



Labor & Employment Law Section



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Disability Discrimination

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ADA Amendments Act of 2008

On September 25, 2008, President Bush signed into law the [ADA Amendments Act of 2008](#) (ADAAA), significantly expanding the scope of the Americans with Disabilities Act of 1990 (ADA). The ADAAA rejects the courts' restrictive interpretation of the ADA's definition of disability and directs courts to construe the term "in favor of broad coverage of individuals."

Specifically, the ADAAA provides that the determination of whether an individual is disabled under the ADA "shall be made without regard to the ameliorative effects of [specific] mitigating measures." Thus, the ADAAA overturns the requirement, enunciated by the United States Supreme Court in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and its companion cases, that mitigating measures must be considered when determining whether a person is disabled under the ADA. Courts must now evaluate plaintiffs' impairments without considering the ameliorating effects of their treatment. The ADAAA provides an exception for those who wear ordinary eyeglasses or contact lenses for daily activity.

The ADAAA also expands the "regarded as" prong of the ADA's disability definition. An individual meets the requirement of being "regarded as" disabled if the individual establishes that he or she has been discriminated against because of an actual or perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity." Individuals no longer have to show that the perceived impairment substantially limited a major life activity. The ADAAA, however, excludes transitory and minor impairments – impairments with an actual or expected duration of six months or less.

The ADAAA also clarifies other major aspects of the ADA, including the following:

- The ADAAA provides that the ADA covers individuals who have an impairment that is episodic or in remission if that impairment would substantially limit a major life activity when active.
- The ADAAA clarifies that an impairment may qualify as a disability even if it substantially limits only *one* major life activity.

- The ADAA rejects the Supreme Court's restrictive interpretation of "substantially limits" in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
- The ADAAA provides a non-exhaustive list of major life activities.

As a result of these changes, more individuals will be considered disabled under the ADA, and the number of disability discrimination lawsuits will likely increase. The ADAAA becomes effective on January 1, 2009.

Eighth Circuit

Restriction Based upon the Recommendations of Physicians

[*Kozisek v. County of Seward*](#), 539 F.3d 930 (8th Cir. 2008): The Eighth Circuit affirmed summary judgment in favor of the Seward County Board, holding that Kozisek, a former weed control officer, failed to establish that he was regarded as disabled under the ADA or that the board's legitimate, non-discriminatory reason for his discharge was a pretext for discrimination.

Kozisek, a Vietnam veteran, suffered from post traumatic stress disorder (PTSD) and took medication to control his symptoms. After leaving work early and drinking one night in July 2005, Kozisek wielded firearms, killed or wounded some of his family's farm animals, and threatened his wife. The Seward County sheriff charged him with making terroristic threats and with using a firearm to commit a felony.

Based on this incident, the board and Kozisek agreed that he would get a psychological evaluation and substance abuse evaluation. Relying upon the recommendation of a Veterans Administration mental health practitioner, the board required that Kozisek complete inpatient alcohol treatment as a condition of keeping his job. Kozisek refused inpatient treatment, and the board terminated his employment. Kozisek subsequently sued the board, arguing that the board regarded him as a disabled alcoholic and that he was disabled because of the PTSD.

In affirming summary judgment, the Eighth Circuit held that the board did not regard Kozisek as disabled within the meaning of the ADA, despite requiring that he complete inpatient alcohol treatment as a condition of keeping his job, because the requirement was not based upon misconceptions, myths, or stereotypes. The court determined that the board had instead based its decision upon a very serious incident resulting in criminal charges against Kozisek and upon a licensed mental health therapist's recommendation.

The Eighth Circuit also affirmed the district court's ruling that the board's proffered reason for terminating the employee, i.e., his refusal of inpatient alcohol treatment, was not a pretext for discrimination on the basis of his PTSD. The court emphasized that there was no evidence that the county knew of his PTSD condition because Kozisek was careful to keep the condition to himself.

District of Minnesota

Driver with Diabetes

[*Gilman v. Schwan's Service, Inc.*](#), 565 F. Supp. 2d 1050 (D. Minn. 2008): The district court granted Schwan's motion for summary judgment as to Gilman's ADA claim, holding that Gilman failed to raise a genuine issue of material fact that he is disabled or regarded as disabled under the ADA.

Gilman, a former route manager, lost his certification to operate a commercial vehicle under the Federal Department of Transportation (DOT) requirements, after being diagnosed with Type 1 diabetes. Gilman had the option to apply for an exemption, but the entire process could take three to six months with no guarantee that the exemption would be granted. In the meantime, Schwan's directed Gilman to look for other job openings within the company. Schwan's subsequently terminated Gilman because he had not taken another job within the company.

The district court found that when properly monitored, Gilman was not substantially limited in the major life activity of working. Although DOT requirements prohibited him from driving a commercial vehicle without an exemption, there was no evidence that the diabetes itself interfered with his ability to drive. The loss of his DOT certification to drive a commercial vehicle prevented Gilman from performing only a particular job, not a class of jobs or a broad range of jobs. For similar reasons, the court also found that Schwan's did not regard Gilman as disabled. Finally, the court determined that there was no evidence that Gilman's diabetes had substantially limited him in the major life activity of eating.

It should be noted, however, that this case was decided before the ADA Amendments Act of 2008 (ADAAA) was signed into law. The ADAAA provides that the determination of whether an individual is disabled under the ADA shall be made without regard to measures that mitigate an individual's impairment. Accordingly, the ADA will likely protect individuals whose diabetes is controlled by medication.

Firefighter with Multiple Sclerosis

[*Starkey v. City of Burnsville*](#), No. 07-1948, 20 A.D. Cases 1665, 2008 U.S. Dist. Lexis 54345, 2008 WL 2788049 (D. Minn. July 15, 2008): The district court granted the city's motion for summary judgment as to Starkey's ADA and MHRA disability discrimination claims, holding that former firefighter/paramedic Starkey failed to show that the city regarded her as disabled.

Starkey was diagnosed with multiple sclerosis (MS) and experienced flare-ups of symptoms due to MS several times during her employment with the city. The city eventually terminated Starkey for performance concerns, placed her on administrative leave for two months to assist her in fulfilling the waiting period for long-term disability benefits, and encouraged her to apply for disability benefits. The city also notified Starkey that it would inform her of job vacancies with the city.

Viewing the facts in the light most favorable to Starkey, the district court determined that Starkey showed that the city erroneously believed that she was unable to be a firefighter. Nonetheless, the court concluded that she failed to show that the city regarded her as disabled under the ADA or MHRA. The fact that the city informed Starkey of possible benefits does not show that the city regarded her as disabled from other jobs; the city barred Starkey from only a "narrow subset of jobs in one very small location," not from a "class of jobs or a broad range of jobs."



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Age Discrimination in Employment Act

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Supreme Court

Disparate Impact and “Reasonable Factor Other Than Age”

[*Meacham v. Knolls Atomic Power Lab.*](#), 128 S. Ct. 2395 (2008): The ADEA exempts from liability “otherwise prohibited” actions if they are “based on reasonable factors other than age” (RFOA). *Meacham* presented the question whether an employer facing a disparate-impact claim and planning to defend on the basis of the RFOA provision must not only produce evidence raising the defense but also persuade the factfinder of its merit.

In the first portion of its opinion, the Court held that the RFOA provision was an affirmative defense that must be proven by the party asserting it. The Court compared the RFOA provision with the bona fide occupational qualification (BFOQ) provision found in the same statutory section, noting that it was established that the BFOQ defense was one that employers are required to prove. The Court also noted its 2005 decision, *Smith v. City of Jackson*, 544 U.S. 228, which recognized disparate impact liability under the ADEA, and concluded that *City of Jackson* does not require or suggest that a business necessity test should apply in ADEA disparate impact cases. In response to arguments by employers that a pro-employee decision on the RFOA issue would prompt an increase in new suit filings, the Court pointed out that the plaintiff in an ADEA disparate impact case must first isolate and identify a specific employment practice that is allegedly responsible for observed statistical disparities.

The claim at issue in *Meacham* arose from a reduction-in-force. The plaintiffs pursued both disparate treatment and disparate impact claims at trial and obtained a jury verdict in their favor on the disparate impact claim. That verdict was initially affirmed by the Second Circuit but later reversed by that court after *City of Jackson* was decided. The Supreme Court vacated the second Court of Appeals decision and remanded the case for further proceedings consistent with the Court’s opinion.

