Employment Law Update
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Pending Supreme Court Employment Law Cases:

What's up first: Justices face class action questions in opening October session.
The Supreme Court has released its October 2015 Term argument calendar for the session beginning October 5, which lists two cases of interest to labor and employment practitioners. The High Court will be facing critical issues arising in class actions soon after it reopens its doors, according to the calendar. On Tuesday, October 6, the Justices will hear arguments in *DIRECTV v. Imburgia*, a case that examines a conflict between state and federal law concerning class action waivers in arbitration agreements. On Wednesday, October 14, the parties in *Campbell-Ewald Co. v. Gomez* will present arguments on the impact of a defendant's offer of complete relief on Article III jurisdiction and on a Rule 23 class action prior to class certification.

Conflict over FAA application.
DIRECTV is a consumer case that could have important implications for labor and employment class actions. The Court agreed to consider whether a California appellate court erred in holding that DIRECTV's arbitration agreement and class action waiver in customer contracts were unenforceable in a consumer class action alleging a violation of the California false advertising and consumer protection laws. The petition for certiorari, filed by DIRECTV, asks the Court to determine whether the appeals court decision created a conflict with the Ninth Circuit and ran contrary to the Court's 2011 holding in *AT&T Mobility LLC v. Concepcion.*

The High Court will review the California court's ruling that DIRECTV's class action waivers and arbitration agreement were unenforceable under California law. The customer contract stated that the parties waived their rights to bring class claims and that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Although the agreement states that section 9 is governed by the FAA, section 9 itself states that the specific issue of the enforceability of the class action waiver shall be governed by "the law of your state."

The court of appeal's holding created a conflict with the Ninth Circuit by applying preempted state law to invalidate an FAA-governed arbitration agreement, according to the petition. In a 2013 ruling, in *Murphy v. DIRECTV, Inc.*, the Ninth Circuit interpreted the same language in the same arbitration agreement but reached the opposite conclusion as the state court of appeal. The Ninth Circuit characterized the reasoning adopted by the court of appeal in *Murphy* as "nonsensical." However, the court of appeal dismissed the Ninth Circuit's analysis as "unpersuasive."

Because court of appeal rulings are binding on all state trial courts, the court in this case created a situation where the enforceability of federally protected arbitration rights in California depended on whether the case was brought in state or federal court, according to DIRECTV. Many arbitration agreements include references to state law. If such references are held to refer to state law preempted by the FAA, the FAA's preemptive effect would be nullified.

Offer of complete relief in class action.
The employer's petition for cert in *Campbell-Ewald Company v. Gomez* presents the issue of whether an offer of complete relief on a plaintiff's claims renders a case moot and therefore beyond the judicial power of Article III—a question the Supreme Court was unable to answer in *Genesis Healthcare Corp. v. Symczyk* because the issue had not been properly presented (the plaintiff had conceded it below). While the case involves claims under the Telephone Consumer Protection Act, it nonetheless is of much broader interest because it implicates an employer's ability to head off both individual and class claims through an offer of judgment for full relief prior to a request for Rule 23 class certification.

The case involves a class action brought under the TCPA against Campbell-Ewald, a national marketing firm, over a text message that the company sent on behalf of the U.S. Navy to recruit new sailors. Below, the Ninth Circuit held that the plaintiff's individual and class claims were not rendered moot by his rejection of an offer of settlement under FRCP Rule 68 tendered before he moved for class certification. That ruling, however, "contravenes basic Article III principles, directly conflicts with the decisions of other circuits, and warrants this Court's review," according to the employer's petition.

The Justices will also resolve the question of whether, under *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), the employer was entitled to derivative sovereign immunity from liability for recruiting activities that it carried out under a valid contract with the Navy. According to the appeals court, *Yearsley* applies "only in the context of property damage resulting from public works projects." Campbell-Ewald argues that this ruling is at odds with *Yearsley* and other circuit court rulings, and also "seriously erodes a bedrock protection for those who carry out valid government contracts for the public good."

<u>Pending Supreme Court Cases of Interest to Employment Lawyers</u>:

- *Tyson Foods, Inc. v. Bouaphakeo*: (1) Whether differences among individual class members may be ignored and a class action certified under Rule 23(b)(c), or a collective action certified under the FLSA, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample. (2) Whether a class action may be certified or maintained under Rule 23(b)(c), or a collective action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages. Eighth Circuit decision (8/25/14).

- *Musacchio v. United States*: (Computer Fraud and Abuse Act) (1) Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment. (2) Whether a statute of limitations defense that was not raised at or before trial is reviewable on appeal. Fifth Circuit decision (11/10/14, unpub).

- *Fisher v. University of Texas at Austin*: Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions

can be sustained under the Supreme Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*. Fifth Circuit decision (7/14/14).

- *Friedrichs v. California Teachers Association*: (1) Whether *Abood v. Detroit Board of Education* should be overruled and public-sector agency shop arrangements invalidated on First Amendment grounds. (2) Whether it is a First Amendment violation to require public employees to affirmatively object to subsidizing non-chargeable speech by public-sector unions rather than requiring them to affirmatively consent to such speech. Ninth Circuit decision (11/18/14) summarily affirming district court judgment on the pleadings (12/5/13).

- *Campbell-Ewald Co v. Gomez*: (1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim. (2) Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified. (3) Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co*. for government contractors is restricted to claims arising out of property damage caused by public works projects. Ninth Circuit decision (9/19/14).

- *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*: Whether a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. Sec. 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim. Eleventh Circuit decision (11/25/14, unpub).

- *Green v. Donahoe*: Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation? Tenth Circuit decision (7/28/14).

- *DIRECTV v. Imburgia*: Whether a California appellate court erred in holding that a reference to state law in an arbitration agreement governed by the FAA requires the application of state law preempted by the FAA. California Appeals Court decision (4/7/14).

- *Spokeo, Inc. v. Robins*: Whether Congress may confer Article III standing on a plaintiff who suffers no concrete harm, and therefore could not otherwise invoke jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute (here Fair Credit Reporting Act. Ninth Circuit decision (2/4/14).

Significant Circuit Court Decisions:

FIRST CIRCUIT

1st Cir.: Bisexual employee's state law wrongful termination, HWE claims revived, (Mar. 3, 2015)

A bisexual Bank of America employee who was discharged after she stopped reporting to work, allegedly because she could no longer endure the disparate treatment to which she had been subjected, presented sufficient evidence that the bank used job abandonment as a pretext for improperly terminating her and that she was actually fired because of her sexual orientation, the First Circuit ruled in vacating summary judgment on her state law wrongful termination claim. While the employee's hostile work environment claim was also revived, the appeals court affirmed the dismissal of her defamation claim (*Flood v. Bank of America Corp.*, February 27, 2015, Lipez, K.).

1st Cir.: Merry Maids franchisee fit within NLRB's discretionary jurisdiction; nonparty comments OK

Rejecting an employer's objections to NLRB jurisdiction and to a union election, the First Circuit granted the Board's petition to enforce an unfair labor practice order and directed the employer to bargain with the union selected as bargaining representative by its employees. Here, the appeals court found that where the employer, a Merry Maids franchisee, provided home cleaning services to residential customers, and generated annual sales in excess of $1 million, it fit well within the Board's jurisdiction, even as limited by the Board's discretionary jurisdiction. Further, the court concluded that the employer failed to show that threats, electioneering, and name-calling by nonparty employees precluded the holding of a fair election or disadvantaged the employer (*NLRB v. LeFort Enterprises, Inc. dba Merry Maids of Boston*, July 1, 2015, Kayatta, W.).

SECOND CIRCUIT

2d Cir.: Employees not required to show damages measurable on classwide basis to certify wage-hour claims, (Feb. 10, 2015)

Determining that the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend* did not require that damages be measurable on a classwide basis for certification under Rule 23(b)(3), the Second Circuit vacated and remanded a district court's order denying, for that sole reason, class certification of wage claims brought by Applebee's employees. The appeals court acknowledged that *Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues; however, the Supreme Court did not completely foreclose the possibility of class certification in cases involving individualized damages calculations (*Roach v. T.L. Cannon Corp.*, February 10, 2015, Droney, C.).

2d Cir.: Contract attorney's overtime claims revived; document review may not be 'practice of law,' (Jul. 23, 2015)

Although the Second Circuit agreed with a district court's conclusion that state, not federal, law informed the FLSA's definition of "practice of law," the appeals court disagreed with its conclusion that by undertaking document review, an attorney was necessarily "practicing law" within the meaning of North Carolina law. The exercise of some legal judgment is an essential element of the practice of law, and because the attorney-plaintiff alleged that he performed document review under such tight constraints that he exercised no legal judgment, the court concluded that he adequately alleged he failed to exercise any legal judgment, and it revived his putative overtime class action (*Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, July 23, 2015, Pooler, R.).

