against McDonald's USA, LLC and local franchisees alleging that they were joint employers. *See* Jay-Anne Casuga, *NLRB General Counsel Issues 13 Complaints Alleging McDonald's Jointly Liable for ULPs*, Daily Lab. Rep. (BNA) No. 244, at AA-1 (Dec. 19, 2014). The *Hy-Brand* NLRB decision is very likely to affect the result in the franchisor-franchisee cases. The Board in *Hy-Brand* noted that an effect of the *Browning-Ferris* test was to make many franchisors and franchisees joint employers, although the Board generally had not found joint employment in such arrangements "regardless of the degree of indirect control retained."

The Board's decision regarding not requiring consent of both joint employers for formation of mixed bargaining units becomes less significant in light of the overruling of *Browning-Ferris*. In *Miller & Anderson*, 364 N.L.R.B. No. 39 (2016), the Board addressed the following question: under what circumstances can an appropriate bargaining unit include employees employed solely by a "user" employer and employees supplied by a "supplier" employer? Is it necessary to obtain employers' consent for such a bargaining unit even if the two groups of employees share a community of interest. In *Oakwood Care Center*, the Board had held that combined or mixed bargaining units consisting of employees employed solely by the user and employees employed jointly by the user and a supplier, were multi-employer units and required consent of both employers. *Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004). *Oakwood Care* had overruled the prior law, *M.B. Sturgis*, that permitted such units without employers' consent. *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000). In a 3-1 decision in *Miller & Anderson*, the Board overruled *Oakwood Care* and returned to the rule of *Sturgis*—that consent of employers is not necessary for bargaining units that combine jointly employed and solely employed employees of a single user employer.

Dissenting, Member Miscimarra, noted the relationship between the Board's decisions in *Browning-Ferris* and *Miller & Anderson*:

> In today's decision, my colleagues substantially enlarge the expanded joint-employer platform created by *Browning-Ferris* and require a more attenuated type of multi-employer/non-employer bargaining in a single unit when the multiple business entities do not even jointly employ all unit employees. Specifically, my colleagues hold that the Board may require two or more businesses to engage in multi-employer bargaining without their consent, even though one of the entities has no employment relationship with some of the unit employees, provided that other employees in the same unit are jointly employed by the employer entities. The latter determination (whether some individuals are jointly employed) will be governed by the expanded *Browning-Ferris* joint-employer standard.

*Miller & Anderson*, 364 N.L.R.B. No. 39 (Miscimarra, Member, dissenting).

***2. Fair Labor Standards Act***

The Fourth Circuit decided a joint employment case under the Fair Labor Standards Act in ***Hall v. DIRECTV, LLC***, 846 F.3d 757 (4th Cir. 2017), *cert. denied*, No. 16-1449, 2018 WL 311311 (Jan. 8, 2018). The test for joint employment was first announced in a decision handed down by the Fourth Circuit on the same day as *Hall—Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017). The Fourth Circuit applied a two-step framework. The first inquiry is "whether the defendant and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work." *Hall*, 846 F.3d at 767. The second inquiry is whether the worker is an employee or independent contractor for purposes of the FLSA, and that question is influenced by the determination as to the first question—

> whether the two entities' combined influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor. By contrast, if the two entities are disassociated with regard to the key terms and conditions of the worker's employment, we must consider

> whether the worker is an employee or independent contractor with regard to *each* putative employer separately.

*Id.* Thus, the worker's entire work arrangement must be viewed as one employment for purposes of determining whether the worker is an employee or independent contractor. "[C]ourts must aggregate the levers of influence over the key terms and conditions of the worker's employment exercised by *all* of the entities when determining whether the worker is an 'employee' within the meaning of the FLSA." *Id.* at 768 (emphasis in original). Thus, workers who would be considered independent contractors if their work for each entity were considered separately may be considered employees when their work is considered in the aggregate. The court identified six nonexhaustive factors to be considered:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, whether by direct or indirect means;
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
> (4) Whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

*See id.* at 769-70

An entity must only play a role in establishing key terms and conditions of employment in order to qualify as a joint employer. Under the correct standard, the Fourth Circuit determined that plaintiffs plausibly pled joint employment and the district court should not have dismissed their complaints.

### C. "Nothing but the Dead and Dying"[1]-- Obama-Era Regulations

#### *1. The Persuader Rule*

Where are we? The DOL announced on June 8, 2017, that it is publishing a notice or proposed rulemaking to rescind the Persuader Rule. available at https://www.dol.gov/newsroom/releases/olms/olms20170608.
Labor Secretary Alexander Acosta announced the decision in an op-ed published May 22, 2017 on the Wall Street Journal's website. The rule had been enjoined by a federal judge in 2016. On appeal, the DOL sought and was granted a stay of the appeal while it decided how to proceed. *Nat'l Fed'n of Indep. Bus. v. Acosta*, 5th Cir., No. 17-10054, motion for extension 5/9/17. The DOL received public comments on the rescission for a 60-day period that began June 12. *See* Ben Penn, *"Persuader" Rule on Union Advice Should Go, DOL Proposes*, Daily Lab. Rep. (BNA) 109, at A-6 (June 8, 2017).

Background: The "persuader rule" is the popular name for a controversial final rule on disclosure requirements for labor relations consultants who advise employers on how to avoid unions. This rule was unveiled by the Office of Labor-Management Standards (OLMS) of the U.S. Labor Department. The rule, which was first noticed in 2011 and was scheduled to become effective in 2016, affects most employers governed by the NLRA. It requires disclosure of the hiring of a third-party labor relations attorney or other consultant if such person engages in persuader activities that go beyond the plain meaning of advice. It applies even if the persuader has no direct contact with workers. A federal district court issued a nationwide

[1] Paul Simon, My Little Town (1975).

preliminary injunction against enforcement of the persuader rule on June 27, 2016. *National Fed'n of Indep. Business v. Perez*, No. 5.16-cv-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016). *See*

The DOL published a Request for Information on the overtime rule on July 26, 2017. The request states as follows:

> The Department is aware of stakeholder concerns that the standard salary level set in the 2016 Final Rule was too high. In particular, stakeholders have expressed the concern that the new salary level inappropriately excludes from exemption too many workers who pass the standard duties test, especially given the lack of a lower long test salary for employers to utilize for lower wage white collar employees. In the 2016 Final Rule the Department estimated that 4.2 million salaried white collar workers would, without some intervening action by their employers, change from exempt to non-exempt status. *See* 81 FR 32393. Concerns expressed by various stakeholders after publication of the 2016 Final Rule that the salary level would adversely impact low-wage regions and industries have further shown that additional rulemaking is appropriate. The Department is publishing this RFI to gather information to aid in formulating a proposal to revise the part 541 regulations.

The Request solicited feedback on questions during a 60-day public comment period. Most of the 11 questions raise issues regarding salary levels. https://www.regulations.gov/document?D=WHD-2017-0002-0001.

Background: The final rule modifying the "white collar" exemptions was released by the Department of Labor on May 18, 2016. The rule raised the requisite weekly salary level from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The level was reduced slightly from the proposed rule ($50,440 annually) after the notice and comment period. The new salary level would have become effective Dec. 1, 2016, and it would have been updated every three years (first update on Jan. 1, 2020). The DOL did not alter the duties test in the new rule. The DOL estimates that the rule will affect 4.2 million workers who are currently exempt and will become covered.
Other changes:

(1) The salary level for the category of "highly compensated

employees" is raised from $100,000 per year to $134,004 annually.
(2) Bonuses, commissions, and incentive payments may count for up to 10% of the new salary level.
(3) Higher education does not have an exemption but can use compensatory time to avoid paying overtime.
(4) The Secretary announced a nonenforcement policy regarding organizations that serve people with disabilities.

A federal district court in Texas granted a nationwide preliminary injunction prohibiting enforcement of the new regulations, arguing that the Department of Labor exceeded its regulatory authority. *Nevada v. U.S. Dept. of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). The Department of Labor filed an appeal with the Fifth Circuit. *Nevada v. U.S. Dept. of Labor*, No. 16-41606 (5th Cir. filed Dec. 1, 2016). The district court denied a stay of its order pending appeal. *Nevada v. U.S. Dept. of Labor*, 227 F. Supp. 3d 696 (E.D. Tex. 2017).

### *3. EEO-1 Pay Data Reporting*

Where are we? The EEOC's plan was stayed for review by the Office of Management and Budget (OMB) at the end of August 2017. *See What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection*, available at https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm. Therefore, employers use the previously approved EEO-1 form and report by March 31, 2018.

On Nov. 15, 2017, the National Women's Law Center and the Labor Council for Latin American Advancement sued the OMB and the EEOC. No. 1:17-cv-02458 (complaint filed Nov. 15, 2017). *See* Jacquie Lee, *Pay Equity Advocates Sued Feds Over Stalled Data Collection Plan*, Daily Lab. Rep. (BNA) No. 219, at 6 (Nov. 15, 2017).

Background: In 2016, the EEOC announced that as part of its annual employer reporting on the EEO-1 form, federal contractors and employers with 100 or more employees will be required to report W-2 pay and hours worked data for their workforces nationwide. The filing date will be moved

from Sept. 30 to March 31 of the following year. The first filing date with the new information will be March 31, 2018; thus, the EEO-1 filing date for 2017 will be March 31, 2018, with no filing in 2017. Presumably, the information will be used by the EEOC to identify pay disparities based on sex. Information is available at https://www.eeoc.gov/employers/eeo1survey/2017survey.cfm.

### *4. The Fiduciary Rule*

Where are we? In an appeal before the Fifth Circuit, the DOL has urged the court to uphold the fiduciary rule except for the anti-arbitration provision. That provision would deny the best-interest-contract-exemption to financial advisers who include in their contracts an arbitration agreement that prevents participation in class claims. The DOL argued that the anti-arbitration condition is "a discriminatory obstacle to arbitration," and it cannot be harmonized with the Federal Arbitration Act. *See* Carmen Castro-Paga, *DOL Defends Fiduciary Rule, Drops Anti-Arbitration Condition*, Daily Lab. Rep. (BNA) No. 127, at 9 (July 5, 2017). The DOL removed documents it filed supporting the fiduciary rule's anti-arbitration condition in *Thrivent Fin. for Lutherans v. Acosta*, No. 0:16-cv-03289, letter to judge (D. Minn. July 14, 2107). *See* Carmen Castro-Pagan, *DOL Withdraws Filings in Support of Anti-Arbitration Condition*, Daily Lab. Rep. (BNA) No. 135, at 16 (July 17, 2017).

The DOL announced an 18-month delay (until July 1, 2019) in the effective date of key parts of the fiduciary rule: the Fiduciary Rule's Best Interest Contract Exemption and the Principal Transactions Exemption, and of the applicability of certain amendments to Prohibited Transaction Exemption 84-24 (PTEs). "Thus, from June 9, 2017, to July 1, 2019, the Department will not pursue claims against fiduciaries working diligently and in good faith to comply with the Fiduciary Rule and PTEs, or treat those fiduciaries as being in violation of the Fiduciary Rule and PTEs." *See U.S. Dept. of Labor Extends Transition Period for Fiduciary Rule Exemptions*, available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20171127-0.

Background: After more than five years of work, the Department of Labor

released its fiduciary, or conflict of interest, rule on April 6, 2016. The rule would require brokers to work under a fiduciary duty when working with retirement investors, meaning they would have to act in the clients' best interest. The rule was met with Congressional proposals to overturn it and lawsuits. On June 8, President Obama vetoed a resolution that would have blocked implementation of the fiduciary rule. Three of the five lawsuits filed were consolidated by a federal judge in Texas. *See* Jacklyn Wille, *Judge Consolidates Lawsuits Challenging Fiduciary Rule*, Daily Lab. Rep. (BNA) No. 122, at A-4 (June 24, 2016). The Fifth Circuit denied a motion to enjoin enforcement pending appeal. *Chamber of Commerce v. U.S. Dep't of Labor*, No. 17-10238, 2017 WL 1284187 (Apr. 5, 2017).

### *5. Tip-Pool Rule*

Where are we? The Wage and Hour Division of the DOL proposed on Dec. 4, 2017, rescinding the 2011 regulation that prohibits service industry employers from requiring front-of-house employees, such as servers, to share tips with back-of-house employees, such as cooks and dishwashers. The proposal would apply only when an employer pays the full minimum wage and would not apply when an employer takes the tip credit. *See* Ben Penn, *Labor Department Proposes Killing Obama Tip Pooling Rule*, Daily Lab. Rep. (BNA) No. 231, at 4 (Dec. 4, 2017). The public comment period on the proposed rulemaking ended on Feb. 5, 2018. *See* Jon Steingart, *Tip Pooling Proposal Gets More Time for Public Input*, Daily Lab. Rep. (BNA), No. 237, at 10 (Dec. 12, 2017).

Background: "In 2011, the Department updated . . . regulations to reflect its then-existing view that the statutory conditions in section 3(m) of the FLSA require that tipped employees retain all of their tips, except for those tips distributed through a tip pool limited to customarily and regularly tipped employees, regardless whether such employees work for an employer that takes a tip credit." See Notice of Proposed Rulemaking, available at https://www.federalregister.gov/documents/2017/12/05/2017-25802/tip-regulations-under-the-fair-labor-standards-act-flsa.
Earlier in 2017, the DOL prohibited investigators from enforcing the 2011 tip-pool rule, restricting use of tip pool sharing, in advance of a proposal to void the regulation. *See* Ben Penn, *DOL Halts Enforcement of Tip-Pool*

*Rule Nationwide*, Daily La. Rep. (BNA) No. 139, at 4 (July 21, 2107).

## *D. Other Trump Administration Changes at the Agencies*

### *1. Department of Labor*

#### *a. Resumption of Opinion Letters*

Secretary of Labor Acosta announced that, after a 7-year hiatus, the DOL will resume issuing opinion letters by the Wage and Hour Division to employers under the FLSA, the FMLA, and the Davis-Bacon Act. https://www.dol.gov/newsroom/releases/whd/whd20170627.
Regarding the resumption of the issuance of opinion letters, consider the Sixth Circuit's decision regarding the statutory defense for good-faith reliance on written interpretations of the Administrator in *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191 (6th Cir. 2017), discussed *infra* under the Fair Labor Standards Act.

#### *b. Withdrawal of Wage & Hour Administrator Interpretations*

Secretary of Labor Acosta on June 7, 2017 announced the withdrawal of Administrative Interpretations (informal guidance) on independent contractors and joint employment. https://www.dol.gov/newsroom/releases/opa/opa20170607

### *2. EEOC*

#### *a. Wellness Plans*

On May 17, 2016, the EEOC issued two final rules, one under the ADA and one under GINA, regarding the permissibility of employers offering financial incentives to encourage employees and their spouses to participate in workplace wellness plans. The rules take effect on the first day of the first employer health plan year that begins on or after Jan. 1,

2017. The ADA rule is at https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act.
The GINA rule is at https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm.
The ADA rule applies to all wellness plans that include disability-related questions and medical exams—not just those offered as part of group health insurance plans. The ADA rule provides that the ADA's safe harbor provision applicable to insurance, 42 U.S.C. 12201(c), does not apply to wellness programs that include disability-related questions or medical examinations. The GINA rule applies to all health plans that offer wellness programs including spousal coverage. The ADA rule provides that wellness plans that ask questions about employees' health or include medical examinations may provide participation incentives of up to 30% of the total cost for self-only insurance coverage. The GINA rule provides the same cap on incentive. The amounts conflict with the larger inducements (50% of coverage cost) permitted under HIPAA and the Affordable Care Act, according to the regulations issued by Labor, Treasury, and Health and Human Services.

A federal district court held the regulations were arbitrary and capricious in ***AARP v. U.S. EEOC***, Civil Action No. 16–2113 (JDB), 2017 WL 3614430 (D.D.C. Aug. 22, 2017). The court found the 30% incentive level for employee participation to be inadequately explained by the EEOC. Rather than vacating the rules, the court remanded to the EEOC to provide a "reasoned explanation" for adoption of the 30% incentive levels as being compatible with the requirement that participation be "voluntary." The EEOC subsequently indicated that it intended to issue a notice of proposed rulemaking in August 2018 and to issue a final rule in October 2019. The AARP filed a motion to alter or amend the district court's judgment, seeking vacatur of the rule. The court granted the AARP's motion, vacating the rules, but staying the vacatur until January 1, 2019. The court found vacatur to be favored by two principal considerations. First, when the court issued its first decision, employers needed to know the rule by July at the latest in order to develop their wellness plans for the following year. Thus, the court did not wish to create a national disruption by vacating the rule in August. However, vacating the rule for 2019 would give employers adequate time to adjust their plans. The EEOC had suggested that employers need six

months' lead time. Second, the EEOC's subsequently expressed intention to pursue a schedule that would have the final rule ready to take effect in about three years troubled the court. The court stated that the EEOC's schedule for a final rule did not comport with the court's assumption in its August decision that the EEOC would address its errors "in a timely manner." In issuing its amended judgment, vacating the rules and staying the vacatur, the court urged the EEOC to move up its deadline for issuing notice of proposed rulemaking (Aug. 2018) so that a final rule could become effective "well before the current estimate sometime in 2021."

