



Labor & Employment Law Section



Labor & Employment Law News

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From the Chair

Dear Section Members:

Thank you for being a member of the MSBA's Labor and Employment Law Section. We are proud of this organization and hope that you will take advantage of the opportunities for learning and connecting with colleagues that our Section provides.

The Section's Governing Council has been meeting regularly and is pursuing a number of initiatives and programs designed to assist Section members. Here are some of the highlights of our recent activities:

- The Section is again this year co-sponsoring, along with the local office of the Equal Employment Opportunity Commission, a training program for investigators and other employees of both the EEOC and state and municipal agencies involved in investigating discrimination charges. This program, which was commenced last year under the leadership of past Section chair Laurie Vasichek, is intended to help educate the investigators and staff employees involved in investigating and processing discrimination charges. The program involves regular 90-minute training sessions on a variety of recurring and sometimes difficult topics. A number of Section members have volunteered to conduct these sessions.
- On March 20, 2008, the Section is co-sponsoring a CLE for labor and employment practitioners in Moorhead, Minnesota. This will be a full-day session addressing a variety of timely topics in this field, and follows a similar session that the Section sponsored in Moorhead two years ago. The Section Council is interested in continuing to provide opportunities for out-state practitioners, and we welcome any suggestions that members may have in this regard.
- In 2005, the Section's Governing Council considered developing a program for certifying accredited specialists in this practice area, and although in favor of the idea shelved it at the time because of insufficient staff support to see the project through to conclusion. Late in 2007, the MSBA Assembly approved funding to hire a staff person to support sections that desire to develop accredited specialist programs. With this decision and the present availability of a dedicated staff person support the initiative, the Governing Council has decided to move ahead in 2008 with preparing an application for a specialist certification program in this area of practice. The Governing Council recently appointed a nine-member certification accreditation committee, chaired by former Section chair Penny Phillips, which, we expect, will be making a recommendation regarding the standards for certifying specialists in this area and the procedure for testing and selecting those specialists. Watch for details on this program later this year.
- The Labor & Employment pages at practicelaw.org have been substantially reworked and, we believe, improved in the past months. Please take a few minutes to check out the resources that are available here. Not only can you quickly access and search the current and past editions of the Section's newsletter (Labor and Employment Law

News), but you can also find the most recent employment law decisions handed down by the Minnesota state and federal courts. The site also includes a number of other useful features.

- Finally, please be sure to mark your calendars for Wednesday evening, May 28, when we will host the Section's annual meeting and spring dinner. This is always a well-attended event, and this year's offering should be particularly exciting, as we will be featuring outside speaker Jeffrey Toobin, a CNN legal analyst and the author of the current best-selling book "The Nine: Inside The Secret World of the Supreme Court."

Thank you again for being a member of this Section. Please feel free to contact me or any other member of the Section's Governing Council if you have any questions, suggestions or comments.

Craig Brandt



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Disability Discrimination

*By Sarah J. Gorajski
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Posted March 2008*

Disability Case Settles, Evading Review by U.S. Supreme Court

Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 19 A.D. Cases 484, 34 NDLR P 226 (8th Cir. 2007), 2008 WL 114946 (U.S. Jan 14, 2008), 2008 U.S. LEXIS 1095, <http://caselaw.lp.findlaw.com/data2/circs/8th/062238p.pdf>: The United States Supreme Court will no longer review this case. See <http://www.supremecourtus.gov/orders/07grantednotedlist.html> [see 07-480]. The parties settled, and therefore the case has been dismissed.

Huber worked as an order-filler until she became disabled. She sought reassignment to a vacant and equivalent position. Wal-Mart did not automatically reassign her, but instead required her to compete with other applicants. Wal-Mart ultimately hired another more qualified applicant for the position.

Huber filed an ADA claim against Wal-Mart. An Arkansas federal court granted summary judgment in favor of Huber, but the Eighth Circuit reversed and ruled in favor of Wal-Mart. The Eighth Circuit held that the ADA does not require an employer to reassign a qualified disabled employee to a vacant position when such reassignment would violate the employer's legitimate nondiscriminatory policy of hiring the most qualified candidate. The federal appeals courts are currently split on the issue.

Eighth Circuit

ADA Does Not Protect Individuals from Consequences of Illicit Conduct Explainable by Chemical Dependency

Dovenmuehler v. St. Cloud Hospital, 509 F.3d 435, 19 A.D. Cases 1701, 36 NDLR P 2 (8th Cir. 2007) <http://caselaw.lp.findlaw.com/data2/circs/8th/071096p.pdf> : The Eighth Circuit affirmed summary judgment in favor of St. Cloud Hospital ("St. Cloud"), holding that a discharged registered nurse with chemical dependency failed to establish that she was disabled or substantially limited in the major life activity of working under the ADA or MHRA.

Six weeks after beginning her position at St. Cloud's Children's Center, the nurse disclosed that her previous employer terminated her employment for the alleged theft of Vicodin, that she had previously reported herself to Minnesota's Health Professional Services Program ("HPSP") seeking help for chemical dependency, and that HPSP had issued a plan intended to address her chemical dependency. The plan contained "practice restrictions," which required St. Cloud to "maintain supervised access to controlled substances . . . for 2000 hours of professional practice or one year of continuous abstinence from alcohol and drugs of abuse"

and until HPSP lifted or amended the restriction. St. Cloud subsequently determined that it could not accommodate the nurse's HPSP plan restriction due to the special patient concerns of the Children's Center position, and it terminated her employment.

In affirming summary judgment, the Eighth Circuit held that the nurse failed to establish that she was disabled. The ADA does not protect individuals from the consequences of illegal conduct explainable by chemical dependency, such as stealing hospital drugs. The HPSP plan "stemmed directly from [the nurse's] unprotected, illegal conduct," not from her status as chemically dependent. Her dependency did not affect activities outside of work. Additionally, the nurse did not show that she was limited in the major life activity of working because she has been able to find nursing jobs at two different hospitals since her termination from St. Cloud.

Temporary Work Restrictions Did Not Render Employee Disabled

Napreljac v. John Q. Hammons Hotel Inc., 505 F.3d 800, 155 Lab.Cas. P 60,515, 26 IER Cases 1200, 19 A.D. Cases 1313, 35 NDLR P 227 (8th Cir. 2007)

<http://caselaw.lp.findlaw.com/data2/circs/8th/064038p.pdf>: The Eighth Circuit affirmed summary judgment in favor of the employer, holding that the former hotel maintenance engineer failed to show that he was substantially limited in the major life activity of working.

The maintenance engineer reported a work-related back injury, and his doctor placed him on temporary work restrictions. Meanwhile, the employer investigated the incident, concluding that the maintenance engineer falsely reported a workplace injury. As a result, the employer terminated the maintenance engineer's employment. Following the termination, the engineer found comparable employment at another hotel.

In affirming summary judgment, the Eighth Circuit concluded that the engineer was not disabled under the ADA because his work restrictions were temporary and he was able to continue working with restrictions.

Employer Had No Duty to Accommodate Depressed Employee Discharged for Attendance Problems

Rask v. Fresenius Medical Care North America, 509 F.3d 466, 90 Empl. Prac. Dec. P 43,043, 155 Lab.Cas. P 35,370, 13 Wage & Hour Cas. 2d (BNA) 82, 19 A.D. Cases 1697 (8th Cir. 2007) <http://caselaw.lp.findlaw.com/data2/circs/8th/063923p.pdf> : The Eighth Circuit affirmed summary judgment in favor of the employer, holding that the patient care technician with depression failed to show that she was a "qualified individual" under the ADA or MHRA. The employer terminated the technician's employment following a series of disciplinary and attendance problems.

The Eighth Circuit held that the technician was not qualified to perform the essential functions of her job without accommodation because she admitted that she was unable to come to work on a regular and reliable basis. The court also held that the employer did not have a duty to accommodate the technician because she failed to provide sufficient notice of her need for an accommodation. The technician never specifically identified her limitations, but instead merely indicated that she was having problems with her medication and might need to miss additional days of work. Finally, the court concluded that providing additional days off work on short notice was not, in this case, a reasonable accommodation because it would not have assisted the technician in performing her job duties but would have been only for her personal benefit.



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Age Discrimination in Employment Act

*By Craig A. Brandt, Gray, Plant, Mooty, Mooty & Bennett, P.A.
Stephen J. Snyder, Snyder & Snyder, P.A.
Posted March 2008*

U.S. Supreme Court

- ***Sprint/United Mgmt. Co. v. Mendelsohn***, No. 06-1221, which was argued in December 2007, presented the question whether a district court may permissibly exclude from an ADEA trial what is often called “me too” evidence, such as testimony by co-workers of the plaintiff who suffered adverse treatment and allege discrimination based on the same characteristic. The Tenth Circuit in the case had overturned a judgment entered on a jury verdict for the employer, finding that the district court impermissibly applied a per se rule barring admission of such evidence.

The Supreme Court decided the case on February 26, 2008. --- S. Ct. ----, 2008 WL 495370 (U.S.), 2008 U.S. LEXIS 2195, 102 Fair Empl.Prac.Cas. (BNA) 1057, <http://www.supremecourtus.gov/opinions/07pdf/06-1221.pdf>. The Court vacated the Tenth Circuit decision, remanded the case to the district court, and said:

The Court of Appeals, having concluded that the District Court improperly applied a per se rule excluding the evidence, engaged in its own analysis of the relevant factors under [Federal Rules of Evidence 401](#) and [403](#), and remanded with instructions to admit the challenged testimony. We granted certiorari on the question whether the Federal Rules of Evidence required admission of the testimony. We conclude that such evidence is neither per se admissible nor per se inadmissible. Because it is not entirely clear whether the District Court applied a per se rule, we vacate the judgment of the Court of Appeals and remand for the District Court to conduct the relevant inquiry under the appropriate standard.

- ***Fed. Express Corp. v. Holowecki***, No. 06-1322, argued in November 2007, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1322.pdf, involved whether and when an intake questionnaire filed with the EEOC may be considered a “charge” under the ADEA. The Second Circuit held that the employee’s filing of an intake questionnaire and a related affidavit satisfied the charge filing requirement. The employer argued that the intake questionnaire did not constitute a charge because the EEOC did not give the employer notice of its filing, and thus the employer could not begin conciliation efforts.

The Supreme Court affirmed the Second Circuit in an opinion handed down on February 27, 2008. --- S. Ct. ----, 2008 WL 508018, 2008 U.S. LEXIS 2196, <http://www.supremecourtus.gov/opinions/07pdf/06-1322.pdf>. The Court concluded that the documents that were submitted met the basic requirements of a charge and that the EEOC’s determination that those documents constituted a charge was a reasonable exercise of its

authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces.

- ***Meacham v. Knolls Atomic Power Lab.***, No. 06-1505: In December 2007, the U.S. Solicitor General submitted an amicus brief, urging the court to grant the employees' petition for a writ of certiorari to clarify which party in an ADEA disparate impact case bears the burden of proof on the ADEA's "reasonable factors other than age" exception. A copy of the amicus brief is available at <http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2006-1505.mer.ami.pdf>. The Court granted the petition on January 18, 2008, and the case is set for argument in April 2008.

Supervisor's Comments Were Not Direct Evidence

Ramlet v. E.F. Johnson Co., 507 F.3d 1149, 102 Fair Empl.Prac.Cas. (BNA) 6, 90 Empl. Prac. Dec. P 43,014 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/071089p.pdf>: The Eighth Circuit upheld the dismissal of an ADEA claim brought by a 42-year-old sales director who was discharged and replaced by persons who were ages 41 and 35. While the employee claimed that he raised a genuine issue of material fact for trial both by offering direct evidence of discrimination and by creating an inference of discrimination under the burden-shifting analysis, the court rejected both arguments.

A supervisor had made comments to lower level employees indicating a preference for "young" employees. While the court assumed that the supervisor was a "decisionmaker," it nonetheless concluded that his remarks were not direct evidence because the plaintiff had not "demonstrated a specific link between the comments and his termination." The comments were "not related to the decisional process as the most recent occurred at least four months before [the] termination, and both were made to employees not involved in the decisional process." In addition, the court noted that the evidence required an inference in order to connect the statements to the plaintiff because the statements did not mention the plaintiff and did not indicate that the supervisor considered him "older."

On the burden-shifting analysis, the court first held that it was not required to apply the standards used in a reduction-in-force case, since the evidence showed that one new employee was hired after the plaintiff's discharge to cover a portion of his former territory. Thus, applying the traditional fourth element required to establish a *prima facie* case that the plaintiff was "replaced by someone sufficiently younger to permit an inference of age discrimination," the court held that the five-year difference between the younger of the two replacements and the plaintiff was not sufficient to raise an issue.