2d Cir.: Demotion led to lower pay but was not 'compensation decision' so Ledbetter did not revive ADA claim, (Jul. 22, 2015)

While the Lilly Ledbetter Fair Pay Act applies to discriminatory compensation decisions under the ADA, the Act did not encompass a demotion decision that resulted in lower pay because the employee had no proof that the compensation itself was set in a discriminatory manner—she was paid the same as all others in the position to which she was demoted. Because the Ledbetter Act did not apply, it could not save her untimely ADA claims. Summary judgment was affirmed (*Davis v. Bombardier Transportation Holdings (USA) Inc.*, July 22, 2015, Wesley, R.).

2d Cir.: Class cert properly denied in intern wage suit; lower court must consider interns' status under new circuit test, (Jul. 7, 2015)

Resolving an intra-district conflict last week over the proper test to apply in deciding whether unpaid interns are "trainees" or "employees" under the FLSA, the Second Circuit, in its published opinion in *Glatt v. Fox Searchlight*, adopted a "primary beneficiary" approach, eschewing the DOL's six-factor test. It also concluded that the trainee vs. employee question turned on largely individualized questions, and so vacated an order conditionally certifying an FLSA class and certifying a Rule 23 state-law class. Here, in an unpublished decision in a case argued in tandem with *Glatt*, the appeals court vacated a district court's decision denying the plaintiffs' motion for partial summary judgment on the question, but affirmed the court's denial of class certification (*Wang v. Hearst Corp.*, July 2, 2015, *per curiam*).

2d Cir.: Class decertified in suit alleging employer, law firm colluded in settling bias claims, (Mar. 4, 2015)

Ruling that individualized inquiries predominated, given the need to apply the law of several states, the Second Circuit held a district court erred in certifying a class of Nextel employees who sued their employer as part of a lawsuit against the plaintiffs' firm that represented them in resolving underlying discrimination claims against the company. The employees contended that Nextel, the only remaining defendant, had colluded with the law firm in settling their claims *en masse* as part of a dispute resolution agreement that resulted in $7.5 million in fees to the firm

but only a $3.9 million total payout to the employees. The class certification order was vacated (*Johnson v. Nextel Communications Inc.*, March 4, 2015, Lynch, G.).

2d Cir.: DOL 'trainee' test deep-sized; intern wage suit class decertified, (Jul. 2, 2015)

"The question of an intern's employment status is a highly individualized inquiry," the Second Circuit observed, as it dealt a major setback for unpaid interns seeking to pursue wage claims on a class basis. Addressing, in a case of first impression, the question whether interns are "trainees" under the FLSA or employees entitled to statutory minimum wage and overtime protections, the appeals court rejected the Department of Labor's six-factor test and adopted the "primary beneficiary" approach favored by the presumptive employer: Fox Searchlight, the defendant in a closely watched lawsuit brought by former production and publicist interns. The appeals court, which presides over the epicenter of (largely New York-based) intern wage litigation, also set forth its own "non-exhaustive" list of factors to consider in evaluating which party gains the primary benefit from the internship. Because this key question couldn't be answered with generalized proof, the court vacated the district court's order conditionally certifying the interns' FLSA collective and certifying a Rule 23 class under the New York Labor Law (*Glatt v. Fox Searchlight Pictures, Inc.*, July 2, 2015, Walker, J., Jr.).

2nd Cir.: Court broadens reading of FLSA retaliation provision to include complaints to employer, (Apr. 20, 2015)

Seizing the chance to interpret the ongoing validity of its own precedent in light of the Supreme Court's FLSA retaliation decision in *Kasten v. Saint-Gobain Performance Plastics Corp*., the Second Circuit concluded that not only does an oral complaint suffice, as the High Court held in *Kasten*, but also an oral complaint made to the employer, rather than only to a government entity, would be enough. Dissenting in part, District Court Judge Korman, sitting by designation, contended the lower court erred by not entering a default judgment for the employee, and also lamented that this case was not the best platform for overruling precedent (*Greathouse v. JHS Security Inc.*, April 20, 2015, Carney, S.).

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THIRD CIRCUIT

3rd Cir: Waiver of bias claims in exchange for independent contractor positions not retaliatory, (Feb. 13, 2015)

Allstate did not unlawfully retaliate against its terminated employee agents by requiring them to sign a release of employment discrimination claims in order to avail themselves of the opportunity to work for Allstate as independent contractors, the Third Circuit held, affirming a federal district court's ruling in a suit brought by the EEOC. In this case, Allstate's conduct conformed to the settled law allowing employers to exchange consideration for releases of claims. Rejecting the EEOC's assertion that the only consideration adequate for a release of such claims is severance benefits, the appeals court wrote that it was not persuaded by the agency's "efforts to arbitrarily limit the forms of consideration exchangeable for a release of claims by a terminated employee." (*EEOC v. Allstate Insurance Co.*, February 13, 2015, Hardiman, T.)

3d Cir.: Employer did not give employee chance to cure medical certification; FMLA claim revived, (Jun. 22, 2015)

Finding that an employee's medical certification in support of her request for intermittent FMLA leave was "insufficient," rather than "negative on its face" as a district court had concluded, the Third Circuit ruled that the employer was required by regulations to give the employee notice of the deficiency and an opportunity to cure it rather than simply firing her. It therefore reversed the dismissal of her interference claim, as well as her FMLA retaliation claim. Judge Roth dissented (*Hansler v. Lehigh Valley Hospital Network*, June 22, 2015, Fuentes, J.).

FOURTH CIRCUIT

4th Cir.: EEOC expert's 'mind-boggling' number of errors supports excluding testimony, (Feb. 20, 2015)

Affirming a district court's exclusion of the EEOC's expert testimony, and the grant of summary judgment in favor of an employer on the agency's claim that a company's background checks had an unlawful disparate impact on black and male job applicants, the Fourth Circuit found that the sheer number of mistakes and omissions in the expert's analysis rendered it "outside the range where experts might reasonably differ." In a separate concurring opinion, Judge Agee wrote that "it troubles me that the Commission continues to proffer expert testimony from a witness whose work has been roundly rejected in our sister circuits for similar deficiencies to those we observe here. It is my hope that the agency will reconsider pursuing a course that does not serve it or the public interest well" (*EEOC v. Freeman*, February 20, 2015, Gregory, R.).

4th Cir.: Isolated but extremely serious incident of harassment can create hostile work environment, (May 7, 2015)

Vacating a district court's decision in an *en banc* ruling, the Fourth Circuit held an African-American female who was called a "porch monkey" by a manager on two consecutive days could pursue race discrimination and retaliation claims under Title VII and Sec. 1981. The appeals court

underscored the Supreme Court's pronouncement in *Faragher v. City of Boca Raton* that an isolated incident of harassment, if extremely serious, can create a hostile work environment. Moreover, the court overruled its prior decision in *Jordan v. Alternative Resources Corp.* to the extent it was in conflict with today's holding. Judge Wilkinson, joined by Judge Agee, filed a separate opinion concurring in part and dissenting in part. Judge Niemeyer wrote a separate dissent (*Boyer-Liberto v. Fountainebleau Corp.*, May 7, 2015, King, R.).

4th Cir.: Nassar leaves burden-shifting framework untouched on retaliation claims, (May 21, 2015)

The Supreme Court's holding in *Univ. of Texas Southwestern Medical Center v. Nassar* did not alter the *McDonnell Douglas* burden-shifting approach as applied to retaliation claims, the Fourth Circuit held, either as to a prima facie case or as to pretext. The appeals court acknowledged a circuit split as to the effect of *Nassar* on the causation prong of the prima facie analysis. It reasoned, though, that "[h]ad the *Nassar* Court intended to retire *McDonnell Douglas* and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect," yet it was silent on the matter. And, because the pretext framework "already requires plaintiffs to prove that retaliation was the actual reason for the challenged employment action," the appeals court found that *Nassar* had no bearing at the pretext stage either. Applying this framework to the underlying case of a university employee allegedly discharged after repeated complaints of reprisal for having reported sexual harassment, the appeals court held that, applying *Nassar* to the analysis, the district court erroneously granted summary judgment to the employer. However, the lower court properly disposed of the sex discrimination and hostile work environment claims, though the appeals court affirmed that the circuit's "failure to warn" theory as to serial harassers remains good law (*Foster v. University of Maryland-Eastern Shore*, May 21, 2015, Floyd, H.).

