



Labor & Employment Law Section



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Disability Discrimination

*By Sarah J. Gorajski
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ADAAA

EEOC Approves Proposed ADA Regulations for Public Comment

On September 16, 2009, the Equal Employment Opportunity Commission voted to approve a proposed rule revising its existing regulations to conform with the ADA Amendments Act of 2008. By a 2-1 vote, EEOC's current members approved a proposal that will interpret the ADA consistent with Congress's original, expansive intent when it passed the act in 1990. The proposal carries a sixty-day period for public comment which officially commenced on September 23, 2009, upon publication of the proposed rule in the Federal Register. [74 Fed. Reg. 48431](#) (Sept. 2009). The EEOC also posted on its website (www.eeoc.gov) a [question-and-answer guide](#) about the proposal and instructions for submitting public comments.

The ADA Amendments Act ("ADAAA"), which went into effect on January 1, 2009, expressly authorizes the EEOC to revise its regulations to conform to changes made by the Act. The EEOC's proposal would amend the current ADA regulations, found at [29 C.F.R. § 1630](#), and the appendix to those regulations.

Consistent with the ADAAA, the proposed rule emphasizes that the disability definition must be construed in favor of broad coverage. The proposal contains a non-exhaustive list of examples of major life activities that follow the ADAAA and adds three activities not mentioned in the act: sitting, reaching, and interacting with others. The proposed rule also supplements the ADAAA's examples of "major bodily functions" by indicating that the following are also covered: hemic, lymphatic, musculoskeletal, genitourinary, and cardiovascular systems; special sense organs; and skin.

Many of the proposed changes track the language of the ADAAA. For example, the proposed regulations provide that mitigating measures are not to be considered when determining whether someone has a disability, and that impairments that are episodic or in remission are disabilities if they would "substantially limit" major life activities when active. The proposed regulations also provide more guidance regarding the major life activity of working, and they implement the ADAAA's new standard for determining whether someone is "regarded as" having a disability.

Minnesota Human Rights Act

Truck Driver Not Regarded as Disabled under MHRA

[McLain v. Andersen Corp.](#), 567 F.3d 956 (8th Cir. 2009): The Eighth Circuit affirmed summary judgment in favor of Andersen Corporation, holding that McLain failed to establish a prima facie case of disability discrimination under the Minnesota Human Rights Act.

McLain worked for Andersen as a “class B” truck driver, limited to driving trucks twenty-six feet long or shorter. He began suffering pain in his knee after Andersen started using the class B trucks primarily for job-site deliveries, which required McLain to unload products on uneven terrain or inclined surfaces. Andersen received a doctor’s report that stated that McLain could work with the permanent restriction that he not perform job-site deliveries. Based on this report, Anderson concluded that McLain’s work restrictions precluded him from performing the essential functions of his job, and it placed him on leave. Andersen eventually terminated McLain when his leave expired.

Although Andersen eventually viewed McLain as incapable of being a class B truck driver, the Eighth Circuit determined that McLain failed to show that Andersen regarded him as incapable of performing a broad range of other jobs. The court noted that, after determining that McLain could not perform his job as a class B truck driver, the company notified McLain of another driving job that it thought he could perform; it indicated that it might hire McLain in another driving position if he pursued certification; and it placed McLain on call to make potential deliveries.

Must Be Disabled to Bring Failure to Accommodate Claim under MHRA

[Taylor v. City of Fridley](#), --- F. Supp. 2d ----, 2009 U.S. Dist. LEXIS 84378, 2009 WL 2998539, No. 08-CV-5175 (D. Minn. Sept. 15, 2009): The district court granted the city of Fridley’s motion for summary judgment with respect to Taylor’s disability discrimination claim, holding that Taylor failed to establish that she was disabled under the MHRA.

Taylor worked for the streets division of the Fridley public-works department and was fired after she refused to chip wood on a Friday, asking to do so on Monday when she could be seen by her doctor. Taylor had health problems when exposed to wood dust, and she asked Fridley to accommodate those problems by excusing her from chipping duty. Fridley instead tried to accommodate her by fitting her with a respirator.

In analyzing Taylor’s MHRA failure-to-accommodate claim, the district court looked for guidance from the Eighth Circuit’s interpretation of the ADA. The court noted that in *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999), the Eighth Circuit held that a failure-to-accommodate claim cannot be brought under the ADA by an employee who is not actually disabled, but who is merely regarded as disabled. Thus, the district court ruled that Taylor’s failure-to-accommodate claim failed because she could not establish that she was disabled. Taylor was unable to show that she had anything other than sawdust-related asthma or rhinitis. According to the court, such limited allergic reaction did not substantially limit a major life activity.



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Age Discrimination in Employment Act

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Reversal of Summary Judgment for Employer under *Gross*

[*Baker v. Silver Oak Senior Living Mgmt. Co.*](#), 581 F.3d 684 (8th Cir. 2009), 107 Fair Empl. Prac. Cas (BNA) 363, 92 Empl. Prac. Dec. P 43,675: This case involved both federal and Missouri state claims that the plaintiff, Kathy Baker (“Baker”), was terminated from her position as director of an assisted living center because of her age and because she opposed age discrimination. The court commented that this was not a “run-of-the-mill” case, as the record included evidence that executive managers of the employer who were involved in Baker’s discharge made several statements indicating a clear preference for a “youth oriented company.” Despite this evidence, the district court had granted summary judgment in the employer’s favor.

In its opinion reversing the district court, the Eighth Circuit first noted that *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), establishes that a plaintiff in a disparate treatment ADEA case must prove that age “was the ‘but-for’ cause of the employer’s adverse decision,” a standard that may be met by using direct or circumstantial evidence. Because the record was “fully developed in the district court on [the] motion for summary judgment,” the court did not apply a burden-shifting framework and instead turned “directly to the question of whether Baker had presented sufficient evidence to raise a genuine issue for trial on the ultimate question of age discrimination *vel non*.”

The court answered this question “yes.” The most significant evidence was statements by the employer’s CEO and by Baker’s supervisor that demonstrated “a preference for the employment of younger workers over persons in the class protected by the ADEA.” The court observed that the CEO’s statements that the employer was “missing the boat by not hiring more younger, vibrant people” and that employees “should start looking over applications better and try to consider hiring younger people” was evidence that a reasonable jury could take to reflect a discriminatory attitude by a person who participated in Baker’s termination. Commenting on other statements that were arguably subject to a benign interpretation (such as the CEO’s statement about a desire to get rid of “dead wood”), the court concluded that they had to be “viewed in the context of” the other evidence that “clearly reflect[ed] a discriminatory attitude against older workers,” and that they therefore were of “greater probative value” than they would be in the absence of such evidence.

The Eighth Circuit also cited other evidence that raised a fact issue for trial. For example, Baker’s supervisor placed her on probation for an alleged rule violation when the supervisor knew that Baker had not actually violated the rule. The employer gave shifting explanations for Baker’s discharge. On this point, the court said, “Not every supplement to an employer’s initial

statement of reasons gives rise to an inference of pretext, but substantial variations raise suspicion.”

The court next noted that while the Missouri Human Rights Act and the ADEA both prohibit an employer from discriminating against an employee “because of” the employee’s age, Missouri law was “less demanding than the ADEA” because under the state law a plaintiff may survive a motion for summary judgment by raising a genuine issue of material fact about whether age was a “contributing factor” in the discharge (as opposed to the “but-for cause” standard of *Gross*). Because the court had already held that there was a genuine issue as to whether age was a “but-for cause” of Baker’s termination, it concluded that there was “likewise a question for trial about whether age was a contributing factor.”

