



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:

1. 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.
2. The ADAAA clarifies that an impairment may qualify as a disability even if it substantially limits only one major life activity.

3. 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).
4. 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 became effective on January 1, 2009.

Eighth Circuit

No Pretext Where Plaintiff Violated Company Policies

[*Kosmicki v. Burlington Northern & Santa Fe Railway Co.*](#), 545 F.3d 649 (8th Cir. 2008): The Eighth Circuit affirmed summary judgment in favor of BNSF, holding that BNSF articulated legitimate, nondiscriminatory reasons for the plaintiff's termination and that the plaintiff failed to offer evidence that BNSF's stated reasons were a pretext for disability discrimination under the ADA.

BNSF terminated the plaintiff, a train engineer, for dishonesty and for violating the company's written drug and alcohol policy. The engineer failed to provide BNSF with complete information regarding his medical treatment and medication on a medical screening questionnaire, and he worked while taking prescription drugs that affected his cognitive abilities. Thus, the court concluded that the engineer failed to show that BNSF's reasons for his discharge were not the company's true reasons. The engineer presented some evidence tending to show that BNSF supervisors suspected that he had suffered brain injuries. Nevertheless, the court determined that the engineer did not meet his burden of producing evidence that would permit a reasonable jury to find that BNSF terminated his employment because it regarded him as disabled.

District of Minnesota

Student in Teaching Program

[*Thomas v. Hamline University*](#), No. 07-3323, 2008 U.S. Dist. LEXIS 94873, 2008WL5071078 (D. Minn. Nov. 21, 2008): The district court granted summary judgment in favor of Hamline University, holding that Jenelle Thomas failed to create a genuine issue for trial with respect to her disability discrimination claims under the ADA and MHRA.

Thomas transferred to Hamline to pursue majors in music and education as part of the music education licensure program. Thomas had suffered from depression since she was eleven years old. Soon after transferring to Hamline, she began to experience problems with her coursework. She missed classes, neglected to turn in assignments, rarely interacted with peers or participated in class, and exhibited a negative and unresponsive attitude in class. Faculty members, therefore, had concerns about her ability to begin student teaching and

required that Thomas teach a lesson before her teachers. Thomas decided not to set up a teaching observation, and she failed two music classes. As a result, Hamline determined that Thomas would not be allowed to pursue her music education licensure.

Thomas sued, arguing that no other student in the history of the music licensure program had been required to submit to a teaching observation prior to beginning the student teaching portion of the program. The court rejected Thomas' argument, noting that Hamline has required observations in other teaching licensure programs. The court also determined that Thomas did not present evidence from which a reasonable trier of fact could conclude that her disability was the motivating factor behind Hamline's decision to require an observation. In doing so, the court emphasized that the state licensure standards require that teachers create a positive learning environment and that it was within the scope of the faculty's professional judgment to determine whether Thomas' personality and demeanor conflicted with the skill set of a successful teacher.



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Age Discrimination in Employment Act

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Supreme Court Accepts Review of Mixed-Motive Case

[Gross v. FBL Fin. Servs. Inc.](#), -- U.S.--, 129 S. Ct. 680, 172 L. Ed. 2d 649, 77 USLW 3340, 77 USLW 3344, 77 USLW 3229, 08 Cal. Daily Op. Serv. 14,850, No. 08-441, *cert. granted*, Dec. 5, 2008: This case presents the question of whether a plaintiff is required to offer direct evidence that age played a substantial role in a challenged employment decision in order to be entitled to a mixed-motive jury instruction at the trial of an ADEA case. The Eighth Circuit, 526 F.3d 356, 103 Fair Empl.Prac.Cas. (BNA) 518, 91 Empl. Prac. Dec. P 43,197, <http://www.ca8.uscourts.gov/opndir/08/05/071490P.pdf>, held that such evidence is required, relying on *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), notwithstanding a provision in the Civil Rights Act of 1991 that superseded the *PriceWaterhouse* requirement for direct evidence in Title VII cases. The case is scheduled to be argued before the Supreme Court on March 31.

Significance of Age-Related Remarks

[King v. United States](#), No. 08-1766, -- F.3d --, 2009 WL 196366, 2009 U.S. App. LEXIS 1774, 105 Fair Empl.Prac.Cas. (BNA) 486 (8th Cir. Jan. 29, 2009): This case involved a failure-to-hire claim by a 54-year-old employee of the U.S. Department of Agriculture who sued after the Department selected a 25-year-old co-worker to fill a new position called "single family housing specialist." The evidence showed that the decision was made by a committee comprised of four individuals, including a director named Dr. Brown. At a bench trial, the plaintiff presented evidence of four comments to the effect that Brown preferred "young blood." Three of the statements were made months before the job opening at issue was announced. The fourth was made a couple of months after the challenged decision was made. In that instance, one of the members of the selection committee (not Brown) told another employee of Brown's philosophy favoring the hiring of younger people.

At the conclusion of the bench trial, the district court held in favor of the employer. The court concluded that the three statements about Brown that were made well before the process to fill the housing specialist position commenced were not probative because they did not demonstrate a specific link between discriminatory animus and the committee's decision to select the younger employee. The district court did not, however, address the other

statement concerning Brown's motivation, which was made shortly after the committee had made its decision.

While the appeals court agreed with the district court that the first three statements were not direct evidence, it nonetheless concluded that a remand was necessary because it was not able to determine based on the record whether the fourth statement was direct evidence of age discrimination. The district court had "failed to make a factual finding about whether [the] testimony about [this] alleged statement was credible, and if so, whether the statement specifically pertained to the selection committee's challenged] decision." One "reasonable interpretation" of the evidence was that it was a statement made shortly after the selection committee's challenged decision that arguably demonstrated discriminatory animus in the decision-making process. Thus a remand was required so that the district court could make the requisite findings.

Employer Sincere Belief of Employee Wrongdoing

[*Roeben v. BG Excelsior L.P.*](#), 545 F.3d 639, 104 Fair Empl.Prac.Cas. (BNA) 1153, 91 Empl. Prac. Dec. P 43,364 (8th Cir. 2008): The court affirmed summary judgment against the plaintiff, who was fired at age 71 after the employer discovered, based on a tip provided by a third party, that the employee possessed a quantity of company property at his home. After the employer investigated, it terminated the plaintiff for unauthorized possession of this property.

The appeals court affirmed dismissal of the claim primarily because there was no evidence disputing the sincerity of the employer's belief at the time of the discharge that the plaintiff wrongfully possessed the property. The employee argued that the company's investigation was poorly conducted and that its decision about his termination was unfair. The court deemed these arguments insufficient to reverse the summary judgment. Age-related comments by the plaintiff's supervisor ("too old to lift boxes") did not raise a fact issue because the supervisor was not the decision-maker on the discharge. The court also held that there was insufficient factual support for the employee's argument that the employer engaged in a pattern of discrimination, noting that the argument was based on the treatment of employees who were "significantly different." The plaintiff's job position (director of purchasing) "required a special emphasis on probity and discretion," and therefore the comparisons to other employees were "unavailing."

Employer's Favorable Treatment of Younger Employees

[*Shannon v. Barilla America, Inc.*](#), No. 08-1889, 2008 WL 5048559, 2008 U.S. App. LEXIS 24414, 105 Fair Empl.Prac.Cas. (BNA) 49 (8th Cir. Dec. 1, 2008): An ADEA claim was asserted by an employee who was fired from his job as a forklift operator at age 51 after he caused several forklift collisions, including one that resulted in substantial damage to the employer's property. The court rejected the employee's argument that a trial was necessary based on evidence that the employer had not terminated two younger employees who had also been involved in forklift accidents, holding that the younger employees were not "similarly situated in all relevant respects." The accident in which one of the younger employees had been involved caused no damage. The other younger employee who had been involved in an

accident “suffered cognitive and memory problems” and was therefore dissimilar to the plaintiff. The court also rejected the employee’s argument that a fact issue was raised by evidence that the employer did not follow its progressive discipline policy.

Notice of Action to Potential Class Members

[*Peterson v. Seagate U.S. LLC*](#), No. 07-2502 (D. Minn. filed Oct. 23, 2008): Chief Judge Michael Davis granted a motion by the plaintiffs under *Hoffman-LaRoche v. Sperling*, 493 U.S. 42 (1989), to send notice of the action, which arose from a 2004 group termination, to potential class members. *Sperling* authorizes a district court to facilitate notice to potential plaintiffs who are “similarly situated.” At an early stage of a case, plaintiffs must only establish a “colorable basis” for their claim that putative class members are the victims of a single decision, policy or plan in order for a court to authorize notice. The court held that the plaintiffs had “easily met” this requirement based on evidence that appeared to show that employees who were discharged were “subject to a company-wide policy, that over half the terminated employees were older than 40, and that many were replaced by younger, less experienced workers.” The court accordingly required the defendants to provide plaintiffs’ counsel with the names and addresses of all employees who were 40 years of age or more in 2004 when the employer offered them a retirement or termination separation agreement.

Age Harassment Claim Dismissed

[*Kassera v. I.S.D. No. 11*](#), No. 07-CV-2292, 2008 WL 4613747, 2008 U.S. Dist. LEXIS 81965 (D. Minn. Oct. 15, 2008): An ADEA claim asserted by a school district paraeducator who had resigned because she felt targeted and harassed by her employer was dismissed because there was no evidence that the work environment was “objectively intolerable.” A plaintiff’s subjective feelings of being targeted or harassed were insufficient, held Judge Patrick Schiltz, who made a distinction between an environment that may be objectively unpleasant (not actionable) and one that is objectively intolerable (actionable).



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Family and Medical Leave Act

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New FMLA Regulations

On January 16, 2009, new Family and Medical Leave Act ("FMLA") regulations became effective. The new regulations provide direction concerning "injured servicemember" and "qualifying exigency" FMLA leaves and also provide significant clarification in a number of other areas.