[*Kentucky Ret. Sys. v. EEOC*](#), 128 S. Ct. 2361 (2008): This case involved a challenge to a pension plan. Under the plan, certain workers were eligible for normal retirement benefits after they had worked for twenty years or after they had worked for five years and had

reached age fifty-five. Additionally, any worker who became disabled in the line of duty was entitled to benefits calculated by adding a number of years to that worker's years of service such that he or she was deemed to have become eligible for retirement benefits. Under the system, workers age fifty-five or older who became disabled after already attaining eligibility for retirement benefits were not treated as generously as younger workers with identical tenure who became disabled before attaining eligibility for retirement benefits.

The Sixth Circuit held that the plan violated the ADEA, but the Supreme Court disagreed in a five to four ruling. The Court began its analysis by noting that, in a disparate treatment case such as this one, the plaintiff was required to prove that age "actually motivated the employer's decision." The Court held that, to the extent certain older workers were treated differently under the terms of the plan at issue, the difference was not "actually motivated" by the workers' ages, but instead by their pension plan status. Citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the Court noted that age and pension status were "analytically distinct." The Court also observed that the pension plan at issue did not rely on any of the sorts of "stereotypical assumptions" that the ADEA was intended to eradicate.

Justice Kennedy wrote a dissent that was joined by Justices Scalia, Ginsburg, and Alito. Justice Kennedy asserted that the majority misinterpreted both the ADEA and *Hazen Paper* and agreed with the EEOC that a disability plan that pays older workers less than younger workers on the basis of age discriminates "because of" age. He said, "[I]f the plan discriminates on its face, it is obvious that decisions made pursuant to the plan are 'actually motivated' by age."

Eighth Circuit

Disparate Impact and Liability Based on Rehire Policy

[*EEOC v. Allstate Ins. Co.*](#), 528 F.3d 1042 (8th Cir. 2008): Just nine days before the Supreme Court's *Meacham* decision, a divided panel of the Eighth Circuit, in an interlocutory ruling, affirmed a district court decision paving the way for disparate impact liability based on a rehire policy adopted by Allstate Insurance. The Eighth Circuit considered two certified questions: (1) whether Allstate's rehire policy was subject to challenge under a disparate impact theory and (2) whether the statistics proffered by the EEOC established disparate impact as a matter of law. The court characterized these as "close and difficult questions," but answered both in the affirmative and thus affirmed the district court.

Allstate sold its insurance products through employee-agents and through agents who were independent contractors. In 1990, Allstate stopped hiring employee-agents. In 1999, Allstate announced a reorganization program that would terminate all employee-agents effective at the end of June 2000. Under the program, an employee-agent had four possible "severance" options: The first two allowed the agent to become an independent contractor, the third offered enhanced severance pay if the employee signed a release, and the fourth was similar to the third except that the employee was not required to sign a release and would receive less severance pay. A short time after implementing this program, Allstate also adopted a policy under which any employee-agents who were terminated under the program were not eligible to be considered for rehire for a certain period.

The EEOC did not challenge the termination of the employee-agents but instead challenged the restriction on their rehiring. The EEOC's complaint alleged that the rehire policy had a disparate impact on former employee-agents age forty and older. The EEOC offered three different statistical analyses in support of its claim.

Allstate moved for partial summary judgment in the district court arguing that the EEOC could not challenge the rehire policy under a disparate-impact theory because the Supreme Court opinion in *Smith v. City of Jackson* indicated that such a claim was not cognizable with respect to hiring policies. Allstate also argued that the EEOC could not establish that the rehire policy had a disparate impact on job applicants over the age of forty because, as a matter of law, the proper way to determine whether a hiring policy has a disparate impact is to determine the policy's impact on the applicant pool. Finally, Allstate argued that even if the EEOC established disparate impact, the hiring policy was based on a reasonable factor other than age and, therefore, did not violate the Act.

In response to Allstate's motion, the district court agreed that, under *City of Jackson*, hiring policies are no longer susceptible to disparate impact challenges. The court held that Allstate's rehire policy was an "employment policy," not a hiring policy. The court also held that the EEOC made out a prima facie case of disparate impact but that fact issues remained concerning the question of whether the rehire policy was reasonable.

In its decision, the Eighth Circuit first noted that it agreed with the district court's holding that the Allstate rehire policy fell within the meaning of 29 U.S.C. § 623(a)(2) as an employment policy (this section is the provision barring an employer from "limit[ing], segregat[ing], or classify[ing] his employees in any way which would deprive or tend to deprive any individual of employment opportunities"). The court observed that the rehire policy denied employee-agents the opportunity to be rehired, and that it therefore deprived such persons "of employment opportunities with Allstate."

The court next held that two of the three statistical approaches relied upon by the EEOC were sufficient to establish disparate impact. The only exception was an "average age analysis," as to which the court said, "The difference in the average age between Allstate's overall workforce and the employee-agents [subject to the rehire policy] cannot possibly reveal how that policy affected older workers because the policy simply did not apply to the overall workforce."

In a dissenting opinion, Judge Shepherd wrote that the EEOC's challenge to the rehire policy fell under 29 U.S.C. § 623(a)(1) (the disparate treatment section, which makes it unlawful to fail or refuse to hire any individual because of such individual's age), not under section (a)(2). Thus the policy was not "susceptible to a disparate impact claim."

Lack of Evidence that Similarly Situated Younger Persons Were Treated More Favorably

[*Bearden v. Int'l Paper Co.*](#), 529 F.3d 828 (8th Cir. 2008): Bearden was discharged after more than thirty-two years of employment. Because there was no direct evidence of age bias,

to avoid summary judgment Bearden was required to submit evidence discrediting the company's assertion that she was discharged for violating company procedures when she modified an approved requisition contrary to a management decision. The Eighth Circuit held Bearden had not satisfied this standard as she had presented "no examples of other employees altering requisitions without authorization." The court remarked that an employer's "imposition of different sanctions on employees with different job duties who failed to comply with rules of varying levels of seriousness does not permit an inference that [an employee's] termination was merely a pretext for a discriminatory motive."

Dismissal of Failure to Hire Claim Affirmed

[*Wingate v. Gage County Sch. Dist. No. 34*](#), 528 F.3d 1074 (8th Cir. 2008): A part-time teacher brought an action alleging that a school district failed to hire her for a variety of positions because of her age. The school district defended by asserting that the younger person it selected for each position was better qualified. When the teacher later asserted that she was entitled to go to trial on her claim because she was better qualified than the persons the district selected, the Eighth Circuit noted that "a comparative analysis of the qualifications" was relevant "to determine whether there is reason to disbelieve the employer's proffered reason." After summarizing the school district's reasons for favoring the younger applicants, the court held that the teacher had presented "no evidence sufficient to reject" those reasons. The court also noted that the plaintiff's disagreement with the school district's assessment of her teaching abilities did not create a triable issue of fact, particularly since the record included a written evaluation of the teacher's performance by the district that described her as merely "proficient," as opposed to "distinguished."

Varying Reasons for Discharge

[*Loeb v. Best Buy Co., Inc.*](#), 537 F.3d 867 (8th Cir. 2008): Loeb was hired by Best Buy at age forty-four and then discharged less than five years later. Toward the end of his employment, Loeb worked on a special project. Loeb's supervisors on this project claimed he was discharged because his role on the special project ended and because the supervisors felt Loeb would not enjoy and was not particularly well suited for additional work on the next phase of the project. In connection with his discharge, Loeb received notices from Best Buy human resource personnel that said he was terminated (i) "to reduce the labor costs" and "to reduce . . . headcount" and (ii) "to streamline processes and eliminate redundant tasks."

After the district court granted Best Buy's motion for summary judgment, Loeb argued that a fact issue for trial was raised by the allegedly inconsistent reasons for his discharge given by Best Buy. Loeb pointed to the supervisors' statements, on the one hand, and to the statements by HR employees, on the other. The Eighth Circuit rejected the argument, concluding that it was not required to consider the statements made to Loeb by Best Buy human resource personnel in determining whether the company had advanced inconsistent reasons for the discharge. The court relied on the principle that statements made by persons other than the relevant decision-maker are not to be considered unless the plaintiff establishes some "causal relationship" between those statements and the challenged action. The court noted that the record contained no evidence showing "a causal relationship between" the statements by the HR employees and any age-related animus against Loeb.

