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Labor & Employment

Supervisory and Coworker Harassment: Narrowing the Differences Between Separate Standards of Employer Liability

Employment Law

Federal courts are sharply divided over the degree of authority necessary to establish that an employee who has engaged in harassment is the victim's supervisor, such that the employer should be vicariously liable for the harassing conduct. With the Supreme Court poised to resolve this issue, employers should prepare for the potential need to reform their organizational structures to more carefully delineate supervisory status. p3

Employment Law

The Eighth Circuit affirmed the dismissal of the EEOC's hostile work environment claims filed on behalf of 67 "aggrieved persons" due to the EEOC's failure to investigate the claims, issue a reasonable cause determination, or conciliate the claims prior to commencing litigation. p14

Employee Benefits

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The Second Circuit reversed the $1.6 million verdict that a second jury awarded to plaintiff on retrial, determining that the district court abused its discretion in granting a new trial as the first verdict for the defendants was grounded in the record and was not egregious or a serious miscarriage of justice. p10

Employee Benefits

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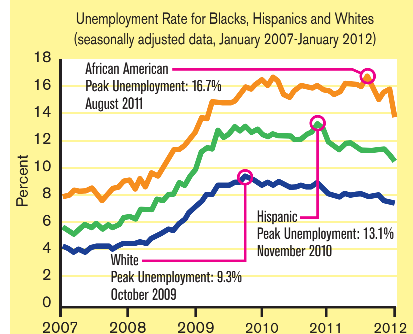
DISPROPORTIONATE RECOVERY



The recovery from the start of the January 2007 recession was slower for minority workers, with unemployment for African Americans peaking in August 2011 at 16.7% whereas unemployment for Whites peaked almost 2 years earlier.

Source: U.S. Dep't of Labor, The African-American Labor Force in the Recovery, 3 Chart 1 (Feb. 29, 2012), http://www.dol.gov/_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf.

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Employment Law

Harassment

Supervisory and Coworker Harassment: Narrowing the Differences Between Separate Standards of Employer Liability

George Patterson | Bloomberg Law

- **The Supreme Court is expected to resolve the divergent approaches to employer liability in hostile work environment cases that federal courts have struggled to reconcile since *Faragher/Ellerth*.**
- **When the perpetrator of harassment is the plaintiff's supervisor, the employer is vicariously liable for the supervisor's actions; however the employer may assert as an affirmative defense that it exercised reasonable care to prevent and remedy any harassment, and the plaintiff unreasonably failed to take advantage of the employer's preventive or corrective policies.**
- **If the harasser is the plaintiff's coworker, the plaintiff must prove that the employer was negligent by showing that the employer knew or should have known of the harassment and failed to stop it.**
- **In determining whether a harassing employee is a supervisor for purposes of Title VII liability, some courts require that the harasser have authority to take tangible employment actions against the victim, such as termination, while others hold the ability to direct or control daily work activities is sufficient.**

Federal courts have traditionally held employers to a much stricter standard when assessing liability for workplace harassment committed by supervisors than when the harassing employee is the plaintiff's mere coworker. Over time, however, many courts have rejected precise rules for distinguishing between supervisors and coworkers based on objective criteria. Several federal circuits continue to confer supervisory status only on those members of management with authority to take "tangible" employment actions against the complaining employee. Nevertheless, a number of state and federal courts have begun to prefer a more subjective method requiring an analysis of the specific work environment in each particular case.

This approach holds employers to the more stringent standard governing supervisory harassment if the harasser has the ability to direct the victim's daily work activities – even in the absence of any authority to hire, fire, demote, reassign or alter pay and benefits. Moreover, courts adopting this view vary with respect to the amount

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of control that is necessary to render the harassing employee a supervisor. Consequently, employers subject to the more flexible, case-by-case approach to establishing supervisory status face substantial organizational and human resource challenges as they seek to identify the proper scope of managerial authority and anticipate which employees will be deemed supervisors in a dynamic labor force under an often imprecise standard.

The United States Supreme Court recently requested the Solicitor General's views on the appropriate definition of "supervisor,"[1] a clear sign that the high court will resolve this dispute in a case involving racial harassment under Title VII of the Civil Rights Act of 1964 (Title VII).[2] Thus, employers and workers alike can soon expect long awaited guidance concerning their responsibilities with respect to workplace harassment, and litigants can hope for a more uniform standard in the federal courts for determining supervisory status and the contours of employer liability.

Meritor and the Origins of the Supreme Court's Harassment Jurisprudence

The United States Supreme Court first recognized sexual harassment as a form of sex discrimination actionable under Title VII in *Meritor Savings Bank, FSB v. Vinson*.[3] Although the *Meritor* Court affirmed the D.C. Circuit's ruling in favor of a plaintiff who asserted claims of sexual harassment against her employer, it rejected the proposition that an employer is strictly liable for a supervisor's harassing conduct in all instances. Instead, the Court "decline[d] the parties' invitation to issue a definitive rule on employer liability," but agreed that "Congress wanted courts to look to agency principles for guidance in this area."[4] Moreover, the Court found "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[5] Accordingly, the Court determined that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[6]

The Court further distinguished between "*quid pro quo*" harassment, in which an employee is required to submit to sexual advances as a condition of employment or advancement, and "hostile environment" harassment, in which the harasser's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[7] In addition, the Court observed that, to be actionable, hostile environment harassment must be sufficiently "severe or pervasive" to alter the conditions of the plaintiff's employment and create "an abusive working environment."[8] However, as the harassing employee in *Meritor* was the plaintiff's supervisor, the Court provided no further guidance regarding the differing standards of liability for coworker and supervisory harassment.

The *Faragher/Ellerth* Affirmative Defense

In 1998, the Supreme Court set forth a more comprehensive framework for evaluating employer liability for supervisory harassment in two landmark decisions, Faragher v. City of Boca Raton[9] and Burlington Industries, Inc. v. Ellerth.[10] Under the *Faragher/Ellerth* standard, employers are vicariously liable for supervisory harassment when the plaintiff experiences a tangible adverse employment action, such as termination, demotion or other changes to the terms or conditions of employment.[11] However, if a supervisor harasses an employee without taking an adverse employment action – essentially by creating a hostile work environment – the employer is still subject to vicarious liability for the supervisor's conduct but may raise an affirmative defense to liability.[12] In accordance with this affirmative defense, the employer must prove by a preponderance of the evidence that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities the employer provided.[13]

With respect to coworker harassment, the Supreme Court did not disturb precedent requiring the plaintiff to prove liability through general negligence principles, rather than through the imposition of vicarious liability. The negligence standard thus continues to be the rule in coworker harassment cases in the federal appellate courts.[14] As the *Ellerth* Court explained, "[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."[15] Accordingly, in a coworker harassment case, the employer must have reason to be aware of the harassing conduct *and* fail to take appropriate actions to remedy it before liability will attach. While courts nominally accept this negligence standard in coworker harassment cases in the post-*Faragher/Ellerth* environment, many have sought to expand protections for harassment victims by broadening the category of employees who fall within the definition of supervisor.

Defining "Supervisor"

One result of the Supreme Court's *Faragher/Ellerth* rulings was an increased focus in harassment cases on the type of power an employee must wield before that employee can be considered a "supervisor." Since neither Title VII nor the Supreme Court had actually defined supervisor, plaintiffs' attorneys encouraged courts to adopt the broadest possible interpretation to increase the likelihood that they would be able to benefit from the Supreme Court's more advantageous vicarious liability standard when claiming damages for harassment. Conversely, counsel for management sought to require a clearly identifiable level of managerial authority – preferably one formally acknowledged within the relevant corporate chain of command – before an employee could be legally deemed a supervisor. As courts grappled

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with the policy implications of these competing approaches, different jurisdictions began to diverge considerably with respect to the requirements necessary to establish supervisory status.

– *Parkins*' Tangible Action Standard

The Seventh Circuit's ruling in *Parkins v. Civil Constructors of Ill., Inc.*[16] initially represented the majority view of supervisory status, defining supervisor as one who has "the power to hire, fire, demote, promote, transfer, or discipline an employee." In *Parkins,* a female truck driver sued her employer under Title VII for hostile environment sexual harassment and retaliation. The court affirmed summary judgment for the employer, holding that the two foremen who harassed the plaintiff were not her supervisors based on multiple factors, including that they: (1) were hourly laborers; (2) could not decide what work was to be done; (3) had no authority to decide how many employees to assign to their crews; (4) answered to a superintendent who made all significant decisions and handled employee evaluations; and, (5) could merely recommend, rather than order, employee terminations.[17]

The First and Eighth Circuits, and initially the Fourth Circuit, adopted the Seventh Circuit's straightforward definition requiring that supervisors have the authority to take some "tangible employment action," such as firing or demotion, against subordinates.[18] The First Circuit explained that "[w]ithout some modicum of this authority [to take tangible employment actions], a harasser cannot qualify as a supervisor for purposes of imputing vicarious liability to the employer in a Title VII case, but, rather, should be regarded as an ordinary coworker."[19]

The Fourth Circuit took this view further in holding that a corporal in the Durham, North Carolina police force was not the supervisor of a private-level officer who sued the city for harassment because the corporal's "authority . . . did not include the power to take tangible employment actions against [the plaintiff] and her rank-peers. At most it would involve the occasional authority to direct her operational conduct while on duty."[20] Similarly, the Eighth Circuit held that the harasser must have the power – even if not exercised – to take tangible employment actions.[21] In addition, the Sixth Circuit and federal trial courts within its jurisdiction appear to favor a comparable approach, holding that supervisors should have "power to hire or fire."[22]

Parkins' requirement that a supervisor have authority to take tangible employment actions against the harassment victim before an employer can be held vicariously liable under Title VII provides clarity, as employees at all levels typically understand which members of the company retain the official power to hire, fire and demote. Moreover, this definition does not foreclose harassment victims from obtaining remedies since, as discussed, plaintiffs may still prove employer liability for coworker sexual harassment under negligence principles.

– *Mack:* The Ability to Control

Nevertheless, the Second Circuit found the *Parkins* approach too rigid and adopted a more expansive definition of the term supervisor in *Mack v. Otis Elevator Co.*[23] Prior to *Mack,* some federal courts had already refused to limit the designation of supervisor to those who could take tangible employment actions against subordinate employees. The District of Minnesota, for example, noted that restricting employer vicarious liability to the acts of those with authority to fire and demote would allow "an employer to effectively insulate itself from the application of *Faragher*, and *Ellerth*, simply by directing all critical personnel decisions to be effected by a personnel department, which may have no direct, and only infrequent contact with the employee subject to the harassment."[24]

Moreover, in *Dinkins v. Charoen Pokphand USA,*[25] the Middle District of Alabama explained that "an employee is a supervisor or 'agent' for purposes of Title VII if he has the actual authority to take tangible employment actions, or to recommend tangible employment actions if his recommendations are given substantial weight by the final decisionmaker, or to direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks."[26] The court opined that this more flexible definition of supervisor was justified since a "harassing employee, endowed with limited actual authority to monitor co-employees, will sometimes fool his comrades for evil ends. Such misconduct is foreseeable, and liability will attach to the employer under the doctrine of apparent authority, provided that the victim reasonably believed that the harasser possessed supervisory powers."[27]

In *Mack,* the Second Circuit relied on the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance[28] to explain that supervisors include individuals who can direct an employee's daily activities, regardless of whether they have authority to take tangible employment actions. Applying this rationale, the court found that the elevator "mechanic in charge" at the Metropolitan Life Building on Park Avenue in Manhattan was the supervisor of a "mechanic's helper" who sued the employer for sexual harassment. In reaching its decision, the court was untroubled by the fact that the mechanic in charge lacked the authority to take tangible employment actions or affect the plaintiff's terms or conditions of employment as those concepts were understood in *Parkins.*[29]

The Second Circuit rejected the *Parkins* standard and held that, under *Faragher/Ellerth*, "an employer may be vicariously liable even for the misbehavior of employees who do not take tangible employment actions against their subordinate victims. The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his

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or her subordinates."[30] Ninth Circuit opinions share this view and, after initially following the *Parkins* approach, the Fourth Circuit appears to have adopted the *Mack* analysis as well.[31]

Challenges of a More Subjective Standard

This shift away from focusing on the harasser's authority to hire, fire and demote in favor of an emphasis on the victim's "reasonable belief" that the harasser "possessed supervisory powers"[32] represents a clear departure from the precise rule established in the *Parkins* line of cases. Further, it requires a much more fact-intensive inquiry, taking into consideration "the totality of the circumstances"[33] in each particular workplace. Indeed, in some instances courts have relied on the analytical framework of *Mack* and *Dinkins* to redefine supervisor based on a wide-ranging set of subjective factors.

For example, in *Entrot v. BASF Corp.*,[34] the New Jersey Appellate Division, resolving a hostile environment sexual harassment claim under New Jersey's Law Against Discrimination,[35] which is analogous to Title VII, established a far more flexible approach to determining supervisory authority. Reversing the trial court's ruling that the harasser was not the plaintiff's supervisor, the court explained that "instead of requiring a litmus test depending on specific factors (e.g., power to fire or power to control daily tasks)," the determination should "turn on whether the power the offending employee possessed was reasonably perceived by the victim, accurately or not, as giving that employee the power to adversely affect the victim's working life."[36] Finding the power to take tangible employment actions as "probative of supervisory status," but not necessary to establish it, the court concluded that other relevant information might include "any evidence that the alleged harasser controlled the workplace in subtler and indirect ways, as long as the effect was to restrict the victim-employee's freedom to ignore sexually harassing conduct."[37]

The fact that a plaintiff's subjective perception – "accurate[] or not" – of the harasser as her supervisor may be enough to impose vicarious liability on an employer appears problematic in some respects. In jurisdictions in which this standard applies, plaintiffs who fail to alert their employers of harassment by those who are not clearly supervisors can later seek to avoid summary judgment by simply asserting that they felt helpless to resist the harasser's perceived authority. This result seems incompatible with the principle that a clear distinction should exist between supervisor and coworker harassment for purposes of establishing employer liability.[38]

Further, imputing liability to an employer based on a plaintiff's inaccurate perception that the harasser was a supervisor does not appear likely to promote the Supreme Court's goal of encouraging employers to institute anti-harassment policies and training. As the Court explained in *Faragher*, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance."[39] Since employers subject to the *Mack* approach will not know which employees should be trained as supervisors rather than rank and file workers – because they cannot anticipate a future plaintiff's subjective perceptions – they may adopt poorly targeted training policies despite their best efforts.

While *Mack* originally represented the minority view, the trend in many jurisdictions appears to be toward a broader definition of supervisor. In fact, even the Seventh Circuit, which decided *Parkins*, held there was "no compelling need to make a dichotomous choice" between strict liability and negligence in a case involving a shift supervisor with some, but not all, of the powers of a "paradigmatic" supervisor who harassed a teenaged employee at an ice cream parlor.[40] In addition, the EEOC's standard for determining supervisory status rejects the *Parkins* tangible action requirement in favor of the analysis described in *Mack* and *Dinkins*.[41] Although courts are not obligated to follow the EEOC's guidelines, they often accord deference to federal agencies' interpretations of the laws those agencies are charged with enforcing.[42] Accordingly, even employers in jurisdictions that follow the *Parkins* rule should be prepared to respond to variations of the argument that vicarious liability is warranted because the harasser "controlled the workplace in subtler and indirect ways."[43]

Despite the judicial divide over the definition of supervisor, some courts have circumvented the issue by reframing the negligence standard in coworker harassment cases to incorporate elements of the affirmative defense normally applicable in cases of supervisory harassment.

