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Labor & Employment Specialist Certification

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Age Discrimination in Employment Act

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

Remand of *Gross* for New Trial

Gross v. FBL Financial Services, Inc., 588 F.3d 614 (8th Cir. 2009): This case came before the Eighth Circuit on remand from the Supreme Court, which held in June 2009 that the plaintiff in a mixed-motives ADEA disparate treatment case must prove that age “was the ‘but-for’ cause of the employer’s adverse decision.” ***Gross v. FBL Financial Services, Inc.***, 129 S. Ct. 2343 (2009). Initially, Gross had obtained a jury verdict in his favor on his ADEA claim and a companion claim under the Iowa Civil Rights Act, but the jury awarded no damages for emotional distress and found that the employer’s conduct was not “willful.”

The jury instruction stated that the jury’s verdict must be for Gross if he proved that his age was a motivating factor in the decision and that the verdict must be for the employer if it proved that it “would have demoted plaintiff regardless of his age.” In the Eighth Circuit’s initial opinion in the case after the trial, ***Gross v. FBL Financial Services Inc.***, 526 F.3d 356 (8th Cir. 2008), the court interpreted this instruction to mean that once Gross proved by a preponderance of the evidence that his age was a motivating factor in the challenged decision, the burden of persuasion shifted to the employer to prove that it would have demoted Gross regardless of his age. The Eighth Circuit rejected this standard and instead held that the burden of persuasion on the issue of causation could be shifted to a defendant only if the plaintiff had shown by direct evidence that an illegitimate criterion was a substantial factor in the decision.

The Supreme Court rejected the Eighth Circuit’s initial analysis and held that the burden of persuasion never shifts to the party defending a mixed-motives ADEA discrimination claim. *Gross*, 129 S. Ct. at 2348. The Supreme Court vacated the Eighth Circuit’s 2008 opinion and remanded the case for further consideration.

Following the Supreme Court’s decision, the Eighth Circuit held in November 2009 that the jury instruction was inconsistent with the law established by the Supreme Court. Because an erroneous jury instruction on a central issue in a case cannot be harmless, the Eighth Circuit held that a new trial was required.

The court next addressed a dispute between the parties about the scope of the new trial. The employer argued that, because Gross did not cross-appeal the jury’s findings that the employer’s conduct was not willful and Gross proved no emotional distress damages, the

trial should be limited to the question of liability for age discrimination and damages for lost wages. Gross, on the other hand, argued that it would be unfair for the employer to obtain a new trial on the issues decided in favor of Gross but not allow Gross a new trial on issues decided in favor of the employer.

In a ruling that stands as a cautionary note for counsel, the court held that the new trial would be limited as the employer had requested. The court cited “the general rule ... that a party must file a cross-appeal if he seeks to enlarge his rights beyond the district court’s judgment,” and noted that Gross had failed to cross-appeal those portions of the district court judgment in favor of FBL. While the court recognized that “the cross-appeal is a non-jurisdictional rule of practice that can be avoided in the discretion of the court,” it found “no strong reason to depart from the rule.” The court rejected Gross’s assertion that “the jury’s decision on liability and lost compensation was interwoven with its decision on emotional distress and willfulness,” i.e., that the verdict represented a compromise. Instead, the court found it more likely that “the jury reached independent decisions on the several issues presented, and simply found that Gross failed to prove willfulness or damages from emotional distress.”

The court also addressed two other issues. First, the court held that it was not error for the district court to have excluded from its final jury instructions the italicized text in the following proposed instruction: “Defendant is entitled to make its own subjective personnel decisions, absent intentional age discrimination, *even if the factor motivating the decision is typically correlated with age, such as pension status, salary or seniority.*” The district court’s final instruction included only the first half of this sentence. The Eighth Circuit held that this decision by the district court was not an abuse of discretion; the district court was not required to list in the instruction “examples” of reasons that did not constitute intentional age discrimination.

The second issue was whether the district court erred when it excluded testimony from a vice-president of the employer about complaints that he heard from Gross’s co-workers about Gross’s performance in the workplace. In a post-trial ruling, the district court agreed with FBL that Eighth Circuit precedent allows testimony about such complaints when the employer shows that it took action on the basis of the information, yet nonetheless upheld its ruling excluding the evidence at trial on the ground that FBL’s offer of proof was insufficient to establish that the witness received and relied on complaints about Gross. The Eighth Circuit declined to make a ruling on the issue because FBL would have a new opportunity to lay an adequate foundation in the second trial.

Summary Judgment in Reduction-in-Force Case

Rahlf v. Mo-Tech Corp., Inc., Civil No. 08-4846, 2009 U.S. Dist. LEXIS 116900, 107 FEP Cases (BNA) 1756 (D. Minn. Dec. 15, 2009): Three mold-makers (two of whom were fifty at discharge, the other forty-two) were discharged in a reduction-in-force (“RIF”), which their employer claimed was required due to a lack of work. The employer brought a motion for summary judgment.

The court said that the case did not involve direct evidence, and observed that in such cases courts traditionally apply the familiar *McDonnell Douglas* burden-shifting framework. The employer in this case, however, argued that *McDonnell Douglas* no longer applied due to the Supreme Court’s recent *Gross* decision [see above]. Judge

Doty noted that the Supreme Court observed in *Gross* that it had not ever “definitively decided whether the evidentiary framework of *McDonnell Douglas* – utilized in Title VII cases – is appropriate in the ADEA context.” He nonetheless applied the *McDonnell Douglas* analysis. In support of this approach, the court cited numerous post-*Gross* disparate treatment pretext cases in which district courts applied that framework, and also noted that the parties had argued in their briefs as if the *McDonnell Douglas* standard would apply.

Judge Doty then rejected the plaintiffs’ argument that a fact issue for trial was raised based on evidence suggesting that a RIF may not have been necessary, such as evidence that the employer hired several new employees a few months after the plaintiffs were let go. Judge Doty characterized this argument as “an attack on Mo-Tech’s business and personnel decisions,” which, he said, was insufficient to establish pretext.

Judge Doty also rejected the argument that a fact issue was raised because the employer had never previously disclosed to the plaintiffs that its stated reason for letting them go (their limited skills on a particular machine) was important to the employer and because the employer had made no effort to train them on these machines. It is not unlawful for an employer to make decisions based upon poor job performance or even on an erroneous evaluation as long as those decisions are not the result of discrimination.

Service of Summons after Dismissal of MHRA Charge

Steen v. Target Corp., Civil No. 09-2108, 2009 U.S. Dist. LEXIS 121454, 107 FEP Cases (BNA) 1756 (D. Minn. Dec. 30, 2009): Steen was terminated from employment with Target in July 2006 at age fifty-two. He later filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”), which was cross-filed with the Minnesota Department of Human Rights (“MDHR”). On May 19, 2009, the EEOC dismissed Steen’s charge and notified him of his right to sue. By letter dated June 24, 2009, the MDHR adopted the EEOC’s disposition of Steen’s charge, dismissed his charge, and notified Steen of his right to sue. Steen filed a lawsuit against Target on August 11, 2009, and nine days later served the summons and complaint.

Target brought a Rule 12(b)(6) motion to dismiss Steen’s Minnesota Human Rights Act (“MHRA”) claim. Target argued that the claim was time-barred under [Minnesota Statute section 363A.33, subdivision 1 \(2008\)](#), which provides that a person may “bring” a civil action under the MHRA “within 45 days after receipt of notice that the commissioner [of human rights] has dismissed a charge.” The MHRA provides that receipt of notice of dismissal of a charge is presumed to occur five days after the date of service by mail of the notice. Steen was presumed to have received the MDHR’s notice of dismissal on June 29, which meant that Steen had only until August 13, 2009 (forty-five days after June 29) to “bring” his MHRA claim. Steen had filed his lawsuit on August 11, but did not serve the summons and complaint until eleven days later.

In granting Target’s motion, Judge Ericksen first noted that an action is “brought” within the meaning of the MHRA when it is commenced within the meaning of [Rule 3.01 of the Minnesota Rules of Civil Procedure](#). That rule provides that an action is commenced against a defendant “when the summons is served upon that defendant.” Because Target was not served with the summons until more than forty-five days after Steen was presumed to have received the MDHR’s notice of dismissal, the court held that the MHRA claim was time-barred.