Some of what has been changed or added includes the following:

1. Qualifying Exigency Leave – [29 C.F.R. § 825.126](#)
 - a. Qualifying exigency leave is designed to allow eligible employees time off for designated reasons when a close relative is called to military duty. Eligible employees may take qualifying exigency leave when the employee's spouse, child, or parent who is an active or retired Guard or Reserve member or a retired member of the Regular Armed Forces (but not active members of the Regular Armed Forces) is called (or has been notified of an impending call or order to active duty), under federal law (not a state call-up unless ordered by the President), to active duty on a contingency operation as specified in Title 10 of the U.S. Code.
 - b. Qualifying exigencies are broadly defined under the new regulations and include absence for:
 - i. Issues related to deployment on short notice (7 days or less);
 - ii. Attendance at military events and related activities;
 - iii. Arranging for or addressing child care and school activities (but not childcare on a routine, regular or everyday basis);
 - iv. Making financial and legal arrangements;

- v. Attending counseling by someone other than a health care provider for self, servicemember, or servicemember's child;
 - vi. Rest and recuperation with the covered military member (up to 5 days per instance);
 - vii. Attending post deployment activities; and
 - viii. Additional activities (if agreed by employer and employee).
- c. The FMLA's other provisions regarding paid and unpaid leave, notice, and reinstatement after leave apply.

2. Injured Servicemember Leave – 29 C.F.R. § 825.127

a. An eligible "spouse, son, daughter, parent, or next of kin of a covered servicemember" is entitled to a total of 26 workweeks of leave during a 12-month period to care for the injured servicemember." 29 U.S.C. § 102(a)(3) (referred to hereinafter as "injured servicemember" leave).

i. This new provision expands the group of employees potentially eligible for FMLA leave to include "next of kin of a covered servicemember."

ii. "Next of kin" means "the nearest blood relative of that individual" other than a spouse, parent, son or daughter. The order of priority is as follows:

- a. Relatives granted legal custody by statute or court order;
- b. Brothers/sisters;
- c. Grandparents;
- d. Aunts/uncles, and
- e. First cousins,

unless the servicemember specifically designates in writing another as his/her nearest blood relative. 29 C.F.R. § 825.127.

iii. when no designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, they all shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously.

b. The injured servicemember must be a current member of the Armed Forces, including the Guard and Reserve but not a former member (discharged or retired), who meets one of the following:

i. Has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing treatment, recuperation or therapy;

- ii. Is in outpatient status; or
 - iii. Is otherwise on the temporary (not permanent) disability retired list.
- c. The 12-month period begins on the first day of the leave and ends 12 months from that date, regardless of the method normally used by the employer to calculate FMLA leave.
- d. Leave may be taken for more than one serious injury or illness per one injured servicemember. Also, leave may be taken for more than one injured servicemember. This latter situation may result in overlapping 12-month periods, depending on the first day of use of leave for each injured servicemember.
- e. The regulations provide a fairly extensive clarification of the terms and definitions regarding servicemember leave.

3. Employee Count – PEOs and Joint Employer Status – [29 C.F.R. § 825.106](#)

The new regulations provide that employees of a Professional Employer Organization (“PEO”) are not considered in the 50-employee count (that triggers employer coverage under the FMLA) if the PEO merely performs administrative functions such as payroll, benefits administration, etc. 29 C.F.R. § 825.106(b)(2). But, whether the PEO is a joint employer with the client employer (and therefore all employees must be counted together) is determined based on the economic realities and specific facts and circumstances of the relationship. If the PEO has the right to hire, fire, assign, or direct and control the client employer’s employees, it could be considered a joint employer with the client employer. However, there is good news for employers even in these instances. The client employer must include its own employees for purposes of determining whether the 50-employee threshold is met, but is only required to include other PEO employees if the client employer jointly employs those other individuals. **29 C.F.R. § 825.106(d).**

4. Eligible Employees – Breaks in Service and Other Issues [29 – C.F.R. § 825.110](#)

- a. Employees must have accumulated 12 months of employment as of the date on which FMLA leave is to begin to be eligible for the leave. The new regulations specify that, while the employee need not show 12 consecutive months of employment, the employee generally cannot count periods of employment preceding a break in service of seven years or more. Exceptions are National Guard service or Reserve military service as well as provisions under a collective bargaining agreement or other written agreement. 29 C.F.R. § 825.110(b).
- b. The new regulations specify that a returning National Guard or Reserve military member must be credited with the hours of service that would have been performed *but for* the period of military service in determining whether the 1,250 hours requirement has been met. 29 C.F.R. § 825.110(c)(2). (Note that this is the same rule specified by The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), [38 U.S.C.A. §§ 4301 to 4335](#).)

c. The new regulations answer the difficult question of whether an employee can become eligible for FMLA while already on an approved absence from work. The new regulations specify that an employee may be on “non-FMLA leave” at the time he/she meets the 12 months of service requirement, which must be determined on the date the FMLA leave is to start. In that case, only the FMLA-qualifying leave taken after the employee meets the eligibility requirement would count as FMLA leave. 29 C.F.R. § 825.110(d).

5. Serious Health Condition – Time Periods and Treatment Parameters – 29 C.F.R. § 825.115

The FMLA definition of “serious health condition” is quite broad, but the new regulations now include a few time limitations and treatment parameters.

a. For a serious health condition involving incapacity of more than three consecutive calendar days with the required in-person medical treatment:

i. The new regulations specify that the period of incapacity must be more than three *full* calendar days.

ii. The new regulations specify certain time periods during which the incapacitated person must seek the required in-person medical treatment.

a. If the person seeks treatment by a health care provider on at least one occasion with a continuing regimen of treatment under the health care provider’s supervision, the in-person visit to the health care provider must be within seven days of the first day of incapacity.

b. If the person seeks treatment two or more times by a health care provider, the first in-person health care provider visit must be within seven days of the first day of incapacity and the second (or more) treatments must take place within thirty days of the first day of incapacity and must be determined by the health care provider. **29 C.F.R. § 825.115(a).**

b. A “serious health condition” for purposes of the FMLA also covers a chronic condition that (a) requires periodic visits for treatment by a health care provider or other specified individual; (b) continues over an extended period of time; and (c) may cause episodic incapacity. The new regulations specify that the periodic visits for treatment must be at least twice a year. **29 C.F.R. § 825.115(c).**

c. Expectant women continue to be entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for their own serious health condition following the birth of the child. The new regulations also specify that the husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth. 29 C.F.R. **§ 825.120(a)(4).**

6. Health Care Provider – Expanded Definition – 29 C.F.R. § 825.125

The definition of health care provider has been expanded to include a physician's assistant who is authorized to practice under state law and who is performing within the scope of his/her practice as defined under state law.

7. Calculation of Leave – Holidays, Plant Closure, and Overtime – [29 C.F.R. §§ 825.200 and 825.205](#)

a. If a holiday occurs during a full week of FMLA leave, the holiday has no effect on counting the amount of FMLA time used. The week is counted as a full week. But, if the employee is using FMLA intermittently and not in full weeks, then the holiday counts as FMLA leave only if the employee was otherwise scheduled and expected to work during the holiday. Similarly, if the employer entirely closes the business (e.g., the week between Christmas and New Year's), the closed week cannot be counted against an employee's FMLA leave. 29 C.F.R. § 825.200(h).

b. If an eligible employee who is "normally" scheduled to work overtime is unable to do so because of a "serious health condition," the overtime missed may be counted as FMLA leave. For example, an eligible employee who, because of a qualifying serious health condition, is able to work only 40 of his/her regular 48 weekly hours uses 1/6 workweek of FMLA leave. Voluntary overtime hours that an eligible employee cannot work may not be counted as FMLA leave. 29 C.F.R. § 825.205(c).

8. Use of Paid Time – Follow the Employer's Rules – [29 C.F.R. § 825.207](#)

FMLA is generally unpaid. The new regulations specify that if an employee chooses, or if the employer requires, use of employer-provided paid time (e.g., accrued sick, vacation, or PTO time) concurrently with FMLA leave, the employer may require the employee to follow its established terms and conditions for use of such time so long as the employer has informed the employee of those terms and conditions. If the employee does not comply with the employer's requirements for use of paid time, no paid time need be provided, but the employee is still entitled to take unpaid FMLA leave. 29 C.F.R. § 825.207.

9. Transfer to an Alternative Job While on Intermittent or Reduced Schedule Leave – [29 C.F.R. § 825.204](#)

The new regulations specify that employers may temporarily transfer employees to an available alternative position if "an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care" The alternative position must have equivalent pay and benefits. The alternative position need not have equivalent duties, but neither can it discourage or work a hardship on the employee (e.g., transferring a white collar employee to a laborer's job). 29 C.F.R. § 825.204.

10. Perfect Attendance – 29 C.F.R. § 825.215

The new regulations specify that if a bonus or other payment is based on achievement of a specified goal—such as hours worked, products sold, or perfect attendance—the bonus or other payment may be denied if failure to meet the requirement is due to FMLA leave *so long as* the same rule applies to non-FMLA absences or other reasons. 29 C.F.R. § 825.215.

11. Waiver of FMLA Legal Claims – 29 C.F.R. § 825.220

Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. However, the new regulations specify that employees may retroactively waive their FMLA rights and legal claims. This means that an otherwise valid release of FMLA claims, such as in a properly drafted separation agreement that is supported by adequate consideration, is enforceable without approval of the Department of Labor or a court. 29 C.F.R. § 825.220(d).

12. Employer Eligibility Notice – 29 U.S.C. § 825.300

The new regulations impose new and more detailed notice requirements on employers. When an employee requests FMLA leave, or when the employer learns that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within 5 business days, absent extenuating circumstances. The eligibility notice must state whether the employee is eligible for FMLA leave. And, if not, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12-month period, and the number of employees at the worksite. 29 U.S.C. § 825.300(b).

13. Employer Designation of FMLA Leave – 29 C.F.R. § 825.300-.301

a. It is an employer's responsibility to designate leave as FMLA leave, within 5 business days from the date on which the employer received notice of the employee's need for leave. (29 C.F.R. § 825.300(c)(4)).

b. The new regulations codify the Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002). Under the new regulations, if an employer fails to designate leave as FMLA leave, the employer may retroactively designate leave as FMLA leave, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. 29 C.F.R. § 825.301(d).

14. Employee Notice Requirements – 29 C.F.R. § 825.302

a. The new regulations require employees to tell their employer "as soon as practicable" when the need for FMLA leave is foreseeable. 29 C.F.R. § 825.302(a).

b. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. If an employee fails to comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. 29 C.F.R. § 825.302(c).