Showing That an Employee Is Qualified for a Position

McGinnis v. Union Pac. R.R., 496 F.3d 868, 101 Fair Empl.Prac.Cas. (BNA) 254, 90 Empl. Prac. Dec. P 42,912 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/063453p.pdf>: The Eighth Circuit clarified the law on this point in an August 2007 decision in which the court affirmed summary judgment for the employer.

The plaintiff, a railroad dispatcher with twenty-eight years of experience, was discharged. The employer said the discharge occurred because the plaintiff had been cited for six rules violations and failed to pass a proficiency test during an apprentice training course.

While the appeals court upheld the district court's dismissal of this claim, the appeals court noted that the district court had misapplied the second element of the *prima facie* case—which requires the plaintiff to show he was qualified for the job in question—when it ruled that the plaintiff was not qualified because of the rule violations. Instead of the standard applied by the district court, the Eighth Circuit said that a plaintiff should be deemed qualified for the position if “he possesses the basic skills necessary for performance of the job, not that he was doing it satisfactorily.” The plaintiff in this case met that standard, said the court, because he had been employed for twenty-three years without receiving any citations and thus “clearly met the minimal qualification standard.”

The court went on to hold that the plaintiff could not establish a *prima facie* case because his replacement was older than he was. In addition, even if a *prima facie* case had been established, the court found that there was no evidence indicating that the reasons the railroad asserted for terminating the plaintiff were pretextual. The court rejected the plaintiff's argument that the rules violations were not valid, noting that the employee had not challenged the citations when he received them. The plaintiff also failed to submit any evidence to support his assertion that other employees who received citations were not similarly treated.

Employees Who Signed Release Forms Allowed to Proceed With Claims

Peterson v. Seagate U.S. LLC, No. 07-2502, 2007 US Dist. LEXIS 85873, 2007 WL 4179399, 102 Fair Empl.Prac.Cas. (BNA) 86, 90 Empl. Prac. Dec. P 43,026 (D. Minn. Nov. 20, 2007): Judge Michael Davis of the U.S. district court recently denied an employer's motion to dismiss ADEA claims asserted by nineteen employees who had signed release forms at the time they were discharged as part of a reduction-in-force. The employer filed a Rule 12(b)(6) motion and argued that those plaintiffs who had signed releases should not be allowed to proceed with their claims.

The court was required to consider the allegations in the plaintiffs' complaint as true. Those allegations included that the plaintiffs were pressured to sign the releases, that the releases misrepresented the number of employees selected for termination, that the release forms were not written in a manner reasonably calculated to be understood by the average employee, and that they failed to disclose the selection criteria and eligibility factors used to select persons for termination. The court held that these allegations were sufficient to conclude that the releases were not valid under the Older Workers Benefit Protection Act and that the plaintiffs signed them under duress.

In the same ruling, Judge Davis also rejected the employer's request to dismiss the claims of the plaintiffs who had not filed their own EEOC charges. The court held that these plaintiffs could “piggyback” on the charges filed by two co-workers, which alleged that they were bringing charges on behalf of themselves and others similarly situated. Judge Davis rejected the employer's argument that an earlier Eighth Circuit case recognizing piggybacking, *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986), stood for the proposition that the class-wide allegations in a charge that provides the basis for piggybacking “must also notify the employer that the class members will also seek individual relief.”

Mandatory Retirement Age for Pilots Increased to 65

President Bush signed legislation making this change on December 13, 2007. The new law, which permits pilots to work until age 65, is effective as of the date it was signed but is not retroactive. Thus, pilots who turned sixty before December 13, 2007, are not entitled to reinstatement. It is expected that airlines and unions may agree on amendments to collective bargaining agreements or benefit plans required to comply with the new law. 49 U.S.C. § 44729,

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ135.110.pdf.

EEOC Regulation Permits Retiree Health Benefits to Be Coordinated with Medicare Benefits

In late December, the EEOC issued a final rule creating an ADEA exemption to permit retiree health benefits to be altered or eliminated when the recipient becomes eligible for Medicare or comparable state-funded health benefit programs. The new rule, which amended 29 C.F.R. Parts 1625 and 1627, stemmed from concern that the EEOC's earlier interpretation of the ADEA was encouraging employers to eliminate employer-provided retiree health benefits. While the new rule had support from employers, labor unions, and the benefits community, it was opposed by the AARP.

Guidance On Tests and Selection Procedures

ADEA claims often arise in failure to hire or promote contexts. The EEOC recently issued a new fact sheet on how the federal anti-discrimination laws apply when employers use tests or other selection procedures in making hiring and promotion decisions. As to ADEA disparate treatment claims, the fact sheet states that "the ADEA forbids an employer from giving a physical agility test only to applicants over age 50, based on the belief that they are less physically able to perform a particular job, but not testing younger applicants." As to discriminatory impact, the fact sheet states that "if a test or other selection procedure has a disparate impact based on age, the employer must show the test or device chosen was a reasonable one." The fact sheet also lists "Best Practices" for testing and selection. http://www.eeoc.gov/policy/docs/factemployment_procedures.html.



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Family and Medical Leave Act

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Posted March 2008*

Amendments Pursuant to the National Defense Authorization Act for FY 2008

PL 110-181, January 28, 2008, 122 Stat 3, available at <http://thomas.loc.gov>: Effective January 28, 2008, the Family and Medical Leave Act (FMLA) (29 U.S.C. §§ 2601 et seq.) was amended when President Bush signed into law the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. No. 110-181. The NDAA added two primary new provisions to the FMLA. The amended statute is posted on the DOL website at <http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>.

The first new provision provides that an eligible "spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember." FMLA § 102(a)(3) ("injured servicemember" FMLA leave). This new provision expands the group of employees potentially eligible for FMLA leave to include "next of kin of a covered servicemember." The term "next of kin" means "the nearest blood relative of that individual." § 101(18).

The second new provision provides that an eligible employee may take up to 12 workweeks of FMLA leave during any 12-month period for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." § 102(a)(1)(E) ("active duty/call to duty" FMLA leave). The Secretary of Labor has not yet issued regulations defining "any qualifying exigency."

The definitions of "spouse, son, daughter, and parent" did not change with the NDAA amendments. See § 101(7), (12), (13). A "covered servicemember" means a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." § 101(16). The term "serious injury or illness" for the purposes of Injured Servicemember FMLA Leave means "an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." § 101(19).

The 26 workweeks of leave under the injured servicemember provision is "available during a single 12-month period." § 102(a)(3). Additionally, during that "single 12-month period," the employee taking FMLA leave is entitled only to a combined total of 26 workweeks of FMLA leave to care for a servicemember and for any other FMLA purpose. § 102(a)(4). The employee will again be eligible for another 12 workweeks of FMLA leave for a covered purpose during any other 12-month period. *Id.*

The FMLA's provisions regarding paid and unpaid leave apply to both "injured servicemember" and "active duty/call to duty" FMLA leave. § 102(d). Employers may require medical certification for "injured servicemember" FMLA leave. § 103(a). For active duty/call to duty FMLA leave, employers may require "certification issued at such time and in such manner as the Secretary [of Labor] may by regulation prescribe." § 103(f).

The U.S. Department of Labor's (DOL) website states that the DOL is working quickly to provide more comprehensive guidance regarding rights and responsibilities under the NDAA amendments, but in the meantime employers must act "in good faith" to provide the additional leave. See http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm

DOL Proposes Regulations

The Department of Labor has proposed regulations on a wide range of topics. Proposed Rule published by the Employment Standards Administration, Wage and Hour Division, of the Department of Labor in the *Federal Register*, February 11, 2008, <http://a257.g.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/pdf/E8-2062.pdf>.

What Is Sufficient Notice of a "Serious Health Condition"?

Rask v. Fresenius Medical Care N. Am., 509 F.3d 466, 90 Empl. Prac. Dec. P 43,043, 155 Lab.Cas. P 35,370, 13 Wage & Hour Cas.2d (BNA) 82, 19 A.D. Cases 1697, 36 NDLR P 34 (8th Cir. 2007): This case provides useful guidance regarding how much information an employee claiming to have depression must provide for her employer to be on notice of the employee's need for FMLA serious health condition leave.

Rask worked as a patient care technician two days per week in two of Fresenius's dialysis clinics. After Rask failed to appear for work on May 28, 2004, Fresenius fired her. The termination followed a series of previous disciplinary and attendance problems. Rask, who had a long history of depression, sued Fresenius for violation of the FMLA and for discrimination under the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA).

The district court granted Fresenius summary judgment on all claims, and the Eighth Circuit affirmed. As to the ADA and MHRA claims, the court found that Rask failed to show that she was qualified to perform the essential functions of her job following a history of unpredictable absences and an admission that she was unable to come to work on a regular and reliable basis. Fresenius had no duty to accommodate Rask because she had failed to provide sufficient notice of a need for accommodation.

As to Rask's FMLA claim, an employee must give her employer enough information to suggest that the employee's health condition could be serious. The FMLA regulations "are generous to employees" as to what type of notice they must give to trigger FMLA serious health condition leave. "The employer must be made aware that the absence is due to a serious illness so the employer can distinguish it from ordinary 'sick-days' or even malingering, as a type of unusual and privileged absence."

"Any mental illness or condition that continues over an extended period of time and requires periodic doctor's visits because of, or to prevent, episodes during which the employee cannot perform regular daily activities qualifies as a serious health condition." Yet "depression, like many mental illnesses, is a condition with many variations" not all of which are serious.

The employee's statement that she had been diagnosed with something called "depression," without details concerning its severity or any incapacity to which it might give rise, was insufficient to show her condition was "serious." The employee's statement that she would be

absent for "help with my medication" also was insufficient to link the absence to a serious health condition.



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Title VII Update

*By Leslie L. Lienemann, Culberth & Lienemann, LLP
Posted March, 2008*

Sex Harassment

Dominic v. DeVilbiss Air Power Co., 493 F.3d 968, 101 Fair Empl.Prac.Cas. (BNA) 21, 90 Empl. Prac. Dec. P 42,907 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/063236p.pdf>: Plaintiff William Dominic obtained a favorable jury verdict on his claims for sexual harassment and retaliation under Title VII, as well as on a state claim for negligent supervision. In addition to awards of compensatory damages and lost wages, the jury also awarded \$250,000 in punitive damages on the Title VII claims.

The company appealed, arguing that the district court erred in submitting the punitive damages issue to the jury. The company argued that it had taken extensive good faith efforts to comply with the law, including hiring the law firm of Leonard, Street & Deinard to review its internal investigation of Dominic's complaints, having a "zero tolerance" policy, minimizing on-going communications between Dominic and the harasser, keeping a written record of those communications, granting Dominic's request to report to a human resources manager in a separate subsidiary, offering him a home work schedule on two occasions, requiring the harasser to participate in training, and organizing sexual harassment training for all salaried employees. The Eighth Circuit Court of Appeals agreed with the company and reversed the award of punitive damages.

Weger v. City of Ladue, 500 F.3d 710, 101 Fair Empl.Prac.Cas. (BNA) 917, 90 Empl. Prac. Dec. P 42,995 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/061970p.pdf>: This sexual harassment case was brought by two communications officers of the Ladue Police Department. During their employment, they were sexually harassed daily by a captain, whose behavior included (1) chasing them, tickling them and blocking doorways; (2) massaging their shoulders, neck and upper chest area underneath their uniforms; (3) attempting to hold their hands; (4) grabbing their waists; (5) running his fingers through their hair; (6) hugging them and pressing his body against their bodies; (7) going under their desks in order to massage their legs; (8) and making inappropriate sexual comments. Several officers and detectives witnessed the conduct and plaintiffs' objections to it, but did nothing to report or stop the behavior.

After approximately a year, one of the plaintiffs reported the conduct to a lieutenant, who reported the conduct to the police chief. The conduct ended. The police chief conducted an investigation, including interviews of many employees. During his investigation, several employees affirmed observing the conduct reported by plaintiffs. The police chief advised some witnesses to get attorneys because the harasser could sue them for slander. The chief ultimately concluded that plaintiffs had not been sexually harassed, but found that the captain had violated the city's policy and engaged in inappropriate conduct. Thereafter, the chief

issued a series of directives to the entire department designed to limit employees' contact with one another.

The plaintiffs brought charges of sexual harassment and retaliation. The district court granted summary judgment on all claims, finding that the hostile environment claims failed because the city established the *Faragher/ Ellerth* affirmative defense, and finding that there had been no adverse employment action to support the retaliation claim.

The Eighth Circuit affirmed on both counts. The court found that the city satisfied the first prong of the first element of the defense (the prevention prong) by showing it had a valid anti-harassment policy that, when invoked by plaintiffs, brought an immediate end to the harassment.