The court also rejected Loeb's argument that he was replaced by younger persons, finding that positions awarded to younger co-workers were different from the one Loeb had performed when he was a member of the special project team.



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Title VII Update

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Sex Harassment

[Adams v. O'Reilly Automotive, Inc.](#), 538 F.3d 926, 103 Fair Empl.Prac.Cas. (BNA) 1793, 91 Empl. Prac. Dec. P 43, 304 (8th Cir. 2008): The Eighth Circuit announced in this case that it agrees with the Eleventh Circuit in holding "once a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to 'know what is going on' within the company," making any constructive notice of harassment "irrelevant."

[Jenkins v. Winter](#), 540 F.3d 742, 104 Fair Empl.Prac.Cas. (BNA) 350 (8th Cir. 2008): Reversing the district court's grant of summary judgment, the Eighth Circuit held that the district court erred in accepting the moving party's statement of facts and refusing to consider the plaintiff's statement of facts. The court then concluded that, viewing the evidence in the light most favorable to the plaintiff, the affidavits submitted by the plaintiff suggested that the employer had "actual or constructive knowledge" of the harassment shortly after it began and could persuade a reasonable jury to find that the employer failed to take prompt or effective remedial measures.

Retaliation

[Heaton v. The Weitz Co., Inc.](#), 534 F.3d 882, 103 Fair Empl.Prac.Cas. (BNA) 1570, 91 Empl. Prac. Dec. P 43, 274 (8th Cir. 2008): In this case the Eighth Circuit affirmed the district court's denial of the employer's motion for judgment as a matter of law, concluding that the jury had sufficient evidence to conclude that Heaton was retaliated against for complaining about ethnic epithets, even though six months passed between the complaint and the alleged retaliatory lay-off. The court noted evidence that an immediate termination of employment was revoked. The court also noted evidence of the employer's demand that the plaintiff apologize to the manager who called him a "spic"; a lay-off accompanied by the comment, "things are catching up to you"; and a failure to find work for the plaintiff when it found work for similarly situated employees. There was sufficient evidence of a pattern of adverse actions beginning shortly after the complaint and lasting until lay-off to permit a jury to find causation.



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Family and Medical Leave Act

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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 Section



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Federal Labor-Management

By Marlin Osthus

Regional Attorney, NLRB Regional Office

Board Decisions Involving Region 18 Unfair Labor Practice Complaints

Whitesell Corp., [352 NLRB No. 138](#), 2008 NLRB LEXIS 282 (August 29, 2008): Affirming most of the findings and conclusions of Judge Bruce D. Rosenstein, Board Members Schaumber and Liebman found that Respondent unlawfully refused to provide information, unlawfully implemented unilateral changes, engaged in numerous instances of 8(a)(1) conduct and, most importantly, prematurely declared impasse and unlawfully implemented parts of its final offer. In addition, the Board agreed that Respondent failed to give notice pursuant to 8(d)(3), and therefore Respondent violated the Act by terminating the existing collective-bargaining agreement and implementing parts of its final offer. Included in the Board's Order is a requirement that Respondent rescind all changes made since June 13, 2006, and restore and honor the terms of the contract that expired on June 12, 2006, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse.

Reported in the last newsletter was Region 18's filing of a motion alleging that Respondent was in contempt of a 10(j) injunction. The motion for contempt is in abeyance, as Respondent agreed to engage in further bargaining with the Union, and agreed that its attorney would be its principal spokesperson at future negotiations.

Benjamin Franklin Plumbing, [352 NLRB No. 71](#), 2008 NLRB LEXIS 165 (May 30, 2008): Board Members Schaumber and Liebman denied exceptions filed by Respondent and affirmed the findings and conclusions of Judge David I. Goldman, which issued December 28, 2007. Among the unfair labor practices were the discharges of two employees, a refusal to recognize and bargain with Charging Party, and numerous 8(a)(1) threats and statements.

Administrative Law Judge Decisions Involving Region 18 Unfair Labor Practice Complaints

Haws, Inc., Cases [18-CA-18611](#) and 18-CA-18666, 2008 NLRB LEXIS 297 (Sept. 11, 2008): Administrative Law Judge William L. Schmidt sustained complaint allegations that the Respondent unlawfully terminated an employee because of his efforts to assist a second employee with regard to compensation issues, unlawfully prohibited employees from talking with one another on company property, unlawfully interrogated an employee about concerted

protected activities, and unlawfully terminated an employee's rental housing agreement because of the employee's efforts to seek the assistance of another employee regarding compensation issues.

Ashley Furniture Industries, Inc., Case [18-CA-18737](#) (formerly 30-CA-17857) (Sept. 17, 2008): In a decision dated September 17, 2008, Judge James M. Kennedy sustained all 8(a)(1) complaint allegations. These included Respondent instructing an employee that he could not discuss discipline issued to him with anyone else, and instructing numerous employees that they could not discuss their "no match" letters from the Social Security Administration with anyone except individuals in Respondent's human resources department. In finding the violations, Judge Kennedy rejected Respondent defenses that it prohibited discussions of the "no match" letters to protect employee social security numbers, to protect employees who received the "no match" letters from harassment and/or retaliation by members of the community, and to protect employees from misinformation that might scare away Hispanic employees it had recruited.

Regional Director Decisions Involving Representation Issues

Mesabi Publishing Co., [18-RC-17574](#) (May 8, 2008): At issue in this case was whether an accounts receivable employee was a supervisor within the meaning of section 2(11) of the Act, or employed by an employer other than the Employer. The Regional Director issued a decision rejecting the Employer's contentions that the disputed employee was a supervisor and/or employed by the Employer's parent company.

With regard to the supervisory issue, the Regional Director found that the record evidence did not support the Employer's contentions that the disputed employee disciplined, assigned work to, or effectively recommended the hiring and firing of employees. With regard to the issue of the employing entity, the Regional Director found that the Employer paid the employee, that the employee was employed at the Employer's location, and that the Employer's managers supervised the employee on a daily basis. Finally, the Regional Director found that the employee spent seventy percent of her time on work for the Employer, and therefore that she should be included in the office and clerical unit sought by United Steelworkers (Petitioner).

AFSCME Council 65, AFL-CIO, [18-UC-419](#) (June 30, 2008): Based on an administrative investigation, the Regional Director dismissed this petition filed by Minnesota Independent Field Staff & Clerical Association (Petitioner). Petitioner sought an order requiring that the organizing director position be included in its existing unit of field staff and clerical employees. The Regional Director found the petition untimely because Petitioner waited ten months after notice of Council 65's creation of the organizing director position to file the petition, and filed the petition after Petitioner agreed to exclude the organizing director position from the unit effective January 1, 2009. Moreover, the Regional Director concluded that unit clarification is inappropriate when the purpose is to argue for temporary placement of a position in a unit, as it would unduly disrupt the parties' collective bargaining relationship.

Federated Telephone Cooperative, [18-RC-17592](#) (July 24, 2008): International Brotherhood of Electrical Workers Local 949 filed a petition to represent the Employer's technicians employed at the Employer's Chokio, Minnesota facility. The Employer contended

that because it was a public utility, the unit must also include customer service representatives. Moreover, according to the Employer, because its employees were scheduled to be combined with another cooperative's employees, the technician and customer service representatives of the other cooperative also belonged in the unit.

The Regional Director rejected both Employer contentions. First, he concluded that compelling evidence existed that the technician unit is appropriate. The Regional Director relied on evidence of differing skills, duties, working conditions and wages that distinguished the technicians from the customer service representatives; lack of interchange between the two groups; separate supervision; and finally minimal interaction between the technicians and customer service representatives. On the issue of including employees employed by another cooperative, the Regional Director concluded that the combination of employees was not imminent and that it would be inappropriate to include employees of another employer in the unit when the other employer neither appeared at the hearing nor stated its position on the issue.