Relaxing the Plaintiff's Burden in Coworker Harassment Cases

Despite the judicial divide over the definition of supervisor, some courts have circumvented the issue by reframing the negligence standard in coworker harassment cases to incorporate elements of the affirmative defense normally applicable in cases of supervisory harassment. These decisions have made it easier for plaintiffs to recover damages for coworker harassment by finding negligence based on the absence of effective anti-harassment policies, not on whether the employer knew or should have known of the coworker's harassing acts. Such rulings appear contrary to

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the original understanding of *Faragher/Ellerth* as imposing an obligation on employers to demonstrate effective anti-harassment policies only in response to claims of supervisor harassment.

In *Ocheltree v. Scollon Prods.*,[44] the Fourth Circuit upheld a jury verdict for a sexual harassment plaintiff and found that, even though the employer lacked knowledge of the harassing coworkers' conduct, it was negligent in failing to maintain an effective anti-harassment policy. In the court's view, a jury could have determined that the employer did not provide the employee with reasonable opportunities to report sexual harassment, and thus, could be charged with "constructive knowledge" of the harassing acts.[45] The Fourth Circuit reiterated this principle in 2011, explaining that under *Faragher/Ellerth*, "an employer may be charged with constructive knowledge of co-worker harassment when it fails to provide reasonable procedures for victims to register complaints."[46] In addition, the Third Circuit's language in a 2009 opinion appears to provide a similar means of establishing liability for coworker harassment: ". . . employer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action."[47]

On its face, this approach would appear to blur the distinction between *Faragher/Ellerth's* separate standards of employer liability for hostile environment harassment – in which coworker harassment requires the plaintiff to prove that the employer knew or should have known of the conduct and failed to remedy it, and supervisor harassment requires the employer to prove as an affirmative defense that it had effective anti-harassment policies in place that the plaintiff failed to utilize. However, courts that have accepted the absence of preventive measures as evidence of "constructive knowledge" in coworker harassment cases have noted that they are merely employing traditional tort law principles under *Faragher/Ellerth's* negligence prong.[48] As the Fourth Circuit explained, nothing in *Faragher/Ellerth* or its progeny suggests that "[a]n employer [can] avoid Title VII liability for coworker harassment by adopting a 'see no evil, hear no evil' strategy."[49]

Finally, under a constructive knowledge theory, the burden of proving coworker harassment directly remains at all times with the plaintiff, in contrast to cases of supervisor harassment in which the employer must prove an affirmative defense to avoid vicarious liability. Therefore, it is probably an overstatement to claim that application of the constructive knowledge theory in coworker harassment cases represents a dramatic erosion of employer protections since defendants have never enjoyed a safe harbor from liability merely because the harasser is not a supervisor.

Supreme Court to Clarify Supervisory Authority

The Supreme Court is expected to clarify the definition of supervisor in response to the Seventh Circuit's decision in a racial harassment case, *Vance v. Ball State University*.[50] In *Vance*, the plaintiff, who was the only African-American in her department, made numerous verbal and written complaints regarding her coworkers' use of racial epithets and other highly offensive conduct. After she filed a multi-count lawsuit, which included allegations that she was subjected to a racially hostile work environment, the district court granted summary judgment for the employer and the Seventh Circuit affirmed. The Seventh Circuit held that the plaintiff did not raise issues of material fact regarding whether one of the harassers was her supervisor merely by asserting that the harasser had the authority to tell plaintiff what to do and did not clock-in like other hourly employees. Evaluating the plaintiff's claim under the framework for coworker harassment, the court explained, "[w]e have not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII."[51]

The specific question before the Supreme Court is: "Whether the 'supervisor' liability rule established by [*Faragher/Ellerth*] (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or (ii) is limited to those harassers who have the power to 'hire, fire, demote, promote, transfer, or discipline" their victim.'"[52] As discussed, courts are sharply divided on this issue, with those taking the approach favored by management holding that businesses cannot function without consistent, predictable guidelines as to which employees' actions are imputable to the company, and those focused on workers' rights concluding that employers should be vicariously liable for an employee's abuse of whatever degree of supervisory authority the employer vests in him or her.[53] Although the Supreme Court's decision will necessarily benefit one interest group over another, employment attorneys should at least welcome the promulgation of uniform standards for employer liability in hostile environment cases, given the divergent approaches that federal courts have struggled to reconcile since *Faragher/Ellerth*.

[1] *Vance v. Ball State University*, No. 11-556, Solicitor General invited to file a brief (Feb. 21, 2012).

[2] 42 U.S.C. § 2000e, *et seq.*

[3] 477 U.S. 57 (1986).

[4] 477 U.S. at 72.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 65, citing Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3).

[8] *Id.* at 67.

[9] 524 U.S. 775 (1998).

[10] 524 U.S. 742 (1998).

[11] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

[12] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

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[13] *Id.*

[14] *See EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 1001 (9th Cir. 2010) ("An employer is liable for an employee's sexual harassment of a coworker if it knew, or should have known, about the harassment and failed to take prompt and effective remedial action."); *Williams v. General Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999) ("To establish employer liability for harassment by a co-worker, a plaintiff must show that the employer 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.'") (internal citations omitted).

[15] 524 U.S. at 759.

[16] 163 F.3d 1027 (7th Cir. 1998).

[17] *Parkins,* 163 F.3d at 1034.

[18] Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005); Mikels v. City of Durham, 183 F.3d 323 (4th Cir. 1999); Joens v. John Morrell & Co., 354 F.3d 938 (8th Cir. 2004).

[19] Noviello, 398 F.3d at 96.

[20] *Mikels,* 183 F.3d at 334. *But see Whitten v. Fred's, Inc.,* 601 F.3d 231 (4th Cir. 2010) ("the existence of authority to take tangible employment action would establish that [the harasser] was [plaintiff's] supervisor, but the absence of that authority does not establish that [the harasser] was merely her co-worker.")

[21] *Joens,* 354 F.3d at 940. *See also Weyers v. Lear Operations Corp.,* 359 F.3d 1049, 1057 (8th Cir. 2004) (citing *Joens* for the proposition that "to be considered a supervisor, 'the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties'").

[22] *Stevens v. U.S. Postal Serv.,* 21 Fed. Appx. 261 (6th Cir. 2001) (unpublished); *Browne v. Signal Mountain Nursery, LP,* 286 F. Supp. 2d 904 (E.D. Tenn. 2003).

[23] 326 F.3d 116 (2d Cir. 2003), *cert. denied,* 540 U.S. 1016 (2003).

[24] *Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 973 (D. Minn. 1998)

[25] 133 F.Supp. 2d 1254 (M.D. Ala. 2001).

[26] *Id.* at 1266 (internal citations omitted).

[27] *Id.*

[28] U.S. Equal Employment Opportunity Commission Enforcement Guidance, *Vicarious Employer Liability for Unlawful Harassment by Supervisors,* modified March 29, 2010.

[29] 326 F.3d at 126.

[30] *Id.*

[31] Dawson v. Entek International, 630 F.3d 928 (9th Cir. 2011); McGinest v. GTE Service Corp., 360 F.3d 1106 (9th Cir. 2004); Whitten, 601 F.3d 231 (4th Cir. 2010).

[32] *Dinkins,* 133 F.Supp. 2d at 1266.

[33] *Id.* at 1267.

[34] 359 N.J. Super. 162 (App. Div. 2003).

[35] N.J.S.A. § 10:5-1, *et seq.*

[36] 359 N.J. Super. at 181.

[37] *Id.*

[38] *Swinton v. Potomac Corp.,* 270 F.3d 794, 803 ("A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence. Which route leads to employer liability depends on the identity of the actual harasser, specifically whether he is a supervisor of the employee, or merely a co-worker").

[39] *Faragher,* 524 U.S. at 803.

[40] *Doe v. Oberweis Dairy,* 456 F.3d 704, 717 (7th Cir. 2006).

[41] U.S. Equal Employment Opportunity Commission Enforcement Guidance, *Vicarious Employer Liability for Unlawful Harassment by Supervisors,* modified March 29, 2010.

[42] *Mack,* 326 F.3d at 127 ("While we are not bound by enforcement guidelines, they are entitled to respect to the extent that they are persuasive.")

[43] *Entrot,* 359 N.J. Super. at 181.

[44] 335 F.3d 325 (4th Cir. 2003) *cert. denied,* 540 U.S. 1177 (2004).

[45] 335 F.3d 333.

[46] *Hoyle v. Freightliner,* LLC, 650 F.3d 321, 335 (4th Cir. 2011)

[47] *Huston v. Procter & Gamble Paper Products Corp.,* 568 F.3d 100, 104 (3d Cir. 2009)

[48] *Ocheltree,* 335 F.3d at 334 ("We limit our discussion to the negligence (or constructive knowledge) theory because the evidence is sufficient to support the jury's finding that [the employer] should have known that [plaintiff] was being harassed by her coworkers").

[49] *Id.*

[50] 646 F.3d 461 (7th Cir. 2011).

[51] 646 F.3d at 470.

[52] *Vance v. Ball State University,* No. 11-556, Petition for Writ of Certiorari (Feb. 21, 2012).

[53] *Browne, supra,* 286 F.Supp. 2d at 913 (E.D. Tenn. 2003).

Individual Plaintiffs Cannot Rely on Acts of Harassment Directed at Other Plaintiffs Unless They Were Aware of Them

Berryman v. SuperValu Holdings, Inc., No. 10-CV-3590, 2012 BL 44278 (6th Cir. Feb. 24, 2012)

The United States Court of Appeals for the Sixth Circuit held that under its "totality-of-the-circumstances test," a plaintiff may establish a hostile work environment claim with evidence of harassment directed at other employees in the same protected category, but only to the extent the plaintiff knew of the harassment. Applying this standard, the Court affirmed the district court's grant of summary judgment in favor of SuperValu Holdings, Inc. on plaintiffs' racially hostile work environment claims because, when each plaintiff's claim was considered individually, none came forward with sufficient evidence of racially offensive conduct that he witnessed or knew of to raise a triable issue of fact as to whether each was subjected to "severe or pervasive" conduct that created an objectively hostile work environment.

After Class Action Claims Dismissed, SuperValu Filed Individual Motions for Summary Judgment

A class of current and former African-American employees filed a putative class action against SuperValu, alleging racial discrimination, retaliation, and hostile work environment claims under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e,*et seq*. Plaintiffs stipulated to the dismissal with prejudice of all the class action claims, leaving only the claims of the eleven individually named plaintiffs. SuperValu filed eleven motions for summary judgment – one for each of the named plaintiffs. In support of their hostile work environment claim, plaintiffs collectively submitted a detailed list of incidents that allegedly occurred over 25 years in SuperValu's warehouses, involving vulgar graffiti, overtly racist comments by coworkers, and racially motivated pranks. Although it found these incidents reprehensible, the district court concluded that, when each plaintiff's claim was reviewed individually, none provided sufficient evidence of severe and pervasive harassment that altered the conditions of his employment. Accordingly, the district court granted summary judgment to SuperValu. Five plaintiffs appealed the dismissal of their hostile work environment claims.

Totality of Circumstances Test

The Court noted that Title VII protects employees from a workplace "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). A plaintiff can defeat summary judgment on such a claim with evidence of harassment that was "ongoing," "commonplace," and "continuing." *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 333-34 (6th Cir. 2008).

On appeal, plaintiffs contended that the district court erred by reviewing each plaintiff's claim individually and limiting its analysis to those events that the individual plaintiff either experienced or knew about, rather than considering the totality of the evidence that all the plaintiffs proffered. The Sixth Circuit, however, found that the district court's approach was consistent with the "totality-of-the-circumstances test" it articulated in *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999). Under this test, the Court explained, a plaintiff may establish a hostile work environment claim based on discriminatory conduct directed at the protected group to which the plaintiff belongs, and not just at the plaintiff herself, provided the plaintiff was aware of the harassment that was allegedly directed at other employees. But the Court emphasized that the *Jackson* decision does not allow a group of plaintiffs to aggregate all of their claims, regardless of whether or not they were aware of one another's experiences.

The Sixth Circuit Court noted that plaintiffs collectively submitted to the district court an exhibit which they described as a "detailed list of the incidents which form the basis for the Plaintiffs' hostile environment claims." The district court considered the incidents on this list as well as additional ones referred to in each plaintiff's deposition, but only to the extent that the individual plaintiff claimed that he had witnessed or was aware of the incident. The Sixth Circuit found that this was a proper application of the *Jackson* test, and that if any plaintiff wanted the district court to consider incidents reported by other plaintiffs, he should have presented evidence showing that he was individually aware of the harassment experienced by other plaintiffs.

Plaintiffs Were Not "Unavoidably Exposed" to Harassment of Other Employees

Plaintiffs also contended that the public nature of some of the alleged acts of harassment, such as an effigy of an African-American supervisor that was displayed "for all the warehouse to see," warranted an assumption that each plaintiff was aware of these events, even though he did not mention them in his deposition or in his individual submission to the district court. The Sixth Circuit found that this assumption was unwarranted, given the physically large and partitioned workplace in which the plaintiffs worked. Further, the Court found it telling that none of the plaintiffs on appeal gave any indication in his deposition that he was aware of the effigy, despite questions prompting each to disclose all such incidents he remembered. In the Court's view, to assume that each plaintiff was aware of the incident under these circumstances would go beyond the reasonable inferences a court must draw in favor of the non-moving party on summary judgment. The Court emphasized that this was not a situation where, due to the configuration of the workplace, the plaintiffs were "unavoidably exposed" to the alleged acts of harassment, warranting an inference that an individual plaintiff was affected by behavior not directed at him or her. *See Gallagher v.C.H.*

Robinson Worldwide, Inc., 567 F.3d 263, 273-74 (6th Cir. 2009). To the contrary, the Court found that the record was devoid of any claim that workers were unavoidably exposed to the various acts of graffiti, comments, and jokes.

Further, the Sixth Circuit found that the district court properly considered those instances where plaintiffs gained second-hand knowledge of a particular incident of harassment, such as by seeing racist drawings or photos of racist graffiti that had been directed at other employees. But even considering these incidents, the Sixth Circuit concluded that plaintiffs failed to show they were aware of the majority of the harassment alleged by their fellow employees, and when each plaintiff's claim was considered individually none came forward with sufficient evidence of "severe or pervasive" harassment to defeat summary judgment.

Dissenting Opinion

Writing in dissent, Justice Stranch contended that the sheer number of racially-hostile incidents that the plaintiffs testified occurred in public areas in their workplace raised a triable question of fact as to whether plaintiffs were subjected to a hostile work environment. The dissent was troubled that plaintiffs were denied their day in court merely because their attorney did not identify each of the incidents that each plaintiff was subjected to or knew about in response to each of the summary judgment motions that SuperValu filed. Further, the dissent believed that the size and configuration of the workplace warranted an inference that each individual plaintiff was affected by harassment not directed specifically at him.

Impact of Hearsay Rule on Court's Ruling

While the majority ruled that a plaintiff seeking to establish a hostile work environment claim may rely on incidents that the plaintiff knew of but did not witness, it clarified that this did not mean that a plaintiff can rely on hearsay. For example, the Court noted that the district court properly refused to consider one plaintiff's testimony that other employees had told him of acts of harassment on the ground that the testimony was inadmissible hearsay. On the other hand, the Sixth Circuit explained, the district court properly considered a plaintiff's testimony that he saw photos of racial graffiti.