On the correction prong of the defense, plaintiffs argued that the department was not entitled to the defense because it had actual and constructive notice of the harassment via its employees' and supervisor's observation of the harassment. The court rejected plaintiff's argument that one of the supervisors who witnessed the harassment was designated to receive harassment complaints under the policy. Rather, because the department had a published policy that provides a reporting procedure, plaintiffs must have invoked the procedure in order to establish actual notice. The court acknowledged in a footnote that it "assumes without deciding" that the constructive knowledge doctrine is relevant in evaluating promptness of an employer's corrective action. The court then held that the six incidents identified by plaintiffs on which the harassment was observed by supervisory and non-supervisory employees did not, as a matter of law, constitute constructive notice because it lacked the "requisite pervasiveness" required to support a finding that it "was obvious to everyone."

The court went on to find that the city had established that, as a matter of law, plaintiffs had unreasonably delayed in making their complaints. The court held that, "In this case, because the record is devoid of any threat by any Department employee, Plaintiffs' fear of retaliation is not credible [and thus did not excuse their delay in reporting the harassment]."

Judge Bye dissented, finding sufficient evidence that the city knew or should have known of the harassment prior to the first official complaint and failed to take action; therefore the affirmative defense should not apply.

Engel v. Rapid City School District, 500 F.3d 1118, 19 A.D. Cases 1057, 35 NDLR P 153 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/063936p.pdf>: Engel appealed the district court's grant of summary judgment on her hostile environment harassment claim. The Eighth Circuit affirmed in part and reversed in part.

Engel was a teacher who, along with other women, reported sexually harassing conduct by a co-worker. The district's investigation of the complaints found that the harassment had occurred, and the district suspended the harasser and prohibited him from being alone with female employees. The district advised the harasser that further incidents would result in the termination of his employment. After the harasser returned to the workplace, Engel continued to encounter him, he spoke to her in the hallway and over the intercom, and he continued to leer at her and look her "up and down." The district again suspended the harasser, but again allowed him to return to work. After his second return to work, the harasser continued to leer at her. Engel resigned from her position, and told the superintendent that the harassment was one of the reasons for her resignation.

The Eighth Circuit reversed the grant of summary judgment on the claim of harassment, finding that there was a genuine issue of material fact as to whether the harassment continued after the initial suspension. The court held, "To show that a hostile work environment has continued after an employer's remedial action, a plaintiff need not prove an

entire accumulation of harassing acts, amounting to a new and free-standing hostile work environment.”

The court concluded that the district was not liable for harassment occurring prior to Engel's first report, as it had taken prompt, reasonable action in response. It then concluded, however, that a reasonable jury could conclude that the district's second remedial action failed to address the ongoing harassment. The court found the district's decreasing, rather than increasing, its threatened sanctions significant; this could reasonably be viewed as contributing to a negligent response. The court reversed the grant of summary judgment on the harassment claim, and affirmed on the claim of constructive discharge.

Brenneman v. Famous Dave's of America, Inc., 507 F.3d 1139, 102 Fair Empl.Prac.Cas. (BNA) 1, 90 Empl. Prac. Dec. P 43,024 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/061851p.pdf>: This case was a review of the grant of summary judgment on Brenneman's sexual harassment claim, which included evidence of offensive touching and humiliating comments by her supervisor that began within the first two weeks of her employment. Brenneman reported the conduct to her trainer, who took no action other than to tell her about Famous Dave's employee hotline. When the harassment continued, Brenneman called the hotline.

The district court granted Famous Dave's summary judgment. The Eighth Circuit affirmed. The district court found that Brenneman had established a prima facie case of sexual harassment. The Eighth Circuit agreed.

However, the court held that Brenneman was not constructively discharged, deciding that a reasonable person in her position would not have found the working conditions so intolerable that she was compelled to resign. Therefore no tangible employment action occurred.

In considering the *Faragher/Ellerth* defense, the court found on the first element that Famous Dave's had a valid harassment policy that alone established the "prevention prong." The court also found that Famous Dave's had established the "correction prong," despite the fact that it called the trainer's lack of response "less than ideal" and Famous Dave's proposed solution of transferring Brenneman rather than the harasser "not ideal." On the second element of the defense, although the court conceded that Brenneman had not unreasonably failed to take advantage of any preventive opportunities, it found she did unreasonably fail to take advantage of the proposed transfer.

Sex Discrimination

McGinnis v. Union Pacific R.R., 496 F.3d 868, 101 Fair Empl.Prac.Cas. (BNA) 254, 90 Empl. Prac. Dec. P 42,912 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/063453p.pdf>: William McGinnis sued Union Pacific for sex discrimination under Title VII, as well as age discrimination under the ADEA. The district court granted summary judgment.

Williams claimed that Union Pacific provided young women with better job opportunities and treated them more favorably than men by giving them preferential daytime shifts and lighter workloads and by protecting them when they violated work rules. McGinnis specifically alleged that his male manager took adverse action against him in order to give his job to a woman with whom the manager was allegedly engaging in a sexual affair.

The Eighth Circuit rejected McGinnis's contention that he had supplied direct evidence of discrimination, reiterating that favorable treatment afforded an employee who engages in consensual sex with a manager does not implicate Title VII, because the employee is not aided in the employment relationship by gender, but rather by sexual conduct. The court noted further that the manager involved was not the decisionmaker in McGinnis's termination, and

that there were no allegations of discrimination or favoritism against the decisionmaker. The court also rejected the claim under the *McDonnell Douglas* framework, noting that 82% of the train dispatchers were men at the time McGinnis was terminated, and finding no evidence showing that Union Pacific's articulated non-discriminatory reasons for McGinnis's termination were pretextual.

Clegg v. Arkansas Dept. of Correction, 496 F.3d 922, 182 L.R.R.M. (BNA) 2465, 101 Fair Empl.Prac.Cas. (BNA) 345, 90 Empl. Prac. Dec. P 42,940 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/063119p.pdf>: Lori Clegg brought suit alleging race and sex discrimination and retaliation under Title VII as well as violations of the USERRA, Uniform Services Employment and Reemployment Rights Act.

Clegg left her job to fulfill her active duty military assignment in Iraq. Prior to her return, the department notified her that it intended to return her to a different position. She filed complaints with the JAG corps and the Department of Labor, and was then returned to her old job. She subsequently filed complaints of retaliation alleging that she had been denied training, that she had been given a poor performance evaluation, that her job duties had been altered or reassigned, and that she was not given tools to do her job.

The Eighth Circuit found that none of the actions about which she complained were, separately or taken together, sufficient to be an "adverse employment action" and thus affirmed dismissal of her discrimination claims.

Clegg also challenged the district court's grant of summary judgment on her retaliation claim. The district court had decided the retaliation claim two days prior to the Supreme Court's issuance of *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), which altered the analysis used by the Eighth Circuit in retaliation claims. The Eighth Circuit held that, even applying the standard articulated in *Burlington Northern*, the actions alleged in the retaliation claims were "at most trivial." Clegg failed to demonstrate that a reasonable worker would have been dissuaded by this conduct from engaging in protected activity.

Race Discrimination

Gilbert v. Des Moines Area Community College, 495 F.3d. 906, 101 Fair Empl.Prac.Cas. (BNA) 572, 90 Empl. Prac. Dec. P 42,929, 223 Ed. Law Rep. 517 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/063021p.pdf>: Fred Gilbert, an African American, appealed the district court's grant of summary judgment on his claims of race discrimination and retaliation.

Gilbert, who had been a provost at one of the college campuses, applied for and was denied the position of college president. After he challenged the hiring, the college commenced an investigation of his complaint and in the course of that investigation uncovered information leading them to believe that Gilbert had included plagiarized materials in the essay portion of his application. The college terminated Gilbert's contract as provost, offering him a new position at a reduced salary.

The court applied the *McDonnell Douglas* analysis, and the parties agreed that the elements of the prima facie case had been met. Gilbert sought to show pretext based upon the college's alleged failure to follow its affirmative action policy and failure to follow its practice of hiring internally, as well as other arguments apparently not raised at the district court. The Eighth Circuit refused to hear the arguments not specifically raised below and found no showing of pretext. The college's affirmative action officer had participated in the search process and reviewed the selection of finalists. Furthermore, the external candidates' scores were significantly better than Gilbert's.

Harris v. Chand, 506 F.3d 1135, 101 Fair Empl.Prac.Cas. (BNA) 1793, 90 Empl. Prac. Dec. P 43,023 (8th Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/8th/062315p.pdf>: In this race discrimination and retaliation case, the Eighth Circuit affirmed a jury verdict in favor of the defendant. Harris challenged the district court's admission of after-acquired evidence, exclusion of evidence of similarly situated incidents, and restriction of the presentation of her case.

During discovery in the litigation, the employer learned that Harris had listed college degrees that she did not hold in her employment and promotion applications. The employer's human resources specialists testified that the employer's policy was to terminate employees who falsify employment applications. The district court allowed the evidence at trial. The court instructed the jury that the evidence was admitted only on the issue of damages and was not to be considered on the issue of liability. The court found that the district court had not abused its discretion in admitting the evidence.

At trial, Harris sought to admit evidence of two white employees (one male, one female). The employer did not object to the admission of evidence concerning the male but objected to the evidence concerning the female employee, contending that the female held a different position, in a different department, with a different supervisor. The district court sustained the objection, and the Eighth Circuit affirmed the ruling.

Harris also argued that the district court abused its discretion in placing time limits on her case. The trial court had allocated her two days of trial time. At 4:59 p.m. on the second day, during the testimony of one of Harris's witnesses, the district court told Harris her time was up, and prevented her from calling five additional witnesses. Harris made no offer of proof at that time.

Because she made no offer of proof, the Eighth Circuit reviewed under the "plain error" rule. The court noted that, at the end of the employer's case, there was an hour and a half of time remaining. When the district court asked Harris if she wished to call witnesses in rebuttal, she declined to do so. The Eighth Circuit acknowledged that Harris had made an offer of proof with respect to two witnesses, who were called in the employer's case and apparently cross examined by Harris, at least as to the issue of punitive damages. The court then reviewed the ruling as to punitive damages under the abuse of discretion standard, and held that the district court had not abused its discretion, as it had allowed time in rebuttal, which Harris had declined.

In dissent, Judge Smith noted that a district's court discretion to impose time constraints exists to prevent undue delay, waste of time, or the needless presentation of cumulative evidence. Judge Smith indicated that "these mischiefs" were absent in this case, and the court had imposed unnecessarily rigid time constraints before the trial began. Judge Smith concluded that the district court's imposition of rigid time limitations prejudiced a substantial right.

Religious Discrimination

Sturgill v. United Parcel Service, Inc., ___ F.3d ___, 2008 WL 123945, 2008 U.S. App. LEXIS 806, 102 Fair Empl.Prac.Cas. (BNA) 707 (8th Cir. Jan. 15, 2008), <https://ecf.ca8.uscourts.gov/>: Sturgill was a package car driver who was terminated by UPS when he refused to complete his route, because working past sundown on a Friday would violate his beliefs as a member of the Seventh Day Adventist Church.

The case was submitted to the jury on both the issue of whether Sturgill was terminated because of his religion and whether UPS failed to reasonably accommodate his religious beliefs. The jury found for UPS on the discrimination claim, but found in favor of Sturgill on the accommodation claim.

The Eighth Circuit affirmed the district court's denial of JAML, finding ample evidence permitting the jury to find that UPS could have accommodated Sturgill's religious practice without undue hardship to UPS. Citing its precedent and the Supreme Court's analysis in *Ansonia* and *Hardison*, the court declined to hold that a reasonable accommodation must eliminate any religion-work conflict. The district court erred in instructing the jury that a reasonable accommodation must eliminate the religious conflict. The court then considered whether the faulty instruction was reversible error and concluded that it neither misled the jury nor had a probable effect on the verdict. The court based this determination on the facts of the case, which it described as a "specific, one-time failure to accommodate resulting in the severe sanction of termination."



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Federal Labor Management

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Posted March 2008*

10(j) Injunctions Involving Region 18

Chester v. Eichorn Motors, 504 F. Supp. 2d 621, 182 L.R.R.M. (BNA) 2652, 154 Lab.Cas. P 10,896 (D. Minn. 2007): U.S. Chief District Judge James M. Rosenbaum granted the petition for 10(j) relief in part and ordered Respondent to reinstate two of three employees who were alleged to have been unlawfully terminated in a complaint issued by the Region. Judge Rosenbaum concluded that Eichorn “has eviscerated the bargaining unit, having terminated its entire team of active Union supporters,” and that “absent interim reinstatement of at least some Union supporters, the Union will experience irreparable harm to its ability to bargain collectively.” Judge Rosenbaum denied reinstatement to one employee because he concluded that Respondent had a valid reason for the employee’s termination. Judge Rosenbaum also declined to enjoin Respondent from engaging in actions inconsistent with its obligation to bargain in good faith under section 8(a)(5) of the National Labor Relations Act.