The final portion of the opinion addressed the employee’s retaliation claim and reversed the dismissal of that claim based on the ground that the district court erred in failing to consider certain evidence relevant to this claim submitted by the plaintiff in an affidavit. In that affidavit, Baker reported that she had repeatedly told her supervisor that the supervisor’s direction to terminate certain employees was wrong because an employer could not get rid of employees “just because they are old.”

The district court struck the affidavit based on its conclusion that it reflected an improper revision of Baker’s earlier deposition testimony. The Eighth Circuit found that the affidavit was not directly contrary to Baker’s earlier testimony and held that Baker “was entitled to present evidence by way of affidavit concerning the details of her alleged statements . . . in opposition to age discrimination.” The court deemed this evidence sufficient to raise a fact issue on the retaliation claim.

The court also rejected the employer’s argument that the affidavit was properly stricken because Baker had not disclosed the specific facts revealed in the affidavit in her answer to an interrogatory that asked her to state all of the evidence supporting any allegation in her complaint. The interrogatory answer referred generally to Baker’s supervisor having ordered her, “over [her] objections,” to write up a disciplinary report on a subordinate, but did not set forth Baker’s specific statements to the supervisor that were later recounted in her affidavit. The court said, “[W]e have never held that the failure to include specific details of all communications in an interrogatory answer precludes a plaintiff from supplementing her submission in a subsequent deposition or affidavit. The omission of detailed information from an interrogatory response can be a proper basis for impeachment but it does not trigger the narrow authority . . . to disregard entirely a portion of the plaintiff’s evidence.”

Democrats Introduce Bill That Would Effectively Reverse *Gross*

In early October 2009, Iowa Senator Tom Harkin, Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced a bill that would effectively reverse *Gross*. [Protecting Older Workers Against Discrimination Act](#), S.F.1756, 111th Cong. (2009). Harkin appeared at a news conference joined by Jack Gross, the losing plaintiff, and characterized the *Gross* standard as an “extremely high burden” that radically undermines the ability of older workers to hold employers accountable. Harkin also commented that the timing of *Gross* was particularly problematic since unemployment figures for workers age fifty-five and older are now at an all-time high.

Desert Palace Applies under Minnesota Human Rights Act

[*Friend v. Gopher Co., Inc.*](#), 771 N.W.2d 33 (Minn. Ct. App. 2009): In this case, which involved a claim of pregnancy discrimination, the Minnesota Court of Appeals concluded that the holding of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)—that circumstantial evidence may support a mixed-motive, disparate-treatment claim—applies to claims under the Minnesota Human Rights Act (MHRA). Thus, the court said that a plaintiff pursuing a disparate treatment claim under the MHRA (which could include a claim for age discrimination) may prove the claim “under the direct-evidence framework—perhaps more appropriately understood as the direct method—through either direct or circumstantial evidence, or a combination of the two.” That framework would likely not apply to a companion ADEA claim, as the U.S. Supreme Court made clear in *Gross* that the mixed-motives burden-shifting framework established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for cases under Title VII does not apply to ADEA claims.

Parent Company Liability

A pair of recent cases provides guidance about when a parent company of the employer of a plaintiff may be held liable for job discrimination.

[*Thompson v. Buhrs Americas, Inc.*](#), No. Civ. 07-2746, slip op., 2009 WL 537633 (D. Minn. Mar. 3, 2009): Judge Ericksen granted a motion for summary judgment brought by the European parent company of a U.S.-based employer of the plaintiff who was pursuing an ADEA claim. Judge Ericksen rejected the plaintiff’s argument that the parent liability issue should be resolved by applying the four-factor test announced by the Eighth Circuit in *Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977), and instead concluded that the appropriate standard was as set forth in a later case, *Brown v. Fred’s, Inc.*, 494 F.3d 736 (8th Cir. 2007). In *Brown*, the Eighth Circuit found that there was a “strong presumption” that a parent company is not the employer of its subsidiary’s employees, which may only be overcome in “extraordinary circumstances.” Relying on the principle that directors and officers holding positions with a parent corporation and its subsidiary can and do “change hats” to represent the two corporations separately despite their common ownership, Judge Ericksen held that the involvement of a parent company executive in the decision to terminate the plaintiff did not justify imposing liability on the parent company because the executive was wearing his “subsidiary hat” when he participated in that decision.

[*Sandvol v. American Building Maintenance Industries, Inc.*](#), 578 F.3d 787 (8th Cir. 2009): In an opinion issued about six months later, the Eighth Circuit clarified the law on the parent liability issue and confirmed that the four-factor test set forth in *Baker*—(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control—continues to apply. The court said that *Brown* “should not be read as establishing a new integrated enterprise test in our circuit” but added that *Brown* could be harmonized with *Baker*. The “traditional four-factor standard is the means by which plaintiffs demonstrate corporate dominance over a subsidiary’s operations and establish affiliate liability.”

The *Sandvol* court then reversed the district court and found that a fact issue had been raised about whether the parent company in that case dominated the subsidiary such that the parent should be deemed an employer of the plaintiffs. While the district court had focused on the fact that the day-to-day operations of the subsidiary were handled by subsidiary employees without involvement or oversight of parent company employees, the Eighth Circuit found that there was substantial contradictory evidence, which included the following: The executive management of the two entities was the same. The parent company and subsidiary had entered into an agreement

under which the parent agreed to provide certain services, including human resources, to the subsidiary. The parent company purchased the subsidiary's workers' compensation insurance, provided harassment training to the subsidiary's employees, and drafted certain company forms, such as employee performance evaluations. The subsidiary's HR director had access to the parent company's HR online manual, which was used to clarify the policies and procedures that the subsidiary was required to follow, and contacted the parent company when questions arose. A handbook provided to employees of the subsidiary included a preamble from the parent company's CEO, which advised employees that the handbook was a useful reference for employment guidelines, procedures, and policies. The parent company promulgated a Code of Business Conduct and Ethics that applied to employees of all of its subsidiaries. The parent company issued statements emphasizing that, through its subsidiaries, the parent company had a workforce of 47,000 employees who followed "comprehensive standards" developed by "[o]ur corporate professionals."

Based on these facts and others, the court held that the parent company's involvement in the operations of its subsidiaries was "sufficient to create a genuine issue of material fact with respect to whether [the parent and subsidiary] are an integrated enterprise."

Constructive Discharge Victory for Employer

[Betz v. Chertoff](#), 578 F.3d 929 (8th Cir. 2009): Betz, formerly a secretary with the Department of Homeland Security, resigned her employment at age sixty-five after becoming frustrated with the fact that her supervisor failed to increase her pay-grade level and told her that there was nothing he could do to respond to her concern that she was performing duties performed by other employees who were at substantially higher pay-grade levels. After a bench trial, the district court (Judge Rosenbaum) held that Betz had not established that she was constructively discharged.

In affirming, the Eighth Circuit surveyed earlier circuit law involving constructive discharge claims and commented, "Virtually all viable constructive discharge claims involve a hostile work environment," which was not alleged in this case. The court held that Betz's "working conditions [i.e. performing tasks for lesser pay than allegedly should have been provided] were not intolerable as a matter of law." The court also rejected arguments that the district court erred by refusing to infer discriminatory intent from a supervisor's question to Betz about her retirement plans, and by concluding that evidence about alleged preferential treatment of younger co-workers was not probative because Betz had not established that these employees were similarly situated to her in all relevant respects.