The EEOC sued an employer that had a wellness plan that required employees, in order to qualify for employer-subsidized health insurance, to complete a medical questionnaire and undergo biometric testing. The EEOC contended that the requirement violated the prohibition on involuntary medical examinations in the Americans with Disabilities Act at 42 U.S.C. § 12112(d)(4). The employer argued that the requirement came within an ADA safe harbor for insurance at *id.* § 12112(d)(4) & 12201(c). The Seventh Circuit held that the employer's voluntary cessation of the mandatory wellness program rendered the relief sought by the EEOC (injunctive relief) either unavailable or moot. ***EEOC v. Flambeau, Inc.***, 846 F.3d 941 (7th Cir. 2017).

#### *b. Harassment Enforcement Guidance*

The EEOC extended the public comment period on the proposed Enforcement Guidance on sexual and other forms of workplace harassment to March 21, 2017. https://www.eeoc.gov/eeoc/newsroom/release/2-3-17.cfm.

### *3. The National Labor Relations Board*

#### *a. NLRB Composition*

The Board now has a 2-2 Republican/Democrat composition, as we await the next appointment. Marvin Kaplan has been appointed Chair after the departure of Philip Miscimarra. Management attorney John F. Ringo will be nominated by President Trump to fill the open seat. Lawrence E. Dubè & Hasan A. Kanu, *NLRB Outlook 2018: Trump Appointees Usher in*

*New Era at Labor Board*, Daily Lab. Rep. (BNA) No. 2, at 4 (Jan. 3, 2018).

Republican Peter Robb took office as the General Counsel on November 17, 2017. The new General Counsel quickly indicated an intent to urge the Board to revisit a number of precedents. He issued a GC Memorandum with a mandatory advice submission list. *See* Memorandum GC18-02 (Dec. 1, 2017). available at https://www.nlrb.gov/reports-guidance/general-counsel-memos.

### *b. Election Rules*

On Dec. 14, 2017, the Board published a Request for Information in the Federal Register regarding the 2014 election rules. The request posed three questions, with the comment period ending on Feb. 12, 2018:

1. Should the 2014 Election Rule be retained without change?

2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?

3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

### *c. Reversals of Precedent*

*i. Joint Employer*: The Board reversed the joint employer test of *Browning-Ferris* and returned to the pre-*Browning Ferris* test in *Hy-Brand*, *see supra*.

*ii. "Micro Bargaining Units"*: The Board overruled the *Specialty Healthcare* (357 NLRB 934 (2011)) standard for determining the appropriateness of a collective bargaining unit in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017). *Under Specialty Healthcare*, if an employer contended that the union's proposed bargaining unit was inappropriate because it did not include a group of employees

(otherwise stated, the smallest appropriate unit must include additional employees), and the proposed unit was determined to be appropriate, the employer could prevail only by demonstrating that the excluded employees shared an overwhelming community of interest with the proposed bargaining unit employees. The *PCC Structurals* majority reasoned that *Specialty Healthcare* "created a regime under which he petitioned-for unit is controlling in all but narrow and highly unusual circumstances." Thus, the *Specialty Healthcare* analysis gives controlling, or far greater, weight than the statute supports to the extent to which employees have been organized. The majority concluded that such an analysis detracts from the Congressional mandate in section 9 of the NLRA that the Board determine an appropriate bargaining unit "in each case" and that unit determinations ensure employees the "fullest freedom" in exercising their section 7 rights. Accordingly, the Board returned to applying the traditional community-of-interest standard to determine whether excluded employees should be included in a unit.

*iii. Employer Rules*: The Board overturned *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which established the standard for evaluating whether facially neutral workplace rules violate section 7 in ***The Boeing Co.***, 365 NLRB No. 154 (Dec. 14, 2017). Under the new standard, the Board will examine whether a facially neutral policy, rule, or handbook provision, when reasonably interpreted, would interfere with section 7 rights by looking at two considerations: (1) the nature and extent of potential impact on section 7 rights; and (2) legitimate justifications for the rule. The Board described three results that follow from application of the test:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
> *Category 2* will include rules that warrant individualized

> scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

*The Boeing Co.*, 365 NLRB at ____.

Applying the test to Boeing's rule that prohibited employees from using camera-enabled devices to capture images or videos without a valid business need and an approved camera permit, the Board found that the rule had a comparatively slight adverse impact on protected activity and any such impact was outweighed by substantial and important justifications associated with the rule, including national security, protection of trade secrets, and protection of employees' personally identifiable information.

*iv. Unilateral Changes*: The board overturned precedent regarding unilateral changes after the expiration of a collective bargaining agreement *in Raytheon Network Centric Sys.*, 365 NLRB No. 161 (Dec. 15, 2017). The Supreme Court held that section 8(a)(5) requires employers to refrain from making changes in mandatory subjects of bargaining unless the union is given notice and an opportunity to bargain about the planned change in *NLRB v. Katz*, 369 U.S. 736 (1962). The Board has interpreted *Katz* as not applying when an employer is continuing its past practice, although that continuation of practice changes terms or conditions of employment. In *Raytheon*, the employer unilaterally made changes in employee medical benefits, as it had done at the same time every year from 2001 to 2012. Because the change in terms involved an exercise of discretion, it was a change that would require notice and opportunity to bargain under the Board's decision in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016). In *DuPont*, the Board held that if the past practice was created under a management-rights clause in a CBA that has expired, or if

the disputed actions involved employer discretion, then the employer had to provide the union with notice of the proposed change and an opportunity to bargain. Overturning *DuPont*, the Board held as follows in *Raytheon*: "[R]egardless of the circumstances under which a past practice developed--i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action--an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past." *Raytheon Network*, 365 NLRB at ____.

### *d. Potential Future Reversals*

*i. Blocking charges*: In a footnote in a recent decision, the two Republican Board members indicated that they think the blocking charge rule policy should be changed. *See ADT Security Servcs. Employer*, Case 18-RD-206831, 2017 WL 6554381 (Dec. 20, 2017).

*ii. Employee Use of Employer E-Mail Systems*: The Board's attorneys continue to argue for enforcement of a Board decision based on *Purple Communications*. *See Communication Workers of Am. v. NLRB*, No. 17-70948. However, the General Counsel stated that he may wish to provide the Board with an "alternate analysis" to *Purple Communications* for email rights. *See* Memorandum GC18-02 (Dec. 1, 2017).

*iii. Confidentiality of Severance Agreements*: The two Republican members of the Board stated that they would like to reconsider the Board's general finding that non-disclosure and non-disparagement agreements violate employees' section 7 rights. *See Baylor Univ. Med. Ctr.*, Cases 16-CA-195335, 2017 WL 6728887 (Dec. 27, 2017); *see also* Hassan A. Kanu, *Labor Board Could Loosen Curbs on Nondisclosure Agreements*, Daily Lab. Rep. (BNA), No. 2, at 7 (Jan. 3, 2018).

## E. State vs. Federal

***Barbuto v. Advantage Sales & Marketing, LLC***, SJC-12226, 477 Mass. 456, 78 N.E. 3d 37 (2017).

Facts: Massachusetts has a law declaring that there is no punishment under state law for medical use of marijuana. Plaintiff alleged upon hire her employer required her to take a mandatory drug test. She told her would-be supervisor that she would test positive because she used marijuana per her doctor's written certification for Crohn's disease. Although she was told that her medical marijuana use would not be a problem for the employer, after her first day of work she was terminated for testing positive for marijuana. The HR representative who delivered the termination message said that the company follows federal law, not state law. Plaintiff sued under Massachusetts state discrimination law for handicap discrimination. The employer argued that plaintiff failed to state a claim for two reasons. First, she was not a "qualified handicapped person" because the accommodation she sought is a federal crime, and that renders the requested accommodation per se unreasonable. Furthermore, because the requested accommodation was facially unreasonable, the employer had no obligation to engage with the employee in an interactive process to determine a reasonable accommodation before terminating her. Second, plaintiff was terminated for failing a drug test required of all employees, not because of her handicap. The trial court dismissed plaintiff's claims on a 12(b)(6) motion under the Massachusetts Rules of Civil Procedure.

The Supreme Judicial Court of Massachusetts rejected the first argument, that the accommodation was facially unreasonable per se, explaining first that the only person at risk of federal criminal prosecution is the employee, not the employer. Second, the court did not think it should, as a matter of public policy, declare such an accommodation unreasonable out of respect for federal law. "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions." *Barbuto*, 78 N.E.3d at 46. Even if the court agreed that the use of medical marijuana were a facially unreasonable accommodation, the employer still would have an obligation under the state statute to participate in an interactive process to explore whether there was an alternative, equally effective medication.

Regarding the second argument, the court explained that the law does

not ignore the fact that the employer's policy resulted in the person being denied employment because of her handicap. An employer cannot circumvent the state law prohibiting handicap discrimination by implementing a company policy prohibiting use of medicine to treat a handicap.

The court explained that the employer could attempt to prove that the request for accommodation would cause an undue hardship on a motion for summary judgment or at trial.

## F. Fair Housing Act (FHA)

***Linkletter v. Western & Southern Fin. Group, Inc.***, 851 F.3d 632 (6th Cir. 2017), *reh'g en banc denied* May 16, 2017.

This is an unusual case invoking the FHA in a lawsuit involving an employee being fired. Plaintiff was offered employment by defendant. Her offer of employment was rescinded because she signed an online petition supporting a women's shelter. Her prospective employer had been sued by residents of the shelter under the FHA, alleging that the business was attempting to pressure the shelter out of the neighborhood because the shelter did not comport with the business's master plan for that part of town. Plaintiff alleged that her signing of the petition encouraged the residents of the women's shelter in the exercise or enjoyment of their rights under the FHA. It is unlawful to interfere with any person aiding or encouraging another in the exercise or enjoyment of FHA-protected rights. 42 U.S.C. § 3617. The Sixth Circuit found that "interfere with" in the FHA has been interpreted by the Department of Housing and Urban Development to include employment disputes. The court held that the language extends to an employer that cancels a contract in retaliation for FHA advocacy. "Aided or encouraged" includes the act of signing an online petition advocating for a women's shelter. The court also found that plaintiff had alleged a sufficient nexus between her act and the rights protected by the FHA. In sum, the court stated, "A factfinder could conclude that through the campaign against the shelter, [defendant] interfered with housing rights under § 3604, and that [plaintiff] encouraged those same rights under § 3617." *Linkletter*, 851 F.3d at 640.

## G. Federal Government Agencies/Departments Taking Different Positions

The EEOC and the DOJ have taken different positions on whether sexual orientation discrimination is a type of sex discrimination covered by Title VII in the rehearing in the Second Circuit in *Zarda v. Altitude Express*, 855 F. 3d 76 (2d Cir. 2017) (holding that panel could not overturn circuit precedent that sexual orientation discrimination is not actionable under Title VII).

The NLRB and the DOJ have taken different positions in the consolidated cases pending before the Supreme Court raising the issue whether mandatory arbitration agreements that waive the right to assert class claims violate the NLRA.

## IV. AMERICANS WITH DISABILITIES ACT (ADA)

***Credeur v. Louisiana, through Office of Attorney General***, 860 F.3d 785 (5th Cir. 2017).

Facts: Plaintiff worked in the office of the Louisiana Attorney General. She suffered serious health problems stemming from a kidney transplant. The AG office granted her a temporary accommodation to work from home with the plan of reintegrating her into the office per her doctor's certification. The granting of the telecommuting accommodation was memorialized in a memorandum. After plaintiff telecommuted for several months, the AG's office denied her request to continue to work from home. The office offered an alternative accommodation, but plaintiff rejected it, renewed her request to work from home, and it was again denied. Later plaintiff resigned and sued for failure to accommodate, harassment, and retaliation under the ADA and the state employment discrimination law. The district court granted summary judgment in favor of the defendant, holding that plaintiff was not a qualified individual with a disability because she could not perform an essential function of the job—regular attendance in the office—and, alternatively, that the AG had not failed to reasonably accommodate plaintiff.

Issue: Whether denying a person the accommodation of telecommuting is a violation of the ADA's duty to reasonably accommodate.

Holding and Rationale: No. The first element of a prima facie case for failure to reasonably accommodate is that plaintiff establish she is a "qualified individual with a disability," meaning that she can perform the essential functions of the job. Essential functions of a job are determined on a case-by-case basis. Both the text of the ADA and the EEOC's regulations provide that the greatest weight in determining essential functions is given to the employer's judgment. The AG maintained that regular office attendance was an essential function of a litigation attorney. The consensus among courts (citing several cases, including *EEOC v. Ford Motor Co*., 782 F.3d 753 (6th Cir. 2015)) is that regular work-site attendance is an essential function of most jobs. The EEOC informal guidance on teleworking "reinforces this point." The court rejected plaintiff's testimony that she adequately had performed her job from home as not creating a genuine dispute of fact. Agreeing with the Sixth Circuit in *Ford Motor Co.*, the Fifth Circuit explained that employees may not define essential functions based on their personal viewpoint and experience, as neither the statute, the

regulations, nor the EEOC guidance advise courts to credit the employee's opinion as they do the employer's judgment. The applicable regulation, 29 C.F.R. § 1630.2(n)(3), lists seven considerations in determining essential functions. Although the list does not purport to be exclusive, the employee's personal judgment is not like any of the seven factors in the list. The employer's judgment is not to be accorded blind deference but should be considered in light of the employer's policies and practices. The AG's policies and practices support the idea that work-site attendance is an essential job function of a litigation attorney. The court reasoned that an increasing number of employers have adopted policies permitting telecommuting under some circumstances, and interpreting the ADA to require employers to offer unlimited telecommuting would have a chilling effect, with employers restricting their telecommuting policies to avoid liability. *Credeur*, 860 F. 3d at 795 (citing *Ford Motor Co*., 782 F. 3d at 765). Plaintiff failed to establish the first element of a failure to accommodate claim--that she was a qualified individual with a disability.

The court reaffirmed that the Fifth Circuit recognizes a claim for disability-based harassment (citing *Flowers v. S. Reg'l Physician Servs*., 247 F.3d 229 (5th Cir. 2001), but found the elements not satisfied under these facts.

***Caldwell v. KHOU-TV***, 850 F.3d 237 (5th Cir. 2017).

Facts: Plaintiff worked at a television station as a video editor. Plaintiff had damage to his leg as a result of childhood bone cancer. An increasing part of a video editor's job responsibilities was working in electronic digital recording (EDR). Although most editors were scheduled in the EDR room two or three times a week, plaintiff's direct supervisors did not schedule him as often because, they testified, they knew the EDR room was tight in spots, and they did not want to jeopardize plaintiff's health. When the parent company ordered a reduction in force, plaintiff and one other editor were fired. Plaintiff had taken leave to have one surgery and had given notice of his need to take leave for a second surgery at the time he was terminated. Plaintiff sued under the ADA and the FMLA. The district court granted summary judgment in favor of defendant.

Issue: Whether plaintiff produced sufficient evidence of pretext to survive summary judgment.

Holding and Rationale: Yes. The employer gave inconsistent reasons for the plaintiff's termination, ranging from his refusing to do assigned work in the EDR room to his not taking initiative to seek out additional EDR work to finally (in a letter to the EEOC) his inability and unwillingness to adapt to technological changes. Yet, the news editor who ultimately made the decision to fire plaintiff testified that the decision had nothing to do with plaintiff's work ethic. The court described the employer's explanations for the termination decision as evolving from insubordination to lack of initiative. Plaintiff testified, and his supervisors confirmed, that it was the decision of his supervisors, not plaintiff, to limit his time working in EDR. Plaintiff further argued that the employer violated the ADA by impermissibly limiting and segregating him, 42 U.S.C. § 12112(b)(1), by not assigning him to as many EDR shifts as they assigned other editors. The court rejected that argument because the cases cited by plaintiff involved physical segregation, and the evidence in this case was not of physical segregation. Finally, plaintiff argued that he was not given the same opportunities as other employees because of his disability. The court found this argument supported by plaintiff's not being scheduled for regular EDR shifts and not being counseled that his job performance was inadequate. Considering all the evidence, the court reversed the summary judgment granted by the district court, holding that plaintiff created a genuine issue of material fact on the issue of pretext.

The court also reversed summary judgment on plaintiff's FMLA claim that the employer interfered with his right to FMLA leave by firing him shortly after he requested leave. The court held that the pretext evidence applied equally to the FMLA claim.