Board Decisions Involving Unfair Labor Practices

CMPJ Enterprises d/b/a Holiday Inn Express, 2007 NLRB LEXIS 308, 2007 WL 2295810, 18-CA-18254 (Sept. 18, 2007) http://www.nlr.gov/shared_files/ALJ%20Decisions/2007/JD-55-07.pdf: In an unpublished order and in the absence of exceptions, the Board affirmed a decision by ALJ Jane Vandeventer, which issued on August 7, 2007. Judge Vandeventer sustained all allegations of the complaint and found that Respondent unlawfully refused to hire nineteen employees of the predecessor employer in order to avoid an obligation to recognize Hotel, Hospital, Restaurant and Tavern Employees Union, Local 21; unlawfully refused to recognize and bargain with Local 21; and unlawfully changed wages and other terms and conditions of employment. With regard to the latter finding, Judge Vandeventer agreed with the Region that Respondent as a successor employer forfeited its right to set initial terms and conditions of employment because it discriminated against employees in hiring in order to avoid a bargaining obligation. See *Planned Bldg Services*, 347 N.L.R.B. No. 64 (2006); *Love’s Barbeque*, 245 N.L.R.B. 78 (1979).

This case was reported in the last issue of the Section News for the 10(j) relief granted by U.S. District Judge Michael J. Davis, wherein Judge Davis ordered the interim reinstatement of the employees and interim rescission of the terms and conditions unilaterally imposed by Respondent.

Marshall Engineered Products Co., 2007 NLRB LEXIS 432, 2007 WL 2948441, 351 NLRB No. 47 (Sept. 29, 2007) http://www.nlr.gov/shared_files/Board%20Decisions/351/v35147.pdf: The Board sustained ALJ Benjamin Schlesinger’s March 21, 2003 decision insofar as he concluded that Respondent unlawfully terminated employee David Spillman. In a 2-1 split, the Board reversed Judge

Schlesinger's conclusion that Respondent unlawfully terminated employees Tim Kelley and Allan Cripps. In reversing the judge, Board members Battista and Schaumber concluded that the judge erred in discrediting testimony of Respondent's witness and further erred by crediting a witness presented by the General Counsel whom the judge found to be a completely neutral witness. In her dissent, Board member Liebman stated, "In overturning the judge's credibility resolutions and finding that the Respondent lawfully discharged two employees for alleged strike misconduct, the majority reaches a result that runs contrary to long-established Board principles" to not overrule credibility resolutions "unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect."

Decisions By Administrative Law Judges

M.J. Mueller, LLC d/b/a Benjamin Franklin Plumbing, 2007 NLRB LEXIS 516, 2007 WL 4616275, 18-CA-18216, 18-CA-18419, 18-CA-18504 (Dec. 28, 2007) http://www.nlr.gov/shared_files/ALJ%20Decisions/2007/JD-82-07.pdf: ALJ David Goldman sustained virtually all allegations of the complaint. He found that Respondent unlawfully terminated two employees because of their concerted protected efforts to protest time card irregularities; that Respondent unlawfully refused to meet with and provide information to the Union representing its employees; and that Respondent's owner unlawfully interrogated and threatened its employees, as well as unlawfully directed an employee not to discuss pay issues with another employee.

Gelita USA Inc., 2007 NLRB LEXIS 505, 2007 WL 4570693, 18-CA-18406, 18-RC-17500 (Dec. 21, 2007) http://www.nlr.gov/shared_files/ALJ%20Decisions/2007/JD-ATL-40-07.pdf: The complaint in this case alleged that Respondent accelerated the voluntary resignation of an employee to prevent that employee from voting in an election where employees would determine whether to be represented by UFCW Local 1142. ALJ William Cates sustained this complaint allegation as well as other allegations related to interrogation, threats, and promises to resolve problems in order to discourage support for the union. In addition, Judge Cates ordered that the employee's ballot be opened and counted, as it was determinative. The election had been conducted on May 31, 2007, with six votes for UFCW Local 1142, six votes against, and the one challenged ballot.

Leiferman Enterprises, LLC d/b/a Harmon Auto Glass, 2007 NLRB LEXIS 269, 2007 WL 2126836, 18-CA-18134 (July 20, 2007) http://www.nlr.gov/shared_files/ALJ%20Decisions/2007/JD-50-07.pdf: In this decision ALJ Jane Vandeventer sustained complaint allegations that Respondent violated the Act by refusing to provide information to the union representing its employees (International Union of Painters and Allied Trades District Council 82) and by implementing changes to employees' terms and conditions of employment in the absence of a bona fide impasse. In addition, consistent with the complaint, Judge Vandeventer found that the receiver must remedy the violations found. The receiver was appointed by the state of Minnesota to operate and dispose of the business after the unfair labor practices occurred. Nevertheless, Judge Vandeventer concluded that the receiver was obligated to carry out the terms of her Order. This decision is pending before the Board.



Labor & Employment Law Section



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Occupational Safety and Health

*By Amy S. York
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Posted March 2008*

OSHA Publishes Final Rule on PPE Payment Responsibility

On November 15, 2007, OSHA published the final rule on payment responsibility for personal protective equipment (PPE). 72 Fed. Reg. 64,341 (Nov. 15, 2007), <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-5608.pdf>. The final rule addresses general industry, construction, shipyards, longshoring, and marine terminals. In these industries, employers must provide most required PPE to employees at no cost. The rule does not change PPE requirements; it only identifies the funding source of required PPE. PPE protects employees from workplace hazards, and OSHA estimates that the rule will result in 21,000 fewer injuries per year.

Relying on its rulemaking authority and the OSH Act's general-duty clause, OSHA concluded that, because PPE is one facet of a safe and healthful workplace, employers must generally provide it free of charge. OSHA encourages employers to pay for all PPE, but it excluded certain PPE from the final rule. Recognizing that some PPE is too personal to be reissued to other employees and that other PPE can be, and often is, used both on and off the jobsite, OSHA excluded "non-specialty safety-toe protective footwear" and "non-specialty prescription safety eyewear," if "the employer permits such items to be worn off the job-site." Additionally, if the employer provides metatarsal guards, it is not required to also provide shoes or boots with built-in metatarsal guards.

The rule also excludes items that are often used but are not technically PPE. It specifically excludes "[e]veryday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots" or "[o]rdinary clothing, skin creams, or other items, used solely for protection from weather." OSHA's explanation of the rule indicates that uniforms, caps, or other clothing worn solely to identify a person as an employee are not PPE because such items are not being worn for protection from a workplace hazard. Similarly, items worn to keep employees clean for purposes unrelated to safety or health are not PPE; this includes items worn for product or consumer safety or patient safety and health rather than employee safety and health. If the item is not PPE, the final rule does not require the employer to pay for it.

OSHA recognized that some employees may prefer different, upgraded, or employee-owned PPE. The employer must provide basic PPE at no cost to the employee. If the employee prefers different or upgraded PPE, he may provide his own, and the employer is not required to pay for it. Similarly, if the employee voluntarily provides his own PPE, the employer may allow it and need not reimburse the employee for it. The employer must, however, ensure that all PPE used by its employees is adequate. The adequacy of PPE includes proper maintenance and sanitation of the equipment, whether it is provided by the employer or employee.

The rule also requires employers to pay for replacement PPE unless "the employee has lost or intentionally damaged" it.

The rule takes effect on February 13, 2008, but employers have until May 15, 2008, to implement it. Because Minnesota already has a state requirement that employers pay for PPE, see Minnesota Statute section 182 subdivision 10(a), this rule is not expected to affect Minnesota employers.



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Federal Wage and Hour

*By Sara McGrane and Ryan Olson, Felhaber, Larson, Fenlon and Vogt
Clayton Halunen and Chris Jozwiak, Halunen & Associates
Posted March, 2008*

Third-Party Exemption Rule for Home Health Care Aides Upheld

Long Island Care at Home, LTD., v. Coke, 127 S. Ct. 2339, 168 L.Ed.2d 54, 75 USLW 4416, 154 Lab.Cas. P 35,298, 12 Wage & Hour Cas.2d (BNA) 1089, 07 Cal. Daily Op. Serv. 6652, 2007 Daily Journal D.A.R. 8508, 20 Fla. L. Weekly Fed. S 329 (2007), <http://www.supremecourtus.gov/opinions/06pdf/06-593.pdf>: Plaintiff was employed by a third-party agency to provide “companionship services” to elderly and infirm persons in their homes. Under the Fair Labor Standards Amendments of 1974, 29 U.S.C. § 213(a)(15), persons “employed in domestic service employment to provide companionship services for individuals . . . unable to care for themselves” are exempted from the minimum wage and maximum hour rules of the Fair Labor Standards Act of 1938.

Primarily at issue were two Department of Labor regulations. Under a regulation labeled an “Interpretation,” the exemption includes “companionship [workers] employed by an . . . agency other than the family or household using their services.” 29 C.F.R. § 552.109(a) (“third-party exemption rule”). The Department of Labor’s “General Regulations,” however, defined the statutory term “domestic service employment” as “services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed.” 29 C.F.R. § 552.3.

The Court of Appeals for the Second Circuit had held that the third-party exemption rule was an interpretive, rather than a legislative regulation, and did not qualify for *Chevron* deference because it was “not promulgated in exercise of Congress’s delegated authority.” 376 F.3d 118, 131–32. The Second Circuit vacated the district court’s ruling that the third-party exemption rule was enforceable, holding that it was unpersuasive in the context of the entire statutory and regulatory regime.

The Supreme Court reversed the Second Circuit, however, holding that the third-party regulation filled a statutory gap, and that the regulation did not exceed the DOL’s delegated rulemaking authority. Importantly, the Supreme Court relied in part upon an internal “Advisory Memorandum” written by the DOL in response to the litigation, which considered the third-party exemption rule to be legally binding.

This case is important for evaluating DOL regulations under the *Chevron* rules and because the third-party exemption rule for home health care aides was upheld.

Requirements for Certifying a Collective Action at the Notice Stage

Parker v. Rowland Express, Inc. 492 F. Supp. 2d 1159, <http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/07-02695.PDF> (D. Minn. 2007); ***Dominquez v. Minnesota Beef Industries, Inc.***, 2007WL2422837, 2007 U.S. Dist. LEXIS 61298; 155 Lab. Cas. (CCH) P35,349; 12 Wage & Hour Cas. 2d (BNA) 1569 (D. Minn. 2007): Two cases addressing the requirements for certifying a collective action came before the Honorable Richard H. Kyle within two months, resulting in opposite outcomes. In *Parker*, the court found the plaintiffs had not met the minimum requirements for conditional certification as a collective action under the Fair Labor Standards Act ("FLSA"), while in *Dominquez* the court held the plaintiffs had satisfied the minimum burden for classification.

The FLSA provides that a collective action may be brought "by any . . . employee[] for and in behalf of himself . . . and other employees similarly situated" as a means to recover for failure to pay overtime. 29 U.S.C. § 216(b). Though the plaintiff has a "fairly lenient" burden, he must show that he is "similarly situated to the employees whom [they] seek[] to represent."

The defendant in *Parker* was a Wisconsin-based package courier company that began an affiliation with DHL Express, a worldwide package delivery company, in 2003. The plaintiffs were drivers by Rowland Express from some time before the affiliation until 2006. The plaintiffs claim that prior to 2003, they were classified as "employees," but after the affiliation they were classified as "independent contractors." According to the plaintiffs, this was an intentional misclassification to avoid paying the drivers overtime. The plaintiffs brought an action seeking conditional certification as a collective action, claiming they were "informed and believe[d]" that other drivers were similarly situated. Relying on *Dybach v. State of Florida Department of Corrections*, 942 F.2d 1562 (11th Cir. 1991), the court held that this was not enough evidence that other similarly situated individuals would wish to opt in to the case.

The defendant in *Dominquez* was a cattle-slaughtering facility in Buffalo Lake, Minnesota until the plant closed in 2006. The defendant employed 110 employees on the "kill floor" and "boning room." All of these employees were required to wear protective gear including a hardhat, a hairnet, earplugs, cloth gloves, cut gloves, rubber gloves, mesh gloves, arm guards, a belly guard, an apron, and a frock. Employees were required to "don" the gear when the shift began and to "doff" the gear when the shift completed. Employees would also have to don and doff the gear during breaks. The plaintiffs brought a motion for conditional certification of a collective action under FLSA. The court held that the plaintiffs had met the low burden necessary for conditional certification at the notice stage.

The difference between these cases is subtle but important. In *Dominquez*, the plaintiffs provided evidence that 110 employees were required to perform the same "donning" and "doffing" procedure, meeting the low burden of establishing a "colorable basis" for the claim. In contrast, the plaintiffs in *Parker* were unable to provide any evidence that any of the other employees may have suffered from withholding overtime pay. Thus, we are reminded that although the burden is low at the notice stage, plaintiffs must still establish that there is some likelihood that other parties similarly situated exist and would likely opt in.