Judge Ericksen rejected Steen's argument that Target's motion to dismiss should be denied because it was filed one day late, on the twenty-first day after service of the summons. Target, which acknowledged that its motion was untimely due to a counting error, argued that this did not constitute a waiver of its limitations defense. Judge Ericksen agreed. She observed that there is "no requirement in Rule 12 to affirmatively raise the statute of limitations defense by motion," and also noted that Target appeared in the action twenty-one days after it was served and then asserted the limitations defense in its first appearance. Under these circumstances, Judge Ericksen concluded that there was no merit to Steen's argument that Target waived the limitations defense.

This case serves as a reminder to attorneys to be sure that the summons and complaint containing an MHRA claim are served within forty-five days after the plaintiff receives notice of dismissal of an MHRA charge. Just filing the complaint in federal court is insufficient to stop the running of the MHRA statute of limitations.

EEOC Settlement of Significant Disparate Impact Claim

In September 2009, the EEOC announced a \$4.5 million settlement of an age discrimination class lawsuit against Allstate Insurance Company, with the funds to be paid to approximately ninety former employees, in addition to significant remedial relief. Allstate adopted a policy under which the company imposed a hiring moratorium that applied to all its employee-sales agents who were affected by a program under which Allstate reorganized from employee-agents to what the company considered independent contractors. The EEOC alleged in the suit that the policy had a disproportionate impact because more than 90% of the agents subject to the hiring moratorium were forty years of age or older. Earlier in the case, the Eighth Circuit had ruled in favor of the EEOC in allowing the ADEA disparate impact claim to proceed. [*EEOC v. Allstate Ins. Co.*, 528 F.3d 1042 \(8th Cir. 2008\)](#).

EEOC Lawsuit Against Law Firm Kelly, Drye & Warren

In January 2010, the EEOC announced that it was suing the Kelly, Drye & Warren law firm, based in New York, for violations of the ADEA. According to the EEOC's suit, in Kelly Drye's compensation system, attorneys who practice law after reaching seventy years of age receive dramatically reduced compensation compared to similarly productive younger attorneys solely because of their ages. The lawsuit also includes a count alleging that the law firm unlawfully retaliated against an attorney who practiced with the firm for over forty years by further reducing his compensation after he complained about the alleged discriminatory policy and filed a charge with the EEOC. Commenting on the suit, the EEOC's acting chairman, Stuart J. Ishimaru, said, "Law firms that single out older attorneys for adverse treatment simply because of their age run great risk of violating the federal prohibition on age discrimination."



Disability Discrimination

By Joe Weiner
Littler Mendelson

Reasonable Accommodation, Retaliation, Aiding and Abetting

Partington v. Intek Plastics, Inc., [No. 08-4614, 2009 WL 5215338](#) (D. Minn. Dec. 28, 2009): The district court granted Intek Plastics, Inc.'s motion for summary judgment on Partington's claims of discrimination and retaliation under the Americans with Disabilities Act ("ADA") and Minnesota Human Rights Act ("MHRA"), and on her claim of aiding and abetting a violation of the MHRA.

Partington worked as a shipping clerk for Intek. The Intek shipping clerks were subject to a collective bargaining agreement ("CBA"). All the shipping clerks operated a special forklift to move inventory at Intek's North Plant. The use of this forklift caused Partington pain in her leg and ankle, which had been previously injured in a car accident. Partington asked that Intek accommodate her disability by moving her to another job site where she would not have to use the special forklift. Intek refused this accommodation, but Partington eventually returned to work when she realized she could adjust the seat in the forklift. Two years later, Partington was terminated after she struck a co-worker while driving the forklift aggressively.

The court determined that Partington failed to establish a prima facie case of discrimination under the ADA and MHRA, finding that the operation of the forklift was an essential function of the job. Among the factors weighing in Intek's favor were a CBA requirement that guaranteed equitable distribution of overtime and the fact that Intek did not exempt other employees from forklift duties.

The court also found there was no retaliation under the ADA and MHRA, citing an eighteen-month gap between Partington's request for an accommodation and any adverse action and no evidence Intek assigned her to use the forklift more than other employees.

Finally, the court determined there was no aiding and abetting violation pursuant to [Minnesota Statutes section 363A.14 \(1\)](#) because the record did not identify any third parties who discriminated against Partington or how Intek incited those parties to violate the MHRA.



Equal Pay Act

*By Antone Melton-Meaux
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Pay Discrepancy Not Gender Based

Drum v. Leeson Electric Corp., 565 F.3d 1071 (8th Cir. 2009): The Eighth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the employer because the employer failed to show that the employee's pay discrepancy was based on some factor other than gender.

Tammy Drum began working for the employer in 1990. In 1999, she was promoted to human resources manager. In 2005, her salary was \$41,548. She was later promoted to another position with a salary of \$45,600. Her male replacement received a salary of \$62,500.

The court found that the pay differential was undisputed. Drum's salary was below market value, and her male replacement's salary was consistent with market value. The two performed essentially the same job functions. As a result, the employer was required to demonstrate that the pay difference was based on a factor other than gender.

The employer argued that the difference was based on Drum's prior salaries. The court reviewed the record of Drum's compensation to determine whether the employer was relying upon a history of justifying lower wages for female employees, otherwise known as the "market force theory." The employer argued that its old policy on compensation was based slightly under the industry average. However, the new policy was restructured to compensate new hires based upon a more competitive salary framework. Although the employer supported this position with data on the names, gender, and salaries of the new hires, the employer did not provide information on their education, experience, and other qualifications. As a result, the court found that the new policy change did not explain the difference in Drum's salary and determined that summary judgment was inappropriate.

Different Pay Scales for Groups of Employees

Yant v. U.S., 588 F.3d 1369 (Fed. Cir. 2009): Thirty-five current and former nurse practitioners brought suit against the United States Department of Veteran Affairs under the Equal Pay Act. They claimed that, as predominantly female nurse practitioners (“NPs”), they were paid less than predominantly male physician assistants (“PAs”). Both groups perform essentially the same job functions under comparable working conditions.

The Federal Circuit found that the differential in pay was based not upon gender but on different pay scales for NPs and PAs. The NP scale was regionally based. The PA scale was nationally based. The NPs failed to show that the VA’s decision to use different pay scales was based on gender. Furthermore, the NPs could not rely solely on gender ratios to demonstrate discrimination as the legislative history of the Equal Pay Act cautioned against applying the statute in such situations.

Job Responsibilities Not Substantially Similar

Nuzzi v. Bourbonnais Elementary School District, No. 09-1066, 2010 U.S. App. LEXIS 620, 2010 WL 114195 (7th Cir. Jan. 11, 2010): Deborah Nuzzi was a principal at a kindergarten and preschool from 2004 until 2006. She voluntarily resigned her job to assume a different teaching position. She subsequently filed a suit against a school board member and the school district alleging, among other things, a violation of the Equal Pay Act.

At summary judgment before the district court, Nuzzi presented a chart comparing the pay of principals in the school district. She also provided testimony that she and other female administrators had voiced complaints about pay disparities and were told to leave the district if they were unhappy. It was undisputed that two male principals earned more than Nuzzi. However, the district court found that the two male principals (1) had been employed longer than Nuzzi (eighteen and six years longer), (2) supervised more staff, and (3) were responsible for larger student populations with full-day students. Moreover, her male replacement accepted the same salary that Nuzzi had been offered for the upcoming school year.

For these reasons, the Seventh Circuit affirmed the decision of the district court. Nuzzi failed to show sufficient evidence that she was paid less than another school district principal with substantially similar duties as required under the Equal Pay Act.

Weatherford v. Arkansas State University, No. 3:09 CV00071, 2009 U.S. Dist. LEXIS 112499, 2009 WL 461400 (E.D. Ark. Dec. 2, 2009): Evelyne Weatherford was an assistant director for the University. She alleged that a male assistant director made \$10,000 more per year than she did. In addition, she claimed that after her promotion to director, she was bullied into paying her assistant \$8,000 more than she was paid when she was in that position.