Attorneys commenting on the case noted that it seems to continue a trend in the once-employer-friendly Fifth Circuit of reversing summary judgments for defendant employers, and the decision takes a pro-employee view of the evidence. *See* Patrick Dorrian, *Laid-Off Video Editor Can Air Disability Claims for Jury*, Daily Lab. Rep. (BNA) No. 43, at A-1 (Mar. 7, 2017) (quoting Houston attorneys Mark J. Oberti and Andrew S. Golub). Attorneys interviewed also commented that the case illustrates that an employer should permit an employee to continue working her normal and usual duties and documenting job performance unless the employer is presented with medical documentation that an accommodation is needed. *Id.*

***Moss v. Harris County Constable Precinct One***, 851 F.3d 413 (5th Cir. 2017).
Facts: Plaintiff was terminated while he was on leave recovering from back surgery. He sued for discrimination and retaliation under the ADA and Texas law. The district court dismissed plaintiff's claims because he was not qualified for the job at the time of his termination.
Issue: Whether the plaintiff's qualification to do the job is determined at the time of the adverse employment action.
Holding and Rationale: Yes. Although plaintiff had performed the job competently for 16 years, the issue is whether he was qualified at the time of his termination. He was medically incapable of performing his job as a deputy when he was fired, and thus he was not a qualified individual with a disability under the ADA. Plaintiff also could not prove that there was a reasonable accommodation which would enable him to perform the essential functions of the job. Although leave for a limited period might be a reasonable accommodation, leave with no specified return date or no intention to return is not a reasonable accommodation.

***Severson v. Heartland Woodcraft, Inc.,*** 872 F.3d 476 (7th Cir. 2017).
Facts: Plaintiff took off from work 12 weeks of FMLA leave because of back pain. On the last day of that leave, he had back surgery, which required him to be out of work for another two to three months. He requested an extension of the leave, but because he had exhausted his FMLA leave entitlement, the employer denied the request and terminated him, inviting him to reapply when he could return to work. Plaintiff sued under the ADA, claiming failure to reasonably accommodate. The district court granted summary judgment in favor of the defendant employer, and plaintiff appealed.
Issue: Whether an employer violates the ADA by refusing to grant long-term medical leave beyond FMLA leave entitlement.
Holding and Rationale: No. "The ADA is an anti-discrimination statute, not a medical-leave entitlement." *Severson*, 872 F.3d at 479. The reasonable accommodation requirement in the ADA is expressly limited to measures that will enable an employee to work and to perform the essential functions of the job. An employee who requires long-term medical leave and cannot work is not a "qualified individual" within the meaning of the ADA. The

Seventh Circuit panel reaffirmed the holding of *Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir.), *cert. denied*, 540 U.S. 881 (2003). While *Byrne* leaves open the possibility that a brief leave (days or a couple of weeks) might be a reasonable accommodation, " a medical leave spanning multiple months does not permit the employee to perform the essential functions of [the] job." *Severson*, 872 F.3d at 481. The court rejected the EEOC's interpretation--that extended medical leave could be a reasonable accommodation--because that interpretation would transform the ADA into a medical-leave statute, essentially "an open-ended extension of the FMLA." *Id*. at 482.

***Stevens v. Rite Aid Corp.***, 851 F.3d 224 (2d Cir.), *cert. denied*, 138 S. Ct. 359 (2017).

Facts: Plaintiff was a pharmacist who suffered from trypanophobia (fear of needles). The pharmacy instituted a new service that pharmacists must administer immunizations to customers who wanted to receive them. Plaintiff had worked as a pharmacist for defendant for 34 years before the immunization requirement was instituted. Plaintiff provided a doctor's note explaining his condition and inability to administer immunizations, and plaintiff requested a reasonable accommodation under the ADA. The doctor opined that plaintiff could not safely administer immunizations by injection because of the likelihood that he would faint. The employer pharmacy terminated plaintiff because he could not comply with the policy requiring pharmacists to administer immunization injections to customers. The pharmacy required pharmacists to hold a valid immunization certificate and included a reference to immunizations in the list of "essential duties and responsibilities" of pharmacists. Plaintiff sued under the ADA and state disability discrimination law. The jury awarded substantial damages, and the district court granted new trial unless plaintiff agreed to remittitur.

Issue: Whether plaintiff was a qualified individual with a disability entitled to a reasonable accommodation under the ADA.

Holding and Rationale: No. Administering immunizations by injection became an essential function of the job when the national pharmacy chain made a business decision to begin administering immunizations and revised the job description for pharmacists. Furthermore, there was no reasonable accommodation that would enable plaintiff to perform the essential function of administering immunizations. Plaintiff argued that the employer could

have offered him desensitization therapy, but he offered no authority supporting the proposition that employers are required to offer employees medical treatment as a reasonable accommodation under the ADA. Plaintiff argued that the employer could have offered him a transfer to a pharmacy technician position. However, the employer offered testimony that it did offer a transfer, and plaintiff offered no evidence that he requested, considered, or was open to a transfer. Plaintiff's suggestion that immunization duties could have been assigned to other employees did not constitute a reasonable accommodation within the meaning of the ADA because it entailed removing essential functions of the job. The court determined that plaintiff could not recover for the employer's failure to engage in the interactive process to determine a reasonable accommodation because it is necessary first to suggest the existence of a reasonable accommodation that would have made possible performance of the essential functions at the time of termination.

***Capps v. Mondelez Global, LLC***, 847 F.3d 144 (3d Cir. 2017).
Facts: Plaintiff took intermittent FMLA leave due to a hip pathology. His employer discovered that during a period of leave he was arrested for DUI, made a court appearance and was convicted, and served jail time. Defendant employer eventually terminated plaintiff for violation of its Dishonest Acts Policy, explaining that he claimed to be out of work due to FMLA-related issues but the documentation he provided did not support the claim. Plaintiff sued under the FMLA and the ADA. The district court granted summary judgment on the ADA claim, reasoning that although plaintiff requested intermittent leave under the FMLA, he never made a request for reasonable accommodation under the ADA.
Issue: Whether a request for FMLA leave also puts an employer on notice of a request for reasonable accommodation under the ADA.
Holding and Rationale: A request for intermittent FMLA leave can, under certain circumstances, constitute a request for reasonable accommodation. Agreeing with the EEOC regulation, 29 C.F.R. § 825.702 (c)(2),[2] the Third

[2] A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if

Circuit explained that the district court was in error if it held otherwise. Nonetheless, even assuming arguendo that the FMLA intermittent leave request also constituted a request for a reasonable accommodation, the record did not support a claim of ADA discrimination or failure to accommodate, as the employer granted plaintiff's intermittent leave requests.

***EEOC v. CRST Int'l***, No.3:17-cv-00241 (M.D. Fla. complaint filed Mar. 2, 2017).
Facts: According to the complaint, defendant freight company withdrew a job offer from a recently hired driver, a military veteran with post-traumatic stress and mood disorder, when he requested that he be permitted to have his service dog ride in the cab with him to provide emotional support. The complaint alleges that the defendant denied the request and did not discuss other potential accommodations with the driver. The lawsuit presents important issues because "service animal" is not defined in the employment section of the ADA (Title I), and it is not clear whether parties should resort to the regulations for the public facilities and accommodation title of the ADA. *See* 28 C.F.R. §§36.104 & 36.302. There has been an increase in employment situations raising issues of accommodations involving service animals. *See* Patrick Dorrian, *Move Over, Rover, and Let EEOC Take Over*, Daily Lab. Rep. (BNA) No. 41, at A-2 (Mar. 3, 2017). The pretrial order set June 1, 2018 as the deadline for summary judgment motions and *Daubert* challenges.
Issue: Whether employer violated the ADA by denying employee's request to have service dog ride with him in truck to provide emotional support to help cope with PTSD and mood disorder.

## V. TITLE VII/SECTION 1981

### A. Harassment

***Phillips v. UAW Int'l***, 854 F.3d 323 (6th Cir. 2017), *reh'g en banc denied* May 30, 2017.
Facts: Plaintiff asserted that the union violated Title VII by creating a

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that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

hostile work environment on the basis of race. She brought this claim against the union in its capacity as an employer and as a union.
Issue: Whether union members can bring Title VII harassment claims against their unions.
Holding and Rationale: The court did not reach the question. The court noted that whether the claim against the union as an employer would succeed turns on a question of agency, but whether the claim against the union as a union was permitted under Title VII was an issue of statutory interpretation. The court called it a "close question" but declined to address it, stating that "whether unions can be held liable for a Title VII hostile work environment claim is only at issue if [the plaintiff] has made the adequate showing that there was a hostile work environment. She hasn't." *Phillips*, 854 F.3d at 327. Citing the "interests of judicial economy" the court declined to address the "interesting interpretive question" presented by the claim.

***Daniel v. T&M Protection Resources, LLC***, No. 15-560, 689 Fed. Appx. 1, 2017 WL 1476598 (2d Cir. Apr. 25, 2017).
The district court had held that supervisor's one-time use of a racial epithet directed at plaintiff in the presence of other employees ("You f***ing n***er") was not, as a matter of law, sufficient to support a hostile environment claim. The Second Circuit vacated and remanded, stating, "although we decline to confront the issue of whether the one-time use of the slur "n***er" by a supervisor to a subordinate can, by itself, support a claim for a hostile work environment, we conclude that the district court improperly relied on our precedents when it rejected this possibility as a matter of law." *Daniel*, 2017 WL 1476598, at *1.

***Castleberry v. STI Group***, 863 F.3d 259 (3d Cir. 2017).
Facts: Plaintiffs alleged, among other things, that a supervisor said to plaintiffs and others that if they had "n___-rigged" a job assigned to them they would be fired. Plaintiffs also alleged that someone anonymously had written on sign-in sheets, "don't be black on the right of way." They further alleged that, despite their significant experience working on pipelines, they were permitted only to clean around pipelines rather than to work on them. Plaintiffs reported the supervisor's comment and were fired two weeks later. They were rehired but then terminated again for lack of work. Plaintiffs

sued for racial harassment, discrimination, and retaliation under section 1981. The court granted defendant's 12(b)(6) motion.
Issue: Whether a single use of a racial epithet could satisfy the severe or pervasive standard for a hostile work environment.
Holding and Rationale: Yes. The Third Circuit first clarified that the standard is severe *or* pervasive—not *and*. Regarding a single use of the word, the court stated, "Although the resolution of that question is context-specific, it is clear that one such instance can suffice to state a claim." *Castleberry*, 863 F.3d at 264. The court held that this result was required by the Supreme Court's articulating the standard in the disjunctive (*or*) rather than conjunctive (*and*). The court cited decisions from other circuits holding that a single extreme act of discrimination can create a hostile work environment. The court stated that use of the racial epithet in front of a group of workers along with a threat of termination "constitutes severe conduct that could create a hostile work environment." *Id.* at 265. The court also stated that the other conduct pled by plaintiffs may satisfy the pervasive standard. All cases cited by defendant in support of its position were resolved on summary judgment, not a 12(b)(6) motion.

***Fuller v. Idaho Dept. of Corrections***, 865 F.3d 1154 (9th Cir. 2017*), cert. filed*, No. 17-959 (Jan. 8, 2018).
Facts: Plaintiff was raped three times outside the workplace by a co-worker with whom she had an intimate relationship. Before that, the rapist co-worker, who had been the subject of several complaints by female co-employees, had been placed on administrative leave because he was under investigation for another rape with no connection to the workplace. Shortly before the rape at issue in this case, a supervisor told employees, including plaintiff, that the agency was "looking forward" to the accused rapist's return from leave. One day after plaintiff reported the rape, a supervisor told her that the employee "had a history of this kind of behavior." Yet, the next day the supervisor sent an email to all agency employees advising them to "feel free" to contact the accused rapist and "give him some encouragement." When plaintiff asked for paid leave to deal with problems caused by the rape, her request was denied, although the accused rapist was granted paid leave. Plaintiff expressed concerns about her safety if the accused rapist were permitted to return to work, and she asked that other employees be informed that she had a civil protection order. The employer

declined, saying that the accused employee was "still our employee" and they did not want a "stigma hanging over him." After investigations, the accused employee resigned before he was terminated. Plaintiff eventually resigned and sued for hostile environment sexual harassment and sex discrimination against the employer and other claims against individuals. The district court granted defendant DOC's motion for summary judgment, finding insufficient evidence to support plaintiff's claim of a hostile work environment, reasoning that the alleged rapes occurred outside the workplace and the employer took remedial measures.

Issues:

(1) Whether a supervisor's expressions of support for an alleged rapist while the employer grants him paid leave which was denied to the victim can create a hostile environment for the victim.

(2) Whether there was sufficient evidence that the employer's actions were because of sex.

Holdings and Rationales:

(1) Yes. A reasonable woman in plaintiff's situation could interpret the statements of concern and encouragement for her rapist as meaning the employer believed she was a liar or that the employer valued his reputation and job over her safety. The support for the alleged rapist was humiliating and potentially physically threatening. The court also considered the denial of paid leave to plaintiff contrasted with the paid leave given the alleged rapist. The court summarized: "[A] reasonable juror could . . . conclude that the IDOC 'effectively condoned' the rapes. . . . [Plaintiff] was forced to return, before she had recovered from her rapes, to a workplace run by supervisors who showed public support for her rapist, eagerly anticipated his return, and continued to pay him while denying her paid leave." *Fuller*, 865 F.3d at 1164. The court concluded that a reasonable trier of fact could find the employer's actions were sufficiently severe or pervasive to create a hostile work environment.

(2) Yes. The record contained evidence that plaintiff's male supervisors were more solicitous in their treatment of a man accused of rape than in their treatment of the woman who reported the rape. Women are disproportionately the victims of rape and sexual assault. Men may not have a full appreciation of the social setting or the underlying threat of violence women perceive. A jury with "'common sense, and an appropriate sensitivity to social context'" could well conclude that the male supervisors'

"siding with" the alleged rapist was because of sex. *Fuller*, 865 F.3d at 1168 (quoting *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991)).

The dissenting judge argued that there was no evidence that the employer treated a woman differently because of her sex, and the evidence established that the employer "abstained from damaging an employee's reputation" while an investigation of his conduct was pending. *Fuller*, 865 F.3d at 1168 (Ikuta, J., dissenting). The dissent characterized the employer's conduct very differently than did the majority:

> [T]his is the story of an employer that worked hard to do the right thing by effectively removing a potential threat from the workplace immediately and permanently, without smearing any employee's reputation before an investigation had been completed. That it may nevertheless find itself liable is a testament not to its missteps, but to our failure to heed [the] central lesson [of *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75 (1998)].

*Id.* at 1179.

### B. Evidence and Analysis

***Rogers v. Pearland Independent School Dist.***, 827 F.3d 403 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 820 (2017).

Facts: Plaintiff applied for a job as a master electrician with a school system. The web-based application asked about criminal history, including whether the applicant had been convicted of or pled guilty to a criminal offense. Plaintiff answered "no" to all of the questions. He also consented to a criminal background check. Plaintiff misrepresented his criminal history, failing to disclose prior felony convictions. He was not hired because of his misrepresentations. When the job next became vacant, plaintiff applied again and was not hired, even though this time he disclosed his criminal history. The reason given for his nonhire was his dishonesty on his first application and the serious nature of the criminal offenses. Plaintiff sued for race discrimination under Title VII. The district court granted summary judgment based on plaintiff's failure to establish a prima facie case

under either disparate treatment or disparate impact.
Issue: Whether plaintiff could establish a prima facie case under the *McDonnell Douglas* pretext analysis.
Holding and Rationale: No. The court listed the elements of the prima facie case under *McDonnell Douglas* as follows: plaintiff (1) belongs to a protected class; (2) applied for position and was qualified; (3) was not hired; and (4) someone outside the protected class was hired, or plaintiff was treated less favorably than others who are similarly situated and outside plaintiff's protected class. First, plaintiff failed at part four because each time he applied but was not hired, an African American man was hired. Second, plaintiff argued that a white man was hired to fill a position similar to the one for which he applied despite that person's failure to disclose a drug-related conviction on his application. The court found the person not to be a similarly situated comparator under "nearly identical circumstances." Though both had drug-related convictions, the seriousness of the criminal records of that person and plaintiff were not comparable. Therefore, the white man identified by plaintiff was not a legitimate comparator for purposes of his prima facie case.

Dissenting, Judge Graves wrote that what led to the nonhiring was not the criminal history but the failure to disclose the criminal history, and on that matter the comparator and plaintiff were nearly identical. He went on to explain that the majority's application of the "nearly identical circumstances" test was "so strenuous that it effectively immunized employers from disparate treatment claims unless the plaintiff is able to show that he shares identical traits with the alleged comparator." *Rogers*, 827 F.3d at 410 (Graves, J., dissenting).

***United States EEOC v. Autozone, Inc.***, 860 F.3d 564 (7th Cir.), *reh'g denied*, 875 F.3d 860 (7th Cir. 2017).
Facts: The charging party worked at Autozone stores in the Chicago area. He was transferred among stores several times with no reduction in pay, benefits, or job responsibilities. The transfer at issue in the case involved a transfer from a store that served a largely Hispanic clientele. Again, there was no diminution in compensation or benefits. He never reported for work at the new location and filed a charge alleging that the purpose of the transfer was to make the store from which he was transferred a "predominantly Hispanic store." After the charge was filed, the EEOC sued

Autozone, alleging that the transfer violated 42 U.S.C. § 2000e-2(a)(2), which declares it unlawful "to limit, segregate, or classify . . . employees . . in any way which would deprive or tend to deprive any individual of opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." The district judge granted summary judgment in favor of the employer, holding that the transfer was not an actionable adverse employment action.
Issue: Whether a transfer with no reduction in pay or benefits, if it was for the purpose of making a store predominantly Hispanic, violated Title VII.
Holding and Rationale: No. The EEOC argued that the deprivation of employment opportunities or adverse employment action was inherent in the act of segregating the employee and need not be proven. The Seventh Circuit panel rejected that argument, interpreting the statue as requiring specific proof of those effects. The court agreed that section (a)(2) "casts a wider net" than (a)(1) because it makes it unlawful to segregate employees if that action has a tendency to deprive an employee of employment opportunities. The EEOC rejected the invitation at oral argument to present evidence that the lateral transfer at issue even tended to deprive the employee of employment opportunities or otherwise adversely affected his employment.