Opinion Testimony Offered By Former Co-Workers

[Jackson v. Lakewinds Natural Foods](#), No. 08-398, slip op., 2009 WL 2255286 (D. Minn. July 28, 2009): In this discharge case, Judge Ericksen granted summary judgment for the employer. In opposition to that motion, the plaintiff submitted affidavits from a number of his former co-workers in which they offered testimony such as the following: "Age, seniority and sex seemed to play a role in the treatment, demotion, and discharge of Mr. Jackson and other employees who met that same fate." Another statement indicated that the witness "believed" that the plaintiff was demoted because of his age. The court found such statements of opinion to be insufficient to create a genuine issue of material fact, and further found that other evidence offered by the plaintiff concerning alleged mistreatment of co-workers was insufficiently specific to allow a

determination whether the employer actually subjected these employees to discrimination and, if so, whether their situations were sufficiently similar to the plaintiff's so as to be relevant.

Dismissal Because Charge Was Untimely

Hutson v. Wells Dairy, Inc., 578 F.3d 823 (8th Cir. 2009), 107 Fair Empl. Prac. Cas. (BNA) 50, 92 Empl. Prac. Dec. P 43,692.: The plaintiff was notified of her discharge on November 28, 2006, but worked through December 1, 2006. She later filed her EEOC charge more than 300 days after November 28 but less than 300 days after December 1. The Eighth Circuit affirmed the district court's conclusion that her ADEA claim was time-barred because her charge was untimely. The opinion reminds practitioners that, in a discharge context, the time clock for filing a charge starts running when the plaintiff is notified of discharge. The appeals court rejected an argument that a discharge could constitute a continuing violation, and said the fact that the plaintiff continued working for several days after being informed of her discharge was "immaterial."

EEOC Issues Q&A Regarding Waivers of Discrimination Claims

The EEOC recently added to its website a section with information and questions and answers concerning waivers of discrimination claims in employee severance agreements. This information can be found at http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.



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Title VII Update

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Sex Discrimination

[Anderson v. Family Dollar Stores](#), 579 F.3d 858 (8th Cir. 2009): In affirming the district court's grant of summary judgment in this sexual harassment case, the Eighth Circuit held the following evidence of a manager's actions insufficiently severe to create a hostile environment: making personal comments in a job interview about plaintiff's hair, eyes, marital status and his wife's sickness; rubbing the plaintiff's shoulders, back, and hand in training testing periods; cupping her chin in his hand; saying, "How far do you want to go in this company, because it's me that makes you be here anyway...I can make you or break you"; telling her she should be where he was—in a motel room—saying, "You ought to be right here in bed with me with a Mai Tai and kicking up"; calling her "baby doll" and "honey"; grabbing her arm and saying, "Are you going to work with me? Are you going to be nice? Are you going to fit into my group? Now you're telling me your back is hurt? You're just nothing but trouble. You're just not going to be one of my girls, are you?"

[Sandoval v. American Building Maintenance Industries Inc.](#), 578 F.3d. 787 (8th Cir. 2009): The Eighth Circuit reversed a grant of summary judgment in this sexual harassment case, addressing both questions of what evidence is relevant to show a hostile environment and what evidence is relevant to a showing of joint employer liability. Clarifying its earlier decisions, the court explained that the standard for joint employer liability is the standard set out in *Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977). Applying the *Baker* test, the court found the evidence sufficient to create a jury question on the issue of joint employer liability, including the following: evidence of common ownership and management, a service agreement under which the parent provided services to its subsidiaries, and public representations of centralized corporate control of labor and human resources. The court also held that evidence of sexual harassment claims by employees other than plaintiff, whether or not the plaintiff was aware of the other incidents, is "highly probative" of both what type of workplace environment the plaintiff was subjected to and whether a reasonable employer should have discovered the sexual harassment.

[EEOC v. Siouxland Oral Maxillofacial Surgery Associates, L.L.P.](#), 578 F.3d 921 (8th Cir. 2009): In this case, a jury found in favor of two women who the EEOC contended had been discriminated against because of pregnancy. The district court denied the EEOC's request to instruct the jury on punitive damages and entered judgment as a matter of law for the defendant on the claims for punitive damages.

Evidence at trial showed that, with respect to one plaintiff, defendant's business manager stated that the newly hired pregnant woman would have to be let go because she would be due to have

her baby during their busy season, and told the new hire she would never have been hired had the employer known of her pregnancy. With respect to the second plaintiff, the evidence included testimony that, after the applicant disclosed her pregnancy during a job interview, the hiring manager said that the pregnancy would be a problem, wrote on the application form “4 months pregnant!” and later informed the applicant she would not be hired.

The Eighth Circuit found the evidence sufficient for a jury to find that the employer acted in the face of a perceived risk that it was violating Title VII. The court highlighted testimony that hiring managers knew pregnancy discrimination was illegal and that one manager warned the employer that it could not or should not fire an employee because she was pregnant.

Race/National Origin Discrimination

Dixon v. Pulaski County Special School District, 578 F.3d 862 (8th Cir. 2009): Norma Dixon, an African-American woman who worked for the defendant school district (“district”) for many years, applied for a buyer position within the district. The district did not grant her an interview, and she sued claiming race discrimination under federal and state law.

The Eighth Circuit affirmed the district court’s grant of summary judgment. In so doing, however, the Eighth Circuit expressly rejected the employer’s contention that the fourth element of a *McDonnell Douglas* prima facie case requires a plaintiff to show that the employer filled an open position with a person similarly qualified to the plaintiff, and affirmed that a prima facie case only requires a showing that the plaintiff was qualified for the position.

Humphries v. Pulaski County Special School District, 580 F.3d 688 (8th Cir.2009): This employer, with a long history of desegregation litigation, obtained a grant of summary judgment from the lower court in this “reverse” race discrimination case, arguing that its employment policies were promulgated in response to court orders requiring the district to desegregate and implement procedures that would make the district attractive to minority students, teachers and administrators.

The Eighth Circuit addressed the question of whether reliance on a court-sanctioned affirmative action plan may be direct evidence of discrimination and held that it may. The court then held that, if the employer defends by asserting that it acted pursuant to a valid affirmative action plan, the question then becomes whether the affirmative action plan is valid under Title VII and the Equal Protection Clause. Finding that genuine issues of material fact remained on the questions of whether the discriminatory policy alleged by Humphries was part of a valid plan; whether there was a manifest racial imbalance in the workforce; and whether the District was impermissibly maintaining, rather than attaining, a racial balance, the court reversed the grant of summary judgment.



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Family and Medical Leave Act

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No Interference/No Retaliation

Scobey v. Nucor Steel-Arkansas, 580 F.3d 781 (8th Cir. 2009): The Eighth Circuit Court of Appeals affirmed summary judgment for the employer finding (1) no interference with the employee's right to leave under the Family and Medical Leave Act ("FMLA"), because the employee had not provided adequate notice of the need for such leave, and (2) no retaliation arising from a demotion following the employee's unexcused absences, because the employee had not shown that he was entitled to FMLA leave for those absences.

Talmadge Scobey ("Scobey") began working for Nucor Steel in Hickman, Arkansas ("Nucor") in 1998. He worked a rotating shift as a ladle man from 1999 to 2005, earning between \$80,000 and \$90,000 annually. Scobey had two unexcused absences in February 2005.