The district court held that Weatherford failed to demonstrate that her male counterpart's job was substantially similar to hers in duties, responsibilities, and length of employment. Furthermore, the court found that Weatherford's claims of bullying were conclusory. She voluntarily decided to pay her assistant more than she was paid when she was in the position.

Riley v. U.S. Bank, No. 4:08 CV00206, 2009 U.S. Dist. LEXIS 76001, 2009 WL 2757048 (E.D. Mo. Aug. 26, 2009): Eileen Riley was hired as a sales assistant by the employer in 2002. Her pay was \$27,000 a year. Prior to her employment, she had obtained a B.A. in Marketing and acquired significant work experience in other fields. In December 2003, Riley applied for a position as a compliance representative. She was hired for the position, which raised her salary to \$35,000 a year. While working as a compliance officer, Riley was paid less than both her male and female counterparts.

The district court determined that Riley had presented no evidence that she performed similar work to her male counterparts. The evidence was clear that the male compliance representatives had job duties distinct from those of Riley; they engaged in different reporting functions. For these reasons, the district found that summary judgment in favor of the employer was appropriate.

Family and Medical Leave Act

*By Mary M. Krakow, Esq.
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The Family and Medical Leave Act (“FMLA”) military leave provisions were expanded effective October 28, 2009 when President Obama signed Public Law 111-84, the [National Defense Authorization Act for Fiscal Year 2009](#) (“NDAA”).

Qualifying-Exigency Leave

FMLA qualifying-exigency leave provides eligible employees up to twelve workweeks of job-protected leave in a twelve-month period when a covered relative is called to military duty. 29 U.S.C. § 2612(a)(1)(E). Per the NDAA, the leave now applies to all active duty servicemembers who have been called or ordered to deploy to covered active duty (which generally must include deployment to a foreign country), in addition to the previously covered Guard and Reserve members and retired members of the Regular Armed Forces or Reserve who were called to active duty. In other words, eligible employees with a spouse, parent, or child who is serving in the Regular Armed Forces, Guard or Reserves, or is called out of retirement to active duty are now entitled to qualifying exigency leave.

Qualifying exigencies are broadly defined and include time away for such events as deployment on short notice, military events and related activities, arranging for or addressing child care and school activities (but not childcare on a routine, regular or everyday basis), making financial and legal arrangements, certain types of counseling, rest and recuperation with the covered military member (up to five days per instance), post-deployment activities, and additional activities (if agreed to by employer and employee).

Injured-Servicemember Family Leave

FMLA injured-servicemember leave provides eligible employees who are the spouse, parent, child, or next of kin of a covered servicemember up to twenty-six workweeks of job-protected leave in a twelve-month period to care for the servicemember. 29 U.S.C. § 2612(a)(3). Per the NDAA, this leave now applies to veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness that occurred in the line of duty on active duty anytime during the five years preceding the date of treatment in addition to the previously covered members of the National Guard and Reserves.

The FMLA's other provisions regarding paid and unpaid leave, notice, and reinstatement after leave continue to apply to both qualifying exigency and injured servicemember leave.



Federal Labor Management

By Marlin Osthus
Regional Director, N.L.R.B. Regional Office

Circuit Courts of Appeal Decisions Involving Region 18 Unfair Labor Practice Complaints

[Loparex LLC v. NLRB](#), 591 F.3d540 (7th Cir. 2009): In a lengthy decision, the Seventh Circuit denied the company's petition for review and enforced the Board's § 8(a)(1) order in full. The court agreed that the company violated the Act when it enacted a restrictive but facially neutral bulletin board policy because the action was motivated by antiunion animus; when it restricted employee union activity in its parking lot; when it promulgated a rule banning the distribution of union literature at anytime, and when it informed shift leaders that they could not participate in union activity because they were statutory supervisors. The court agreed with the Board that shift leaders did not exercise independent judgment when they assigned work and deferred to the Board's interpretation of "responsibly direct" in *Oakwood* as requiring the ability to take corrective action to ensure that employees perform required duties. The court stated that the "Board is entitled to take the position that it would be incongruous to hold someone accountable for the conduct of others she could not control or correct." The court cautioned the Board to take care to "distinguish between corrective and disciplinary action in order to ensure that each part of section 2(11) has meaning."

Board Decisions Involving Region 18 Unfair Labor Practice Complaints

[Leiferman Enterprises, LLC d/b/a Harmon Auto Glass & Its Successor Auto Glass Repair & Windshield Replacement Service, Inc.](#), 354 N.L.R.B. No. 98 (Oct. 30, 2009): Affirming the findings and conclusions of Judge Robert Gianassi, Board Members Schaumber and Liebman found that Respondent Windshield Replacement Service, Inc. (WRS) is a *Golden State* successor liable to remedy the unfair labor practices of Leiferman Enterprises. They also affirmed Judge Gianassi's conclusion that WRS may not escape liability because of a state court order that the sale of any assets to WRS would be free and clear of any liens or encumbrances.

Administrative Law Judge Decisions Involving Region 18 Unfair Labor Practice Complaints

National Association of Letter Carriers (United States Postal Service), Case 18-CB-4819 (Nov. 25, 2009): Administrative Law Judge George Carson II dismissed the complaint, which alleged that the union unlawfully failed and refused to respond to an employee's request for information concerning the procedure and open period for revoking the employee's dues check off and unlawfully failed to give effect to the employee's effort to revoke dues check off. According to Judge Carson, when the employee asked the NALC about how to revoke dues check off, the NALC referred the employee to the employer for a form the employee needed to fill out, and at no time did the employee timely file the form or ask the NALC for further information. No exceptions were filed to Judge Carson's decision.

Scheid Electric, Case 18-CA-19084 (Nov. 13, 2009): Judge Bruce D. Rosenstein sustained complaint allegations that Respondent unlawfully threatened and interrogated an employee about his union activities, unlawfully constructively discharged an employee because of his support for the union, unlawfully withdrew recognition from the union (IBEW Local 343), unlawfully repudiated an existing collective-bargaining agreement, and unlawfully unilaterally changed employee terms and conditions of employment. In concluding that Respondent constructively discharged an employee, Judge Rosenstein agreed with the General Counsel that Respondent unlawfully reduced the employee's hours of work to a level that the employee was forced to resign, and also forced the employee to resign when Respondent informed the employee that he had to resign his membership in the union once Respondent went non-union. The judge also found that the union and Respondent had a § 9(a) relationship, and therefore Respondent unlawfully withdrew recognition, unlawfully repudiated the existing contract, and unlawfully changed employee terms and conditions of employment. While Respondent did not appear at the hearing, it did file exceptions to the decision of Judge Rosenstein.

Regional Director Decisions Involving Representation Issues

Aramark Uniform & Career Apparel, LLC, Case 18-RD-2692 (Nov. 30, 2009): Rejecting the union's argument that the Region should bar an election in this matter because the employer and union entered into a recognition agreement, the Regional Director held that he is bound by decisions of the Board, and therefore declined to overrule *Dana Corporation*, 351 N.L.R.B. 434 (2007), as urged by the union. The Regional Director further noted that no party notified the Regional Office that the employer had voluntarily recognized the union, and therefore the Regional Office did not provide the employer with a notice for posting as prescribed by the Board in *Dana Corporation*. Therefore, an election was directed in the unit stipulated by the parties. Because the union's request for review is pending at the Board, the ballots cast at the election were impounded.

Appollo Systems, Inc., Case 18-UC-423 (Dec. 3, 2009): Pursuant to an Order to Show Cause, the Regional Director clarified an existing bargaining unit to exclude the employer's residential division employees from a unit of installers and technicians employed by the employer's commercial division. In clarifying the unit, the Regional Director noted that the residential employees have been historically excluded from the unit represented by the union. In June 2009 the union filed a grievance seeking to add them to the unit. The union claimed that because of a name change the two divisions became one company. However, the Regional Director concluded that the name change did not constitute a substantial change as there was no evidence refuting the employer's

position that the two divisions are separate businesses with separate management teams, employees, accounting, and employee benefit plans. Therefore, consistent with the Board's decision in *Zeigler, Inc.*, 333 N.L.R.B. 949 (2001), the Regional Director clarified the existing unit to exclude the residential division employees. In doing so, the Regional Director also rejected the union's argument that unit clarification proceedings cannot be utilized when parties have a § 8(f) relationship.