Dissenting from the denial of rehearing, three Seventh Circuit judges, in an opinion written by Chief Judge Wood, argued that the panel's endorsement that separate-but-equal workplaces are permitted by Title VII should not be permitted to stand. The dissent agreed with the position of the EEOC that intentionally assigning members of different races to different stores "tend[s] to deprive any individual of employment opportunities" on the basis of race. According to the dissent, the opportunity to work at a particular store or in a particular area is a job opportunity within the meaning of the statute.

***Ortiz v. Werner Enters., Inc.,*** 834 F.3d 760 (7th Cir. 2016).
Facts: Plaintiff was terminated from his position as a freight broker after seven years. Defendant employer asserted that plaintiff was fired for falsifying business records, but the plaintiff alleged that he was fired because of his Mexican ethnicity and sued under Section 1981 and the Illinois Human Rights Act. The district court granted summary judgment in favor of the defendant after evaluating the evidence under the "direct" and "indirect"

methods of analyzing individual disparate treatment cases. As the Seventh Circuit would say on appeal, the district court "did not try to aggregate the possibilities to find an overall likelihood of discrimination."

Issue: Whether evidence in individual disparate treatment cases should be evaluated under the direct or indirect method to determine whether there is a "convincing mosaic."

Holding and Rationale: No. To begin with, the court explained that "convincing mosaic" was used as a metaphor by the Seventh Circuit to explain why courts should not differentiate between direct and indirect evidence. It was never intended to be a new legal test. The court overruled prior Seventh Circuit opinions to the extent they treated "convincing mosaic" as a legal standard. Next, the Seventh Circuit stated that the proper legal standard is "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion or other proscribed factor caused the discharge or other adverse employment action" and stated that "evidence is evidence" and must be considered as a whole, based on its relevance or lack thereof. *Ortiz*, 834 F.3d at 765. The court stated that the circuit courts must stop separating direct and indirect evidence and treating those kinds of evidence as if they were subject to different legal standards. In doing so, the court overruled several of its own decisions that did so ("to the extent that those opinions rely on the direct- and indirect-framework"). "[A]ll evidence belongs in a single pile and must be evaluated as a whole." *Id.* at 766. Finally the court said that these holdings do not affect the use of the *McDonnell Douglas* framework or any other burden-shifting framework. After examining the evidence in the case, the court reversed the lower court's judgment and remanded the case for trial, given that there was "conflict on material issues" appropriate for a jury to resolve.

***Shultz v. Congregation Shearith Israel of the City of New York***, 867 F.3d 298 (2d Cir. 2017).

Issue: Whether a Title VII claim can be based on a prospective notice of termination which is to become effective in three weeks, but is revoked before it becomes effective.

Holding and Rationale: Yes. The Supreme Court held that the limitations period on filing a charge begins to run from the date that an employee receives notice of termination in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Although *Ricks* did not address a notice of termination that was

rescinded, if the claim accrues at the time of notification, the adverse employment action already has occurred. The court explained, however, that a rescission is not without legal effect and is relevant to the calculation of damages. Finally, the court noted that the holding was limited to the facts. There could be notices of termination that are rescinded so quickly that they render the termination de minimis and not actionable. *Shultz*, 2017 WL 3427130, at *5 (citing *Keeton v. Flying J, Inc.*, 429 F.3d 259, 264 (6th Cir. 2005) ("termination lasting only hours" not an adverse employment action)). Furthermore, the holding was limited to a notice of termination and did not apply to other types of adverse employment actions that might be rescinded.

### C. Procedures and Coverage

***EEOC v. Catastrophe Management Solutions,*** 852 F.3d 1018 (11th Cir. 2016).

Facts: The EEOC filed suit on behalf of Chastity Jones, a black job applicant whose offer of employment was rescinded by Catastrophe Management Solutions pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks. The EEOC alleged that this constituted race discrimination under Title VII. Importantly, the EEOC asserted only a disparate treatment claim, which requires a showing of intentional discrimination on the basis of race. The EEOC's argument was that although the CMS grooming policy is race neutral, its prohibition on dreadlocks constitutes race discrimination because dreadlocks are physiologically and culturally associated with a certain race. The lower court dismissed the claim under 12(b)(6) on the grounds that it did not plausibly allege intentional racial discrimination on the part of CMS.

Issue: Whether a race-neutral rule prohibiting something culturally associated with one race can constitute race discrimination.

Holding and Rationale: No. First, the EEOC's argument blended disparate treatment and disparate impact, the latter theory which the EEOC did not plead. The two theories are not interchangeable. The court rejected the argument that the Supreme Court's opinion in *Young v. United Parcel Serv.*, *Inc.*, 135 S. Ct. 1338 (2015), supported use of disparate impact arguments in a disparate treatment claim. Second, the court rejected the EEOC's

definition of race as including individual expression tied to race. The court considered the definition of "race" and concluded that, at the time of enactment of Title VII, the term probably referred to common characteristics shared by a group of people and transmitted by ancestors over time. The court reasoned that the characteristics must be immutable and a matter of birth, not culture. Even if race today is considered a "social construct"—an idea and not a biological fact—that does not control what it meant in 1964. Eleventh Circuit precedent prohibits discrimination based on immutable characteristics but not cultural practices. The EEOC did not allege that dreadlocks, although culturally associated with race, are an immutable characteristic of race. Third, the court was unpersuaded by the EEOC's Compliance Manual position that Title VII prohibits discrimination based on cultural characteristics linked to race because the position was inconsistent with the agency's position in an administrative appeal in 2008. Fourth, no court yet has accepted the position of the EEOC that Title VII protects hairstyles culturally associated with race. Finally, the court acknowledged that there have been calls for a more expansive interpretation of the concept of "race" as including cultural characteristics. The court noted additional issues that would arise from such an expansion. It then explained that the task of courts is to interpret the statute enacted by Congress rather to "grade competing doctoral theses in anthropology or sociology." *Catastrophe Management Solutions*, 852 F.3d at 1034. Determining the meaning of "race" today should be left to the democratic process.

***Texas v. EEOC***, 838 F.3d 511 (5th Cir. 2016).
The Fifth Circuit remanded this case to the district court to determine whether it has subject matter jurisdiction over Texas's challenge of the EEOC's enforcement guidance on employer's use of criminal background checks. The remand was to give the district court an opportunity to evaluate the question in light of *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016), in which the Supreme Court held in the context of the Clean Water Act that a jurisdictional determination is a final agency action that is subject to judicial review under the Administrative Procedure Act.

### D. Sex

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,*** 201 F. Supp. 3d 837

(E.D. Mich. 2016), *appeal filed*, No. 16-2424 (6th Cir. Oct. 13, 2106).
This is one of the first two cases the EEOC filed challenging transgender discrimination.
Facts: Claimant Anthony Stephens served as the funeral director at the funeral home for about six years. Stephens provided the funeral home with a letter disclosing his gender identity disorder and stating that in order to have sex reassignment surgery, he would have to live and work full-time as a woman for one year. After the surgery, he expressed an intent to return to work as a woman, Aimee Stephens. It is undisputed that Stephens intended to abide by the funeral home's dress code for women upon his return as Aimee. Stephens hand-delivered the letter to the owner of the funeral home, and he was terminated about two weeks later. After the termination, Stephens met with an attorney and subsequently filed a charge with the EEOC. The EEOC brought suit against the funeral home, asserting that the funeral home violated Title VII by terminating Stephens on the basis of sex: that the decision to terminate Stephens was motivated by the fact that Stephens is transgender, by Stephens's decision to transition from male to female and/or because Stephens failed to conform to the funeral home's sex- or gender-based preferences, expectations, or stereotypes. The district court concluded that the funeral home is entitled to protection under the Religious Freedom Restoration Act (RFRA) and that the RFRA does apply to the EEOC as a federal agency.
Issue: Whether defendant had an exemption under the RFRA from complying with Title VII and the sex-stereotyping case law developed under it.
Holding and Rationale: Yes. The court found that there was direct evidence to support a claim of employment discrimination based on statements made in deposition by the funeral home owner ("Well, because he—he was no longer going to represent himself as a man. He wanted to dress as a woman."). The court rejected the funeral home's sex-specific dress-code defense, reasoning that after *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), an employer cannot prevail by putting gender-based stereotypes into a formal policy. The court then turned to the funeral home's RFRA defense and found that the employer prevailed on that defense--RFRA prohibits the EEOC from applying Title VII to "force the Funeral Home to violate its sincerely held religious beliefs." *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 851.

Under *Burwell v. Hobby-Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), a for-profit corporation is considered a "person" for the purposes of RFRA protection. As a for-profit corporation, the funeral home was entitled to RFRA protection. The RFRA applies to the "government," which includes agencies of the United States, so the RFRA does apply to the EEOC as well. The district court held that the funeral home met its initial burden of showing that compliance with Title VII "substantially burdens" its free exercise of religion, by establishing that the owner of the funeral home sincerely believes that allowing one of his funeral home directors to "deny their sex while acting as a representative of the Funeral Home" would "violate God's commands." There is no dispute, according to the district court, that this is an "honest conviction" and that the burden on the funeral home is "substantial" in that the owner testified he would feel pressured to sell the business and "give up his life's calling" if he were required to permit claimant to dress as a woman at work. Because the funeral home established that Title VII imposes a substantial burden on its religious exercise, it is entitled to a RFRA exemption unless the EEOC can show that "the application of the burden to the person: 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest." *R.G & G.R*, 201 F. Supp. 3d at 841. The district court was "at a loss" for how to scrutinize the compelling governmental interest factor, and consequently assumed that the EEOC met that requirement, and the court proceeded directly to the "least restrictive means." The court found that the EEOC had not met this burden, by failing to even explore the possibility of any accommodation or less restrictive means. The court speculated that the reason the EEOC did not do that was because it was proceeding as if gender identity or transgender status is a protected class under Title VII. *Id.* at 860. The court explained that neither is protected under Title VII, and the only viable theory in the case was gender stereotyping. The court explained that if the EEOC has a compelling interest in eliminating gender stereotype discrimination, it could have proposed a gender-neutral dress code, which would have been a less restrictive means of advancing its goal. Because the EEOC did not even discuss or explore such less restrictive means, it failed to satisfy its burden under the RFRA, and the defendant funeral home was entitled to the RFRA exemption from Title VII. The court noted that the Sixth and Seventh Circuits have held that a RFRA defense does not apply in a private party

lawsuit. It was available in this case, however, because the EEOC brought the case. *Id.* at 863-64 (citing *General Conf. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010); *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015)).

### D. Religion

***EEOC v. Consol Energy, Inc.***, 860 F.3d 131 (4th Cir. 2017).

Facts: Claimant worked as a coal miner for 37 years without incident. When the employer implemented a biometric hand scanner to track employees, claimant informed the employer that he could not use the system for religious reasons. Claimant was an evangelical Christian and an ordained minister who believed that using the scanner would result in her receiving the "Mark of the Beast"—the Antichrist in the Biblical book of Revelation. Although the employer provided an alternative to the scanner for employees who could not use the scanner for non-religious reasons (employees with injured hands were permitted to enter their personnel numbers on a keypad attached to the system), it refused to accommodate claimant other than to have him scan his left hand rather than his right hand (as the Biblical Mark of the Beast is to be on the right hand or forehead). Claimant retired under protest. The EEOC sued, alleging that the employer violated Title VII by constructively discharging claimant rather than accommodating his religious beliefs. The jury returned a verdict for the EEOC, awarding claimant $150,000 in compensatory damages but not punitive damages. The court awarded back pay and front pay, for a total award of about $587,000.

Issue: Whether the evidence was sufficient to establish a conflict between the employee's religious belief and the employer's requirement that she use the hand scanner.

Holding and Rationale: Yes. The employer essentially argued that there was no conflict because the employer explained fully that the scanner would not imprint a physical mark on her hand. The court explained that the employer's argument was based on its disagreement with claimant's religious beliefs. The employer opened oral arguments with quotations from scripture to demonstrate that plaintiff's belief was wrong. The court explained that it is not the role of the employer or the court to question the correctness or the plausibility of the employee's religious beliefs. As long as

there is evidence that the employee's beliefs are sincerely held and are in conflict with a requirement of the employer, that is all. Beyond the issue of the correctness of the claimant's religious beliefs, almost nothing was in dispute. The employer acknowledged that it could permit her to bypass the scanning with no additional burdens or costs, as it was doing with employees who needed to do so for non-religious reasons.

***Fallon v. Mercy Catholic Med. Ctr. of Southeastern Pa.***, 877 F.3d 487 (3d Cir. 2017).

Facts: Defendant Mercy Catholic required its employees to be inoculated against the flu unless they qualified for a medical or religious exemption. Plaintiff objected to the flu vaccination because he thought it might do more harm than good, and he sought exemption on religious grounds. The hospital determined that plaintiff did not qualify for the exemption and terminated him when he continued to refuse to be vaccinated. The hospital had twice granted his request for exemption based on a long essay he submitted explaining his beliefs. The hospital denied the exemption on the third time, explaining that it had changed the standards for granting a religious exemption. Plaintiff sued for religious discrimination under Title VII. The district court granted summary judgment in favor of the employer, finding that plaintiff's beliefs were sincere and strongly held, but they were not religious in nature.

Issue: Whether plaintiff's objection to receiving a flu vaccination was based on religious beliefs.

Holding and Rationale: No. The court noted that "'[f]ew tasks that confront a court require more circumspection that that of determining whether a particular set of ideas constitutes a religion . . . .'" *Fallon*, 877 F.3d at 490 (quoting *Africa v. Commonwealth of Pa*., 662 F.2d 1025, 1031 (3d Cir. 1981)). The Third Circuit looks to whether beliefs "address[] fundamental and ultimate questions having to do with deep and imponderable matters," are "comprehensive in nature," and are accompanied by "certain formal and external signs." The court did not find that plaintiff's belief satisfied any of those three criteria. The court characterized his belief that the vaccine does more harm than good as a medical belief rather than a religious one. The moral commandment ("Do not harm your own body") to which he subscribed was an "isolated moral teaching," not a "comprehensive system of beliefs about fundamental or ultimate matters." *Id.* at 492. The belief

regarding vaccinations did not occupy a place in his life similar to that occupied by a more traditional faith. The court qualified its holding by observing that anti-vaccination beliefs can be part of a broader religious faith in some circumstances.

### E. Retaliation

***Fisher v. Lufkin Indus., Inc.,*** 847 F.3d 752 (5th Cir. 2017).
Facts: The series of events involved the following: supervisor instructed plaintiff when to take his breaks, with which plaintiff disagreed; supervisor responded, "Boy, I don't know why every time I come over here it's a hassle!"; plaintiff, an African American man, reported the supervisor's use of "boy" as racial harassment; white coworker and supervisor, who were unhappy with plaintiff's reporting of the supervisor, devised a "sting operation" to catch plaintiff selling possibly pornographic DVDs at work; plaintiff sold a DVD to coworker; management conducted an investigation of plaintiff's selling DVDs at work, with which plaintiff cooperated partially and then terminated his cooperation; and plaintiff was fired for violation of company policy (conducting unauthorized business on company property). Plaintiff sued for discrimination and retaliation. The district court found that the investigation of plaintiff was undertaken in retaliation for his protected activity, but that his termination was justified on the independent grounds of resisting the investigation and lying to his supervisors about his activities. The district court dismissed plaintiff's claims.
Issue: Whether a causal connection existed between plaintiff's protected activity and the adverse employment action.
Holding and Rationale: Under Fifth Circuit precedent, a plaintiff establishes cat's paw liability if he establishes (1) supervisors were motivated by retaliatory animus when they took acts intended to cause an adverse employment action; and (2) those acts were a but-for cause of the adverse action. *Fisher*, 847 F.3d at 758 (citing *Zamora v. City of Houston*, 798 F.3d 326 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016)). The court turned to the concept of proximate cause, applied by the Supreme Court in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). Proximate cause requires a direct relation between the injury and the injury-causing conduct and excludes only links that are "too remote, purely contingent, or indirect." *Fisher*, 847 F.3d at 759 (quoting *Hemi Group, LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010)).

Applying this concept, the court found no remoteness between the retaliatory motive and the firing, and found that plaintiff's failure to fully cooperate with the retaliatory investigation was not a superseding cause of the termination because it was not of independent origin that was unforeseeable. The magistrate and district court erred in finding that plaintiff's mild resistance severed the causal link between plaintiff's protected conduct and the firing of plaintiff.