Interference with Employment Relationship

Second Circuit Overturns $1.6 Million Verdict for Plaintiff on Tortious Interference Claim Against Credit Agricole Indosuez

Andrea Fitz | Bloomberg Law

Raedle v. Credit Agricole Indosuez, Nos. 10-CV-2565/2734, 2012 BL 48455 (2d Cir. Feb. 28, 2012)

The U.S. Court of Appeals for the Second Circuit held that William Raedle was not entitled to recover on his claim that Credit Agricole Indosuez (CAI) and Lee Shaiman (collectively, defendants) tortiously interfered with his job offer from Dreyfus Corporation because he failed to present sufficient evidence to support his claim. Raedle claimed that, after he was terminated for poor performance, defendants made false and disparaging comments to Dreyfus about Raedle, including that he had "mental issues," and Dreyfus rescinded his job offer. A jury returned a verdict for defendants, but the district judge granted Raedle a new trial, opining that the verdict was "drastically wrong." The Court concluded that the district court abused its discretion because the first verdict was grounded in the record and was not egregious or a serious miscarriage of justice. The Court thus reversed the $1.6 million verdict that a second jury awarded to Raedle on retrial and ordered the first verdict reinstated.

CAI Terminated Raedle, Who Sued After Losing His Offer from Dreyfus

Raedle began working as a financial analyst for CAI, a corporate and investment bank, in 1998. In January 2000, Shaiman became Raedle's supervisor. In 2001, CAI terminated Raedle for allegedly poor performance. He obtained a job offer from Dreyfus, an investment company, but Dreyfus rescinded the offer after conversations between CAI personnel and Dreyfus. In 2004, Raedle sued defendants claiming that they tortiously interfered with his prospective contractual advantage by making false and negative comments about him to Dreyfus.

First Trial

The Second Circuit extensively reviewed the evidence presented at the first trial because it stated that the main appellate question was whether the first verdict was a miscarriage of justice. Shaiman testified that Raedle was "difficult, argumentative, [and] didn't listen to direction," among other things. A memorandum regarding

Raedle's termination stated that he communicated poorly about his portfolio, failed to document his credit analysis sufficiently, and failed to show leadership skills or help develop junior analysts.

Raedle obtained a job offer from Gerald Thunelius at Dreyfus, which Dreyfus rescinded after contacting CAI to inquire about Raedle's performance. Thunelius testified that he attended a meeting with Dreyfus's human resources manager, Mary Beth Leibig, and others where he found out that Raedle's former boss had indicated to Leibig that some "mental issues" existed and that Raedle had problems with some co-workers and "personal issues." Thunelius testified that he called CAI himself and spoke with "someone who identified himself as Raedle's boss" who stated that Raedle "was a problem, [and] that he had mental issues." Thunelius could not recall the name of such CAI employee.

Former CAI employee Sriram Balakrishnan testified that Shaiman told him about a phone call inquiring about Raedle and that Shaiman doubted that Raedle would get the job after what Shaiman told the caller. Leibig testified that she did not remember speaking with anyone at CAI. Shaiman testified that he did not recall speaking with Leibig or Thunelius about Raedle, stating that he would have remembered the name Thunelius because his son had a poster of jazz musician Thelonious Monk. Shaiman further testified that he never would have said Raedle had "mental issues" because he had a son under a behavioral psychologist's care for many years, so it was "a hot button issue for me personally."

Defense counsel argued that, although the defense witnesses did not remember giving a "bad reference" to Dreyfus, as Thunelius allegedly told Raedle in 2001, if they did so, it would have been honest because of his poor performance. The district judge instructed the jury that they should consider the "very sharp challenge" to Thunelius's credibility. After deliberating for 93 minutes, the jury returned a verdict for defendants.

District Court Grants New Trial at Which Raedle Prevailed

The district court suggested that Raedle move for a new trial, stating that "there's absolutely no rational reason why [CAI] could not find out who made the statements [to Dreyfus] and produce evidence of that effect." The district court granted Raedle's motion under Fed. R. Civ. P. 59(a)(1)(A), criticizing the verdict as against the weight of the evidence and opining that it "would result in a serious injustice if allowed [to] stand." *Raedle v. Credit Agricole Indosuez*, No. 04-CV-2235, 2009 BL 80354 (S.D.N.Y. Apr. 15, 2009). The district court stated that "[a]gainst the testimony of Thunelius and Balakrishnan must be weighed the total lack of explanation from the people who were really responsible for what happened - *i.e.*, plaintiff[']s superiors at CAI, particularly Shaiman. The court simply does not credit this total denial, or total denial of any memory."

After a retrial, the jury found for Raedle, awarding him $1,023,922 in lost wages, $600,00 in reputational damages, and $800,000 in punitive damages. The district court denied defendants' motion for judgment as a matter of law or for a new trial, but vacated the punitive damages award. *Raedle v. Credit Agricole Indosuez*, No. 04-CV-2235, 2010 BL 82978 (S.D.N.Y. Apr. 14, 2010). The parties cross-appealed.

Tortious Interference

As the Second Circuit explained, to state a claim under New York law for tortious interference with prospective contractual advantage, Raedle was required to show (1) business dealings with a third party; (2) defendants' interference with those dealings; (3) "that defendants acted with the sole purpose of harming [him] or used dishonest, unfair, or improper means"; and (4) injury to the business relationship. *Purgess v. Sharrock*, 33 F.3d 134, 141 (2d Cir. 1994).

The Court discussed two New York Appellate Division cases that it described as illustrating the "fine line separating honest and defamatory job references that can form the basis for tortious interference claims." In *Miller v. Mt. Sinai Medical Center*, 733 N.Y.S.2d 26, 27 (1st Dep't 2001), the Court held that plaintiff's tortious interference claim failed because (1) the fact that plaintiff's former supervisor might have provided a negative reference did not qualify as interference by "wrongful means"; and (2) plaintiff failed to allege that the sole purpose for the alleged interference was to harm her. In another case, the Appellate Division concluded that plaintiff, whose job offer was allegedly rescinded, failed to allege specific facts to show that his former employers' description of him as an "average" employee to his prospective employer "was objectively false or otherwise independently wrongful." *See Jacobs v. Continuum Health Partners, Inc.*, 776 N.Y.S.2d 279, 280-81 (1st Dep't 2004).

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Rule 59(a)(1)(A)

The Second Circuit stated that Rule 59(a)(1)(A) authorizes a district court to grant a new trial if the verdict is against the weight of the evidence, among other reasons, that is, if the verdict is "seriously erroneous" or "a miscarriage of justice." *See Farrior v. Waterford Bd. of Educ.*, 277 F.3d 633, 635 (2d Cir. 2002). The Court emphasized that, while district judges may weigh the evidence

and witness credibility on new trial motions, jury verdicts should very rarely be overturned. *See, e.g.*, *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992).

The Court then concluded that the record did not support the district court's determination that the verdict "would result in a serious injustice if allowed [to] stand." The district court accurately noted that Thunelius's testimony was the only evidence that Shaiman or anyone at CAI interfered with Raedle's employment by wrongful means or with the sole purpose of harming him, rather than merely giving an unfavorable, non-tortious assessment of his job performance. Agreeing with the district court, the Court concluded that Raedle's case thus depended on whether the jury believed Thunelius's testimony. Since the jury did not find Thunelius credible, the Court opined, it was "somewhat irrelevant whether the defense witnesses were lying when they claimed not to recall discussing Raedle's employment prospects."

The Court reasoned that it was not inconceivable that defense witnesses would not recall discussing Raedle more than three years earlier. The Court also opined that the jury could reasonably have (1) believed Shaiman's testimony that he would not have described Raedle as having "mental issues"; (2) been persuaded by the defense theory that, if Shaiman said anything about Raedle, it would have been an honest negative evaluation; or (3) believed Shaiman's testimony that he provided an honest negative assessment to another company which he recalled because he knew the party requesting a reference. The Court concluded that the first jury apparently accepted at least some of such evidence and that jury's evidence-based verdict was not egregious or a miscarriage of justice.

Notes on Employee References

According to the district court, CAI generally would provide prospective employers with only limited facts of a former employee's employment. It is unclear to what extent CAI deviated from such policy here, but this case illustrates that providing subjective references or evaluations can open the door to difficult disputes.

Race & Color Discrimination

Eighth Circuit Finds District Court Erred in Setting Aside Plaintiff's Verdict on Race-Based Constructive Discharge and Award of Punitive Damages

George Patterson | Bloomberg Law

Sanders v. Lee County School District No. 1, No. 10-CV-3240, 2012 BL 46761 (8th Cir. Feb. 28, 2012)

The U.S. Court of Appeals for the Eighth Circuit held that Sharon Sanders was entitled to recover damages on her claims that the Lee County School District No. 1 (District) and individual members of the County's Board of Education (Board) (collectively, defendants) constructively discharged her because of her race by demoting her from finance coordinator to food services assistant. The Court disagreed with the district court's setting aside the jury's $60,825 verdict for Sanders because Sanders presented sufficient evidence to support the verdict. The Court also held that Sanders was entitled to punitive damages but remanded for the district court to allow her to prove her punitive damages claims subject to defendants' right to assert ignorance of federal law as an affirmative defense.

Sanders Is Demoted and Resigns

In August 2000, Sanders began working for the District as finance coordinator. Her duties included making monthly financial presentations to the Board. Tension between Sanders and Elizabeth Johnson, one of the African-American Board members, arose over the format of Sanders's financial reports to the Board, among other reasons.

On September 25, 2007, the election of a fourth African-American Board member changed the composition of the seven-member Board from 4 to 3 majority Caucasian to 4 to 3 majority African-American. Most of the District employees were African-American. Sanders and Wayne Thompson, the school superintendent, were the only two Caucasian administrators in the District.

In November 2007, the Board voted 4 to 3 along racial lines to summarily reassign Sanders and Thompson to diminished positions without consulting employee manuals, the superintendent, or legal counsel. Sanders was reassigned to food services assistant, while some of her financial responsibilities were given to an African-American employee. Thompson was replaced by an African-American as interim superintendent and was reassigned to Assistant Superintendent of Maintenance and Transportation.

From November 2007 through August 2008, Sanders took sick leave and repeatedly requested a description of her new job and a new contract, but the Board did not provide them. In fact, within five months of Sanders's reassignment, the four African-American Board members moved to eliminate her new position, but the motion ultimately failed because one of the African-American members withdrew her support for the motion.

In August 2008, the superintendent informed Sanders that he was recommending her termination because of the number of days she had been on leave. In response, Sanders provided a doctor's note releasing her to work as of September 2, 2008. Later in August, Sanders received a letter stating that a new contract was awaiting her return to school. Sanders still had not received a copy of the job description or the contract. On September 2, 2008, Sanders submitted a resignation letter.

Jury Returns Verdict in Sanders's Favor

Sanders sued the Board and its four African-American members claiming discrimination and constructive discharge on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1983. At trial, Sanders presented the above evidence. The Board presented evidence to show that Sanders was reassigned because she was insubordinate and failed to answer questions during Board meetings. The jury found for Sanders, awarding her $10,000 in compensatory damages for emotional distress resulting from race discrimination, $60,825 for lost wages and benefits as to her constructive discharge claim, and punitive damages against three of the four individual defendants totaling $8,000. *Sanders v. Lee County Sch. Dist. No. 1*, No. 08-CV-219, 2010 BL 166542 (E.D. Ark. July 22, 2010). The district court later set aside the jury's constructive discharge and punitive damages verdicts pursuant to Fed. R. Civ. P. 50, but left undisturbed the jury's verdict on the race discrimination claim and compensatory damages award. *Sanders v. Lee County School District No. 1*, No. 08-CV-219 (E.D. Ark. Sept. 10, 2010). Sanders appealed.

Constructive Discharge

Sanders argued that the district court erred in setting aside the constructive discharge verdict because she presented sufficient evidence for a reasonable jury to find that she was constructively discharged because of her race. As the Eighth Circuit stated, to make out such a claim, Sanders had to show that her employer "deliberately created intolerable working conditions with the intention of forcing her to quit." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010). The Court noted that Sanders was required to provide her employer with a reasonable opportunity to remedy a problem before resigning, however. *Id.* The Court further explained that evidence of defendants' intent could be proven via "direct evidence" or evidence that defendants could have reasonably foreseen that Sanders would resign because of their actions. *Fercello v. Cnty. of Ramsey*, 612 F.3d 1069, 1083 (8th Cir. 2010). The Court noted that the standard of tolerability was objective, not subjective. *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000).

The Eighth Circuit stated that the Board did not contest the jury's finding that it reassigned Sanders on the basis of race, but rather asserted that Sanders could not prove intolerable working conditions since she was on sick leave and was never actually exposed to the working conditions. The Court disagreed, emphasizing that a plaintiff may base a constructive discharge claim on evidence of reassignment to a position that "a reasonable employee in [his or her] position would find demeaning and intolerable." *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 732 (8th Cir. 1996). The Court opined that a reasonable jury could find that Sanders's reassignment constituted a demotion including a diminution in title and responsibilities and that a reasonable employee in Sanders's shoes would find such reassignment demeaning. The Court added that a plaintiff may show constructive discharge by demonstrating that he or she was intentionally placed in a job for which he or she was unqualified and was unable to perform, "regardless of whether the environment [was] intolerably abusive or oppressive." *See Green v. Harvard Vanguard Med. Assocs., Inc.*, 944 N.E.2d 184, 195 n.10 (Mass. App. Ct. 2011); *see also Allison v. Treadco, Inc.*, 1 Fed. Appx. 598, 599 (8th Cir. 2001).

Although "a close case," the Court reversed the district court's grant of defendants' motion to set aside the verdict because there was not "a complete absence of probative facts to support the verdict."

The Eighth Circuit found that the Board's failure to respond to Sanders's multiple requests for a job description supported her claim and met the requirement that she give defendants a reasonable chance to remedy a problem before resigning. The Court also found evidence that the Board intended to compel her to resign by summarily reassigning her and Thompson right after the Board's racial composition changed and voting to eliminate her new position.

Although "a close case," the Court reversed the district court's grant of defendants' motion to set aside the verdict because there was not "a complete absence of probative facts to support the verdict." *See Wilson v. Brinker Int'l, Inc.*, 382 F.3d 765, 769 (8th Cir. 2004).

Punitive Damages

The Eighth Circuit explained that Sanders was entitled to recover punitive damages if there was evidence that defendants unlawfully discriminated against her with malice or reckless indifference to her

federally protected rights. *See* 42 U.S.C. § 1981a(b)(1). The plaintiff must show that the employer knew that it was discriminating and that it might be acting contrary to federal law. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). The Court then adopted the approach of the Third Circuit, which has held that, if a plaintiff presents evidence of overt race discrimination, it is sufficient to show that the defendant knew that such discrimination violated federal law unless the defendant affirmatively proves ignorance. *See Alexander v. Riga*, 208 F.3d 419, 432 (3d Cir. 2000).

Applying such standard, the Eighth Circuit noted that Sanders had presented strong evidence that the individual defendants discriminated against her on the basis of race. The Court opined that such evidence together with defendants' failure to consult with the superintendent, legal counsel, or even employee manuals before demoting Sanders substantiated that defendants acted with reckless indifference to whether they were violating federal law. The Court reversed and remanded for Sanders to prove her punitive damages claim subject to the affirmative defense of ignorance of federal law.