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Wage and Hour

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

Minnesota Federal Court: State FLSA Claims and ERISA Claims

[*LePage v. Blue Cross & Blue Shield of Minnesota*](#), Civ. No. 08-584 (RHK/JSM), 2008 WL 2570815, 2008 U.S. Dist. LEXIS 49298, 44 Employee Benefits Cas. (BNA) 1229 (D. Minn. June 25, 2008): Two former customer-service representatives, on behalf of themselves and other similarly situated individuals, have commenced suit against their former employer alleging, in part, that it violated the minimum wage and overtime provisions of the federal Fair Labor Standards Act ("FLSA"); the minimum wage, overtime, and recordkeeping provisions of Minnesota's Fair Labor Standards Act ("MN FLSA"); and the record-keeping and fiduciary-duty provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). In response, the former employer moved for a partial dismissal, seeking, in part, the dismissal of the plaintiffs' FLSA minimum-wage claim; the MN FLSA minimum-wage, overtime, and recordkeeping claims; and both ERISA claims.

Plaintiffs' allegations of potential violations were insufficient to support their FLSA minimum-wage claim.

The plaintiffs alleged their former employer allowed them "to work hours each week without minimum wage compensation," and that "there may have been instances . . ." they did off-the-clock work and were not paid the minimum-wage rate. In moving to dismiss the claim, the former employer contended the plaintiffs failed to identify their hourly rates or any facts that would allow the court to infer that they were paid less than the minimum wage in any workweek and, thus, failed to state a claim for a violation of the FLSA's minimum-wage provisions. The court agreed.

The FLSA requires covered employers to pay employees a minimum hourly wage. An employer violates the FLSA's minimum-wage provisions if an employee's total weekly wage is not equal to or above the number of hours actually worked during the week multiplied by the minimum hourly wage. The court observed that the plaintiffs' allegation that they were allowed "to work hours each week without minimum wage compensation" was an insufficient conclusory pleading. Moreover, the court noted that pleading—"there may have been instances" of violations—is an insufficient pleading of "hope that discovery will uncover facts indicating that [the employer] violated the minimum-wage provisions of the FLSA." The court

stressed that “Plaintiffs are required to plead facts that would, if proved, establish a violation of the minimum-wage provisions of the FLSA.”

Plaintiffs failed to properly plead their MN FLSA minimum-wage and overtime claims.

As with the plaintiffs’ FLSA minimum-wage claim, the plaintiffs failed to plead allegations that, if proved, would establish a violation of the MN FLSA minimum-wage and overtime provisions. Under the MN FLSA, a Minnesota employer violates the minimum-wage provision if it fails to pay the state minimum hourly rate for all hours worked during a workweek. With respect to the MN FLSA minimum-wage claim, the former employer argued that the plaintiffs failed to identify their hourly pay rates or facts that would allow the court to infer that the plaintiffs were paid less than Minnesota’s minimum wage in any workweek. The court agreed for the same reasons it articulated in dismissing the FLSA minimum-wage claim.

With respect to the overtime claim, the court noted the plaintiffs failed to allege that they worked more than forty-eight hours in any workweek, which is the amount of hours necessary to be entitled to overtime under Minnesota law. The court observed that the plaintiffs’ recitation of the legal elements for an overtime-provision violation was nothing more than a conclusion, which the court did not need to accept as true for purposes of the motion. Moreover, the court rejected the plaintiffs’ assertion that it is “possible that the record evidence in [the] case, as it is developed through discovery, will substantiate [their] claims for overtime under the MN FLSA,” noting the United States Supreme Court “requires more—namely, that there are factual allegations that ‘raise a right to relief above the speculative level.’” *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). The court, therefore, dismissed the plaintiffs’ MN FLSA claims without prejudice.

Plaintiffs failed to state a legally cognizable MN FLSA record-keeping claim.

The court also agreed with the former employer that the plaintiffs failed to state a legally cognizable record-keeping claim under the MN FLSA, concluding the plaintiffs failed to allege any facts to support a violation of the record-keeping provision. The court observed that the plaintiffs did not allege the former employer failed to keep any time records or that the records retained were inaccurate based upon time cards submitted by the plaintiffs.

Further, the court noted that the “Plaintiffs are claiming that [the former employer] should have maintained records for this off-the-clock time even though they never reported it on their time cards.” The court observed that the plaintiffs were “attempting to take their substantive claim that they were not paid overtime, and bootstrap a record-keeping violation into their Complaint.” Accordingly, the court dismissed the plaintiffs’ MN FLSA record-keeping claim without prejudice.

ERISA fiduciary-duty and failure-to-maintain-records claims were not supported by alleged FLSA violations.

The plaintiffs asserted the former employer violated ERISA by “failing to record all of the hours they worked, which resulted in its failure to maintain records sufficient to determine the

benefit accrual rights” under the employer-sponsored ERISA plan, and breached its fiduciary duty to them “by failing to account for overtime in administering” the plan. In essence, the plaintiffs claimed the former employer had a fiduciary duty to credit them for unpaid overtime.

The court concluded the plaintiffs’ ERISA claims were not legally cognizable. After noting that ERISA does not govern the former employer’s business decision about how to classify an employee for payroll and FLSA purposes, and that even if an employer is also a plan administrator the employer still does not owe a fiduciary duty to double-check a business decision and determine whether employees are legally entitled to more compensation. The court observed that the former employer, as the plan administrator, only had a duty to act in accordance with the documents and instruments governing the plan. The court noted that under the Plan’s plain language, a participant’s eligible earnings are the total earnings paid to a participant reported on a Form W-2 as wages, tips, or other compensation. Eligible earnings did not include compensation that should have been paid, and the plaintiffs were never paid overtime. Accordingly, the court concluded there were no records to correct “because they properly reflect[ed] the compensation actually paid to the [plaintiffs],” and there was no breach of a fiduciary duty under ERISA because the former employer’s decision not to pay the plaintiffs’ overtime was a business decision unrelated to the administration of the plan.

Moreover, the court rejected plaintiffs’ plea to adopt the reasoning in unpublished federal district court opinions from the Ninth Circuit and not dismiss the ERISA claims because the former employer, in its role as the employer as opposed to the plan administrator, should have paid the employees’ overtime. The court, citing *Maranda v. Group Health Plan, Inc.*, Civ. No. 07-4655, 2008 WL 2139584 (D. Minn. May 20, 2008), observed that the unpublished decisions “did not adequately address whether there is a fiduciary duty to review an employer’s business decision for classifying employees as exempt or nonexempt for payroll purposes and a corresponding fiduciary duty to investigate whether the employees had some legal claim to additional compensation.” The court further noted that the unpublished opinions relied upon by the plaintiffs “did not address the policy implications of recognizing such a sweeping fiduciary duty.” The court stressed:

In this case, Plaintiffs draw an extremely fine line between business and fiduciary decisions—namely, that a plan administrator has a fiduciary duty to second guess the employer’s classification of all of its employees as exempt or nonexempt. Such a far-reaching duty would send the administration of the plan into gridlock and dramatically increase the cost of administering the plan. And the Supreme Court has repeatedly warned that Congress did not intend that ERISA be “a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering . . . benefit plans in the first place.” (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

The court, therefore, dismissed the plaintiffs’ ERISA claims.

Conditional Certification Granted in Suit Against M.A. Mortenson

[Keef v. M.A. Mortenson Co.](#), No. 07-CV-3915(JMR/FLN), 2008 WL 3166302, 2008 U.S. Dist. LEXIS 59076 (D. Minn. Aug. 4, 2008): A former field engineer at M.A. Mortenson Co.

("Mortenson") commenced suit on his own behalf and on behalf of all field engineers who worked for Mortenson from July 10, 2004, to the present time alleging Mortenson failed to pay its field engineers overtime in violation of the federal Fair Labor Standards Act ("FLSA"). Mortenson's field engineers, according to the plaintiff, consistently work more than 40 hours per week without receiving overtime compensation. The field engineers, according to the plaintiff, perform routine clerical duties, have no management duties, and are allegedly misclassified as exempt from overtime under the FLSA.

This summer, the plaintiff sought an order granting conditional certification of an opt-in class of Mortenson's field engineers, and permitting the plaintiff to notify the potential opt-in members of the lawsuit. In August, the Court granted the plaintiff's motion in part by granting the conditional collective action certification.

Under the FLSA, an employee may sue an employer on behalf of himself and other employees similarly situated, but the "other employees" must opt-in because the FLSA requires their written consent to be a party. Federal courts generally employ a two-stage certification process in determining whether employees are similarly situated: the notice stage and the opt-in or merits stage.