15. Content of Medical Certification – 29 C.F.R. § 306

a. The Department of Labor has developed two optional forms for use in obtaining medical certification: one for use when the employee needs leave to care for a family member with a serious health condition, the other for use when the employee needs leave due to the employee's own serious health condition. 29 C.F.R. § 825.306(a)(8).

b. If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave. 29 C.F.R. § 825.306(d).

16. Clarification and Authentication of Medical Certification – 29 C.F.R. § 825.307

a. Under the new regulations, if an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. But the employer may contact the health care provider for clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. 29 C.F.R. § 825.307(a).

b. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. 29 C.F.R. § 825.307(a).

17. New Forms

The regulations provide new and expanded forms for FMLA administration that appear to be more user-friendly and hopefully will facilitate gathering of more helpful information:

- a. [Employee Rights and Responsibilities;](#)
- b. [Notice of Eligibility and Rights and Responsibilities;](#)
- c. [Certification of Health Care Provider – Employee's Serious Health Condition;](#)
- d. [Certification of Health Care Provider – Family Member's Serious Health Condition;](#)

- e. [Certification of Qualifying Exigency for Military Family Leave](#);
- f. [Certification for Serious Injury or Illness of Covered Servicemember](#); and
- g. [FMLA Designation Notice](#).

Terminations and Retaliation Claims

Failure to Follow Employer's Call-in Policy

[*Bacon v. Hennepin County Medical Center*](#), 550 F.3d 711 (8th Cir. 2008): Melondy Bacon had begun working for Defendant Hennepin County Medical Center as a janitor in 1992 and, beginning in 2003, began periodically breaking out in hives, which, her doctor later determined, was from environmental exposure. Following one such breakout on July 8, 2004, plaintiff obtained FMLA leave paperwork which her physician subsequently completed, indicating that plaintiff had a chronic health condition for which she would need intermittent leave, the duration of which was estimated to be twenty-four hours for each breakout, and recommending that plaintiff see an allergist. When plaintiff submitted her FMLA paperwork to her supervisor, she told him that, per her doctor's advice, she would be on leave until she saw an allergist. Plaintiff began FMLA leave that very day.

Defendant's call-in policy required an employee on indefinite sick leave to call in her absence every day, and plaintiff did so only through August 4th, although she did not return to work. For the days she called in, her absences were recorded by HCMC as FMLA leave. On August 11th, the department director wrote to plaintiff, informing her that she had been absent without calling for three days (August 5, 9, and 10) and, therefore, was deemed to have resigned pursuant to the union contract's provision that three consecutive days of absence without notice was considered a voluntary termination.

During her subsequent unemployment compensation hearing, plaintiff testified that she stopped calling in because she had received information that the FMLA guidelines did not require any call-ins and defendant's guidelines did not contain any directive to call in. Plaintiff prevailed on her unemployment claim.

Plaintiff later filed suit against defendant, raising both FMLA interference and retaliation claims, but she subsequently abandoned the retaliation claim. The district court granted summary judgment to defendant on the remaining interference claim, finding that defendant had not interfered with plaintiff's FMLA rights when it fired her for violating its call-in policy. A policy requiring employees on FMLA leave either to provide a tentative date for their return to work or to call in daily to report their absence is permissible, said the court, citing 29 C.F.R. § 825.309(a). Enforcement of such policies does not violate the FMLA.

On appeal to the Eighth Circuit and citing 29 C.F.R. § 825.301(b)(1), plaintiff argued that the FMLA required defendant to provide her specific written notice of its call-in requirement at the time she filed for FMLA, and that, by failing to do so, defendant had violated the FMLA's notice requirements.

The Eighth Circuit rejected plaintiff's argument, citing 29 C.F.R. § 825.301(b)(2), which states that the "specific notice *may* include other information—e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, *but is not required to do so.*" (emphasis added by the court). The court also noted that defendant's FMLA leave request form required the employee to acknowledge that the Human Resources Rules (or applicable labor agreement) apply to the absences. Also, defendant's FMLA employee handbook specifically provided that the FMLA did not change the county's leave of absence procedures and that the standard leave policies in the Human Resources Rules book and/or union contract continued to apply.

Finally, the Eighth Circuit agreed with the district court's rejection of plaintiff's self-serving affidavit, stating that her supervisor had told her she no longer needed to call in her absences every day, as there was no probative evidence to support it.

Failing to Appear for Work Before a Scheduled Doctor's Appointment

[Phillips v. Mathews](#), 547 F.3d 905 (8th Cir. 2008): Plaintiff Jamila Phillips ("Plaintiff") began employment with the State of Arkansas on October 14, 2004. On Monday, April 17, 2006, plaintiff transferred to a new department—the Department of Arkansas Heritage ("DAH"), where she was subject to a six-month probationary period. During her first week in the new job, plaintiff was reprimanded twice. On Tuesday, April 18, plaintiff was in a car accident on the way to work, but arrived at work by midday. Because DAH had not received the usual "Proof of Prior Service" detailing the balance of plaintiff's paid leave time when she transferred, DAH categorized plaintiff's partial day absence as leave without pay.

On Thursday, April 20, plaintiff scheduled a doctor's appointment for the next Monday, April 24, at 10:45 a.m., and discussed the appointment with her supervisor, Sharon Hacker. They agreed that the time off for the appointment would be unpaid because they still did not know how much paid time off plaintiff might have available and agreed that plaintiff would arrive to work at 8:00 a.m. and work until she needed to leave for the appointment. During this conversation, plaintiff mentioned she might need physical therapy, and, in response, Hacker gave plaintiff FMLA paperwork and told her to discuss the possibility of FMLA leave with two other designated employees (presumably from human resources, but their titles were not provided). Plaintiff did not do so.

On Monday, April 24, due to car trouble plaintiff did not report to work before her doctor's appointment. At the appointment, plaintiff's doctor prescribed several sessions of physical therapy and recommended she take off work through Thursday, April 27. Plaintiff's doctor completed the FMLA paperwork, and plaintiff took it with her back to DAH after the appointment.

Plaintiff did not deliver the FMLA paperwork, however, because when she arrived at DAH she was given a termination letter stating that she did not report to work until after her doctor's appointment and she had used leave without pay for a car not starting.

The final paycheck stub plaintiff received after the termination showed she had paid leave time available but the Proof of Prior Service that DAH finally received on May 5, 2006 showed no leave time remaining. No explanation was given for the discrepancy.

Plaintiff sued her supervisor, the Director of DAH, and the Governor of the State of Arkansas in the Eastern District of Arkansas, alleging both interference and retaliation in violation of the FMLA. The district court granted defendants summary judgment, concluding that the interference claim failed because DAH did not have notice of plaintiff's need for FMLA leave, and alternatively her termination was not due to any FMLA rights. The district court also granted defendants' summary judgment on the retaliation claim, concluding that plaintiff never exercised her FMLA rights, and alternatively her termination was not because of those rights. On appeal, the Eighth Circuit affirmed on both counts.

As to plaintiff's interference claim, the Eighth Circuit first found that the district court erred in concluding that plaintiff had not provided enough information to put defendants on notice that she may need FMLA leave, writing that a reasonable jury could find that her doctor visit was related to her prior car accident and could result in additional treatment and time off work. The court also found that it was immaterial that plaintiff was terminated before she could submit her FMLA paperwork or before defendants learned she needed additional time off work. An employer cannot avoid liability by discharging an employee before the employee can inform the employer of the need for leave. The employer bears the risk that the employee's health condition may later develop into a serious health condition.

Still, the court found that plaintiff's interference claim failed because, if plaintiff had a serious health condition (which the court did not decide), she still was entitled to FMLA starting only from her doctor's appointment at 10:45 a.m. on Monday, April 24. Plaintiff was terminated because she did not appear for work *prior to* her doctor's appointment as she had agreed with her supervisor she would do. Car trouble is not a serious health condition. Therefore, terminating plaintiff because her car would not start was completely unrelated to her doctor's appointment and potential need for FMLA leave.

Furthermore, the court rejected as immaterial plaintiff's argument that she had paid time off for her missed work time before her doctor's appointment because, the court explained, everyone was operating on the morning of April 24 that plaintiff had no leave time available. At best, the court wrote, the employer was mistaken. "However, termination based on even a mistaken, but honestly held, belief concerning leave time is still termination based on a reason unrelated to the FMLA." Therefore, defendants had met their burden of showing that plaintiff would have been terminated regardless of any request for or taking of FMLA leave.

Lacking direct evidence of the alleged retaliation, the court analyzed plaintiff's retaliation claim under the well-familiar *McDonnell Douglas* burden-shifting framework: A plaintiff must show that she exercised her FMLA rights and suffered an adverse employment action with a causal connection between the two. If the plaintiff does so, the burden shifts to the defendants to proffer a legitimate, nondiscriminatory reason for the adverse action. If that is accomplished, the plaintiff must present evidence creating a genuine issue of fact that the defendants' reason was pretext for discrimination.

As to the first requirement, the Eighth Circuit found that the district court had incorrectly concluded that plaintiff had not exercised her FMLA rights. Rather, as already discussed, plaintiff's doctor's appointment was covered by the FMLA if it resulted in treatment of a condition found to be a serious health condition under the FMLA. Still, the court upheld the grant of summary judgment on plaintiff's retaliation claim, finding that the defendants had put forward a legitimate, nondiscriminatory reason for plaintiff's termination—her failure to appear for work as agreed before going to her doctor's appointment and her lack of paid leave time to cover the absence.

The court rejected both of plaintiff's attempts to show pretext. First, the court rejected plaintiff's claim that the reason for the termination was not based in fact because, she said, she had paid leave time available. Again, as with plaintiff's interference claim, the facts showed that everyone believed, whether rightly or wrongly, at the time of the termination that plaintiff did not have any paid leave available. Second, the court rejected plaintiff's claim that the defendants changed their reasons for the termination when they subsequently cited her two prior reprimands and her probationary status as justification for her discharge. The court explained that adding to the original reason for the termination (plaintiff's failure to appear for work before her doctor's appointment as had been agreed upon without any paid time to cover the absence) was not a substantial change and not probative of pretext. Therefore, plaintiff's retaliation claim failed also.

