



## Labor & Employment Law Section



### *Labor & Employment Law News*

Vol. 22, No 1 | Summer 2008

#### **In this issue ...**

##### **Federal**

[Disability Discrimination](#)

[Age Discrimination in Employment Act](#)

[Family and Medical Leave Act](#)

[Title VII Update](#)

[Labor-Management](#)

[Wage and Hour](#)

##### **State**

[State Law Discrimination Update](#)

[Minnesota Tort and Contract Cases](#)

[Unemployment Compensation](#)

[State Legislative Update 2008](#)

##### **Other**

[Public Sector](#)



## ***Labor & Employment Law News***

Vol. 22, No 1 | Summer 2008

### **Disability Discrimination**

*By Sarah J. Gorajski  
Littler Mendelson, P.C.*

#### **Eighth Circuit**

#### **No Duty to Accommodate Where Discharged Employee Fails to Show Benefit of Additional Time Off**

***Brannon v. Luco Mop Co.***, 521 F.3d 843 (8th Cir. 2008);  
<http://www.ca8.uscourts.gov/opndir/08/04/071434P.pdf>: The Eighth Circuit affirmed summary judgment in favor of Luco Mop, holding that a discharged mop-heads packer failed to establish that she was a qualified individual under the ADA.

While employed at Luco Mop, Brannon suffered from Type II diabetes and neuropathy. On March 8, 2005, Brannon suffered an injury from a splinter in her toe. The next day she underwent surgery because the splinter had caused an infection. Following the surgery, Brannon postponed her return to work three times. On April 26, 2005, Luco Mop sent Brannon a letter, advising her that she was being terminated immediately because of "extended absence[s]" and "deficient" work quality that caused strain on Luco Mop's "ability to meet [its] production requirements."

In affirming summary judgment, the Eighth Circuit noted that regular attendance at work is an essential function of employment. Accordingly, the court held that Brannon failed to establish that she was qualified because she was absent from work 40 of the 77 work days preceding her termination, and she failed to demonstrate that her requested accommodation of additional time off to recuperate would have enabled her to perform the essential job function of consistent attendance at work.

#### **Mental Instability Not Enough to Equitably Toll Time Period for Filing Action**

***Jessie v. Potter***, 516 F.3d 709 (8th Cir. 2008);  
<http://www.ca8.uscourts.gov/opndir/08/02/071050P.pdf>: The Eighth Circuit affirmed dismissal of a U.S. Postal Service employee's Title VII complaint alleging discrimination by her employer in connection with its response to her work-related injuries. The district court held that Jessie's Title VII claim against the federal agency was barred by her failure to contact an EEO counselor within the prescribed time limit. On appeal, Jessie argued that the time limit was

tolled because she was “physically and emotionally incapacitated” during the time when she should have contacted the EEO counselor. Jessie provided a medical opinion that mentioned “depression” but did not provide information regarding whether the depression affected her ability to understand her legal rights or act upon them.

In affirming the dismissal, the Eighth Circuit held that the medical opinion did not establish that Jessie’s mental condition prevented her from managing her legal affairs, especially in light of the fact that Jessie had pursued her workers’ compensation claims pro se and requested disability retirement from the Postal Service.

***Lyons v. Potter***, 521 F.3d 981 (8th Cir. 2008);

<http://www.ca8.uscourts.gov/opndir/08/04/071646P.pdf>: The Eighth Circuit affirmed summary judgment in favor of the Postmaster General, holding that Lyons’ ADA action against the U.S. Postal Service was untimely because she filed the action ten months after the USPS rendered a final agency decision on her EEO complaint. Lyons claimed that the ninety-day statutory deadline should be equitably tolled because she “was distraught over [her] situation with the post office and daily life was an effort for [her].” On appeal, Lyons argued that she was entitled to a separate evidentiary hearing on the equitable tolling issue. The Eighth Circuit rejected Lyons’ argument, holding that she was not entitled to an evidentiary hearing because she had an opportunity to present evidence of mental illness but failed to do so.

## **District of Minnesota**

### **ADD and Depression Are Not Disabilities Per Se**

***Erickson v. Canadian Pacific Railway***, 2008 WL 1699554, 2008 U.S. Dist. LEXIS 29124 (D. Minn. Apr. 9, 2008): The district court granted the railroad’s motion for summary judgment as to Erickson’s ADA claim, holding that Erickson failed to raise a genuine issue of material fact that he is disabled. Erickson brought an ADA action against the railroad after it disqualified him from the student engineering training program. Erickson argued that he was disabled under the ADA due to his ADD and depression.

The court rejected Erickson’s argument, finding that Erickson failed to present evidence that his ADD and depression substantially limited his ability to concentrate. Indeed, the court noted that Erickson was able to succeed at tasks despite his ADD and depression. Notably, Erickson completed high school and some college courses, and passed the conductor training program and the classroom portion of the engineer training program. Furthermore, the court concluded that Erickson failed to show that his ADD and depression, as opposed to his other personal issues, including his divorce and his mother’s death, caused him to have problems during the training.



## ***Labor & Employment Law News***

Vol. 22, No 1 | Summer 2008

### **Age Discrimination in Employment Act**

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

#### **Supreme Court: ADEA Covers Retaliation Claims by Federal Workers**

***Gomez-Perez v. Potter***, 128 S. Ct. 1931 (2008),

<http://www.supremecourtus.gov/opinions/07pdf/06-1321.pdf>: On May 27, 2008, the Supreme Court held in a six-three decision that § 633a(a) of the ADEA, [29 U.S.C. § 633a\(a\)](#), provides coverage for retaliation claims brought by federal workers against their employers.

The Court followed the reasoning of two earlier cases, which held that retaliation was barred by similar language in other discrimination statutes. The Court also rejected the argument that there was a clear difference between a cause of action for discrimination and one for retaliation. The employee's counsel in the case characterized the ruling as "an enormous victory for the more than one million federal civil service employees covered by the act."

#### **Eighth Circuit: *Price Waterhouse* "Direct Evidence" Model Applies to ADEA**

***Gross v. FBL Financial Services, Inc.***, 526 F.3d 356 (8th Cir. 2008),

[http://www.ca8.uscourts.gov/](http://www.ca8.uscourts.gov/opndir/08/05/071490P.pdf)

[opndir/08/05/071490P.pdf](http://www.ca8.uscourts.gov/opndir/08/05/071490P.pdf): Overturning a jury verdict for an employee who claimed he was demoted because of his age, the Eighth Circuit reiterated that Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), sets forth the governing rule of law for ADEA mixed-motives claims. A jury instruction used at the trial specified that the plaintiff was required to show that his age was "a motivating factor" in the demotion, and that the verdict must nonetheless be for the employer if it had shown that it "would have demoted plaintiff regardless of his age."

The Eighth Circuit determined that the jury instruction improperly shifted a burden of persuasion to the employer. Under the *Price Waterhouse* analysis, the burden of persuasion shifts to the employer when the plaintiff shows by *direct* evidence that an illegitimate factor played a *substantial* role in an adverse employment action. The court considered but rejected the argument that the Civil Rights Act of 1991 and the Supreme Court's later decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), supersede *Price Waterhouse* and the Eighth Circuit prior decisions applying it to ADEA claims. The court cited a Fourth Circuit case, *Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004), which reasoned that the "higher

evidentiary burden in *Price Waterhouse* was not “implausible” given that “age is often correlated with perfectly legitimate, non-discriminatory employment decisions.”

Since the case was remanded for a new trial, the court considered a separate jury instruction issue and held that the district court had not erred in refusing to include in the final instructions the italicized portion of the employer’s proposed instruction:

Defendant is entitled to make its own subjective personnel decisions, absent intentional age discrimination, *even if a factor motivating the decision is typically correlated with age, such as pension status, salary or seniority.*

### **“Contrived” Reason for Discharge Not an Issue of Fact**

***Riley v. Lance, Inc.***, 518 F.3d 996 (8th Cir. 2008),

<http://www.ca8.uscourts.gov/opndir/08/03/063697P.pdf>:

The employer asserted that it discharged the plaintiff because he failed to meet his supervisor’s sales performance expectations. In an effort to defeat the employer’s motion for summary judgment, the employee claimed that a performance improvement plan he had been subject to was “contrived.”

The court rejected the argument and affirmed the summary judgment for the employer. The court cited evidence that the employee was not meeting the employer’s legitimate expectations at the time the performance improvement plan was implemented, and further noted that the employee failed to satisfy the requirements of the plan.

On a separate issue, the court observed that the district court had erred in requiring the plaintiff to show he was meeting the “employer’s legitimate expectations” to establish a prima facie case. The correct standard is whether the plaintiff has shown that he was “otherwise qualified” for the position he held.

### **Claim by Employee Hired at Age Fifty and Discharged Two Years Later**

***Fitzgerald v. Action, Inc.***, 521 F.3d 867 (8th Cir. 2008),

<http://www.ca8.uscourts.gov/opndir/08/04/072199P.pdf>:

The plaintiff claimed he was discharged because of (i) his age and (ii) his need for employee benefits coverage; he asserted both ADEA and ERISA § 510 claims. Even though the plaintiff offered evidence of comments by his supervisor that suggested age animus, the court nonetheless upheld the summary judgment for the employer on the ADEA claim. The court was influenced by the fact that the plaintiff was age fifty when hired and was discharged only two years later. The court observed that the age-related comments by the supervisor “might create an inference of discrimination” in “different circumstances.”

The court reversed the summary judgment for the employer on the ERISA claim. On this claim, the court held that a fact issue was raised by the employer’s conflicting explanations about its action. The court remarked: “for one who tells the truth need not recite different versions of the supposedly same event.”

## **Sufficiency of Evidence to Raise Fact Issue in RIF Case**

***Johnson v. Deloitte & Touche, LLP***, No. 06-4399, 2008 U.S. Dist. LEXIS 44244, 2008 WL 2331578 (D. Minn. June 3, 2008): The court granted the employer's motion for summary judgment on ADEA disparate treatment and disparate impact claims arising from a fifty-six-year-old employee's discharge as part of a reduction in force. While a prima facie case in the RIF context was established by evidence that the three oldest of eight senior managers in a Minneapolis work group were included in the RIF, the court held that no fact issue was raised on the pretext question.

The court first rejected an argument that the RIF itself was unnecessary and pretextual. The court next held that an internal Deloitte email discussing the RIF and referring to potential "adverse impact issues" was not evidence of discriminatory animus. A manager's comment that the plaintiff was too old to be considered for partnership was deemed too remote in time to be indicative of age bias.

The court also held that the statistical evidence offered by the plaintiff did not permit a reasonable inference that the employer's explanation for his inclusion in the RIF was pretextual. The court characterized the statistical evidence submitted as "limited" and noted that there were "no other independent direct grounds for disbelieving" the employer's explanation.

The disparate impact claim was dismissed because the plaintiff had submitted insufficient evidence of the age demographics of the employees in the work group to permit comparison of the effect of the RIF on protected and non-protected employees.

## **Invalid Release Forms**

***Peterson v. Seagate US LLC***, No. 07-2502, 2008 U.S. Dist. LEXIS 42179, 2008 WL 2230716 (D. Minn. May 28, 2008): The court granted the plaintiffs' motion for summary judgment, determining that releases of ADEA claims were invalid. The court applied the standards set forth in the Older Workers Benefit Protection Act (OWBPA) and noted that they establish "strict" and "unqualified" requirements for such waivers.

The waivers at issue were defective because (i) employees were given inaccurate information about the job titles and ages of employees terminated in the RIF, and (ii) the disclosures about job categories and job codes were not provided in a manner calculated to be understood by the employees. The disclosures were found to be in violation of the OWBPA even though only one or two employees had been omitted.

The court rejected the argument that the overall releases were also rendered invalid by the fact that they also included provisions purporting to bar the employees from filing charges with the EEOC. The court concluded that such provisions did not invalidate the releases but instead "render[ed] only that specific provision invalid as a matter of law."



## Labor & Employment Law Section



# Labor & Employment Law News

Vol. 22, No 1 | Summer 2008

## Family and Medical Leave Act

By Mary M. Krakow, Esq.  
Fredrikson & Byron, P.A.