Scobey had another four unexcused absences from April 10-13, 2005 due to alcohol use as follows: On April 10, Scobey called a lead man while intoxicated and stated that "he was through and done with us." The lead man, concerned for Scobey's mental state, told Scobey not to do anything stupid and come in the next day and talk with his direct supervisor or him regarding what he wanted to do. Later the same night Scobey called a supervisor (Blakemore) and, out of concern, Blakemore met with Scobey that same evening, when Scobey complained to Blakemore about the pressure the company put on its employees. On April 11, Scobey told his direct supervisor (Teeter) that he had suffered a nervous breakdown but then hung up the phone without any further explanation. Teeter did not believe Scobey's statement because of previous incidents of dishonesty. Teeter later reported that Scobey's speech was slurred and he thought Scobey was drunk. On April 11, Scobey also called a shift manager and said, because of personal problems and a relative's funeral, he would not be back to work for "a while." On April 12, Scobey did not appear for work or contact anyone at the company. On April 13, Scobey missed work but called and left a message for the human resources manager in charge of administering FMLA leave, saying he would call her again the next day. Interestingly, on April 14 Scobey told Blakemore he could not remember the previous four days.

Beginning on April 15 and continuing until sometime in late April, Scobey visited a physician, was referred to the company's employee assistance program ("EAP"), entered an inpatient alcoholism and depression treatment program, and participated in outpatient care thereafter. Nucor did not designate any of these absences as FMLA leave but did provide Scobey paid leave for the missed days beginning April 14.

Per the company's attendance policy, an employee could be terminated upon a fourth consecutive unexcused absence. Rather than terminate Scobey for his unexcused absences on April 10-13, Nucor demoted Scobey to the shipping department, resulting in a 40-50% pay reduction and requiring Scobey to work the night shift. Scobey worked in the new position for two weeks, received a pay raise, and thereafter stopped coming to work without notifying Nucor.

Scobey subsequently sued Nucor for FMLA interference and retaliation. The district court dismissed both claims on summary judgment, and Scobey appealed on both counts.

On the interference claim, the Eighth Circuit explained that Scobey needed to have given Nucor notice of his need for FMLA leave to be entitled to the leave. The applicable regulation as to the amount of notice required was 29 C.F.R. § 825.303(b) (2005). As then written, an employee reporting an absence did not have to assert rights under the FMLA or even identify the FMLA when requesting time away, and it was the employer's responsibility to obtain any needed additional information to determine if FMLA applied.

Scobey argued that he had met the minimal notice requirements by putting Nucor on notice that he had a serious health condition and that it was Nucor's obligation to inquire further, if needed. Such inquiry could have included requiring a medical certification, which Nucor had not requested of Scobey. Because Nucor did not inquire further, Scobey argued that "Nucor was estopped from denying that he had a serious medical condition protected by the FMLA." The Eighth Circuit disagreed, ruling that Scobey had fallen short of providing adequate information to put Nucor on notice of his need for leave for a "serious health condition" that made him "unable to work" on any of the four days of unexcused absence (April 10-13).

Scobey also urged the Eighth Circuit to adopt the "constructive notice" doctrine of the Seventh Circuit. The doctrine provides that "either an employee's inability to communicate his illness to his employer or clear abnormalities in the employee's behavior may constitute constructive notice of a serious health condition." The Eighth Circuit made short shrift of this argument, however, finding that the regulatory language on which the doctrine was premised, 29 C.F.R. § 825.303(a), had been deleted in the January 16, 2009, amended regulations and, therefore, was no longer applicable.

The current version of this regulation places more responsibility on the employee, stating, "The employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying."

Finding that Scobey had not provided Nucor notice of his need for FMLA leave, the court found that Scobey's FMLA interference claim necessarily failed, and Scobey's retaliation claim failed for the same reason. Since the four unexcused absences were sufficient to support termination under Nucor's attendance policies, they were more than sufficient for Nucor to demote Scobey. Because Scobey had failed to show that the absences were covered by the FMLA, Scobey could not show that Nucor's demotion decision based on the unexcused absences was in retaliation for Scobey exercising his FMLA rights.

Daugherty v. Wabash Center Inc., 577 F.3d 747 (7th Cir. 2009): The Seventh Circuit Court of Appeals affirmed summary judgment for the employer on the former employee's FMLA wrongful termination and retaliation claims.

Michael Daugherty ("Daugherty") worked for Wabash Center Inc., a not-for-profit agency serving developmentally disabled adults and children, from 1992 to August 2006 when he was terminated. During his employment, Daugherty rose through the ranks from maintenance assistant to vice-president of information technology and received "very good" and "excellent" performance reviews. He also was the vice-president and chief information officer for Rest Assured, LLC, a joint venture between Wabash and another company.

On June 19, 2006, Daugherty received a written warning from his supervisor Steve McAninch "for sending abusive emails [to other employees] and for his management style." While Daugherty did not agree that he should have received the warning, surprisingly Daugherty agreed with the substance of it and drafted his own corrective action plan. At the same time, Jeffrey Darling (Darling), president of Wabash and a named defendant in the case, told Daugherty that the company was revoking his previously approved, one-month vacation "because of pressing company business."

Daugherty left the June 19 meeting before discussing the proposed corrective action plan and went to see his doctor. Daugherty returned to work the same day with a note stating, "off work 2 weeks due to medical illness." Daugherty's FMLA application did not identify any specific health condition but described personnel conflicts within the company. Wabash approved the requested FMLA leave.

While Daugherty was out, Wabash discovered that Daugherty had made at least five prior unauthorized purchases on the company credit card (e.g., a generator and/or computer equipment). One or more shipments had been sent to Daugherty's home. Wabash previously had warned Daugherty that he needed permission for making purchases. Daugherty subsequently acknowledged that the purchases violated company policy but explained that he had done nothing wrong because he never retained any of the items for his personal use and delivered them all to the company.

On June 30, McAninch learned that emails he had sent to and received from Daugherty were missing. That same day, two of the company computer servers crashed. The outside consultants Wabash engaged in Daugherty's absence reported several key deficiencies in Daugherty's previous IT work, including failure to provide for server backup capabilities. They also reported that it appeared Daugherty was remotely accessing and perhaps sabotaging the company's computers.

On July 3, Daugherty's first scheduled day back, management gave Daugherty a revised corrective action plan. Daugherty refused to sign, stating that doing so would be "work" and presenting a new doctor's note placing him on continued medical leave. McAninch asked Daugherty not to access the company's computer network while he was out and to turn in his password and keys. Daugherty responded, "I'd rather not." Wabash again requested Daugherty's password and keys on July 19 and August 3 (while Daugherty continued on FMLA leave). Both times Daugherty refused.

On July 31, a forensic expert hired by Wabash discovered that more than 5,000 computer files had been deleted from the Wabash server on June 19 (the day Daugherty received the written warning and began his FMLA leave).

On August 9, while Daugherty was still on FMLA leave, Wabash terminated Daugherty's employment based on his "authoritarian management style, poor IT practices, failure to turn over keys, missing files, and violations of the purchasing protocols."

Daugherty filed suit against the company and Darling in September. Daugherty's first claim was that Wabash had violated the FMLA by failing to reinstate him and instead terminating him while he was on FMLA leave. Per Daugherty, even if Wabash had legitimate performance reasons to terminate him, Wabash should have been required to reinstate him before firing him.

The Seventh Circuit disagreed. Citing 29 U.S.C. § 2614(a)(3)(B) (2006) and 29 C.F.R. § 825.216 (2006), the court explained that the FMLA requires an employer to restore an employee on FMLA to the position to which he would have been entitled had the employee not taken leave. Employers may terminate employees even while on FMLA leave "if the employer discovers misconduct that would justify termination had leave not been taken." Wabash had presented undisputed evidence supporting its termination decision. The court did not agree that Wabash's request of Daugherty while on leave to turn over his keys and password was an improper request for him to "work" while on leave. These requests were no more onerous than an employee's obligation to keep the employer informed of his status while on medical leave, as required by 29 C.F.R. § 825.311(a) (2006).