Reporting to Work One Day After Her Scheduled Return

Cutting v. Ferrous Processing & Trading Co., No. 07-14422, 14 Wage & Hour Cas. (BNA) 2d 640 (E.D. Dist. Ct. Mich. 2008): Plaintiff Cutting began employment with defendant Ferrous Processing & Trading Co. in October 1997 and oversaw human resources for the company. On July 22, 2005, plaintiff informed the company that her doctor was taking her off work due to complications with her pregnancy. Plaintiff gave birth in early August and thereafter intended to take only six weeks of FMLA parenting leave. However, plaintiff underwent gallbladder surgery on September 8, 2005 and informed her supervisor that she would be taking another six weeks of FMLA leave, returning on October 24, 2005. Plaintiff would later testify that her supervisor allegedly "said that was fine, there was no problem with that . . ."

Nevertheless, on Friday, October 14, 2005, plaintiff called her supervisor and said she would be returning to work on Monday, October 17. Plaintiff had a note from her physician releasing her to work on that day. The supervisor told plaintiff to see the director of human resources on Monday. So, when plaintiff returned to work on October 17, she went to see the director of human resources who told plaintiff she was terminated. In fact, the company on the previous Thursday (October 13) had sent plaintiff a certified letter telling her that her FMLA had expired on October 13, and because she was not able to return to work on October 14, her position was terminated. Plaintiff later received the letter on October 21.

Plaintiff sued the company for both interference with her FMLA rights (she called it her FMLA entitlement) and retaliation.

The company moved for summary judgment on plaintiff's interference claim on grounds that an employer can avoid liability if the employee was incapable of returning to work at the end of the 12-week FMLA leave period. The company cited the original physician's note indicating that plaintiff would not be able to return to work until October 24, 2005, and the physician's October 14 note releasing plaintiff to return to work only on October 17. Plaintiff countered with evidence from her physician showing that plaintiff could have returned to work as early as October 10 and her own testimony that she could have returned to work on October 14 if the company had told her that it believed her FMLA leave had expired on October 13. Given plaintiff's evidence, the court denied the company's summary judgment motion, finding that it was not indisputable that plaintiff was unable to return to work at the conclusion of her 12 weeks of leave.

Plaintiff moved for summary judgment on her retaliation claim, asserting that the company had treated her differently from the way it treats others who have had only one unexcused absence. Because plaintiff did not have direct evidence supporting her claim, she was required to show (1) she availed herself of a right under the FMLA, (2) she suffered an adverse action, and (3) there was a causal connection between the two. If plaintiff met her burden, then defendant could prevail only if it provided a legitimate, nondiscriminatory rational for its decision to terminate plaintiff and plaintiff failed to show that the company's reason was a pretext.

The court found that plaintiff had met all three requirements of her claim, citing close proximity in time as sufficient evidence of a causal connection between plaintiff's exercise of her FMLA rights and her termination. In response, defendant argued that it terminated plaintiff for the legitimate, nondiscriminatory reason that she was incapable of returning to work on October 14. The court rejected defendant's argument, however, finding that there was nothing in the record indicating that the company possessed any evidence of plaintiff's inability to return to work on October 13—the day of that decision. Defendant received the physician's October 14 note only after it had already made its decision and sent the termination letter to plaintiff.

The court also found that plaintiff had presented evidence showing that defendant's proffered reason for the termination was pretextual. Defendant's employment manual provided that the usual recourse for one unexcused absence was a verbal reprimand, and the director of human resources testified that she could not name anyone who had been terminated for one unexcused absence.

Plaintiff also claimed that her FMLA leave had not expired on October 13 as the company said because her immediate supervisor allegedly had verbally approved her FMLA leave to October 24. The court agreed that plaintiff's testimony raised a genuine issue of material fact as to whether defendant should be estopped from arguing that plaintiff's leave expired on October 13.



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Title VII Update

*By Leslie L. Lienemann
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Religious Discrimination

[*EEOC v. Southwestern Bell Telephone, L.P.*](#), 550 F.3d 704 (8th Cir. 2008): The EEOC brought suit on behalf of two employees who were Jehovah's Witnesses and worked as customer service technicians. The EEOC claimed that the employer discriminated against the employees and failed to accommodate their sincerely held religious beliefs by denying them a vacation day to attend a church function and by firing them for failing to appear at work on that day.

The district court denied motions for summary judgment and for judgment as a matter of law made prior to submission of the case to the jury. The jury found in favor of the EEOC and awarded the employees \$396,000 and \$390,000 in damages. The district court then awarded reinstatement.

The Eighth Circuit held that it could not review the employer's challenges based upon sufficiency of the evidence because the employer failed to renew its motion for judgment as a matter of law after entry of judgment. The employer had argued that it was required to renew only its motion for judgment challenging the sufficiency of plaintiff's proof and was not required to renew its motion based on its affirmative defenses. The court rejected this view, noting that Rule 50(a) expressly applies to both claims and defenses, and therefore Rule 50(b) requires the motion to be renewed after entry of judgment in order for sufficiency of evidence to be reviewed, whether the motion relates to claims or to defenses.

Retaliation

[*Crawford v. Metropolitan Government of Nashville & Davidson County*](#), ___ U.S. ___, 129 S. Ct. 846, 2009 U.S. LEXIS 870, 105 Fair Empl. Prac. Cas. (BNA) 353, 09 Cal. Daily Op. Serv. 963 (2009): The United States Supreme Court rejected the narrow holding of the Court of Appeals for the Sixth Circuit that a woman who reported sexual harassment while being questioned in an investigation instigated by a complaint by a co-worker had not engaged in protected conduct under Title VII. The Supreme Court unanimously held that Title VII's anti-

retaliation provision protects an employee who discloses sexually offensive conduct in response to questions asked by an employer during an internal investigation.

[*Betton v. St. Louis County, Missouri*](#), 2009 WL 103330, 2009 U.S. App. LEXIS 957 (8th Cir. 2009): The Eighth Circuit overturned the district court's grant of summary judgment in this Title VII retaliation case, in which the plaintiffs alleged retaliatory job re-assignments. The lower court had concluded that the plaintiffs had established a prima facie case but nonetheless dismissed the case, concluding that there was no jury question on the element of pretext.

The court of appeals disagreed, citing evidence that could demonstrate that the reasons given by the employer were untrue. The evidence of pretext, including the timing of the reassignments, the changes to the job duties, and other factors created a jury question. The court reiterated its earlier holding in *Fitzgerald v. Action, Inc.*, 521 F.3d 867 (8th Cir. 2008) that "evidence of pretext and retaliatory intent must be viewed in its totality, and that temporal proximity may directly support inference of retaliation and also affect the reasonableness of inferences drawn from other evidence in the overall record."



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WARN Act

By Matthew C. Helland, Nichols Kaster, PLLP

Special Thanks to Jared Cook, Law Clerk

Effect of Brief Recall

[*United Steel v. Ainsworth Eng'd \(USA\), LLC*](#), No. 07-4731 ADM/RLE, 2008 WL 4857905, 2008 U.S. Dist. LEXIS 91541; 156 Lab. Cas. (CCH) P11,124; 28 I.E.R. Cas. (BNA) 715 (D. Minn. Nov. 10, 2008): In *Ainsworth*, the employees were laid off, then within thirty days temporarily recalled for six or seven days in order to winterize the employer's facility. Under the WARN Act, an employer must give sixty days advance notice before ordering a layoff exceeding six months. Measured from the original date of the layoff, the layoff lasted more than six months.

The defendant argued, however, that the six-month period ought to be measured from the last day of the temporary recall. The plaintiffs argued that the recall—only seven days—was too short to count.

Judge Montgomery agreed with the plaintiffs that a temporary recall may be disregarded if "it was too brief and was implemented with the purpose of attempting to evade the WARN Act." However, noting that the employer in this case did have a legitimate business reason for the recall and that there was no evidence of a bad faith attempt to evade the WARN Act, the court held that the recall would not be disregarded.

The plaintiffs argued, in the alternative, that even if the temporary recall was not disregarded, the layoff period amounted to a reduction in hours of more than 50% over six months and that the employer still had advance-notice obligations under 29 U.S.C. § 2101(a)(6)(C) (providing that WARN obligations are triggered by a 50% reduction in hours lasting more than six months). The court did not consider this claim on the merits. Instead, the court held subsection (C) simply did not apply because subsection (B) (dealing with layoffs) and subsection (C) (dealing with a reduction of hours) are mutually exclusive. In other words, the court held that when an employer announces a formal layoff, that layoff can never qualify as a reduction in hours—even if it doesn't qualify as a layoff under subsection (B).

ERISA Funds, Affiliated Corporations, and "Faltering" Company

In re APA Transport Corp. Consol. Litig., 541 F.3d 233, 156 Lab. Cas. (CCH) P11,093; 45 Employee Benefits Cas. (BNA) 2100; 28 I.E.R. Cas. (BNA) 97, (3d Cir. 2008): A trucking company shut down, and several employees, unions, and ERISA funds sued, arguing that the employer had failed to give advance notice as required by the WARN Act. All parties moved for summary judgment. The district court granted in part and denied in part their motions, and the parties appealed.

The first issue for the Third Circuit was whether the ERISA funds had standing to enforce WARN Act requirements. The WARN Act provides that employers are liable “to each aggrieved employee who suffers an employment loss” as a result of the employer’s violation of the Act. 29 U.S.C. § 2104(a)(1). It further provides that “[a] person seeking to enforce such liability, including [a union or a local government] may sue . . .” *Id.* § 2104(a)(5). The court observed that neither the parties nor the district court had addressed the threshold issue of whether an ERISA fund was a “person” under § 2104(a)(5). The court held that the statute itself does not define “person” narrowly, and that under normal circumstances, “person” can be defined broadly.

However, the court then went on to observe that the DOL regulations provide that “Employees, their representatives and units of local government may initiate civil actions against employers [under the WARN Act]. The [DOL] has no legal standing in any enforcement action.” 20 C.F.R. § 639.1(d). The court held this regulation provides an exhaustive list of those with standing under the WARN Act. Because the regulation does not list ERISA funds, those funds have no standing.