4th Cir.: 'Hybrid' test for joint employment adopted; Title VII claim proceeds against temp agency's client, (Jul. 15, 2015)

Applying the "hybrid" test for joint employer status under Title VII, which considers both the common law of agency and the economic realities of employment, the Fourth Circuit reversed summary judgment on Title VII sexual harassment claims by a temporary employee. It ruled, as a matter of law, that she was jointly employed by a staffing agency and the automotive parts manufacturer to which she was assigned. Although the staffing agency paid her checks and formally terminated her, the manufacturer supervised her day-to-day activities, asked that she be removed, and otherwise exercised substantial control over her employment (*Butler v. Drive Automotive Industries of America, Inc. dba Magna Drive Automotive*, July 15, 2015, Floyd, H.).

4th Cir.: United's 'lukewarm' response to anonymous racial death threats nets trial for flight attendant, (Jul. 1, 2015)

Anonymous racist death threats made to a United flight attendant at Dulles airport, discovered in a secure mailroom to which only authorized personnel had access, were not only sufficiently severe and pervasive to create an actionable hostile work environment, the Fourth Circuit found a fact question as to whether United's initial response to the flight attendant's report was both prompt and reasonably calculated to end the harassment. Given the seriousness of the conduct—"an

unmistakable threat of deadly violence against an individual based on her race, occurring in the particularly sensitive space of an airport"—and in a space within the airlines' control, a reasonable jury could find a causal relationship between United's "lukewarm initial response" and the later reappearance of additional threatening notes, more broadly disseminated, the appeals court concluded (*Pryor v. United Air Lines, Inc.*, July 1, 2015, Gregory, R.).

4th Cir.: District court erred in again denying class certification of race claims at Nucor steel plant, (May 11, 2015)

Confronting again the question of whether African-American steel workers at a South Carolina plant presented a common question of employment discrimination through evidence of racism in the workplace, a divided Fourth Circuit found that the court below erred in relying on *Wal-Mart* to decertify the workers' promotions class. Finding that the district court fundamentally misapprehended the reach of *Wal-MartStores, Inc. v. Dukes*, and its application to the workers' promotions class, the appeals court vacated in part and remanded for re-certification of the class. More than seven years have elapsed since the workers first filed their class certification motion and the district court twice refused to certify the class, said the court, explaining that the nature of the allegations, the evidentiary support buttressing them, and the inherent cohesiveness of the class all demonstrated that the lower court's failure to certify was an error. Judge Agee filed a separate, lengthy dissent (*Brown v. Nucor Corp.*, May 11, 2015, Gregory, R.).

FIFTH CIRCUIT

5th Cir.: 'Old fart' comments, alleged papering of disciplinary file support revival of age bias claim, (Jul. 16, 2015)

An employee's claims that his employer manufactured steps in the disciplinary process by issuing written warnings to paper his file after it had decided to fire him, combined with his supervisor's alleged comments referring to him and two other employees as "old farts" —which was potentially corroborated by the termination of two of the "old farts" —was sufficient to allow a jury to conclude that age was a reason for his termination, ruled the Fifth Circuit, in reversing the grant of summary judgment against his federal and state law age discrimination claims. Summary judgment was affirmed as to his retaliation claim, however (*Goudeau v. National Oilwell Varco, L.P.*, July 16, 2015, Costa, G.).

5th Cir.: Appeals court won't stay injunction blocking Obama's immigration reform efforts, (May 26, 2015)

More than half the states in the union have taken issue with President Obama's "go it alone" immigration reform agenda. Today, a divided Fifth Circuit panel refused to stay a district court's order at least temporarily blocking the Department of Homeland Security from implementing a key component of that agenda. The court of appeals rejected the federal government's bid to stay a preliminary injunction that bars DHS from implementing its Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program while the states' legal challenge is ongoing. Concluding that the federal government was unlikely to succeed on the merits of its appeal of the injunction, the Fifth Circuit also denied the government's request to confine the

scope of injunctive relief to Texas alone or at least to the other plaintiff states. Judge Higginson dissented (*State of Texas v. United States*, May 26, 2015, Smith, J.).

5th Cir.: Circuit divided on whether identifying, shunning whistleblower is materially adverse, (Mar. 12, 2015)

Addressing whether the disclosure of a whistleblower's identity to coworkers is a materially adverse action if followed by coworker ostracism, Fifth Circuit Judge Jolly, joined by Judges Jones and Smith, dissented from the court's 8-to-7 decision denying en banc review of a panel's conclusion that it was materially adverse. The panel had affirmed a decision by the DOL's Administrative Review Board (ARB) holding Halliburton liable for $30,000 in compensatory damages. In Judge Jolly's view, the panel's decision could not be squared with Fifth Circuit precedent holding that ostracism by itself is not materially adverse (*Halliburton Co. v. Administrative Review Board, U.S. Department of Labor*, March 11, 2015, Jolly, E., dissenting).

5th Cir.: Hiring performer in gorilla suit for safety meeting on Juneteenth created HWE, (Jan. 28, 2015)

An employer's motion for judgment as a matter of law was properly denied with respect to the race-based hostile work environment claims of African-American employees, determined the Fifth Circuit in an unpublished opinion. The facts and inferences, including evidence that a woman wearing a gorilla costume performed at a safety meeting on the Juneteenth holiday (which commemorates the abolition of slavery) and a manager said "Here's your Juneteenth," did not point "strongly and overwhelmingly" in the employer's favor (*Henry v. CorpCar Services Houston, Ltd.*, January 27, 2015, *per curiam*).

5th Cir.: Telling chief on Facebook to 'get the hell out of the way' not protected speech, (Jan. 9, 2015)

Although a police officer's "hot-headed" Facebook posts criticizing the police chief's leadership ability in light of his decision not to send a patrol car to a fallen officer's funeral were made as a citizen rather than as a public employee, they were not protected speech under the First Amendment, the Fifth Circuit ruled. Affirming a lower court's grant of summary judgment in favor of her municipal employer, the court found that despite the "perhaps genuine desire to inform the community about the GPD's failure to send a representative to the funeral of a police officer killed in the line of duty, we cannot allow the 'mere insertion of a scintilla of speech regarding a matter of public concern' to 'plant the seed of a constitutional case.'" Further, the court found that the department's substantial interests in maintaining discipline and close working relationships and preventing insubordination within the department outweighed the officer's minimal interest in speaking on a matter of public concern (*Graziosi v. City of Greenville Mississippi*, January 9, 2015, Stewart, C.).

RETALIATION—5th Cir.: Transfer that created 16-mile commute may have been adverse action, (Dec. 12, 2014)

A pro se school employee, who alleged that she was involuntarily transferred to another school after filing an EEOC complaint, which required her to walk 16 miles to work at night, sufficiently

stated a claim for retaliation, the Fifth Circuit ruled in an unpublished decision. Finding that the employee should be allowed to proceed at least to the summary judgment stage, the appeals court reversed the district court's order dismissing her complaint for failure to state a claim (*Webb v. Round Rock Independent School District*, December 11, 2014, *per curiam*).

SIXTH CIRCUIT

6th Cir.: Butt-dialing exec had no privacy expectation in his inadvertent cell phone call, (Jul. 21, 2015)

When the chair of an airport board, while traveling with his wife overseas to attend a business conference with the vice chair, inadvertently "pocket-dialed" the airport CEO's executive assistant—who then listened to and recorded their conversations, including a discussion about potentially replacing the CEO—did the chair have a reasonable expectation of privacy? Analyzing the case under Title III of the Omnibus Crime Control and Safe Street Act of 1968, the Sixth Circuit said no, likening his failure to take "simple and well-known measures" to prevent pocket-dialed calls from occurring to a person "who exposes in-home activities by leaving drapes open or a webcam on and therefore has not exhibited an expectation of privacy." But the mere fact that his wife exposed her statements to her husband, aware that he was carrying an "interception-capable device—i.e., an iPhone"—did not displace *her* expectation of privacy *(Huff v. Spaw*, July 21, 2015, Boggs, D.).

6th Cir.: Telecommuting not reasonable accommodation of IBS, says en banc court, (Apr. 10, 2015)

Vacating a panel decision reversing summary judgment against an employee with Irritable Bowel Syndrome (IBS) who was denied a requested telecommuting accommodation and then fired, a divided Sixth Circuit, sitting *en banc*, concluded that "regular and predictable on-site job attendance" was an essential function of her job and, therefore, her request to telecommute for up to four days per week was not a reasonable accommodation. Penning the opinion for the majority was the dissenting judge from the vacated panel opinion. The majority also found that the employer did not retaliate against the employee for filing an EEOC charge. Judge Moore wrote a separate and virulent dissent, which was joined by four other judges (*EEOC v. Ford Motor Co.*, April 10, 2015, McKeague, D.).