Fairview Lakes Health Services, Case 18-RC-17674 (Jan. 5, 2010): Service Employees International Union sought to represent a unit of technical employees employed by the employer at its Wyoming, Minnesota, medical clinics and at its surrounding satellite clinics located in six communities near Wyoming. The Regional Director, in agreement with the employer, ordered an election in a unit consisting of technical employees employed by the employer in its region-wide medical system rather than in the unit sought by the SEIU. Applying the Board's community-of-interest test described in *Park Manor Care Center*, 305 N.L.R.B. 872 (1991), the Regional Director found that employees in the unit sought by the union and employees the union sought to exclude were commonly supervised; that the employees in the unit sought by the union interchanged with employees the union sought to exclude from the unit; that at least some employees in the unit sought by the union had the same skills and job functions as employees the union sought to exclude from the unit; and that the employer was a highly integrated health care system requiring all technical employees to be in the same unit. The Regional Director also noted that the SEIU provided no rational basis for the unit it sought. See *Seaboard Marine, Ltd.*, 327 N.L.R.B. 556 (1999).



Title VII Update

By Leslie L. Lienemann
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Sex Discrimination

Lewis v. Heartland Inns of America, LLC, ___ F.3d ___, No. 08-3860, 2010 U.S. App. LEXIS 1283, 2010 WL 184087 (8th Cir. Jan. 21, 2010): The Eighth Circuit Court of Appeals reversed the lower court's grant of summary judgment.

Lewis alleged that she had been terminated from her job as a front-desk hotel clerk because of sex stereotyping after an upper-level manager saw her and determined that she was not "pretty" enough. The manager maintained Lewis did not have the look that the hotel wanted for its front-desk workers, which the manager described as a "Midwestern girl look." Lewis described her own appearance as "slightly more masculine." She prefers to wear loose-fitting clothing, men's button-down shirts and slacks; to avoid makeup; and to wear her hair short. Her immediate manager, who had recommended her for the job and testified favorably about her job performance, described Lewis's looks as "an Ellen DeGeneres kind of look."

The lower court granted summary judgment in part because it believed Lewis could not demonstrate that similarly situated males were treated more favorably.

The Eighth Circuit rejected that view. That court held that plaintiffs are not required to prove their cases by showing that members of another group were treated more favorably. It noted the long-standing line of cases, prior to and after *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which courts have found "sex specific impositions on women in customer service jobs such as this one illegal."



Wage and Hour

By Daniel Leland, Halunen & Associates
Alyssa Toft, Felhaber Larson Fenlon & Vogt

Class Certification Denied on Minnesota's FLSA and Unjust Enrichment Claims

Cruz v. Lawson Software, Inc., No. 08-cv-05900 (D. Minn. Jan. 5, 2010): Judge Davis denied plaintiffs' motion for class certification on their Minnesota FLSA ("MFLSA") and unjust enrichment claims in a suit brought by several former Lawson consultants who claimed they were misclassified as exempt.

The plaintiffs brought a six-count complaint against Lawson, alleging, *inter alia*, violations of FLSA, MFLSA and unjust enrichment. On May 21, 2009, the court granted Lawson's motion to dismiss the MFLSA claims based on lack of standing because none of the named plaintiffs had ever lived or worked in Minnesota, and held that "the MFLSA does not apply extraterritorially." Plaintiffs filed an amended complaint, which added a Minnesota resident as a named plaintiff, and sought a Rule 23 certification of a nationwide class on their MFLSA and unjust enrichment claims.

The court noted at the outset: "The analysis of the applicable Rule 23 factors will depend on whether the Court accepts Plaintiffs' request to apply Minnesota law – the MFLSA and Minnesota unjust enrichment law – to all putative class members' claims."

Because the plaintiffs "failed to offer any evidence of how the 438 non-Minnesota residents are linked to Minnesota," the court found that not only was it inappropriate to apply the MFLSA extraterritorially but that "blanket application of the MFLSA to the putative class in this case would be unconstitutional" because of "substantive conflicts" between the MFLSA and the wage and hour laws of the other relevant states in which putative class members reside. Similarly, the court noted that that "there are material conflicts among many of the unjust enrichment laws of the various states in which putative class members reside."

The court went on to determine whether application of Minnesota's unjust enrichment law would violate due process, stating "[t]here is no shortcut around following the Eighth Circuit's directive in *St. Jude I* and conducting an individualized choice of law analysis for each putative class member." The court noted, in this case, "[s]uch a task would be herculean ... the Court will need to make more than four hundred, detailed, individual choice of law analyses for each putative class member in order to determine which laws apply."

The court concluded that it was unnecessary to discuss Rule 23(a)'s provisions because the plaintiffs failed to meet either of Rule 23(b)(3)'s requirements, *i.e.*, whether common issues of law or fact predominate and if a class action is the superior method to adjudicate Plaintiffs' claims.

Class Action re Booting Up/Shutting Down Off-the-Clock Violations

Burch v. Qwest Communications Int'l, Inc., No. 06-cv-03523 (D. Minn. Dec. 16, 2009): Judge Davis denied defendants' motion for decertification of a conditional class in a case brought by Qwest non-exempt call-center employees. They alleged FLSA violations based on uncompensated off-the-clock work, including time spent booting up and shutting down computers; working during "breaks"; and other pre- and post-shift work, such as reading e-mails.

After discovery following conditional certification, the court found "[a]s to the booting up and shutting down allegations, Plaintiffs have provided substantial evidence of a widespread Qwest policy that, in practice, required off-the-clock work." In contrast, however, the court found no evidence of a Qwest policy or common practice regarding the other alleged FLSA violations, such as working through meal breaks and performing other pre- and post-shift tasks; "[t]estimony is widely varying." While the variation in time spent booting up/shutting down "is not significant," the amount of time regarding other alleged uncompensated tasks "varies wildly" and would require an individualized inquiry.

Thus, the fact that plaintiffs worked at dozens of different call centers in numerous states did not sufficiently distinguish them for purposes of the booting up/shutting down allegations, but the other alleged violations "are dependent on the practices of different Qwest managers at different locations." The court further concluded that Qwest knew about the off-the-clock work regarding booting up/shutting down based on (1) an audit completed in 2003 as part of a settlement of a lawsuit alleging off-the-clock violations; (2) the "apparently widespread nature of the practice"; and (3) the fact that "logistically, these activities had to occur off the clock in order to meet Qwest's requirements regarding availability at the beginning and end of shifts." The court found "little evidence," however, that Qwest was aware of the other alleged off-the-clock violations.

The court also found that Qwest's uniform payroll system weighed in favor of certification because "incidental overtime, as a category, is intended to cover overtime incurred finishing a customer call, not performing the various other off-the-clock activities alleged by Plaintiffs." Lastly, the court held that Qwest's defenses, which included arguments that the tasks were not "work" and that the *de minimus* exception should apply, "are either legal questions that can be resolved on a classwide basis or defenses that relate to the amount of damages, not liability."

The court concluded a class action was appropriate regarding the booting up/shutting down allegations, and denied Qwest's decertification motion with respect to these plaintiffs. However, the court found that the remaining "hodgepodge of other uncompensated activities" was inappropriate for a class action and modified the certified class to exclude such plaintiffs.

The magistrates report was filed February 4, 2010.

FLSA Minimum Wage Pleading Standards Under *Iqbal*

Bailey ex Rel. Border Foods Inc., 2009 U.S. Dist. LEXIS, 2009 WL 3248305, Civil No. 09-1230 (D. Minn. Oct. 6, 2009), *appeal dismissed* (8th Cir. Dec. 28, 2009): The court addressed FLSA pleading standards under *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937 (2009). The court dismissed the plaintiffs' complaint, stating that the plaintiffs had failed to plead facts that, if proven, would establish a violation of the minimum-wage provisions of the FLSA.