The second issue was whether two affiliated corporations could be considered a single “business enterprise” for purposes of the WARN Act. The Third Circuit reiterated its earlier adoption of the DOL’s five-factor test for liability of affiliated corporations. *See Pearson v. Component Tech. Corp.*, 247 F.3d 471, 487-90 (3d Cir. 2001). The five factors include “(i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations” between the corporations. *See* 20 C.F.R. § 639.3(a)(2). However, the court held that the first two factors—common ownership and common directors—are not sufficient to find that two corporations are a “single employer,” and that “[c]onsequently, the remaining three factors are determinative.”

The court found that the third factor—de facto exercise of control—was not met. Although the two corporations “shared certain administrative functions,” the affiliated corporation did not play a part in the decision to close the plant. The fourth factor—unity of personnel policies—was also not met. The court held that to determine the fourth factor is to ask “whether the two companies in question engaged in centralized hiring and firing, payment of wages, and personnel and benefits recordkeeping.” The two corporations shared benefit plans and employee monitoring functions, but the employees were hired and fired independently, reported separately to their supervisors, were paid from separate payrolls, reported their taxes under separate employer ID numbers, and had separate labor contracts. As for the last factor—dependency of operations—the court found that although loans were made between the two companies, they were at arm’s length. Accordingly, the court affirmed the decision that the two corporations were not a “single employer” for WARN Act purposes.

The third issue was whether the defendant could avail itself of the “faltering company” exception to the WARN Act. The WARN Act provides that an employer is not fully liable for a shutdown if at the time it was required to give notice “the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.” 29 U.S.C § 2102(b)(1).

The defendant argued that it met the “faltering company” exception because it had met with another affiliated company to discuss financing and later offered to mortgage two of its properties to the other corporation. But, drawing from the legislative history, the court observed that the faltering company defense was intended to be construed narrowly. “[T]o avail itself of this defense an employer must prove the specific steps it had taken, at or shortly before the time notice would have been required.” 541 F.3d at 247 (quoting 134 Cong. Rec. S8686-01 (1988)). The district court held that because the defendant had met with an affiliated corporation several months before the start of the sixty-day notice period, it was not reasonable to require “specific, actual and literal steps” when the sixty-day notice period began. The defendants argued that the district court’s approach was correct because “prediction of the date a company will need to shut down is not an exact science.”

The Third Circuit rejected this approach, holding that it would “read a ‘foreseeability’ requirement into the faltering business exception,” and that “such an approach runs counter to both the text and the purpose of the WARN Act.” As a result, the court held that a company must prove it took specific steps sixty days prior to the plant closing in order to avail itself of the faltering company defense. The court then went on to hold that the two meetings described, three months apart, do not meet the requirements to “actively” seek capital. “APA Transport’s actions can, at best, be characterized as *waiting* for Transamerica to offer additional financing.” Waiting for an offer of additional capital does not meet the requirements of the defense.

Bankruptcy

[In re Powermate Holding Corp.](#), 394 B.R. 765, 60 Collier Bankr. Cas. 2d (MB) 743; 50 Bankr. Ct. Dec. 195; 157 Lab. Cas. (CCH) P11,163 (Bankr. D. Del. 2008): In *Powermate Holding*, the plaintiff asserted WARN Act claims against a debtor in bankruptcy and argued that his WARN Act claims should have priority over other claims as an administrative expense. Under chapter 11, claims that qualify as administrative expenses have priority over most other claims. See 11 U.S.C. § 1129(a)(9)(A). Congress amended the Bankruptcy Code in 2005. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). The code, as amended, defines administrative expenses in part as

(A) the actual, necessary costs and expenses of preserving the estate including—

(i) Wages, salaries, and commissions for services rendered after the commencement of the [bankruptcy] case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the [NLRB] as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered

11 U.S.C. § 503(b)(1)(A).

The issue in *Powermate Holding* was whether, under this new version of § 503(b)(1)(A), WARN Act claims for a sixty-day period running past the filing of a bankruptcy petition were “wages and benefits awarded pursuant to a judicial proceeding . . . as back pay attributable to any period of time occurring after [the] commencement of the case,” and whether such claims might qualify for priority status as administrative expenses, “without regard to the time of the occurrence of unlawful conduct.”

The court held that WARN Act claims are treated as administrative expenses only if the employees were terminated after the employer filed a bankruptcy petition. To reach this conclusion, the court first stated that the statutory language “wages and benefits awarded . . . attributable to any period of time occurring after commencement of the case” means claims that “vest or accrue” after the bankruptcy petition is filed. It then concluded, comparing WARN Act damages to contractual severance pay, that a WARN Act claim vests in its entirety when the employee is terminated in violation of the Act. Because all the plaintiffs were laid off before the employer filed its bankruptcy petition, the court concluded that their WARN Act claims vested before the petition was filed and therefore did not qualify as administrative expenses under section 503(b)(1)(A).

The *Powermate Holding* case creates a distinct divide between pre-petition and post-petition terminations in violation of the WARN Act. If layoffs occur pre-petition, WARN claims are not entitled to administrative treatment; instead, the entire sixty days of damages are treated as pre-petition wages. However, the reasoning in *Powermate Holding* suggests that WARN Act claims arising from post-petition terminations receive administrative treatment in their entirety.



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Federal Labor Management

By Marlin Osthus
NLRB Region 18

Board Decisions re Unfair Labor Practices

[Whitesell Corp.](#), 352 NLRB No. 138, 2008 NLRB LEXIS 282, 184 L.R.R.M. (BNA) 1419, 2008 WL 4056269 (August 29, 2008) <[NLRB Brief](#) (filed December 22, 2008)>: On September 29, 2008, the General Counsel filed a petition for enforcement of the Board's Decision in the Eighth Circuit. Respondent filed a brief in opposition. Further, since the motion for contempt was withdrawn, the Region issued a complaint on December 23, 2008, alleging surface bargaining from the time of issuance of the § 10(j) injunction through filing of the motion for contempt and seeking bargaining expenses and the Region's and the union's litigation expenses.

Affirming most of the findings and conclusions of Judge Bruce D. Rosenstein, Board Members Schaumber and Liebman found that Respondent unlawfully refused to provide some (but not all) 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 a prior newsletter was Region 18's filing of a motion alleging that Respondent was in contempt of a § 10(j) injunction. The motion for contempt was held 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, 184 L.R.R.M. (BNA) 1442, 2008 WL 2275414 (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 the Charging Party, and numerous § 8(a)(1) threats and statements. On October 17, 2008, the Region filed for enforcement in the Eighth Circuit. On November 25, the Respondent agreed to a Stipulation for Consent Judgment. The case remains open pending compliance.

[Haws, Inc.](#), Cases 18-CA-18611 and 18-CA-18666, 2008 NLRB LEXIS 297, 2008 WL 4238809 (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. No exceptions were filed.

On November 4, 2008, the Board adopted the ALJ decision in an unnumbered Decision. The case is pending settlement in compliance.

[Ashley Furniture Industries, Inc.](#), 353 NLRB No. 71, 185 L.R.R.M. (BNA) 1255, 2008 WL 5427716, 2008 NLRB LEXIS 413 Case 18-CA-18737 (formerly 30-CA-17857) (Sept. 17, 2008): On December 31, 2008, the Board issued its Decision and Order, 353 NLRB No. 71, adopting the Decision of the Administrative Law Judge. The Region is seeking compliance.

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 a single individual in Respondent's human resources department. In finding the violations, Judge Kennedy rejected Respondent's 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.

Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

Administrative Law Judge Decisions re Unfair Labor Practices

[Loparex LLC](#), Cases 18-CA-18436, 18-CA-18448 and 18-CA-18671, 2008 WL 4905801 (Nov. 12, 2008): Pursuant to an investigation into the facts, the Region found that Respondent had engaged in certain unfair labor practices. The Region issued a complaint, and, after settlement efforts were fruitless, a hearing was held on May 14, 2008.

On November 12, 2008, Administrative Law Judge Paul Bogas issued a Decision in which he found that Respondent interfered with employees' exercise of their § 7 rights: (1) by

restricting access to company bulletin boards on about April 16, 2007; (2) by prohibiting employees from distributing literature anywhere on company property in late May or early June; (3) by prohibiting employees from distributing union-related materials anywhere in its facility on June 20; (4) by discriminatorily prohibiting employees from talking about the union on June 20; and (5) by telling employees classified as shift leaders that they were supervisors and therefore prohibited from signing union cards or engaging in any union activities.

On December 24, 2008, Respondent filed twenty-eight exceptions to that decision. The General Counsel filed cross-exceptions on two issues and an answering brief. The case is pending before the Board.

Decisions Involving Representation Issues

[Mail Contractors of America, Inc.](#), 18-RD-2464 (Jan. 16, 2009): Pursuant to a petition filed on July 24, 2003 and a Stipulated Election Agreement, an election was conducted on April 30, 2008. The petition was blocked for five years because of a series of unfair labor practice charges filed by the union, including charges that resulted in litigation. The election was held by mail ballot from April 30, 2008 to May 14, 2008, and by manual ballot on May 13, 14 and 15, 2008. A majority of the valid votes counted were cast for the incumbent labor organization, Des Moines Area Local, American Postal Workers Union, AFL-CIO. Challenges were not determinative.

On May 22, 2008, the employer filed a timely objection to the conduct affecting the results of the election. A hearing was directed and subsequently held on July 9. A Hearing Officer's Report and Recommendation on Objection issued on July 24. The report recommended that the objection be sustained and that the election be set aside based on the union's announcements and effectuation of dues forgiveness during the critical period.

The union filed exceptions to the Hearing Officer's report, and on January 16, 2009, the Board adopted the Hearing Officer's report and directed a second election. A second mixed mail/manual election was conducted in March, and on March 24 the Regional Director ordered a hearing about contested ballots.

[Mille Lacs Hospital & Home](#), 18-RC-17604, 2008 NLRB Reg. Dir. Dec. LEXIS 255 (Oct. 21, 2008): The Steelworkers filed a petition on September 18, 2008, seeking a bargaining unit consisting of licensed practical nurses (LPNs) employed by the employer at its long-term care facility located in Onamia, Minnesota. The employer contended that its long-term care facility and acute-care hospital constitute a single facility, and that therefore the bargaining unit must also include LPNs employed in the hospital. Further, the employer contended that the Board's health care rules apply, and that the employer's technical employees must also be included in the bargaining unit with the LPNs. The parties stipulated that the LPNs employed in the clinic in Onamia, Minnesota, should be excluded from the bargaining unit.