***Alkhawaldeh v. Dow Chem. Co.***, 851 F.3d 422 (5th Cir. 2017).
Facts: Plaintiff, a scientist at Dow, was given the lowest possible rating, a "1," on Dow's 1-5 scale and placed on a performance improvement plan (PIP). Plaintiff protested his rating to no avail and later filed an EEOC charge and still later another. The second charge alleged discrimination and retaliation. The retaliation claim was based on the protected conduct of reporting to a supervisor remarks that were made to him implicating race or national origin. Plaintiff eventually was terminated for poor performance and failure to complete his PIP. The trial court granted summary judgment in favor of the defendant.
Issue: Whether plaintiff created a genuine issue of material fact on the reason for his termination.
Holding and Rationale: No. All the conduct that plaintiff alleged as protected conduct occurred after he received a bad evaluation and was placed on a PIP. Given all the negative evaluation of plaintiff's job performance, he could not satisfy the high but-for standard--proving that but for his protected conduct he would not have been fired. "Poor performance is not an activity protected by Title VII." *Alkhawaldeh*, 851 F. 3d at 430.

***Carvalho-Grevious v. Delaware State Univ.***, 851 F.3d 249 (3d Cir. 2017).
Issue: Whether a plaintiff must satisfy the but-for causation standard at the prima facie case stage of the retaliation analysis.
Holding and Rationale: No. The court reasoned that the onus is on the plaintiff to prove causation at two stages of the retaliation analysis—the prima facie case stage and the pretext stage. Initially, a plaintiff proves a prima facie case of retaliation by establishing (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal connection between the protected activity and the adverse employment action. Then, under the *McDonnell Douglas* analysis, the

defendant employer must provide a legitimate, nondiscriminatory reason for the adverse employment action. Finally, at stage three, the plaintiff must prove that the employer's proffered reason is a pretext and retaliation was the real reason for the adverse employment action. The Supreme Court held that under Title VII's anti-retaliation provision a plaintiff must prove but-for causation in *University of Texas Southwestern Medical Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). The court reasoned that *Nassar* did not conflict with continued application of the *McDonnell Douglas* analysis to retaliation claims. The Third Circuit held that the but-for causation standard does not apply at the stage of the prima facie case. The burden at the prima facie case stage is not onerous and is easily met. The Third Circuit noted that the Sixth and Tenth Circuits, post-*Nassar*, have required that but-for causation must be met at the prima facie case stage. The Third Circuit instead agreed with the Fourth Circuit that the Supreme Court could not have intended that result in *Nassar*, as that would require plaintiffs to satisfy the ultimate burden at the stage of the prima facie case and would amount to a "retir[ing]" of *McDonnell Douglas* and 40 years of precedent. Carvalho-Grevious, 851 F.3d at 259 (quoting *Foster v. University of Md.-Eastern Shore*, 787 F.3d 243, 251 (4th Cir. 2015)). Thus, at the prima facie case stage, the Third Circuit requires a plaintiff to produce sufficient evidence that the protected activity was a *likely reason* for the adverse employment action. Regarding the Court's concern in *Nassar* that a lower causation standard would encourage the filing of frivolous claims, the Third Circuit observed that FRCP Rule 11's certification requirements would deter attorneys from filing frivolous claims.

The Third Circuit's opinion collects the cases in the circuit split. *Foster*, 787 F.3d at 251 n.10.

***O'Daniel v. Indus. Serv. Solutions,*** No. 17-190-RLB, 2018 WL 265585 (M.D. La. Jan. 2, 2018).

Facts: Plaintiff posted on her Facebook page a photograph of a man wearing a dress at a Target store and commented on the subject's ability to use the women's restroom and dressing room with her daughters.[3] The president of the plaintiff's employer, a member of the LGBT community, took offense

[3] "So meet, ROBERTa! Shopping in the women's department for a swimsuit at the BR Target. For all of you people that say you don't care what bathroom it's using, you're full of shit!! Let this try to walk in the women's bathroom while my daughters are in there!! #hellwillfreezeoverfirst,"

and suggested that plaintiff be fired, and she was. Plaintiff sued, eventually amending her complaints to assert claims for violation of her right to freedom of expression in La. Const. Art. I § 7 and retaliation under Title VII of the Civil Rights Act of 1964. The district court dismissed all claims on a 12(b)(6) motion.

Issues:

(1) Whether plaintiff stated a claim on which relief can be granted under the Louisiana Constitution or state tort law.

(2) Whether plaintiff stated a claim on which relief can be granted under the retaliation provision of Title VII.

Holdings and Rationales:

(1) No. Like the First Amendment, the privacy and expression rights in the Louisiana Constitution are a restriction on state action. Neither "guarantees any protections from private sector entities or individuals imposing consequences against an employee under the instant circumstances." *O'Daniel*, 2018 WL 265585, at *4. The court went on to address the possibility that plaintiff was asserting a wrongful-discharge-in-violation-of-public-policy claim. The court recognized the breadth and strength of the employment-at-will doctrine in Louisiana, as embodied in Civ. Code Art. 2747. The Louisiana Supreme Court has made clear that, aside from the federal and state statutory exceptions to employment at will, there are no broad policy considerations creating exceptions to employment at will. *Id.* at *5 (citing *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 546 (La. 2002)).

(2) No. There are three required elements for a Title VII retaliation claim: (1) participation in protected activity; (2) adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action. Plaintiff alleged that she told her employer that she would file a complaint alleging discrimination before her discharge. She planned to allege that she was discriminated against on the basis of being "a married, heterosexual female." Plaintiff contended that while discrimination based on that status may not be prohibited under Title VII, she held a reasonable belief that it was. The court explained that plaintiff was basing her retaliation claim on belief that Title VII prohibits discrimination based on sexual orientation, which is incorrect under Fifth Circuit precedent. *See Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). Plaintiff attempted to frame her retaliation claim as sex discrimination. The court stated that it

was unreasonable for plaintiff to believe either that discrimination based on her status as a married, heterosexual female is discrimination based on sex or that complaining of discrimination based on sexual orientation is protected activity. The court stated further that, even if Title VII covered sexual orientation discrimination, plaintiff did not allege a causal relationship between her termination and her sexual orientation.

## F. Pregnancy and Marital Status

***Richardson v. Northwest Christian Univ.***, 242 F. Supp. 3d 1132 (D. Or. 2017).

Facts: Plaintiff was an assistant professor of exercise science at a private Christian university in Eugene, Oregon. The university expects its faculty to adhere to Biblical Christianity. Trouble began when plaintiff, a single mother of two children, informed the president (in order to arrange maternity leave) that she was pregnant. After some dialogue, with plaintiff admitting that she was living out of wedlock with the father of the baby, the president offered plaintiff three options: marry the father; discontinue cohabiting with the father; or suffer job loss. When plaintiff insisted on her privacy rights, she was terminated. Plaintiff sued for pregnancy and sex discrimination and marital status discrimination under Oregon employment discrimination law. Defendant university moved for summary judgment.

Issues:

(1) Whether the ministerial exception to employment discrimination laws applied.

(2) Whether there was sufficient evidence of sex/pregnancy discrimination to withstand summary judgment.

(3) Whether it violated the state prohibition on marital status discrimination to fire an employee either for cohabitating with a partner outside of marriage or for engaging in extramarital sex.

Holdings and Rationales:

(1) No. Plaintiff's job position title was secular. She did not undergo any specialized religious training for the job. She did not hold herself out as a minister. Finally, although she performed some religious functions in her job, they were secondary to her secular role.

(2) Yes, under the *McDonnell Douglas* analysis, plaintiff presented evidence of pretext: the employer's chosen method of enforcement would lead to disproportionate enforcement of the policy or rule against pregnant women; in correspondence, defendant's president expressed concern that the visibility of plaintiff's pregnancy would make it obvious that she engaged in extramarital sex; and a juror could conclude that defendant was more concerned with people knowing its employees were having extramarital sex than it was with the fact of their having such sex—a concern that amounts to animus against pregnant women.
(3) Yes. The Oregon statute prohibiting employment discrimination based on marital status could be interpreted as protecting unmarried cohabitating couples. The highest courts in Alaska, California, and Massachusetts have so construed their analogous statutes. The supreme courts of North Dakota, Minnesota, Montana, and Wisconsin have held the other way. The split in authority supports the idea that "marital status" is ambiguous. The court rejected a bright-line distinction between status and conduct. The court reasoned as follows:

> Based on the absence of any evidence suggesting Oregon has a public policy of prohibiting sex outside of marriage, the close correlation between the conduct defendant wishes to prohibit and marital status, the questionable utility of a bright-line distinction between conduct and status in this context, and the canon of statutory construction governing remedial statutes, I conclude Oregon's marital status discrimination law makes it illegal for an employer to impose a policy prohibiting extramarital sex or cohabitation.

*Richardson,* 242 F. Supp. 3d at 1152.

## VI. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

***Vaughan v. Anderson Regional Med. Ctr.***, 849 F.3d 588 (5th Cir.), *cert. denied,* 138 S. Ct. 101 (2017).
Issue: Whether damages for pain and suffering and punitive damages are available in a claim for retaliation for asserting an age discrimination claim.

Holding and Rationale: No. Fifth Circuit precedent bars recovery for such damages—*Dean v. Am. Sec. Ins. Co*., 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *Dean* held that "neither general damages [i.e., compensatory damages for pain and suffering] nor punitive damages are recoverable in private actions posited upon the ADA." *Dean*, 559 F.2d at 1040. The Fifth Circuit rejected the argument endorsed by the EEOC and adopted by the Seventh Circuit in *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279 (7th Cir. 1993), that the 1977 amendments of the Fair Labor Standards Act enlarged the remedies available under ADEA retaliation claims. No other intervening changes in the law justify a departure from the circuit precedent of *Dean*.

***Villarreal v. R.J. Reynolds Tobacco Co.,*** 839 F.3d 958 (11th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 2292 (2017) (No. 16-971).

Facts: Plaintiff was 49 when he applied for a position as a territory manger with R.J. Reynolds. Plaintiff's application was screened out, after review by a contractor. The resumé review guidelines relied on by the contractor described the "targeted candidate" as someone "2–3 years out of college" and who "adjusts easily to changes" and instructed the contractor to "stay away from" applicants "in sales for 8–10 years." Neither the contractor nor R.J. Reynolds informed plaintiff that he had been rejected, and he did not follow up on his application. The suit was filed 2 years later.

Issue: Whether a job applicant can state a disparate impact claim under section 4(a)(2) of the ADEA.

Holding and Rationale: No. The Eleventh Circuit held that applicants are not entitled to bring disparate impact claims under the ADEA because an applicant has no status as an employee, as required by section 4(a)(2). That section makes it "unlawful for an employer … to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). The court's interpretation of the plain language of the statute, read in context with sections 4 (c)(2) and 4(a)(1), was that it covers discrimination against employees only. This interpretation turned largely on the phrase "or otherwise adversely affect his status as an employee." Particularly, the court read the phrase "or otherwise" to make the language "deprive or tend to deprive any individual of employment

opportunities" a subset of "adversely affect his status as an employee." Thus, section 4(a)(2) protects an individual only if the individual has status as an employee.

The outcome of *Villarreal* conflicts with the holding of the District Court for the Northern District of California in ***Rabin v. PricewaterhouseCoopers***, 236 F. Supp. 3d 1126 (N.D. Cal. 2017), where the court held that older job applicants could sue for disparate impact. The district court focused on the language "any individual" rather than "any employee" as identifying who is protected by section 4 (a)(2). The court acknowledged the *Villarreal* decision, but found the Eleventh Circuit's interpretation unpersuasive in light of the statute's use of "any individual." The court summarized its statutory interpretation: "Given that it is [defendant's] alleged discrimination that deprived [plaintiff] of his status [as] an employee, it would turn the ADEA on its head to say that [plaintiff] cannot bring a disparate impact claim because he was never actually hired." *Rabin*, 236 F. Supp. 3d at 1130. After explaining its statutory interpretation, the court explained that its interpretation is supported by Supreme Court precedent, agency interpretation, and legislative history.

***Karlo v. Pittsburgh Glass Works, LLC,*** 849 F.3d 61 (3d Cir. 2017).

Facts: Plaintiffs brought ADEA collective action asserting, among other claims, a disparate impact claim that the employer's practice had a disparate impact on employees who were 50 years old or older. The district court granted summary judgment on the disparate impact claim on the basis that a disparate impact claim based on a subgroup is not cognizable under Title VII.

Issue: Whether a disparate impact claim is actionable when based on evidence of a disparate impact on a subgroup and not all employees 40 years old or older.

Holding and Rationale: Yes. "[T]he ADEA prohibits disparate impacts based on age, not forty-and-older identity." *Karlo*, 849 F.3d at 66. The court explained that this result must follow from the statutory text and the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). Although age forty and older establishes the scope of the ADEA, it does not modify or define the ADEA's substantive prohibition on age discrimination. Furthermore, the court saw its holding as supported by *Connecticut v. Teal*, 457 U.S. 440 (1982), in which the Court

explained that disparate impact theory protects rights of individual employees, not the rights of a class. The court explained that its holding follows from the statutory language of the ADEA, and "age" as used in the ADEA is not like "race" and "sex" in Title VII—age is a "continuous variable," while race and sex are usually treated as categorical. "The continuous, non-categorical nature of age cannot be adequately addressed by simply aggregating forty-and-older employees. More exacting analysis may be needed in certain cases, and subgroups may answer that need." *Karlo*, 849 F.3d at 74. The court noted that its holding was at odds with that of three other circuits. *Id.* at 75 (citing *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059, 1991 WL 11271 (6th Cir. 1991) (table opinion); *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999)).

## VII. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

***Gomez v. Ericsson, Inc.***, 828 F.3d 367 (5th Cir. 2016).

Facts: The employee was required, in order to receive severance pay when he separated from employment with Ericsson, to sign a waiver of claims and to return all of the employer's property. In exchange, the employee would receive "notice pay" and severance pay based on years of service. Plaintiff returned the company laptop, but he wiped the hard drive of all files, including those related to work. He said he did this because he was concerned about leaving personal information and the employer's confidential data on an unencrypted laptop. The employer argued that the deletions mattered because they included the only copy of raw data supporting the employee's final deliverables. As a result, the employer denied all severance pay. After exhausting administrative appeals, plaintiff filed a lawsuit, asserting a violation of ERISA. Alternatively, he sought a declaratory judgment that ERISA did not apply, in which case he would sue for breach of contract in state court. The district court ruled that ERISA governed but granted summary judgment for the employer, holding that the company did not abuse its discretion.

Issues:

(1) Whether ERISA governed the severance plan at issue.
(2) Whether the employer/administrator abused its discretion.
Holdings and Rationales:
(1) Yes, the Fifth Circuit agreed that ERISA governed. It stated that although retirement and health plans are better-known examples of ERISA plans, the statute does cover some severance plans. On the other hand, some severance plans are not covered by ERISA. The litmus test for coverage is the existence of an "'ongoing administrative program.'" *Gomez*, 828 F.3d at 371 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). Such a program may exist even in programs with a one-time payment if there are features that require exercise of discretion such as calculations of payment, provision of additional services beyond severance payment, and establishment of procedures for handling claims and appeals. The plan at issue in this case involved significant administrative activity, including determinations of eligibility, calculation of benefits, some ongoing monitoring, and COBRA insurance coverage issues.
(2) No. The first question is whether the administrator's decision is legally correct. In determining correctness, the court considers "(1) whether the administrator has given the plan a uniform construction, (2) whether the interpretation is consistent with a fair reading of the plan, and (3) any unanticipated costs resulting from different interpretations of the plan." *Gomez*, 828 F. 3d at 373-74. If the decision is correct, the inquiry ends. If not, the inquiry proceeds to whether the administrator abused discretion, although that inquiry was not reached in this case. Under legal correctness, plaintiff argued that the plan set the release of claims as the only condition to receiving severance pay. The Fifth Circuit considered that the plan did not so limit the conditions, and it was not inconsistent with the plan to impose other conditions reasonably related to termination of employment, such as return of the employer's property. Accordingly, the trial court did not err in granting summary judgment for the defendant.

The *Gomez* decision has been invoked in subsequent cases to determine whether severance agreements are covered by ERISA. ***Thorson v. Aviall Servs., Inc.***, No. 3:15-CV-0571-D, 2017 WL 361895 (N.D. Tex. Jan. 24, 2017) (holding that plan did not require plan administrator to make discretionary decisions; thus, plan was covered not by ERISA, but by state contract law; *cf.* ***Peet v. State Farm Mut. Auto. Ins. Co.***, No. 16-cv-626,

2016 WL 5855473 (W.D. La. Aug. 22, 2016) (holding that voluntary and involuntary severance payment plans provided for significant administrative support and discretion and thus were covered by ERISA).