Factors to Consider on Constructive Discharge

Noting that it had not established factors for determining whether a plaintiff has been constructively discharged, the Court adopted the Fifth and Sixth Circuit's approach, which involves seven factors to be considered individually or in combination: (1) demotion; (2) salary reduction; (3) reduction in responsibilities; (4) reassignment to degrading work; (5) reassignment to a younger supervisor; (6) harassment by the employer; or (7) early retirement offers on terms that would make the employee worse off whether or not the offer was accepted. *See Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994); *Logan v. Denny's, Inc.*, 259 F.3d 558, 569 (6th Cir. 2001).

Sexual Harassment

Eighth Circuit Affirms Dismissal of EEOC's Action Based on Its Failure to Investigate or Conciliate Each Aggrieved Person's Claim

Equal Employment Opportunity Commission v. CRST Van Expedited, Inc., Nos. 09-CV-3764, 09-CV-3765, 10-CV-1682, 2012 BL 41485 (8th Cir. Feb. 22, 2012)

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the Equal Employment Opportunity Commission's (EEOC) hostile work environment claims filed on behalf of 67 "aggrieved persons" pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-5, due to the EEOC's failure to investigate the claims, issue a reasonable cause determination, or conciliate the claims prior to commencing litigation. The Court also held that, even though some individual intervening plaintiffs were judicially estopped from pursuing their claims because they did not disclose their involvement in the EEOC's action in their bankruptcy petitions, the EEOC was not judicially estopped from suing the employer, CRST Van Expedited, Inc. (CRST), in its own name to correct CRST's allegedly discriminatory employment practices against the plaintiffs.

Addressing the merits of the claims, the Court determined that CRST's "Lead Drivers" were not supervisory employees merely because they controlled minor aspects of their trainees' work and made non-binding recommendations to superiors concerning whether trainees should be promoted to full-time status. Therefore, the Sixth Circuit held that CRST was not vicariously liable for any harassment that the Lead Drivers allegedly perpetrated. Moreover, because most of the remaining plaintiffs

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did not adequately allege sufficiently severe or pervasive conduct, or did not report the alleged harassment, or because CRST took prompt remedial action when the conduct was reported, the Court concluded that (with two exceptions) CRST could not be held liable for co-worker harassment. Finally, the Court vacated, without prejudice, the district court's award of $ 4.5 million in attorney' fees to CRST because, in light of the its ruling that the claims of two employees survived summary judgment, CRST was no longer a "prevailing" defendant under 42 U.S.C. § 2000e-5(k).

District Court Dismissed All of EEOC's Claims

CRST operated a fleet of team-driven tractor trailers. The team consisted of two drivers who alternated between driving and sleeping in their truck's sleeper cab for up to 21 days to maximize mileage and minimize stops. Newly hired drivers were required to successfully complete a training program, which included a 28-day road trip with an experienced "Lead Driver." Following the trip, the Lead Driver gave the trainee a pass/fail evaluation that superiors considered when determining whether to certify the trainee as a CRST driver. But the Lead Drivers could not hire, fire, promote, demote, or reassign trainees.

In 2005, a CRST trainee, Monika Starke, filed a charge of discrimination with the EEOC, alleging that she was sexually harassed by her Lead Driver who she claimed "forced [her] to have unwanted sex with him on several occasions while [they] were traveling in order to get a passing grade." The EEOC investigated Starke's complaint, as well as similar complaints filed by four other CRST driver-trainees. In 2007, the EEOC notified CRST that it had found reasonable cause to believe that CRST subjected Starke and "a class of employees" to sexual harassment. In 2007, after the parties could not reach an agreement on conciliation, the EEOC sued CRST pursuant to Section 706 of Title VII "to correct [CRST's] unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of [CRST] who were adversely affected by such practices."

For nearly two years, the EEOC did not identify all the women comprising the putative class. The district court concluded that the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief, and instead was using discovery to find them. Finally, the EEOC identified 270 "aggrieved individuals," but when it failed to make 120 of them available for deposition, the district court imposed a "discovery sanction" forbidding those persons from testifying at trial and barring the EEOC from seeking relief on their behalf.

In a series of orders, the district court dismissed all the EEOC's claims, finding that: (1) the EEOC was barred from seeking relief for 67 women because it had failed to conduct a reasonable investigation and *bona fide* conciliation of these claims; (2) three women were judicially estopped from prosecuting their claims for failure to disclose their involvement in the lawsuit in their bankruptcy petitions; and (3) the remaining claims failed on the merits. The EEOC appealed the dismissal of its claims on behalf of 107 women.

EEOC Failed to Meet Statutory Conditions Precedent to Filing Suit

The Sixth Circuit noted that Section 706 of Title VII authorizes the EEOC to bring suit in its own name, on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). Before the EEOC may do so, however, the following statutory conditions precedent must be met: (1) the aggrieved employee must file a charge with the EEOC; (2) the agency must then "investigate the charge and determine whether there is reasonable cause to believe that it is true"; and (3) if reasonable cause exists, the EEOC must then "attempt[] to remedy the objectionable employment practice through the informal, nonjudicial means "of conference, conciliation, and persuasion." *Occidental Life Insurance Co. of California v.EEOC*, 432 U.S. 355, 368 (1977).

Further, the Sixth Circuit has held that, while "[t]he permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge" and may extend to any discrimination "developed during a reasonable investigation of the charge," the "additional allegations of discrimination [must be] included in the reasonable cause determination and subject to a conciliation proceeding" before the EEOC can pursue them in litigation. *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668 (8th Cir. 1992).

The Sixth Circuit concluded that, with respect to the 67 persons at issue, the EEOC did not investigate their claims (or even identify the claimants) prior to the commencement of its action, much less make a reasonable-cause determination as to their specific allegations or attempt to conciliate the claims. Moreover, given the EEOC's total abdication of its role in the administrative process, the Court found that the district court did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint as to these 67 women under 42 U.S.C. § 2000e-5(f)(1).

EEOC Not Judicially Estopped

The Sixth Circuit upheld the district court's finding that three individual plaintiffs were judicially estopped from pursuing their claims on their own behalf because they did not disclose their involvement in the EEOC's action as a potential source of income in their bankruptcy petitions. However, addressing an issue of apparent first impression on the federal appellate court level, the Sixth Circuit held that a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the employer happened to discriminate against an employee who, herself, was judicially estopped.

Merits of Sexual Harassment Claims

Addressing the merits of the hostile work environment claims, the Court first held that CRST was not vicariously liable for any harassment that its Lead Drivers allegedly committed because

they did not have the authority to hire, fire, promote, or reassign the trainees to significantly different duties and were therefore not supervisory employees.

As for the co-worker sexual harassment claims, the Court found that, with two exceptions, the claims were deficient because: (1) the trainees alleged conduct that was not so severe or pervasive that it altered the conditions of the trainees' employment; (2) they failed to apprise CRST of the conduct; or (3) if they did, CRST took prompt and effective remedial action.

In sum, the Sixth Circuit affirmed the grant of summary judgment to CRST on the claims of 105 trainees but reversed on the claims of two trainees. Nevertheless, because CRST had not prevailed on all the claims, the Court vacated without prejudice the district court's award of $4.5 million in attorney's fees against the EEOC.

Ruling Does Not Apply to "Pattern-or-Practice" Litigation under Section 707 of Title VII

The Sixth Circuit noted that the EEOC did not plead that CRST engaged in "a pattern or practice" of gender discrimination or otherwise plead a violation of Section 707 of Title VII, 42 U.S.C. § 2000e-6. Further, assuming the EEOC had asserted such a claim, the district court held that, as a matter of law, there was insufficient evidence from which a reasonable jury could find that it was CRST's "standard operating procedure" to tolerate sexual harassment. *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918(N.D. Iowa 2009). Like the district court, the Sixth Circuit expressed no view as to whether the investigation, determination, and conciliation that the EEOC did conduct in this case would be sufficient to support a pattern-or-practice lawsuit, but it noted that at least one federal court has permitted the EEOC to use discovery to find more victims of sexual harassment in a Section 707 case. *See EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 934-44 (N.D. Ill. 2001).

Unemployment

Jobless Claims in U.S. Rose 8,000 Last Week to 362,000

Alex Kowalski | Bloomberg Law

March 8 (Bloomberg) -- The number of Americans filing claims for jobless benefits rose to 362,000 last week, a level consistent with an improving labor market.

Applications for unemployment insurance payments increased by 8,000 in the week ended March 3, Labor Department figures showed today. Economists forecast 352,000 claims, according to the median estimate in a Bloomberg News survey. The average over the past four weeks held close to a four-year low.

The rate of firings indicates companies have grown more comfortable with headcounts and could take on additional employees when demand picks up. Economists forecast a Labor Department report tomorrow will show that employers boosted payrolls in February and the jobless rate held at an almost three-year low.

"The level of claims is still quite low," said Jennifer Lee, a senior economist at BMO Capital Markets in Toronto. "I'm still encouraged by what we've seen in the labor market in recent months."

Stocks rose as more investors indicated they will participate in Greece's debt swap. The Standard & Poor's 500 Index climbed 0.6 percent to 1,361.22 at 10:58 a.m. in New York.

Estimates for first-time claims ranged from 345,000 to 370,000 in the Bloomberg News survey of 52 economists. The Labor Department revised the prior week's applications to 354,000 from the initially reported 351,000.

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Nothing Unusual

A Labor Department official today said there were no unusual circumstances affecting today's figures.

The four-week moving average, a less-volatile measure, was little changed at 355,000 from 354,750, which were the fewest since March 2008.

The number of people continuing to collect jobless benefits rose by 10,000 in the week ended Feb. 25 to 3.42 million. The continuing claims figure does not include the number of workers receiving extended benefits under federal programs.

Those who've used up their traditional benefits and are now collecting emergency and extended payments increased by about 26,800 to 3.4 million in the week ended Feb. 18.

The unemployment rate among people eligible for benefits held at 2.7 percent in the week ended Feb. 25, today's report showed. Twelve states and territories reported an increase in claims, while 41 had a decrease.

Initial jobless claims reflect weekly firings and tend to fall as job growth -- measured by the monthly non-farm payrolls report -- accelerates.

More Employment

Job creation has strengthened in recent months. The projected 210,000 increase in February payrolls would cap the best six-month stretch of job growth since the period ended June 2006, more than a year before the recession began. Employers took on an estimated 1.13 million workers from September through February.

Data from a private report based on payrolls showed companies added more workers in February than a month earlier. Employment increased by 216,000 last month after a 173,000 gain in January, according to figures from ADP Employer Services released yesterday.

Improving job prospects will help absorb those who are still losing jobs. International Business Machines Corp., the world's largest computer-services provider, fired more than 1,000 workers in North America last week, according to employee advocacy group Alliance@IBM.

Federal Reserve Chairman Ben S. Bernanke said "the job market remains far from normal" when he spoke at a U.S. House hearing in Washington last week. The 8.3 percent unemployment rate and a subdued inflation outlook warrant a highly accommodative stance for monetary policy, he said.

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Employee Benefits

Health & Welfare Benefits

Finding DOMA Violated Equal Protection, Federal Employee Health Benefits Plan Administrator Required to Allow Employee to Enroll Same-Sex Spouse in Plan

Golinski v. U.S. Office of Personnel Management, No. 10-CV-257, 2012 BL 49822 (N.D. Cal. Feb. 22, 2012)

In a closely watched, politically charged case, the U.S. District Court for the Northern District of California held that federal judicial employee Karen Golinski was entitled to enroll her wife in her health insurance under the Federal Employees Health Benefits Program (Plan) because denying recognition of her lawful same-sex marriage under the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, violated Golinski's equal protection rights. The Court permanently enjoined the Plan Administrator, U.S. Office of Personnel Management (OPM), from interfering with such enrollment, thus enabling enforcement of the U.S. Court of Appeals for the Ninth Circuit's order under its Employment Dispute Resolution Plan (EDR Plan) that Golinski be permitted to enroll her wife. *See In the Matter of Golinski*, 587 F.3d 956 (9th Cir. 2009).

The Court, whose decision has already been appealed, extensively discussed legislative history and equal protection analysis, finding that § 3 of DOMA, the federal definition of marriage codified at 1 U.S.C. § 7, discriminates on the basis of sexual orientation. Notably, the Court held that sexual orientation is a suspect or quasi-suspect class deserving of heightened scrutiny, concluding that *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), in which the Ninth Circuit concluded that homosexuals did not qualify as a suspect or quasi-suspect class and that rational basis review was warranted, was no longer binding precedent. The Court held that DOMA, as applied to Golinski, "violates her right to equal protection of the law under the Fifth Amendment to the United States Constitution by, without substantial justification or rational basis, refusing to recognize her lawful marriage to prevent provision of health insurance coverage to her spouse."

Golinski Sought to Enroll Her Wife in the Plan

Golinski worked for the Ninth Circuit as a staff attorney. In August 2008, when same-sex marriage was permitted under California law, Golinski married a woman, Amy Cunninghis, her partner of more than 20 years.

Golinski attempted to enroll Cunninghis in her existing family coverage under the Plan, a comprehensive health insurance program for federal civilian employees and their families, which already insured the couple's minor son. Pursuant to OPM's regulations, "self and family coverage" "includes all family members who are eligible to be covered by the enrollment." 5 C.F.R. § 890.302(a)(1). The definition of "member of family" includes "the spouse of an employee." 5 U.S.C. § 8901(5).

The Administrative Office of the U.S. Courts (AO) refused to process Golinski's request on the grounds that Golinski's identification of Cunninghis as "family" was barred by § 3 of DOMA, which states,

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

Credit: Jin Lee/Bloomberg

Ninth Circuit Orders OPM/AO to Allow Enrollment

Golinski filed a complaint under the EDR Plan, alleging that the AO's refusal to allow her wife to enroll violated the EDR Plan's ban on discrimination on the basis of sex or sexual orientation. The Chief Judge of the Ninth Circuit, Alex Kozinski, in his capacity as arbiter of the Judicial Council, agreed and ordered that the AO process Golinski's request. Judge Kozinski concluded that, despite DOMA's language, the OPM had the discretion to provide benefits to Golinski's same-sex spouse by construing the terms "family members" and "member of family" to establish a floor, not a ceiling, for coverage eligibility. *See In the Matter of Golinski*, 587 F.3d 901 (9th Cir. 2009). (The Court disagreed with such reasoning, finding that the statutory definition was unambiguous.) The AO complied, but the OPM directed Golinski's insurer not to process her request on the grounds that DOMA defines "spouse" as a member of the opposite sex, precluding enrollment of a same-sex spouse.

In an escalating dispute involving separation of powers, Judge Kozinski directed the OPM to rescind its order to Golinski's insurer and to stop interfering with the Ninth Circuit's jurisdiction. *Golinski*, 587 F.3d 956, discussed in *Ninth Circuit Orders Administrative Office of the United States Courts to Provide Health Insurance to Employee's Same-Sex Spouse*, Bloomberg Law Reports - Labor & Employment, Vol. 3, No. 51 (Dec. 21, 2009). Instead of appealing, OPM issued a press release declaring that it was bound by DOMA, not the Court's order.

Golinski Sues OPM

In January 2010, Golinski sued the OPM. While OPM's motion to dismiss was pending, at President Barack Obama's direction, Attorney General Eric Holder announced on February 23, 2011, that the Justice Department would no longer defend § 3 of DOMA because it was unconstitutional. In March 2011, the Court dismissed Golinski's complaint but granted her leave to amend. *Golinski v. U.S. Office of Personnel Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011). Golinski filed an amended complaint seeking declaratory and injunctive relief that § 3 of DOMA as applied to her violated her equal protection rights. The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) was allowed to intervene for the limited purpose of defending DOMA. BLAG moved to dismiss, and Golinski moved for summary judgment.