### Notice of Proposed Rulemaking

On February 11, 2008, the Department of Labor (“DOL”) published its Notice of Proposed Rulemaking (“NPRM”) in regard to the Family and Medical Leave Act regulations. Federal Reg., Vol. 73, No. 28, pp. 7876-8001, <http://edocket.access.gpo.gov/2008/pdf/E8-2062.pdf>. The FMLA regulations are found at 29 C.F.R. Part 825. The comment period on the proposed amendments closed on April 11, 2008.

In addition to proposing changes to the current FMLA regulations, the NPRM includes a description of the new military family leave provisions, a discussion of the issues the DOL has identified under those provisions, and a series of questions seeking public comment on subjects and issues that may be addressed in the final regulations.

The DOL’s website states that, after a full consideration of the comments received, the next step will be issuance of final regulations. No date is given for publication of the final regulations. <http://www.dol.gov/esa/whd/FMLANPRM.htm>.

### Case Law

#### Retaliation Because of Association with Complainant Co-worker

***Elsensohn v. St. Tammany Parish Sheriff’s Office***, -- F.3d --, 2008 WL 2315667, 2008 U.S. App. LEXIS 12209 (5th Cir. 2008), <http://www.ca5.uscourts.gov/opinions/pub/07/07-30693-CVO.wpd.pdf>: The Fifth Circuit held that the FMLA does not allow a spouse of another employee to assert a derivative FMLA claim based solely on the protected activity of the spouse.

Plaintiff Lawrence Elsensohn (“Elsensohn”) was a sergeant in the St. Tammany Parish Sheriff’s Office. Wendelle Elsensohn (“Mrs. Elsensohn”) also had worked for the same sheriff’s office prior to bringing an FMLA claim against the office. Mrs. Elsensohn settled her FMLA claim in October 2004 and, thereafter, left her employment. Elsensohn admitted that he did not involve himself in his wife’s FMLA claim “except to give her moral support.” All parties knew, however, that if his wife’s claim went to trial, he would be called as a witness.

Elsensohn received excellent job reviews after his wife left the office and reasonably expected to be promoted, but he was denied every promotion for which he applied. Upon Elsensohn's inquiry, the Deputy Warden Captain told him he would not receive a promotion of any kind. In a subsequent meeting, the sheriff and warden told Elsensohn there was "nothing" he could do to put himself in a better position for a promotion and further discussions were "closed off." Shortly thereafter Elsensohn was involuntarily moved to a less favorable night shift causing him to lose his holiday and overtime pay and reducing his ability to work details. He also was unable to seek secondary and supplemental employment.

Elsensohn asserted two claims against the defendants: (1) The defendants' actions were taken with discriminatory and retaliatory intent against Elsensohn because of his association with Mrs. Elsensohn's FMLA claim. (2) The defendants' tortious conduct caused him to suffer mental anguish and emotional distress. The district court dismissed Elsensohn's complaint. The Fifth Circuit affirmed.

Although citing § 2615(a)(2) as one basis for his FMLA claim, Elsensohn did not seek to satisfy the criteria for a retaliation claim under that provision. That provision makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). Rather, Elsensohn relied upon § 2615(b) which, in pertinent part, provides as follows:

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual -- . . .

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

The court found that neither provision applied to Elsensohn. He had not given information in connection with his wife's FMLA claim. In fact, he had admitted that he attempted not to involve himself in her claim. Also, Elsensohn did not testify in any proceeding relating to his wife's claim, and he was not about to testify when the alleged retaliatory conduct occurred because at that time his wife's case was already settled.

As to its dismissal of the FMLA claim, the Fifth Circuit rejected the argument that other courts had ruled that anti-retaliation provisions of Title VII protect employees based on a familial relationship to another employee who had opposed an unlawful or discriminatory action. *E.g., Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 647 (6th Cir. 2008). Instead, the Sixth Circuit looked for support from those courts that have refused to broaden the anti-retaliation provisions of the ADA and ADEA. *E.g., Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-69 (3d Cir. 2002); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996).

The Fifth Circuit covers Texas, Louisiana, and Mississippi.

## Twenty-Day Time Limit for Return of Medical Certification Form

*Townsend-Taylor v. Ameritech Services*, 523 F.3d 815 (7th Cir. 2008), <http://www.ca7.uscourts.gov/tmp/EMONGP4T.pdf>: The plaintiffs, Diedre Townsend-Taylor (“Townsend-Taylor”) and Ronnie Taylor (“Taylor”) both worked for Ameritech Services. Both had a record of absenteeism, and both lost their jobs when Ameritech denied their respective retroactive applications for FMLA leave. Both sued for interference with their FMLA rights. The district court granted summary judgment for the employer, and the Seventh Circuit affirmed.

Taylor missed several days of work to care for his sick child suffering from an infection. When he returned to work, his supervisor gave him the FMLA medical certification form. As was Ameritech’s usual procedure, the form contained Taylor’s name and a bar code that translated his social security number into symbolic language that protected his privacy. He was also told that his doctor must submit the completed form within twenty calendar days (the regulations provide for a fifteen-day deadline, but longer is permissible).

When the company’s third-party FMLA administrator (FMLA Processing Unit or “FPU”) had not timely received the completed medical certification form, it sent Taylor notice that he would have fifteen more days within which to submit proof of extenuating circumstances for his failure to file the certification in time. Within that fifteen-day period FPU received a letter from the child’s doctor stating that the doctor had completed the FMLA papers three times and “either faxed them to the [company] or gave them directly to the parents.” Taylor speculated that FPU had lost the faxes and, in doing so, had interfered with his FMLA rights. In fact, Taylor had crossed out his wife’s name and had written in his own and his social security number on the medical certification form he had given to the doctor, but he had not changed the bar code.

While the Seventh Circuit agreed that misleading instructions to an employee regarding the FMLA medical certification form can constitute prohibited “interference” with an employee’s FMLA rights, the court found nothing misleading about Ameritech’s form and instructions. The court specifically noted, “. . . an employee should know better than to submit a request for leave on another employee’s form, even if the other employee is the person’s spouse. There is a limit to how many warnings an employer must encumber its forms with.”

Taylor also argued that Ameritech should have given him yet another chance “to rectify the deficiencies in his attempt to excuse” his failure to meet the initial twenty-day deadline for returning the completed medical certification. He claimed the failure to do so was “interference” with his FMLA rights. Rather, the court said that Taylor’s assertion was stretching the concept of “interference” too far and would make deadlines ineffectual. “Taylor was given a ‘reasonable opportunity’ to cure the deficiency; no more was required.” See 29 C.F.R. § 825.305(d).

Finally, Taylor argued that Ameritech interfered with his FMLA rights by requiring that the doctor mail or fax the completed medical certification form, rather than permitting the employee to do so. The court disagreed. Such permission, it said, would facilitate fraud by creating an opportunity for the employee to forge a letter from a doctor or embellish it, before sending it to the employer.

Townsend-Taylor missed work due to a back problem and, upon her return, was given the FMLA medical certification form for her doctor to complete. Townsend-Taylor waited for twelve days before even giving the form to her doctor. FPU received the completed form nine days later – one day past the required deadline. Townsend-Taylor explained that she believed the clinic's hours overlapped her work shift so she had to wait until her first day off work to deliver the form to her clinic. The company did not accept that as a reasonable explanation and terminated her employment.

The court agreed, writing that while termination was a harsh result for missing the deadline by one day, Townsend-Taylor's "was a case of the last straw." The court further explained that Townsend-Taylor "had a history of failed attempts to justify absences as being authorized by the FMLA" and the company was "not required to exhibit more patience than the law [or] its own rules required." The court also rejected Townsend-Taylor's attempt to characterize her termination as prohibited retaliation for exercising her FMLA rights, finding there was no proof of retaliation. Townsend-Taylor was terminated for unexcused absences.

The Seventh Circuit covers Illinois, Indiana and Wisconsin.

### **Retaliation Claim Arising from a Demotion while Taking Intermittent FMLA Leave**

**Lewis v. School District #70**, 523 F.3d 730 (7th Cir. 2008), <http://www.ca7.uscourts.gov/tmp/EMONKG8J.pdf>: Defendant School District #70 demoted plaintiff Debra Lewis while she was taking intermittent FMLA leave to care for a sick parent. Lewis alleged the demotion was retaliatory. The school district said the demotion was based on performance. The district court granted the school district summary judgment. The Seventh Circuit reversed and remanded for further proceedings.

Lewis worked as a bookkeeper and treasurer for the school district beginning in 1997 and was regarded as doing praiseworthy work until 2004. In 2004, both of Lewis's parents became terminally ill, and Lewis attempted to care for them in her home. Her father died on May 23, 2004. Her mother came home from the hospital eight days later and needed constant care. Lewis often missed work intermittently to care for her mother – she missed 72.5 out of 242 workdays in fiscal year 2004. Lewis worked at home as much as she could.

The school board discussed Lewis during several school board meetings. The school board's meetings were tape-recorded pursuant to law.

In June 2004, the superintendent explained some of the hardships caused by Lewis's absences: she had failed to produce a cafeteria report for a number of months; the superintendent was forced to pay some of the school district's bills himself; the office did not function as smoothly without her; she was unavailable for vendor calls. Some board members suggested that they hire a new bookkeeper, but the superintendent dissuaded them. Nevertheless, the same day the superintendent sent Lewis a letter telling her to resume a regular 8:00 a.m. to 4:00 p.m. schedule by the start of the next school year.

In September 2004 Lewis missed six of twenty-one work days. She missed another seven of twenty work days in October.

At the October board meeting, the superintendent again talked about the inconveniences caused by Lewis's absences and described "performance" problems he claimed were unrelated to those absences: the school district's tax payments to the IRS had been late, resulting in a penalty; the school district had been denied credit from Verizon due to a blemish on its credit check; etc. One board member said Lewis should be fired for absenteeism and poor performance. The superintendent informed the board, however, that the school district potentially could be legally liable under the FMLA and suggested that Lewis be offered FMLA leave. The board approved of the leave, and in early November the superintendent sent Lewis notice of her right to twelve weeks of FMLA leave.

While taking intermittent FMLA, Lewis was still asked to perform all of the bookkeeper functions. She worked at home as much as possible, including nights and weekends. She was not paid for FMLA days or for her night and weekend work. The school district did not seek part-time help during this time.

At a November closed-session board meeting, several board members suggested firing Lewis but were concerned about FMLA liability if they did. The superintendent agreed that "it's all too soft to do anything about her in terms of performance." The school board members responded with disdain for the FMLA, saying the law was "just ludicrous" and it's because of "FMLA and Bill Clinton." The board encouraged the superintendent to continue documenting performance problems "in order to build a case" against Lewis "unrelated to her absences."

Lewis received her first and only performance review on March 10, 2005, from the superintendent. Lewis received two rankings of "very good," seven rankings of "satisfactory," and four rankings of "needs improvement." The superintendent specifically noted that "pride in work" had become an issue in the past six months with the reduced hour week. He also noted that most of the "satisfactory" or "needs improvement" items were a direct result of her intermittent absences.

At the board's March 21, 2005, meeting, which again by law was to be tape-recorded, the first fifty-six minutes of the eighty-one-minute session were missing from the tape. Coincidentally, the board discussed Lewis during the missing fifty-six minutes. The superintendent, in a signed note, stated that the machine malfunctioned. Another unsigned note stated that the operator had believed the machine was running when it was not.

At this meeting, the board decided to offer Lewis two options: (1) resign, with paid insurance for the rest of the school year, or (2) accept a reassignment to a teacher's assistant position with a much lower teacher's assistant salary beginning the next school year. The position was not intended to be temporary.

In the superintendent's letter to Lewis offering her the options, he stated the reason to remove her from the bookkeeper position was "you miss too much work to meet the essential functions of your present assignment."

Lewis's husband, an attorney, thereafter wrote an email to the superintendent suggesting that the school district's actions violated the FMLA. Lewis requested reinstatement to her

bookkeeper position in August 2005. The superintendent and the school district's counsel wrote back denying the request and explaining that newly discovered performance problems were the reason.

Lewis filed suit against the school district, the individual members of the board, the superintendent, and the school district's legal counsel alleging violation of the FMLA, breach of contract, defamation, and intentional infliction of emotional distress. The district court dismissed certain claims against specified defendants and entered summary judgment in favor of all remaining defendants on the grounds that the record was replete with evidence of Lewis's poor work performance.