The Seventh Circuit also found Daugherty's retaliation claim to be without merit. Daugherty claimed that his designation as a "key" employee showed discriminatory animus by Wabash, even though Wabash did not use that designation as a reason for the termination. Daugherty also claimed that the timing of his termination while on leave demonstrated Wabash's discriminatory motive for the decision. While acknowledging that timing of a termination can indicate a discriminatory motive, the court also cited several cases holding that temporal proximity alone is not sufficient to withstand summary judgment. The court also rejected Daugherty's assertion that Wabash had initially told him it would use progressive discipline for his performance problems because no Wabash policy or past practice required the company to do so in light of the additional evidence of poor performance the company had discovered while Daugherty was on leave. As further evidence that the termination was not retaliatory, the court cited Daugherty's testimony that the defendants "really, really mean it" when they say they fired Daugherty for performance reasons.

Mixed-Motive Retaliation Case

[*Hunter v. Valley View Local Schools*](#), 579 F.3d 688 (6th Cir. 2009): The Sixth Circuit reversed summary judgment for the employer on the employee's FMLA retaliation claim where the employer admitted it had placed the employee on an involuntary leave in part because of her previous excessive absenteeism, which included multiple FMLA leaves.

Eunice Hunter ("Hunter") was a custodian for the Valley View Local Schools ("Valley View"), beginning as a substitute in 1996 and moving to a full-time, regular position in 1999. Hunter performed the usual custodian duties including such tasks as lifting/moving furniture, sweeping, mopping floors, waxing, emptying and cleaning waste receptacles, etc.

On June 16, 2003, Hunter was in a non-work related car accident, after which she began a series of FMLA-covered absences from work as follows: From June 16, 2003, to August 18, 2003, Hunter missed sixty days, initially returning part-time and eventually resuming full-time work on November 10, 2003. In the spring of 2004, Hunter again went to part-time work for thirty days

per her doctor's orders and then was off full-time for surgery for ninety days, returning part-time July 2, 2004, and resuming full-time work one month later. In June 2005 Hunter underwent another surgery and took forty-five days of leave, returning on August 18, 2005, with permanent restrictions of no lifting, pushing, or pulling more than ten pounds and no climbing stairs or ladders.

In August 2005, Valley View superintendent Sherry Parr ("Parr") and principal Todd Kozarec met with Hunter and notified her that she would be placed on an involuntary leave of absence. The leave began October 14, 2005. The formal written notice Parr sent Hunter told Hunter she was being "placed on unpaid medical leave not to exceed one (1) year based on your doctor's restrictions limiting your ability to perform your job and excessive absenteeism for the past four (4) years."

Hunter filed suit on June 8, 2006, in Ohio state court alleging violation of the FMLA under federal law and failure to accommodate, disability discrimination, and intentional infliction of emotional distress under Ohio law. Valley View removed to federal court.

In October 2006, Valley View extended Hunter's unpaid leave for another year.

In February 2007, Hunter's doctor again reviewed her job duties and indicated that Hunter could perform all the duties except climbing ladders to change light bulbs. Hunter returned to work at Valley View and continued working there at the time of this action.

At her deposition, Parr testified that Hunter's FMLA leave was one of the two reasons she placed Hunter on the involuntary leave. While the district court found this testimony to be direct evidence of the school district's impermissible use of Hunter's FMLA leave, it still granted summary judgment for the school district, finding that, regardless of Hunter's FMLA leave, the school district would have placed Hunter on leave because her permanent restrictions prevented her from performing the job. The district court declined to exercise jurisdiction over the state law claims, remanding those to the state court.

On appeal of her FMLA claim, Hunter argued that Valley View placed her on involuntary leave because she had exercised her FMLA rights. Valley View argued that it placed Hunter on involuntary leave because she was unable to perform her job and that it would have done so even if Hunter had never taken FMLA leave.

As an initial matter, the Sixth Circuit concluded that the Title VII burden-shifting analysis applies to FMLA claims despite the Supreme Court's recent reminder in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2348-49 (2009) that Title VII cases "do not automatically control the construction of other employment discrimination statutes." The Sixth Circuit reached this conclusion based on its reasoning that the FMLA regulations specifically forbid employers from using an employee's FMLA leave "as a negative factor in employment actions," citing 29 C.F.R. § 825.220(c) (2006). By using the phrase "a negative factor," the court explained that the regulations contemplate that an employment decision might be based on other permissible factors. Thus, the FMLA, like Title VII, authorizes claims based on both permissible and impermissible factors.

With this conclusion, the Sixth Circuit ruled that the burden-shifting framework of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to mixed-motive FMLA retaliation claims. Once Hunter produced evidence of a discriminatory motive (i.e., Parr's testimony that she placed Hunter on leave because of her excessive absenteeism, which included FMLA leave), it was

Valley View's burden to prove by a preponderance of the evidence that it would have placed Hunter on involuntary leave absent its reliance on her FMLA leave. Here again Parr's testimony that there were two reasons for placing Hunter on involuntary leave – her permanent restrictions and her excessive absenteeism – created a question of fact regarding whether or not the school district would have placed Hunter on leave absent her FMLA leave. The Sixth Circuit therefore reversed the district court's grant of summary judgment and remanded the case.



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Wage and Hour

By Daniel Leland, Halunen & Associates
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Unauthorized Payroll Deductions and Exempt Employee under Minnesota FLSA

[Erdman v. Life Time Fitness, Inc.](#), 771 N.W.2d 58 (Minn. Ct. App. 2009): In *Erdman*, the plaintiff-employee and similarly situated class members alleged that the defendant-employer's payroll deductions to recover unearned bonus advances precluded a finding that the employees were paid a "salary," and therefore they were non-exempt employees under the Minnesota Fair Labor Standards Act ("MFLSA"). The court of appeals disagreed, however, holding that because the employer guaranteed the employees a predetermined amount of pay for each workweek, they were salaried employees under the MFLSA.

Under the employer's compensation plan, the plaintiff-employees earned base salaries and were eligible for annual bonuses. Although these bonuses were not calculated finally until the end of the year, the employees were allowed to receive regular bonus advances based on year-to-date financial performance. If bonus amounts advanced were not ultimately earned, the employer made deductions to the employees' base-salary payments to recover amounts advanced but not earned. The employees did not provide written authorizations for this deduction arrangement in violation of the Minnesota Payment of Wages Act ("PWA").

The MFLSA exempts from its overtime-pay requirements individuals who perform certain types of duties and are paid a "salary," which is defined under rules promulgated by the Minnesota Department of Labor and Industry to mean that an employee "is guaranteed a predetermined wage for each workweek." The court noted that, in contrast to the federal Fair Labor Standards Act ("FLSA"), the MFLSA rules "require that exempt employees be 'guaranteed a predetermined wage for each workweek,' not that such an amount be *received* each workweek." Based on this distinction, the court acknowledged that this interpretation of the MFLSA dictated a result different from that under the FLSA. The plaintiff-employees were guaranteed a predetermined amount of pay for each workweek and therefore were salaried for the purposes of the MFLSA. As the plaintiff-employees did not dispute that the other requirements for exemption under the MFLSA were met, the court reversed the district court and remanded for entry of summary judgment in the employer's favor.

Evidence to Support FLSA Conditional Class Certification

[Saleen v. Waste Management, Inc.](#), --- F. Supp. 3d., No. 08-CV-4959 (D. Minn. Sept. 1, 2009), available at 2009 U.S. Dist. Lexis 78506, 2009 WL 2768433: In *Saleen* the plaintiff-employees objected to the United States magistrate judge's order denying the plaintiffs' motion for

conditional class certification. While the court concluded that the question of conditional certification was a “close one,” this conclusion required affirming the magistrate judge’s order.