The plaintiffs were pizza-delivery drivers who received regular hourly wages in addition to a set dollar amount for each of their deliveries as reimbursement. The drivers, who were required to pay for their own gas, automobile expenses and other travel-related expenses, alleged that the reimbursements they received were insufficient to reimburse them for the actual expenses incurred in delivering pizzas.

The court initially noted, "To establish a viable FLSA claim for unpaid minimum wages, the complaint 'should indicate the applicable rate of pay and the amount of unpaid minimum . . . wages due.'" The court stated that the plaintiffs' complaint failed to "identify their hourly pay rates, the amount of their per-delivery reimbursements, the amounts generally expended in delivering pizzas, or any facts that would permit the Court to infer that Plaintiffs actually received less than minimum wage." The court held that the allegation that the plaintiffs were systematically deprived of the minimum wage as a result of the travel expenses they incurred was conclusory, and that the plaintiffs had not alleged any facts indicating that any plaintiff actually received less than the minimum wage. The court therefore granted the defendant's motion to dismiss the plaintiffs' complaint.



WARN Act

By Matthew C. Helland
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WARN Act Claims in Bankruptcy

In re Continentalafa Dispensing Co., 403 B.R. 653, 61 Collier Bankr. Cas.2d 1192 (Bankr. E.D. Mo. 2009): The court considered whether pre-petition WARN Act claims should be treated as an administrative expense. Following *In re First Magnus Fin. Corp.*, 390 B.R. 667 (Bankr. D. Ariz. 2008), the *Continentalafa* court held that WARN Act claims are entitled to administrative status only if an employee provides service to the debtor after the bankruptcy petition. The *Continentalafa* court did not address *In re Powermate Holding Corp.*, 394 B.R. 765 (Bankr. D. Del. 2008), which disagreed with the reasoning in *First Magnus*.

After determining that the employees' claims were not entitled to administrative priority, the *Continentalafa* court also concluded that the adversary proceeding violated the Bankruptcy Code's automatic stay. The court reached this conclusion by stating that the adversarial proceeding was an attempt to recover pre-petition debt, for the purposes of 11 U.S.C. § 362. The court also extended the automatic stay to non-debtor defendants, holding that the "identity of the debtor is so entangled with a third-party defendant that judgment against the third-party defendant will in effect be a judgment against the debtor."

The *Continentalafa* decision resulted in complete dismissal of the plaintiffs' adversary proceeding.

State Discrimination Cases

By Anne M. Radolinski
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Pregnancy Discrimination

Friend v. Gopher Co., Inc., 771 N.W.2d 33 (Minn. Ct. App. 2009): The court of appeals reversed judgment entered in favor of a former employee on pregnancy discrimination claims under the Minnesota Human Rights Act and remanded the case to the district court for further findings.

Friend was employed as a receptionist from October 2004 until her termination in August 2005. According to the testimony of company witnesses, she missed over 200 hours of work during her short tenure. Many of the absences were due to an ongoing medical problem, but others were not attributable to medical reasons. The company's owner, Jason Brouwer, testified that he talked with Friend regularly about her poor attendance and that he had given her an attendance warning. In August 2005 Friend informed coworkers that she was pregnant. Friend testified that she told Brouwer, and that "he said 'congratulations' and immediately told her to get back to work." Brouwer discussed his concerns about Friend's pregnancy and how it would affect the business with his wife. He testified that he considered putting Friend in the backroom to do paperwork and trying to hire a replacement in the morning. He also approached another employee about job-sharing with Friend. Brouwer apparently never discussed his concerns with Friend.

During the first two weeks of August Friend had good attendance, but she was absent on August 16 because she was having extreme stomach pain. She went to the emergency room. She informed Brouwer that she would be in the next day after a required follow-up appointment with the doctor. Friend testified that Brouwer's reaction was that stomach pains were a normal part of pregnancy and that he expected her at work the next day. Friend saw her doctor on the morning of August 17 and returned home to a message from Brouwer indicating that she no longer had a job. Brouwer confirmed this in a phone conversation with her that day.

Friend pursued an action for pregnancy discrimination. The district court found in her favor, determining that while Friend missed work occasionally, "her pregnancy was the factor that had changed[,] causing [the Company] to terminate her employment."

The court of appeals determined that the district court had not made sufficient findings to allow for appellate review under either a "*McDonnell Douglas* or direct-evidence

framework.” In its discussion, the court of appeals concluded that the U.S. Supreme Court’s holding in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) should apply to claims under the MHRA because, like Title VII, the MHRA does not limit the types of evidence that may be used to prove a discrimination claim” and Minnesota common law, like federal common law, “makes no distinction between circumstantial and direct evidence as to the degree of proof required.” The court also made two “observations” to aid the district court on remand: The district court has broad discretion in determining damages, which “extends to determining whether, and at what point, an award of backpay would become speculative.” The court “likewise has discretion to determine an appropriate award of attorneys’ fees” with the application of the lodestar analysis.

Age Discrimination – Failure to Promote

[Minell v. City of Minnetonka](#), No. A08-2183 (Minn. Ct. App. Sept. 15, 2009) (unpublished opinion): The court of appeals reversed a dismissal of an age discrimination claim based on failure to promote, remanded for further findings, and affirmed the dismissal of the remaining age discrimination and harassment claims in an action by a fire marshal against the city of Minnetonka.

Minell alleged that the fire chief, his supervisor, had made frequent comments and jokes directed at Minell regarding age and retirement, unfairly berated his performance, limited his work assignments, and made comments leading Minell to believe that the fire chief was seeking to terminate him. In January 2007, a younger coworker was promoted to the position of Assistant Chief of Fire Prevention, becoming Minell’s supervisor. The city did not engage in a competitive process for the promotion. Minell filed a complaint against his supervisor with the city’s department of human resources alleging, among other things, that his supervisor made inappropriate sexual and age-based jokes and comments and discriminated against him based on age. Minell accepted the city’s offer of paid administrative leave during the investigation and never returned to work due to mental health issues. The city determined that the fire department had a pervasive, widespread pattern of hostile and offensive behavior and disciplined each full-time fire department employee, including the fire chief.

Minell was treated for depression during his administrative leave. He applied for an extended medical leave after exhausting his Family and Medical Leave entitlement. In applying for the extended leave, Minell did not submit documentation from his doctor “indicating a likelihood that [he could] return to work within a reasonable time” as required by the city’s Extended Medical Leave policy. His treating psychologist indicated that he could not return to work “at this time” and that she was “unable at this time to give a specific date.” The city denied an extension and terminated Minell’s employment.

Minell pursued claims of age discrimination, age harassment, sexual harassment, and reprisal against the city. Minell did not challenge the dismissal of his sexual harassment claim.

The court of appeals reversed the dismissal of the age discrimination claim, which was based on the failure to promote Minell to the Assistant Chief of Fire Prevention position. The city argued that Minell had failed to establish a *prima facie* case because he had not applied for the position. The court rejected the argument, noting that it was undisputed that the process was not competitive, and also noting that there was no evidence that Minell was aware of the position opening until he was informed that his coworker had

been promoted to it. Moreover, Minell had applied for an assistant fire chief position two years earlier. On remand, the district court was instructed that the record could be reopened to receive additional evidence.

Regarding the age harassment claim the court of appeals determined that the city was entitled to the *Ellerth-Faragher* affirmative defense, precluding Minell's hostile-work environment harassment claim. Minell was unable to avoid application of the *Ellerth-Faragher* defense in part because he failed to show that he suffered a tangible adverse employment action. The fire chief's decision to restrict his job duties to public education was not tangible employment action because public education was a legitimate employment duty for a fire marshal. His discharge upon the expiration of his medical leave was not a tangible adverse employment action because he could not present sufficient evidence to link the discharge to the alleged harassment. Minell also argued that the city should not be entitled to the *Ellerth-Faragher* affirmative defense because it had not taken sufficient corrective action in response to his internal complaint. The court determined, however, that Minell could not maintain that the city's actions were insufficient when he did not return to work after making the internal complaint. Minell's retaliation claim failed because he could not present sufficient evidence of a link between the discharge at the end of his medical leave and the internal complaint.