Based on the record as a whole, the Region concluded that a bargaining unit consisting of the LPNs at the nursing home, excluding the technical employees and LPNs at the hospital, is an

appropriate bargaining unit. An election was held on November 18 in the unit found to be the appropriate bargaining unit, and the union was certified on November 25, 2008.



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Wage and Hour

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

Liquidated-Damages Award against Famous Dave's Restaurants

[*Chao v. Barbeque Ventures, LLC et al.*](#), 547 F.3d 938 (8th Cir. 2008): Two limited liability companies, which owned and operated five Famous Dave's restaurants, appealed a district court's liquidated-damages award granted on summary judgment for the Secretary of Labor under the Fair Labor Standards Act, arguing that they acted in good faith. In *Barbeque Ventures*, the limited-liability companies, which did not attempt to track whether an employee worked at more than one Famous Dave's location, or how many hours they worked at each location, failed to pay numerous dual-restaurant employees overtime.

The FLSA requires employers to pay non-exempt employees overtime pay for hours worked in excess of forty hours in a workweek. If an employer violates the overtime-pay requirement it may be held liable not only for the unpaid overtime compensation, but also for an equal amount as liquidated damages. While liquidated damages, which are intended to compensate a plaintiff for the delay in payment of compensation owed under the FLSA, are generally granted, a court may choose not to award liquidated damages if an employer shows that its actions were taken "in good faith" and with "reasonable grounds for believing" that it complied with the FLSA. To carry the employer's burden to establish the good-faith requirement, an employer must show that it took affirmative steps to determine the requirements under the FLSA, and that its belief that it was complying with the FLSA was objectively reasonable.

In their attempt to satisfy this burden the employers made several unsuccessful arguments. They contended that they demonstrated good faith by showing that the two owners did not know their employees worked at multiple locations. Noting that "lack of knowledge is not sufficient to establish good faith," the court agreed with the district court that, given the senior management's sophistication, the employers were aware that employees may have been working at multiple locations. The court concluded that the "employer's lack-of-specific-knowledge argument fail[ed] to meet their burden of showing an 'honest intention' to ascertain and follow the FLSA's requirements."

The employers' remaining arguments were that they established good faith by proving that no employees complained about overtime pay, that the Secretary's failure to allege a willful violation undercuts the liquidated-damages claim, and that they used a third party to handle payroll. These were rejected by the court, as they were contrary to well-established case law. Accordingly, because the employers could not establish good faith, the court affirmed the district court's liquidated-damages award.

Collective Bargaining Agreement and Federal Question Jurisdiction

[*Zupancich v. U.S. Steel Corp.*](#), No. 08-5847 (ADM/RLE), 2008 WL 5450036, 2008 U.S. Dist. LEXIS 105336 (D. Minn. Dec. 31, 2008): A U.S. Steel employee commenced a Minnesota FLSA action in state court alleging that U.S. Steel, which employs approximately 1,600 employees, does not pay its hourly employees for the time between swiping in at a security gate and arriving at a work station, and improperly deducts six minutes of paid work time if an employee swipes out prior to six minutes following the end of a shift. U.S. Steel removed the matter to federal court, citing federal question jurisdiction and diversity jurisdiction under the Class Action Fairness Act ("CAFA"). The plaintiff moved the court to remand the action back to state court.

The court denied the plaintiff's motion to remand, finding federal question and, in the alternative, diversity jurisdiction. The court agreed with U.S. Steel that the matter presented a federal question because the "determination of whether U.S. Steel violated the Minnesota FLSA is inextricably intertwined with an analysis of the CBA." The court noted that section 177.35 of the Minnesota FLSA provides that "[n]othing in [the Minnesota FLSA] limits the rights of employees to bargain collectively with their employers through representatives of their own choosing to establish wages and other conditions of work more favorable to the employees than those required by [the Minnesota FLSA]." Thus, where a CBA exists the Minnesota FLSA requires a court to evaluate "the CBA to determine whether in the process of bargaining there have been negotiations between the parties to give the employees more favorable work conditions in exchange for FLSA protection." In this case, "[o]ne trade-off employees may have chosen to make was to concede travel time while on a work site in exchange for a higher hourly wage." Accordingly, the court found that federal question jurisdiction exists.

Moreover, the court noted that even if federal question jurisdiction did not exist, diversity jurisdiction existed under the CAFA. The CAFA grants a federal court jurisdiction over a case "in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests and costs, and . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." Although in disagreement with both parties' calculations, the court observed that the Minnesota FLSA requires a defendant found in violation of the statute to pay attorneys' fees, and that the attorneys' fees are included in calculating the threshold dollar amount. Based on the "best calculations by the parties and the inclusion of attorneys' fees," the court concluded that U.S. Steel satisfied its burden of demonstrating by a preponderance of the evidence that the amount in controversy will likely exceed the \$5,000,000 threshold. Accordingly, the court concluded that even if federal question jurisdiction did not exist, diversity jurisdiction did exist under CAFA.

Denial of Motion for Conditional Certification of a Collective Action

[*Thompson v. Speedway SuperAmerica LLC*](#), 2009 U.S. Dist. LEXIS 3816 No. 08-CV-1107 (D. Minn. Jan. 20, 2009), [available at](#) 2009 WL 130069: The plaintiffs were formerly employed by Speedway SuperAmerica LLC (“SSA”) at convenience stores and brought a motion for conditional certification of a collective action. The plaintiffs alleged that SSA failed to compensate them and similarly situated individuals for a wide range of tasks. In their motion, the plaintiffs focused on two specific tasks: SSA’s failure to pay overtime for time spent answering work-related phone calls and performing gas-price surveys.

The court denied the plaintiffs’ motion. SSA’s formal policies regarding answering work-related phone calls and performing gas-price surveys required that members of the putative class be paid for those activities. In holding that the plaintiffs had failed to establish a colorable basis that SSA had a policy or plan to violate its formal policy, the court noted that the plaintiffs had failed to submit sufficient evidence that employees were not compensated because of a corporate decision to ignore its published policies.

The court gave specific attention to the sheer volume of the class, which consisted of approximately 8,000 putative class members. Specifically, the court noted the magistrate judge’s observation that because complaints about failure-to-pay came “from such a tiny fraction of the putative class, they are very weak evidence of the existence of a nationwide corporate policy.”

The plaintiffs also proffered evidence from a former SSA store manager who stated that SSA calculated the number of “authorized hours” available to a store without accounting for time spent by employees outside of the store or work performed before and after their shifts while in the store. The court rejected the sufficiency of this evidence for conditional certification of a collective action, noting that this evidence related to only one of SSA’s 1600 stores.

Motion to Compel Discovery of Contact Information of Putative Class

[*Knutson v. Blue Cross & Blue Shield of Minnesota*](#), --- F.R.D. --- , No. 08-584 (D. Minn. Dec. 29, 2008), [available at](#) 2008 U.S. Dist. LEXIS 104560, 2008 WL 5424125, 157 Lab. Cas. (CCH) P35, 529: The plaintiff alleged that she and other customer-service representatives were not paid for work they performed prior to and after their scheduled work shifts. After engaging in some discovery, the plaintiff brought a motion for conditional certification of a class action under the Fair Labor Standards Act, which was denied without prejudice by the court.

In the motion at bar, the court reversed the portion of the magistrate judge’s order which granted the plaintiff’s motion to compel the discovery of contact information for BCBS’s customer-service representatives. The court noted that a collective-action plaintiff is entitled to contact information for other employees “only if she can show that such information is discoverable for some reason other than facilitating notice to potential plaintiffs.” The court also noted that the discovery sought did not fall within the ambit of Federal Rule of Civil Procedure 26(b)(1), which authorizes discovery only of matters “relevant to any party’s claim

or defense.” The court stated that discovery sought solely for the purpose of inviting others to join litigation would not achieve that purpose and would not be relevant to the particular claims and defenses currently asserted in the case.

Additionally, the court assumed *arguendo* that the information sought was relevant under the Federal Rules, but stated that under those rules “the court has discretion to deny discovery relating to putative class members.” The court noted that the plaintiff had been provided contact information for at least forty-three of her former co-workers, and that given the length of the plaintiff’s employment with BCBS the plaintiff was likely aware of the identity of other customer-service representatives. Given that the plaintiff had “reached out” to at least a dozen of those individuals and had “made only the weakest of showings that [the case was] appropriate for collective-action certification,” the court believed that the burden of producing contact information for the putative class of more than 1,200 people would not serve much benefit.

The court also stated that the plaintiff would not be prejudiced by denial of the requested information as the plaintiff had not argued that this would prevent her from proving her case at trial, and lack of the contact information would not affect her claims in any way.



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State Law Discrimination Update

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There have been very few cases issued by the state appellate courts involving employment discrimination claims since the last newsletter. The court of appeals, however, issued two cases of interest in related areas—public accommodation discrimination and business discrimination—and two cases involving statute of limitations challenges.

Public Accommodation—Sexual Orientation Discrimination

[*Monson v. Rochester Athletic Club*](#), 759 N.W.2d 60 (Minn. Ct. App. 2009): The court of appeals rejected a public accommodation discrimination claim under the Minnesota Human Rights Act brought by a same-sex couple against a health club. The plaintiffs, who have a child, sought to become members of the health club at the family membership rate. The club rejected their application citing its policy to provide family memberships only to married couples. The plaintiffs challenged the club's decision as sexual orientation discrimination based on the Minnesota Human Rights Act ("MHRA"). The district court granted summary judgment in favor of the club.

The court of appeals affirmed. The court of appeals determined that the plaintiffs failed to establish that the policy discriminated on its face against potential members based on sexual orientation. The court reasoned that the policy denied family memberships to unmarried heterosexual couples and unmarried homosexual couples alike and thus was facially neutral. The court noted that it is "only when the policy combines with the marriage statute [which allows only heterosexual marriage] that a disparate impact occurs."

The court of appeals also rejected the plaintiffs' disparate impact claims, ruling that Minnesota does not recognize disparate impact claims in the public accommodations context. In doing so, the court of appeals, among other matters, contrasted the operative employment discrimination prohibitions where disparate impact claims are allowed, which prohibit an employer from maintaining "a system of employment which unreasonably excludes a person seeking employment," with the language of the public accommodations section of the Act, which prohibits the denial of "full and equal enjoyment of . . . goods, services, facilities, privileges, advantages and accommodations."