Sexual Orientation Deserves Heightened Scrutiny

As the Court stated, the Fifth Amendment does not contain a separate equal protection clause, but the Due Process Clause encompasses an equal protection element. *See* U.S. Const. amend. V.

The Court explained that, as applied here, DOMA creates a distinction between legally married couples by permitting benefits for opposite-sex couples but not same-sex couples, thus treating them differently because of their sexual orientation (and sex). The Court determined that the holding in *High Tech Gays*, 895 F.2d 563, requiring rational basis review for sexual orientation classifications, was no longer binding precedent because the analysis was severely undermined by more "recent and overriding precedent," especially *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The Court opined that the level of review of sexual orientation classifications was thus open and extensively analyzed several factors including whether (1) gay men and lesbians have experienced a history of discrimination; (2) sexual orientation is irrelevant to a person's ability to contribute to society; (3) sexual orientation is immutable or highly resistant to change; and (4) political powerfulness. *See Varnum v. Brien*, 763 N.W.2d 862, 887-88 (Iowa 2009) (collecting cases). The Court concluded

that heightened scrutiny was appropriate for reviewing statutory classifications based on sexual orientation. *See In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009).

DOMA Fails Heightened Scrutiny and Rational Basis Review

The Court then thoroughly reviewed each proffered justification for DOMA's classification to determine whether it was "substantially related to an important governmental objective," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), first emphasizing that DOMA's legislative history was "replete with expressed animus toward gay men and lesbians." The Court examined the purported underpinnings of each justification and concluded that none of the four governmental interests that Congress offered met the standard: (1) promoting responsible procreation and child-rearing; (2) protecting and nurturing the institution of traditional marriage; (3) defending traditional concepts of morality; and (4) preserving scarce governmental resources.

Alternatively, the Court concluded that DOMA fails even rational basis review as other courts have done. *See Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 379 (D. Mass. 2010), now on appeal in the First Circuit, discussed in Joseph S. Adams, Todd A. Solomon, Stephen R. Miller, & Brian J. Tiemann, Mc Dermott Will & Emery LLP, *Court Rulings that Federal Ban on Same-Sex Marriage is Unconstitutional Raises Significant Implications for Employee Benefit Plans*, Bloomberg Law Reports - Employee Benefits, Vol. 3, No. 16 (Aug. 2, 2010). The Court concluded that "neither Congress' claimed legislative justifications nor any of the proposed reasons proffered by BLAG constitute bases rationally related to any of the alleged governmental interests."

Further Information

BLAG has also intervened in the appeal of *Gill* in the First Circuit, where oral argument is scheduled for April 4, 2012. A large number of *amici curiae* on both sides have filed briefs in *Gill*, including corporations, religious groups, government officials, and non-profit organizations. *See Gill v. OPM*, No. 10-CV-2214 (filed Oct. 18, 2010).

For additional information on recent court decisions and legislative developments, please *see, e.g.*, Peter O'Hara, *New York's Marriage Equality Act, DOMA and Domestic Partner Benefits*, Bloomberg Law Reports - Labor & Employment, Vol. 6, No. 2 (Jan. 9, 2012); Peter O'Hara, *Ninth Circuit Grants Preliminary Injunction Blocking Arizona Law Eliminating Same-Sex Employee Benefits*, Bloomberg Law Reports - Labor & Employment, Vol. 5, No. 38 (Sept. 19, 2011).

Reporting & Disclosure

Not All Plan Documents Are Created Equal: Common Mistakes in Health & Welfare Plan Disclosures

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THE RIGHT RESPONSE AT THE RIGHT TIME

Contributed by Isabella Lee and Tiffany Downs, Ford & Harrison LLP

Many plan sponsors rely on their insurance carriers or third-party service providers to provide documents describing their health and welfare plans for distribution to employees. These documents may take the form of an insurance policy, certificate of insurance, or summary of benefits booklet (collectively "provided documents").

Plan sponsors will maintain and distribute provided documents as their plans' summary plan descriptions (SPDs) and/or plan documents. However, often times provided documents do not contain the required plan information and will not satisfy a plan sponsor's disclosure obligations under the Employee Retirement Income Security Act of 1974 (ERISA). Moreover, insurers or service providers do not draft policies with ERISA compliance in mind. Therefore, these documents may include or omit important language that could result in a plan sponsor taking on unnecessary liability.

Often times the provided documents do not contain all of the information that is required in a plan document or SPD.

Most plan sponsors are aware that they must have a plan document and summary plan description (SPD) for each health and welfare benefit offering. These disclosures serve the important purpose of informing participants about the benefits the plan provides, how the plan operates, and their rights relating to those benefits.

Among other things, the plan document and SPD must specify the plan administrator's name and contact information, the agent for service process for the plan, eligibility provisions, the plan's other fiduciaries, the statement of ERISA rights, the plan's funding, and the plan's claim procedures. Further, the plan documents must include disclosures required by other federal laws, including COBRA, HIPAA, Healthcare Reform, FMLA, and USERRA.

In order to ensure their plan disclosures are ERISA-compliant, plan sponsors should review their provided documents to confirm that they contain all of the necessary information.

Courts have imposed financial penalties against plan sponsors who provide non-ERISA compliant insurance documents in lieu of a SPD.

In *Killian v. Concert Health Plan*,[1] the plan sponsor responded within 30 days to a request for an SPD. However, rather than provide an actual SPD, the plan sponsor tendered a copy of the plan's 50-page certificate of insurance and a copy of the plan sponsor's benefits summary. The court rejected the plan sponsor's submissions, finding that they did not constitute an ERISA-compliant SPD. In so holding, the court concluded that a certificate of insurance cannot constitute both the comprehensive benefits portion of the policy and the summary thereof. The employee benefits summary also lacked "several essential SPD requirements" such as official names of the plan or the plan administrator, the administrator's contact information, the plan sponsor's EIN, the name and address of the agent for service of legal process, claims review procedures, or the mandatory, consolidated statement of ERISA rights. The court further held that the plan sponsor should have been aware of ERISA's requirements for SPDs.

Penalties for failure to provide plan documents of up to $110 per day from the date of failure or refusal may be imposed.[2] The actual amount may vary based on the court's discretion. Factors in the court's decision include the length of delay, bad faith, and harm to the participant.[3]

Plan administrators are liable for failures to comply with information requests, even if they have a third-party claims administrator.

Plan sponsors typically serve as the plan administrator for their welfare benefit plans. Often, plan administrators will delegate their claims administration to a third-party service provider, such as an insurance company. However, plan administrators are ultimately liable for statutory penalties due to failure to produce plan documents. Therefore, an insurance company who serves as the claims administrator may not be held responsible for the welfare benefit plan's purported failure to produce documents.[4]

Eligibility provisions may not address whether coverage applies to all worker categories.

Eligibility provisions in plan documents and SPDs will dictate whether an employee is eligible to participate in a benefit plan. Typically, eligibility provisions describe eligible employees as "employees who work 30+ hours a week" or "full-time employees." However, such provisions do not account for non-traditional employment types, such as independent contractors, temporary workers, leased employees, seasonal employees, or other discrete groups of workers.

By failing to spell out which workers are entitled to benefits coverage, plan sponsors may take on unintended liability for benefits coverage. In *Vizcaino v. Microsoft Corp.*,[5] a class of workers classified as contractors sued for participation in various Microsoft benefit plans (including a stock option plan). After years of litigation, the court concluded that the former contractors were common-law employees of Microsoft and entitled to the company's benefits. Microsoft settled the case in 2000 for $97 million.

The lessons from the *Microsoft* case carry forward to health and welfare plans. Broadly worded eligibility provisions may result in unexpected and substantial liability for employee benefits to workers that plan sponsors believed to be excluded from coverage. Plan sponsors should review eligibility provisions to ensure that the benefits they provide are, indeed, what they intended.

> Plan sponsors will want to ensure that their plan disclosures contain the "magic language" so that they receive the most favorable standard of review should the plan's benefits determinations be scrutinized by a court.

Amendments to an SPD may not carry out a plan sponsor's intended changes if the plan document is not similarly amended.

The Supreme Court's decision last year in *Cigna Corp. v. Amara*[6] held that the formal plan document is what controls the benefits, not the plan summaries (i.e. the SPDs). A plan's SPD provisions will change as insurance carriers or third-party service providers update the insurance policy, certificate of insurance, or informational booklet to reflect coverage changes. However, plan sponsors often do not realize that the underlying plan document must also be amended. Therefore, the plan sponsor and plan participants may be relying on the SPD, when the relevant provisions are governed by the plan document.

Accordingly, plan sponsors must ensure that their plan documents and SPDs do not conflict and provide the benefits they intended.

Provided documents may not contain the "magic language" that expressly grants the plan administrator's final discretionary review.

Plan language regarding a plan administrator's decisionmaking authority dictates the applicable standard of review if a claims decision is brought before a court.

Where a plan document expressly provides that the plan administrator has "discretionary authority" to interpret and administer the plan's terms and to make factual determinations, a court will review a plan's decision under an "abuse of discretion" standard. The abuse of discretion standard is a more favorable standard of review, because it requires a plaintiff to show that the plan administrator's decision was "arbitrary and capricious." In other words, a court will uphold the plan administrator's interpretation of a plan unless the decision was without reason, unsupported by substantial evidence, or erroneous as a matter of law.

Without plan language granting a plan administrator "discretionary authority," a reviewing court will apply the less favorable "*de novo*" standard of review. *De novo* review enables the court to review claims without any deference to the prior decisions and consider additional information.

Plan sponsors will want to ensure that their plan disclosures contain the "magic language" so that they receive the most favorable standard of review should the plan's benefits determinations be scrutinized by a court.

Provided documents often do not designate the claims administrator as a named fiduciary.

Plan sponsors typically delegate their plan administrator discretion to make benefits determinations to a third-party administrator (TPA) who serves as the claims administrator. Where the TPA also drafts the provided documents, such documents may fail to designate the TPA as a named fiduciary.

Plan disclosures should name any persons or entities who perform fiduciary functions, such as exercising discretionary responsibility, authority, or control over plan management decisions and disposition of Plan assets, as named fiduciaries. Fiduciaries must act solely in the best interest of the plan and its participants. Due to the higher standard to which they are held, fiduciaries are more likely to engage in careful review of claims and benefits determinations, as they may be personally liable for damages to the plan resulting from breaches of their fiduciary duties.

The plan disclosures may reference procedures required by other federal laws but not actually contain such procedures.

ERISA § 609(a) requires group health plans to provide benefits in accordance with the applicable requirements of any qualified medical child support order (QMCSO). Further, ERISA requires that a group health plan have written QMCSO procedures to distribute to participants. Additionally, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires that a group health plan's plan documents contain provisions that require the privacy and security of individuals' protected health information.

Frequently, provided documents will reference QMCSO or HIPAA procedures, and refer participants to the plan administrator for additional information or copies of such procedures. Unfortunately, plan sponsors frequently discover that provided documents do not contain the required procedures, their service providers do not draft such procedures for plan sponsors, and that the creation of any required procedures are their sole responsibility.

The plan documents may create contractual responsibilities on the plan sponsor that are not otherwise required under ERISA.

Plan sponsors may unknowingly use provided documents that were intended for fully insured plans for use with their self-insured benefits. In doing so, the plan sponsor creates potential liabilities for itself that were not required by ERISA but must nevertheless be upheld because the plan sponsor has unintentionally created a contractual agreement with plan participants.

Self-funded short-term disability benefits is a common scenario where this situation arises. Plan sponsors will use provided documents intended for fully-insured disability plans, which contain second-level claims review procedures and impose fiduciary-level review standards. However, self-funded short-term disability benefits may be "payroll practices" exempt from ERISA requirements. By using ERISA plan language to administer a non-ERISA benefit, a plan sponsor may subject itself to plan obligations that could otherwise have been avoided.

Plan sponsors can amend their plan disclosures to correct deficiencies.

The ultimate responsibility for accurate and up-to-date plan disclosures remains with the plan sponsor, and the plan sponsor may be liable for any errors or omissions. Plan disclosure failures can result in time-consuming and expensive penalties and litigation. Proactive legal review of plan documents and adoption of necessary plan amendments can help prevent such costs and ensure compliance in advance of a Department of Labor audit.

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[1] No. 07 C 4755, 2010 BL 152449 (N.D. Ill. 2010).

[2] 29 U.S.C. § 1132(c)(1); 29 C.F.R. § 2575.502c-1.

[3] *See Killian v. Concert Health Plan*, No. 07-CV-4755, 2010 BL 299958 (N.D. Ill. Dec. 17, 2010) (imposing $10 per day); *Kasireddy v. Bank of America Corp. Corporate Benefits Communications*, No. 09-CV-7940, 2010 BL 245830 (N.D. Ill. Oct. 13, 2010) (imposing $110 per day).

[4] *See Rumpf v. Metropolitan Life Insurance Co.*, No. 09-CV-557, 2010 BL 167748 (E.D. Pa. July 23, 2010).

[5] 120 F.3d 1006 (9th Cir. 1997).

[6] 131 S. Ct. 1866 (2011).

Retiree Health Plans

District Court Reinstates Retirees to Cost-Free Health Care Under Terms of Current Plan

Peter O'Hara | Bloomberg Law

Tackett v. M&G Polymers USA, LLC, Case No. 07-CV-126, 2012 BL 45978 (S.D. Ohio Feb. 21, 2012)

The United States District Court for the Southern District of Ohio granted the prevailing plaintiffs' motion for a permanent injunction reinstating their lifetime, contribution-free health care benefits under plans sponsored by M & G Polymers USA, LLC (M&G). Having previously held that plaintiffs – retirees who had worked at a plant operated by M&G and its predecessors before August 5, 2005 – had a vested right to the benefits, the Court now found that plaintiffs were entitled to the injunction because: (1) they had prevailed on the merits; (2) absent the injunction, they would suffer irreparable injury, including ongoing quality of life concerns; (3) they would suffer far greater hardship, including denial of benefits and having to pay improper premiums, if the injunction were denied than M&G would if the injunction were granted; and (4) it was in the public interest to impose the burden of coverage upon the private company that bargained to provide the coverage, rather than upon public assistance programs. Because, however, the pertinent collective bargaining agreements (CBAs) did not address the details of the vested benefits and the retirees had accepted modifications to their benefits in the past, the Court ordered that plaintiffs be reinstated into the current version of the health care plan, rather than be provided with more favorable benefits under terms set forth in the CBA.

Plaintiffs' Health Care Benefits Vested

In their class action complaint, plaintiffs alleged that M&G violated their right to lifetime contribution-free health care benefits by shifting a large part of the health care costs onto plaintiffs. They asserted claims under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and ERISA §§ 502(a)(1)(B), and 502(a)(3), 29 U.S.C. § 1132(a)(1)(B) and 1132(a)(3).

The district court initially granted M&G's motion to dismiss the action for failure to state a plausible cause of action. The Sixth Circuit affirmed the dismissal of plaintiff's claim under ERISA § 502(a)(3), but reversed the dismissal of plaintiffs claim under the LMRA and ERISA § 502(a)(1)(B). *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478 (6th Cir. 2009), discussed in Bloomberg Law Reports® -Employee Benefits, Vol. 2, No. 8 (Apr. 20, 2009).