***Whitley v. BP, PLC***, 838 F.3d 523 (5th Cir. 2016).
Facts: Employees of BP who invested in BP's Employee Stock Ownership Plan (ESOP) sustained significant losses after the BP Deepwater Horizon explosion and oil spill. They brought a suit, known as a stock-drop suit, alleging that the plan fiduciaries breached their duties under ERISA by purchasing and holding overvalued BP stock, not providing adequate investment information to plan participants, and not monitoring those responsible for managing the BP fund. Defendant filed a 12(b)(6) motion, and the district court denied the motion, holding that under *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the plaintiffs had plausibly pled two alternative actions and that, on the basis of the pleadings, the court could not determine "that no prudent fiduciary would have concluded that [the alternatives] would do more good than harm."
Issue: Before the Supreme Court's decision in *Fifth Third*, many courts had applied the presumption of prudence to employee stock-drop lawsuits from *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). The Supreme Court in *Fifth Third* rejected the presumption. The Fifth Circuit found the standard applied by the district court materially altered the standard articulated by the Supreme Court. Under the *Fifth Third* formulation, plaintiff has the "significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." *Whitley*, 838 F. 3d at 529. The plaintiffs in this case did not plead this regarding their proposed alternatives. Plaintiffs alleged that the BP stock was overvalued because internally it was known that BP had great exposure to liability. Plaintiffs proposed the alternatives that the plan fiduciaries disclose the information to the public or freeze trade of BP stock. Rather than satisfying the Supreme Court's standard, a prudent fiduciary might easily conclude that these proposed alternatives would do more harm than good. Thus, the court held that the complaint was insufficient and the district court erred in granting the motion to amend.

The Fifth Circuit decision in *Whitley* is consistent with those from

other circuits imposing a high pleading standard on plaintiffs in stock-drop lawsuits in the aftermath of *Fifth Third*.

***Ariana M. v. Humana Health Plan of Tex., Inc.***, 854 F.3d 753 (5th Cir.), *reh'g en banc granted*, 869 F.3d 354 (5th Cir. 2017).
Issue: Whether the standard of review for review of an administrator's denial of benefits is abuse of discretion.
Holding and Rationale: Yes. The panel followed circuit precedent in applying the abuse of standard discretion from *Pierre v. Connecticut Gen. Life Ins. Co./Life Ins. Co. of N. Am.*, 932 F.2d 1552 (5th Cir. 1991), *cert. denied*, 502 U.S. 973 (1991). The court rejected the argument that provisions in the Texas Insurance Code mandate de novo review. Thus, the court held that state law did not change the deferential standard of review articulated in *Pierre*.
The concurrence consisting of the entire panel likened the standard of review to instant replay review in sports. The concurrence noted that the Fifth Circuit is the only circuit that applies the abuse of discretion standard of review when the plan itself does not vest the administrator with that discretion. At the time that *Pierre* was decided, only the Fourth Circuit had ruled on the issue, and the Fourth ruled that de novo review applies. Since that time, six other circuits have decided the issue as the Fourth did. The judges wrote,

> The pillars supporting *Pierre* may have thus eroded. This question concerning the standard of review for ERISA cases is not headline-grabbing. But it is one that that potentially affects the millions of Fifth Circuit residents who rely on ERISA plans for their medical care and retirement security.
>
> . . . . The lopsided split that now exists cries out for resolution.

*Ariana M.*, 854 F. 3d at 765 (Costa, J., concurring specially).

The Fifth Circuit has granted rehearing en banc in *Ariana M*.

## VIII. COMPUTER FRAUD AND ABUSE ACT (CFAA) AND STORED COMMUNICATIONS ACT (SCA)

***United States v. Nosal***, 844 F.3d 1024 (9th Cir. 2016), *cert. denied*, 138 S.Ct. 314 (2017).

Facts: Defendant in criminal case under the CFAA, left Korn/Ferry Int'l, executive search firm, and started a competitor. When defendant left employer, employer revoked his computer access credentials. Nonetheless, defendant and employees he hired away continued to access former employer's database, using credentials of defendant's former executive assistant.

Issue: "[W]hether the 'without authorization' prohibition of the CFAA extends to a former employee whose computer access credentials have been rescinded but who, disregarding the revocation, accesses the computer by other means." *Nosal*, 844 F.3d at 1029.

Holding and Rationale: Yes. When an employer rescinds permission to access a computer and an employee uses the computer anyway, the situation comes within the "common sense, ordinary meaning of" the statutory language "without authorization." The court rejected the parade of horribles posed about criminal convictions under the CFAA for password sharing, explaining that this case was not about password sharing. The requirement in the statute that the access be "knowing[]and with intent to defraud" protects innocent password sharing.

For a decision interpreting the CFAA more narrowly, see *WEC Carolina Energy Solutions, LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012*), dismissing cert.*, 568 U.S. 1079 (2013) (holding that the CFAA is a criminal statute targeting hackers rather than employees who access computers in bad faith or who disregard a computer use policy).

***Brown Jordan Int'l, Inc. v. Carmicle***, 846 F.3d 1167 (11th Cir. 2017).

Facts: Carmicle began working at BJI in 2002. By 2005, he was responsible for BJI's national account, and eventually a BJI subsidiary, BJS. While he was never formally appointed president of BJS, he was permitted to use the title as a "customer facing accommodation." When a new CEO came into BJI, Carmicle entered into an Executive Employment Agreement, which was the only written employment agreement between Carmicle and BJI. In 2011, problems began. There was evidence that Carmicle had been

incurring excessive entertainment expenses and had added his wife to the BJS payroll. Carmicle received a verbal warning and a "second chance." Ultimately he was given responsibility for another subsidiary, BJC. However, in 2013 more unauthorized expenses were discovered. The CEO was ready to terminate Carmicle for cause, but was cautioned against doing so because the company was being offered for sale. The CEO, CFO and General Counsel were also pursuing a management buyout (MBO) at the time and had created a second financial model for the company, different than that which was being provided to potential buyers. At some point during the summer of 2013, BJI began to transition to a new email service. During the transition, all employees were given a generic password to test their new email accounts. Carmicle used the generic password to access another employee's email account because he was suspicious that the employee was communicating directly with the CFO and the two were lying to him about a personnel matter. From there, Carmicle's use of the generic password to access other email accounts expanded. He continued to access email accounts and take hundreds of screenshots over the next 6 months. While snooping, he learned the CFO was scrutinizing his expenses and discovered the MBO and second financial model. In 2014, the subsidiaries under Carmicle's control were struggling and in order to save his job Carmicle wrote a letter to the Board accusing the CEO and CFO of various illegal and fraudulent activities. The Board hired an independent investigator, who reported the accusations to be without merit, but also discovered Carmicle's email snooping with the generic password and reported it, along with his excessive entertainment expenditures, to the Board. The Board decided to terminate Carmicle. When he was terminated, Carmicle requested that he be permitted to take his personal laptop with him, but he was told he could not until he proved that he purchased it with his own funds. When he left, Carmicle used an app to remotely lock a laptop owned by the company. He said he intended to lock his personal laptop. Carmicle claimed to have lost the iPad with which he had taken screenshots of emails.

The company filed suit against Carmicle in federal court in Florida for violations of the CFAA and SCA. Carmicle filed suit in Kentucky state court for wrongful termination and breach of contract. The state court case was removed to federal court and transferred, and the cases were consolidated. After a bench trial, the court found Carmicle was terminated

for cause. It also found his access of email accounts violated the CFAA and the SCA.

Issues:

(1) Whether BJI suffered "loss" within the meaning of the CFAA.

(2) Whether the emails accessed by Carmicle were in "electronic storage" within the meaning of the SCA.

(3) Whether Carmicle's email access was "unauthorized" within the meaning of the SCA.

Holdings and Rationales:

(1) Yes. "Loss"[4] for purposes of the CFAA includes both (1) reasonable costs incurred in connection with activities responding to the violation of the CFAA, and (2) any revenue lost or other damages arising from an interruption of service. The Eleventh Circuit agreed with two other circuits on this point. *Brown Jordan, Int'l*, 846 F.3d at 1173 (citing *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065, 1073–74 (6th Cir. 2014); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 646 (4th Cir. 2009)). BJI's loss resulting from Carmicle's violation of the CFAA did not need to be related to an interruption of service in order to be compensable. Because BJI's hiring of forensic specialists to conduct extensive physical and forensic review of BJI's computer systems was (1) reasonable in order to determine the extent of Carmicle's hacking and (2) incurred in the course of responding to the offense, it was a compensable loss under the CFAA.

(2) The court declined to address the issue of whether "electronic storage" for the purposes of the SCA included opened emails, unopened emails, or both, because Carmicle failed to fairly present the issue to the district court. The court did note some of the authorities debating the issue.

(3) Yes. BJI's computer and internet policy contains phrases to the effect that employees of BJI should understand that the employer has the right to monitor and review their email and internet communications, and also authorizes senior management to authorize access to another employee's email for legitimate purposes. Carmicle defended on the grounds that he was a member of senior management, therefore he did not need to obtain

[4] "[T]the term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offenses, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11).

authorization from a member of senior management to access an employee's email account for legitimate purposes. The court concluded the district court was correct that it was "unreasonable to interpret the Computer and Internet Policy as authorizing Carmicle to exploit a generic password … solely on suspicion of dishonesty concerning the content of communications between others, without any reason to suspect wrongful or illegal conduct prior to doing so." *Id.* at 1177 (quoting from district court opinion).

A federal district court addressed the issue the Eleventh Circuit did not reach in *Brown Jordan Int'l, Inc.*—whether emails must be unopened to be in storage within the meaning of the SCA. The court held that a plaintiff need not allege that the emails were unopened at the time of the alleged unauthorized access in ***Levin v. ImpactOffice, LLC***, TDC-16-2790, 2017 WL 2937938 (D. Md. July 10, 2017). However, the court further explained that "[i]n order to prevail on her claim, [plaintiff] will be required to prove that the allegedly accessed emails were either unopened and in temporary storage under § 2510(17)(A) or were stored for the purposes of backup protection under § 2510(17)(B)." *Levin*, 2017 WL 2937938 at *5.

## IX. FAIR CREDIT REPORTING ACT (FCRA)

***Syed v. M-I, LLC,*** 853 F.3d 492 (9th Cir.), *cert. denied*, 138 S. Ct. 447 (June 2017).

Facts: The FCRA requires employers to provide to a "consumer" (job applicant) a "clear and conspicuous disclosure" in writing in "a document that consists solely of the disclosure" that a consumer report may be obtained for employment purposes." 15 U.S.C. § 1681b(b)(2)(A)(i). The second subsection provides that the applicant may authorize in writing on that document the procurement of the report. *Id.* §1681b(2)(A)(ii). Plaintiff applied for a job with defendant in 2011. Defendant provided him with a document labeled "Pre-employment Disclosure Release." This release informed plaintiff that his credit history and other information could be collected and used as a basis for the employment decision. The disclosure further authorized defendant to procure plaintiff's consumer report and stipulated that by signing the document plaintiff was waiving his rights to sue defendant and its agents for violations of the FCRA. Thus, plaintiff's

signature was to serve as both an authorization and a broad release of liability. Plaintiff filed a putative class action on behalf of himself and others whose consumer reports were obtained based on the disclosure form. The action sought statutory damages and punitive damages for a willful violation of the FCRA. The district court twice dismissed on 12(b)(6) motions.

Issues:

(1) Whether plaintiffs alleged a "bare procedural violation" of the FCRA, "divorced from any concrete harm," and thus failed to satisfy Article III's injury-in-fact requirement. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

(2) Whether the disclosure form satisfied the disclosure requirements of the FCRA. Particularly, whether the inclusion of the liability waiver with the disclosure complied with the requirement that the disclosure document consist "solely" of the disclosure.

(3) Whether the evidence supported a finding as a matter of law of a willful violation for which statutory and punitive damages are available under the FCRA.

Holdings and Rationales:

(1) No. The court first held that the plaintiff, who did not suffer actual harm from the improper disclosure and waiver, still had standing to sue, based on the fact that the disclosure requirement creates a right to information and the authorization requirement creates a privacy right. A concrete injury sufficient to confer standing to sue occurred when the plaintiff was "deprived of [his] ability to meaningfully authorize the credit check." *Syed*, 853 F.3d at 499. Congress recognized this harm by creating a private cause of action for violation of § 1681b(b)(2)(A).

(2) No. This was a matter of first impression in the federal courts of appeals. The FCRA requires employers to provide applicants with a document consisting "solely" of a disclosure that the employer intends to obtain a consumer report for applicant in the hiring process. The statute further provides in subsection (ii) that the consumer may authorize the procurement of the consumer report on the same document that contains the disclosure. Defendant argued that "solely" does not mean "only"; the disclosure may appear in the document because the statute also permits the applicant to authorize in writing on that document, rendering the statute internally inconsistent. The court answered that argument explaining that Congress intended the two subsections to work together, and Congress could have reasonably concluded that permitting an authorization on the same document

as the disclosure enhanced the effectiveness of both the disclosure and the authorization. Thus, the court rejected the argument that the statute was internally inconsistent. The Ninth Circuit rejected defendant's argument that because Congress created an express exception to "solely" by permitting the authorization on the document, the waiver should be permitted as an implicit exception. Unlike the expressly permitted authorization, the waiver would frustrate the statutory goal of protecting an applicant's right to control dissemination of personal information. Next, the court rejected the argument that the waiver was permitted by the language because a waiver is one type of authorization. Authorization is a defined term in the statute, meaning only "procurement of" a consumer report, and in ordinary meaning "authorize" and "waive" mean different things. Thus, the court rejected the argument that the statute expressly permits a waiver because it is a type of authorization. Finally, the court rejected the argument that the waiver was valid because, even with it included, the disclosure was "clear and conspicuous" as required by the statute. The court explained that the question of whether the disclosure is "clear and conspicuous" is a separate inquiry under the statute from whether the document consisted solely of the disclosure.

(3) Yes. In light of the statute's unambiguous foreclosure of a waiver in the disclosure document, the court found that defendant's action was "willful" under 15 U.S.C. § 1681n. A finding of willfulness requires a finding of "reckless disregard of statutory duty." In order to satisfy that standard, a party must have taken a risk greater than the risk associated with a careless reading of the statute. Defendant argued that a lack of guidance on the meaning of the statute rendered its interpretation objectively reasonable. The court countered that under the FCRA a lack of definitive authority does not immunize a party from potential liability. Despite the lack of guidance, defendant's interpretation was not objectively reasonable. However, that finding only would satisfy negligence and not recklessness. Turning to reckless disregard, the court explained that defendant's subjective interpretation of the statutory language was immaterial to the issue because the statute unambiguously barred defendant's interpretation. *Syed*, 853 F.3d at 505. An employer should not get a pass just because the issue has not been decided before. Defendant "'ran an unjustifiably high risk of violating the statute.'" *Id.* at 506 (quoting *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 70 (2007).

In the cert. petition in *Syed*, which was denied, the employer raised two questions:
(1) Whether a so-called "informational injury" satisfies the Article III standing requirement of real-world harm articulated in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), where plaintiff alleges at most a bare procedural violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681b.
(2) Whether a bare procedural violation of a statute may be deemed "willful" - *i.e.*, knowing and reckless - under *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), where no risk of harm resulted from the alleged violation.

***Smith v. LexisNexis Screening Solutions, Inc.,*** 837 F.3d 604 (6th Cir. 2016).
Facts: LexisNexis contracted to do criminal history checks on potential employees. LexisNexis was not given the plaintiff's middle initial and did not cross-reference with a credit report that showed middle initial. It reported incorrect fraud conviction that resulted in six-week delay in plaintiff's being hired. When plaintiff contacted LexisNexis and faxed it his driver's license, the service corrected the report, and he was hired. Plaintiff sued LexisNexis for violation of the FCRA for failing to follow reasonable procedures that would assure maximum accuracy. The jury returned a verdict finding the defendant liable for negligent and willful violation of the FCRA, awarding $75,000 in compensatory damages and $300,000 in punitive damages.
Issues:
(1) Whether there was sufficient evidence of a negligent violation of the FCRA.
(2) Whether there was sufficient evidence of a willful violation of the FCRA.
Holdings and Rationales:
(1) Yes, jury could reasonably find LexisNexis negligent. The statutory standard is as follows: "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). The name "David Smith" is a very common name, and the jury could have reasonably concluded that a reasonably prudent service would have asked for the middle name, and

failure to do so constituted negligence. The court upheld the award of $75,000 in compensatory damages.
(2) No. Negligence is a far cry from willfulness, which requires an unjustifiably high risk of harm that is either known or so obvious that it should be known. "[A] single inaccuracy, without more, does not constitute a willful violation of the FCRA." *Smith*, 837 F.3d at 611. The award of punitive damages was reversed because the Act provides for punitive damages for only willful violations. 15 U.S.C. § 1681n(a)(2).