“Business” Discrimination—Gender Discrimination

[Krueger v. Zeman Construction Co.](#), 758 N.W.2d 881 (Minn. Ct. App. 2008): The court of appeals upheld the dismissal of sex discrimination and sexual harassment claims brought by a female owner-member of a business against another business based on the alleged actions by male managers of the other business. Diamond Dust Contracting, an LLC of which Krueger was the sole owner/member, entered into a subcontract agreement with Zeman Construction Company to supply labor and materials for a multi-unit, residential construction project. Krueger was subjected to what the court referred to as “various forms of outrageous sex discrimination and sexual harassment” by male managers of Zeman. She complained to Zeman regarding the behavior, but the company did not take corrective action.

Krueger brought sex discrimination and sexual harassment claims under the business discrimination provisions of the Minnesota Human Rights Act, section 363A.17(3) (2006). The district court dismissed both claims. On appeal, the court of appeals upheld the dismissal ruling that Krueger did not have standing to pursue the discrimination and harassment claims under section 363A.17(3) because she was not, individually, a party to the contract between the two companies.

Section 363A.17 provides at subpart (3) that it is an unfair discriminatory practice for a person engaged in business to “to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.” The court reasoned that Krueger, in focusing on the highlighted phrase of subpart (3) above, did not claim that she was subject to discrimination as to the basic terms, conditions or performance of the contract, but that Zeman discriminated against her *personally* in the performance of the contract. The court, in rejecting Krueger’s arguments, engaged in an extensive legislative and legal analysis of the various provisions of section 363A. Judge Minge, dissenting, also engaged in an extensive legislative and legal analysis to the contrary.

Statute of Limitations

[DeBerg v. RSM McGladrey, Inc.](#), No. A07-1731, 2008 WL 4471222, (Minn. Ct. App. Oct. 7, 2008) (unpublished opinion): In an unpublished decision, the court of appeals upheld age discrimination claims ruling that the district court had erred in dismissing the claims as time barred. In December of 2006, the plaintiff had timely filed an age discrimination charge with the Minnesota Department of Human Rights. While the charge was pending, the plaintiff, in February 2007, instituted a civil action for age discrimination and tortious interference with contract. In March of 2007, the company, through its counsel’s office, notified the department of the civil action and the department notified the parties that it had withdrawn the administrative action.

The company moved to dismiss the civil action, and in July, 2007, the district court entered summary judgment in favor of the company, dismissing the complaint without prejudice. The company argued in part on appeal that plaintiff’s civil action was time barred because he failed to give the MDHR notice, as set forth in section 363A.33, subd. 1(3), of the filing the civil suit. The appeals court rejected the company’s arguments, reasoning that the Department was in

fact notified by the company of the civil action, and that the plaintiff had in fact commenced the lawsuit within the required ninety days of the notice.

[*Bonczek v. City of Minneapolis*](#), No. A07-2050, 2009 WL 173086, (Minn. Ct. App. Jan. 27, 2009) (unpublished opinion): In an unpublished opinion, the court of appeals upheld a district court dismissal of age discrimination and retaliation claims, where the plaintiff received right-to-sue letters from both the Minnesota Department of Human Rights and the Equal Employment Opportunity Commission, and failed to file a civil action within the required forty-five-day (state) and ninety-day (federal) periods. The court declined to apply equitable tolling to the plaintiff's claims because he had not demonstrated that he did not have knowledge of his "right not to be discriminated against or the means of obtaining such knowledge." The plaintiff had testified that he did not file a timely civil action because he did not have the time or documentation to do so and because his documents and property had been seized.



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Minnesota Tort and Contract Cases

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Insufficiently Definite Employment Handbook

[Alexandria Housing & Redevelopment Authority v. Rost](#), 756 N.W.2d 896, 28 I.E.R. Cas. (BNA) 666 (Minn. Ct. App. 2008): Judith Rost petitioned the State's Bureau of Mediation Services pursuant to Minnesota Statutes section 179A.25 for independent review of the decision to terminate her employment from the Alexandria Housing and Redevelopment Authority (AHRA). Rost claimed that AHRA's termination decision violated its employment handbook, which she alleged "limit[ed] discharge to enumerated reasons – 'for cause.'" After the Bureau of Mediation Services arbitrator ordered Rost to be reinstated with back pay, AHRA filed a petition for writ of certiorari with the Minnesota Court of Appeals.

Rost became executive director of AHRA in 2001. In March 2004, Rost was conducting an inventory of a box of items that had been left in an AHRA public housing unit by a former resident and came across a bottle of prescription medication in the box. After Rost was told to dispose of the medication by the health-care services company that administered the health-care needs of the former resident, Rost told her assistant that the pills were expensive and "it was a shame" to dispose of the pills because they were the same type of pills Rost had been prescribed by a physician. Rost ultimately put in the medication in her desk. Rost later claimed that she was aware of a law requiring AHRA to retain a former tenant's possessions for at least sixty days and that there was at least one week left in the sixty-day period, so she could not do anything with the pills for that time. Rost's assistant sent a letter to the AHRA board of directors reporting that Rost had taken pills that belonged to a former tenant. After investigating the incident, the AHRA board of directors decided to discharge Rost.

AHRA's employment handbook provided that "[a]n employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice." The AHRA handbook also stated that "[t]he employment of personnel and all actions affecting the employees of the [AHRA] shall be based solely on merit, ability and justice." The handbook contained a disclaimer that stated, "[t]he [AHRA] shall consider all employees to be 'employed at will.' There shall be no employment contracts with any employee." Rost alleged that the handbook conferred on her the contractual right not to be terminated unless she had "given unsatisfactory service" or was "guilty of substantial violation of regulations."

On AHRA's writ of certiorari, the Minnesota Court of Appeals determined that AHRA's handbook did not create a unilateral contract limiting the reasons for which AHRA may terminate an employee. The court applied *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) and determined that the terms of the handbook were not sufficiently definite to create a binding unilateral contract. The court noted that several key terms in the handbook language Rost relied on were vague, including "unsatisfactory," "substantial," and "regulations." Therefore, the language used was simply not definite enough for a court to discern with specificity what the provision required of the employer so that it can be determined if there is a breach. In addition, the second clause on which Rost relied, regarding actions "based solely on merit, ability and justice," was "nothing more than a general statement of policy, which does not meet the contractual requirements for an offer."

The court also found that even if the terms of the handbook had been sufficiently definite, the handbook disclaimer prevented the formation of a contractual right to continued employment. Although Rost argued that the disclaimer was ineffective because it was located on page 7 of a 26-page handbook and, therefore, was not sufficiently conspicuous, the court found that the disclaimer was sufficient, considering the handbook as a whole. The court also rejected Rost's argument that the disclaimer was ineffective because she did not receive the handbook until several months after she began working. The court noted that any such argument by Rost undermined her claims, which were based on provisions out of the same handbook.

The court concluded that Rost's continued employment after dissemination of the handbook constituted acceptance of the handbook's terms, including the disclaimer.

Denial of Tenure Not a Breach of Contract

[*Nash-Marshall v. University of St. Thomas*](#), No. A07-2028, 2008 Minn. App. Unpub. LEXIS 954, 2008 WL 3290383 (Minn. Ct. App. Aug. 12, 2008): Siobhan Nash-Marshall brought suit against the University of Saint Thomas and its president for breach of contract and breach of the covenant of good faith in employment following the denial of her application for tenure.

UST hired Nash-Marshall as an assistant professor in the philosophy department in 2000. After a probationary period, she was transferred to a tenure-track position.

Tenure decisions are governed by UST's Faculty Handbook. The procedures for tenure in the handbook provide that "[a]fter due consideration of the application of the candidates for tenure (and promotion if applicable) the Academic Council will make a recommendation to the President of the university for his consideration. The President makes the final tenure and promotion decision after considering this advice." Elsewhere in the tenure policies, the handbook states, "[t]he recommendation of the Academic Council is forwarded by the executive vice president/chief academic officer to the president, who makes the final disposition." The handbook sets forth criteria on which candidates are evaluated for tenure.

Nash-Marshall applied for tenure in 2005. UST's academic council recommended against granting tenure to Nash-Marshall, and UST's president, acting on that recommendation, denied Nash-Marshall's application. Nash-Marshall requested reconsideration, and following a

hearing, the academic council reversed its decision and recommended tenure in April 2006. The UST president, however, again denied Nash-Marshall's tenure application. Following this denial, Nash-Marshall filed a grievance. Following the grievance hearing, UST's grievance committee recommended reconsideration of Nash-Marshall's tenure application. UST's president again denied Nash-Marshall's tenure application.

On the defendants' motion to dismiss, the parties agreed to dismiss the claim for breach of covenant of good faith in employment, because it does not exist as a cause of action in Minnesota. The parties also agreed to dismiss UST's president as a party to the action. The district court then dismissed Nash-Marshall's breach of contract claim for failure to state a claim upon which relief can be granted.

On appeal, the Minnesota Court of Appeals affirmed the district court's decision. The court rejected Nash-Marshall's argument that the handbook was a unilateral contract and that she had accepted and performed the terms of the contract. The court noted that the provisions of the handbook only set forth the procedure by which candidates for tenure would be considered; it did not say that all those who accept and perform the criteria for tenure will be granted tenure. The court also rejected Nash-Marshall's argument that the handbook required the president to follow the recommendation of the academic council, as the handbook explicitly stated that the president "makes the final tenure and promotion decision."



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Public Sector

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Chargeable Expenses in Union Fees

[Locke v. Karass](#), 129 S.Ct. 798, 172 L. Ed. 2d 552; 157 Lab. Cas. (CCH) P11,153; 157 Lab. Cas. (CCH) P60,732; 185 L.R.R.M. 2833 (2009): The Supreme Court held, under the First Amendment, that a local union may charge nonmembers for national litigation expenses if (1) the expenses relate to collective bargaining and contract administration, and (2) the expenses may ultimately benefit the members of the local union because of their affiliation with the parent organization.