On appeal, the Seventh Circuit affirmed dismissal of the defamation and intentional infliction of emotional distress claims. The court reversed on Lewis's FMLA retaliation claims finding that Lewis had presented sufficient evidence of an impermissible retaliatory motive under the direct method of proof to create a genuine issue of material fact for trial. The court explained that Lewis "need not prove that retaliation was the only reason for her termination; she may establish an FMLA retaliation claim by 'showing that the protected conduct was a substantial or motivating factor in the employer's decision.'" The court also explained that the direct method of proof does not require "direct evidence." Circumstantial evidence that suggests discrimination is sufficient. The court noted that the most significant evidence supporting Lewis's retaliation claim was the superintendent's letter informing her of the school district's decision to replace her as its bookkeeper and offering only one justification for the decision – "It was determined that you miss too much work to meet the essential functions of your present assignment." Circumstantial evidence supporting Lewis's retaliation claim included the board's and the superintendent's actions before and during her FMLA leave and at the time of her termination.



## ***Labor & Employment Law News***

Vol. 22, No 1 | Summer 2008

### **Title VII Update**

*By Leslie L. Lienemann  
Culberth & Lienemann, LLP*

#### **Race Discrimination**

***Batiste-Davis v. Lincare, Inc.***, 2008 WL 2079035, 2008 U.S. App. LEXIS 10649 (8th Cir. May 19, 2008), <http://www.ca8.uscourts.gov/opndir/08/05/04206P.pdf>: This appeal arose following a trial in which the district court admitted evidence of a prior lawsuit in which the plaintiff had alleged discrimination. The Eighth Circuit stated that such evidence is not admissible unless there is evidence that the prior suit was fraudulently filed. In this case, the district court abused its discretion in admitting the evidence when its probative value was substantially outweighed by its unfair prejudice. Nevertheless, the Eighth Circuit affirmed the district court's judgment as the "error was harmless in the context of the whole trial."

#### **Sex Discrimination**

***Sturm-Sandstrom v. County of Cook***, 2008 WL 2036820, 2008 U.S. Dist. LEXIS 38937 (D. Minn. May 13, 2008): In this case the district court denied summary judgment on claims of constructive discharge and sexual harassment creating a hostile work environment. The court found that plaintiff "easily" met her burden to demonstrate issues of material fact that would allow a jury to "infer gender discrimination." The evidence included a history of discrimination against women, including a remark that "women don't belong in law enforcement"; denial of training opportunities afforded to men; denial of the equipment provided to men; ostracism by co-workers; unwarranted criticism; and condescending memoranda in response to her concerns.

#### **Religious Discrimination**

***Winspear v. Community Development Inc.***, 2008 WL 1699481, 2008 U.S. Dist. LEXIS 29112 (D. Minn. Apr. 9, 2008): Plaintiff Winspear, whose brother had committed suicide prior to his employment, worked for CDI and confided in CDI's president about his brother's suicide. CDI's president hired his wife to work as a receptionist. The president's wife repeatedly told Winspear that she had the gift of communicating with the dead, that she had communicated with his dead brother, that his dead brother was in hell, and that he needed to find God or he would go to hell. She described to Winspear the tortures she said his brother was enduring in hell. When Winspear reported the conduct to the president and explained that

these “messages” were very upsetting to him, the president told him that his wife had the “gift” and that Winspear should listen to her. After five or six weeks, the conduct stopped. Winspear continued to work for a few months thereafter, during which time the receptionist asked him to attend church every few weeks. He quit seven months after the conduct started.

Winspear sued on a theory of reverse religious discrimination leading to constructive discharge. The court found that Winspear “may have” raised a fact issue as to whether he suffered a hostile work environment, but the court rejected Winspear’s constructive discharge claim because of the time gap between the harassment and the resignation.

## **Retaliation**

***Soto v. Core-Mark Int’l, Inc.***, 521 F.3d 837 (8th Cir. 2008),

<http://www.ca8.uscourts.gov/opndir/08/04/071301P.pdf>:

On appeal from the district court’s grant of summary judgment, the Eighth Circuit affirmed dismissal of Soto’s retaliation claim. Soto argued that the district court erred because it accepted as true the employer’s articulated reason for terminating his employment (that he had been found sleeping on the job), and disregarded Soto’s testimony that he was stretching his back and not sleeping.

On the issue of pretext, the Eighth Circuit held that Soto’s testimony did not call into question the employer’s good faith belief that he was sleeping on the job. Soto claimed that, after he expressed his belief that he was being discriminated against, his manager said, “Get out of my office.” The Eighth Circuit found that the statement was not evidence of retaliatory motive, but “at most, the evidence shows [the manager] was frustrated with repeatedly having to tell him to follow the rules.”

***Van Horn v. Best Buy Stores, L.P.***, 2008 WL 2151692, 2008 U.S. App. LEXIS 11068 (8th Cir. May 23, 2008), <http://www.ca8.uscourts.gov/tmp/072677.html>: In this case, the Eighth Circuit reiterated its view that a plaintiff may not succeed on a Title VII retaliation claim by showing that retaliation was a “motivating” factor in the employer’s adverse employment decision. Rather, the plaintiff must show that retaliation was “a determining factor” in the decision.

***Smith v. International Paper Co.***, 523 F.3d 845 (8th Cir. 2008),

<http://www.ca8.uscourts.gov/opns/opFrame.html>:

Smith originally filed claims of race discrimination, hostile environment harassment, and retaliation, all of which were dismissed on summary judgment. On appeal, Smith challenged only the grant of summary judgment on the retaliation claim. The Eighth Circuit held that Smith had not engaged in protected conduct when he complained to his employer about his manager’s “yelling, cussing and hollering at him” without reference to his race.

***Brannum v. Missouri Dept. of Corrections***, 518 F.3d 542 (8th Cir. 2008), <http://www.ca8.uscourts.gov/opndir/08/03/071598P.pdf>: In this case, the Eighth Circuit determined that the employee had not engaged in protected conduct when she assisted a co-worker in making a

complaint about a comment made to him that “women are better by and large as they do a better job than men do anyway and are more patient and nurturing than men.” The Eighth Circuit held that no reasonable person would have believed that this comment was either harassing or discriminatory. Therefore the report of the comment was not protected conduct.

***Recio v. Creighton University***, 521 F.3d 934 (8th Cir. 2008),

[http://www.ca8.uscourts.gov/opndir/](http://www.ca8.uscourts.gov/opndir/08/04/072460P.pdf)

[08/04/072460P.pdf](http://www.ca8.uscourts.gov/opndir/08/04/072460P.pdf): Recio, an associate professor, alleged retaliation for her prior complaint of national origin discrimination. The Eighth Circuit, on review from grant of summary judgment, identified nine actions claimed by Recio to be materially adverse employment actions. The Eighth Circuit dismissed two of these allegations because Recio offered no evidence to support them. A delay in notification of a job vacancy, keeping her office too cold, requiring her to acknowledge her probation in her employment contract, and denying her opportunities to study abroad were “trivial harms” and therefore not actionable. “Disallowing Recio from maintaining her preferred teaching schedule, without any indication that Recio suffered a material disadvantage” was not actionable retaliation. Similarly, the instances of ostracism were no more than petty slights. Although denial of the opportunity to teach advanced classes could be a materially adverse action, Recio failed to demonstrate the causal connection between her complaint and her course assignments. The court did not discuss any impact of all of the alleged actions taken together.

***Carter v. Dayton Rogers Manufacturing, Co.***, 543 F. Supp. 2d 1026 (D. Minn. 2008): The district court granted summary judgment for Dayton Rogers on the sex discrimination claim but denied defendant’s motion for summary judgment on plaintiff’s claim of retaliation, finding that fact issues existed as to the causation element. The court wrote, “The Court finds that the timing and circumstances of Carter’s termination are suspicious, at best. Although there are no documented issues regarding Carter’s performance in the four years prior to her filing the MDHR/EEOC charge, Lowry, the same individual accused of discrimination, suddenly decided to informally survey Carter’s performance with the other divisions.”



## ***Labor & Employment Law News***

Vol. 22, No 1 | Summer 2008

### **Federal Labor Management**

*By Marlin Osthus*

*Regional Attorney, NLRB Regional Office*

#### **10(j) Injunctions Involving Region 18**

**Whitesell Corporation** (S.D. Iowa, Civ. No. 3-07-CV-00009-CRW-TJS); via PACER:

[https://ecf.iasd.uscourts.gov/cgi-bin/HistDocQry.pl?318147637169476-L\\_413\\_0-1](https://ecf.iasd.uscourts.gov/cgi-bin/HistDocQry.pl?318147637169476-L_413_0-1)

On April 25, 2008, Region 18 filed a Motion for Adjudication in Civil Contempt and for Other Civil Relief, a supporting memorandum, an order to show cause, proposed findings of fact and conclusions of law, and a proposed order with the federal district court for the Southern District of Iowa. The motion asks the court to hold Whitesell Corporation in civil contempt with regard to a temporary injunction issued by the court pursuant to section 10(j) of the National Labor Relations Act.

The motion alleges that Whitesell has bargained in bad faith with Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 359, in violation of the court's order, by (since issuance of the court's 10(j) order) making bargaining proposals intended to undermine the union's status as collective-bargaining agent; engaging in regressive bargaining; making proposals giving Whitesell unilateral control over employee terms and conditions of employment; failing to provide information; unilaterally changing terms and conditions of employment; failing to rescind unilateral changes to the 401(k) benefit as ordered by the court; and, most recently, refusing to meet for bargaining.

A hearing on the motion before Judge Wolle is scheduled for June 12, 2008.

#### **Board Decisions Involving Unfair Labor Practices**

**Gelita USA Inc.**, 352 N.L.R.B. No. 59 (April 30, 2008);

[http://www.nlr.gov/shared\\_files/Board%20Decisions/352/V35259.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/352/V35259.pdf); 2008 WL 1957902, (N.L.R.B.), April 30, 2008; 2008 NLRB LEXIS 131: Affirming the decision of ALJ William Cates, Board Members Schaumber and Liebman found 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. The Board ordered that the employee's ballot be opened and counted, as it was determinative. The Board agreed as well that other allegations related to interrogation, threats, and promises to

resolve problems in order to discourage support for the union were unfair labor practices in violation of section 8(a)(1) of the Act.

***Leiferman Enterprises, LLC d/b/a Harmon Auto Glass***, 352 N.L.R.B. No. 24 (Feb. 21, 2008); [http://www.nlr.gov/shared\\_files/Board%20Decisions/352/v35224.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/352/v35224.pdf); 2008 WL 501518, (N.L.R.B.), February 21, 2008; 2008 NLRB LEXIS 46: ALJ Jane Vandeventer sustained the complaint's allegations that Respondent Leiferman violated the Act by refusing to provide information regarding health care contributions and regarding Respondent's financial condition to 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. Board Members Schaumber and Liebman denied exceptions filed by the Party-In-Interest, Lighthouse Management Group, Inc., Receiver, to these findings of the ALJ.

However, the Board concluded that Respondent did not violate the Act by failing to provide the union with information about Respondent's merit pay proposal because Respondent established that the information did not exist. The Board also noted that the complaint did not allege that Respondent failed to negotiate about goals or standards regarding its merit pay proposal. The Board also found, contrary to the judge, that the Party-In-Interest is not personally liable to remedy Respondent's unfair labor practices.

#### **Decisions by Administrative Law Judges**

***Eichorn Motors, Inc.***, 18-CA-18226 (Feb. 5, 2008); [http://www.nlr.gov/shared\\_files/ALJ%20Decisions/2008/JD-05-08\\_2.pdf](http://www.nlr.gov/shared_files/ALJ%20Decisions/2008/JD-05-08_2.pdf); 2008 WL 348767; 2008 NLRB LEXIS 19: The last newsletter contained a summary of the Region's success in obtaining reinstatement of two of three discharged employees in a 10(j) proceeding before U.S. Chief District Judge James M. Rosenbaum.

On February 5, 2008, ALJ John T. Clark issued a decision in the underlying unfair labor practice cases. He concluded that Respondent unlawfully disciplined and discharged all three employees identified in the consolidated complaint because of their support for the United Automobile Workers International Union; unilaterally changed terms and conditions of employment in violation of the Act (including unilaterally implementing work performance measurements and unlawfully utilizing those measurements to discharge the three employees); and engaged in numerous threats and promised improved conditions of employment, in order to discourage support for the union.