In *Saleen*, the defendant-employer maintained a timekeeping system that automatically deducted a thirty-minute meal break from employees’ time records. While the employer provided a process for employees to “reverse” the meal-break deduction on days they worked through lunch, the plaintiffs alleged that the employer maintained an unwritten policy to refuse to honor these reversal requests. Plaintiffs sought to conditionally certify a nationwide class of employees.

Notably, the court stated that the case law of the District of Minnesota requires that putative class members be the “*victims* of a single decision, policy, or plan” which requires that the putative class members be harmed by an “*unlawful* companywide policy.” Evidence from 112 declarants and a number of deponents supported the plaintiffs’ contention that the employer maintained an unwritten policy of refusing to honor reversal. Taken alone and assumed to represent the experience of every one of the plaintiffs’ co-workers, this would probably provide a colorable basis for believing the employees had been victimized by a single policy sufficient to conditionally certify a class.

The court, however, noted that it was unaware of any court that had agreed to ignore evidence submitted by a defendant in opposition to conditional class certification. Under the facts at bar, the court stated that it was “unwilling” to ignore evidence proffered by the employer. Taking the defendant’s evidence that employees had been paid for working during meals and that reversal requests were honored, and in light of the employees’ differing explanations of why they were allegedly not paid for working through lunch, the court affirmed the magistrate judge’s order denying conditional class certification.

Class Certification and Tip Sharing

[*Delsing v. Starbucks Coffee Corp.*](#), No. 08-CV-1154, 2009 U.S. Dist. Lexis, 2009 WL 3202378 (D. Minn. Sept. 30, 2009): The United States District Court for the District of Minnesota denied Rule 23(b)(3) class certification in a suit brought by two former baristas against Starbucks alleging that the company’s tip-sharing policy, which consisted of distributing tip money equally among all employees who worked shifts during a week, violated the tip sharing provision of Minnesota’s Fair Labor Standards Act, Minnesota Statute section 177.24, subdivision 3 as well as a state regulation governing gratuity division, Minnesota Rule 5200.0080. The court reasoned that class certification was inappropriate because of serious intra-class conflicts resulting from the plaintiff’s proposed remedy, which was to split tips among employees working a specific shift, because the policy change would result in a financial gain to some members of the class to the detriment of others. Moreover, the court referenced the numerous affidavits submitted by current Starbucks employees claiming support for the current tip-sharing policy and opposing a change. The court observed, “Clearer evidence of intra-class conflict would be hard to come by.”

Although the court denied class certification, the court ultimately held that Starbucks’ policy of requiring employees who work on a particular shift to share tips received on that shift with employees who do not work on that shift violates Minnesota law. Additionally, the court concluded that an employee’s eligibility to share in tips under Minnesota law does not turn on whether that employee was formally clocked in as a “coverage” (direct service) or “non-coverage” (indirect service) employee—designations that are expected to determine the amount of customer service employees will be providing during their shifts. Rather, eligibility turns on whether the employee is primarily engaged in

direct customer service during a particular shift. If so, the employee may be treated as a direct-service employee for the entire shift and share in all tips left during that shift.

Lastly, the court granted Starbucks summary judgment on the plaintiffs' record-keeping claim by holding that the Minnesota FLSA does not require employers to maintain records of the tips received by their employees.

Claim Investigators Not Exempt

Fenton v. Farmers Insurance Exchange, No. 07-CV-4864, ___ F. Supp. 3d ___, 2009 U.S. Dist. Lexis 90244, 2009 WL 3164772 (D. Minn. Sept. 29, 2009): The United States District Court for the District of Minnesota held that employees hired to investigate potentially fraudulent insurance claims were improperly classified as "exempt" from overtime pay under the Fair Labor Standards Act. The court concluded as a matter of law that investigators did not exercise sufficient discretion and independent judgment with respect to matters of significance as required for exemption under the FLSA's short-duties test. The court's holding turned in part on the fact that the investigators had extensive review guidelines that they were required to follow when performing and documenting their work and that "the investigators' subjective opinions and conclusions are excluded from their written reports." The court concluded that "their primary role is simply to gather facts and present them for someone else to analyze," and observed that "[t]hey have no authority to determine whether a claim is covered or whether FIE should seek to negotiate a settlement."

Additionally, the court found that the plaintiffs failed to meet the weighty burden of proving that the employer's FLSA violations were willful, as would be required to extend the statute of limitations from two to three years for their claims. However, with respect to the issue of liquidated damages, the court concluded that FIE failed to meet "the difficult burden of showing that this is the exceptional case where liquidated damages are inappropriate."



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Federal Labor Management

*By Marlin Osthus
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10(j) Injunctions Issued in Region 18 Cases

[Osthus v. Whitesell Corp.](#), No. 3-09-cv-100-CRW-CFB (S.D. Iowa Sept. 11, 2009) (order granting preliminary injunction): On September 11, 2009, U.S. District Judge Charles Wolle granted an injunction requiring Respondent Whitesell Corporation to cease and desist from: (1) failing to bargain in good faith; (2) seeking to eliminate the union's representational role and leaving employees worse off than if they had no contract through Respondent's contractual proposals; (3) proposing contract language that is regressive when compared to the most recent collective-bargaining agreement between Respondent and Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 359; (4) refusing to consider counterproposals made by the union; (5) insisting on bargaining from comprehensive bargaining proposals; and, (6) undermining the union, delaying providing the union information, and unilaterally changing terms and conditions of employment. The injunction also required Respondent to rescind its implementation of a final offer.

Respondent has filed a motion for a stay with the district court, pending an appeal to the Eighth Circuit Court of Appeals.

[Osthus v. Vincent/Metro Trucking, LLC](#), No. 09-1726 (DSD/JJK), 2009 U.S. Dist. Lexis 72609, 2009 WL 2516165 (D. Minn. Aug. 14, 2009): On August 14, 2009, U.S. District Judge David S. Doty granted an injunction sought by Region 18. Judge Doty ordered Respondent to recognize and bargain in good faith with United Food and Commercial Workers Local 789, including rescinding its withdrawal of recognition, providing information relevant to bargaining, refraining from direct dealing and bypassing the union, and ceasing the solicitation of employees to withdraw their support of the union. The court also ordered that Respondent post the order in English, Spanish and Mandarin Chinese, and read the order to unit employees, including providing translators for employees speaking Spanish and Mandarin Chinese. Respondent is taking steps to comply with the order.

Board Decisions Involving Region 18 Unfair Labor Practice Complaints

[Bernard Dalsin Manufacturing Co.](#), 18-CA-18797: In the absence of exceptions the Board affirmed the June 30, 2009, findings and order of Administrative Law Judge Eric Fine. Judge Fine sustained complaint allegations that Respondent illegally permanently replaced striking employees who were on an economic strike because Respondent had an "independent unlawful

purpose” motivating the hiring of the permanent replacements. Judge Fine also sustained an allegation of direct dealing and bypassing, while dismissing other allegations alleging the same conduct. Judge Fine ordered Respondent to offer striking employees their former positions and to make striking employees whole for any losses suffered as a result of Respondent’s failure to return striking employees to their jobs upon the union’s unconditional offer to return to work.