During the notice stage, the stage *Keef* was in, a court can conditionally certify a representative class, which permits the plaintiff(s) to notify potential opt-in plaintiffs of the lawsuit and their potential right to join as a party. The burden to obtain a conditional certification is low, as a "plaintiff only needs to show 'a colorable basis for the claim that the putative class members were victims of a single decision, policy, or plan.' "

During the opt-in stage, a court decides whether the class should be maintained through trial. If a collective action is improper the opt-in class members are dismissed without prejudice and the original plaintiff forges ahead in his or her individual capacity.

In *Keef*, the plaintiff satisfied the burden at the notice stage by alleging the field engineers were similarly situated because the job description for the position was the same regardless of where employees were located and the alleged misclassification affected them all in a similar fashion. Therefore, while the court cautioned that the ultimate certification "remains highly problematic," it granted conditional certification.

Second Circuit: Determining FLSA "Employer" Status

[*Barfield v. New York City Health and Hospitals Corp.*](#), 537 F.3d 132 (2d Cir. 2008): In *Barfield* the plaintiff, a certified nursing assistant, was employed by three referral agencies, each of which arranged for her to work at defendant Bellevue Hospital Center ("Bellevue"). While in any given week the plaintiff never worked more than forty hours for a single referral agency, the plaintiff sometimes worked more than forty hours per week at Bellevue. Both parties moved for summary judgment as to the plaintiff's overtime claim. *Barfield v. New York City Health & Hospitals Corp.*, 432 F. Supp. 2d 390 (S.D. N.Y. 2006). The district court granted summary judgment in favor of the plaintiff, which the appellate court affirmed.

The court distinguished between formal and functional control and stressed the non-exclusivity of the multi-factor analyses.

In determining whether the plaintiff was simultaneously employed by Bellevue in addition to the referral agencies, the court noted that employment for FLSA purposes is a flexible concept, grounded in economic reality rather than technical concepts, and determined on a case-by-case basis by review of the totality of the circumstances. Agreeing with the district court, the court held that Bellevue exercised sufficient formal and functional control over the plaintiff's work to qualify as her joint employer.

Explaining Second Circuit precedent, the court distinguished between formal control and functional control in determining FLSA employer status, but noted that the factors relied upon in case law stated no rigid rule for the identification of an FLSA employer. Indeed, the court stated that the various factors relied upon to (1) examine the degree of formal control over a worker, (2) distinguish between independent contractors and employees, and (3) assess whether an entity that lacked formal control nevertheless exercised functional control over a worker provided a "nonexclusive and overlapping set of factors" to ensure that the economic realities test is sufficiently comprehensive and flexible.

The court determined Bellevue maintained functional control over the plaintiff's work.

The court determined as a matter of law that Bellevue exercised sufficient functional control over the plaintiff to qualify as her employer. In determining functional control, the court analyzed the employment relationship under the six factors set forth in Zheng v. Liberty Apparel Co., 355 F.3d 61, 77 (2d Cir. 2003). Like the district court, the appellate court concluded that no material issue of fact existed on the following Zheng factors: "(1) [the Plaintiff] worked on Bellevue's premises using Bellevue equipment; (2) no referral agency shifted its employees as a unit from one hospital to another, but instead each assigned health care workers, including [the plaintiff], to the same facility whenever possible to ensure continuity of care; (3) [the plaintiff] performed work integral to Bellevue's operation; (4) [the plaintiff's] work responsibilities at Bellevue remained the same regardless of which agency referred her for a particular assignment; (5) Bellevue effectively controlled the on-site terms and conditions of [the plaintiff's] employment; and (6) [the plaintiff] worked exclusively for Bellevue."

Further, the court rejected the Defendant's arguments that the Zheng factors are only relevant in determining sham arrangements aimed at subverting the purposes of the FLSA, and that the "economic realities test is to 'segregate those contracting arrangements lacking true economic purpose from normal, necessary business relationships.'" To the contrary, the court stated that the reason to look beyond formal control is to give full "content to the broad 'suffer or permit' language in the [FLSA]."

The court also rejected Defendant's argument that the plaintiff's own conduct, specifically using three different agencies to secure more than forty hours per week of work when plaintiff was aware that Bellevue had a policy against temporary employees working overtime, precluded an award of summary judgment. The court stated that the plaintiff recorded her hours, which were confirmed and approved by a supervisor at Bellevue, and that Bellevue's

failure to maintain those records in such a way that allowed it to recognize when the plaintiff had worked a total of more than forty hours in a given week prevented it from claiming that it lacked “actual or imputed knowledge” of the work the plaintiff was performing. The court stated that such “inaction . . . would not permit a factfinder to conclude that [Bellevue] did not ‘suffer or permit’ the overtime work to be performed.”

Accordingly, the appellate court affirmed the district court’s grant of summary judgment. Additionally, the appellate court determined that the district court did not err in awarding the plaintiff liquidated damages, or in reducing the plaintiff’s attorney’s fees.

Tenth Circuit: “Outside Sales” Exemption

[*Clements v. Serco, Inc.*](#), 530 F.3d 1224 (10th Cir. 2008): The plaintiffs worked for a company (“Serco”) that provided recruiting services to the Army and Army Reserves. The plaintiffs would contact individuals to inform them about opportunities to serve in the United States Army or Army Reserves, but had no authority to enlist a recruit. Once a recruit expressed interest, the plaintiffs set up an initial interview, administered prescreening math and English tests, and engaged in follow-up activities, such as obtaining necessary documents, and transporting recruits. The Plaintiffs were provided a salary and received no overtime compensation for the hours they worked over forty per week.

The district court granted summary judgment for plaintiffs, holding that the plaintiffs were entitled to overtime compensation and that backpay was to be calculated based on the “fluctuating workweek” approach. [See *Clements v. Resource Consultants, Inc.*](#), No. : [2:04CV01008](#), 2008 WL 1579634, 2006 U.S.Dist. LEXIS 36944 (D. Utah June 2, 2006). The Court of Appeals for the Tenth Circuit affirmed.

Serco argued that the plaintiffs were not entitled to overtime pay because they were properly classified as “outside salesman,” an exemption under the FLSA. The appellate court noted, however, that the touchstone for making a sale under the Federal Regulations, 29 C.F.R. §§ 541.500 et seq., was obtaining a commitment—by making a sale or obtaining an order or contract for services. At length, the court distinguished between promotional activities designed to stimulate sales, which will be made by someone else, and efforts directed toward the consummation of an employee’s own specific sales. The court found that the plaintiffs had “merely cultivated ‘a list of persons who seem[ed] receptive to the idea’ of joining the army.” Accordingly, the court affirmed that plaintiffs were not, under FLSA, exempt employees acting as “outside salesmen.”

The court denied plaintiffs’ appeal that the trial court erred by calculating their backpay using the “fluctuating workweek” method rather than the time-and-a-half formula. The court noted that the “fluctuating workweek method” was proper when there was a “clear mutual understanding of the parties” that the fixed salary was compensation for hours worked each workweek, whatever their number. The appellate court agreed with the district court that this clear and mutual understanding existed given the facts at bar. In deposition, plaintiffs stated that they were hired on a salaried basis, that they routinely worked more than forty hours per week, and that they were neither docked for working less than forty hours per week nor paid more when they worked more than forty hours a week. The court further held that plaintiffs’ allegation that they were told that they would be paid “\$600.00 per week . . . [which] would

work out to \$15.00 per hour" was not sufficient to create a dispute of material fact as to whether plaintiffs would be paid at an hourly rate.



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State Law Discrimination Update

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

Tolling of Pendent State Claims

[*Goodman v. Best Buy, Inc.*](#), 755 N.W.2d 354 (Minn. Ct. App. 2008): The Minnesota Court of Appeals ruled that the federal tolling statute, 28 U.S.C. § 1367(d), is properly interpreted to suspend the running of limitation periods on pendent state claims while a case is pending in federal court.

Goodman, a customer service representative with Best Buy, was terminated on February 21, 2005, and instituted an action in state court under the federal Family and Medical Leave Act and the Minnesota Human Rights Act on July 12, 2005. Best Buy removed the case to federal court on August 4, 2005; the federal district court granted summary judgment for Best Buy on the FMLA claim and dismissed the MHRA claim without prejudice on December 4, 2006. Goodman re-filed the MHRA claim in state district court on March 9, 2007. The state district court dismissed the claims as time barred pursuant to 28 U.S.C § 1367(d).