No exceptions were filed to Judge Clark's decision, and this matter is currently in compliance.



## ***Labor & Employment Law News***

Vol. 22, No 1 | Summer 2008

### **Wage and Hour**

*By Sara McGrane and Ryan Olson, Felhaber, Larson, Fenlon and Vogt  
Chris Jozwiak and Daniel Leland, Halunen & Associates*

#### **Meal Break Law Update**

In our last article, we discussed *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 WL 2780504, 2007 U.S. Dist. LEXIS 71179 (D. Minn. Sept. 24, 2007). That case holds 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 *Frank* court ruled contrary to *Rios v. Jennie-O Turkey Store, Inc.*, No. 27-CV-03-020489 (Hennepin Cty. Dist. Ct. Oct. 6, 2006).

When our last article was written, the *Rios* decision was under reconsideration by the state court. In mid-February, the state court denied Plaintiffs' Motion to Reconsider Summary Judgment, concluding the plain language and the legislative history of Minnesota Statutes section 177.254 and Minnesota Rule 5200.0120 do not support a finding of a mandatory bright line thirty-minute minimum meal break ("*Rios II*").

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." In *Rios II*, the state court observed that the earlier language of the statute required employers to give employees a twenty-minute lunch break if the employees worked eight or more consecutive hours. The final version of the law, however, eliminated the bright line twenty-minute minimum meal break, opting for the more flexible "sufficient time" standard. Because the legislature specifically rejected a twenty-minute minimum meal break, the *Rios II* court held that section 177.254 cannot be read to require a more lengthy bright-line thirty-minute minimum meal break.

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.

The *Rios II* court noted that the legislative history also demonstrated why Rule 5200.0120, which was adopted by the Minnesota Department of Labor and Industry in 1986 (three years before the legislature enacted section 177.254), does not support a bright-line thirty-minute minimum meal break. The *Rios II* court noted that when provisions of a rule and statute conflict, the most recently enacted law (i.e., section 177.254) prevails. Moreover, it noted that a “subsequently enacted Statute supersedes and renders unenforceable the earlier Rule with which it conflicts.” Thus, even assuming there is a conflict because Rule 5200.0120 is interpreted to support the thirty-minute minimum meal break argument, the *Rios II* court observed that section 177.254, which established the “sufficient time” test, controls.

The *Rios II* court further observed that Rule 5200.0120 relates directly to minimum wage requirements, not minimum meal breaks. Thus, the *Rios II* court noted that it would be imprudent to “adopt a line of analysis whereby some relatively unclear text from a rule relating to minimum wage hours is exported to create a ‘bright line’ test in a meal break statute, especially when the legislature unambiguously rejected even a twenty-minute minimum in the later enacted statute.”

Furthermore, the *Rios II* court noted that Rule 5200.0120 does not employ typical language of mandate, such as shall or must. Instead, the Rule focuses on what “is ordinarily long enough” because it was intended to address hours worked for purposes of minimum wage laws by determining when a lunch break constitutes a bona fide meal period.

Accordingly, the legislative history provided to the state court in response to the motion for reconsideration in *Rios II* should convince courts that the *Rios II* decision, not the *Gold’n Plump* decision (which likely did not have the benefit of the legislative history before it), reflects Minnesota’s meal-break law.

***Bolin v. Japs-Olson Co., Civ.***, 2008 WL 1699531, 2008 U.S. Dist. LEXIS 29129 (D. Minn. April 9, 2008): The court held, without much discussion, that neither the federal nor state Fair Labor Standards Acts required the defendant employer to give the plaintiffs a bona fide meal break—that is a meal period during which the employee was completely relieved from duty. The court noted that under Minnesota law, an employer must permit employees who work eight or more consecutive hours sufficient time to eat a meal, and that “state and federal laws ensure that employers expecting workers to perform job-related activities while eating—even if only minimal supervision—must compensate workers for that time.” The court thus granted summary judgment in favor of the defendant employer, noting that the employer allowed the plaintiffs to eat while working, and order compensation for the employees for that time.

### **The Minnesota Fair Labor Standards Act**

***Milner v. Farmers Ins. Exchange***, 748 N.W.2d 608 (Minn. 2008)  
<http://www.lawlibrary.state>.

[mn.us/archive/supct/0805/OPA060178-0515.pdf](https://www.mn.us/archive/supct/0805/OPA060178-0515.pdf): The *Milner* decision answered a question of first impression concerning the interpretation and application of the Minnesota Fair Labor Standards Act ("MFLSA"). Employees brought a class-action lawsuit against their employer, Farmers Insurance Exchange, claiming that Farmers misclassified them as exempt and failed to pay them overtime. The plaintiffs sought, inter alia, compensatory damages, injunctive relief, attorneys' fees and costs, and any other relief afforded by the MFLSA. In defense, Farmers argued the employees were exempt under the bona fide administrative capacity exemption.

The issue of whether the employees were exempt went to the jury. Following a special verdict form (which did not address whether Farmers failed to maintain appropriate records), the jury concluded that the employees were not exempt—employed in a bona fide administrative capacity—but did not award any compensatory damages, implicitly concluding that the employees did not demonstrate that they worked more than forty-eight hours in a week during the five-year class period.

After the jury returned its verdict, Farmers moved for judgment in its favor under Minnesota Rule of Civil Procedure 58.01, and the employees asked the district court to address their request for injunctive relief and civil penalties. The district court denied Farmers' motion and concluded the employees were entitled to injunctive relief, civil penalties, and attorney fees and costs under Minnesota Statutes section 177.27. The district court found that Farmers violated numerous sections of the Act during the class period by refusing to classify the class as employees under the Act (or misclassifying the class as exempt employees) and failing to keep the requisite time records for them. Accordingly, the district court enjoined Farmers from misclassifying Minnesota claims representatives as exempt and ordered Farmers to comply with the record-keeping requirement. The district court also ordered Farmers to pay the individual employee-litigants a civil penalty of \$500 per person, per pay period worked during the class period, totaling \$376,000, and awarded over \$1.8 million in attorney fees and costs.

The court of appeals affirmed in part as modified, reversed in part, and remanded. The court concluded that although the district court had the authority to order injunctive relief and civil penalties under the Act, civil penalties were payable only to the state, not to individual litigants. The district court did not abuse its discretion in determining that the employees were the prevailing party and awarding attorneys fees using the lodestar method. The court of appeals found, however, that the district court abused its discretion in applying a 1.5 multiplier to the lodestar amount in calculating attorney fees.

The Minnesota Supreme Court granted review to consider "(1) whether misclassification of employees is a violation of the MFLSA and in what circumstances private parties may seek civil penalties and injunctions; (2) whether the district court's findings of fact, conclusions of law, and order were proper in light of the special verdict; and (3) whether the district court abused its discretion in awarding attorney fees."

*Misclassification and private parties' ability to seek civil penalties and injunctions*

Under the MFLSA, section 177.27, subdivision 8 provides that “[a]n employee may bring a civil action seeking redress for a violation or violations of sections 177.21 to 177.35 directly to district court.” The court, however, concluded that “[a]n employer’s act of misclassifying an employee, without more, does not constitute a violation of the MFLSA.” The court agreed with Farmers’ contention that section 177.23, subdivision 7(6) is simply a definition of the term employee, not a substantive provision that can be violated because, like the rest of section 177.23, it does not impose any affirmative requirement on an employer upon which a violation may be based. Unlike several of an employer’s obligations under the Act (i.e., obligation to make and keep records), section 177.23 merely lists definitions and does not impose any affirmative requirement upon which a violation may be based.

With respect to the civil penalty and injunctive relief, Farmers argued that either could only be imposed by the Commissioner; if they could be imposed by a district court, they could only be awarded if compensatory damages were awarded. The court concluded that employees may seek injunctive relief and civil penalties in district court. Minnesota Statutes section 177.27, subdivision 8 specifies:

An employer who pays an employee less than the wages and overtime compensation to which the employee is entitled under sections 177.21 to 177.35 is liable to the employee for the full amount of the wages, gratuities, and overtime compensation, less any amount the employer is able to establish was actually paid to the employee and for an additional equal amount as liquidated damages. *In addition*, in an action under this subdivision the employee may seek the damages and other appropriate relief provided by subdivision 7 and otherwise provided by law.

Section 177.27, subdivision 8 specifically provides that the relief obtainable from the Commissioner in subdivision 7 is available to a private party in a civil action and the relief includes civil penalties and injunctive relief. The phrase “[i]n addition” is not limiting, but granting. To illustrate, the court noted that an employee can bring a claim against an employer for failing to maintain records, and, “[a]lthough such a violation may not result in compensatory damages, other relief, such as civil penalties or injunctions, may be appropriate.”

The court then held that all civil penalties awarded under the MFLSA are payable to the state, not to individual litigants. Noting that it must look to related statutes for guidance because the MFLSA is silent as to whom civil penalties are payable, the court looked not to the federal FLSA or the Minnesota Human Rights Act, but turned instead to the Minnesota Payment of Wages Act (“PWA”). That statute addresses how often wages must be paid and establishes penalties for wages that are paid late. The court observed that the PWA expressly specifies that civil penalties are to be paid to the individual employee; if the same result had been intended under the MFLSA, the legislature would have used similar language.

#### *District Court’s Findings of Fact and Conclusions of Law*

Farmers claimed the district court erred in finding that it violated the recordkeeping provisions of the MFLSA. Farmers contended that the employees failed to plead a violation of the recordkeeping provision in their complaint, that the issue of recordkeeping was not raised by

the evidence during trial, and that there were no questions on the issue submitted to the jury. The court, however, noted that the recordkeeping provision of the MFLSA was referenced in the complaint, that Farmers admitted in its answer that it did not keep records pursuant to MFLSA, and that recordkeeping was an issue at trial as lay and expert witnesses testified about their inability to calculate hours worked given the lack of recordkeeping by Farmers. Thus, because a district court can make factual findings not submitted to a jury, and because the recordkeeping issue was raised, the court concluded that the district court properly found that Farmers violated the recordkeeping provisions of the MFLSA.

The court then found that Farmers' recordkeeping violations could serve as a basis of an award of civil penalties but agreed with Farmers that the district court's award of civil penalties was inconsistent with the jury's special verdict. Under section 177.27, subdivision 7, an employer is subject to a civil penalty "of up to \$1,000 for each violation for each employee." The amount of a civil penalty is determined by "the size of the employer's business and the gravity of the violation." Because the district court based its award in part on a finding that "the claim representatives worked 'very long hours,' routinely in excess of 48 hours per week" (which was inconsistent with the jury's finding of no compensatory damages) and on Farmers' misclassification (which is not a violation of the MFLSA), the court remanded the case to the district court to recalculate the amount of the civil penalty.

### **Attorney fees**

Reasonable attorneys' fees can be awarded after any violation of the MFLSA; thus, the court concluded that the employees were entitled to reasonable attorneys' fees calculated under the lodestar method. The court, however, remanded the determination of the amount of the attorneys' fees to the district court because that court had failed to provide the clear explanation required to support the reasonableness of the attorney fees award in light of Farmers' challenge. The court stressed that the district court had failed to even consider the employees' failure to prove their claim for millions of dollars in unpaid overtime compensation – the central issue at trial. On remand, the court instructed the district court to "limit the attorney fee award to an amount that is 'reasonable in relation to the results obtained'" and to base the attorney fees award on the lodestar amount alone, without the use of a multiplier. An upward adjustment is warranted only in "rare cases of 'exceptional success,'" which the employees did not obtain in this case.

### **Misclassifying an Employee under FLSA and Fiduciary Duty under ERISA**

***Maranda v. Group Health Plan, Inc.***, Civ. No. 07-4655 (DSD/SRN), 2008 WL 2139584, 2008 U.S. Dist. LEXIS 41500 (D. Minn. May 20, 2008): In *Maranda*, an employee brought a class action lawsuit against her employer alleging that the employer violated state and federal fair labor standards acts by misclassifying her and the purported class of others similarly situated as exempt administrative employees. The suit also alleged that the employer violated the Employee Retirement Income Security Act ("ERISA") by breaching its fiduciary duty in failing to account for overtime in administering its plan (i.e., contribute 5% of the employees' eligible earnings, including overtime, to the plan). The employer's motion to dismiss the ERISA claims contended they were not legally cognizable because plan contributions were based on compensation actually paid to the employee, not on allegedly owed overtime.