On remand, the district court conducted a bench trial on the issue of liability and concluded that the CBAs between plaintiffs' union and a series of employers entitled those who retired before August 5, 2005 with vested retiree health care benefits. As to employees who retired on or after August 5, 2005, however, the Court held that there was an enforceable cap-letter agreement between the union and M&G that permitted M&G to charge affected retirees monthly contributions for their healthcare coverage, even if those contributions became prohibitively expensive. *Tackett v. M & G Polymers USA, LLC*, No. 07-CV-126, 2011 BL 204117 (S.D. Ohio Aug. 5, 2011).*See Ohio District Court Finds Retiree HealthCare Benefits Vested*, Bloomberg Law Reports® -Labor & Employment, Vol. 5, No. 35 (Aug. 22, 2011).

While the issue of damages was still pending, the prevailing plaintiffs moved for a permanent injunction reinstating their contribution-free health care benefits.

Plaintiffs Entitled to Permanent Injunction

Although the Court had previously held that the benefits had vested, it revisited the issue at some length, particularly its prior conclusion that, in reversing the district court's dismissal for failure to state a plausible claim, the Sixth Circuit had ruled on the merits that the benefits had vested. The Court vigorously defended its interpretation of the Sixth Circuit decision, but also reiterated, that, even if its interpretation was wrong, the prevailing plaintiffs had nevertheless independently demonstrated that they had a vested right to lifetime, uncapped (or contribution-free) medical benefits under the terms of the CBAs.

Applying the traditional four-part test, the Court then found that plaintiffs met the first requirement for an injunction because they had prevailed on the merits of their claims, and it was unlikely that M&G would prevail on appeal. Further, the Court determined that, regardless of any money ultimately awarded them, plaintiffs would suffer irreparable harm absent equitable relief, including quality of life concerns, potentially shortened life spans, ongoing anxiety, and undue strife.

For these same reasons, the Court found that the balance of equities favored plaintiffs who would suffer great hardship without the injunction while M&G would continue improperly charging premiums and denying benefits. The Court also concluded that the enforcement of M&G's contractual obligations was unquestionably in the public interest, which would also be furthered by transferring the burden of coverage to the private company that bargained to provide such coverage rather than imposing the burden on public assistance programs.

Finally, the Court decided not to require plaintiffs to post a bond, given that plaintiffs' age and limited financial means outweighed the limited possibility that M&G would prevail on appeal. In so ruling, the Court noted that M&G had prospered from its impropriety for years and presented testimony in support of its liability arguments that the Court recognized as simply false. Thus, the Court held that plaintiffs were entitled to a permanent injunction without posting a bond and turned to what the scope of the injunction should be.

Plaintiffs Entitled to Benefits under Terms of Current Plans

The primary issue the Court had to decide in determining the scope of the injunction was whether plaintiffs should be provided with coverage under the more generous terms of one of the plans set forth in the CBA or under the terms of the plan as it currently existed. To resolve this issue, the Court first looked to the terms of the CBA, applying basic rules of contract interpretation as required by *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983). If there was ambiguity in the CBA, the Court would then resort to extrinsic evidence to ascertain what benefits the parties intended to vest. *Id.*

Plaintiffs relied on a recent district court decision, which held that a class of retirees was entitled to the health-care benefits in effect at the time they vested because: (1) the only circumstances under which the parties had allowed prior modifications to benefits was through a collectively bargained agreement; and (2) a plant shutdown agreement explicitly barred modifications to the retirees' vested welfare benefits through future negotiations. *Reese v.CNH Global N.V.*, No. 04-CV-70592, 2011 BL 56319 (E.D. Mich. Mar. 3, 2011). The Court, however, found the decision was of limited relevance, given that plaintiffs had not presented evidence of a comparable course of conduct between the parties or any contractual language prohibiting modification of benefits post-vesting.

Instead, the Court looked to the reasoning of prior Sixth Circuit decisions in the *Reese* case, which held that, under the terms of a CBA with terms comparable to the M&G CBAs, plaintiffs were entitled to lifetime vested health care benefits but not necessarily to the same benefits in effect when the benefits vested. *See Reese v.CNH America LLC*, 574 F.3d 315, 327(6th Cir. 2009);*Reese v.CNH America LLC*, 583 F.3d 955 (6th Cir. 2009). Determination of that issue, the Sixth Circuit instructed, would depend on such factors as whether: (1) the retirees had approved prior modifications; (2) the changes the employer made diminished the nature of the benefits (as opposed to any particular benefit itself); and (3) the employer made reasonable changes under a prior course of dealing approach. *Id.*

Applying this analysis, the Court found that the retirees had tacitly agreed to prior modifications to their benefits, including modifications that enhanced their benefits. Further, unlike the situation in the *Reese* case, the Court determined, plaintiffs' union lacked the ability to negotiate retiree benefits and therefore benefit changes could and did occur absent company-union negotiation. Moreover, in the Court's view, the modifications that would result from using the terms of the current plan were not so significant that they would diminish the essential nature of the benefits.

The Court concluded that the proposition that plaintiffs' lifetime vested benefits had to "be maintained precisely at the level provided for in the [CBA] . . . [was] not supported by the [CBA], extrinsic evidence provided by the parties or common sense." *Reese*, 574 F.3d at 327. Accordingly, the Court held that providing the prevailing plaintiffs with benefits under the current version of the health care plan was appropriate.

Further Information

For commentary on and analysis of recent litigation involving retiree health benefits claims, please see *Retiree Health Benefits Litigation in 2011,*Bloomberg Law Reports® - Labor & Employment, Vol. 6, No. 5 (Jan. 30, 2012).

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Standard of Review

Circuit Courts' Jurisprudence Regarding Conflict of Interest in ERISA Benefit Claims Determinations: Now and *Glenn*

Tracey S. Bellapianta | Bloomberg Law

Nearly four years have passed since the Supreme Court decided the landmark case *Metropolitan Life Insurance Co. v. Glenn*,[1] which sought to clarify the appropriate standard of judicial review of benefits determinations by fiduciaries or plan administrators under the Employee Retirement Income Security Act § 502(a)(1)(B).[2] Specifically, the *Glenn* court addressed situations where a conflict of interest exists because the same party both decides whether an employee is eligible for benefits and pays those benefits, and how such a conflict is to be taken into account by the courts.

As all of the appellate courts now have had time to consider the *Glenn* decision, it is appropriate to review the impact of *Glenn* on each circuit's ERISA claims review jurisprudence.[3] In so doing, this article will identify and discuss key cases in each circuit both before and after *Glenn*.

MetLife v. Glenn

The *Glenn* case began in the typical fashion as most ERISA benefits cases -- plaintiff Wanda Glenn filed a claim for benefits against Metropolitan Life Insurance Co. (MetLife), under ERISA § 502(a)(1)(B), after it terminated her long term disability benefits that she had been receiving on the ground that her condition had improved to the point that she was no longer "totally disabled" as defined by the relevant long term disability plan (Plan). The District Court upheld MetLife's denial of benefits, and Glenn appealed this decision to the United States Court of Appeals for the Sixth Circuit.[4]

The Sixth Circuit reviewed the administrative record under a deferential standard based on the language in the Plan granting MetLife the "discretionary authority to . . . determine benefits."[5] However, the court found there was a conflict of interest because MetLife was "authorized both to decide whether an employee is eligible for benefits and to pay those benefits" and overturned the District Court's decision, holding that the district court did not give the conflict of interest the appropriate consideration.[6]

The Supreme Court granted *certiorari* to this lawsuit in part to address a split among the Circuit Courts that was created by some of the issues left open by its prior decision in its decision *Firestone Tire & Rubber Co. v. Bruch*,[7] which sought to address the appropriate standard of judicial review of benefit determinations by fiduciaries or plan administrators under ERISA § 502(a)(1)(B).

– *Firestone's Influence*

The Supreme Court thus began its analysis in *Glenn* with a review of its prior decision in *Firestone*, highlighting four relevant principles: (i) in determining the appropriate standard of review, a court should be guided by the principles of trust law and, in doing so, should consider a benefit determination to be a fiduciary act which requires that the administrator owes a special duty of loyalty to plan beneficiaries; (ii) trust law requires courts to review a denial of plan benefits under a *de novo* standard unless the plan provides otherwise; (iii) where a plan provides language granting the administrator or fiduciary discretionary authority to determine eligibility for benefits, trust principles make a deferential standard of review appropriate; and (iv) if "a benefit plan gives discretion to a fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion."[8]

Focusing on the language in the fourth trust principle from *Firestone*, the Supreme Court held that the conflict of interest that arises when a plan administrator both evaluates claims for benefits and pays benefits claims creates the kind of "conflict of interest" to which *Firestone* refers. The Supreme Court found support for this conclusion based on the facts and circumstances in *Firestone*, which involved an employer who administered an ERISA benefits plan and both evaluated claims and paid for benefits.[9]

– *The Existence of a Conflict of Interest*

The Supreme Court ultimately reached the conclusion that "for ERISA purposes a conflict exists" because: (i) the employer's own conflict may extend to its selection of an insurance company to administer its plan, insofar as it may sacrifice the accuracy of the claims processing for a lower rate on an insurance policy; (ii) ERISA imposes higher-than-marketplace quality standards on insurers by: (a) setting forth a special standard of care upon a plan administrator to discharge its duties with respect to claims processing "solely in the interests of the participants and beneficiaries" of the plan pursuant to ERISA § 404(a)(1);[10] (b) focusing on the particular importance of accurate claims processing by insisting that administrators provide a full and fair review of claim denials; and (c) supplementing the marketplace and regulatory controls with judicial review of individual claim denials under ERISA § 502(a)(1)(B); and (iii) it is appropriate to create a rule treating insurance company administrators and employer alike with respect to the conflict because, under the "combination-of-factors method of review" set forth by the Supreme Court below, "significance or severity" of the conflict will be considered separately.[11]

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– *Taking into Account the Conflict of Interest*

The Supreme Court then turned to how the identified conflict of interest should be taken into account on judicial review of the discretionary benefit determination, and, again, ultimately relied on the underlying trust law principles set forth in *Firestone,* and the Supreme Court's holding that a conflict should "be weighed as a 'factor in determining whether there is an abuse of discretion.'"[12] Instead of elucidating a clear rule, the Supreme Court began its analysis by identifying the various methodologies it was rejecting:

- We do not believe that *Firestone's* statement implies a change in the standard of review, say, from deferential to *de novo* review.
- Nor would we overturn *Firestone* by adopting a rule that in practice could bring about near universal review by judges *de novo* - i.e., without deference - of the lion's share of ERISA plan claims denials[.]
- Neither do we believe it necessary or desirable for courts to create special burden-of proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict.[13]

The Supreme Court then set forth a self-described "combination-of-factors method of review" which requires that "judges take into account several considerations of which a conflict of interest is just one" and then reach a result as to the appropriateness of the claims determination by considering those factors together. Though no exact standard was articulated, the Supreme Court opinion provided the following guidance:

- Any one factor can act as a tiebreaker when the other factors are closely balanced, and the degree of closeness would depend on the tiebreaking factor's inherent or case-specific importance.
- Conflict of interest could be more important where circumstances suggest a higher likelihood that it affected the benefits decisions, including, but not limited to, cases where an insurance administrator has a history of biased claims administration.
- Conflict of interest could be less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, such as: walling off claims administrators from those interested in firm finances (interdepartmental information walls) or by imposing management checks that penalize inaccurate decision making irrespective of whom the inaccuracy benefits.[14]

The Circuit Courts

As a result of *Firestone*, and prior to the *Glenn* decision, the Circuit Courts grappled with how to handle conflicted claims administrators in benefit cases brought pursuant to ERISA. Over the years, certain trends emerged. The First, Second, Seventh and Eighth Circuits adopted what would be considered a "presumptively neutral" or an "actual conflict" approach. Under this approach, the courts applied an abuse of discretion analysis unless there was evidence of the existence of an actual conflict. The Third, Fourth, Fifth and Tenth Circuits employed a sliding scale approach, whereby the abuse of discretion standard would be modified based upon the severity of the conflict, as determined by the court. The Sixth and Ninth Circuits utilized a "combination of factors" analysis, which is arguably similar to the current standard set forth by the *Glenn* court, which requires that both actual and possible conflicts be considered. Finally, the 11th Circuit used its own burden shifting test, which ultimately required the claims administrator to prove that its decision was not tainted by self-interest.[15]

These tests and the manner in which the circuits revised their analysis in the wake of *Glenn* will be reviewed in turn.

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Actual Conflict Required

– **The Second Circuit**

– ***Pre*-Glenn**

Prior to *Glenn*, the Second Circuit followed the two-step test set forth in *Sullivan v. LTV Aerospace & Defense Co.*,[16] which assisted courts in determining whether a conflicted administrator's interpretation of the plan was arbitrary and capricious. Pursuant to the test, first, it looked to see whether the determination made by the administrator was reasonable in light of possible competing interpretations of the plan; and second, it examined whether the evidence showed that the administrator was in fact influenced by such conflict. When it was shown that a conflict of interest actually influenced that decision, the court would review *de novo* the administrator's decision and the deference otherwise accorded to the administrator would drop away.[17] Thus, the arbitrary and capricious standard applied unless the plaintiff could show not only that a potential conflict of interest existed, but also that the conflict affected the reasonableness of the administrator's decision.

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– *Post*-Glenn

After *Glenn*, the Second Circuit abandoned the standard described in *Pulvers v. First UNUM Life Insurance Co.* as inconsistent with the instructions from *Glenn*. In *McCauley v. First UNUM Life Insurance Co.*,[18] the Second Circuit recognized that a conflict of interest is to be weighed as a factor in determining whether there was an abuse of discretion. In *Durakovic v. Building Service 32 BJ Pension Fund*,[19] the Second Circuit identified another two-step inquiry, this time based on *Glenn*, to assist courts in reviewing benefits determinations made by conflicted administrators:

> The initial inquiry is simple: whether the "plan administrator both evaluates claims for benefits and pays benefits claims." 128 S. Ct. at 2348. (Evaluator-payor dual role creates a conflict between the administrator's responsibilities to plan beneficiaries and its financial interests.") if so, the court goes on to determine how heavily to weight the conflict of interest thus identified, considering such circumstances as whether procedural safeguards are in place that abate the risk, "perhaps to the vanishing point." *Id.* at 2351.[20]

– Seventh Circuit

– *Pre*-Glenn

Prior to the *Glenn* decision, the Seventh Circuit also adopted a presumptively neutral approach. In *Kobs v. United Wisconsin Insurance*,[21] the Seventh Circuit specifically rejected the argument that the defendant in that case had an inherent conflict of interest solely due to its dual role as insurer and administrator of the plan. Relying on Seventh Circuit precedent in *Mers v. Marriott International Group Accidental Death and Dismemberment Plan,*[22] the *Kobs* court held that it "presume[s] that a fiduciary is acting neutrally unless a claimant shows by providing specific evidence of actual bias that there is a significant conflict."[23]

– *Post*-Glenn

The Seventh Circuit appears to be the most critical of post-*Glenn* conflict of interest jurisprudence. In *Marrs v. Motorola*,[24] the Seventh Circuit expanded the application of *Glenn* to a plan administrator's interpretation of plan language and concluded that the decisive standard in the judicial review of such interpretation was the likelihood that a conflict of interest influenced the decision.