6th Cir.: Mini-Dukes plaintiffs may seek class cert; American Pipe tolling applied, (Jul. 7, 2015)

Plaintiffs in a "Mini-*Dukes*" case were not barred from seeking to certify a Wal-Mart Region 43 Rule 23(b)(3) putative class, ruled the Sixth Circuit, reversing and remanding. The appeals court clarified its prior decisions, reasoning that the action was timely under *American Pipe* tolling and that no court has ruled on whether certification of the Rule 23(b)(3) class is appropriate. The plaintiffs would also be allowed to pursue certification of a Rule 23(b)(2) putative class seeking declaratory and injunctive relief (*Phipps v. Wal-Mart Stores, Inc.*, July 7, 2015, Stranch, J.).

6th Cir.: ADA claim revived over AT&T's refusal to let employee sit down as needed, (Jun. 5, 2015)

An AT&T retail employee's ADA failure-to-accommodate claim was revived on appeal to the extent it related to a supervisor's refusal to allow him a chair on the sales floor so that he could sit down as needed. Though the employee could do his job without the chair, that did not let AT&T off the hook because he needed it to work as other employees do—without pain and a risk of infection. In an unpublished decision, the Sixth Circuit also noted AT&T provided a chair to a pregnant worker, suggesting that was not an undue burden. Summary judgment on the sex discrimination claim was affirmed (*Gleed v. AT&T Mobility Services, LLC*, June 4, 2015, Kethledge, R.).

Under emerging standard, financial analyst had reasonable belief complained-of conduct was fraudulent, (May 28, 2015)

Rejecting the standard first enunciated in *Platone v FLYi, Inc.*—that a SOX whistleblower's complaint must "definitively and specifically" relate to an enumerated legal violation to qualify for protection and that the complaint must "approximate . . . the basic elements" of the kind of fraud or violation alleged—the Sixth Circuit held that a complainant need only show that he reasonably believed the conduct complained of constituted a violation of the enumerated laws. Applying that standard to a jury verdict in favor a former U.S. Bancorp Investment financial analyst, who claimed he was disciplined and fired in retaliation for his complaint about fraud perpetrated on an elderly customer in violation of SOX, the appeals court found the evidence more than adequate to sustain the judgment that he possessed an objectively reasonable belief the complained-of conduct constituted unsuitability fraud. Accordingly, it affirmed the judgment of the court below (*Rhinehimer v. U.S. Bancorp Investments, Inc.*, May 28, 2015, Clay, E.).

6th Cir.: Doctor's note plus knowledge of workplace incident may have been sufficient notice under FMLA, (May 11, 2015)

Disagreeing with a district court's determination that a police officer failed to provide sufficient notice of a serious condition qualifying him for intermittent FMLA leave, the Sixth Circuit, in an unpublished opinion, found that a doctor's note limiting his workday to eight hours together with the employer's knowledge of a serious health-related incident at work (chest pains) provided evidence that his superiors were aware of his potential FMLA-qualifying condition. Further, because he provided sufficient evidence of the elements for a constructive discharge, the appeals court found that he established a fact issue as to whether he was denied a benefit under the FMLA. The grant of summary judgment on his FMLA retaliation claim was reversed as well because a reasonable jury could conclude he was targeted in such a way as to compel him to resign (*Festerman v. County of Wayne*, May 8, 2015, McCalla, J.).

6th Cir.: Employee assumed to be aggressor in altercation has discrimination claim revived, (May 7, 2015)

Reversing summary judgment on an African-American employee's Title VII race discrimination claim, the Sixth Circuit concluded that a jury could find a bank's rationales for firing him had no

basis in fact, did not actually motivate the decision, or were insufficient to warrant discharge, in light of testimony that the employee relations consultant who investigated his altercation with a Caucasian coworker was told by the coworker from the start that he—and not the employee—was the aggressor. The appeals court also noted that, at the summary judgment stage, the district court should have credited the employee's testimony that he was uncooperative when the consultant interviewed him because she was asking irrelevant questions and she refused to let him tell his side of the story (*Wheat v. Fifth Third Bank*, May 7, 2015, Daughtrey, M.).

6th Cir.: Red Cross volunteer relationship not covered by Title VII, (Nov. 14, 2014)

Two Catholic nuns who were disaster relief volunteers for the American Red Cross and a county agency for an extended period of time were not entitled to the protections of Title VII, ruled the Sixth Circuit Court of Appeals, because their volunteer relationship did not fairly approximate employment under the Act. Specifically, they failed to show that they received compensation or substantial benefits, completed employment-related tax documentation, were restricted in their schedule or activities, or were generally under the control of either organization. The appeals court also affirmed the dismissal of their constitutional claims, finding that the Red Cross was not a state actor and that there was nothing to support their allegations that the state agency and its director singled them out for hostility and unequal treatment because of their religious beliefs (*Marie v. American Red Cross*, November 14, 2014, Van Tatenhove, G.).

6th Cir.: Jury should decide if satellite installer was independent contractor, (Mar. 26, 2015)

Vacating summary judgment in favor of an alleged employer in an FLSA suit by a technician who installed Internet satellites, a Sixth Circuit majority concluded that there were genuine issues of fact on whether the installer was an independent contractor rather than an employee. Judge Norris dissented (*Keller v. Miri Microsystems LLC*, March 26, 2015, Moore, K.).

6th Cir.: First Amendment did not protect "abysmal" professor's "one-finger salute", (Oct. 24, 2014)

"Teaching methods" are not generally afforded constitutional protection and, even assuming an art history professor's use of his middle finger and other idiosyncratic methods were protected, his denial of tenure was not in retaliation for protected speech, nor because he was regarded as having a disability, the Sixth Circuit ruled. The court affirmed summary judgment to a public university on the professor's First Amendment and state-law disability discrimination claims (*Frieder v Morehead State University*, October 24, 2014, Sutton, J).

6th Cir.: Tribal government subject to NLRB jurisdiction over labor relations at Indian-owned casino

The NLRB's jurisdiction over Native American tribes is a matter of contention on several fronts these days. Yesterday, a tribe in Michigan filed the latest lawsuit challenging the Board's revised representation election rules after being served with a Steelworkers petition at its casino. Tomorrow, the Senate Committee on Indian Affairs will take up S. 248, which would bar the

NLRB from exercising jurisdiction on tribal lands. And last week, the Board itself showed restraint, declining to assert jurisdiction over the Chickasaw Nation in an election dispute at one of its casinos (applying the test it had established in *San Manuel Indian Bingo & Casino*). Adding to this flurry of activity, a divided Sixth Circuit today held a casino resort operated by the Little River Band of Ottawa Indians was subject to the NLRB's jurisdiction. Thus, it enforced a Board order requiring the tribe to cease and desist from enforcing an ordinance that conflicted with the NLRA. The tribe could not show that application of the Act to the casino undermines "tribal self-governance in purely intramural matters" where the tribal ordinance principally regulates the labor-organizing activities of tribal employees, and specifically casino employees—most of whom are not members of the tribe, the appeals court determined. Judge McKeague filed a dissented (*NLRB v. Little River Band of Ottawa Indians Tribal Government*, June 9, 2015, Gibbons, J.).

SEVENTH CIRCUIT

7th Cir.: FedEx fails to overcome Kansas Supreme Court's conclusion that full-time drivers were 'employees', (Jul. 8, 2015)

Although FedEx may have disagreed with the Kansas Supreme Court's conclusion in response to certified questions that its full-time drivers were "employees" under the Kansas Wage Payment Act (KWPA), the Seventh Circuit explained that the state high court's determination was binding. Rejecting all of FedEx's arguments, the appeals court reversed an MDL court's denial of the plaintiffs' motion for summary judgment and the grant of summary judgment for FedEx on that issue (*Craig v. FedEx Ground Package System, Inc.*, July 8, 2015, *per curiam*).

7th Cir.: EBSA form removed Notre Dame from 'sin of contraception;' no injunction in ACA dispute, (May 26, 2015)

The Seventh Circuit held that the University of Notre Dame was not entitled to a preliminary injunction barring its insurer and third party administrator from providing contraception coverage to university students and employees under the Patient Protection and Affordable Care Act (ACA) contraception mandate. On remand from the Supreme Court, the Seventh Circuit held that the accommodation provided by EBSA Form 700 adequately removed Notre Dame from complicity in what Notre Dame called the "sin of contraception." The court reasoned that because only a third party administrator and Notre Dame's insurer were engaged in the provision of contraceptives, no religious objection by Notre Dame was sufficient to prevent continuation of that coverage (*University of Notre Dame v. Burwell*, May 19, 2015, Posner, R.).