The court granted the motion to dismiss. The court observed that under the plan's plain language a participant's eligible earnings are the "'total of all compensation paid' to the individual during the Plan year. Eligible earnings do not include compensation that *should* have been paid." Accordingly, the court, after distinguishing unpublished opinions from district courts in the Ninth Circuit, found that the employer provided the benefits it was required to provide under the plan and, thus, did not breach its fiduciary duty under ERISA.

### **Common Performance Measurement Policies and Class Actions**

***Brennan v. Qwest Communications Intern. Inc.***, Civ. No. 07-2024, 2008 WL 819773, 2008 U.S. Dist. LEXIS 27080 (D. Minn. March 25, 2008): This case involved plaintiffs' motion for conditional class certification on both Minnesota and federal Fair Labor Standards Act claims. The plaintiffs, network technicians, argued that production standards used to assess employees' work productivity forced plaintiffs to work uncompensated overtime hours. Specifically, Qwest utilized a "Quality Jobs per Day" program ("QJD program"). Qwest's QJD program computed a QJD score for each employee based upon the number of "productive jobs" the employee completed within the total hours worked on a given day. Plaintiffs' QJD scores were directly related to their performance classification and could subject them to progressive discipline.

The plaintiffs argued that Qwest's QJD policy forced them, and others similarly situated, to work without pay both before and after their shifts and during meal and rest breaks in violation of the FLSA. The plaintiffs thus moved for conditional class certification, defining the proposed FLSA class as "all individuals who are, were or will be employed by Defendants in the State of Minnesota as Network Technicians . . . ." The plaintiffs alleged that members of the proposed class were all subject to the same job requirements and all subject to the same QJD policy.

The defendants argued, *inter alia*, that conditional class certification was not appropriate because performance expectations are not a common factor supporting collective action. Qwest contended the plaintiffs' employment as network technicians is individualized and that performance measures vary among the different classes of technicians.

The court found, however, that the plaintiffs' declarations demonstrated a colorable claim that they had worked off-the-clock to complete required tasks and that supervisors were aware of this and took no action in response. Further, the court noted that, even though the plaintiffs reported to different garages throughout Minnesota and to different supervisors, all had made similar allegations regarding the effect of Qwest's QJD program. The court thus granted the plaintiffs' motion for conditional class certification.

### **Employers Bound to Wage and Hour Actions of Their Agents**

***Copeland v. ABB, Inc.***, 521 F.3d 1010 (8th Cir. 2008), <http://www.ca8.uscourts.gov/opndir/08/03/063403P.pdf>: The plaintiff, Cynthia Howser, was an hourly employee receiving medical treatment for a workers' compensation injury. ABB's third-party workers' compensation administrator, Gallagher Basset Services ("Gallagher"), scheduled a medical reevaluation for

plaintiff during her regular working hours. ABB argued that it never authorized Gallagher to make an appointment for the plaintiff.

The district court granted partial summary judgment in favor of the employee and ordered ABB to compensate the plaintiff for the time spent traveling to and attending the appointment. The employer appealed. The appellate court found Gallagher to be acting as an agent of ABB, and thus the 3.8 hours plaintiff missed to attend her doctor's appointment were directed by ABB, and constituted hours "worked" under the Fair Labor Standards Act. The court further noted that, even though the plaintiff had elected to take unpaid leave to attend the appointment, the plaintiff's FLSA rights were statutory and thus could not be waived.



## Labor & Employment Law News

Vol. 22, No 1 | Summer 2008

### State Law Discrimination Update

By Anne M. Radolinski  
Fredrikson & Byron, P.A.

#### Adoption of the *Ellerth/Faragher* Standard

[\*Frieler v. Carlson Marketing Group, Inc.\*](#), No. A06-1693, \_\_\_ N.W.2d \_\_\_, 2008 WL 2229478, 2008 Minn. LEXIS 290 (Minn. May 30, 2008). The Minnesota Supreme Court, in a decision issued in late May, addressed a lingering ambiguity created by the 2001 amendment to the definition of sexual harassment under the Minnesota Human Rights Act. The legislature amended the definition of sexual harassment with respect to employment in 2001 to remove the following phrase, noted in italics, from section 363.01, subdivision 41 (3) (now section 363A.03, subdivision 43 (3)):

“Sexual Harassment’ includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other . . . conduct or communication of a sexual nature when . . . (3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment . . . , or creating an intimidating, hostile or offensive employment . . . environment; *and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.*”

The removal of this phrase in 2001 caused much discussion concerning whether the amendment was meant to create a strict liability standard, whether the amendment was intended to signal the adoption in whole or in part of the United States Supreme Court direction in *Ellerth* and *Faragher*, and related questions.

Plaintiff, Judy Frieler brought an action against Carlson Marketing for hostile-work-environment sexual harassment under the MHRA, as well as for common-law assault and battery, arising out of the alleged behavior of Ed Janiak, a supervisor at the company, but not Frieler’s supervisor. Frieler had inquired about moving from her part-time position in the bindery department to a full-time position in the shipping department, where Janiak was the supervisor. The alleged behavior by Janiak occurred during the time when Frieler was waiting to hear whether she would be moved to his department and thus during a period in which she reported to another supervisor. Frieler told coworkers and her group leader about the behavior. The group leader insisted that Frieler report the behavior to human resources, and an investigation ensued. Janiak denied the harassment but resigned during the investigation.

Frieler resigned after her psychologist recommended that she not return to any job at the company.

The district court granted summary judgment in favor of the company on Frieler's harassment claim, as well as her assault and battery claims, ruling that Frieler had failed to raise a genuine issue of material fact as to (i) whether the company knew or should have known of the harassment; (ii) whether Janiak was her supervisor for purposes of vicarious liability; and (iii) as to whether the harassment was foreseeable either at the company or in the industry.

The court of appeals affirmed, ruling that Minnesota had not adopted the *Ellerth* and *Faragher* standard and that there was no evidence that the company knew or should have known of Janiak's behavior. The court of appeals also ruled that Frieler's assault and battery claims failed because Frieler did not produce the expert testimony necessary to raise a genuine issue as to the foreseeability of sexual harassment for warehouse or collation work.

The Minnesota Supreme Court granted Frieler's petition for review to determine whether the *Ellerth/Faragher* standard should apply to the Minnesota Human Rights Act, and whether foreseeability can be established only by expert affidavit or expert testimony for purposes of surviving summary judgment. The court also granted a cross-petition by the company in regard to whether Frieler had raised a fact issue as to Janiak's supervisory authority over Frieler.

The Minnesota Supreme Court affirmed the dismissal of the assault and battery claims, but reversed summary judgment for the company and remanded the sexual harassment claim. Justice Page delivered the opinion of the court with respect to the sexual harassment claim, and Justice Gildea delivered the opinion of the court with respect to the assault and battery claims. Justice Page dissented from the court's opinion on the assault and battery claims, and Justices Gildea, G. Barry Anderson, and Dietzen dissented at length from the court's opinion on the sexual harassment claim.

In its discussion of Frieler's sexual harassment claim involving the behavior of the shipping department supervisor, the Minnesota Supreme Court adopted the *Ellerth/Faragher* standard, and ruled that an individual who brings a claim under the MHRA for sexual harassment by a supervisor need not prove that the employer knew or should have known about the sexual harassment and failed to take timely and appropriate action. The court, citing and quoting from the *Ellerth* and *Faragher* cases, held that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over a victimized employee. An employer may raise an affirmative defense to liability or damages by showing a preponderance of the evidence that (1) it exercised reasonable care to prevent and promptly correct sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This defense is not available where tangible employment action is taken against the employee.

The Minnesota Supreme Court's adoption of the *Ellerth/Faragher* standard is perhaps not surprising; however, the court's discussion regarding what constitutes a supervisor for vicarious liability purposes may give one pause. The court commented at some length on how

various federal circuits have addressed the threshold definition of a supervisor in the years since the *Ellerth* and *Faragher* decisions. In the end, the court determined that the EEOC's definition should be used to determine whether a person is a supervisor for purposes of sexual harassment claims under the MHRA. The court's specific reference to the EEOC definition is as follows:

Under the EEOC definition, an individual qualifies as an employee's supervisor if "the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or . . . the individual has authority to direct the employee's daily work activities." EEOC, Notice No. 915.002 (June 18, 1999) . . . . According to the EEOC, an employee should be considered a supervisor even if he or she does not have the final say in making tangible employment decisions if "the individual's recommendation is given substantial weight by the final decision-maker(s)." *Id.* In addition, "an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a 'supervisor' when determining whether the employer is vicariously liable. *Id.*

The court, in its application of the definition to Frieler's claims, focused on the degree of actual power Janiak had over Frieler. The court appears to require a showing of a significant degree of authority over the plaintiff. The court relied upon the following alleged facts in determining that Frieler had raised an issue of fact:

1. Janiak was the supervisor in the shipping department when Frieler applied for an open position in that department.
2. When Frieler inquired about the shipping department position, she was told by her own supervisor that she must speak to Janiak about the position.
3. When Frieler spoke to Janiak, he told her that he would consider her for the position.
4. Both Janiak and Frieler's supervisor interviewed her for the open shipping department position.
5. Despite Janiak's assertions to the contrary, there was evidence that the decision to offer her the position was a group decision by Janiak, Frieler's supervisor, and another individual.
6. Janiak was given authority to determine whether Frieler's attendance issues would interfere with the duties of the shipping department position.
7. Janiak testified that he and Frieler's supervisor told her that if she wanted the position, she could not miss any time for the next two weeks.
8. Janiak monitored her attendance and went to Frieler's supervisor to talk about the concern when Janiak found that she had missed several days of work during this time period.

9. Frieler's supervisor told Janiak to talk to Frieler about her absences, which Janiak did.
10. Janiak used his position as shipping department supervisor to bring Frieler to the limited-access room where the alleged sexual harassment took place, by telling her that he wanted to show her tasks related to the open position.
11. All of the alleged sexual harassment occurred while Frieler was being considered for the open position in the shipping department.

All eyes will be on Frieler's case as it proceeds after remand and on subsequent district court and appellate court decisions as Minnesota courts grapple with applying the definition of supervisor articulated by the Minnesota Supreme Court in *Frieler* and with applying the *Ellerth/Faragher* analysis to the Minnesota Human Rights Act.

In regard to the assault and battery claim, the court affirmed summary judgment in favor of the employer. To survive summary judgment on a claim that an employer is liable for an employee's intentional tort based on respondeat superior, the plaintiff must present sufficient evidence to raise an issue of fact that the misconduct of the employee was foreseeable. Frieler had argued that evidence of foreseeability should not be required in instances such as her case, and alternatively that the evidence that an employer had a sexual harassment policy was sufficient to raise a factual issue as to the foreseeability of sexual harassment in the workplace. The court rejected both arguments.

### **Temporary Tolling Agreement Not Bar to Action**

[\*Kunza v. St. Mary's Regional Health Center\*](#), 747 N.W.2d 586 (Minn. Ct. App. 2008): The Minnesota Court of Appeals determined that a tolling agreement entered into by the employer and employee during settlement negotiations did not bar the employee from initiating a lawsuit. Kunza, a ward clerk in the emergency service department at St. Mary's Regional Health Center, alleged in an internal complaint that an emergency room physician had sexually harassed her. She requested to be transferred alleging that he and other employees were retaliating against her. St. Mary's refused, and she resigned. The parties entered into settlement negotiations and a tolling agreement whereby Kunza promised not to sue or file a charge during the term of the tolling agreement, and that either party could cancel the tolling agreement upon ten days' advance notice.

Settlement negotiations broke down, and Kunza pursued litigation without conforming to the notice provisions of the tolling agreement. Kunza voluntarily dismissed her common law claims and those against the physician individually under the MHRA, and the district court granted summary judgment as to the remaining claims, dismissing the claims without prejudice as barred by the tolling agreement. St. Mary's and the individual physician sought costs and disbursements, which were granted, and the physician sought attorney's fees, which were denied.