Disability/Pregnancy – Regular On-Site Attendance as Essential Job Function

Ferguson v. C/Base, Inc., No. A08-2125 (Minn. Ct. App. Sept. 15, 2009) (unpublished opinion): The court of appeals upheld summary judgment in favor of the employer on claims of pregnancy, disability discrimination, and failure to accommodate a disability under the Minnesota Human Rights Act.

Ferguson was the transportation manager for C/Base, a container storage depot and transportation company. Ferguson missed work due to complications with her pregnancy and was ultimately admitted to the hospital. A week later, Ferguson informed the company that she was not able to work and did not know when she would be released to return to work. The company terminated her employment three days later. Ferguson was cleared to return to work about five weeks after her termination.

The court noted that Ferguson had conceded that she could not succeed on any of her discrimination claims if she was not a qualified disabled person within the meaning of the MHRA. The court of appeals determined that the district court has properly concluded Ferguson was not a qualified disabled person. Due the nature of the transportation manager position, regular attendance was an essential job function, even by Ferguson's own description of the job requirements. Ferguson had argued to the district court, and on appeal, that she could have performed all of her essential job functions via remote access. She, however, conceded that she would not be able to supervise employees from home, and other employees would have had to perform certain office functions required in her position. Moreover, the court noted that Ferguson's physician had not released her to return to work in any capacity as of the time of the company's termination of her employment.

Retaliation – Post-Employment Conduct

American Building Contractors, Inc. v. Asset Restoration & Remodeling, LLC, No. A09-294 (Minn. Ct. App. Nov. 10, 2009) (unpublished opinion): The court of appeals upheld summary judgment in favor of the employer on claims of retaliation under the Minnesota Human Rights Act and common law claims including tortious interference with contract. The plaintiff maintained that the employer's action in seeking enforcement of post-employment noncompetition obligations constituted retaliation for the employee's opposition to practices prohibited by the MHRA. In rejecting the claims, the court cited to Minnesota Statutes Section 363A.15 which defines reprisal to include an employer's conduct during the employment period unless the alleged reprisal involves the employer informing a new employer of the employee's MHRA-related concerns.

Tort and Contract Cases

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Non-Solicit Clause Applicable to Prohibiting Solicitation During Employment

Schaber v. Dan Olson Agency, [No. A09-24](#), 2009 WL 3818351, 2010 Minn. LEXIS 26 (Minn. Ct. App. Nov. 17, 2009): An employee who solicited her former employer's clients both during her employment and after her resignation argued that her solicitations while still employed did not violate her non-solicit agreement. The non-solicit agreement prohibited solicitation for a period of "one year following the termination" of the employment agreement. The Minnesota Court of Appeals rejected this argument, because it would lead to an absurd result, and upheld the jury's verdict in favor of the former employer on its breach of contract claim.

Plaintiff C.J. Schaber operated a State Farm Insurance Agency ("Schaber Agency"), which employed defendant Brenda Murphy. During the course of her employment with Schaber Agency, Murphy signed an employment agreement that included a non-solicit provision. The agreement prohibited Murphy from inducing, advising, or soliciting Schaber Agency's customers on behalf of any other State Farm Insurance agency for a period of one year after resigning from employment with Schaber Agency.

Murphy gave notice of her resignation in November 2005, and her last day of employment with Schaber Agency was December 31, 2005. Another State Farm Insurance agency, operated by Dan Olson ("Olson Agency") offered Murphy a position in late November 2005. Murphy accepted the offer. Thereafter, Schaber, Olson, and State Farm Insurance Company executed a contract that prohibited Olson from diverting State Farm policies from other State Farm agents to his own account.

Nevertheless, between December 19, 2005 and December 23, 2005, while still employed by Schaber Agency, Murphy allegedly transferred thirty-five insurance policies to Olson Agency. Schaber alleged that a total of 192 customers transferred their policies from Schaber Agency to Olson Agency within one year of termination of Murphy's employment with Schaber Agency.

Schaber brought suit against Murphy and Olson for breach of contract and against Olson for tortious interference with contract. At the close of Schaber's case at trial, defendants Murphy and Olson moved for judgment as a matter of law. The district court granted the motion with respect to the tortious interference claim against Olson, but denied the

claim with respect to the breach of contract claims. The jury ultimately found in favor of Schaber on the breach of contract claims and awarded damages. Murphy and Olson appealed the district court's denial of their post-judgment motion for judgment as a matter of law on the breach of contract claims.

The language of Murphy's employment agreement prohibited the specified conduct for a period of "one year following the termination of this agreement." Murphy argued that the non-solicit provision did not go into effect until after the date of Murphy's resignation. Thus, Murphy claimed the transfers in December 2005 could not have violated the employment agreement because they occurred before her employment with Schaber Agency terminated.

The Minnesota Court of Appeals rejected Murphy's argument that the transfers made before her resignation from Schaber Agency did not violate her employment agreement. The court rejected this argument as a matter of contract construction. The court concluded that Murphy's "construction of the contract render[ed] the contractual language meaningless, leading to an absurd result." The court noted that "Murphy knew at the time she transferred the policies in late December [2005] that she would be working for Olson, and the fact that her employment [with Schaber Agency] had not yet terminated [did] not eliminate her responsibility to act in accordance with her employment contract that mandated that she not improperly solicit clients for the benefit of another agency." The court also found that there was sufficient evidence of breach by Murphy and Olson to sustain the jury's verdict in favor of Schaber because many of the transfers had, in fact, occurred after Murphy's resignation.

Repeated Assurances re Payment of Bonus Toll Statute of Limitations

Bottum v. Jundt, [No. A09-797](#), 2009 WL 5092747, 2009 Minn. App. Unpub. LEXIS 1358 (Minn. Ct. App. Dec. 29, 2009): The court found that an employer's repeated oral promises to pay an employee's overdue bonus in the future tolled the statute of limitations on the employee's breach of contract claim. When the employee brought suit for the unpaid bonus approximately fifteen months after the statute of limitations expired, the court found that the employer was equitably estopped from arguing a statute-of-limitations defense, and that the employer's oral assurances to pay in the future had modified the contractual term requiring the bonus to be paid by a certain date.

The plaintiff, Paul Bottum, worked as a hedge-fund portfolio manager for Jundt Associates, Inc. ("JAI"). In January 2000, James Jundt, chairman of JAI's board, orally offered Bottum a \$1 million bonus for each year in which JAI's hedge fund outperformed the Standard and Poor's 500 index ("S & P 500"). Bottum accepted the offer.

The JAI hedge fund outperformed the S & P 500 for the year 2000. In February 2001, Bottum allegedly spoke with JAI majority owner Marcus Jundt about payment of the bonus due on March 1, 2001. Marcus Jundt allegedly acknowledged that JAI owed the bonus to Bottum but stated that JAI could not pay the full amount because it lacked the necessary liquidity. Instead, JAI paid Bottum a partial payment of \$175,000. Throughout 2001 and 2002, Marcus Jundt allegedly assured Bottum that JAI would pay the remainder of the bonus when the company had more cash. Beginning in late 2002 or early 2003, Marcus Jundt allegedly began using his pending divorce as the reason for

JAI's failure to pay Bottum's 2000 bonus, but repeatedly assured Bottum that the bonus would be paid as soon as he finalized his divorce.

Bottum earned another \$1 million bonus when JAI's hedge fund outperformed the S & P 500 in 2003. In early 2004, Marcus and James Jundt allegedly confirmed and acknowledged that JAI owed Bottum a total of \$1.825 million for the 2003 bonus and the remainder of the 2000 bonus. Bottum alleged that Marcus Jundt told him repeatedly throughout 2004 that JAI would pay the balance of the bonus amount after Marcus Jundt settled his divorce.

Marcus Jundt finalized his divorce on April 5, 2005. On April 18, Marcus Jundt informed Bottum that JAI was moving his salary to Acuo Technologies, L.L.C., a company controlled by James Jundt. On May 23, James Jundt terminated Bottum's employment, purportedly because James Jundt wanted a "change of philosophy" at Acuo. When Bottum asked about his unpaid bonuses, Jundt allegedly told him that he had been "fairly compensated." This was allegedly the first time JAI or either of the Jundts indicated that they would not pay the bonuses.