In doing so, the Seventh Circuit rejected the multi-factor approach used by other appellate courts, including its own *Jenkins v. Price Waterhouse Long Term Disability Plan,*[25] which held that the existence of a conflict of interest was one factor of many considerations. Writing for the court, Judge Posner argued that the multi-factored test was "not conducive to providing guidance to courts or plan administrators."[26] He also argued that the Supreme Court had not clearly adopted such a balancing test in *Glenn*. Instead he found that, in applying *Glenn*, a court should consider the likelihood that the conflict of interest influenced a benefit decision.[27] Under this approach, if the circumstances indicate that the decision denying benefits was decisively influenced by the plan administrator's conflict of interest, it must be set aside.

– Eighth Circuit

– *Pre*-Glenn

Prior to *Glenn*, the Eighth Circuit had held that it was wrong to assume a financial conflict of interest from the fact that a plan administrator was also an insurer.[28] In the Eighth Circuit, in order to obtain a less deferential review, the plaintiff was required to present "material, probative evidence demonstrating that (1) a palpable conflict of interest or a serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator's fiduciary duty to her."[29] To satisfy the second part of this requirement, the court held that plaintiffs must only show that the conflict or procedural irregularity has "some connection to the substantive decision reached."[30]

Thus, under *Woo v. Deluxe Corp.*, if a claimant proved a conflict of interest, he also had to prove a serious breach of the plan administrator's fiduciary duty. If the claimant met the so-called *Woo* test, the district court would then review the administrator's decision using a sliding-scale approach, decreasing the "deference given to the administrator in proportion to the seriousness of the conflict of interest."[31]

– *Post*-Glenn

The *Glenn* decision impacted the Eighth Circuit's approach to conflict of interest cases in several ways. In *Hackett*, the Eighth Circuit held that a conflict of interest must be taken into account if it is present, which was a departure from earlier Eighth Circuit case law.[32] In *Chronister v. Standard Insurance Co. of America*,[33] the Eighth Circuit clarified that, while a causal connection might be important in determining the amount of scrutiny for a plan administrator's decisionmaking, such a connection was no longer required. Furthermore, the Eighth Circuit has held that the weight of an administrator's conflict would depend upon the circumstances present in each case.[34]

– First Circuit

– *Pre*-Glenn

Thought it doesn't fall squarely into the "Actual Conflict" category, the First Circuit comes close insofar as, prior to *Glenn*, it resisted heightening the standard of review for structural conflict cases[35] and reviewed the resolution of benefits claims by structurally conflicted plan administrators for abuse of discretion, taking into account both the potential for conflict and the mitigating effect of market forces. [36] In *Doyle v. Paul Revere Life Insurance Co.*,[37] the First Circuit acknowledged that the *Firestone* case could be read to imply a heightening of the standard of review for structural conflict cases; however, held that market forces would work to keep employers from contracting with insurer who acquired

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reputations for "miserliness." The First Circuit thus adhered to a baseline abuse of discretion standard in cases involving structural conflicts, but gave the standard "more bite" where it put a "special emphasis on reasonableness."[38] As noted by the First Circuit, the bottom-line inquiry was "whether [the plan administrator] had substantial evidentiary grounds for a reasonable decision in its favor."[39] This approach left the claimant free to show an actual conflict–and if she succeeded in doing so, that showing would influence the evaluation of the benefits decision.

– *Post*-Glenn

In *Denmark v. Liberty*,[40] the First Circuit addressed the impact of *Glenn* on how it should handle structural conflict cases and noted that two aspects of the First Circuit's original approach required refinement. First, as a result of *Glenn*, the market forces rationale no longer allowed a reviewing court to disregard a structural conflict without further analysis.[41] The court held that *Glenn* required that structural conflicts be accorded weight - albeit not necessarily dispositive weight - in the standard of review analysis and that courts were "duty-bound" to inquire into what steps a plan administrator had taken to insulate the decision-making process against the potentially detrimental effects of structural conflicts. Second, the court held that *Glenn* "makes explicit what was implicit in our earlier decisions: in cases in which a conflict has in fact infected a benefit-denial decision, such circumstance may justify a conclusion that the denial was itself arbitrary and capricious (and, thus an abuse of discretion)."[42]

Sliding Scale Approach

– Third Circuit

– *Pre*-Glenn

Prior to the *Glenn* decision, the Third Circuit reviewed cases where the plan administrator was shown to have a conflict of interest with a sliding scale approach.[43] Under the sliding scale approach, "if the level of conflict is slight, most of the administrator's deference remains intact, and the court applies something similar to traditional arbitrary and capricious review; conversely, if the level of conflict is high, then most of its discretion is stripped away."[44] In *Pinto v. Reliance Standard Life Insurance Co.*, the Third Circuit held that an insurance company that both funds and administers benefits was generally acting under a conflict that warranted a heightened form of the arbitrary and capricious standard of review."[45] It further held that, under the heightened version of this form of review, a court should be "deferential, but not absolutely deferential" to the administrator.[46]

– *Post*-Glenn

After *Glenn*, the Third Circuit reconsidered its approach with respect to the review of benefits determinations by conflicted administrators in *Estate of Schwing v. The Lilly Health Plan*.[47] In *Schwing*, the Third Circuit held that *Glenn* required courts to take a conflict of interest into account when a conflict of interest is present, but that this should not impact the formulation of the standard of review.[48] Thus the Third Circuit invalidated its sliding scale approach.

– Fourth Circuit

– *Pre*-Glenn

Prior to the *Glenn* decision, the Fourth Circuit applied a modified abuse-of-discretion standard to neutralize any effect of the conflict of interest.[49] Under this standard, if a plan administrator had a conflict of interest because the administrator both determined benefit eligibility and paid claims, the administrator's decision was given less deference than if the administrator had no conflict of this nature. In applying this standard, the Fourth Circuit held that a conflict would modify the abuse-of-discretion standard according to a "sliding scale," requiring greater objective reasonableness and more substantial evidence in support of a decision depending on the degree of the administrator's financial incentive to benefit itself by reaching a certain outcome.[50] Additionally, the Fourth Circuit defined a conflict of interest more narrowly prior to the *Glenn* decision.[51]

Prior to *Glenn*, the Fourth Circuit was also unique in its review of benefits claims insofar as it had adopted into its analysis a review of eight nonexclusive factors that a court may consider, including a conflict of interest.[52] The so-called *Booth* factors include: (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decisionmaking process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.[53]

– *Post*-Glenn

The principles announced in *Glenn* altered some of the Fourth Circuit's earlier approaches to reviewing discretionary determinations made by ERISA administrators operating under a conflict of interest. In *Champion v. Black & Decker,*[54] the Fourth Circuit held that its prior modified abuse-of-discretion standard no longer was applicable. Instead, it held that courts should view any such conflict of interest as but one factor among the many identified in *Booth* for reviewing the reasonableness of a plan administrator's discretionary decision, not to modify the standard of review itself.

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– Fifth Circuit

– *Pre*-Glenn

Like the Third and Fourth Circuits, the Fifth Circuit also applied a sliding scale to assess the potential impact of a conflict of interest.[55] Under this approach, the greater the evidence of conflict on the part of the administrator, the less deferential its abuse of discretion standard would be."[56] As explained in *Lain v. UNUM Life Insurance Co.*, when a "minimal basis for a conflict [was] established," the court would "review the decision with only *a modicum less* deference than we otherwise would" under the abuse of discretion standard.[57]

In *Crowell v. Shell Oil Co.*,[58] the Fifth Circuit set forth a two-step process for conducting an abuse of discretion review where there was evidence of a conflict of interest:

> We first ask whether the plan administrator's determination was "legally correct." If it was, our inquiry ends here; if not, we ask whether the determination was an abuse of discretion. Because the administrator had a conflict of interest, we weigh the conflict of interest as a "`factor in determining whether there is an abuse of discretion'" in the benefits denial, meaning we "take account of several different considerations of which conflict of interest is one."

Thus, conflict of interest was not considered until the second step of the pre-*Glenn* analysis.

– *Post*-Glenn

In a footnote in *Holland v. International Paper Company Retirement Plan*,[59] the Fifth Circuit addressed the circuit's sliding scale approach in light of *Glenn*, noting that the Supreme Court decision "directly repudiated the application of any form of heightened standard of review to claims denials in which a conflict of interest is present."[60] The court held that *Glenn* "supersede[d]" its sliding-scale approach which, constituted a change in the level of scrutiny, noting that every other court of appeals to consider the sliding-scale approach of similar methodology in the wake of *Glenn* had concluded that *Glenn* superseded such modifications to the abuse of discretion standard of review.[61]

Despite this, the Fifth Circuit has held that much of its sliding scale precedent was compatible with the Supreme Court's newly clarified "factor" methodology, and held that *Glenn* did not supersede that precedent to the extent it reflects the use of a conflict as a factor that would alter the relative weight of other factors.[62]

In *Stone v. Unocal*,[63] plaintiff alleged fault with the two-part analysis set forth in *Crowell* and argued that *Glenn* requires a reviewing court to consider conflicts of interest as a factor in their analysis and that the Fifth Circuit's two-part analysis, which allows the reviewing court to ignore a conflict of interest in the event of a legally correct interpretation, directly contradicts the Supreme Court's ruling. The Fifth Circuit disagreed, holding that the *Glenn* court's new standard for evaluating a conflict of interest did not affect the first step of the Fifth Circuit's analysis and only comes into play during the second step in considering whether an abuse of discretion occurred. According to the court, the Fifth Circuit reiterated that it should not consider a conflict of interest until the second stage of the analysis because if an administrator's interpretation was legally correct, "no abuse of discretion could have occurred."[64]

– Tenth Circuit

– *Pre*-Glenn

Prior to the *Glenn* decision, the Tenth Circuit had similarly adopted a sliding scale analysis and held that, where there was an inherent conflict of interest, a sliding scale of deference should be applied with the claims administrator bearing "the burden of proving reasonableness of its decision pursuant to this court's traditional arbitrary and capricious standard."[65]

– *Post*-Glenn

After *Glenn*, the Tenth Circuit held that the *Glenn* decision abrogated the 10th Circuit's previous approach to evaluating conflict of interest in which it shifted the burden to the administrator to establish by substantial evidence that the denial of benefits was not arbitrary and capricious when evidence of a conflict was presented.[66] Instead, the Tenth Circuit adopted the "combination-of-factors method of review" set forth by *Glenn*.

6-Step Burden-Shifting

– Eleventh Circuit

– *Pre*-Glenn

The Eleventh Circuit differed from the rest of the circuits because, prior to *Glenn*, it employed a six-step burden shifting approach to conflict of interest cases related to benefits determinations, as follows:

> (1) Apply the *de novo* standard to determine whether the claim administrator's benefits-denial decision is "wrong" (*i.e.*, the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision.
>
> (2) If the administrator's decision in fact is "*de novo* wrong," then determine whether he was vested with discretion in reviewing claims; if not, end judicial inquiry and reverse the decision.
>
> (3) If the administrator's decision is "*de novo* wrong" and he was vested with discretion in reviewing claims, then determine whether "reasonable" grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard).

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(4) If no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest.

(5) If there is no conflict, then end the inquiry and affirm the decision.

(6) If there is a conflict of interest, then apply heightened arbitrary and capricious review to the decision to affirm or deny it.[67]

Once a conflict of interest was identified, the burden then shifted to the fiduciary to demonstrate that its decision was not "infected with self-interest."[68]

– *Post*-Glenn

In *Doyle v. Liberty Life Assurance*,[69] the Eleventh Circuit revisited this approach, and acknowledged that *Glenn's* mandate to use the conflict of interest as a factor was incompatible with the prior precedent since *Glenn* did not allow a heightened standard of review, nor did it approve of any burden shifting methodologies.[70] The Eleventh Circuit still utilizes the six-step approach to review benefits determinations; however, it took the *Glenn* decision into account by simply modifying the sixth step's "heightened" review and shifting the burden of proof about the influence of a conflict of interest from the administrator to the prospective beneficiary.[71]

Combination of Factors Approach

– Ninth Circuit

Ninth Circuit pre-*Glenn* precedent is largely consistent with the ruling in *Glenn*. The key case in the Ninth Circuit was, and remains, *Abatie v. Alta Health & Life Insurance Co*.[72] Under *Abatie*, the Ninth Circuit has held that an administrator's conflict of interest does not cause a *de novo* review, but should be considered and weighted by the reviewing court.[73] Furthermore, in the Ninth Circuit, both actual and possible conflicts of interest are considered.[74]

Montour v. Hartford[75] provides a good overview of the state of the law in the Ninth Circuit and how it handles the combination-of-factors method of review set forth by the Supreme Court in *Glenn*:

> Our court has implemented this approach by including the existence of a conflict as a factor to be weighed, adjusting the weight given that factor based on the degree to which the conflict appears improperly to have influenced a plan administrator's decision. *See Abatie*, 458 F.3d at 968; *see also Nolan v. Heald College*, 551 F.3d 1148, 1153-54 (9th Cir. 2009); *Saffon*, 522 F.3d at 867-68. These cases should not be mistaken to imply that the existence of a conflict of interest alters the standard of review itself, rather than merely its application. As *Abatie* explicitly held, if a conflict of interest exists, "abuse of discretion review applies" and "that conflict must be weighed as a factor in determining whether there is an abuse of discretion." 458 F.3d at 965 (internal quotation marks and alteration omitted). In fact, *Abatie* "conscious[ly] reject[ed]" the "sliding scale metaphor" that some other circuits had adopted, which involved adjusting the level of "deference" or "scrutiny" in the standard of review itself in proportion to the "seriousness of the conflict." Id. at 967 (internal quotation marks omitted); *see also* id. at 968 ("[I] n any given case, all the facts and circumstances must be considered, and nothing slides[.]'"). This comports with the Supreme Court's more recent pronouncement "that a reviewing court should consider [a] conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits[,] and that the significance of the factor will depend upon the circumstances of the particular case." [*Glenn*], 128 S.Ct. at 2346.[76]

– Sixth Circuit

In *Glenn*, the Supreme Court endorsed the approach taken by the Sixth Circuit, which weighed three factors, namely, the medical evidence, a contrary SSA disability determination, and the administrator's inherent conflict of interest, and ultimately concluded that the administrator had abused its discretion in denying benefits to the claimant.[77] As one court noted, "the [Supreme] Court expressly approved of the approach first enunciated in *Firestone*, *supra*, and followed by this court in *Glenn:* '[W]hen judges review the lawfulness of benefits denials, they will often take account of several different considerations of which a conflict of interest is one."[78] In deciding post-*Glenn* cases, the Sixth Circuit considers the claims based on the principles outlined in *Glenn* and in pre-*Glenn* Sixth Circuit decisions.[79] Thus, in the Sixth Circuit, where there is a conflict of interest present in a benefits denial case, the arbitrary and capricious standard will apply, but application of the standard is shaped by the circumstances of the inherent conflict of interest.[80]

Conclusion

With the exception of the Ninth and Sixth Circuits (the Sixth Circuit being where the *Glenn* case originated), each of the other Circuit Courts made significant changes to its review of benefits decisions made by a conflicted administrator or insurer. Both the Second and Eighth Circuits no longer require evidence of actual harm by the administrator, and instead have recognized that a conflict of interest is to be weighed as a factor in determining whether there was an abuse of discretion. The Third, Fourth and Tenth Circuits have reconsidered their sliding-scale approach and rejected their modified abuse-of-discretion standard that had been used to neutralize any effect of the conflict of interest, similarly replacing it with the multi-factor test set forth in *Glenn*. The First Circuit also replaced its market forces rationale with the multi-factor test.