Regarding the tolling agreement, the court of appeals discussed at some length the difference in legal consequence of a release of claims as opposed to a covenant not to sue. The release is an affirmative defense to a cause of action, whereas a covenant not to sue is not “a satisfaction”, but “merely an agreement not to enforce an existing cause of action against the party to the agreement.” A covenant not to sue whereby a party agrees to indefinitely forbear from instituting an action for certain acts and transactions is an effective bar of relief and operates as a release. This is not so for a covenant not to sue which is an agreement to temporarily refrain from bringing a cause of action. Kunza’s covenant was merely an agreement to refrain from bringing a cause of action for a limited period of time, so the court of appeals refused to give it the effect of a bar to the action. The case was remanded to the district court for further proceedings.

The court of appeals upheld the denial of attorney’s fees to the physician, declining to disturb a matter that was in the discretion of the district court. The court of appeals relied upon the standard set forth in *Sigurdson* for an award of attorney’s fees to a respondent: “[A] trial court may, in its discretion, award attorney fees to a prevailing defendant . . . only upon a finding that the employee’s action was frivolous, unreasonable, or without foundation, or was brought in bad faith.” *Sigurdson v. Isanti County*, 386 N.W.2d 715, 723 (Minn. 1986). The appeals court ruled that the amendment to the MHRA attorney’s fees provision since *Sigurdson* did not signal a different standard, rejecting an argument by the physician that the same standard as applies to a prevailing plaintiff should be applied to a prevailing defendant.



## Labor & Employment Law Section



### *Labor & Employment Law News*

Vol. 22, No 1 | Summer 2008

#### Minnesota Tort and Contract Cases

*By Holly M. Robbins & Julie M. Giddings  
Faegre & Benson*

This article was written with the assistance of Nicole Fritz, Faegre & Benson summer associate and third-year law student at the University of St. Thomas.

#### **Breach of Covenant Not to Sue for Limited Period of Time**

***Kunza v. St. Mary's Regional Health Center***, 747 N.W.2d 586 (Minn. Ct. App. 2008), <http://www.lawlibrary.state.mn.us/archive/ctappub/0804/opa070360-0422.pdf>: While plaintiff Michelle Kunza was employed by St. Mary's Regional Health Center ("St. Mary's"), she reported to St. Mary's management that another St. Mary's employee, Wade Wernecke, had sexually harassed and retaliated against her for over two years. Kunza voluntarily resigned from her employment thereafter. Kunza threatened to sue, and St. Mary's and Wernecke entered into settlement negotiations with Kunza in an effort to avoid litigation. The parties executed a tolling agreement in which Kunza agreed not to sue St. Mary's or Wernecke for a specified period of time. The parties also agreed that either party could cancel the agreement upon ten days' notice.

The parties did not settle their dispute through negotiations. St. Mary's and Wernecke each sent a letter to Kunza providing notice that they were cancelling the tolling agreement. Less than ten days after receiving the notice, Kunza served a summons and complaint upon the parties. The complaint asserted claims for breach of contract, defamation, assault, and intentional and negligent infliction of emotional distress, as well as claims under the Minnesota Human Rights Act. As a defense to Kunza's claims, St. Mary's and Wernecke raised the breach of the tolling agreement as an affirmative defense in their answers to the complaint and interrogatories.

After Kunza voluntarily dismissed several of her claims, the defendants moved for summary judgment under the tolling agreement on Kunza's remaining claims. The district court granted the defendants' motion, reasoning that Kunza brought her lawsuit during the time she had agreed not to sue. As a remedy for the breach, the district court dismissed Kunza's remaining causes of action without prejudice and dismissed with prejudice those claims she had voluntarily dismissed. In doing so, the district court cited no authority for the proposition that

a breach of a covenant not to sue for a limited period of time could be asserted as a defense to a breach of contract claim.

The Minnesota Court of Appeals, noting that this was a case of first impression in Minnesota, reversed the decision of the district court. The court of appeals found that a breach of a covenant not to sue cannot be asserted as a defense to claims in breach of contract.

The court centered its reasoning on the difference between a release and a covenant not to sue. Relying on *Gronquist v. Olson*, 64 N.W.2d 159 (Minn. 1954) and *Joyce v. Mass. Real Estate Co.*, 217 N.W. 337 (Minn. 1928), the court concluded that a release effectively eliminates a right of action and can be used as a defense to any suit on the action, while a covenant not to sue does not extinguish a right of action, but is merely an agreement not to enforce a cause of action and is not intended to discharge a cause of action. The court reasoned that Kunza did not give up her claims against the defendants in signing the tolling agreement, but rather temporarily agreed not to bring a cause of action. The court found that the agreement reflected the parties' intent to maintain the cause of action while they attempted to negotiate a settlement.

The court also reasoned that, unlike the situation when a plaintiff has violated a release by bringing a lawsuit, the damages defendants may have suffered as a result of Kunza bringing the action early are not the same as the damages Kunza could recover in her lawsuit against the defendants. The court stated that because the damages in both actions are not the same, giving judgment to the defendants in Kunza's action does not produce the same effect as permitting Kunza's action to proceed and allowing the defendants to recover damages in a separate action for breach of contract. The court concluded that the defendants' defense could not bar Kunza's suit, but instead they could pursue a separate cause of action to enforce their rights under the tolling agreement.

### **Consideration for Post-Hire Non-Compete Agreement**

***Witzke v. Mesabi Rehabilitation Services, Inc.***, No. A07-0421, 2008 WL 314535, 2008 Minn. App. Unpub. LEXIS 114 (Minn. Ct. App. Feb. 5, 2008), <http://www.lawlibrary.state.mn.us/archive/ctapun/0802/opa070421-0205.pdf> : Plaintiff John Witzke brought a declaratory judgment action against his former employer, Mesabi Rehabilitation Services ("Mesabi"), alleging that the non-competition clause in the employment agreement he had signed with Mesabi was invalid and unenforceable. Mesabi filed a counterclaim for breach of the non-competition and non-solicitation clauses of the agreement.

Mesabi provides rehabilitation services to injured individuals who qualify for services under the Workers' Compensation Act. Mesabi receives most of its client referrals from attorneys who represent injured workers in workers' compensation proceedings. Mesabi hired Witzke in 1988 as a part-time job-placement specialist. Witzke had no background or training in rehabilitation services when he was hired. After Witzke worked for Mesabi for approximately eight months, Mesabi asked him to sign an employment agreement. The agreement included a non-competition clause and a non-solicitation clause. Witzke signed the agreement after the parties agreed to modify a provision of the non-competition restriction in the agreement. In

the agreement, Witzke agreed not to “perform[] any rehabilitation, placement, or consulting professional services” within a 150-mile radius of Virginia, Minnesota, for three years following the termination of his employment.

After signing the agreement, Witzke transitioned from his part-time position to a position as a qualified rehabilitation consultant (“QRC”). He began training for his new position, which began about a year after he signed the agreement, participating in a QRC internship and working on his master’s degree. Mesabi supported Witzke and paid for a number of the costs associated with his training. While working at Mesabi, Witzke had contact with many attorneys in the area, who were the primary source of Mesabi’s client referrals, and he also worked directly with clients as their QRC.

In 2006, Witzke decided to leave Mesabi to start his own rehabilitation company. On the day he gave his two-week notice, he sent letters to all the clients he had worked with through Mesabi notifying them he was leaving Mesabi and informing them that they could stay with Mesabi or they could continue working with him. A significant number of Witzke’s clients (thirty-four out of thirty-eight) left Mesabi. Witzke’s new company directly competes with Mesabi in the same geographic area.

Witzke moved for summary judgment on his claims. The district court granted Witzke’s motion for summary judgment, finding that Witzke’s employment agreement was invalid and unenforceable for a lack of consideration.

The Minnesota Court of Appeals reversed the district court’s decision, finding sufficient consideration in Witzke’s continued employment with Mesabi along with significant professional advantages, including education, training, and professional support, leading to increased pay and responsibility.

The court of appeals stated that the restrictive covenants in the employment agreement required independent consideration because Witzke was already a Mesabi employee when he signed the agreement. Mesabi argued that continuing Witzke’s employment was the consideration for the agreement, and the court agreed. The court found that continuing employment could be consideration as long as the employee is employed for many years after signing the agreement, advances in his job, and receives increased responsibilities, relying on *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980) and *Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635 (Minn. Ct. App. 1986). The court found this case indistinguishable from *Satellite*, where the court held that long-term career advantages constituted consideration for a post-hire employment agreement. Thus, the court determined that Witzke had consideration for the agreement.

Further, the court noted that continuation of employment alone can be consideration sufficient to support a restrictive covenant as long as the agreement is bargained for and provides the employee with real advantages. Here, Witzke bargained for a modification to the non-competition clause to allow him to be employed by a local school district to perform rehabilitation services without violating the non-competition clause. This bargaining showed that Witzke and Mesabi contemplated that he would advance in his role at the company from a job-placement specialist to a QRC. In fact, Witzke advanced significantly in the company,

receiving an entirely new position, increased pay, and increased responsibility. Mesabi also offered that it relied on the restrictive covenants as it promoted Witzke throughout his employment. Witzke did not present any evidence to refute Mesabi's reliance or to show that his career advances were not important. The court held that the non-competition agreement and the non-solicitation agreement were supported by consideration.

### **Specifically Targeted Advertisements Violating a Non-Competition Agreement**

*Sealock v. Petersen*, No. A06-2479, 2008 WL 314146; 2008 Minn. App. Unpub. LEXIS 135 (Minn. Ct. App. Feb. 5, 2008),

<http://www.lawlibrary.state.mn.us/archive/ctapun/0802/opa062479-0205.pdf>: Plaintiff Donald Sealock entered into a purchase agreement in January 2005 to buy defendant Jay Petersen's optometry practices in Mound, Delano, and Watertown, Minnesota. Sealock paid \$782,606, \$305,000 of which was designated as being for the good will of Petersen's business. The parties also entered into an additional agreement along with the purchase. The additional agreement designated that Petersen would work for Sealock as an independent contractor. The independent contractor agreement could be terminated at any time by either party upon thirty days' notice. The agreement also included a non-competition agreement where Petersen agreed not to "participate, compete or be engaged in the business of optical goods . . . within a five-mile radius" of his previous practices while he worked as an independent contractor for Sealock and for three years after the termination of the independent contractor relationship.

In March 2005, the parties terminated the independent contractor agreement. Petersen opened a new practice in Waconia, which was outside the five-mile radius requirement. Petersen began advertising for his new practice in local newspapers. He placed advertisements in newspapers published in Mound, Delano, and Watertown. The advertisements featured a photo of Petersen and stated "Not retired . . . just relocated!" After the advertisements ran in the local newspapers, thirty-five of Petersen's previous customers switched from the offices owned by Sealock to Petersen's new office in Waconia.

Sealock brought a claim against Petersen for breach of a non-competition agreement and moved for a temporary restraining order to prohibit Petersen from advertising in select newspapers. The district court granted Sealock's motion for a temporary injunction. The case proceeded to a bench trial, where the court concluded that advertising in newspapers published in the three locations of Petersen's previous practices violated the non-competition agreement.

The Minnesota Court of Appeals affirmed the district court's decision. The court found that Petersen's advertisements breached the non-competition agreement based on the plain language of the agreement. The court agreed with the district court in deciding that the advertisements specifically targeted the geographic locations restricted in the non-competition agreement and found that Petersen was attempting to compete directly with Sealock's business. The court of appeals further stated that the advertisements were designed to take business away from Sealock by soliciting his previous customers.

Petersen argued that there were no published Minnesota decisions where the court has found a party violated a non-competition agreement when the competing business is not physically located within the restricted geographic area. Relying on *Haynes v. Monson*, 224 N.W.2d 482 (Minn. 1974), the court reasoned that the fact that Petersen's competing business was located outside of the geographic area was not enough to rule in his favor given that he advertised within the restricted area.

Petersen also argued that the non-competition agreement was unenforceable based on general rules construing non-competition agreements narrowly. The court ruled that it was necessary to enforce the agreement to secure the good will that Petersen included in the price Sealock paid for the business. The court further stated that its decision would not restrain Petersen from all local advertising. It explained that Petersen could advertise in publications with large circulation that just happened to include the restricted areas, such as the Yellow Pages, the Internet, and the Star Tribune. The court concluded that only advertisements that specifically targeted the restricted area violated the non-competition agreement.