The Maine State Employees Association exclusively represents certain executive branch employees. Even nonmembers of the union are required to pay a service fee, part of which goes to the national union as an affiliation fee. The affiliation fee, in part, goes towards litigation activities that do not directly benefit Maine employees but do benefit other local unions and the national organization. The litigation fees are limited to “chargeable” activities (i.e., those that relate to collective bargaining and contract administration). The nonmembers challenged this portion of the fee, but both the district court and the First Circuit Court of Appeals upheld the fee. The Supreme Court granted certiorari because of inconsistency at the circuit court level on this issue.

The Court summarized precedent on the issue, ending with a discussion of the *Lehnert* decision in 1991. In *Lehnert*, nonmembers challenged certain fees they were required to pay the union. The *Lehnert* Court noted that it has never required a direct relationship between the expense in question and a tangible benefit to the nonmembers’ bargaining unit. At the same time, the *Lehnert* Court did not reach a consensus on the issue of charging national litigation costs to employees.

In *Locke*, the Court determined that national litigation expenses are chargeable to a nonmember if the subject matter of the litigation bears an appropriate relationship to collective bargaining and the local union’s payment will ultimately lead to benefits to members of the local union because of its affiliation with the parent organization. The Court reasoned that national litigation is in no way distinct from other national costs the Court has previously

found chargeable. The national litigation expenses were related to collective bargaining and other previously established chargeable issues. Accordingly, the Court ruled that such expenses may be charged to nonmembers so long as the charge is reciprocal in nature, i.e., in circumstances where the contributing local union reasonably expects other locals to contribute in a similar manner to the national's resources.

Opposition to Sexual Harassment

[*Crawford v. Metro. Gov't of Nashville*](#), 129 S.Ct. 846, 172 L. Ed. 2d 650, 91 Empl. Prac. Dec. (CCH) P43434, 105 Fair Empl. Prac. Cas. (BNA) 353 (2009): The Supreme Court held that Title VII protects employees from employer retaliation both when affirmatively reporting race or gender discrimination and when answering employer questions during an internal investigation.

The respondent, Metropolitan Government of Nashville and Davidson County, Tennessee (Metro) investigated allegations that one of its employees, Hughes, was committing sexual harassment. One of Metro's human resources officers asked appellant Vicky Crawford ("Crawford") if she had witnessed any inappropriate behavior by Hughes. Crawford noted two specific instances where Hughes acted inappropriately and also professed she had adverse reactions to his conduct. Two other accusers made similar reports about Hughes. Metro took no action against Hughes, but fired Crawford and the other two accusers saying they were attempting to commit embezzlement.

Crawford disputed her termination, filing a retaliation charge with the EEOC. Crawford alleged Metro violated both the "participation" and "opposition" clauses of Title VII. Although both the district court and court of appeals reached decisions on both clauses, the Supreme Court reached a decision only on the opposition clause.

The district court granted summary judgment in favor of Metro, reasoning Crawford could not satisfy the opposition clause of Title VII, which makes it unlawful for an employer to discriminate against employees "because he has opposed any practice made an unlawful employment practice by this subchapter." The district court held that merely answering questions is not equivalent to instigating or initiating a complaint. The court of appeals affirmed on the same grounds.

The Supreme Court reversed on this issue, holding Crawford's adverse reactions to the alleged acts of sexual harassment could cause reasonable jurors to conclude she was resistant or antagonistic – two words synonymous with "opposition." The Court also referred to an EEOC Compliance Manual that notes that an employee's communication to her employer of a belief that the employer has engaged in a form of employment discrimination "virtually always 'constitutes the employee's opposition to the activity.'"

The Court dismissed the Sixth's Circuit's contention that opposition demands active and consistent action and that an employee must instigate a complaint to be covered under the retaliation clause. The Court reasoned that creating such a dichotomy between actively reporting harassment and responding to an employer's questions about harassment would be

inappropriate. The Sixth Circuit reasoned that “lowering the bar” will produce a lesser likelihood that employers will investigate claims since they would open themselves up to retaliation claims. The Court dismissed this contention, citing both *Ellerth* and *Faragher* as motivations for an employer to actively investigate claims so as to avoid vicarious liability. The Court stated the Sixth Circuit’s argument would undermine Title VII’s deterrent objective. If the Sixth Circuit’s rule was adopted, an employee could be penalized, with no remedy, for responding to an employer’s questions by reporting discrimination. Under such circumstances, employees would be unlikely to report discriminatory behavior.

Right to Independent Review of Termination

[*Alexandria Housing & Redevelopment Authority v. Rost*](#), 756 N.W.2d 896 (Minn. Ct. App. 2008): The Minnesota Court of Appeals held that a public employee without a contractual right not to be terminated except for cause does not have a right of independent review under Minnesota Statutes section 179A.25.

The Appellant, Judith Rost, was employed as executive director of the Alexandria Housing and Redevelopment Authority (AHRA). Rost was accused of “misappropriating” the prescription pills of a former public housing resident and was given the option of resigning or being terminated. Rost elected to resign.

Weeks later, Rost petitioned for independent review of her termination with the Bureau of Mediation Services (BMS) on the grounds that her termination was not one of the reasons listed “for cause” in the employment handbook. AHRA requested BMS to dismiss Rost’s petition, alleging that the sole means of review was a writ of certiorari filed with the court of appeals.

The BMS denied AHRA’s request and directed the parties to select an arbitrator to hear the dispute. AHRA then sought a declaratory judgment in Ramsey County District Court, alleging that section 179A.25 was unconstitutional as applied to this matter. Both the district court and court of appeals dismissed the action. An arbitrator then determined that Rost did not steal the pills and that she should be reinstated with back pay and benefits. AHRA then petitioned for certiorari to the court of appeals.

The court of appeals first considered the issue of whether the AHRA has statutory authority under section 179A.25 to conduct a review of Rost’s termination. Section 179A.25 provides “every public employee should be provided with the right of independent review . . . of any grievance arising out of interpretation of or adherence to terms and conditions of employment.” Citing precedent, the court noted that public employees are entitled to independent review only if they have a contractual right to be dismissed only for cause.

Importantly, the precedent cited by the court, *Boe v. Polk County Library Board*, was decided prior to the Minnesota Supreme Court’s decision in *Pine River State Bank v. Mettile*. At the time of *Boe*, a contract of employment could be formed only by express agreement between an employee and an employer. *Pine River*, on the other hand, held that an employee handbook may be enforceable as a unilateral contract. The court in *Pine River* required four elements for a term in a handbook to constitute a binding term of employment: “(1) the terms

are definite in form; (2) the terms are communicated to the employee; (3) the offer is accepted by the employee; and (4) consideration is given.”

Here, the parties focused on the first element. Rost relied on a clause in the handbook providing that “[a]n employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice.” The court held that this language was vague and insufficiently definite, so as to preclude a court or jury from determining if there was a breach of the contract. The court further held that other language in the handbook created only procedural, rather than substantive, rights, which does not meet *Boe’s* requirements for independent review. The court also dismissed Rost’s reliance on “general statements” that provided no set standards that would allow a reviewing court to determine if there was a breach of the standards. Accordingly, the court dismissed all of the handbook’s language as not sufficiently definite as required by *Pine River*.

Even if the terms had been sufficiently definite, the court noted that the handbook contained a disclaimer that expressly repudiated the formation of any employment contract and expressly retained an at-will employment relationship. The court also dismissed Rost’s argument that the disclaimer was inconspicuous. Despite being placed in the middle of the handbook, the manner of the disclaimer’s presentation was no less conspicuous than the language Rost attempted to rely on for the formation of additional contractual rights. Rost also contended the disclaimer was ineffective because she received the handbook months after beginning employment. The court dismissed this contention, noting Rost is claiming contractual rights from the same handbook, meaning Rost is attempting to “have it both ways” under the handbook.

The court ultimately ruled that Rost was not subject to “terms and conditions of employment” as required by section 179A.25 and that Rost was not entitled to obtain independent review of her termination.

PERA Benefits

[*In re McGuire*](#), 756 N.W.2d 517 (Minn. Ct. App. 2008), review denied (Dec. 16, 2008): The Minnesota Court of Appeals held that an individual who does not meet the statutory requirements for receiving Public Employees Retirement Association (PERA) benefits cannot equitably estop PERA from rescinding unauthorized annuity benefits that the individual already has received.

The appellant, Michael McGuire, worked as a city administrator for the city of Bayport. McGuire announced his retirement in September 2004, indicating his last day would be April 30, 2005. McGuire was a member of PERA and began receiving retirement benefits from PERA on May 1, 2005. In July 2007, PERA informed McGuire that PERA would no longer provide retirement benefits. PERA further informed McGuire of their intention to recover \$112,969.20 in past payments. PERA explained that McGuire had worked for Bayport as an independent contractor within thirty days of retiring. This violated a statutory requirement that a public employee must not work for his or her former public employer for thirty days following separation.

McGuire petitioned for review and was granted a hearing. At the hearing McGuire contended he was unaware that the thirty-day separation requirement prohibited work as an independent contractor. At oral argument in front of the PERA board, McGuire also testified he was never made aware of the thirty-day requirement. McGuire explained that he asked PERA staff whether working as an independent contractor for Bayport within ten days of retiring would cause a problem. The PERA board held that McGuire did not separate for thirty days from his work as a public employee and was therefore ineligible for future benefits and was required to repay past payments. The board did not address the issue of equitable estoppel.

On review, the Minnesota Court of Appeals held that PERA did not act arbitrarily by rescinding McGuire's benefits without addressing the equitable-estoppel claim. The court noted that estoppel cannot be applied when it would cause an agency to act outside the bounds of its authority. A contrary rule would lead to chaos—if there is no prohibition on estoppel, states and municipalities could be bound by unauthorized actions of agents and officers who possess limited authority. The court reviewed the history of estoppel against the government, noting the most recent authority, *Axelson v. Minneapolis Teachers' Retirement Fund Association*, held that "where an agency has no authority to act, agency action cannot be made effective by estoppel."

Applying this principle, the court held that McGuire admitted he failed to comply with the statutory requirement of a thirty-day separation. The PERA payments were unauthorized. Because estoppel cannot be applied so as to cause an agency to make unauthorized payments, PERA could not be equitably estopped from rescinding the erroneous payments.