## X. FAMILY AND MEDICAL LEAVE ACT (FMLA)

***Wink v. Miller Compressing Co***., 845 F.3d 821 (7th Cir. 2017).
Facts: Plaintiff's two-year-old son was autistic. She requested intermittent leave to care for him. When he was expelled from day care, plaintiff requested of her employer's HR department that she be granted FMLA leave to work from home two days a week to care for her son. HR granted a hybrid arrangement under which plaintiff stayed home two days a week to care for her son and reported the hours that she worked. The employer then subtracted from the eight-hour work day the number of hours she spent caring for her son, which counted as FMLA leave. At a certain point, the company decided that no employees would be permitted to work from home any longer, and all employees would work 5-day, 40-hour workweeks on the company's premises. The company gave plaintiff an ultimatum to resume full-time work at the workplace. The HR employee wrongly told plaintiff that the FMLA covers only leave for doctors' appointments and therapy. When plaintiff explained that she could not find affordable day care, she was told that if she did not report and work full days, it would be treated as a "voluntary quit." Plaintiff went home to take care of her son, and it was treated as the employer said—a voluntary quit. Plaintiff sued for retaliation for the assertion of her rights under the FMLA. The jury returned a verdict for plaintiff
Issue: Whether plaintiff was retaliated against based on her assertion of FMLA rights.
Holding and Rationale: Yes. A reasonable inference from the facts is that plaintiff's superiors were angry with her for requesting a continuation of the work-at-home arrangement that they had granted for a period of time.

***Jones v. Gulf Coast Health Care of Del., LLC***, 854 F.3d 1261 (11th Cir. 2017).

Issue: In an FMLA retaliation claim, whether effort to establish causation through temporal proximity between protected activity and adverse employment action should be measured from beginning of leave or employer's knowledge of planned use to adverse employment action or from last day of leave to adverse employment action.

Holding and Rationale: Temporal proximity is measured from the last day of FMLA leave to adverse employment action. There is a split in the circuits on this issue (cases cited in opinion, *Jones*, 854 F.3d at 1273), and the Eleventh Circuit's resolution is consistent with that of the Fifth—*Amsel v. Texas Water Dev. Bd.*, 464 Fed. Appx. 395 (5th Cir. 2012). The Eleventh Circuit found this result more consistent with the remedial purposes of the FMLA, as it would aid plaintiffs in establishing a prima facie case for FMLA retaliation.

***Coutard v. Municipal Credit Union***, 848 F.3d 102 (2d Cir. 2017).

Facts: Plaintiff requested FMLA leave to take care of his grandfather who was seriously ill. The employer denied the request. When plaintiff nonetheless stayed home to care for his grandfather, he was terminated. Plaintiff did not inform his employer that his grandfather had raised him from the age of four after plaintiff's father died. Under the FMLA, grandparents are not persons listed for whom an employee may take leave to care for if they have a serious health condition unless they satisfy the definition of parent, which includes a person who stood in loco parentis to an employee. 29 U.S.C. § 2611(7). Plaintiff sued under the FMLA, and the district court granted summary judgment in favor of the defendant employer because plaintiff did not advise his employer of facts that would inform them his grandfather had stood in loco parentis and thus leave was requested for a qualifying purpose.

Issue: Whether employer had an obligation to inquire regarding additional facts needed to determine whether there was an FMLA-qualifying purpose.

Holding and Rationale: Yes. The regulations under the FMLA provide that if an employee provides sufficient information for the employer reasonably to determine that the requested leave may qualify under the FMLA, the employer must specify what additional information is required for a

determination. *Coutard*, 848 F.3d at 110 (citing 29 C.F.R. § 825.303(b)). "[I]n the absence of a request for additional information, an employee has provided sufficient notice to his employer if that notice indicates reasonably that the FMLA may apply." *Id.* at 111. The court held that plaintiff's request satisfied that standard.

***Woods v. START Treatment & Recovery Ctrs., Inc.***, 864 F.3d 158 (2d Cir. 2017).
Issue: Whether the but-for standard of causation applies to FMLA retaliation claims.
Holding and Rationale: No, the standard is "motivating factor" or "negative factor." The court held that retaliation claims involving termination for exercising FMLA rights are actionable under 29 U.S.C. § 2615(a)(1).[5] Retaliation claims are not limited to § 2615(a)(2).[6] Notwithstanding the Supreme Court's employment discrimination decisions regarding causation standards (*Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009)), the court accorded *Chevron* deference to the Department of Labor regulation, 29 C.F.R. §825.220(c).

## XI. FAIR LABOR STANDARDS ACT (FLSA)

***Hills v. Entergy Operations, Inc.,*** 866 F.3d 610 (5th Cir. 2017).
Facts: Security guards at nuclear power plant were classified as "security shift supervisors" and not paid overtime. Plaintiffs believed they were misclassified as white collar exempt and brought an action for unpaid overtime. The district court granted summary judgment on an issue, holding that if plaintiffs were misclassified, the fluctuating workweek would apply to determine their regular rate of pay for the purpose of calculating overtime owed.
Issue: Whether district court erred in ruling on summary judgment that fluctuating workweek method applied to calculation of regular rate of pay
Holding and Rationale: Yes, the applicability of the fluctuating workweek

[5] "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."
[6] "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."

could not be decided as a matter of law because there was a factual dispute regarding the understanding of the employees as to what their salary compensated. Under the fluctuating workweek method, the regular rate of pay is determined by taking each week individually and dividing the salary by the number of hours actually worked. 29 C.F.R. § 778.114(a). Thus, the regular hourly rate varies week to week, and overtime varies week to week. A fluctuating workweek must be agreed upon by employer and employee. The court must consider the parties' initial understanding of the employment arrangement and the parties' conduct during the term of employment. In the Fifth Circuit, employees bear the burden of establishing that the fluctuating workweek method is inapplicable. The evidence established that the plaintiffs initially agreed to have their salary compensate them for alternating biweekly schedules of 36 and 48 hours per week. Plaintiffs argued that they believed that their schedules were limited to those specified alternating weeks. However, there also was evidence that plaintiffs knew they would be required to work more. The district court rested its summary judgment on the admission of the plaintiffs that their schedules alternated every other week. The Fifth Circuit found this to be "too literal" an interpretation of the fluctuating workweek. Instead, the court limited the application as follows:

> The fluctuating workweek method may be applied only where the employee "clearly understands" that her salary is intended to compensate any unlimited amount of hours she might be expected to work in any given week—as the CFR puts it, "whatever hours the job may demand in a particular workweek."

*Hills*, 2017 WL 3324928 at *4 (quoting 29 C.F.R. § 778.114 (c)). In other words, it does not apply to any deviation from week to week. Under the facts of this case, the plaintiffs claimed that they worked an arrangement that was fixed in the sense that it alternated between two fixed numbers of hours. Thus, a "biweekly alternating, but fixed, schedule is not necessarily 'fluctuating' as that term of art is used in the fluctuating workweek method." *Id*. The court noted that the Fourth Circuit reached the contrary conclusion in *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998). The Fifth Circuit found the Fourth Circuit ruling to be based on misinterpretations of a DOL

Wage and Hour Letter Ruling. The court noted that at trial the trier of fact might credit the employer's explanation that the agreement was that the employees agreed to have their salaries compensate an unlimited number of hours of work each week, and in that case the fluctuating workweek would apply. On the other hand, if the trier of fact credited the plaintiffs' evidence that they agreed to two set alternating workweeks, then the fluctuating workweek would not apply, and their regular rate would be determined from those two numbers of hours.

***Pineda v. JTCH Apartments, LLC***, 843 F. 3d 1062 (5th Cir. 2016).
Issues:
(1) Whether emotional distress damages are available under the anti-retaliation provision of the FLSA.
(2) Whether the FLSA protects a nonemployee spouse from retaliation.
Holdings and Rationales:
(1) Yes. The 1977 amendment of the FLSA added a private right of action for retaliation. The provision permits recovery of "such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The Fifth Circuit agreed with the other circuits that have decided the issue (6th and 7th). Like the Seventh Circuit, the court found the language "such legal or equitable relief as may be appropriate" to be expansive language that should include emotional distress damages typically available for torts—like retaliatory discharge. District courts in the Fifth Circuit had held otherwise, many citing *Dean v. American Security Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), in which the court held that emotional distress damages are not available under the ADEA. However, *Dean* was interpreting the ADEA before the 1977 amendment of the FLSA. The court also distinguished *Dean* on the basis that the FLSA does not have a preference for administrative conciliation and mediation that the ADEA does; permitting emotional distress damages under the ADEA would stymie the goal of fast and uncomplicated administrative resolution of ADEA claims. Unlike the ADEA, the FLSA does not require exhaustion of administrative remedies. Thus, the ADEA precedents are not on point, and the statutory language "legal and equitable relief" includes compensatory damages for

emotional distress.
(2) No. Plaintiff relied on the Supreme Court's decision that the anti-retaliation provision of Title VII includes nonemployees in the "zone of interests" in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011). The Fifth Circuit rejected the reliance on *Thompson* because of a textual difference in the anti-retaliation provisions in the two statutes: Title VII's provision protects "a person claiming to be aggrieved," while that in the FLSA protects "any employee."

***Perry v. Randstad Gen. Partner (US) LLC***, 876 F.3d 191 (6th Cir. 2017).
Facts: Employer classified employees as exempt administrative employees and did not pay them overtime. The Sixth Circuit reversed the district court's granting of summary judgment in favor of the employer, finding that a reasonable finder of fact could find that the employees' primary duties were nonexempt. The district court also held that the employer was entitled to rely on the statutory good-faith reliance defense based on its reliance on a WHD Letter. The statutory defense provides that

> no employer shall be subject to any liability or punishment for ... failure of the employer to pay minimum wages or overtime compensation under the [FLSA] ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the WHD] ... with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. § 259(a), (b)(1); *see also* 29 C.F.R. §§ 790.13–790.19.
Issue: Whether the employer was entitled to the statutory good-faith defense based on its reliance on a 2005 WHD letter opinion.
Holding and Rationale: No. The WHD Letter was a written ruling by the Administrator. However, the statutory defense also requires that the

employer acted both "in conformity with" the Letter and "in good faith." The court held that the employer did not act "in conformity with" the opinion because the Letter did not provide a clear answer to the particular situation faced by the employer. There were important differences between the employees described in the 2005 WHD Letter and the employees of the defendant employer. Second, the employer could not establish that it relied "in good faith." Despite knowing that the employees' duties differed depending on several factors (including clients serviced, the market, who the branch manager was, and who the area vice president was), the employer classified the employees as exempt on a nationwide basis. Thus, the fact that the employer did not conduct a review of individual duties raised a question of fact regarding the employer's good faith reliance on the WHD Letter.

Consider the significance of the *Perry* decision in light of the DOL's resumption of WHD opinion letters.

***Knight v. Tucker***, 50,993 (La. App. 2 Cir. 11/16/16); 210 So. 3d 407, *writ denied*, 2017–0247 (La. 4/7/17); 218 So. 3d 109.

Facts: Plaintiff, a CPA, joined an accounting firm, and the firm presented itself as an LLC. Plaintiff and other CPAs received W-2 forms, federal income withholding was done, plaintiff was listed as an employee in the firm's personnel manual, and he signed a form indicating that he received a handbook. The firm experienced cash flow problems, and plaintiff eventually took his client files and moved them from the office in the middle of the night, leaving a letter of resignation. Plaintiff made demand for payment of $49,500 in unpaid salary and accrued and unused vacation time of at least $9,000, and unreimbursed business expenses. The firm refused to pay. Plaintiff sued under the FLSA for overtime and Louisiana Wage Payment Law for unpaid wages and other sums. The district court, applying the control test, held that plaintiff was not an employee within the meaning of the statutes but nonetheless awarded him $49,500 because he should be compensated for work he performed.

Issues:

(1) Whether plaintiff was an employee within the meaning of the FLSA.

(2) Whether the employer lost the white collar exemption for plaintiff as a professional because his salary sometimes was not paid, thus meaning that he was not paid on a salary basis.

Holding and Rationale:
(1) Yes. Applying the economic realities test, the Second Circuit concluded that plaintiff was an employee of the firm.
(2) No. The employer did not make unauthorized deductions from plaintiff's salary. He sometimes was not paid his salary in a timely manner because of cash flow problems, but he was entitled to the full amount of his salary twice a month. Therefore, the employer did not lose the "professional" white collar exemption from overtime (and minimum wage) regarding plaintiff. As a professional paid on a salary basis, plaintiff was not entitled to overtime.

***Starnes v. Wallace***, 849 F.3d 627 (5th Cir. 2017).
Facts: Plaintiff was a risk manager in a corporate office. An employee reported to her that the employee's husband, also an employee, was not being paid for travel time or overtime. Plaintiff reported the complaint up the line. Eventually the claim was settled, but plaintiff and the employee who reported the violation were laid off ostensibly for financial reasons. The layoffs occurred ten days after the company settled the wage dispute. Plaintiff sued for retaliation under the FLSA. The district court granted summary judgment in favor of the defendant on grounds that plaintiff did not engage in protected conduct because she did not act outside of her job duties in reporting the dispute, and she could not establish causation because of the lapse of more than a year between her report and her layoff.
Issues:
(1) Whether the "manager rule" exception rendered plaintiff's reporting unprotected activity.
(2) Whether plaintiff produced sufficient evidence of causation when more than a year elapsed between plaintiff's reporting and her termination.
Holdings and Rationales:
(1) No. Courts recognize a "manager rule" which requires that an employee step outside of her normal job role and assert a right adverse to the company. *Starnes*, 849 F. 3d at 632 (citing *Hagan v. v. Echostar Satellite, LLC*, 529 F.3d 617 (5th Cir. 2008)). The court noted that the Ninth Circuit applies a slightly different version, which treats a plaintiff's job duties as one factor in determining whether an employee gives fair notice to the employer that there is an assertion of rights protected by statute, but the standards are consistent.

*Id.* (citing *Rosenfield v. GlobalTranz Enters., Inc.*, 811 F.3d 282 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 85 (2016)). In this case, plaintiff unequivocally on two occasions asserted that the employer was violating the law—once to human resources and once to the company president. The defendant employer relied on plaintiff's job description, which stated that plaintiff investigates and reports to the president all violations of federal and state law, including the FLSA. However, it was unclear that the job description had been created at the time of plaintiff's report or that it had been delivered to her. Plaintiff signed the job description several months after her first report. Additional evidence that reporting FLSA violations was not part of her job duties as a risk manager was that plaintiff never had dealt with a pay issue, and her primary responsibilities were insurance and workers' compensation matters. Furthermore, in cases that have found the manager rule applicable, the manager has raised issues about misclassification of all or categories of workers, evidencing a concern for protecting the employer by ensuring full compliance with the law. In this case, plaintiff expressed concern about the underpayment of one maintenance worker, although other maintenance workers were subject to the same pay policies. Thus, the court concluded that plaintiff was asserting rights adverse to the company by advocating for another's statutory rights. *Starnes*, 849 F.3d at 634 (citing *Hagan*, 529 F.3d at 630). The court reversed the district court, holding that there was a genuine dispute of fact as to "whether [plaintiff] was stepping outside her ordinary role as [manager] and giving fair notice to [the employer] that she was asserting rights adverse to it." *Id.*

(2) Yes. The court found sufficient evidence of causation despite the passage of time between the reporting and the termination. The court warned against "rigid, mechanized, or ritualistic" application of the *McDonnell Douglas* pretext analysis, which would require causation evidence at the stage of the prima facie case stage. Instead, the court explained that pretext evidence should be considered as relevant to causation because both causation and pretext are aimed at the ultimate question in a retaliation case. Evidence of pretext should not be cabined into the third part of the *McDonnell Douglas* analysis. *Id.* at 635. (citing *Bosque v. Starr County, Tex.*, 630 Fed Appx. 300 (5th Cir. 2015)). Furthermore, the prima facie case should not consider only one temporal connection. The firing occurred ten days after the employer settled the problem that plaintiff raised.

As the court put it, "The time when funds have gone out the door may be when the retaliatory impulse is strongest." *Starnes*, 849 F.3d at 635.

## XII. PUBLIC EMPLOYEES AND THE CONSTITUTION

***Wetherbe v. Texas Tech Univ. Sys.,*** No. 16-10458, 699 Fed. Appx. 297, 2017 WL 2722287 (5th Cir. June 23, 2017) (unpublished decision).
Facts: University professor sued university alleging that it retaliated against him because he publicly criticized tenure in the academy. The district court granted defendants' 12(b)(6) motion on the basis that his speech did not involve a matter of public concern (tenure is a benefit restricted to government employment).
Issue: Whether professor's speech criticizing tenure is a matter of public concern.
Holding and Rationale: Yes. The court explained that the professor's articles and speech discussed the systemic impact of tenure, not his own job conditions, and thus were a matter of public concern.

What does this decision tell us about *Garcetti v. Ceballos*, 547 U.S. 410 (2006)? In *Garcetti*, the Supreme Court modified the *Connick-Pickering* test applicable to public employee First Amendment cases. Under *Garcetti*, before reaching the question of matter of public concern and the balancing test, a court first must ask whether the speech at issue was made as an employee or as a citizen. Employee speech is unprotected without advancing to the next two parts of the test. The Court said in *Garcetti* that it was not addressing whether the new analysis would apply in the same manner to a case involving speech related to scholarship or teaching. The Fifth Circuit's opinion in *Wetherbe* goes to the question of matter of public concern without addressing the *Garcetti* question. Did the Fifth Circuit panel implicitly decide the issue left open in *Garcetti*—that the question regarding employee or citizen speech does not apply in the academic context and speech? See Jay-Anne B. Casuga, *Anti-Tenure Texas Tech Professor's Retaliation Claims Revived*, Daily Lab. Rep. (BNA) No. 105, at A-2 (June 2, 2017). The *Garcetti* issue was briefed in *Wetherbe*.