Section 1367(d) provides in pertinent part that the limitations period for a pendent state claim “shall be tolled while the claim is pending and for a period of [thirty] days after it is dismissed unless state law provides for a longer tolling period.” The Minnesota Court of Appeals discussed a number of possible interpretations of the language as follows: (1) the state limitations period is *replaced* with the fixed limitations period of thirty days after federal dismissal; (2) the limitations period for the state claim is *annulled* if the state filing deadline would otherwise have expired; and (3) the state limitations period is *suspended* while the case is pending in federal court. The court of appeals, after a discussion of statutory interpretation principles and various approaches of other jurisdictions, chose the “suspension of the clock” approach, and determined that Goodman’s claim was not barred by the statute of limitations.

***Frieler* Hostile Work Environment Standard**

[*Geist-Miller v. Mitchell*](#), No. A07-1859, 2008 WL 3898207, 2008 Minn. App. Unpub. LEXIS 1032, 2008 Minn. App. Unpub. LEXIS 1168 (Minn. Ct. App. August 26, 2008) (unpublished opinion): The Minnesota Court of Appeals recently upheld summary judgment in favor of the employer on a quid pro quo harassment claim. However, the court reversed and remanded a hostile work environment harassment claim for further consideration in accordance with the principles of [*Frieler v. Carlson Marketing Group, Inc.*](#), 751 N.W.2d 558 (Minn. 2008).

Geist-Miller was general manager for two tanning salons owned and operated by Ronald Mitchell and his wife at that time. Mitchell filed for divorce in 2003. The court issued a temporary order putting Mitchell in charge of one company, his wife in charge of the other, and prohibiting each from entering the other's business premises. Mitchell terminated Geist-Miller for refusing to sign an acknowledgment that she would make no attempt to contact his wife and that she would inform him if his wife attempted to contact her. Geist-Miller pursued hostile work environment and quid pro quo sexual harassment claims and a retaliation claim. The harassment claims were based on multiple allegations of harassment by Mitchell.

The district court dismissed Geist-Miller's hostile work environment claim, applying a pre-*Frieler* standard, as Geist-Miller failed to show that the defendants knew or should have known of the harassment. In *Frieler*, issued in May of this year, the Minnesota Supreme Court adopted the *Ellerth/Faragher* standard. The court ruled among other matters 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 appeals court thus reversed and remanded Geist-Miller's claim for evaluation under the *Frieler* principles.

However, the court of appeals affirmed summary judgment for the defendants on the quid pro quo harassment claim, reasoning that Geist-Miller failed to present any evidence to connect Mitchell's inappropriate conduct with a threat to terminate her employment. The court rejected arguments that a quid pro claim under the MHRA simply requires a showing of unlawful harassment. Rather, the claim requires a showing that "her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment."

Geist-Miller failed to establish a prima facie case of retaliation because she could not remember whether she shared incident reports detailing the alleged conduct with anyone. Nevertheless, she also failed to present evidence of pretext, to be shown "either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Defendants presented a reasonable business explanation for requiring the acknowledgment, and all managers, not simply Geist-Miller, was required to sign the acknowledgment.

Reverse Discrimination

[*Anderson v. Fairview Health Services, Inc.*](#), No. A07-1481, 2008 WL 3289269, 2008 Minn. App. Unpub. LEXIS 964 (Minn. Ct. App. August 12, 2008) (unpublished opinion): The Minnesota Court of Appeals determined that a plaintiff had met the "low threshold" for establishing a prima facie case of reverse race discrimination under the MHRA, but had failed to meet the more rigorous threshold for showing pretext.

Anderson, an administrative financial representative with Fairview Health Services, had ongoing absenteeism issues and was terminated when she failed to report for work on a day for which she had requested time off. A supervisor, who is African American, denied Anderson's request for the day off because she did not have sufficient PTO.

Anderson complained of race discrimination when her request was denied. Anderson pursued reverse race discrimination and retaliation claims under the MHRA. The district court granted summary judgment in favor of the employer on both claims.

The court of appeals affirmed. The court determined that Anderson had made a sufficient showing to give rise to an inference of discrimination for purposes of the "low threshold" prima facie case. Among other matters, Anderson alleged that a minority employee was allowed time off even though the employee, like Anderson, did not have sufficient PTO.

The appeals court, determined, however, that Anderson did not make sufficient showing of pretext to survive summary judgment. Anderson contended that she was similarly situated to the minority employee who was allowed time off and was neither disciplined nor terminated. The court emphasized that the standard for determining at the pretext stage whether employees are similarly situated is a more rigorous standard; the comparison must involve individuals who have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without any mitigating or distinguishing circumstances. Anderson, in contrast to the minority employee, had numerous warnings for absenteeism and other performance issues.

The retaliation claim failed on similar grounds.



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Unemployment Compensation

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Seeking Suitable Re-employment

Jobless employees in Minnesota are obligated under [Minnesota Statute section 268.085](#), subdivision 13c(a)(1)-(2) to seek "suitable" re-employment to be eligible for unemployment compensation benefits.

The "suitability" issue usually arises in two different contexts: when an employee is offered a different position by the same employer and refuses it or when an employee does not seek other work after losing a job. The Minnesota Court of Appeals addressed both of these situations in a half-dozen recent rulings, reaching different results in the sextet of suits.

The statute disqualifies employees from unemployment benefits for eight weeks for refusal to accept "suitable" employment. Under Minnesota Statutes section 268.035, subdivision 23a, a "suitable" job is one "reasonably related to the applicant's qualifications." The statutory considerations also include the "length of unemployment, prospects for securing employment in the [employee's] customary occupation, and the distance of the employment from the applicant's residence."

Three of the cases concerned accountants and an architect.

[*LaMaack v. Adecco USA Inc.*](#), 2008 WL 2727370, 2008 Minn. App. Unpub. LEXIS 821 (Minn. Ct. App. Jul. 15, 2008) (unpublished): A veteran accountant was entitled to unemployment compensation benefits after refusing a bookkeeping position. An unemployment law judge with the Department of Employment & Economic Development (DEED) ruled that the claimant, who had thirty-six years of accounting experience, was disqualified from receiving benefits after he turned down a bookkeeping position offered to him through a temporary agency following the closure of a business where he had been working on a temporary basis as an accountant.

The appellate court reversed, holding that the claimant was eligible for unemployment benefits. Reviewing the "legal question" of suitability de novo, it noted that the ULJ had found both "some similarities" and "differences" between the accounting position that the claimant previously held and the bookkeeper position that was tendered to him. But the newly-offered

position was not “reasonably related to the applicant’s qualifications,” based upon a “number of factors.”

The main consideration included the “prior training and experience” of the applicant. In his previous job, the employee had prepared financial reports and performed cash and inventory management analysis. The new position, however, would have mainly included clerical duties which “primarily involve[d] working with customers.” Consideration of the applicant’s “prospects” was significant because there was no evidence that he had “unfavorable prospects of obtaining employment at his skill level” as an accountant.

[Ryks v. Dept. of Employment & Economic Development](#), 2008 WL 2966673, 2008 Minn. App. Unpub. LEXIS 921 (Minn. Ct. App. Aug. 5, 2008) (unpublished): Another accountant was barred from receiving benefits for failing to seek suitable work. After her job as an accountant ended, the claimant decided to make a career change. She went to Mexico, unsuccessfully looking for an English language teaching position. She was denied unemployment benefits on grounds that she was not “actively seeking suitable employment” under section 268.035, subdivision 23a, in the same “labor market area”.

The appellate court affirmed, holding that the “plain statutory definition” barred her claim because accounting, not teaching, constituted “suitable employment . . . based on her education and work experience.” Although she “preferred” to teach, she had no experience and little training in that field. Her attempt to “confine her [job] search to teaching positions” transgressed the statute, as did her unavailability for work in Minnesota, which remained her “permanent residence,” while looking for a job in Mexico.

[O'Brien v. Aerotek Inc.](#), 2008 WL 3835818, 2008 Minn. App. Unpub. LEXIS 980 (Minn. Ct. App. Aug. 19, 2008) (unpublished): An unemployed architect who faced a moral quandary was denied unemployment benefits. The architect was deemed disqualified by DEED when he rejected a temporary position while awaiting a prospective permanent job offer, turning down the former because he thought it improper to take that position and soon leave it if the other one materialized.