7th Cir.: $70,000 OSHA penalty stands; no excuse for failing to immediately call 911 for sand-trapped worker, (May 5, 2015)

Denying an employer's petition to review a $70,000 OSHA penalty, the Seventh Circuit found that a plant manager's failure to immediately call rescue services for a worker who was trapped in a bin of sand, and failure to prevent untrained coworkers from trying to dig him out at their own peril, was "willful" because the danger "must have been obvious" but he did not call 911 for well over an hour. The petition was also denied as to a "serious" violation concerning a safety railing (*Dukane Precast, Inc. v. Perez*, May 4, 2015, Posner, R.).

7th Cir.: General contractor was not Title VII 'employer' under clarified right-to-control test, (Mar. 10, 2015)

A general contractor on a city project that had a plaintiff removed from a construction site after his altercation with another worker, effectively terminating him because his subcontracting employer had no other projects, was not the plaintiff's indirect or de facto employer under Title VII, determined the Seventh Circuit, affirming summary judgment. Clarifying that the five-factor test it applied in prior cases was "simply a more detailed application of the economic and control considerations present in the 'economic realities' test" and applying those factors here, the appeals court explained that the general contractor did not exercise sufficient control over the plaintiff's employment relationship to be deemed his "employer" under Title VII (*Love v. JP Cullen & Sons, Inc.*, March 9, 2015, Flaum, J.).

7th Cir.: On race retaliation claim, newly created company held liable as successor to defunct company, (Jan. 29, 2015)

A district court did not abuse its discretion when it found a newly created company liable as a successor to a defunct company, and therefore liable to remedy a finding that an employee suffered retaliation for his opposition to racial harassment, ruled the Seventh Circuit. Nor die the district court abuse its discretion when it fashioned a 15 percent tax-component award in order to make the employee whole (*Equal Employment Opportunity Commission v. North Star Hospitality, Inc, dba Sparx Restaurant*, January 29, 2015, Kanne, M.).

7th Cir.: Naming employee in SEC filing after EEOC seriously pursued charge supports retaliation claim, (Jan. 12, 2015)

Because it was undisputed that an employee's EEOC charge alleging sexual harassment was a protected activity and naming her in SEC filings under "Legal Proceedings" was an adverse action, and emphasizing that the employer did not identify her by name until after the EEOC began seriously pursuing her claim, the Seventh Circuit reversed summary judgment for the employer on her Title VII retaliation claim. It also noted that retaliatory animus could be inferred from the CEO's having forwarded her harassment complaint to the alleged harasser and from an email by the company's general counsel which evinced "disdain for the EEOC process and animus against [the employee] for filing her complaint" (*Greengrass v. International Monetary Systems, Ltd.*, January 12, 2015, Williams, A.).

7th Cir.: Work at home policy did not excuse tardiness; ADA claims fail, (Dec. 1, 2014)

Explaining that punctuality and regular attendance were essential functions despite an employer's policy allowing work from home, and finding that an employee could not perform the essential functions of her job, as shown by her ongoing tardiness, the Seventh Circuit affirmed summary judgment against her ADA discrimination claim because she was not "qualified." Even assuming the employee was qualified, she did not meet her employer's legitimate expectations for punctuality and accountability. Noting that the employer accommodated her multiple sclerosis (MS) with modifications to her schedule and workload and that her request that she not be required to check in with her supervisor was unreasonable, the court also affirmed summary

judgment on her ADA retaliation claim. Additionally, the employee's FMLA claim failed because she was not denied any rights under the Act (*Taylor-Novotny v. Health Alliance Medical Plans, Inc.*, November 26, 2014, Ripple, K.).

EIGHTH CIRCUIT

8th Cir.: Nassar does not require but-for causation for cat's paw retaliation theory under state law, (Jun. 4, 2015)

Affirming a jury verdict in favor of an employee who brought a state law whistleblower suit claiming he was fired because his supervisors were angry that he reported a forged document seeking VA benefits, the Eighth Circuit rejected the employer's arguments that the trial court erred in not instructing the jury on a but-for causation standard and that the evidence did not support that standard. The Supreme Court's ruling in *Nassar* did not apply to the unique circumstances of this cat's paw case, explained the appeals court. In addition, because the employer's Rule 50(b) motion failed to address its no-protected activity argument, that argument was not preserved for appellate review (*Ludlow v. BNSF Railway Co.*, June 4, 2015, Loken, J.).

8th Cir.: Texting supervisor of absence may have been adequate notice; FMLA claims revived, (May 26, 2015)

A Tyson Fresh Meats supervisor who was fired shortly after his return from non-FMLA approved leave, purportedly for failing to notify the company that he was going to be absent, will have another chance to convince a jury that his termination violated the FMLA. Reversing the grant of summary judgment on his entitlement claim, the Eighth Circuit found fact issues existed as to whether he was restored to leave before being terminated. And because fact issues existed at to whether Tyson enforced its call-in policy and whether the employee adequately notified the company of his absence, his discrimination claim was also revived (*Hudson v. Tyson Fresh Meats, Inc.*, May 22, 2015, Benton, W.).

8th Cir.: Bipolar disorder not obvious from erratic, rude behavior, so ADA claims fail, (Mar. 9, 2015)

Because a long-time employee admitted that people skills were essential to her job and she did not disclose to her employer that her recent rudeness was due to her bipolar disorder, let alone suggest accommodations that would allow her to do her job, she failed to show that she was a "qualified" individual under the ADA. Summary judgment was properly granted on her discriminatory termination claim, ruled the Eighth Circuit, which also affirmed summary judgment on her failure-to-accommodate claim because an employer is not required to guess an employee's disability (*Walz v. Ameriprise Financial, Inc.*, March 9, 2015, Gruender, R.).

8th Cir.: Assuming employee lacked commitment, then hiring someone eight years younger support ADEA claim, (Feb. 5, 2015)

Assuming a 51-year-old police chief applicant was uncommitted to the job because his age made him eligible for retirement is prohibited age-stereotyping, the Eighth Circuit stated in finding that

a city offered no evidence that the commissioners who passed him over in favor of a younger less-experienced applicant doubted his commitment for any reason but his age-based retirement eligibility. Further finding that the eight-year age difference between the candidate and the successful applicant was substantial under the facts of this case, the appeals court reversed the district court's grant of summary judgment in favor of the city on the applicant's federal and state law age bias claims (*Hilde v. City of Eveleth*, February 5, 2105, Benton, W.).

8th Cir.: Award requiring EEOC to pay over $4M in attorneys' fees remanded a second time, (Dec. 22, 2014)

In what the Eighth Circuit called a "second major litigation" over attorneys' fees in a sexual harassment suit filed by the EEOC, originally on behalf of 270 female employees, the appeals court reversed an award requiring the agency to pay the employer $4.69 million in attorneys' fees and costs, even though the employer had whittled the claims down to one claimant. Among other rulings, the appeals court found that the lower court erred in assuming that the EEOC asserted a pattern-or-practice claim, dismissing that claim, and including that assumed claim as a basis for fees; and erred in concluding that the dismissal of 67 claims, based on the EEOC's failure to satisfy pre-suit obligations like conciliation, was a ruling on the merits. It also ruled that the lower court, on remand, must explain why a particular claim is frivolous, unreasonable, and groundless (*EEOC v. CRST Van Expedited, Inc.*, December 22, 2014, Smith, L.).

8th Cir.: Verdict affirmed, damages remanded for Bayer rep fired after reporting customer's fraud, (Dec. 17, 2014)

Rejecting Bayer's argument that a former sales rep produced insufficient evidence of retaliation to support a jury verdict in his favor on his False Claims Act claim, the Eighth Circuit pointed to evidence of a "culture of silence"—that Bayer discouraged sales reps from reporting customer fraud to the authorities. It further noted that the employee was fired after his company credit card was cancelled, but a similarly situated non-whistleblower was not fired. The appeals court also rejected Bayer's contention that the FCA required the employee to prove that it acted in concert with a customer to defraud the government or to orchestrate retaliation. However, the court remanded the case on the issue of emotional distress damages, finding the jury's $568,000 award for two-and-a-half-years of untreated depression and sleeplessness excessive as a matter of law (*Townsend v. Bayer Corp.*, December 17, 2014, Bye, K.).

8th Cir.: Health insurance costs could be proxy for age; employer laid off "oldest and sickest", (Oct. 7, 2014)

Evidence that an employer asked its health insurer for lower rates because it laid off its "oldest and sickest" employees, that it disciplined an employee for poor performance after she refused to choose Medicare rather than the company health plan, and that she was the only one to have been issued a reprimand and put on probation could suggest that age was the but-for cause of her termination and that her purported performance issues were merely pretext, ruled an Eighth Circuit panel, reversing summary judgment for the employer on her ADEA discrimination and retaliation claims. Distinguishing the Supreme Court's analysis in *Hazen Paper*, the appeals court found that "[c]ertain considerations, such as health care costs, could be a proxy for age in the sense that if the

employer supposes a correlation between the two factors and acts accordingly, it engages in age discrimination." Summary judgment on the employee's ADA discrimination claim was affirmed (*Tramp v Associated Underwriters, Inc*, October 7, 2014, Beam, C).