Ramifications of Practice and Policy of Pay Docking Exempt Employees

Ergo v. International Merchant Services, Inc., 519 F. Supp. 2d 765, 12 Wage & Hour Cas.2d (BNA) 1645 (N.D. Ill. 2007): Plaintiffs alleged violations of overtime compensation laws for their employer's failure to pay them time-and-a-half pay for all hours worked over forty. While plaintiffs asserted multiple bases to contest their exemption status, on summary judgment the court held that the employees were non-exempt because plaintiffs' wages were subject to reduction for violations of non-safety-related rules or partial-day absences. The court specifically noted that the employer's employee handbook set forth a progressive discipline policy that provided for suspension with or without pay, as one of the five steps the employer could use to discipline employees for violations of rules unrelated to safety. The policy made no distinction between exempt and non-exempt employees.

The record showed at least twelve instances of pay docking of exempt employees in plaintiffs' department over the course of one year. This included seven instances of actually docking two of the plaintiffs' pay.

While the employer defendant argued that under *Auer v. Robbins*, 519 U.S. 452 (1997), the handbook itself was insufficient to establish a likelihood of pay being docked from exempt employees, the employer had an actual practice of docking purportedly exempt employees, and the practice was not one of the "unusual circumstances" allowed under *Auer*. The court further found that even those employees who were not actually docked pay nevertheless faced a "significant likelihood" of docking.

This case is significant for its illustration of *Auer* and the factual analysis employed by a court to determine whether an employer's policy of pay docking in fact creates a "significant likelihood" of docking under *Auer*.

Employee Time Spent at Security Check Points – Defining "Integral" and "Indispensable"

Gorman v. Consolidated Edison Corp., 488 F.3d 586, 154 Lab.Cas. P 35,296, 12 Wage & Hour Cas.2d (BNA) 1104 (2d Cir. 2007), <http://caselaw.lp.findlaw.com/data2/circs/2nd/056546p.pdf>: Plaintiffs, nuclear power station employees, sued their employer, seeking overtime compensation. The U.S. Court of Appeals for the Second Circuit held that the employees were not entitled to compensation under the Fair Labor Standards Act for time spent going through security checkpoints and "donning and doffing" a helmet, safety glasses, and steel-toed boots.

Although the security-related activities were required in order to get into and out of the plant and thus were "indispensable," the court held that the activities were not "essential to completeness" of the employees' assigned tasks and therefore were not integral. Similarly, the court found that the donning and doffing of "generic protective gear" was not essential to completion of the employees' assigned work tasks. The court further noted that activities were not integral merely because they were required by the employer or by government regulation.

Bonilla v. Baker Concrete Construction, Inc., 487 F.3d 1340, 154 Lab.Cas. P 35,297, 12 Wage & Hour Cas.2d (BNA) 1100, 20 Fla. L. Weekly Fed. C 676 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 813 (2007), <http://caselaw.lp.findlaw.com/data2/circs/11th/0612515p.pdf>: In another case involving security checkpoints, plaintiff employees brought suit for overtime compensation for travel by the employer's authorized vehicles to the airport worksite and time spent in a required security checkpoint. The U.S. Court of Appeals for the Eleventh Circuit stated that the "integral and indispensable test" is not a but-for test of causal necessity. While the security screening was required by the FAA and necessary for the employees to perform their work, it was not done primarily or even particularly for the benefit of the employer. As the security screening was not for the benefit of the employer, the activity was not "integral and indispensable" and therefore was not compensable.

Retaliation Under the FLSA – Protected Reports, Wrong Outlet

Burns v. Blackhawk Management Corp., 494 F. Supp. 2d 427, 12 Wage & Hour Cas. (BNA) 798, 154 Lab.Cas. P 35,268, (S.D. Miss. 2007): A plaintiff-employee involved in quality-control activities was protected under the Fair Labor Standards Act against retaliation for making informal complaints to his employer. The employee, however, was not protected when his complaints went "too far" and he unreasonably complained to direct and indirect customers of his employer.

The employer's proffered reason for discharge, that it was not the employee's complaints but rather the unreasonable manner in which he complained, was found to be legitimate and non-discriminatory. The court found that once the president of the employer told plaintiff that she was through discussing the matter, the employee's reasonable recourse was to file a complaint with the Department of Labor. Moreover, the plaintiff failed to show that complaining to a customer was "an appropriate channel" given the particular employment setting. While the court allowed the employee to proceed with his overtime pay claim, plaintiff's retaliation claim was dismissed.

This case is important because while the employer acknowledged that it terminated the employee for complaints of wage and hour violations, the plaintiff's complaints were so unreasonable from the perspective of the court to justify his termination as legitimate and non-discriminatory.

Primary Duties of Store Managers Present Fact Issues, Preclude Summary Judgment

Nerland v. Caribou Coffee Co., Inc., 2007 WL 1170770, <http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/07-01790.pdf>: A retail coffee company brought a motion for summary judgment on claims against it by former store managers that they were improperly classified as exempt employees. The court denied defendant's motion with respect to the misclassification claim but granted the motion with respect to the issue of defendant's willfulness.

The court examined the following management duties in order to determine whether they were "primary" ones: "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." After reviewing the record at hand, the court found "simply too many factual disputes concerning the nature of plaintiffs' duties for the Court to enter judgment for Caribou as a matter of law." The court highlighted the entrenched fact disputes between the parties, going so far as to opine that "[s]omebody is obviously not being forthright with the Court." This part of the opinion is important because it reminds both plaintiffs and defendants of the fact-intensive nature of FLSA claims and how this inherently poses a difficulty for defendants in bringing a summary judgment motion.

The court also examined the willfulness element, a burden shouldered by plaintiffs in order to extend the statute of limitations period an additional year. At issue was a legal memorandum of defendant's counsel, advising Caribou to conduct regular audits of store managers to determine what percentage of their time was spent performing nonexempt tasks. While plaintiffs argued Caribou's failure to do the same was illustrative of its recklessness, the court found Caribou's lack of immediate response to the recommendation insufficient to create a fact issue of willfulness. Similarly, the court found it insignificant that defendant's counsel had advised Caribou on ways to describe and document the store manager position in order to support exempt status. While plaintiffs argued this was an attempt to evade the law, the court found it could just as well be an attempt to comply with the law. This part of the opinion is important because it illuminates the potential difference in a company's knowledge of the FLSA's requirements and its reckless indifference to the same.

Early Rule 68 Offers for Judgment to Named Plaintiffs Will Not Necessarily Moot Claims

Roble v. Celestica Corp., 2007 WL 2669439 (D. Minn. 2007): Defendant's attempt to moot a FLSA class action and obtain dismissal by serving a Rule 68 offer of judgment on the named plaintiffs prior to their motion for class certification failed. The court adopted the report and recommendation of Magistrate Judge Noel after conducting a *de novo* review.

Plaintiffs sought conditional certification of a donning and doffing class. After defendant's motion to dismiss plaintiffs' complaint, defendant served plaintiffs with offers for judgment under Rule 68 and instead of specifying a dollar amount, offered to accept judgment "for the full amount of relief" sought by any named plaintiff. The defendant then filed a motion to dismiss, alleging the claims were moot. The court opined that, although defendant's strategy had been successful in cases where the named plaintiffs had not been able to identify other class members, the motion failed because plaintiffs in the present action were able to identify other potential employees with an interest in the litigation, thus satisfying the case-or-controversy requirement.

Significantly, the court further held that "[a]llowing such a defensive strategy would frustrate the FLSA's collective action provision allowing for the aggregation of small claims, and would endorse an unacceptably narrow understanding of Article III's case-or-controversy requirement."

Minnesota's Meal-Break Law

Frank v. Gold'n Plump Poultry, Inc., No. 04-CV-1018 (PJS/RLE), 2007 WL 2780504, (D. Minn. Sept. 24, 2007), <http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/07-03941.pdf>: *Gold'n Plump* turns conventional thinking on Minnesota's meal-break law on its head. In *Gold'n Plump*, the court held that under Minnesota law, employers must provide their employees who work for at least eight consecutive hours with thirty-minute meal breaks, absent special conditions. The plaintiffs alleged that their meal breaks were not long enough because portions of the thirty-minute breaks were spent donning and doffing clothing and equipment, leaving them with actual break time of less than thirty minutes.

Minnesota Statutes section 177.254 requires employers to "permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal." The meal break need not be paid, however. Moreover, Minnesota Rule 5200.0120 specifies:

Bona fide meal periods are not hours worked The employee must be completely relieved from duty for the purpose of eating regular meals. Thirty minutes or more is ordinarily long enough for a bona fide meal period. A shorter period may be adequate under special conditions. The employee is not completely relieved from duty if required to perform any duties, whether active or inactive, while eating. It is not necessary that an employee be permitted to leave the premises, if the employee is otherwise completely freed from duties during the meal period. If the meal period is frequently interrupted by calls to duty, the employee is not relieved of all duties and the meal periods must be considered as hours worked.

Relying heavily on its interpretation of Rule 5200.0120, the court granted in part Gold'n Plump's motion for summary judgment on the plaintiffs' meal-break claims. While acknowledging that federal courts have held that 29 C.F.R. § 785.19 (which is the origin of Rule 5200.0120) does not require meal breaks to be thirty minutes long, the court did not find federal cases interpreting the federal rule useful for two reasons. First, Rule 5200.0120, unlike the federal rule, is binding. Second, the court observed that at least one federal court, the Fourth Circuit, suggested that the federal rule "should be interpreted as mandating thirty-minute meal breaks."

The court also respectfully disagreed with a Minnesota district court's decision in *Rios v. Jennie-O Turkey Store, Inc.*, NO. 27-CV-03-020489 (Minn. Dist. Ct. – Hennepin Cty. Oct. 6, 2006). In *Rios*, the court granted summary judgment to Jennie-O on the same issue and on nearly identical facts, concluding that the inclusion of certain language – *i.e.*, "ordinarily long enough," "while eating," and "[i]f the meal period is frequently interrupted by calls to duty, the employee is not relieved of all duties" – demonstrated that Minnesota's Department of Labor and Industry did not intend to interject a bright-line, thirtyminute lunch period in

place of the statute's "sufficient time" standard; rather, it solely intended to ensure that bona fide meal periods are free from interruption.

To explain its disagreement with the *Rios* decision, the *Gold'n Plump* court noted:

[T]he fact that Rule 5200.0120 emphasizes that meal breaks must be uninterrupted is in no way inconsistent with the notion that the rule also requires that meal times be 30 minutes long (in the absence of special conditions). One rule can do two things; Rule 5200.0120 can require *both* that meal periods be at least 30 minutes in length *and* that those 30-minute breaks be uninterrupted.

The court further observed:

[T]he Minnesota rule, unlike its federal counterpart, is binding law - as binding as a statute. Words in laws *mean* something; they have consequences; they express directives, not suggestions or opinions. Under *Rios*, though, the statement in Rule 5200.0120 that "[t]hirty minutes or more is ordinarily long enough for a bona fide meal period" becomes meaningless – nothing more than a factual assertion about how long it takes most people to eat a meal. The same is true of the language about "special conditions"; under *Rios*, that language becomes either surplusage or another factual observation.

Thus, the court, after noting that agencies "generally do not promulgate binding regulations in order to make observations about the human condition," denied Gold'n Plump's summary judgment motion with respect to one Minnesota plaintiff's meal-break claim, but granted the motion for the time period in which two other Minnesota plaintiffs voted to take a paid, twenty-minute meal break instead of an unpaid, thirty-minute meal break, concluding that the agreement constituted a special condition. The court denied Gold'n Plump's motion to the extent the two Minnesota plaintiffs' claims arose from a period of time not covered by the agreement.

Accordingly, contrary to conventional thinking and a surprise to employers, Minnesota employees who work for at least eight consecutive hours may be entitled to thirty-minute meal breaks, absent special conditions. Employers, therefore, should alter their meal-break policies and practices, if necessary, to ensure their employees are receiving an uninterrupted thirty-minute meal break, absent special conditions, or face the risk of defending state-wage claims.

Notably, while the *Gold'n Plump* case settled, eliminating the possibility of an appeal, the *Rios* decision is currently under reconsideration by the state court. If the *Rios* decision is ultimately appealed to the Minnesota Supreme Court, employers and employees may have a definitive answer to this issue.

Learned-Professional Exemption

Wage and Hour Op. Ltr., FLSA 2007-5 (Feb. 1, 2007), http://www.dol.gov/esa/whd/opinion/FLSA/2007/2007_02_01_05_FLSA.pdf: In February 2007, the Department of Labor issued an opinion letter concluding that radiology technologists (RTs) did not qualify for the learned-professional exemption under the Fair Labor Standards Act. The RT position required completion of an accredited two-to-three-year radiology technology program and the successful completion of the exam for registration with the American Registry of Radiologic Technologists (ARRT). The RTs' duties included reviewing physicians' orders for patient examinations and ensuring that the exam room was properly prepared for the procedure; visiting patients to determine their tolerance for the exam and positioning; preparing patient information cards; administering chemicals orally or intravenously; setting technical factors on equipment; and other miscellaneous duties. RTs

were also required to meet continuing education requirements every two years to maintain ARRT registration.