Sympathizing with the architect’s dilemma, the appellate court affirmed because the applicant failed to accept “suitable” employment, as required under section 268.085, subdivision 13c(a)(2). It was understandable for the jobless architect “to consider the moral issue of joining but then quickly abandoning” the pending position and “the possible impact on the company and his own integrity.” But those factors do not constitute “a statutory basis . . . to remain eligible for unemployment benefits after rejecting suitable employment.” The applicant lacked “good cause to reject” the temporary offer “while waiting to hear definitively” about the permanent position. Therefore, he was not entitled to benefits under the suitability section of the law.

[Biblenko v. Dept. of Employment & Economic Development](#), 2008 WL 4471102, 2008 Minn. App. Unpub. LEXIS 1187 (Minn. Ct. App. Oct. 7, 2008) (unpublished): A business student obtained reversal of denial of benefits. He was denied benefits by an unemployment judge on grounds that he checked the “no” box on his application, indicating that he was unwilling to cease attending business school to accept a “suitable” job offer.

But the appellate court reversed, holding there was no evidence that he invoked limitations on his job search while going to school or that he could not be available for a work shift that did not conflict with his school schedule.

[Burk v. Department of Employment & Economic Development](#), 2008 WL 2796575, 2008 Minn. App. Unpub. LEXIS 859 (Minn. Ct. App. July 22, 2008) (unpublished): An unemployment applicant's failure to diligently seek other work resulted in denial of his claim for benefits. The employee, who had worked for twenty-seven years as a machine operator, was unable to continue that work after he was injured in an automobile accident which prevented him from standing for long periods of time and limited his ability to lift heavy objects. He was disqualified from receiving unemployment compensation benefits by an unemployment law judge who determined that he was not actively seeking suitable employment.

The appellate court affirmed on grounds that the employee was required to "apply for positions that are suitable for his skill level," while he is allowed to participate in "approved job training and counseling." But the employee's testimony was "inconsistent" and "unclear" regarding his efforts to seek other work. By applying only for three other jobs and not regularly attending workforce centers for job training or counseling, the employee's efforts were not "adequate to show a genuine attachment to the workforce."

[Bushard v. Contractors Edge Inc.](#), 2008 WL 2885948, 2008 Minn. App. Unpub. LEXIS 880 (Minn. Ct. App. July 29, 2008) (unpublished): Similarly, an unemployment compensation applicant was disqualified for inadequately searching for "suitable" re-employment. The unemployment law judge properly refused to allow documentation of the claimant's job search activities as reconsideration after he failed to mention it at the hearing. Moreover, the employee's own testimony that he "kind of waited" six months after his lay-off to look for suitable new work reflected a lack of diligent job search in contravention of the obligation to "actively" seek another job under section 268.085, subdivision 16(a).

These half-dozen cases show that the right to unemployment benefits is not granted cavalierly to jobless employees. They must engage in diligent efforts to find or accept a position reasonably related to their prior skills and training.



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Minnesota Tort and Contract Cases

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Failure to Pay Severance Package and CEO's Misuse of Company Property

[*Zebeck v. Metris Companies, Inc.*](#), No. A07-0756, 2008 Minn. App. Unpub. LEXIS 608, 2008 WL 2168333 (Minn. Ct. App. May 27, 2008): Plaintiff Ronald Zebeck brought suit for breach of contract against his former employer, Metris Companies, Inc. ("Metris"), seeking to recover severance pay.

Zebeck became CEO of Metris in 1998. He entered into a Change of Control Severance Agreement (the "Agreement") with Metris in which Metris promised a severance package to Zebeck in the event he was discharged either at the request of a third party who was effecting a change in control of Metris or in connection with or in anticipation of a change of control. The Agreement provided that Zebeck would not be entitled to any severance if he was discharged for cause.

After the company began to suffer serious financial problems in 2002, it retained two investment bankers to advise it on the company's financial situation. Among the possibilities proposed by the investment bankers was the sale of Metris. Metris discharged Zebeck in December 2002. Zebeck's termination letter stated that the company reserved the right to determine if his termination had been for cause. Zebeck demanded his severance package, but Metris hired an accounting firm to audit Zebeck's expense records. Several months later, Metris's board of directors determined that Zebeck's discharge had been for cause. Metris was ultimately sold to HSBC in November 2005.

After a trial, the jury found that Zebeck had not been terminated for cause; that he had been terminated in anticipation of a change in control and was therefore entitled to his severance package in the amount of \$30,211,716; that Zebeck had used Metris's money and/or property contrary to the company's best interests; and that Metris was entitled to \$236,000 from Zebeck. Metris moved for a new trial or JMOL, which was denied.

On appeal, the Minnesota Court of Appeals upheld the jury's verdict. Metris argued that the jury's finding that Zebeck was fired in anticipation of a change in control was contrary to the evidence because there was not evidence the company was actually for sale in 2002 and the company was not sold until three years after Zebeck was fired. The court found, however,

that the investment bankers' letters and presentations regarding pursuing a structured sale of the company was evidence that Metris was planning to be sold in December 2002. The court also found that the Agreement did not specify any limitation on time for "anticipation." The court noted that the parties could have put a limitation in the Agreement on the time frame for "anticipation" of a change in control, which is fairly common in such change-in-control agreements. Because there was not such a limitation, Zebeck's discharge did not have to occur within any particular time frame relative to the change-in-control.

Metris also argued that Zebeck had forfeited his right to severance pay by improper use of Metris's property. To support its forfeiture argument, Metris relied on *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777 (Minn. 1989), which held that Minnesota Statutes section 181.79 subdivision 1 (prohibiting employers from deducting an employee's debt from the employee's wage unless a court has found the employee liable for the debt) did not supersede the common-law doctrine of forfeiture.

The court, however, found *Stiff* to be distinguishable on several grounds. First, *Stiff* involved an employee who could not prove the amount he was claiming in unpaid commissions because of his own misconduct in destroying the company's business records. But in Zebeck's case, there were ample business records for the jury to determine how much Zebeck owed Metris. Second, here there was a contractual provision stating the circumstances under which Zebeck would forfeit the money owed by Metris; in *Stiff*, there was no such contractual provision. Because Zebeck was not actually terminated for cause, he did not forfeit the severance benefits under the terms of the Agreement, and the jury's verdict was not improper.

Defamatory Statements Made During Investigation

[*Bahr v. Boise Cascade Corp.*](#), No A07-1353, 2008 Minn. App. Unpub. LEXIS 918, 2008 WL 2966433 (Minn. Ct. App. Aug. 5, 2008): Plaintiff LeRoy Bahr brought a defamation lawsuit against his employer, Boise Cascade Corp. ("Boise"); his supervisor, Eural Dobbs; and a co-worker, Stacey Rasmussen. The case arose out of a workplace complaint made by Rasmussen and the resulting investigation conducted by the company.

Rasmussen complained to Dobbs, who was his supervisor and his uncle, that Bahr had confronted him in a hostile and threatening manner. The confrontation between Bahr and Rasmussen was about Rasmussen's accusation that Bahr had spread a rumor in the workplace, but later it was discovered that a different employee had actually spread the rumor. When Rasmussen reported the confrontation to Dobbs, Bahr denied that he had confronted Rasmussen in a hostile and threatening manner. A human resources coordinator interviewed Rasmussen about his complaint against Bahr, and Rasmussen stated that Bahr "yells and shouts" at him and "is almost to the point of physical violence." Rasmussen also reported that Bahr did "as little as possible" on the job and did not finish his work.

The company began an investigation into Rasmussen's complaints, during which human resources personnel discussed with other employees the rumor about Rasmussen, the confrontation between Rasmussen and Bahr, and Bahr's work habits. Dobbs subsequently issued a disciplinary document to Bahr that stated Bahr "had a confrontation with

[Rasmussen] that was very hostile and threatening in nature" and that Bahr had "committed a major infraction of Company Policy."

In the lawsuit, Bahr alleged that Rasmussen's complaints to Dobbs about him were false and defamatory and that Dobbs had communicated or republished those defamatory statements to others in the course of his employment. Although the defendants brought a summary judgment motion claiming that the statements were privileged, the summary judgment motion was denied and the case proceeded to trial.