Bottum filed suit against JAI on May 10, 2006 seeking the \$1.825 million in unpaid bonuses for 2000 and 2003. The district court entered judgment in favor of Bottum for \$1.825 million plus interest. JAI appealed the district court's conclusion that Bottum's claim for the 2000 bonus was timely.

The Minnesota Court of Appeals found that Bottum's claim for the 2000 bonus was timely under two theories. First, the Jundts' repeated promises to pay the bonus once Marcus Jundt's divorce was resolved modified the parties' contract and extended the time for JAI's payment until the divorce was settled or concluded. Second, JAI was equitably estopped from asserting the statute-of-limitations defense.

The court noted that the parties' intent controls whether a contractual term has been modified or waived, and that a party's intention to make or accept an offer may be inferred from words and conduct. The court also found that there was clear and convincing evidence of JAI's offer to modify the contract by paying the bonus to Bottum upon resolution of Marcus Jundt's divorce and Bottum's implicit acceptance of that offer. The Jundts repeatedly acknowledged the bonus owed to Bottum and promised to pay it upon completion of Marcus Jundt's divorce. Bottum thereafter took no legal action to recover the bonus, indicating acceptance of the contract modification. Therefore, because Bottum's cause of action for payment of the bonus did not accrue until Marcus Jundt settled his divorce in April 2005, Bottum's commencement of the action in May 2006 was timely.

The court of appeals also found that JAI was equitably estopped from asserting a statute of limitations defense regarding payment of the 2000 bonus. The court found that Bottum established the three elements of equitable estoppel: (1) promises or inducements were made, (2) that he reasonably relied upon the promises, and (3) he would be harmed if the court did not apply estoppel. The court found that the Jundts repeatedly promised to pay the outstanding bonus. The Jundts lulled Bottum into waiting several years for the bonus payments with repeated promises to pay upon the occurrence of an event, satisfying the reliance element. The Jundts then repudiated their promises to pay for the first time after the triggering event (the divorce decree) occurred; Bottum would be harmed if JAI were not estopped from asserting the statute-of-

limitations defense because he would be unable to collect \$825,000 of his 2000 bonus. The court of appeals affirmed the full judgment in favor of Bottum.



Unemployment Compensation

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Eligibility of Applicants Who Work for a “Family” Business

Soderquist v. Universal Services Telecom Tech Inc., 774 N.W.2d 729 (Minn. Ct. App. 2009): Relator worked full-time as a technical service route manager for her daughter’s business for four years. Universal Services discharged her when a client took over the majority of her work. DEED determined Relator was not eligible to receive benefits because she received wages of \$7,500 or more in only fifteen of the sixteen calendar quarters preceding her termination.

Minnesota Statutes section 268.085, subdivision 9 (2008) prohibits an applicant who works for a “family” business and who has been paid five times her weekly benefit from receiving benefits unless “the applicant had wages paid of \$7,500 or more . . . in each of the 16 calendar quarters prior to the effective date of the benefits account.”

Relator argued an average of her total wages should determine her quarterly pay, and the purpose of statute was to “ensure a benchmark of earnings . . . for the employee who happens to have a familial relationship with the employer.” The Minnesota Court of Appeals disagreed with Relator’s statutory interpretation. The court determined the legislative intent of the meaning of the word “each.” The court looked at the common meaning of the word “each,” found it unambiguous, and held that the statute required Relator to have received wages of \$7,500 in every one of the sixteen calendar quarters. It called upon the legislature to change the language if the outcome did not accord with legislative intent.

Lack of Good Cause for Failure to Participate in Telephone Appeal Hearing

Paul v. Geco Corp., A09-482, 2009 WL 3818381, 2009 Minn. App. Unpub. LEXIS 1217 (Minn. Ct. App. Nov. 17, 2009): After an initial denial of unemployment benefits, Relator requested a telephone appeal hearing with an unemployment law judge (ULJ). The telephone hearing was to take place on December 22, 2008 at 8:15 a.m. When Relator did not answer his telephone for the hearing, the ULJ dismissed Relator’s appeal.

Relator submitted a request for reconsideration, arguing that he had an emergency dental appointment the morning of the hearing. The ULJ affirmed the dismissal, finding that Relator did not demonstrate “good cause” for his failure to participate. The ULJ found that a reasonable person, acting with due diligence, would have answered the telephone to explain the situation or contacted the department to report the emergency.

The Minnesota Court of Appeals affirmed. Minnesota Statutes section 268.105, subdivision 1(d) (2008) states that the ULJ may dismiss an appeal “if the appealing party fails to participate in the evidentiary hearing” and the ULJ determines the appealing party did not show good cause for failing to participate. “Good cause” is a “reason that would have prevented a reasonable person acting with due diligence from participating at an evidentiary hearing.” *Id.* § 268.105 subd. 2(d). The court noted that “a person acting with due diligence would make an effort to notify the department of an emergency appointment.”

No Requirement of Written Policy re All Prohibited Behavior

[Davis v. EMC Publishing LLC, A09-129](#), 2009 WL 4573766, 2009 Minn. App. Unpub. LEXIS 1271 (Minn. Ct. App. Dec. 8, 2009): For five years, Relator worked as an executive assistant for EMC. Relator’s duties included booking company travel and purchasing office supplies with a credit card provided by EMC. EMC had no written policy that permitted or prohibited an employee’s personal use of the company credit card. Throughout her employment, Relator had used the company credit card for personal purchases in conjunction with business purchases. She then wrote a check to the company for any personal purchases when the bill arrived. Other employees also did so.

In 2008, Relator purchased a water heater, planning to make monthly payments. When the vendor did not receive Relator’s payment, she authorized the vendor to charge that month’s payment on the company credit card. The vendor, however, mistakenly charged the credit card for the entire \$1,439 balance. Upon discovering this mistake, Relator spoke with the EMC’s head accountant, who told her not to make any additional personal purchases with the card. Relator complied. When the bill arrived, Relator spoke with the accountant and asked if she could postpone reimbursement to EMC because she needed to pay her son’s tuition. EMC granted her request. When the next monthly bill arrived, Relator contacted EMC’s VP/CFO to ask for another postponement. This was the first time the VP/CFO had learned of Relator’s large charge. EMC discharged Relator for improper use of the company credit card and for failing to promptly reimburse EMC for her personal purchase.

DEED denied Relator benefits due to misconduct.

The Minnesota Court of Appeals affirmed. The court found that “EMC had a right to reasonably expect its employees using the company credit card to charge only incidental, personal purchases and to reimburse EMC within that billing cycle. The fact that EMC had no written policy directing employees in their personal use of company assets does not mean that unfettered credit card use was appropriate.”

The court found Relator’s conduct did not fall within the “single-incident exception.” Her actions had a significant, adverse impact on the employer because her job responsibilities required her to use the company’s credit card. In prior cases, the court

has held that an employer suffered a significant adverse impact when an employee's conduct undermined the employer's ability to assign the essential functions of the job to that employee.

The court also found that Relator's conduct did not fall within the "good faith error in judgment" exception. For this exception to apply, the employee's act must require judgment related to her work with the company. It does not apply to situations that fall outside the scope of employment. Because Relator's action of using the company credit card to purchase a personal water heater was separate from her position with EMC, the exception did not apply.

Public Sector

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Establishment Clause vs. Free Exercise

Milwaukee Deputy Sheriff's Ass'n v. Clarke, 588 F.3d 523 (7th Cir. 2009), *cert. denied* (U.S. Jan. 11, 2010): The Seventh Circuit held that a sheriff violated the First Amendment by inviting a Christian group to speak at a number of mandatory employee meetings.