Administrative Law Judge Decisions Involving Region 18 Unfair Labor Practice Complaints

[Vincent/Metro Trucking, LLC](#), 18-CA-18935: On June 25, 2009, Administrative Law Judge Bruce D. Rosenstein sustained the complaint insofar as it alleged that Respondent unlawfully withdrew recognition from the union, unlawfully refused to provide information to the union, unlawfully bypassed the union and dealt directly with employees, and unlawfully induced employees to cease supporting the union. However, Judge Rosenstein dismissed the complaint allegation that Respondent unlawfully refused to execute a contract, concluding that the parties did not reach agreement. Respondent filed exceptions, which are pending before the Board.

[Leiferman Enterprises d/b/a Harmon Auto Glass & Successor Auto Glass Repair & Windshield Replacement Service, Inc.](#), 18-CA-18134: This case was decided by Administrative Law Judge Robert Gianassi on June 26, 2009, based on a stipulated record. This matter concerned backpay issues related to the Board’s decision at 352 N.L.R.B. 24, requiring Respondent Leiferman Enterprises d/b/a Harmon Auto Glass to make employees whole for illegal unilateral changes.

The issue in the case is whether the purchaser of Respondent (Auto Glass Repair and Windshield Replacement Service, Inc.—herein WRS) is liable for the backpay. WRS purchased Respondent’s assets by approval of the District Court for the State of Minnesota, County of Hennepin, pursuant to a receivership ordered by the court due to the failure of Respondent to make payments to its secured creditor. The court ordered the sale “free and clear of any liens and encumbrances.”

In spite of the sale free and clear of any encumbrances, Judge Gianassi agreed with Region 18 that WRS is a *Golden State* successor, *see Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and that WRS may not escape liability because of the order by a court of the state of Minnesota that the sale was free and clear of any liens and encumbrances. Judge Gianassi found that federal preemption applies, and that in any event the Board has held that even federal bankruptcy courts may not extinguish a *Golden State* successor’s liability, citing *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980).

Regional Director Decisions Involving Representation Issues

[Associated Hotels Duluth LLC d/b/a Radisson Hotel Duluth](#), 18-RM-1380 (June 19, 2009): Following an administrative investigation, the Regional Director dismissed this petition concluding that no question concerning representation existed. The Regional Director rejected the employer’s contention that the decisions by Local 99, Chicago & Midwest Regional Joint Board to disaffiliate from UNITE HERE, to form a new union (Workers United), and to become an autonomous conference of the SEIU created a question concerning representation. In doing so, the Regional Director rejected the employer’s position that there were competing claims for representation – one claim by UNITE HERE and the other claim by Local 99. Rather, applying Board law related to union affiliation votes, the Regional Director concluded that Local 99’s

decision to change affiliations did not change the identity of Local 99 as the collective-bargaining agent.

[CHS, Inc.](#), 18-UC-422 (Aug. 27, 2009): The Regional Director dismissed this petition filed by Local 638, International Brotherhood of Teamsters, concluding that the employees the union sought to clarify into an existing unit have been historically excluded from the unit. The decision states that, even assuming that a similarity in terms and conditions of employment weighs in favor of finding accretion, the fact that the disputed employees have been historically excluded from the unit is dispositive.



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Unemployment Compensation

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Commissions Earned Before Yet Paid After Discharge Affect Compensation Amount

Meder v. Rapid Sports Center, Inc., 773 N.W. 2d 341 (Minn. Ct. App. 2009): Relator worked as a salesperson. His employment contract provided that, in addition to salary, he would receive a commission on each boat he sold after the sale was final, i.e. after the boat was completely paid for. At the time of his discharge, Relator had sales that were not yet final.

While receiving unemployment, Relator received commission payments over the course of four weeks. The Department of Employment and Economic Development (DEED) determined that Relator had been overpaid during the weeks he received commissions in excess of his weekly benefit amount. Appealing the decision, Relator argued that his commissions were earned before he began receiving unemployment compensation benefits.

The Minnesota Court of Appeals affirmed. In a case of first impression, the court looked at the statutory construction of Minnesota Statute section 268.085, subdivision 5 (2008): “If [an] applicant has earnings with respect to any week, from employment . . . equal to or in excess of the applicant’s weekly unemployment benefit amount, the applicant [is] ineligible for unemployment benefits for that week.”

The court relied on the employment agreement between the parties, which provided that no commission was owed to Relator until the sale was final. Because Relator earned a commission only when a final payment was made to the employer, the court held that section 268.035, subdivision 30(a) did not apply. That section provides that: “Any wages earned but not paid with no scheduled date of payment shall be considered ‘wages paid’ on the last day of employment.” Relator’s commissions were not considered “wages paid” on the last day of employment.

Failure to Provide Notice of Absence Due to Unexpected Hospitalization of Immediate Family Member Not Misconduct

Hanson v. Crestliner, Inc., 772 N.W.2d 539 (Minn. Ct. App. 2009): The employer’s policy required employees to call in when they were absent from work. On August 26, 2008, Relator was scheduled to work. Relator did not call in and did not inform his employer he would be absent after his mother was hospitalized. Relator’s testimony shows that he meant to call in, but due to the circumstances of the demands on him at the hospital, he did not.

The court of appeals looked at the reason for the Relator's absence and the statutory definition of misconduct. The court held that his actions did not constitute misconduct.

Minnesota Statute section 268.095, subdivision 6(a) (2008) defines misconduct to include "intentional, negligent, or indifferent" conduct that displays a serious violation of the standards the employer has a right to expect or a lack of concern for employment. The court found that because Relator's absence was caused by the need to care for an immediate family member, his absence did not clearly display a serious violation of the standards of behavior the employer has a right to reasonably expect or display a substantial lack of concern for employment. The court further noted that under this provision, an employee does not commit misconduct when the employee displays conduct the average employee would have engaged in under the circumstances.

Notice of Future Discharge Not Termination When Employment in Any Capacity Available

Bangston v. Allina Medical Group (Corp.), 766 N.W.2d 328 (Minn. Ct. App. 2009): The employer presented Relator with a separation agreement and release, which stated his employment would terminate four days later. Relator became agitated, threw his drink across the room, approached and pointed a finger at a colleague, and began yelling at him. On his way out of the building, he grabbed this employee by the throat, pushed his head against a coat hook, and grabbed his tie trying to flip him over. Following this incident, the employer informed Relator that his employment was terminated immediately.

The Department of Employment and Economic Development (DEED) determined Relator was ineligible for benefits, determining he was discharged for misconduct.

The court of appeals affirmed. The court first determined whether a notice of discharge is a termination when employment is still available to the employee in any capacity. The court held no, finding that "a notice of discharge does not constitute an immediate discharge when continuing employment in any capacity is still available to the employee who receives the notice of discharge." The court found that Relator was not discharged at the time he was presented with the separation agreement because the language did not purport to terminate him immediately. Instead, the court found it provided him notice that he would be terminated at a future date.

Second, the court found Relator committed misconduct noting, "It is beyond dispute that Relator's completely unwarranted and unprovoked assault on [his colleague] is misconduct."



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Minnesota Tort and Contract Cases

*By Charles F. Knapp, Julie M. Giddings, & Valerie A. Darling
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Defamation Verdict Upheld Against Co-worker; Reversed Against Employer Based on Qualified Privilege

[Bahr v. Boise Cascade Corp.](#), 766 N.W.2d 910, 29 I.E.R. Cas. (BNA) 564 (Minn. 2009): LeRoy Bahr filed a defamation action against his employer, Boise Cascade Corporation (“Boise”); his supervisor, Eural Dobbs; and a co-worker, Stacy Rasmussen, as a result of statements Rasmussen made about Bahr in the course of a harassment investigation in the workplace.