To qualify for the learned-professional exemption, a position must satisfy the salary-basis requirement (*i.e.*, compensated in excess of \$455 per week) and the primary-duty test. The primary-duty test under the learned professional exemption consists of three elements: "(1) The employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction." Moreover, " 'work requiring advanced knowledge' means 'work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.' "

While assuming the RTs satisfied the salary-basis requirement, the DOL found that the RT position did not satisfy the primary-duty requirements. The DOL concluded that the primary duty of the RTs did "not appear to require 'knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction.'" And, the mandatory accrediting program did not override the requirement for a prolonged course of specialized instruction.

Additionally, the DOL found that the RTs' work, though involving the important use of advanced skills and procedures, did not appear to be "work which is predominantly intellectual in character." Rather, it "seem[ed] to be more in the character of routine mental, manual, mechanical and physical processes than intellectual work requiring the consistent exercise of discretion and judgment."

This well-reasoned opinion letter is important because it not only provides guidance to health-care providers on whether RTs should be treated as exempt employees, but it also provides some insight into how the DOL will view similar positions in the health-care industry. Additionally, it serves as a reminder that while accredited curriculums and certification programs may be relevant in determining exempt learned professional status, neither is determinative.

Outside-Sales Exemption

Wage and Hour Op. Ltr., FLSA 2007-1 and 2007-2 (Jan. 25, 2007), http://www.dol.gov/esa/whd/opinion/FLSA/2007/2007_01_25_01_FLSA.pdf: In two opinion letters, the DOL concluded that certain sales associates employed in the housing and real estate industry were exempt as outside-sales employees. Besides selling homes, the sales associates met with prospective buyers, conducted site visits, showed the homes under construction, conducted tours of the communities, and performed several other sales-related tasks. In both cases, the sales associates spent very little time (*i.e.*, one to four hours per week) performing work that was not incidental to and in conjunction with their own sales or solicitations.

In reviewing the sales associates' job duties, the DOL concluded that the sales associates were exempt as outside sales employees, as their primary duty was to sell homes, and they were customarily and regularly engaged away from the employer's place or places of business while selling the homes.

These opinion letters are important because they provide needed guidance to housing and real estate employers as to when their sales associates may be exempt under the outside-sales exemption. Employers, however, need to review the duties of their sales associates closely to ensure that their duties are akin to those held by the salespersons in the above opinion letters, as a small difference in job duties may be enough to change the DOL's tune on the issue.

Twin Cities' Living-Wage Ordinances

Saint Paul Living Wage Ordinance, Chapter 98,

<http://www.ci.stpaul.mn.us/code/ac098.html>: In January 2007, a new living-wage ordinance went into effect in St. Paul. Qualifying employers must pay a "living wage" equivalent to at least 130 percent of the federal poverty level for a family of four (*i.e.*, \$13.25 for 2008), or, if the employer provides basic health insurance, a wage equivalent to at least 110 percent (*i.e.*, \$11.21 for 2008) of the federal poverty level for a family of four. Employers must pay the living wage for the duration of the contract to each employee who works pursuant to the contract, or who is employed in the specific location for which a subsidy was provided for the longer of the duration of the subsidy or three years. Employers must also file an annual report, provide written notice to its employees of Chapter 98, and provide employees a copy of the chapter.

The living-wage ordinance applies to employers who receive city contracts (including amendments for services not covered by Administrative Code Section 82.07, but excluding contracts relating to depository and/or financial services to St. Paul, providing health care benefits to St. Paul employees, and management services for city owned land or improvements, if the city contractor pays a portion of the revenues to St. Paul), subcontracts, or business subsidies in the aggregate of \$100,000 or more. It also applies to a tenant that initially leases from a city business subsidy recipient in the specific location for which the city business subsidy was provided, or if there is more than one such entity or person, then it includes the entity or person that leases the greatest amount of space and any entity or person that leases space of 15,000 or more square feet.

The ordinance, however, exempts a number of employers, including:

- Small, for-profit businesses within the meaning of Minnesota Statutes section 645.445;
- 501(c) entities that meet the criteria of Minnesota Statutes section 645.455, subdivision 2 or that are sole source providers of product or service;
- Recipients of any city contract, city business subsidy, or city subcontract (including a tenant) that contains an express provision that the purpose of the contract or subsidy is job readiness and training services and that the recipient or tenant is exempt from the living-wage requirement;
- Recipients for whom the City Council determines the application of the living-wage requirements would conflict with federal or state law or program requirements;
- Recipients bound by a collective bargaining agreement for the duration of the contract or subsidy; and
- Intermediary recipients, such as community development corporations, or community banks who serve as a pass-through agency for the assistance.

The ordinance also exempts certain employees, including those in temporary internship or similar positions that are intended to provide career exposure to new entrants to the workforce, lasting no more than twelve consecutive months; individuals placed as the result of a job readiness or training program or who are participants in an employment program that provides work opportunities for those with serious mental and physical barriers to employment; and other seasonal, part-time, or temporary employees. Additionally, the living-wage requirement may be waived in certain situations where the City Council or HRA Board of Commissioners finds a compelling public purpose or economic hardship.

Notably, failure to comply with the living-wage requirement will result in ineligibility for a city business subsidy or contract in the next contract cycle or calendar year, along with repayment of up to the entire value of the contract or subsidy. The ordinance also prohibits retaliation against those that seek enforcement of the living wage or participate in any manner in a proceeding to enforce the ordinance.

Minneapolis Living Wage Ordinance, Chapter 38:

While Minneapolis' living-wage ordinance took effect on January 1, 2006, it did not apply to city contract or business subsidies established or renewed prior to January 1, 2007. Like employers subject to St. Paul's living-wage ordinance, employers (excluding a tenant as defined under St. Paul's living-wage ordinance) who receive contracts (including subcontracts) or business subsidies of at least \$100,000 from the City of Minneapolis must pay a living-wage equivalent to at least 130% of the federal poverty level for a family of four (*i.e.*, \$13.25 for 2008), or at least 110% (*i.e.*, \$11.21 for 2008) of the federal poverty level for a family of four if the employer provides basic health insurance benefits. City contract recipients must pay the living wage for the duration of the contract to employees of the city contractor for hours worked on the city contract. For subsidy recipients, the city's "goal" is that one living wage job is created out of every \$25,000 of city business subsidies. To this end, recipients of business subsidies must enter into a city business subsidy agreement with the city, and if the number of required living-wage jobs to be created by the subsidy recipient is less than the city's goal, the city's department of planning and economic development must supply written reasons for not meeting the goal to the city council.

Similar to the exemptions found in St. Paul's living-wage ordinance, section 38.40(c) of the ordinance exempts a number of employers, including:

- Small businesses within the meaning of Minnesota Statutes section 645.455;
- 501(c) entities that meet the criteria of Minnesota Statutes section 645.445, subdivision 2, that are the sole source providers of services, or that provide health and social services directly to low-income and at-risk populations;
- For-profit or 501(c) entities that provide contract health care benefits or wellness- or fitness-related products or services to city staff;
- For-profit or 501(c) entities involving city depository and financial service institutions;
- Recipients of a city contract or business subsidy that expressly states that the purpose of the contract or subsidy is job readiness and training services and that the recipient is exempt from the living-wage requirement;
- City contract or business subsidy recipients for whom the City Council determines that the application of the living-wage requirements would conflict with federal or state law or program requirements;
- City contract or business subsidy recipients who are bound by a collective bargaining agreement for the duration of the contract or subsidy;
- Recipients of a business subsidy where the purpose of the subsidy is assistance for housing, but this exemption does not apply to non-housing portions of a business subsidy;
- Business subsidies awarded solely to remediate redevelopment property polluted by contaminants as defined in Minnesota Statutes section 116J.552, subdivision 3;
- Projects that the recipient's investment in the purchase of the site and in site preparation was made at fair market value, except that this exemption does not apply to other portions of or separate business subsidies for the same business subsidy recipient;
- City contracts or business subsidies leading to the employment of certain seasonal, part-time, or temporary employees;
- Temporary internships or similar positions designed to provide career exposure to new entrants to the relevant workforce;
- Conduit bonds and 501(c) bonds; and
- Historic preservation projects, except for jobs created as a result of the renovation, in which case at least 75% of the new workers must be paid a living wage.

The living-wage requirements may be waived by a majority vote of the entire city council upon a written showing of sufficient cause by a recipient. Criteria that may be considered in making

a waiver decision include whether fulfilling the requirement will cause economic hardship or financial infeasibility, if a city business subsidy cannot reasonably be considered economic development, or if the imposition of a living wage would require the contract or subsidy recipient to make business decisions that adversely impact the city.

Failure to comply with the living-wage requirement may result in ineligibility for a city business subsidy or contract for the next calendar year. City contract recipients that fail to meet the living-wage requirements are also liable to the city for liquidated damages of 20% of the contract value, and city business subsidy recipients shall be liable for liquidated damages of four times the value of the subsidy proportional to the rate at which the recipient failed to create living-wage jobs. The ordinance provides the following example: "If a recipient received a subsidy of one million dollars (\$1,000,000) and only created thirty-nine (39) living wage jobs, instead of forty (40), it would owe one hundred thousand dollars (\$100,000) to the city or four (4) times their proportional rate of failure of twenty-five thousand dollars (\$25,000)." Thus, the "goal" of having one living wage job created out of every \$25,000 of city business subsidies is more of a requirement than simply an aspirational goal. Moreover, the Minneapolis living-wage ordinance contains the same retaliation protections found in St. Paul's living-wage ordinance.

Furthermore, the Minneapolis living-wage ordinance requires city contract or business subsidy recipients to provide "a copy of payrolls showing wages paid or records substantiating jobs created from a business subsidy" within five working days upon request of city staff, who also have the right to audit the employer's books to determine compliance or noncompliance with this ordinance. Noncompliance will result in placement on a suspended list and termination of rights to proceed with the work or such part of the work as to which there has been a violation. City contract or business subsidy recipients must retain the relevant records and documents for at least one year after the completion of the work.

Although both cities typically refresh employers' recollection of their obligations under the living-wage ordinances, employers need to fully understand their obligations, as both ordinances have teeth. Thus, qualifying employers must ensure that they fulfill all of their obligations under the ordinances if they want to avoid liability and continue to do business with Minneapolis or St. Paul.

Federal minimum wage increase

Effective July 24, 2008, the federal minimum wage for covered employers will increase to \$6.55 an hour, which is up \$.70 from last year's increase. Covered employers will need to pay \$7.25 an hour as of July 24, 2009. <http://www.dol.gov/esa/whd/flsa/index.htm>

Notably, Minnesota's minimum wage remains \$5.25 an hour for small employers (annual sales volume of less than \$625,000) and \$6.15 an hour for large employers (annual sales volume of more than \$625,000).

http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP_SEC&year=current§ion=177.24



Labor & Employment Law Section



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State Law Discrimination Update

*By Anne M. Radolinski, Esq.
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Posted March, 2008*

The Parameters of “Materially Limited” under the MHRA

Leitner v. Gartner Studios, Inc., No. A07-63 (Minn. Ct. App. Feb. 5, 2008) (unpublished decision), 2008 Minn. App. Unpub. LEXIS 134, 2008 WL 314177, <http://www.lawlibrary.state.mn.us/archive/ctapun/0802/opa070063-0205.pdf>: A recent unpublished decision of the Minnesota Court of Appeals relied on the federal standard under the Americans with Disabilities Act in determining whether a physical impairment rose to the level of a disability under the Minnesota Human Rights Act.

The court of appeals affirmed a district court grant of summary judgment in favor of the employer, ruling that the plaintiff had not established that the effects of his heart condition materially limited one or major life activities under the Minnesota Human Rights Act.

Leitner was a first-shift production supervisor with a heart condition and required surgery in November 2002. His physician allowed him to return to work part-time on January 6, 2003 and full-time on January 13, 2003. His physician advised that he should not work more than forty hours per week, and that he should not lift more than five to ten pounds at a time for one month. Shortly after receiving the physician’s restrictions, the employer informed Leitner that he needed to work the second shift. Leitner raised both personal and medical concerns to working the second shift, but apparently never provided the employer with the requested instruction from his physician as to whether he had any restrictions in terms of working the second shift. There were no positions on the first shift that did not require lifting. Leitner was ultimately terminated.

He filed a disability discrimination claim with the Minnesota Human Rights Department, which issued a probable cause determination, and the district court action ensued.