## Labor & Employment Law Section



### *Labor & Employment Law News*

Vol. 22, No 1 | Summer 2008

#### Unemployment Compensation

*By Marshall H. Tanick  
Mansfield, Tanick & Cohen*

##### 'Seeking Suitable' Employment Situations

An often-disregarded, but important, provision of the unemployment compensation statute is the provision requiring an employee to be "actively seeking suitable employment," which is required under Minnesota Statutes section 268.085 subdivision 1(4)

<https://www.revisor.leg.state.mn.us/statutes/>

[?id=268.085](https://www.revisor.leg.state.mn.us/statutes/?id=268.085). If an employee fails to satisfy this obligation he may be denied unemployment compensation benefits. The "actively seeking" measure is a codification of the common law mitigation doctrine, which generally requires employees to seek other employment in order to minimize their damages.

The Minnesota Court of Appeals recently decided a pair of cases on this issue. It affirmed one ruling by an unemployment law judge of the Department of Employment and Economic Development (DEED) while reversing and remanding another. The cases demonstrate the duties imposed upon unemployment applicants in re-employment.

***Behrens v. Building Restoration Corp.***, [2008 WL 495671](#), 2008 Minn. App. Unpub. LEXIS 185 (Minn. Ct. App. Feb. 26, 2008) (unpublished);

<http://www.lawlibrary.state.mn.us/archive/ctapun/>

[0802/opa070017-0226.pdf](#): The appellate court held that an employee who was on a short-term medical leave of absence was disqualified from unemployment compensation because he was not "actively seeking suitable employment" as statutorily required during his leave. The employee, a tow truck driver, had injured his left heel while off duty. This resulted in medical restrictions that prevented him from driving a truck. He was off work for about five weeks before he returned to work on light duty for a month prior to his restriction being lifted.

The driver attempted to collect unemployment compensation benefits while he was on leave. An unemployment law judge for DEED denied his claim on the grounds that he was not "actively seeking suitable employment." The appellate court affirmed, holding that during the time he was off work the employee "made only one inquiry," which was directed to his employer regarding the availability of light-duty work, but had not "conducted job searches or submitted applications for employment with any other employers." His failure to seek other positions doomed his claim under the "actively seeking" provision.

The employee's claim that his leave of absence should be equated to a temporary lay-off lacked legal authority. The court also rejected his argument that his claim was tantamount to one under Minnesota Statutes section 268.095 subdivision 1(6), <https://www.revisor.leg.state.mn.us/statutes/?id=268.095>. That section states that if an employee quits because the employer notifies the employee of a lay-off occurring within thirty days due to lack of work, the employee is entitled to unemployment compensation benefits. This provision was "inapplicable" because the employee "was on a medical leave of absence but was not laid off."

The employee argued that "his supervisor told him that there would be light-duty work available for him . . . within thirty days of his application for benefits." Since the employee "did not offer any such evidence" during the unemployment compensation proceeding, he could not raise that issue on appeal.

***Lee v. Department of Employment & Economic Development***, 2008 WL 495674, 2008 Minn. App. Unpub. LEXIS 199 (Minn. Ct. App. Feb. 26, 2008) (unpublished);

[http://www.lawlibrary.](http://www.lawlibrary.state.mn.us/archive/ctapun/0802/opa070024-0226.pdf)

[state.mn.us/archive/ctapun/0802/opa070024-0226.pdf](http://www.lawlibrary.state.mn.us/archive/ctapun/0802/opa070024-0226.pdf): On the other hand, an employee of Northwest Airlines, caught up in the labor dispute between the airlines and its mechanics preceding and during the company's bankruptcy, was entitled to a new hearing and probably to receipt of unemployment compensation benefits. At the unemployment hearing, the main issue was whether the employee failed to file bi-weekly requests for unemployment benefits.

The "actively seeking" issue was only a secondary and less significant issue. The employee was denied benefits on both grounds.

The appellate court reversed and remanded. The issue regarding the filing of bi-weekly requests for benefits was made "moot" by legislation enacted in 2007 that relieved those involved in the labor strike at Northwest Airlines from having to file bi-weekly requests.

The "actively seeking" issue was not dealt with clearly during the unemployment compensation hearing. The employee was "confused" by questions asked by the unemployment law judge. He subsequently submitted detailed evidence of job-seeking efforts, but the unemployment judge refused to accept them on a request for reconsideration.

The appellate court reversed, holding that the "detailed new evidence [the employee] sought to submit supports his claim that he was actively seeking employment during the time in question." Since this evidence "would likely have changed the conclusion" regarding his disqualification, it should have been taken into account by the unemployment law judge.

The employee also had "good cause" for not submitting this evidence at the hearing. Because the "main focus" of the hearing was on the filing requirement, insufficient attention was paid to the "actively seeking" issue. The employee was not notified that he was required to prove that he was actively seeking employment by identifying "specific" efforts he made to find work. Since he was notified that his ineligibility was based on his failure to report, the "lack of directive" regarding the "actively seeking" provision explains the employee's confusion during the hearing. This constitutes "good cause" for submitting new evidence for reconsideration.

Therefore, the case was remanded for re-hearing with the strong implication by the appellate court that the employee should be granted unemployment benefits.

These two cases spotlight an important, but frequently disregarded, intention of the unemployment compensation laws: the obligation by employees to mitigate their damages by actively seeking suitable employment in order to qualify for unemployment compensation benefits.

### **Loss of Driver's License**

It is well-established that loss of a driver's license, usually due to a driving under the influence (DUI) conviction or other vehicle-related offense, warrants denial of unemployment compensation benefits to employees who need their licenses to perform their jobs. *E.g.*, *Markel v. City of Circle Pines*, 465 N.W.2d 382 (Minn. 1992); *Smith v. American Indian Chemical Dependency Division Project*, 343 N.W.2d 43 (Minn. Ct. App. 1984).

But what about an employee whose loss of a driver's license that is not needed for work impairs his ability to get to the job? The Minnesota Court of Appeals recently addressed the issue.

***Anderson v. R.P. Enterprise, Inc.***, 2008 WL 763171, 2008 Minn. App. Unpub. LEXIS 281 (Minn. Ct. App. 2008) (unpublished),

<http://www.lawlibrary.state.mn.us/archive/ctapun/0803/opa070141-0325.pdf>: The employee, who worked as a floor sander, lost his driver's license due to a DUI. The employee was sufficiently valued by his employer that the company paid another employee to drive him the thirty to forty miles to work, but that employee subsequently lost his driver's license, too. Due to lack of transportation, the sander was unable to work for several days even though work was available for him. The employee was off work for awhile and then was in jail for two weeks because of the DUI. The company's president told the sander to contact him after his incarceration, but he apparently did not do so and was fired.

An unemployment law judge (ULJ) held that the employee was disqualified from unemployment benefits because he voluntarily quit his work without good cause attributable to the employer. In the alternative, he also was barred on grounds that his discharge was due to his extended absence from work because of lack of transportation, which constitutes disqualifying "misconduct."

The appellate court affirmed, holding that the employee "quit his employment." The "good reason" provision, which allows unemployment benefits if the cause for quitting was attributable to the employer, was inapplicable because the employee did not identify any reason that would justify his behavior in failing to contact the employer after he was told to do so, even though work was available for him.

The court stated that the employee "abandoned his job" following loss of his license and was "unable to arrange any transportation, after the other employee lost his driver's license too. It is the "employee's responsibility" to have transportation to and from work. An employer

cannot be expected to "hold open [a] job indefinitely." The employee was deemed to have quit the job and was disqualified for receiving unemployment compensation benefits.

***Carlson v. Department of Employment & Economic Development***, 747 N.W.2d 367 (Minn. Ct. App. 2008), <http://www.lawlibrary.state.mn.us/archive/ctappub/0804/opa070028-0415.pdf>: Another alcohol-driving offender lost his unemployment compensation benefits claim in this case. The claimant was jailed and then placed on electronically monitored house arrest after a fifth DUI conviction, pursuant to a statutory minimum sentence of one-year incarceration under Minnesota Statutes section 169A.275, subdivision 4.

The appellate court rejected the applicant's argument that, because he was eligible for work release privileges, he was "available" for employment under section 268.085, subdivision 1. The claimant did not qualify for benefits because of section 286.085, subdivision 2(3), which renders an applicant ineligible if "incarcerated." Since the statutory minimum incarceration applied, the claimant was ineligible.

The cases underscore that absence from work on account of DUI-related offenses can constitute grounds for denial of unemployment compensation benefits. The cases are distinguishable from *Jenkins v. American Express Financial Advisors*, 721 N.W.2d 286 (Minn. 2006), in which an employee who missed work because she was jailed following an assault conviction was held entitled to unemployment compensation benefits. In that case, the employer had promised that a job would remain open for the employee while on a work-release program. The employer had work available and wanted the employee to report to work, but the employee was unable to do so.

The lesson from these cases is that losing a driver's license can lead to loss of a job and loss of unemployment compensation benefits.



## Labor & Employment Law Section



### *Labor & Employment Law News*

Vol. 22, No 1 | Summer 2008

#### State Legislative Update 2008

*By Ellen Sampson*

*Leonard, Street, and Deinard*

The following new laws either were passed during the 2008 Legislative session, which ended on May 19, 2008, or will be effective in the year 2008.

#### **Use of Social Security Numbers**

- Effective July 1, 2008, [Minn. Stat. § 325E.59](#), which regulates the use of social security numbers, requires that a person or entity, not including a government entity, may not do any of the following: (1) publicly post or publicly display in any manner an individual's social security number (to publicly post or display means to intentionally communicate or otherwise make something available to the general public); (2) print an individual's social security number on any card required for the individual to access products or services provided by the person or entity; (3) require an individual to transmit their social security number over the Internet, unless the connection is secure or the number is encrypted; (4) require an individual to use their social security number to access an Internet Web site, unless a password or unique personal identification number or other authentication device is also required to access the site; (5) print a number that the person or entity knows to be an individual's social security number on any materials that are mailed to the individual, unless state or federal law requires the social security number to be on the document to be mailed; (6) assign or use a number as the primary account identifier that is identical to or incorporates an individual's complete social security number; or (7) sell social security numbers obtained from individuals in the course of business.
- Notwithstanding the above provisions, social security numbers may be included in applications and forms sent by mail, including documents sent as part of an application or enrollment process; to establish, amend, or terminate an account, contract, or policy; or to confirm the accuracy of the social security number.
- A person or entity, not including a government entity, must restrict access to individual social security numbers it holds so that only employees who require the numbers in order to perform their job duties have access to the numbers, except as required by Titles XVIII and XIX of the Social Security Act and by [Code of Federal Regulations, Title 42, Section 483.20](#).

- This Section does not prevent the collection, use, or release of a social security number as required by state or federal law or the use of a social security number for internal verification or administrative purposes.
- This Section does not apply to documents that are recorded or required to be open to the public under Chapter 13 or by other law.

### **Minnesota Human Rights Act**

- [Minn. Stat. § 363A.29](#), Subd. 4, was amended to raise the punitive damages cap from \$8,500 to \$25,000. Ch. 215, § 1.

### **Personal Jurisdiction**

- [Minn. Stat. § 543.19](#), Subd. 1, dealing with personal jurisdiction over foreign corporations and nonresident individuals, has been amended to delete from the situations where no jurisdiction shall be found in claims for defamation and privacy. Ch. 185, § 1.

### **Background Checks for Coaches and Other School Personnel**

- [Minn. Stat. § 123B.03](#) has been amended to require a school hiring authority to request a criminal background check on “all individuals except enrolled student volunteers, who are offered the opportunity to provide athletic coaching services or other extracurricular services to a school, regardless of whether any compensation is paid.” School districts are also required to expand their background check of prospective teachers to include contacting the Board of Teaching to determine whether the Board has taken previous disciplinary action against the teacher arising out of sexual misconduct between a teacher and student, even if the misconduct may not have been illegal. Ch. 275, § 1; Ch. 369, § 1.

### **Public Sector Employee Changes**

- [Minn. Stat. § 626.89](#), Subd. 9, has been clarified so that it is clear that a police officer who is the subject of an investigation may speak with an attorney, a union representative, or both, prior to making a formal statement. Prior to this change, the officer may have had to choose one or the other. Ch. 205, § 1.
- [Minn. Stat. § 179A.16](#), Subd. 7(a), dealing with arbitration for firefighters, has been repealed. Ch. 267, § 1.
- [Minn. Stat. § 299A.465](#), Subd. 1, makes some changes to the law dealing with disability pay qualifications for police and firefighters. It makes clear that beginning July 1, 2008, the Public Employees Retirement Association will deal with disabilities that occur within the line of duty. Ch. 243, § 1.