8th Cir.: NLRB should not merely infer coercion in cases alleging surveillance of nonunion workers

The NLRB properly upheld a law judge's finding that three nonunion employees were unlawfully discharged for orchestrating a statutorily protected work stoppage, the Eighth Circuit held. The Board went awry, though, when it found comments made to the workers as they were being fired were improperly coercive and created an unlawful impression of surveillance. With respect to the latter, missing here was a finding of coercion—an essential element of this Section 8(a)(1) violation, and one that ought not to be inferred in the context of a nonunion setting (*Greater Omaha Packing Co. v. NLRB*, June 22, 2015, Loken, J.).

NINTH CIRCUIT

9th Cir.: Employee's failure to allege overtime denied in specific workweek dooms claim, (Nov. 12, 2014)

In an issue of first impression and mindful of the Supreme Court's admonition that the pleading of detailed facts is not required under Rule 8, the Ninth Circuit joined the First, Second, and Third Circuits in holding that in order to survive a motion to dismiss post-*Twombly* and *Iqbal,* a plaintiff asserting an overtime claim must allege that he worked more than 40 hours in a given workweek without being compensated for the overtime hours worked during that workweek. Also agreeing that the plausibility of a claim is "context-specific," the appeals court explained that a plaintiff may establish a plausible claim by estimating the length of his average workweek during the applicable period and the average rate at which he was paid, the amount of overtime wages allegedly owed, or any other facts that will permit a court to find plausibility. Applying that standard to the pleadings at issue here, the Ninth Circuit found that an employee failed to state a claim for unpaid minimum wages and overtime where his complaint did not allege facts showing that there was a specific week in which he was entitled to but was denied minimum or overtime wages. Accordingly, the dismissal of his complaint was affirmed (*Landers v. Quality Communications, Inc*, November 12, 2014, Rawlinson, J.).

9th Cir.: No more 'hand-in-public-disclosure' requirement for FCA claims, (Jul. 8, 2015)

Overruling 23 years of precedent, an en banc Ninth Circuit held that there are two, and only two, requirements in order for a whistleblower to be an "original source" who may recover under the False Claims Act: (1) Before filing the action, the whistleblower must voluntarily inform the government of the facts underlying the complaint's allegations; and (2) the whistleblower must have direct and independent knowledge of the allegations underlying the complaint. Joining many of its sister Circuits, the court gave a "respectful burial" to the requirement that the whistleblower must also have had a hand in the public disclosure of the fraud. Accordingly, the appeals court reversed and remanded the district court's dismissal of consolidated civil qui tam suits in which the plaintiffs alleged that their former employer fraudulently claimed reimbursements from Medicare (*U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, July 7, 2015, Bea, C.).

9th Cir.: Sex was BFOQ for certain female-only positions in women's prisons, (Jun. 12, 2015)

The Washington Department of Corrections' individualized, well-researched decision to designate discrete female-only correctional officer categories was justified because sex was a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the women's prisons, determined the Ninth Circuit, affirming summary judgment against the Title VII sex discrimination claim of a union asserted on behalf of male officers. The BFOQ positions served the paramount concern of security, as well as the legitimate prison objectives of inmate privacy and preventing sexual assaults (*Teamsters Local Union No. 117 v. Washington Department of Corrections*, June 12, 2015, McKeown, M.).

9th Cir.: Title VII punitive damages cap satisfies due process requirements, (Dec. 10, 2014)

Sitting en banc, the Ninth Circuit has upheld as comporting with due process a $300,000 punitive damages award in a Title VII sexual harassment case in which only nominal damages were awarded, finding that the statute's provisions specifying maximum damages—including both compensatory and punitive damages—also provided specific notice of the penalties employers could face if they engage in proscribed conduct (*Arizona v. ASARCO LLC*, December 10, 2014, Thomas, S.).

9th Cir.: DOL deference due: FLSA exemption didn't apply to auto dealer's service advisors, (Mar. 24, 2015)

An auto dealership's service advisors did not fall within the FLSA's exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," the Ninth Circuit held in a case of first impression. Parting ways with the Fourth and Fifth Circuits and granting *Chevron* deference to the DOL's regulatory definitions in the face of statutory ambiguity, the appeals court reversed a lower court's dismissal of the service advisors' FLSA and state-law overtime claims. "[There are good arguments supporting both interpretations of the exemption," the court wrote. "But where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice." (*Navarro v. Encino Motorcars, LLC*, March 24, 2015, Graber, S.).

9th Cir.: Employers properly relied on reasonable chain of logic in establishing CAFA amount in controversy requirement, (Jan. 8, 2015)

Finding that in removing a putative class action filed against it to federal court, the defendants relied on a reasonable chain of logic and presented sufficient evidence to establish that the amount in controversy exceeded $5 million as required under the Class Action Fairness Act (CAFA), the Ninth Circuit reversed a district court's order remanding the case to state court. In so ruling, the appeals court cited its decision in *Ibarra v Manheim Investments, Inc.*, filed simultaneously with this opinion (and reported herein), which held that when a defendant relies on a chain of reasoning that includes assumptions to satisfy its burden to prove by a preponderance of the evidence that the amount in controversy exceeds $5 million, the chain of

reasoning and its underlying assumptions must be reasonable (*LaCross v. Knight Transportation Inc.*, January 8, 2015, Gould, R.).

9th Cir.: Class certification order created new occasion for removal of wage suit to federal court, (Apr. 1, 2015)

In class action over Dollar Tree's denial of rest periods to assistant store managers, the Ninth Circuit found that a class certification order created a new occasion for removal of the suit from state court to federal court and remanded the matter to a federal district court to exercise jurisdiction under the Class Action Fairness Act (CAFA). Following the class certification by a state court, Dollar Tree sought to remove the lawsuit to federal court for a second time. Because the first remand was on "grounds that subsequently became incorrect," the successive removal was permissible, explained the appeals court. Further, contrary to the employee's contention, the removal was timely because Dollar Tree removed within 30 days of the class certification order (*Reyes v. Dollar Tree Stores, Inc.*, April 1, 2015, Hurwitz, A.).

9th Cir.: 'Pattern and practice' allegation not enough to show $5 million at stake under CAFA, (Jan. 8, 2015)

A company facing a putative class action over its alleged failure to pay for off-the-clock work could not support federal jurisdiction under the Class Action Fairness Act (CAFA) merely by asserting that more than $5 million was at stake based on the complaint's allegation of a "pattern and practice" of labor law violations. Because the complaint did not allege that the employer in every single shift violated labor laws, and the employer was relying on assumptions to satisfy the amount in controversy, the Ninth Circuit held that it had to show its chain of reasoning and the underlying assumptions were grounded in real evidence. Because the employer had not done so here, the appeals court remanded for both sides to submit proof on the amount in controversy (*Ibarra v. Manheim Investments, Inc.*, January 8, 2015, Gould, R.).

9th Cir.: Union breached duty of fair representation by abandoning arbitration award establishing seniority list

A union breached its duty of fair representation by abandoning its existing obligation to use a seniority list established in an arbitration award when it entered into a memorandum of understanding (MOU) that contained a facially neutral seniority provision, ruled the Ninth Circuit, drawing closer to a settlement of a long-running dispute between pilots from U.S. Airways (East Pilots) and America West (West Pilots) regarding the merger of pilot seniority lists. Here, the court determined that the US Airline Pilots Association (USAPA) acted in a manner to advance the interests of the East Pilots over those of the West Pilots in opposing the arbitration award that provided for an integrated pilots seniority list. Judge Tashima filed a separate opinion concurring in part and dissenting in part (*Addington v. US Airline Pilots Association*, June 26, 2015, Bybee, J.).

9th Cir.: No injunction for changing pilot 'work rules' during negotiations for an initial CBA

Vacating a preliminary injunction that barred an airline from making policy changes to work rules for pilots during negotiation for a new contract following certification of the union as the pilots' representative, the Ninth Circuit disagreed that the airline had to maintain the status quo. Rather, the work rules were negotiated and agreed to by an advocacy group long before the union's certification as representative. Because that group had not sought to be certified as the labor representative by the National Mediation Board, the work rules did not constitute a collective bargaining agreement, and the Railway Labor Act does not require an airline to maintain the status quo during negotiations of an *initial* CBA (*International Brotherhood of Teamsters, Airlines Division v. Allegiant Air, LLC*, June 8, 2015, Murphy, S., III).