At trial, the jury found that Boise and Rasmussen had made statements constituting defamation per se and that the statements were made with malice. The jury awarded Bahr \$27,200 in damages against Boise and \$1,000 in damages against Rasmussen. The defendants resubmitted the same arguments from their summary judgment motion in JMOL motions at the close of Bahr's case, at the close of their case, and following the jury's verdict. All of the JMOL motions were denied.

On appeal, the Minnesota Court of Appeals reversed the district court's decision, finding that the defamatory statements were subject to a qualified privilege and that there was insufficient evidence of malice to defeat the qualified privilege. Generally, statements made during the course of an employer's investigation into misconduct receive a qualified privilege because such statements are made upon a proper occasion, from a proper motive, and are based upon reasonable or probable cause. Thus, sufficient proof of actual malice was required in order to defeat the qualified privilege.

The court noted that "malice cannot be implied from the statement itself or from the fact that the statement was false," but must be proven by other evidence, such as ill feelings. Although Bahr provided evidence that his supervisor Dobbs harbored ill feelings against him, there was no basis to impute Dobbs' purported ill feelings to Boise, and Dobbs had not even authored the allegedly defamatory statements. Further, although Bahr claimed that Boise's investigation into this work habits during the harassment investigation revealed malice by the company, the court found that the investigation's scope was proper, as Rasmussen had also complained about Bahr's work habits, and employers such as Boise have an important interest in protecting themselves against employee conduct that harms its operations.

The court also found that there was insufficient evidence of actual malice on the part of Rasmussen. Although there was evidence that Rasmussen had insulted Bahr, a personality conflict where the parties simply trade insults does not suffice to prove malice. The court concluded that the statements were subject to a qualified privilege and that the jury's verdict was contrary to the evidence, reversing the judgment for Bahr.



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Public Sector

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[*Engquist v. Oregon Dept. of Agriculture*](#), 128 S. Ct. 2146 (2008): The Supreme Court has held that although persons may assert a class-of-one claim in the context of challenging state legislative and regulatory action, a similar claim cannot be brought in the context of public employment because it would produce undue judicial interference in state employment practices and invalidate public at-will employment.

The petitioner, Anup Engquist, was hired as an international food specialist within the Oregon Department of Agriculture (ODA). Engquist had a variety of personality conflicts with co-workers and eventually was laid off because of reorganization. Although Engquist's collective bargaining agreement (CBA) allowed Engquist to "bump" to another position, ODA denied the requested transfer finding Engquist unqualified for the only other available position.

Engquist brought suit in the United States District Court for the District of Oregon, alleging violations of federal antidiscrimination statutes, the Equal Protection clause, Due Process clause, state law, and a "class of one" claim, alleging she was fired not because she was a member of an identified class, but for arbitrary, vindictive, and malicious reasons.

The district court granted ODA's motion for summary judgment on some claims but allowed the class-of-one claim to go forward. A jury found for Engquist on the class-of-one claim because she was intentionally treated differently than other similarly situated individuals without any rational basis and solely for arbitrary, vindictive, or malicious reasons. The court of appeals reversed, finding that the class-of-one concept is inapplicable to decisions made by public employers with regard to their employees.

The Supreme Court affirmed, noting a "crucial difference" between the government using its power to regulate and the government acting as a proprietor to manage an internal operation. The Court distinguished *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), where a plaintiff successfully brought a class-of-one claim on grounds the government there was regulating land use, rather than an internal employment issue. According to the Court, allowing an Equal Protection claim based on a class-of-one in employment law would be inconsistent with the at-will employment theory. In addition, allowing such claims would overload the judicial system with class-of-one claims and interfere with the effective functioning of government offices.

Justices Stevens, Souter, and Ginsburg filed a dissent, arguing that the majority's ruling was unnecessarily broad in tolerating arbitrary and irrational decisions in the employment context. The dissent argued that the rational review standard could effectively limit the large body of claims that would be submitted on a class-of-one theory.

[Martinez v. City of St. Louis](#), 539 F.3d 857 (8th Cir. 2008): The court of appeals held that a hiring decree for St. Louis firefighters was validly dissolved, reversed the award of damages to the two applicants, and remanded to address reverse discrimination claims for the period subsequent to the dissolution of the decree.

In reaction to alleged racially discriminatory hiring by the St. Louis Fire Department in the 1970's, the city consented to a decree by which it would hire qualified black applicants for at least fifty percent of the vacancies in entry level positions. The decree was enacted to achieve a racial balance within the firefighter unit that was comparable to that of the civilian labor force in St. Louis.

In 1990, the United States moved to modify the decree, based on the disparity between the number of African-Americans in the civilian labor force (15.7%) and in entry-level positions within the Fire Department (49%). A district court denied the motion, reasoning the United States did not meet "the burden of demonstrating changed circumstances showing the hiring goal to be unnecessary because achieved."

Martinez, who is white and was already employed by the city, applied in 1998. In 1999, the city hired eight African-American candidates with lower scores than Martinez. In 2005, Martinez finally was hired as an entry-level firefighter. Deeken also applied in 1999 and was not hired despite having a score higher than thirty-four African-American applicants who were hired. The court ordered Deeken to be appointed to a probationary position. A 2006 stipulation noted that both employees would have been considered for appointment if not for the decree.

In 2001, Martinez and Deeken challenged the decree as causing reverse discrimination, bringing claims pursuant to Title VII, § 1981, § 1983, and the Equal Protection clause. In 2003, a district court dissolved the decree, believing racial parity had been achieved. A jury trial in 2005 resulted in the two applicants receiving probationary status as firefighters, along with damages and other related relief. The city appealed the decision.

On review, the Eighth Circuit held that any error in the district court's dissolution of the consent decree was harmless because the court determined racial parity had been achieved. The Eighth Circuit next determined that damages were inappropriate until after the decree was dissolved by a court. Here, the city was required to comply with the terms of the decree until 2003, yet the district court awarded damages prior to that date. The Eighth Circuit held that demonstrated compliance with a valid Title VII decree is a complete defense to pre-dissolution claims for damages. Lastly, the Eighth Circuit remanded on the issue of reverse discrimination because the district court did not address the requisite elements of that claim.

In re Masson, 753 N.W.2d 755 (Minn. Ct. App. 2008): The Minnesota Court of Appeals ruled that the Public Employees Retirement Association (PERA) must offset disability benefits by any earnings from employment not covered under the plan, irrespective of whether the employment occurred before or after the date of disability.

The Minneapolis Park board hired Mylan Masson in 1991 as a full-time police officer. In 1994 Masson took a second full-time position as the assistant director of the criminal justice and law enforcement program at Minneapolis Community and Technical College (MCTC). In 2001, Masson sustained disabling injuries while on duty as a police officer, resulting in termination because of inability to perform essential duties. Masson, however, was still employed by MCTC because she was able to perform those positional duties.

Masson applied for long-term benefits from PERA and began receiving them in 2004. In 2006, PERA learned of Masson's employment with MCTC and asked about her "reemployment earnings." Masson indicated her work at MCTC was not reemployment because she had worked there prior to the accident. PERA told Masson she had been overpaid and withheld 25% of her benefits to recoup that overpayment. Masson objected to this determination, but an administrative judge, upheld PERA's decision to include Masson's MCTC earnings in the reemployment calculation.

On review, the Minnesota Court of Appeals considered whether Masson's compensation for preexisting employment was subject to the offset provisions of Minnesota Statutes section 353.656 subdivision 4(b) (2006). That section states, "[i]f a disabled member [of the plan] resumes a gainful occupation with earnings that, when added to the normal disability benefit, and workers compensation benefit if applicable, exceed the disabilitant reemployment earnings limit, the amount of the disability benefit must be reduced as provided in this paragraph."

The court acknowledged both parties had advanced reasonable interpretations of the statute, and therefore the statute must be considered ambiguous. Reasoning that the legislature intends to favor the public interest over the private interest, the court determined preservation of public funds is in the public interest.

The court dismissed Masson's interpretation of the statute—reemployment is only employment procured before the disability—as leading to absurd results. For example, if Masson had only worked limited hours before her disability at MCTC, but substantially increased them after her disability, the offset would not apply to that work. Reviewing legislative history, the court reasoned the legislature "intended § 353.656, subdivision 4(b), as a limitation on income replacement when a member is able to return to, or retain, employment not covered by the plan." The court determined PERA correctly calculated Masson's disability benefits.