The appellant, Milwaukee County Sheriff David A. Clarke, invited founders of the Christian Centurions to address officers in his department. The Centurions are a peer support group for law enforcement who sent flyers to law enforcement agencies in Wisconsin. At the first meeting, the sheriff distributed a handout that included a Bible quotation and a list of qualities a leader should look for in his inner circle. "People of faith" had been underlined. One of the Centurion members who spoke at the meeting discussed the stresses of working in law enforcement and promoted the Bible and God as sources of guidance and support. Another speaker passed out invitations to a church event and made available copies of a book on Christian faith. Subsequently, and despite employee complaints, the sheriff allowed the Centurions to make presentations during sixteen separate roll calls, which were mandatory for police officers who were on duty. He also had invited presentations from other support groups, such as the Alliance for Blacks in Law Enforcement, the National Latino Peace Officers Association, the United Way, and Big Brothers and Big Sisters.

The plaintiffs were one Muslim and one Catholic police officer who, with their union, brought a § 1983 claim against the sheriff, the sheriff's captain, and Milwaukee County. They alleged violations of the Establishment and Free Exercise Clauses of the First Amendment and sought damages as well as an injunction to prevent further presentations. The district court granted the plaintiffs' motion for summary judgment on the Establishment Clause claim, enjoining further Centurion presentations. The court awarded the plaintiffs attorneys' fees but only nominal damages. The defendants appealed to the Seventh Circuit.

The Seventh Circuit affirmed the district court, holding that the sheriff's actions had the effect of advancing religion, violating the second prong of the Supreme Court's test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Seventh Circuit reasoned that the Centurions' "unique faith based approach," including discussions on how officers could "impact others for Christ" distinguished them from the secular speakers. A number of

the sheriff's other actions, particularly his refusal to cease in the face of complaints, manifested an endorsement of the Centurions' message. The court clarified that its ruling was limited to "a Christian-focused presentation at a mandatory conference for government employees" and does not suggest that "religiously affiliated groups are always constitutionally barred from working with or speaking to government employees."

The Seventh Circuit rejected the defendants' claims that the Free Speech Clause compelled him to grant the Centurions access to the department as a public forum. The court noted that in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court distinguished between the right of a group to express its views in a public space and access to a captive audience of government employees, the latter being unprotected. The Centurions sought access to the sheriff's deputies as an audience, not a physical space. The court concluded that the Free Speech Clause did not require the sheriff to allow the Centurions to speak.

The Supreme Court denied the defendants' petition for writ of certiorari.

Procedural Due Process Rights

Smith v. Minnesota Dept. of Human Servs., 764 N.W.2d 388 (Minn. Ct. App. 2009): The Minnesota Court of Appeals ruled that the Commissioner of the Department of Human Services afforded Glenn Smith due process when it permanently disqualified him from direct-contact services in facilities licensed by the department. Smith argued that Minnesota Statutes section 245C.27 (2008) entitled him to a hearing, but the court affirmed the department's decision based on a finding that Smith failed to request a hearing within the time set forth in the statute.

On three separate occasions in 2006-2008, Smith applied for jobs that involved direct contact with persons receiving services from facilities licensed by the department. The department's background check revealed information from the FBI that Smith had committed a second-degree assault in 1997, but that he was never charged. Under section 245C.15, subdivision 1 (2008), second-degree assault is an offense that permanently disqualifies a person from direct-contact positions. Each time the department notified Smith of his disqualification, it also advised him that he could request reconsideration within thirty days, or ninety days with good cause shown. Smith requested reconsideration after each notice of disqualification, but none of his requests were timely.

The court of appeals reviewed by certiorari to determine whether Smith was entitled to a fair hearing on whether he had committed a disqualifying act and whether he had been afforded procedural due process. The court looked to section 245C.29, subdivision 2(a)(2)(iii), which states that a failure to challenge the department's decision results in a conclusive determination that a person is disqualified. Because Smith failed to challenge the determination in a timely manner, he became permanently disqualified and did not have the right to a hearing.

In response to Smith's due process claim, the court stated that "there is no due process violation if an aggrieved party fails to take advantage of an appeal process." The department did afford Smith due process by giving him the opportunity to challenge his disqualification in a hearing.

Equal Protection Issue as to Adult Foster Parent Application

[*Murphy v. Comm. of Human Servs.*](#), 765 N.W.2d 100 (Minn. Ct. App. 2009): The court of appeals held that the Commissioner of Human Services violated a prospective employee's equal protection rights under state law when it disqualified her from working at an adult foster care facility based strictly on the involuntary termination of her parental rights.

Murphy challenged the constitutionality of a 2005 amendment to the Background Studies Act (BSA), which permanently disqualified individuals with criminal convictions as well as those whose parental rights had been involuntarily terminated. Minnesota Statutes section 245C.15, subdivision 1(a) (2008). In contrast, the statute provided for lesser periods of disqualification for a variety of other offenses, as well as for the voluntary termination of parental rights. *Id.* subd. 2(c). The statute allows the commissioner to set aside a disqualification under certain circumstances, but not for individuals who fall into the permanent disqualification category. *Id.* § 245C.24, subd. 2. The 2005 amendment eliminated language that allowed the commissioner to set aside disqualifications of individuals whose rights had been involuntarily terminated but who worked exclusively with adults.

Murphy had worked in facilities that provided foster care for mentally ill adults, but as a result of the amendment, the commissioner no longer had the discretion to set aside her disqualification.

The court analyzed the disqualification scheme under a rational-basis standard, as it did not interfere with a fundamental right, nor did it involve a suspect classification. The question for the court was whether the permanent disqualification for individuals whose parental rights had been involuntarily terminated served the background-check statute's purpose of protecting children and vulnerable adults. The court found that the distinction the statute made was based on a flawed assumption that individuals who had their rights involuntarily terminated posed a greater risk to children and vulnerable adults than individuals who consented to the termination of their parental rights. The court noted that "in actual practice, exactly the same conduct by a parent toward a child can lead to either a voluntary or an involuntary termination because of factors that have nothing to do with the parent's acceptance, understanding, and acknowledgment of the harmful nature of the conduct." The court cited factors that may influence a parent's decision to contest a termination petition, such as resources, the availability of witnesses, and individual negotiating skills. The court concluded that the contested nature of an involuntary termination of parental rights is an invalid basis for determining whether the commissioner may set aside an individual's disqualification from employment in state-licensed facilities.

The court remanded the case to the commissioner for reconsideration.

District Court Order Restraining Governor's Unilateral Funding Cut

[*Brayton v. Pawlenty*](#), (TRO) File No. 62-CV-09-11693, 2009 WL 5150309 (Minn. Dist. Ct. 2d Dist. [Ramsey Cty.] 2009): On December 30, 2009, a district court judge granted a temporary restraining order enjoining Governor Pawlenty and the Minnesota

Department of Management and Budget from discontinuing funding to the Minnesota Supplemental Aid Special Diet Program. The plaintiffs were six low-income and disabled Minnesotans who would have been denied state funding to purchase food for a medically prescribed diet. They argued that the governor's use of the unallotment power violated the separation of powers guaranteed under Article III, § 1 of the state constitution.

The controversy stems from the failure of the Governor and the Legislature to agree on a biennial budget during the 2009 legislative session. The Commissioner of Management and Budget had projected a budget deficit of \$4.487 billion for the 2010/2011 biennium. Rather than veto the Legislature's appropriations bill, H.F. No. 1362, Governor Pawlenty vetoed its revenue bill, H.F. No. 2323, after the legislative session had ended, and then proceeded unilaterally to cut funding for specific programs that had already been enacted in an effort to balance the budget.

Ramsey County District Court Chief Judge Kathleen Gearin held that although the governor's legislatively granted unallotment authority is constitutional under a prior ruling by the Minnesota Court of Appeals, *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App. 2004), Governor Pawlenty used that authority in an unconstitutional manner. The district court distinguished the earlier unallotment decision at issue in *Rukavina*, prompted by an unanticipated financial crisis, from the current situation, in which the governor based his unallotment decisions on a budget deficit that he and the Legislature knew about well in advance. By unallotting programs already signed into law, "the Governor crossed the line between legitimate exercise of his authority to unallot and interference with the legislative power to make laws." In ordering the State to fund the programs, the court stressed the importance of adhering to the separation of powers despite a budget crisis that requires difficult policy decisions.

Governor Pawlenty and the Minnesota Department of Management and Budget have appealed directly to the Minnesota Supreme Court, which will hear the case in March.