***Howell v. Town of Ball***, 827 F.3d 515 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 815 (2017) (No. 16-631).
Facts: Plaintiff, a police officer for the town, alleged that he was fired in violation of his First Amendment rights for cooperating with an FBI

investigation of public corruption.

Issue: Whether cooperation with an FBI investigation was made in furtherance of the public employee's official duties and thus was unprotected under the First Amendment pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Holding and Rationale: No. The Supreme Court clarified the *Garcetti* inquiry in *Lane v. Franks*, 134 S. Ct. 2369 (2014) (public employee's testimony before grand jury was protected speech although it was about matters of which he gained knowledge through his job as a public employee). Under *Garcetti* and *Lane*, the inquiry is a practical one—whether the speech is ordinarily in the scope of the employee's professional duties. Plaintiff's statements to the FBI were outside the chain of command and were without the knowledge or permission of anyone else in the police department. It was not part of his normal job duties to aid, secretly and without authorization, an FBI investigation, much less to surreptitiously record co-workers' conversations per the FBI's request. Thus, plaintiff's speech was protected by the First Amendment. However, because the *Garcetti* distinction was "relatively new" at the time and had not been interpreted by many courts, the defendants did not violate a "clearly established" constitutional right, and qualified immunity of the individual defendants thus was not defeated.

## XIII. NATIONAL LABOR RELATIONS ACT (NLRA)

The Supreme Court denied certiorari in cases raising the issue of the NLRB's jurisdiction over American Indian tribes that operate casinos and other businesses on Indian lands. *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2508 (2016) (No. 15-1024); *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016) (No. 15-1034). In both cases, the Sixth Circuit enforced Board decisions finding unfair labor practices. The proposed Tribal Labor Sovereignty Act (H.R. 986) would deprive the NLRB of such jurisdiction.

The Board rendered a 2-1 panel decision on permanent replacement of economic strikers that is sure to catch the attention of employers. In

***American Baptist Homes of the West (Piedmont Gardens)***, 364 N.L.R.B. No. 13 (May 31, 2016), *reconsideration denied*, 364 N.L.R.B. No. 95 (Aug. 24, 2016), the Board found an unfair labor practice where an employer hired permanent replacements when it had sufficient temporary replacements but the employer wanted to punish the strikers and to avoid future work stoppages. Although the general principle is that employers may hire permanent replacements for economic strikers, based on *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Board interpreted its decision in *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964), as finding a limitation in *MacKay Radio*. In *Hot Shoppes*, the Board said it construed the statement that an employer has a legal right to replace economic strikers at will as meaning that the motive of the employer is immaterial "*absent evidence of an independent unlawful purpose.*" The ALJ had interpreted that limitation (italicized) as applying to something unrelated to or extrinsic to the strike. The Board disagreed, holding that the illegal purpose could be any purpose prohibited by the NLRA. Applied to the facts, the employer admitted to hiring permanent replacements to punish the strikers and to avoid future work stoppages, thus it admitted to interfering with employees' future protected conduct.

Dissenting, Member Miscimarra, explained that the ALJ's interpretation of the *Hot Shoppes* exception to the general rule is correct--that the independent illegal purpose must be unrelated to or extraneous to the strike itself; otherwise, the exception consumes the rule. The dissent further pointed out the potential ramifications of the decision:

> [U]nder the majority's decision today, if the employer hires permanent replacements, it appears that any evidence of antistrike animus will render unlawful the employer's actions, resulting in potentially debilitating backpay liability. This would represent a structural change in the competing interests of employees, unions and employers that is contrary to what Congress intended, and what the Supreme Court has recognized, in the statute we are duty-bound to enforce.

***EYM King of Missouri, LLC d/b/a Burger King***, 365 N.L.R.B. No. 16, 208 L.R.R.M. (BNA) 1696 (Jan. 24, 2017). The Board held that a one-day strike was not an unprotected intermittent strike. The employer asserted that the

one-day strike was the ninth in a series of one-day strikes throughout the nation and part of an orchestrated series of strikes, rallies, and other actions designed to increase the wages of low-wage workers nationally. The ALJ delineated the factors to be considered in determining whether a series of strikes constitute unlawful intermittent strikes: (1) frequency and timing; (2) whether the strikes were part of a common plan; (3) whether there was union involvement; (4) whether the strikes were intended to harass the employer into a state of chaos; (5) whether the strikes were motivated by distinct acts of the employer; and whether the employees intended "'to reap the benefits of strike action without assuming the vulnerabilities of a forthright and continuous strike . . . .'" Considering the factors, the ALJ first noted that there is no Board precedent supporting the argument that strikes against other employers in the same industry could be considered to support a finding of intermittent strikes. Although the ALJ found that a union, although not the collective bargaining representative, was involved in orchestrating the strike, there was not sufficient evidence that the strikes were part of a common plan to exert pressure on the industry to raise wages. The ALJ found that no factor favored a finding of intermittent strikes.

***FedEx Home Delivery v. NLRB,*** 849 F.3d 1123 (D.C. Cir. 2017).

In *FedEx I*, 563 F.3d 492 (D.C. Cir. 2009), the D.C. Circuit held that single-route FedEx drivers working out of Wilmington, Massachusetts were independent contractors, not employees, as defined by the NLRA. The D.C. Circuit had applied the ten factors listed in the Restatement (Second) of Agency, looking at those factors through the lens of entrepreneurial opportunity. In this case, the NLRB held, on a materially indistinguishable factual record, that single-route FedEx drivers working out of Hartford, Connecticut are statutorily protected employees. The D.C. Circuit reversed the NLRB's order, stating that single-route FedEx drivers are independent contractors, to whom the NLRA's collective action protections do not apply. The court stated that "the same issue presented in a later case in the same court should lead to the same result" and "doubly so when the parties are the same." This is the so-called "law-of-the-circuit" doctrine, which is intended to insure stability, consistency, and evenhandedness in circuit law. The court noted in matters where courts accord administrative deference to agencies, that the agency may change its interpretation and implementation of the law where it is reasonable to do so. However, because the question of whether a

worker is an employee or an independent contractor is based on "pure" common-law agency principles that require no special administrative expertise, the agency is not afforded deference on this issue. Contrary to the Board's opinion, the D.C. Circuit in *FedEx I* did consider all of the common law factors.

***Alcoa, Inc. v. NLRB,*** 849 F.3d 250 (5th Cir. 2017).

Facts: Alcoa acquired TRACO, and TRACO employees subsequently contacted the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("the Union") about obtaining representation. A Union organizer visited the TRACO facility to determine where representatives would be able to handbill. He was informed by police that handbilling could occur in the public right of ways on the sides of the roads adjacent to the facility and the crosswalks. The director of industrial relations informed him that people not employed by TRACO would not be allowed to enter TRACO's property to handbill in the parking lots. On the day that the handbilling was to occur, TRACO did not permit anyone to enter the property, including Alcoa employees that would otherwise be permitted to enter with their ID's and clearance. The general manager of the TRACO facility also positioned himself near the handbillers, so that any employee who approached the group to obtain a leaflet would have to walk directly past him. He remained there for approximately 20 to 30 minutes. The Union filed a charge with the NLRB, which ultimately decided (1) that Alcoa and TRACO were a "single employer" within the meaning of the NLRA, (2) that they violated Section 8(a)(1) of the Act by refusing Alcoa employees entry to the TRACO facility parking lots, and (3) that the company engaged in unlawful surveillance.

Issues:

(1) Whether the NLRB correctly determined that the Alcoa and TRACO were a single employer; and

(2) Whether the companies violated Section 8(a)(1) of the Act.

Holdings and Rationales:

(1) Yes, the NLRB did correctly determine that Alcoa and TRACO were a single employer. In determining whether two companies are a single employer, the Board looks at four factors: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. Only two of the factors were disputed:

interrelation of operations and common control of labor relations. The court found that the Board was correct in finding that Alcoa and TRACO held themselves out to the public and employees as a single entity. This was particularly because of statements made by Alcoa that indicated an intent to merge the businesses of both entities, and because the companies' safety and employment manuals referred to the companies as a single entity. Further, there was evidence that Alcoa and TRACO did not always deal with each other at arm's length. The court also held that the Board was correct in finding that there was a common control over labor relations. Alcoa's policies regarding unions was clearly adopted by TRACO, and the events leading up to this case indicated that Alcoa did exercise control over certain aspects of TRACO's labor policy. The court emphasized that the union representative consulted with Alcoa legal counsel to determine whether it would be proper for union representatives to handbill on or near TRACO property.

(2) Yes. The court also affirmed the NLRB's holding that the companies were in violation of Section 8(a)(1) of the Act. The Act protects "off-duty employees engaging in Section 7 activity outside nonworking areas of their employer's facilities." Although no Board precedent so held, the court agreed with the Board that it would be reasonable in light of the Board's prior decisions to find that "employees of one entity that comprises part of a single employer have a right of access to the exterior areas of the plant of another entity that is also part of the single employer for purposes of organizational handbilling." *Alcoa*, 849 F.3d at 260. The court concluded that applying the single-employer doctrine to the question of liability under section 8(a)(1) was consistent with the purpose of the statute and serves to protect the employees' right to collectively pressure their employer.

The court also affirmed the Board's finding that the companies did engage in unlawful surveillance of handbilling, in that the General Manager positioned himself in a place where he could see which TRACO employees took handbills. This sort of observation has repeatedly been held to constitute unlawful surveillance under the Act.

***NLRB v. Pier Sixty, LLC***, 855 F.3d 115 (2d Cir. 2017).

The Second Circuit unanimously affirmed the NLRB's finding that Pier Sixty violated the NLRA when it fired an employee after the employee had written a profane Facebook post about a supervisor. Two days prior to the

representation election, the employee was chastised by a supervisor in a "harsh tone." During an authorized break immediately after, the employee accessed Facebook from his iPhone and posted: "Bob is such a NASTY M_____ F_____ don't know how to talk to people!!!!!! F___ his mother and his entire f____ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" The employee knew his Facebook friends, including his coworkers, would see the post. The post was removed three days later, but after it had come to the attention of management and after the union election. The employee was fired about a week later, also following the union election. The former employee filed a charge with the NLRB on the same day, asserting that he was fired for "protected concerted activities." The NLRB found that Pier Sixty had violated the NLRA by terminating the employee in retaliation for protected activity. Pier Sixty asserted that the NLRB erred in holding that the employee's behavior was not so abusive as to remove it from the protection of the NLRA.

The Board applied its nine-factor "totality of the circumstances" test for social media cases. The Second Circuit held that the NLRB's decision to protect the employee's behavior was justified based on several factors. First, the subject matter of the message included workplace concerns, and the employer had previously demonstrated significant hostility toward the employees' union activities in the time immediately preceding the election. "Thus, the Board could reasonably determine that Perez's outburst was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election." *Pier Sixty*, 855 F.3d at 124. Second, there was significant evidence that Pier Sixty consistently tolerated the use of profanity by its employees. In particular, there was no evidence that the use of profanity had ever been the basis for terminating an employee. Third, the statements were made online, which is a "key medium of communication among coworkers and a tool for organization in the modern era." *Id.* at 125. Additionally, the "outburst" did not occur in the immediate presence of customers and did not disrupt the catering business. The employee also testified that he was under the impression that his Facebook profile was private, and he removed the post when he realized that it was not. The employer thus failed to satisfy its burden of proving that the conduct was so egregious as to lose protection under the NLRA, although the court noted that the case "seem[ed] . . . to sit at the outer-bounds of protected, union-related comments." *Id.*

***UNF West, Inc. v. NLRB***, 844 F.3d 451 (5th Cir. 2016).
Labor consultants hired by company to assist it in opposing unionization during a union organizing campaign conducted coercive interrogations and made threat to employees. The consultants told employees that a document setting forth employee rights under the NLRA did not work at that business. The consultants also told employees that the employer could lower wages and suggested that the employer could do it unilaterally--not as a result of collective bargaining. Finally, the consultants engaged in coercive interrogations of employees. The Fifth Circuit enforced the Board's order, finding all of the challenged practices to be unfair labor practices by the employer.

***Mineteq, Int'l, Inc. v. NLRB***, 855 F.3d 329 (D.C. Cir. 2017).
Employer's unilateral implementation of noncompete and confidentiality agreement without bargaining was a violation of section 8(a)(5), as this was a mandatory subject of bargaining.

## XIV. IMMIGRATION

***Employer Solutions Staffing Group, LLC v. Office of the Chief Admin. Hearing Officer***, 833 F.3d 480 (5th Cir. 2016).
Facts: Defendant, a temporary staffing agency, subcontracted with a company to hire staff for a client. The subcontractor completed part of the Employee Eligibility Verification Form ("I-9 Form"). The subcontractor would make sure that employees when hired completed the form and make color copies of the original documents and send the copies along with the I-9 Form to defendant to complete, which involved inspection of the copies of the documents, completing a description of the identifying documents, and signing an attestation that the employer examined the documents and believed them to be genuine. Immigrations and Customs Enforcement (ICE) served a notice of inspection of I-9 Forms on defendant and, after inspection, alleged that defendant failed to ensure that 242 employees properly completed Section 1 or failed to complete Sections 2 or 3. The Immigration and Naturalization Act (INA, which is under the Department of Homeland Security) provides that a "person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney

General by regulation, that it has verified that the individual is not an unauthorized alien by examining" employee documents. 8 U.S.C. §1324a(b)(1)(A). Defendant was fined over $237,000. Defendant sought a hearing, and an administrative law judge ruled in favor of ICE. The ALJ found that defendant did not properly complete Section 2 of the I-9 because the employee of defendant who signed the form did not personally inspect the employee documents in the presence of the employee.

Issue: Whether the INA's verification procedures require personal rather than corporate attestation.

Holding and Rationale: No. First, the INA does not require that the attester be the same person who inspects the documents. Second, the court found no bar to corporate attestation in the regulations or prior adjudications. The court granted only *Skidmore* deference to language appearing on the I-9 Form itself because defendant, as a regulated party, lacked fair notice of the interpretation. The language on the I-9 Form was silent on the issue of corporate attestation. Applying traditional tools of interpretation, the court held that the statute, the regulation, and the form itself appear to permit corporate attestation.

The court did not address whether the Department of Homeland Security could prohibit corporate attestation or whether the decision of the ALJ in this case could be used as support in future enforcement actions.

## XV. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT

***Meadows v. Latshaw Drilling Co., LLC***, 866 F.3d 307 (5th Cir. 2017).

Facts: Plaintiff worked on onshore drilling rigs for defendant. He and 397 other employees were terminated when a decrease in oil prices decreased demand for services. Defendant gave no advance written notice of terminations. Plaintiff sued on behalf of himself and others, seeking class certification, alleging a violation of the WARN Act for defendant's mass layoff or plant closure without providing the 60-day written notice required by the WARN Act. Defendant had 39 drilling rigs, and employees sometimes moved from one rig to another. The company had its corporate office in Tulsa, Oklahoma, and it had three yards where it housed extra equipment and stored drilling rigs. Defendant moved for summary

judgment, arguing that there was no employment loss of at least 50 employees at a single site. The district court granted the summary judgment.
Issue: Whether there was a plant closing or a mass layoff, within the meaning of the WARN Act, at a single site of employment.
Holding and Rationale: No. The WARN Act itself does not define "single site of employment." The DOL guidance provides the general rule that separate facilities are separate sites. However, there is an exception in the guidance for geographically separate sites that have an "inextricable operational connection." The regulations provide that "'[s]eparate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.'" 29 C.F.R. §639.3(i)(3). There are three requirements: (1) separate facilities are in reasonable geographic proximity; (2) used for the same purpose; and (3) they share same staff and equipment. Plaintiff did not present sufficient evidence that the drilling rigs were in reasonable geographic proximity. He established only that the rigs were located an unspecified distance from each other within an area that measured about 250 miles wide by 300 miles long. The Fifth Circuit has noted that "'two plants across town rarely will be considered a single site.'" *Meadows*, __ F. 3d at __ (quoting *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 934 (5th Cir. 1994)).

***Varela v. AE Liquidation, Inc.***, 866 F.3d 515 (3d Cir. 2017).
The Third Circuit adopted the test for "reasonably foreseeable" for when the notice requirement is triggered under the WARN Act that has been adopted by every other circuit to have considered the issue—to be "reasonably foreseeable" the WARN Act event (layoff or plant closure) must be "probable"—"more likely than not." The standard was articulated by the Fifth Circuit in *Halkias v. General Dynamics Corp.*, 137 F.3d 333 (5th Cir. 1998), *cert. denied sub nom. Bryant v. General Dynamics Corp.*, 525 U.S. 872 (1998). Under the facts of the case in *Varela*, the sale of the business was as likely to close as to fall through on a certain date so that no WARN Act notice was required before that date. Accordingly, the employer was entitled to invoke the unforeseeable business circumstances exception.