TENTH CIRCUIT

WAGE-HOUR—EXEMPTIONS—10th Cir.: One-time pay deduction was not violation of salary-basis test, (Mar. 9, 2015)

Affirming summary judgment in favor of J.R.'s Country Stores, the Tenth Circuit ruled that an exempt store manager failed to show that the one-time deduction from her salary—because she worked only 40.91 hours of the requisite 50 in that particular week—established a practice or policy of making inappropriate pay deductions for salaried employees. Therefore, the appeals court held, the district court properly declined the employee's invitation to strip the company of its exemption as to the employee. Nor did the district court err in concluding that the company was entitled to rely on the window-of-correction defense. Accordingly, the court affirmed the grant of summary judgment to the convenience store chain on the employee's FLSA overtime claim (*Ellis v. J.R.'s Country Stores, Inc.*, March 9, 2015, Holmes, J.).

10th Cir.: Independent investigation of safety violation blocks cat's paw claim, (Jul. 16, 2015)

A grocery store employee fired after his store manager determined that he violated safety rules when he left a 12-inch knife in the trash failed to convince the Tenth Circuit to revive his Title VII reverse sex bias claim. Although he attempted to invoke the "subordinate bias" (or cat's paw) doctrine by asserting that his female supervisor's bias against men tainted the termination decision, the evidence clearly indicated that the manager conducted his own investigation without relying on any recommendation by supervisor. In an unpublished opinion, the appeals court affirmed dismissal of his claim on summary judgment (*Jordan v. Dillon Companies d/b/a King Soopers, Inc.*, July 9, 2015, McHugh, C.).

10th Cir.: Employee's burdensome daily commute not discriminatory, (Jul. 9, 2015)

A female employee who was subject to a four-hour daily commute after new management instituted a check-in policy for her and her coworkers, and who was discharged after she failed to return from a stress-induced leave precipitated by her attendance-related disciplinary warning, was unable to convince the Tenth Circuit to revive her claims of gender and age bias and retaliation

under state and federal law. Affirming summary judgment against her, the appeals court determined that although the newly acquired employer's policy led to a difficult employment situation for her, there was no evidence suggesting that the policy reflected retaliation or unlawful discrimination (*Bennett v. Windstream Communications, Inc.*, July 9, 2015, Kelly, P.).

ELEVENTH CIRCUIT

11th Cir.: Questions on timing, content of FMLA certification lead to remand, (Jun. 12, 2015)

Finding issues of fact on whether an FMLA certification form indicated an employee's knee injury was a serious health condition; whether the employee gave proper notice of the need for leave, considering it was unforeseeable; and whether the employer granted her an extension for providing certification, when a VP told her to provide it "as soon as possible," the Eleventh Circuit reversed summary judgment on her FMLA interference claim. The fact that her doctor estimated she would be incapacitated for 13 weeks did not disqualify her from reinstatement—that was only an estimate and was contradicted by evidence that she could have returned within the protected 12-week-period. Her retaliation claim was also revived (*White v. Beltram Edge Tool Supply, Inc.*, June 12, 2015, Martin, B.).

11th Cir.: FedEx drivers' status as independent contractors is jury question, (May 28, 2015)

Reversing summary judgment granted to FedEx by a federal court in Indiana that is presiding over multidistrict litigation, the Eleventh Circuit found that both sides of a dispute over whether FedEx drivers are employees or independent contractors have support under Florida law and ultimately the issue has to be decided by a jury. Significantly, though the agreement between the parties specified that the drivers are independent contractors, that conclusory language was not determinative, given that other contract provisions and procedures gave FedEx control over delivery procedures, uniforms, and truck specifications, among other things. The court affirmed a Florida district court's grant of summary judgment on the individual claims of two of the plaintiffs (*Carlson v. FedEx Ground Package Systems, Inc.*, May 28, 2015, Jordan, A.).

11th Cir.: FCA claim over Kaplan's student recruitment incentives revived on appeal, (Mar. 12, 2015)

In an appeal related to a consolidated *qui tam* action brought against Kaplan University by former employees, only one of the employees saw relief on appeal to the Eleventh Circuit. That relator, a professor formerly employed by the university, will get a second shot at pursuing one of his claims under the False Claims Act based on an allegation that Kaplan violated the incentive-compensation ban imposed on schools receiving funds under Title IV of the Higher Education Act of 1965. He claimed Kaplan had, in fact, incentivized recruitment, while falsely claiming that it did not. However, summary judgment was affirmed on the FCA claims of a second relator (*Urquilla-Diaz v. Kaplan University*, March 11, 2015, Dubina, J.).

11th Cir.: Discharge of truck driver with 'current' diagnosis of alcoholism did not violate ADA, (Jan. 28, 2015)

A commercial truck driver who was discharged one week after being diagnosed with alcohol dependence was unable to revive his claims that his termination violated either the ADA or FMLA. On *en banc* review, the Eleventh Circuit once again affirmed a district court's grant of summary judgment to the trucking company employer, finding the employee's seven-day-old diagnosis of alcohol dependence was a "current" diagnosis for purposes of Department of Transportation regulations, rendering him unqualified under those regulations—and thus *not* a qualified individual with a disability (*Jarvela v. Crete Carrier Corp.*, January 28, 2015, Cox, E.).

11th Cir.: Time limit on veteran's reemployment right could be extended by depression, (Dec. 3, 2014)

Finding a question of fact existed as to whether a wounded Army veteran's depression made it "impossible or unreasonable" for her to return to work within the two years that USERRA generally protected her right to reemployment, the Eleventh Circuit, in an unpublished opinion, found that a district court erred by failing to consider an exception to the two-year limit for circumstances beyond the employee's control. The grant of summary judgment in favor of her employer was therefore reversed in part (*Lamar v. Wells Fargo Bank*, December 1, 2014, per curiam).

11th Cir.: Rejecting blame game, court finds TitleMax knew hours underreported; OT claim revived, (Jan. 15, 2015)

Rejecting TitleMax's argument that because an employee violated several company policies when he worked off the clock, when he failed to object to his supervisor changing his time records, and when he failed to report inaccuracies in those records, his misconduct barred his FLSA overtime claim, the Eleventh Circuit explained that if an employer knows or has reason to know its employee underreported his hours, it cannot escape FLSA liability by asserting equitable defenses based on that underreporting. "To hold otherwise would allow an employer to wield its superior bargaining power to pressure or even compel its employees to underreport their hours, thus neutering the FLSA's purposeful reallocation of that power," the court stated in reversing a lower court's grant of summary judgment in favor of TitleMax (*Bailey v. TitleMax of Georgia, Inc.*, January 15, 2015, Martin, B.).

D.C. CIRCUIT

D.C. Cir.: Support of union, not poor attendance, determining factor in selection for layoff, (Jul. 24, 2015)

Substantial evidence supported the NLRB's conclusion that an employee who was allegedly selected for layoff because of his poor work attendance was unlawfully terminated in violation of the NLRA, ruled the D.C. Circuit. Although there was evidence that the employee was often late, there was no credited evidence before the court that showed the employer would have terminated him for this reason alone. However, the appeals court disagreed with the Board's decision to allow

a late amendment of the General Counsel's complaint because it left the employer without notice of a new charge that it lacked the opportunity to fairly contest (*Bruce Packing Co., Inc. v. NLRB*, July 24, 2015, Griffith, T.).

D.C. Cir.: AT&T lawfully prohibited employees from wearing 'Inmate/Prisoner' shirts, (Jul. 10, 2015)

Although NLRA Section 7 protects the right of employees to wear union apparel at work, under the "special circumstances" exception to that rule, AT&T lawfully prohibited publicly visible employees from wearing "Inmate/Prisoner" shirts, ruled the D.C. Circuit. It was reasonable for AT&T to believe that the message displayed on the shirts may harm its relationship with its customers or its public image. Thus, the appeals court granted the employer's petition for review of an NLRB decision and vacated the Board order with respect to the "Inmate/Prisoner" shirts (*Southern New England Telephone Co. v. NLRB*, July 10, 2015, Kavanaugh, B.).

D. D.C.: Notice-posting rule for government contractors passes constitutional muster, (May 11, 2015)

The Department of Labor's regulation which requires government contractors to post workplace notices informing employees of their rights under the NLRA did not violate the First Amendment, ruled the federal district court in the District of Columbia. Moreover, the president had the authority under the Procurement Act to require the posting of a notice, entitled "Notification of Employee Rights under Federal Labor Laws" (Posting Rule), as a condition of federal contracts; the notice did not violate the Administrative Procedure Act; and the rule was not preempted by the NLRA, the court held. Finding that challenges to the posting requirement brought by industry groups were without merit, the court granted the DOL's motion for summary judgment (*National Association of Manufacturers v. Perez*, May 7, 2015, Mehta, A.).