Interestingly, in determining that Leitner had failed to meet the threshold for establishing a disability under the MHRA, the court of appeals interchangeably referred to the Minnesota standard of “materially limits one or more major life activities” and the federal standard of “substantially limits one or more major life activities.” There was no dispute that the heart condition was a physical impairment and that working is a major life activity. However, the restrictions of working no more than forty hours a week and a one-month lifting restriction did not constitute a material limitation. The court noted that a “major life activity is materially or substantially limited if an individual is significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities,” citing 29 C.F.R. 1630.2(j)(3)(i).

The court of appeals similarly used the Minnesota and federal standards interchangeably in its discussion of whether Leitner had raised a genuine issue of material fact as to either of the other two prongs of the disability definition under the MHRA—whether Leitner had a “record of such [an] impairment” or was “regarded as having such an impairment.” In regard to a record of impairment, the court noted that Leitner produced no evidence that his history of coronary heart disease or his heart attack “substantially limited his ability to work.” In regard to the perception of disability, the record did not reflect that the employer believed Leitner could not perform a broad range of jobs, and thus Leitner had not raised a genuine issue of material fact as to “having an impairment that substantially limited his ability to work.” Even so, the court indicated that the employer had reasonably accommodated Leitner by offering him a position on the second shift, which did not require lifting.

Stray Remarks

Suneson v. Northern Tool and Equipment Company, Inc., No. A06-1844 (Minn. Ct. App. Oct. 23, 2007), 2007 Minn. App. Unpub. LEXIS 1055, 2007 WL 3076992, <http://www.lawlibrary.state.mn.us/archive/ctapun/0710/opa061844-1023.htm>: The Minnesota Court of Appeals in another unpublished decision affirmed summary judgment in favor of the employer on an age discrimination claim, determining that the individual had not raised a genuine issue of material fact as to pretext.

Suneson had been terminated after the company determined, following an investigation, that he had violated the company’s sexual harassment policy. Suneson argued among other matters on appeal that he had raised a material fact as to pretext to survive summary judgment by presenting evidence that (1) the company’s documentation demonstrated that it did not believe he had engaged in sexual harassment; (2) he was subjected to ageist comments; (3) a similarly-situated younger employee was treated differently; and (4) the district court applied the wrong standard in the pretext analysis.

In regard to the first argument, the court determined that while the company’s documentation could have been clearer, the record did not indicate that the termination resulted from something other than a female employee’s allegations of sexual harassment. In regard to the second argument, only one of the comments was that of a decisionmaker and that comment was not made in connection with the decision to terminate. As to the third argument, the court found that the handling of the sexual harassment complaint against a younger worker was distinguishable in that it involved the use of offensive language and was apparently less serious than the conduct of the plaintiff. Finally, Suneson argued that the district court had erred in requiring him to show both that the company’s proffered reason for the discharge was false and that the real reason was his age. The court of appeals, however, ruled that Suneson had failed to present either direct evidence of age discrimination or indirect evidence that the harassment investigation was a pretext for discrimination.



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Minnesota Tort and Contract Cases

*By Mary E. Stumo & Julie M. Giddings
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Posted March, 2008*

Employment Handbook Is Contract Governing Vacation Pay Upon Termination

Lee v. Fresenius Medical Care, Inc., 741 N.W.2d 117, 155 Lab.Cas. P 60,521, 13 Wage & Hour Cas.2d (BNA) 161 (Minn. 2007)
<http://www.lawlibrary.state.mn.us/archive/supct/0711/OPA051887-1115.htm>: Plaintiff Susan Lee alleged that her former employer, Fresenius Medicare Center ("Fresenius"), failed to compensate her for paid time off that she had earned and was entitled to receive upon the termination of her employment. Around the time Lee's employment with Fresenius began, Fresenius issued a copy of its employee handbook to Lee and she signed an acknowledgment form that she received the handbook. The employee handbook contained provisions related to earning paid time off and stated, "An employee who gives proper notice . . . is eligible to be paid for earned but unused Paid Time Off (PTO). Unless otherwise required by state law, if you do not give acceptable notice, you may not be paid for earned but unused PTO, and you may not be considered eligible for re-employment. In addition, if your employment is terminated for misconduct, you will not be eligible for pay in lieu of notice or payment of earned but unused PTO unless required by state law." Fresenius terminated Lee for misconduct in August 2002 and, therefore, did not pay Lee for her unused PTO.

The Minnesota Court of Appeals held that under Minnesota Statutes section 181.13(a), an employer must compensate a terminated employee for accrued but unused vacation time, and therefore the provision in the employee handbook that made employees terminated for misconduct ineligible for paid time off was legally ineffective.

The Minnesota Supreme Court reversed, holding that Lee was not entitled to receive payment for accrued but unused paid time off upon the termination of her employment because Fresenius's employee handbook explicitly made her ineligible for such payment. Applying *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), and without addressing the validity or enforceability of a "this is not a contract" clause, the court concluded that the employee handbook was an enforceable employment contract between Lee and Fresenius and, therefore, the terms of the employee handbook governed the payment of accrued but unused paid time off upon the termination of employment. Because the employee handbook included a provision stating "if your employment is terminated for misconduct, you will not be eligible for pay in lieu of notice or payment of earned but unused PTO unless required by state law," and Lee was discharged for such misconduct, she was ineligible for payment.

Although the court agreed that paid time off and vacation are "wages" under section 181.13(a), the court concluded that this statute is merely a timing statute and employers are permitted to set conditions that employees must meet in order to exercise their earned right to paid time off or vacation. The court stated that such conditions may be set in an employee handbook, and to the extent paid time off is considered wages, the conditions set in an

employee handbook define those wages. The court concluded that Fresenius's employee handbook was an enforceable contract because (1) the employee signed an acknowledgement that she received the handbook, and (2) the employer retained the employee after such acknowledgement.

Arbitration Clause in Employment Application May Be Binding on Employee

Nabry v. MV Transportation, No. 07-CV-0124, 2007 U.S. Dist. LEXIS 91812, 2007 WL 4373107 (D. Minn. Dec. 13, 2007) <http://www.nysd.uscourts.gov/courtweb/pdf/D08MNX/07-05070.PDF>: Plaintiffs, eight current or former employees of defendant MV Transportation, Inc. ("MV"), brought claims of employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964. MV moved to dismiss and compel arbitration, arguing that plaintiffs were bound by arbitration clauses found in some of plaintiffs' employment applications and arbitration clauses in some versions of MV's employee handbook.

Four plaintiffs had signed applications for employment agreeing to arbitrate claims "arising out of, or relating to my application or candidacy for employment, employment and/or cessation of employment." The employment applications also contained disclaimers, stating "I understand that nothing contained in this employment application or in the granting of an interview is intended to create a contract between me and this company for either employment or the provision of any benefits; and further understand that if an employment relationship subsequently is established, I will have the right to terminate my employment at any time and the company will have a similar right." These plaintiffs argued that the arbitration clauses in the employment applications were not binding because, by including disclaimers in the applications, MV disavowed any intent to form a contract. The court found, based on the language of the disclaimer, that MV disclaimed only the intent to form a contract with respect to "employment or the provision of any benefits," and that the disclaimer said nothing about how the parties would settle disputes that arise between them. Thus, the disclaimer did not render the arbitration clause unenforceable.

These four plaintiffs also argued that a 2006 employee handbook that did not contain an arbitration clause superseded the arbitration clauses in the employment applications. The court found that, even if plaintiffs could prove that they received copies of an employee handbook that did not contain an arbitration clause (which they could not), nothing in the employee handbook purported to revoke the arbitration clause in the employment applications. The fact that an employee handbook says nothing, one way or the other, about an arbitration commitment made in an employment application does not support an inference that the employer intended to vitiate the commitment to arbitrate. Thus, the employees were bound by the agreement to arbitrate contained in their employment applications, and the court granted MV's motion with respect to four of the plaintiffs.

MV argued that the remaining four plaintiffs were bound to arbitrate by an arbitration clause in MV's 2003 and 2004 employee handbooks. In addition to the arbitration clause, those employee handbooks also contained a disclaimer stating, "this handbook cannot anticipate every situation or answer every question about employment. It is not an employment contract and it is not intended to create contractual obligations of any kind. Neither the employee nor the company is bound to continue the employment relationship if either chooses, in its will, to end the relationship at any time."

The court applied *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983), and found that the 2003 and 2004 employee handbooks were not binding contracts between MV and plaintiffs because MV could not prove that plaintiffs received the employee handbooks, and thus could not prove that it communicated an offer to contract to the employees. The court also found that even if MV's offer to arbitrate in the employee handbook had been communicated to plaintiffs, the disclaimer in the employee handbook would prevent the arbitration clause in the employee handbook from being a contract. Although MV argued that, like the disclaimer in the employment application, the employee handbook disclaimed only the

intent to alter the at-will nature of the employment relationship, the unambiguous language of the disclaimer informed employees that the employee handbook “is not intended to create contractual obligations of *any kind*” (emphasis added). Thus, the court denied MV’s motion to dismiss and to compel arbitration with respect to the remaining four plaintiffs.

Summary Judgment for Employer Is Affirmed Where Former Employee Alleged Defamation

Wikstrom v. Little Earth of United Tribes Housing Corp., No. A06-1023, 2007 WL 1746908, 2007 Minn. App. Unpub. LEXIS 637 (Minn. Ct. App. Sep. 18, 2007), review denied (Sep 18, 2007) <http://www.lawlibrary.state.mn.us/archive/ctapun/0706/opa061023-0619.htm>: Plaintiff Elladean Wikstrom brought suit against defendants alleging defamation, intentional infliction of emotional distress, tortious interference with economic advantage, negligent supervision, retention, and hiring, and retaliation under the whistleblower statute (which is not addressed in this summary) after she was discharged from her job as executive director of the Little Earth Community Partnership. Defendants were granted summary judgment in full, and Wikstrom appealed.

The Little Earth community is a low-income housing program designed to assist American Indians living in Minneapolis. As executive director, Wikstrom’s “basic job responsibilities were to develop and administer annual budgets, fundraise, act as a public relations liaison, and supervise the management company, which had responsibility for rentals and evictions, and other day-to-day operations of the housing units.” The combined boards of Little Earth Community Partnership voted to terminate Wikstrom’s employment after an investigation of her work performance revealed that she was unable to handle public relations, as she had alienated police officers and a county attorney through inappropriate behavior, and that she had difficult relationships with staff and residents of Little Earth, as she yelled at staff, use profanity-laced language, and yelled at residents and threatened them with eviction.

On appeal, the Minnesota Court of Appeals found that Wikstrom had failed to establish a prima facie case for any of her claims. With respect to her defamation claim, the court found that Wikstrom’s allegations were too vague to support a claim. Although Wikstrom alleged that defendants made false and libelous statements about her in her professional community and that she would be forced to inform potential employers about the circumstances of her discharge, she did not identify the speaker or the recipient of the statements or when or where the statements were made. In addition, Wikstrom’s assertions of emotional harm failed in all respects to establish a claim for intentional infliction of emotional distress. Finally, Wikstrom’s tortious interference with economic advantage claim failed because she failed to establish sufficient facts regarding a contract between the parties and an improper motive.



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Unemployment Compensation

*By Marshall H. Tanick
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Timing is critical in obtaining unemployment compensation benefits. A trio of cases recently decided by the Minnesota Court of Appeals focus on timing as the crucial factor in these determinations. One involved an employee who was chronically late to work, while the other two involved belated filings of unemployment appeals.

Czerniak v. ATK Ordinance & Ground Systems, LLC, 2007 WL 4394456, 2007 Minn.Ct.App.Unpub. LEXIS 1204 (Minn. Ct. App. Dec. 18, 2007) (unpublished) <http://www.lawlibrary.state.mn.us/archive/ctapun/0712/opa062221-1218.htm>: A software engineer was terminated after he was consistently late for work over a five-year period. An unemployment compensation judge denied benefits on grounds of “misconduct,” and the court of appeals affirmed. The failure by an employee to follow “reasonable” work rules regarding timely attendance constitutes “employment misconduct” because it “demonstrates a substantial lack of concern for the employer’s interests.” Even if not intentional, “excessive tardiness may . . . constitute employee misconduct.”

The employer’s requirement that the employee be at work at a set time was “reasonable,” and the employee’s failure to be timely was both “chronic” and “excessive.” The employer had warned the employee of the need to be at work on a timely basis. Coming fifteen to twenty minutes late after three warnings constituted grounds for disqualification from unemployment benefits on grounds of “misconduct” under Minnesota Statute section 268.095, subdivisions 4(1) and (6)(a).