In September 2001, Rasmussen learned of a rumor being spread that Rasmussen had been involved in an extramarital affair with R.B., another Boise employee. Rasmussen was led to believe that the source of the rumor was Bahr. Rasmussen and R.B. called Bahr to ask him about the rumor. Bahr denied to R.B. that he had started the rumor. Later that day, Bahr and two other employees confronted Rasmussen about the matter. Rasmussen testified that he felt “threatened and harassed” by them and ultimately complained to Dobbs about feeling threatened by Bahr. After Rasmussen complained to Dobbs, at the direction of human resources and without interviewing Bahr to hear his side of the story, Dobbs immediately placed Bahr on “investigatory suspension” and had him escorted from the premises.

Later that afternoon, Rasmussen and R.B. met with human resources to file an informal harassment complaint against Bahr. Rasmussen made three allegations of misconduct against Bahr: (1) Bahr started the rumor about the affair; (2) Bahr “yells and shouts and he is almost to the point of physical violence;” and (3) Bahr “will do as little as possible because he is mad at Boise.” When Boise interviewed Bahr, Bahr denied all of Rasmussen’s allegations. At the conclusion of the investigation, Bahr received a three-day suspension, which was rescinded as a result of a union grievance settlement.

Based upon statements Rasmussen made during the harassment investigation, Bahr filed a defamation action in which he alleged that Rasmussen “communicated to Dobbs a false and defamatory statement” and that Dobbs and other management-level employees of Boise communicated these statements to “additional parties.” After a jury verdict in favor of Bahr against Boise and Rasmussen, Boise and Rasmussen filed a motion for judgment as a matter of law under Rule 50.02. The district court denied the motion.

The court of appeals reversed, holding that the district court had erred in submitting to the jury the question of actual malice as to both Rasmussen and Boise. The Minnesota Supreme Court granted Bahr’s petition for review.

The first issue before the Minnesota Supreme Court was whether its scope of review allowed it to review the denial of summary judgment after judgment had been entered on a jury verdict. The court adopted the majority rule in the federal appellate courts, including the Eighth Circuit, by holding that it would not review the denial of a motion for summary judgment after a trial on the merits.

The court next reviewed whether the district court had properly denied Rasmussen's motion for judgment as a matter of law. While the district court concluded that Rasmussen's statements were protected by a qualified privilege, the district court denied Rasmussen's motion for judgment as a matter of law and submitted the question of actual malice to the jury. Actual malice requires a showing that the defamatory statements are made from "ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff" and defeats a qualified privilege. After examining the evidence submitted by Bahr in support of finding actual malice by Rasmussen, the supreme court held that the evidence provided a legally sufficient basis for a reasonable jury to conclude that Rasmussen made the defamatory statements in his harassment complaint with actual malice in an effort to cause employment problems for Bahr. The court remanded the defamation claims against Rasmussen to the court of appeals for consideration of several legal issues previously raised but not addressed.

The supreme court concluded, however, that the district court erred in denying the motion for judgment as a matter of law against Boise. The defamatory statements alleged against Boise were Rasmussen's statements, which had been repeated in the course of Boise's harassment investigation. The court determined that neither the manner in which the harassment investigation was conducted nor any alleged ill will by Dobbs, which would have been imputed to Boise, created issues of fact as to the question of actual malice. Although Bahr argued that Boise conducted a "sham" investigation, the court found that Boise conducted its investigation for the purpose of determining the validity of Rasmussen's allegations and that it limited republication of the alleged defamatory statements to employees that the company could have reasonably believed would provide some information about the truth or falsity of Rasmussen's allegations. The court noted that "[i]t might be argued that Boise should have conducted a more detailed or different investigation prior to imposing discipline. But pointing merely to instances in which Boise might have better conducted the investigation does not provide a basis for a reasonable jury to conclude that Boise [acted with actual malice]." The court held that Boise was entitled to judgment as a matter of law with respect to Boise's alleged defamation because Bahr did not present sufficient evidence on the question of actual malice as to Boise.

Non-party to Noncompetition Agreement Is Bound by Forum-Selection Clause

[*C.H. Robinson Worldwide, Inc. v. FLS Transportation, Inc.*](#), 772 N.W.2d 528, 13 No. 38 Minn. Lawyer 20 (Minn. Ct. App. 2009): C. H. Robinson Worldwide, Inc. ("C.H. Robinson") and FLS Transportation, Inc. ("FLS") are competitors. After FLS hired eight of C.H. Robinson's former employees, C.H. Robinson filed a complaint against FLS, its officers, and the eight former employees. The complaint alleged that the employees breached their nondisclosure agreements by using confidential and proprietary information and soliciting C.H. Robinson customers on behalf of FLS. The complaint also alleged that FLS and its officers intentionally induced the employees to breach their nondisclosure agreements.

Some former employees had signed Confidentiality and Noncompetition Agreements ("CNAs") while employed by C.H. Robinson. Some CNAs provided that Minnesota law governed the

interpretation and enforceability of the agreement and contained a forum selection clause providing that any legal action to enforce the terms of the CNA would be brought in Minnesota state or federal court and that the employees consented to the jurisdiction of those courts.

FLS, its officers, and the former employees challenged the district court's denial of its motion to dismiss for lack of personal jurisdiction and on the basis of forum non conveniens.

The Minnesota Court of Appeals first addressed whether the CNAs' forum selection clauses were enforceable. A forum selection clause may be unreasonable and unenforceable if the chosen forum is seriously inconvenient, the clause appears in a contract of adhesion, or the agreement is otherwise unreasonable. The court found that the CNAs were not adhesion contracts and were not so unreasonable that enforcement of the forum selection clauses contained in the agreements would be unconscionable. The record did not show that the employees received inadequate compensation for entering into the CNAs or that the employees lacked business sophistication resulting in unequal bargaining power. Nor did the record show that the employees did not receive consideration for the alleged inconvenience of the chosen forum at the time of contracting.

The court also affirmed the district court's decision that FLS, its officers, and employees who had not signed a CNA were nonetheless bound by the forum selection clauses therein because they were "closely-related" to the dispute. The court noted that "a third party may be bound by a forum selection clause where it is 'closely related to the dispute such that it becomes foreseeable that it will be bound'" by the clause. The district court found (1) that C.H. Robinson alleged that the defendants who were nonparties to the CNA undertook a concerted effort to solicit the former employees bound by the CNAs, with knowledge that they were subject to the CNAs, and (2) that all the defendants were represented by a common attorney and shared a common interest in asserting the same defenses. Thus the defendants who were nonparties to the CNAs were sufficiently closely related to the dispute to be bound by them.

The court also held that the forum selection clause subjected all the defendants, both the parties to the CNA and the nonparties, to personal jurisdiction in the forum state of Minnesota. Because the nonparties were held to be "closely-related" to the dispute such that it would be foreseeable that they would be bound by the forum-selection clauses, it follows that the nonparties should also reasonably anticipate defending themselves in a Minnesota court.

The former employees also challenged the district court's ruling that the required minimum contacts existed to subject them to specific personal jurisdiction despite the fact that none of them resided in Minnesota. The court found that the employees had ongoing, regular contact with Minnesota during their employment. They were in frequent contact with C.H. Robinson's Minnesota offices to handle travel, administrative, and personnel matters. Additionally, their supervisors were located in Minnesota, and they traveled to Minnesota for training. Therefore, the former employees had sufficient minimum contacts to subject them to personal jurisdiction in the state.

Finally, the court held that the district court did not abuse its discretion in refusing to dismiss the case for forum non conveniens. The case involved an injury to a Minnesota resident, the CNA provided for Minnesota law to apply, and the appellants failed to show that the balance of public and private interest factors favored another forum.