D.D.C.: Long-running ERISA suit against U.S. Airways settled for over $5M, (Apr. 28, 2015)

Ending a long and hard-fought ERISA class action over an allegedly unreasonable 45-day delay in lump-sum retirement benefit payments, asserted against U.S. Airways until it declared bankruptcy and the Pension Benefit Guaranty Corporation (PBGC) was substituted as defendant, a federal district court in the District of Columbia approved final class settlement to the tune of $5,250,000 (*Stephens v. US Airways Group, Inc.*, April 24, 2015, Collyer, R.).

D.C. Cir.: Union not liable for derisive Facebook posts by non-agent members during strike, (Apr. 17, 2015)

The D.C. Circuit refused to hold a union liable for failing to remove derisive and allegedly threatening comments posted on a Facebook page maintained for union members, denying a non-union employee's petition for review of the NLRB order dismissing his charge on this issue. Significantly, there was no indication or allegation that union officials or agents posted the contested comments and the record revealed that only union members could post and/or view comments on the Facebook page. However, the appeals court declined to address whether the postings would be deemed "threatening" if made by union agents and emphasized that the Board

was not necessarily foreclosed from ever finding a union guilty of unfair labor practices for postings on "closed" Internet sites (*Weigand v. NLRB*, April 17, 2015, Edwards, H.).

D.C. Cir.: Construction contractors fail in effort to overturn OFCCP's revisions to disability affirmative action regulations, (Dec. 12, 2014)

Affirming a ruling earlier this year by a federal district court, the D.C. Circuit rejected an attempt by Associated Builders and Contractors, Inc (ABC) to overturn OFCCP regulatory revisions that require federal contractors and subcontractors to establish a seven percent utilization goal for the employment of workers with disabilities. Emphasizing that its review of an agency's exercise of rulemaking authority is narrow, the appeals court upheld the rule's utilization goal as well its data collection requirements. The court also found that, in promulgating the rule, the OFCCP was justified in not exempting construction contractors (*Associated Builders & Contractors, Inc v. Shiu*, December 12, 2014, Tatel, D.).

D.C. Cir.: Refusal to consider Brazilian chef's cultural knowledge as "specialized knowledge" for visa was error, (Oct. 21, 2014)

An immigration appeals office incorrectly excluded culturally acquired knowledge, skills, and experience derived from a visa applicant's upbringing in the Southern Brazil gaucho culture and *churrasco* tradition as irrelevant to the "specialized knowledge" needed for an L-1B visa, a divided D.C. Circuit ruled. Moreover, the appeals office's finding that there was insufficient evidence that a Brazilian-born chef had completed the company's internal training program was not supported. The appeals court remanded the matter to the lower court with instructions to vacate the appeals office's decision and to remand to the agency for further proceedings. Judge Kavanaugh dissented (*Fogo De Chao (Holdings) Inc v U.S. Department of Homeland Security*, October 21, 2014, Millett, P).

D.C. Cir.: NLRB failed to address interplay of NLRA provisions in finding employer had to arbitrate displaced union's grievances

An employer did not have a duty to arbitrate grievances with a decertified union under an expired collective bargaining agreement after a new union had been certified, ruled the D.C. Circuit. In ruling to the contrary, the NLRB failed to make a serious effort to grapple with the statutory text regarding the interplay of NLRA Sections 8(a)(5) and 9(a) in a situation where a decertified union had been *replaced* by a new union, the appeals court said. Because the Board failed to address the relevant statutory provisions, the court granted the employer's petition for review (*Children's Hospital and Research Center of Oakland, Inc. dba Children's Hospital of Oakland v. NLRB*, July 7, 2015, Henderson, K.).

D.C. Cir.: On-site work stoppage by hotel employees was protected under clarified balancing test

Agreeing with the NLRB, the D.C. Circuit granted the agency enforcement of its order finding that a hotel employer acted unlawfully by suspending 77 employees for participating in an on-site work stoppage at the hotel. The appeals court found that the Board complied with its earlier

remand directing that it clarify one factor in the ten-factor balancing test to determine whether the organizational rights of employees engaged in a work stoppage outweighed the property rights of the employer. Finding that the Board issued a reasonable order supported by substantial evidence, the appeals court concluded that the work stoppage was protected and the employer's suspension of participating employees violated the NLRA (*Fortuna Enterprises, LP v. NLRB*, June 12, 2015, Sentelle, D.).

D.D.C.: Court vacates DOL 'companionship services' regulation, (Jan. 15, 2015)

Following its successful effort to vacate the third-party employer provisions of the Department of Labor's domestic service regulation, the Home Care Association of America has now successfully challenged the DOL's narrowed definition of "companionship services" in a ruling by the same judge in the federal district court in the District of Columbia. Faced with a long-standing regulation left untouched by Congress for 40 years, the court concluded that Congress's intent in 1974 to exempt from minimum wage and overtime wage requirements domestic workers providing services, including care to the elderly and disabled, is still clear today. Finding that the DOL was trying to do through regulation what must be done through legislation, the court vacated the new companionship services definition (*Home Care Association of America v. Weil*, January 14, 2015, Leon, R.).

D.D.C.: Challenge to revised union election rules stumbles on first hurdle, (Apr. 24, 2015)

A legal challenge to the NLRB's sweeping changes to its representation election procedures has suffered its first blow. After consolidating the action with a similar lawsuit levied by the U.S. Chamber of Commerce and other trade groups, the federal district court in the District of Columbia denied an employer's motion for a temporary restraining order barring the Board from processing a union election at the company in accordance with the revised rules. The employer failed to show that it (or its employees, three of whom it subsequently added as plaintiffs) would suffer irreparable harm if the final rule's provisions were implemented, the court found—emphasizing, however, that its ruling on the motion for injunctive relief "should not be read as any harbinger of what the Court's ultimate decision on the merits will be" (*Baker DC, LLC v. NLRB*, April 22, 2015, Jackson, A.).

STATE SUPREME COURT DECISIONS

WAGE-HOUR—WORKING TIME—Cal. Sup. Ct.: On-call hours security guards spent at construction sites constituted hours worked, (Jan. 9, 2015)

Security guards who spent on-call hours at construction sites were under the control of their employer and so were entitled to compensation for all on-call hours spent at the assigned worksite, ruled a unanimous California Supreme Court. The state high court found that under California Wage Order 4, which covers security guards, the on-call time constituted hours worked. Moreover, the court concluded that Wage Order 4 did not permit the exclusion of sleep time from compensable hours worked in 24-hour shifts (*Mendiola v. CPS Security Solutions, Inc.*, January 8, 2015, Corrigan, C.).

N.J. Sup. Ct.: Worker-friendly test will decide independent contractor status under state wage law, (Jan. 15, 2015)

Resolving a question of state law certified to the court by the Third Circuit, the New Jersey Supreme Court concluded that the "ABC" test, derived from the state's New Jersey Unemployment Compensation Act, governs whether a worker is an employee or an independent contractor under state wage laws. The holding came in a class-action wage suit brought by workers who deliver mattresses to customers for a retail mattress chain who alleged they were improperly misclassified as independent contractors to their financial detriment (*Hargrove v. Sleepy's LLC*, January 14, 2015, Cuff, M.).

N.J. Sup. Ct.: High court recognizes *Faragher/Ellerth* affirmative defense, rejects narrow *Vance* definition of supervisor, (Feb. 12, 2015)

New Jersey employers facing vicarious liability for a supervisor's sexual harassment under the New Jersey Law Against Discrimination (LAD) may assert a *Faragher/Ellerth* affirmative defense, the New Jersey Supreme Court held in a 5-2 opinion, definitively adopting the federal standard set forth by the U.S. Supreme Court and allowing an employer to establish that it had an effective anti-harassment policy in place but that the plaintiff failed to take advantage of it. However, the state high court declined to adopt the narrow definition of "supervisor" set forth by the U.S. Supreme Court in *Vance v. Ball State University*, favoring the EEOC's broader construction. The high court reversed the appellate court's affirmance of summary judgment to the employer so that the trial court, on remand, could decide the case in accordance with the standards set forth here (*Aguas v. State of New Jersey*, February 11, 2015, Patterson, A.).

W.D. Wash.: Court won't enjoin Seattle from treating franchisees as large employers, with faster phase-in of $15 wage floor, (Mar. 18, 2015)

A federal district court in Washington has refused to enjoin the City of Seattle from treating franchises as "large employers" under the city's new minimum wage ordinance, which phases in a $15 minimum wage rate for employees within the city. Rebuffing the International Franchise Association's assertions that the ordinance unfairly lops franchises in with the city's large employers (which are subject to a three-year phase-in) rather than small businesses (which enjoy a more gradual ramp-up), the court denied the trade group's motion for preliminary injunctive relief (*International Franchise Association, Inc. v. City of Seattle*, March 17, 2015, Jones, R.).