Schuna v. Reynolds & Reynolds Partnership, 2007 WL 4394638, 2007 Minn.Ct.App.Unpub. LEXIS 1205 (Minn. Ct. App. Dec. 18, 2007) (unpublished), <http://www.lawlibrary.state.mn.us/archive/ctapun/0712/opa062287-1218.htm>: An employee lost her claim for unemployment benefits before an unemployment law judge and then belatedly filed a request for reconsideration. A request for reconsideration must be filed within “30 calendar days of the signing of the unemployment law judge’s decision” under Minnesota Statute section 268.105, subdivision 2(a) (2006). The unemployment law judge’s decision was mailed on August 22, and the “unambiguous postmark date” of the employee’s request for reconsideration was September 22, 2006—a thirty-one-day lag. Affirming the denial, the appellate court held that because it was filed one day late the request for reconsideration was “untimely.”

Under long-standing Minnesota case law there are no “mitigating circumstances” that can overcome the “strict determination of statutory time limits for appeals” in unemployment compensation cases. The court cited case law in which the time period for appeal runs from the date of the determination, regardless of when received by the employee, and in which any appeal must be filed within the thirty-day time period. Even though the request was “only one day late,” the unemployment judge had lacked “jurisdiction to consider the request.” Because a request for reconsideration is required to pursue an appeal, the appeal was barred, too.

Note: Section 268.105 now requires a request for reconsideration to be filed within twenty days of the sending of the unemployment law judge's decision.

Stewart v. Executive Affiliates, Inc., 2007 WL 4510255, 2007 Minn.Ct.App.Unpub. LEXIS 1234 (Minn. Ct. App. Dec. 24, 2007) (unpublished)

<http://www.lawlibrary.state.mn.us/archive/ctapun/0712/ opa062467-1224.htm>: The employee quit at least two jobs during her base period and then was denied unemployment benefits in an initial adjudication. She claimed that she was unaware that she needed to file an appeal from her most recent employer because she had worked there only a week. She did not appeal the determination until about a week after the deadline. The notification of disqualification informed the employee of the need to appeal within the thirty-day time period, and the employee's claim that she was given conflicting information orally by DEED staff was of no avail. Because the appeal was filed late, the unemployment law judge "lacked jurisdiction" to review [the] untimely appeal," and her claim was properly dismissed.

These cases demonstrate the strict timelines that exist in unemployment compensation proceedings and how the courts adhere to them. The lesson of these cases is that being late, whether for work or in unemployment filings, can be fatal to a discharged employee's entitlement to unemployment compensation benefits.



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Public Sector

By Stephen F. Befort and Jennifer Heim
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Constitutional Claims

Bradley v. James, 479 F.3d 536, 89 Empl. Prac. Dec. P 42,735, 154 Lab.Cas. P 60,373, 217 Ed. Law Rep. 31, 25 IER Cases 1559 (8th Cir. 2007)
<http://caselaw.lp.findlaw.com/data2/circs/8th/062283p.pdf>: Plaintiff university police officer filed suit against the university and the university police chief alleging his First Amendment rights were violated when he was fired in retaliation for reporting that the police chief was intoxicated and had interfered with an investigation. The district court granted summary judgment for the defendants. The court of appeals affirmed.

University of Central Arkansas Police Chief James came into the police office after receiving a complaint at home that university police officers were seen running through a dormitory with automatic weapons. Plaintiff Bradley, who was on duty at the time, had sent officers to a respond to a call in the dormitory but had stayed behind at the office. James reprimanded Bradley orally for not responding personally to the call and later instituted an investigation regarding the incident. When Bradley met with the investigating officer, Bradley reported that James was intoxicated when he came in to the office and that he had interfered with the investigation. After the completion of the investigation, the university's vice president for human resources sent Bradley a letter stating that his inaction in responding to the police call and his "unsubstantiated" comments about the chief were grounds for termination and giving Bradley the option of quitting or being fired. When Bradley did not respond, the chief sent Bradley a letter stating that he was fired for "deliberate or gross neglect of duty."

The court rejected Bradley's claim that his statements made during the investigation were protected for purposes of First Amendment retaliation claims. The court applied the two-part *Pickering* test and asked first if the employee spoke as a citizen on a matter of public concern. In determining whether or not Bradley spoke as a private citizen the court relied on the recent Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), stating that whether a person speaks as a citizen or a public employee depends on whether the speech was made "pursuant to official responsibilities." The court found that Bradley had an official responsibility as a police officer to cooperate in the investigation of the department. His allegations were made only during that investigation and therefore were made pursuant to his official duties and not protected under the First Amendment.

Lindsey v. City of Orrick, 491 F.3d 892 (8th Cir. 2007)
<http://caselaw.lp.findlaw.com/data2/circs/8th/063299p.pdf>: Plaintiff former public works director sued the city and its mayor alleging retaliation in violation of his First Amendment rights. The district court found that the city and the mayor acted in violation of the First Amendment and were not entitled to qualified immunity. The court of appeals affirmed.

Plaintiff Lindsey attended a seminar on Missouri's open meetings, or "sunshine," law as part of a training session he was sent to by the city. After the seminar, Lindsey became convinced that the city was violating the state's sunshine laws and raised his concerns at four public meetings. He also privately made statements to Taylor, the city mayor, threatening to report the violations. Lindsey was fired for his statements.

The Court of Appeals for the Eighth Circuit first held that the city violated Lindsey's constitutional right to engage in protected speech. In order to assert a claim for retaliation under the First Amendment, public employees must speak as a citizen addressing matters of public concern. Relying on *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), the court found that Lindsey was speaking as a citizen because his comments were not made pursuant to his official duties. Even though Lindsey was required to attend council meetings as part of his job, his job duties involved providing park, water, sewer, and street reports. He was not charged with monitoring or reporting sunshine law compliance. The court also found that his speech involved a matter of public concern, a characterization that was not destroyed in spite of the vehement nature of some of Lindsey's statements in Taylor's home.

After deciding that Lindsey spoke as a citizen on a matter of public concern, the court declined to engage in the *Pickering* balancing test, stating that the city and Taylor did not meet its threshold burden to show that the speech had an adverse impact on the efficiency of the city's operations. The court found that mere claims that council members did not like Lindsey did not on their own show that city functions were disrupted by Lindsey's speech.

Finally, the court concluded that Taylor and the city were not entitled to section 1983 immunity. Though neither the Eighth Circuit nor the Supreme Court has considered the precise case of an employee's firing after alleging violations of sunshine laws, previously decided cases in this area were sufficiently similar to give Taylor notice that her action was unconstitutional.

Ganley v. Minneapolis Park & Rec'n Bd., 491 F.3d 743, 154 Lab.Cas. P 60, 447 (8th Cir. 2007) <http://caselaw.lp.findlaw.com/data2/circs/8th/063673p.pdf>: Plaintiff police officers sued the city park board alleging that the board violated their due process and equal protection rights when plaintiffs were denied benefits under a collective bargaining agreement. The district court granted summary judgment for the defendants. The court of appeals affirmed.

Plaintiffs, police officers for the Minneapolis Police Department (MPD) retired from the MPD in order to become officers with the Minneapolis Park and Recreation Board. The contract governing transfers between the MPD and the park board states that if an officer of the MPD is hired by the park board, the time served by the officer in the MPD will be considered as seniority for the purpose of determining the officer's placement on the salary scale and his or her vacation accrual. Because the plaintiffs retired, instead of transferring with no break in service as others did, the park board found that they had liquidated their time banks and were not eligible for the benefit of that contract provision.

The Court of Appeals for the Eighth Circuit first rejected the parties' equal protection claim. The court found that there was a rational basis for the park board's refusal to grant benefits under the collective bargaining agreement because the plaintiffs were not similarly situated to those officers who transferred with no break in service. Specifically, the plaintiffs were not employed by the MPD at the time the park board reviewed their status in order to place them on the salary schedule. The court found no evidence of purposeful or intentional discrimination.

The court rejected the parties' claim of violation of their substantive due process rights stating that the plaintiffs did not articulate the violation of a fundamental right. Applying a rational-basis standard, the court found that park board's actions were not arbitrary.

The court also rejected the claim that the plaintiff's procedural due process rights were violated. The plaintiffs argued that they should have received information before they retired about the effects of retirement on subsequent hiring. The court stated that the plaintiffs had misdirected this claim against the board. It was the MPD that created plaintiffs' status as retirees, and therefore the board was not the proper governmental actor against which to assert this claim.

Phillips v. State, 725 N.W.2d 778, 215 Ed. Law Rep. 1084 (Minn. Ct. App. 2007) <http://www.lawlibrary.state.mn.us/archive/ctappub/0701/opa060627-0116.htm>: Plaintiff college instructor sued the state, the college, the state's college and university system, its board of trustees, and two college employees alleging that his due process rights were violated when the college did not rehire him following an investigation of a sexual harassment charge. The district court granted summary judgment for the defendants finding no protectable property interest and no violation of a liberty interest under the Due Process Clause. The court of appeals affirmed.

Plaintiff Phillips worked as a temporary, part-time instructor. Under the terms of his collective-bargaining agreement with the state, Phillips' employment was on a fixed-term basis with no terms for renewal. Before renewing his contract for the spring 2004 semester, the college's director of legal affairs conducted an investigation into a written complaint by a student who alleged that Phillips sexually harassed her. The director concluded from her investigation that Phillips had violated the college's sexual harassment policy. The college's vice president of student and academic affairs informed Phillips that he would not be rehired.

The court first rejected the claim that Phillips was deprived of a property interest when he was not rehired, stating that property interests must arise from a legally enforceable expectation of continued employment based on either statute or contract. Here, the plaintiff cited no statute, and the court found no contractually-created property interest where the employee had only a fixed-term contract with no terms providing for renewal.

The court also rejected Phillips' claim that the college violated a liberty interest. To demonstrate a violation of a liberty interest, an employee must show that the reasons for separation from employment were stigmatizing and that those reasons were publicized. Phillips argued that he was required to disclose the reasons he was not rehired to colleagues and that this constituted publication. The court, however, held that compelled self-publication does not satisfy the publication element required for a liberty interest claim.

Public Employment Labor Relations Act

Education Minnesota-Osseo v. Indep. School Dist. 279, 742 N.W.2d 199 (Minn. Ct. App. 2007) <http://www.lawlibrary.state.mn.us/archive/ctappub/0712/opa061989-1204.htm>: Plaintiff teacher's union sued school district for failing to negotiate before replacing the district's former 403(b) plan vendors with a single vendor. The district court found that that PELRA does not require mandatory negotiation for 403(b) plan vendor selection. The court of appeals affirmed.

Osseo Area Schools Independent School District 279 unilaterally replaced twenty-four approved 403(b) plan vendors with a single vendor. Education Minnesota-Osseo sued alleging an unfair labor practice under PELRA, which mandates negotiation of "terms and conditions of employment." The statute's definition of "terms and conditions" of employment expressly excludes "retirement contributions or benefits" not related to health insurance coverage. Minn. Stat. §179A.03 subd. 19. The Minnesota Court of Appeals stated that the primary purpose of a 403(b) plan is to save for retirement and held that, therefore, selection of vendors for such plans is excluded by the plain language of PELRA. The court acknowledged that the policy reasons for excluding pension-related decisions from negotiation have more application to

defined-benefit plans than to defined-contribution plans like 403(b) plans, but stated that the issue is one to be resolved by the legislature.

Peterson v. County of Dakota, 479 F.3d 555, 154 Lab.Cas. P 60,374, 25 IER Cases 1547 (8th Cir. 2007) <http://caselaw.lp.findlaw.com/data2/circs/8th/062029p.pdf>: Plaintiff former county employee sued the county, her union, and various county and union officials alleging that the individual defendants and the union tortiously interfered with her employment contract, that the county violated her procedural due process rights, and that all defendants defamed her. The district court granted summary judgment for the defendants on all claims. The court of appeals affirmed.

Plaintiff Peterson worked for the county social services department as an intake officer when her supervisors received complaints about inappropriate comments she made to callers. Peterson was reprimanded orally for these and other violations and placed on temporary leave. Peterson's supervisors later received notice that police officers had seen Peterson at the courthouse on a day when she reported on her time card that she had been working in the office. At a pre-termination hearing, an officer testified to seeing Peterson at the courthouse though Peterson continued to deny the charge. After the hearing, Peterson was terminated. She sought a grievance through her union. At the grievance meeting, the county refused to reinstate Peterson but agreed to accept a resignation from Peterson by letter. When Peterson did not send a letter, the county denied her grievance. The union decided not to challenge the grievance denial.

The Eighth Circuit Court of Appeals first rejected Peterson's tortious interference claims against the county employees. In order to establish a tortious interference with contract claim, a plaintiff must show the other party knew of the existence of a contract and intentionally and without justification procured its breach. An employee who is acting within the scope of his or her duties is privileged to interfere with another employee's employment contract if it is done in good faith. The court found no evidence of bad faith on the part of the county employees. The court also rejected Peterson's tortious interference claim against union officers stating that Minnesota law does not recognize a claim for tortious interference against a union and that an employee's exclusive remedy against a union is for breach of the union's duty of fair representation.