- [Minn. Stat. § 43A.187](#) requires a state employer to grant an employee leave with 100 percent of pay to donate blood at a location away from work. The amount of leave may not exceed three hours in a twelve-month period, and the employee is required to provide fourteen-days' notice. The leave must not affect the employee's vacation leave or any other leave benefits. Employees of the Minnesota State Colleges and Universities system are excluded. Ch. 318, § 11.
- [Minn. Stat. § 124D.13](#), Subd. 11, was amended to require a school board to employ licensed teachers for its early childhood family education program. Ch. 266, § 1.
- [Minn. Stat. § 471.88](#) was amended to add a subdivision creating an exemption to the conflict of interest rules to permit a school board to contract with "a class of school district employees such as teachers or custodians where the spouse of a school board member is a member of the class of employees contracting with the school board." Ch. 176, § 1.

### **Other Statutory Changes**

- [Minn. Stat. § 62L.05](#) was amended to add a subdivision requiring health insurers selling small employer group coverage to provide information to small employers about the availability of flexible benefit plans. Ch. 231, § 1.
- [Minn. Stat. § 181.9458](#) permits a private employer to grant paid leave from work for an employee to donate blood. Ch. 318, § 12.
- [Minn. Stat. § 192.325](#) prohibits an employer from taking adverse action against any employee "because of the membership of that employee's spouse, parent, or child in the military forces of the United States, of this state, or any other state." In addition, an employer may not "discharge from employment, take adverse employment action against, or otherwise hinder an employee from attending the following kinds of events relating to the military service of the employee's spouse, parent, or child and to which the employee is invited or otherwise called upon to attend by proper military authorities: (i) departure or return ceremonies for deploying or returning military personnel or units; (ii) family training or readiness events sponsored or conducted by the military; and (iii) events held as part of official military reintegration programs." This statute requires the employee to provide reasonable notice and for the employer to provide a reasonable amount of unpaid time off, not to exceed two consecutive days or six days total in a calendar year. The employer may not require the employee to use accrued but unused vacation for these events. This law is effective August 1, 2008. Ch. 297, art. 2, § 8.
- [Minn. Stat. § 268](#) has been modified to provide additional insurance benefits of at least thirteen weeks in counties with high unemployment. Ch. 300, § 15.



## ***Labor & Employment Law News***

Vol. 22, No 1 | Summer 2008

### **Public Sector**

*By Stephen F. Befort and Jennifer Heim  
University of Minnesota Law School*

#### **Nonmembers' Agency Shop Fees**

***Davenport v. Washington Education Association***, 127 S. Ct. 2372 (2007); <http://www.supremecourtus.gov/opinions/06pdf/05-1589.pdf>: The Washington Supreme Court held that a Washington statute requiring unions to obtain affirmative authorization to use nonmembers' agency shop fees for election purposes violates the First Amendment. The United States Supreme Court reversed as applied to public-sector unions.

A Washington statute provides that a union may not use a nonmember's agency shop fees to make contributions or expenditures for election purposes unless the nonmember affirmatively authorizes the union to do so. The respondent was the exclusive bargaining agent for public educational employees and, in that capacity, collected agency fees from nonmembers. The respondent, consistent with the requirements of *Teachers v. Hudson*, 475 U.S. 292 (1986), notified nonmembers of their right to object to paying fees for expenditures not germane to the union's collective bargaining duties. When the union used nonmember agency fees for election purposes, nonmembers brought suit under the Washington statute.

The Washington Supreme Court concluded that the union could not show that it had obtained affirmative authorization as required by the Washington statute. However, the court held the Washington statute unconstitutional because, in shifting the burden on unions to obtain affirmative consent, the statute impermissibly upsets the balancing of the First Amendment rights of unions and the individual nonmembers as established in *Hudson*.

The U.S. Supreme Court reversed, holding that the constitutional floor created in *Hudson* to protect nonmembers is not also a constitutional ceiling for state-imposed restrictions on union collection and use of fees. The Court rejected the argument that the statute impermissibly restricts the use of the union's own funds for protected purposes, stating that the agency fees were in the union's possession only because the state compelled its employees to pay those fees. Therefore, the Court said, "[a]s applied to public-sector unions, [the statute] is not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money." Finally, the Court also rejected the argument that the statute, in its focus on election purposes, unconstitutionally draws a distinction based on the content of the speech. The

Court stated that the statute is narrowly focused to maintain integrity in the election process and noted that unions remain free to expend for election purposes all funds except the "state-coerced agency fees lacking affirmative permission." The statute, according to the Court, is reasonable and view-point neutral.

***Shockency v. Ramsey County***, 493 F.3d 941 (8th Cir. 2007);

<http://www.ca8.uscourts.gov/opns/opFrame.html>: Plaintiffs, a former patrol lieutenant and a former sergeant, sued a Minnesota county, sheriff, and inspector alleging retaliation under the First Amendment after the lieutenant announced his plan to run for sheriff and the sergeant supported him. The plaintiffs also alleged equal protection and due process violations.

The district court granted summary judgment on the due process claims but denied summary judgment on the equal protection and First Amendment claims. The district court also denied the defendants' motion for qualified immunity on those claims. The defendants filed an interlocutory appeal. The court of appeals affirmed as to the defendant sheriff and reversed as to the defendant inspector.

Plaintiff Moore, a patrol lieutenant, announced to a coworker his intention to run against the incumbent sheriff, Fletcher, in the upcoming election. Ten days later, Fletcher transferred Moore and placed him under the supervision of defendant, Inspector O'Hara, allegedly causing Moore to lose overtime pay and access to a take-home vehicle. Moore also received diminished responsibility as he was assigned to O'Hara as an executive assistant and given only administrative duties. O'Hara allegedly criticized and disciplined Moore unfairly and required Moore to perform dangerous tasks no other officers were required to do.

Plaintiff Shockency was a sergeant who publicly supported Moore's campaign. After Shockency displayed her support for Moore, Fletcher transferred her to a unit where she could perform only deputy level work and her supervisory role was diminished.

Addressing the issue of qualified immunity, the Eighth Circuit stated that it was necessary to determine: (1) whether, accepting the facts alleged by the plaintiffs, a constitutional violation occurred and (2) whether the plaintiffs' right to engage in the relevant activity was clearly established at the time of the violation. There was no dispute that the parties were exercising a First Amendment right in campaigning, and the court found that the action of transferring the plaintiffs, if true as alleged, amounted to adverse employment actions. The court rejected the argument that the state's interest in suppressing the speech outweighed the employees' interest in exercising their rights because the defendants did not allege that the plaintiffs' actions adversely impacted the efficiency of the sheriff's department.

Addressing whether or not a reasonable officer would know that the actions taken violated the plaintiffs' rights, the court found that the law was not sufficiently clear that a reasonable officer would know that the actions taken by O'Hara were severe enough to rise to the level of adverse employment action.

However, the court found that the law was sufficiently clear to preclude Fletcher from claiming immunity. Fletcher argued that the plaintiffs' right to engage in campaigning issues was

unclear because *Branti v. Finkel*, 445 U.S. 507 (1980), allows adverse employment actions to be taken against employees for First Amendment activities if the employees hold confidential or policymaking positions for which political loyalty is necessary for effective job performance. The Eighth Circuit stated that while other circuits have found deputy sheriffs to be in policymaking positions, under Minnesota law the positions held by the plaintiffs are “in the classified service” and are not based on political affiliation. These employees may not be required to contribute to campaign funds and cannot be disciplined if they choose not to do so. Minnesota law also creates the right of these employees “to be free from coerced participation in political activity” which the court found “reasonably includes the right to participate willingly in the political sphere.” The plaintiffs were also protected by a collective bargaining agreement prohibiting adverse action taken based on their political beliefs. Because the agreement and the relevant Minnesota laws were available to Fletcher, according to the court, the right of the plaintiffs to engage in this activity was clearly established. Therefore, the court concluded, a reasonable official could not have thought that the plaintiffs held policymaking positions and could not have reasonably relied on the *Branti* exception in taking adverse employment actions.

### **Health Care Benefits**

*In re Sletten*, 742 N.W.2d 701 (Minn. Ct. App. 2007); <http://www.lawlibrary.state.mn.us/archive/ctappub/0712/opa062263-1224.htm>: Relator, a former city fireman, was denied continued employer-provided health care benefits by the Public Safety Officers Benefit Eligibility Panel. The panel denied benefits on the ground that it was inconclusive whether the relator’s occupational duties or professional responsibilities put him at risk for the injury he sustained. The court of appeals reversed.

Relator Sletten initially injured his shoulder moving a chair in order to clean the floor while working at a fire station. He aggravated his injury two years later while performing a cave rescue. He did not seek medical treatment until a couple of months after the cave rescue. Sletten became unable to perform his work duties as a result of the second injury, and he was awarded a PERA duty-related disability pension. He was denied continuing health care benefits by the Minnesota Public Safety Officers Benefit Eligibility Panel on the ground that it was inconclusive whether Sletten’s occupational duties or professional responsibilities put him at risk for the injury he sustained.

According to Minnesota Statutes section 299A.465, continuing health coverage is provided to a firefighter receiving a PERA disability pension if he or she suffers a disabling injury that results in separation from service and occurs while the firefighter is acting in the course and scope of his or her duties as a firefighter. Subdivision 6 of that statute provides that the Eligibility Panel, in making its determination of eligibility, shall determine whether or not the firefighter’s occupational duties or professional responsibilities put the firefighter at risk for the type of injury sustained.

The court of appeals stated that the Eligibility Panel likely made its determination based on its belief that Sletten’s injury was the result of the earlier incident of moving the chair and a belief that such an activity does not qualify under the statute. The court pointed out that the duties of a firefighter include maintenance and care of living quarters and suggested that a

decision that moving a chair could not qualify as arising from occupational duties is inconsistent with recently decided cases in this area. According to the court, these cases have established that “there is no narrow limiting requirement that the injury be indigenous to fighting fires or police work” in order to satisfy the statute.

However, the court did not base its ruling on this ground because it found the cave rescue injury clearly fell with the requirements of section 299A.465 subdivision 6. The respondent argued that the cave injury could not be considered by the panel because Sletten did not immediately seek medical assistance. The court rejected this argument stating that this failure was irrelevant where medical examinations conducted by both sides established that Sletten had a disability arising from the cave rescue.

***EEOC v. Jefferson County Sheriff's Dept.***, 467 F.3d 571 (6th Cir. 2006), *cert. granted* 128 S. Ct. 36 (2007);

<http://www.ca6.uscourts.gov/opinions.pdf/06a0405p-06.pdf>: Plaintiff EEOC brought suit against the county sheriff's department, the Kentucky Retirement Systems, and the Commonwealth of Kentucky alleging that the state's disability-retirement-benefits plan violated the ADEA. The district court held that the EEOC failed to establish a prima facie case because it did not provide evidence of discriminatory animus. The court of appeals reversed and remanded.

The state's disability-retirement-benefits plan provided that in order for employees in hazardous positions to receive disability-retirement benefits the employee must have sixty months of service credit, be under age fifty-five, and apply within twelve months of his or her last day of paid employment in a regular full-time position. The age requirement existed because, at fifty-five, employees who worked in hazardous positions were eligible for normal retirement benefits. The plan also calculated benefits in such a way that, even in the case of those who qualified, an older disabled employee received fewer benefits than a younger disabled employee. The EEOC brought suit on behalf of an employee who sought disability-retirement benefits but was denied because he was over fifty-five.

The court of appeals concluded that the EEOC met its prima facie burden absent a showing of animus because the plan was facially discriminatory in two ways. First the plan categorically excludes some employees because of their age. Second, it was facially discriminatory because “employees who become disabled when they are still ‘young enough’ to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age.” In holding that a discriminatory animus is unnecessary to support an ADEA claim, the court examined the legislative history of the ADEA and determined that Congress intended to reach arbitrary distinctions based on age regardless of any kind of prejudice or dislike toward older persons. The court also stated that its decision was consistent with other circuits, citing for instance to the Eighth Circuit case of *Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005).

The United States Supreme Court granted certiorari. The case was heard January 9. [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-1037.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1037.pdf).