The Seventh Circuit offered harsh criticism of the multi-factor approach utilized by the Circuit Courts in the wake of Glenn, and instead has held that courts should consider the likelihood that the conflict of interest included a benefits decision, harkening back to its "actual conflict" pre-*Glenn* roots. The Fifth Circuit has come under criticism for considering a potential conflict of interest

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only after it has been determined that a plan administrator's determination was legally correct. And, finally, the Eleventh Circuit has kept its six-step burden shifting approach; however it has been slightly tweaked to shift the burden of proof in its final prong from the administrator to the prospective beneficiary.

It remains to be seen whether the schism between the Circuit Courts that utilize the "multi-factor" test and the other Circuit Courts that continue to use circuit-specific tests will become so wide that the Supreme Court will once again have to weigh in with its definition of the standard of review in the context of claims determinations by conflicted administrators.

[1] 128 S. Ct. 2343 (2008). *See also Supreme Court Rules Insurers that Review and Pay Benefits Claims Operate Under a Conflict of Interest*, Bloomberg Law Reports© - Employee Benefits, Vol. 1, No. 12 (June 30, 2008).

[2] 29 U.S.C. § 1132(a)(1)(B).

[3] The impact of the *Glenn* decision on the scope of discovery in benefit cases brought pursuant to ERISA § 502(a)(1)(B) will not be discussed in this article. For commentary on and analysis of the expansion of discovery in ERISA cases post-*Glenn* and confusion and inconsistency in the courts, please see Nicole A. Eichberger, Proskauer Rose LLP, *The Slow Erosion of the Judicial Doctrine of Administrative Exhaustion*, Bloomberg Law Reports® – Labor & Employment, Vol. 6, No. 4 (Jan. 23, 2012); Nicole A. Eichberger, Proskauer Rose LLP, *Conflict of Interest Discovery: The Who, The What, and The Confusing*, Bloomberg Law Reports® – Employee Benefits, Vol. 4, No. 5 (Feb. 28, 2011).

[4] *Glenn v. MetLife,* 461 F.3d 660 (6th Cir. 2006).

[5] *Id.* at 666.

[6] *Id.*

[7] 489 U.S. 101 (1989).

[8] *Glenn*, 128 S. Ct. 2343, 2347-8 (emphasis omitted), *citing Firestone*, 489 U.S. at 111-115 (citing Restatement (Second) of Trusts § 187 Comment *d*).

[9] *Id.* at 105.

[10] 29 U.S.C. § 1104(a)(1).

[11] *Glenn*, 128 S. Ct. at 2350-51.

[12] *Firestone*, 489 U.S. at 115 (quoting Restatement § 187, Comment *d*).

[13] *Glenn*, 128 S. Ct. at 2350-51.

[14] *Id.*

[15] See Kathryn J. Kennedy, Judicial Standard of Review in ERISA Benefit Claim Cases, American University Law Review, 50 Am. U.L. Rev. 1083, 1135-72 (2001) (identifying divergent approaches to the presence of a conflict of interest in the review of a benefits determination), *cited in Denmark v. Liberty Life Assurance Co. of Boston*, 566 F.3d 1, 6 (1st Cir. 2009).

[16] 82 F.3d 1251, 55-56 (2d Cir. 1996).

[17] *Pulvers v. First UNUM Life Insurance Co.*, 210 F.3d 89 (2d Cir. 2000).

[18] 551 F.3d 126 (2d Cir. 2008).

[19] 609 F.3d 133 (2d Cir. 2010).

[20] *Durakovic*, 609 F.3d at 138.

[21] 400 F.3d 1036 (7th Cir. 2005).

[22] 144 F.3d 1014, 1020 (7th Cir. 1998).

[23] *Kobs*, 400 F.3d at 1039.

[24] 577 F.3d 783 (7th Cir. 2009).

[25] 564 F.3d 856 (7th Cir. 2009).

[26] *Marrs*, 577 F.3d at 788.

[27] *Id.* at 788-789.

[28] See *Chronister v. Baptist Health*, 442 F.3d 648, 655 (8th Cir. 2006); *McGarrah v. Hartford Life Insurance Co.*, 234 F.3d 1026, 1030 (8th Cir. 2000).

[29] *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160 (8th Cir. 1998), citing *Buttram v. Central States, S.E. & S.W. Areas Health & Welfare Fund*, 76 F.3d 896, 900 (8th Cir.1996).

[30] Id. at 901; *see also Layes v. Mead Corp.*, 132 F.3d 1246, 1250 (8th Cir.1998); *McGarrah*, 234 F.3d at 1030 (holding financial conflict of interest would not trigger a less-deferential review unless the claimant could show that the conflict was causally connected to the specific decision at issue).

[31] *Hackett v. Standard Insurance Co.*, 559 F.3d 825, 830 (8th Cir. 2009), citing *Woo*, 144 F.3d at 1161.

[32] *Hackett*, 559 F.3d at 830 (8th Cir. 2009) (referencing *Glenn*'s ruling that a conflict of interest exists whenever the plan administrator is also the employer or insurance company which ultimately pays benefits).

[33] 563 F.3d 773, 775 (8th Cir. 2009).

[34] *Green v. Union Security Ins. Co.*, 646 F.3d 1042, 1053 (8th Cir. 2011); see also *Wakkinen v. UNUM Life Insurance Co. of America*, 531 F.3d 575, 581 (8th Cir. 2008) (noting that the existence of a conflict does not cause the court to change the standard of review, but to weigh the conflict as a factor in determining whether there is an abuse in discretion).

[35] *See Doe v. Travelers Insurance Co.*, 167 F.3d 53, 57-58 58 (1st Cir. 1999) (noting "gradations in phrasing are as likely to complicate as to refine the standard");*Pari-Fasano v. ITT Hartford Life & Accident Insurance Co.*, 230 F.3d 415 (1st Cir. 2000) (holding that the terms "abuse of discretion," "arbitrary and capricious," and "reasonableness" were functionally equivalent in the ERISA context, but that none of the required a heightened standard of review for structural conflict cases.)

[36] *See Leahy v. Raytheon Co.*, 315 F.3d 11, 15-16 (1st Cir. 2002); *Doe v. Travelers Insurance Co.*, 167 F.3d 53, 57-58 (1st Cir. 1999).

[37] 144 F.3d 181 (1st Cir. 1988).

[38] *Id.* at 184.

[39] Id.

[40] 566 F.3d 1 (1st Cir. 2009).

[41] *Id.* at 9.

[42] *Id.* citing *Glenn*, at 2351.

[43] *See Pinto v. Reliance Standard Life Insurance Co.*, 214 F.3d 377, 391-92 (3d Cir. 2000).

[44] *Post v. Hartford Insurance Co.*, 501 F.3d 154, 161 (3d Cir. 2007).

[45] *Id.* at 378.

[46] *Id.* at 393.

[47] 562 F.3d 522 (3d Cir. 2009).

[48] *Id.* at 526 (It is not "necessary or desirable" for courts to create special procedural, evidentiary, or burden-of-proof rules to account for conflicts of interest, and that "conflicts are but one factor among many that a reviewing judge must take into account.") citing *Glenn*, 128 S. Ct. at 2351.

[49] *See Stanford v. Continental Casualty Co.*, 514 F.3d 354, 357 (4th Cir. 2008).

[50] Id.

[51] *See Colucci v. Agfa Corp. Severance Plan*, 431 F.3d 170, 179 (4th Cir. 2005) ("But the simple and commonplace fact that a plan's administrator is also its funder is not enough to support a finding of conflict of interest that would cause an adjustment to our deference."); *citing De Nobel v. Vitro Corp*, 885 F.2d 1180, 1191 (4th Cir. 1989).

[52] *See Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335 (4th Cir. 2000).

[53] *Id.* at 342-43.

[54] 550 F.3d 353, 359 (4th Cir. 2008).

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[55] *See Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287 (5th Cir. 1999); reaffirmed in *Corry v. Liberty Life Assurance Co. of Boston*, 499 F.3d 389 (5th Cir. 2007).

[56] *See Lain v. UNUM Life Insurance Co., of America*, 279 F.3d 337, 343 (5th Cir. 2002).

[57] *Id. citing* Vega, 188 F.3d at 301 (emphasis in original).

[58] 541 F.3d 295, 312 (5th Cir. 2008).

[59] 576 F.3d 240, 247 FN 3 (5th Cir. 2009).

[60] *Id.*

[61] *Id.*

[62] *Id.*, citing *Vega*, 188 F.3d at 296 (adopting the sliding-scale approach because it adheres to the use of a conflict as a factor in the abuse of discretion analysis).

[63] No. 08-CV-20254, 2009 BL 131395 (5th Cir. June 15, 2009).

[64] *Id.*

[65] *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825-26 (10th Cir. 1996).

[66] *Holcomb v. Unum Life Insurance Co.*, 578 F.3d 1187, 1193 (10th Cir. 2009). This holding seemingly overruled an earlier decision in the Tenth Circuit which held that the sliding scale approach in the Tenth Circuit "mirror[ed]" *Glenn's* approach. *See Weber v. GE Group Life Assurance Co.*, 541 F.3d 1002, 1010-11 (10th Cir. 2008).

[67] *Williams v. Bell-South Telecommunications, Inc.*, 373 F.3d 1132, 1137-38 (11th Cir. 2004); *HCA Health Services of Georgia, Inc. v. Employers Health Insurance Co.*, 240 F.3d 982, 993-95 (11th Cir. 2001).

[68] *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566–67 (11th Cir. 1990).

[69] 542 F.3d 1352 (11th Cir. 2008).

[70] *Id.* at 1359-60.

[71] *Blankenship v. Metropolitan Life Insurance Co.*, 644 F.3d 1350, 1354-55 (11th Cir. 2011).

[72] 458 F.3d 955 (9th Cir 2006).

[73] *Id.* at 959.

[74] *Saffon v. Wells Fargo*, 522 F.3d 863, 871-72 (9th Cir. 2008).

[75] 582 F.3d 933, 941 (9th Cir. 2009).

[76] Id.

[77] *See Glenn v. MetLife*, 461 F.3d 660, 666-74 (6th Cir. 2006), *aff'd by*, 128 S. Ct. at 2351-52 (finding "nothing improper in the way in which the [Sixth Circuit] conducted its review").

[78] *Roumeliote v. Long Term Disability Plan for Employees of Worthington Industries*, 292 Fed. Appx. 472 (6th Cir, 2008) (unpublished), *citing Glenn*, 128 S. Ct. at 2351.

[79] *See Smith v. Health Services of Coshocton*, 314 Fed. Appx. 848 (6th Cir. 2009) (unpublished), *citing Bennett v. Kemper Natl. Services, Inc.*, 514 F.3d 547 (6th Cir. 2008) (noting that the Fifth Circuit, when determining whether a decision was arbitrary and capricious, will factor in whether there existed a conflict of interest) and *Glenn*, 128 S. Ct. at 2351 ("[W]hen judges review the lawfulness of benefit denials, [*855] they will often take account of several different considerations of which a conflict of interest is one.").

[80] *Curry v. Eaton Corp.*, 400 Fed Appx. 51 (6th Cir. 2010) (unpublished), *citing Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1069 (6th Cir. 1998).

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Litigation

ERISA Class Action Tracker

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This table summarizes significant ERISA class actions that have been recently filed or are currently pending in the courts. A more comprehensive list of ERISA class actions is available at Bloomberg LawNotes, Quick Reference to Recent ERISA Class Action Lawsuits.

Retirement Plans

401(k) Plans/Defined Contribution Plans/Stock Plans

Plan Fees

***George v. Kraft Foods Global, Inc.*, No. 10-CV-1469 (7th Cir.) (Feb. 26, 2010) Docket**
***George v. Kraft Foods Global, Inc.*, No. 10-CV-1465 (7th Cir.) (filed Feb. 25, 2010) Docket**
***George v. Kraft Foods Global, Inc.*, No. 07-CV-1713 (N.D. Ill.) (filed Mar. 26, 2007) Docket (*George I*)**
***Piro v. Kraft Foods Global, Inc.*, No. 07-CV-1954 (N.D. Ill.) (filed Apr. 9, 2007) Docket**

Plaintiffs allege breach of fiduciary duty and seek to recover the losses suffered by the Plan on a plan wide basis and to obtain injunctive and other equitable relief for the plan from defendants as a result of the payment of unreasonable plan and service provider fees, and failure to disclose, among other things. 29 U.S.C. §§ 1132(a)(2) and (a)(3)	Settlement class certified pursuant to FRCP 23(b)(1): All persons who participated in the Plan at any time between October 16, 2000 and February 23, 2012, including the surviving spouse or designated beneficiary of a deceased person who participated in the Plan at any time between October 16, 2000 and February 23, 2012, and/or, alternate payees, in the case of a person subject to a QDRO who participated in the Plan at any time between October 16, 2000 and February 23, 2012. Excluded from the Settlement Class are any persons who served as members of the Corporate Employees Plans Investment Committee of the Altria Group, Inc. Board of Directors, the Compensation and Governance Committee of the Board of Directors of Kraft Foods Inc., and the Benefit Investments Committee of Kraft Foods Global, Inc.	Feb. 29, 2012: Order granting preliminary approval of class settlement and certifying class. Feb. 23, 2012: Motion For Preliminary Approval of Class Settlement. May 26, 2011: Order denying defendants' motion for rehearing *en banc*. Apr. 11, 2011: Order affirming district court's order denying leave to file amended complaint. The district court's grant of summary judgment to defendants is affirmed in part, reversed in part, and the case is remanded for further proceedings. Aug. 25, 2010: Order granting plaintiffs' motion for class certification.

***George v. Kraft Foods Global, Inc.*, No. 08-CV-3799 (N.D. Ill.) (filed July 2, 2008) Docket (*George II*)**		
Plaintiffs allege that defendants breached their fiduciary duties by including the Growth Equity Fund and Balanced Fund as Plan investment options and by failing to properly monitor the funds. Plaintiffs also allege that defendants actively concealed material information regarding their imprudent decision to select and retain the funds as Plan investment options. 29 U.S.C. § 1132(a)(2).	Settlement class certified pursuant to FRCP 23(b)(1): All persons who participated in the Plan at any time between October 16, 2000 and February 23, 2012, including the surviving spouse or designated beneficiary of a deceased person who participated in the Plan at any time between October 16, 2000 and February 23, 2012, and/or, alternate payees, in the case of a person subject to a QDRO who participated in the Plan at any time between October 16, 2000 and February 23, 2012. Excluded from the Settlement Class are any persons who served as members of the Corporate Employees Plans Investment Committee of the Altria Group, Inc. Board of Directors, the Compensation and Governance Committee of the Board of Directors of Kraft Foods Inc., and the Benefit Investments Committee of Kraft Foods Global, Inc.	Feb. 29, 2012: Order granting preliminary approval of class settlement and certifying class. Feb. 23, 2012: Motion For Preliminary Approval of Class Settlement. Oct. 13, 2011: Order denying defendants' motion to reconsider Court's denial of partial summary judgment. July 19, 2011: Order denying plaintiffs' cross-motion for partial summary judgment. July 14, 2011: Order granting in part and denying in part defendants' motion for summary judgment.

***Butler National Corporation v. Union Central Life Insurance Co.*, No. 12-CV-177 (S.D. Ohio) (filed Mar. 1, 2012) Docket**		
Plaintiffs allege defendant breached its fiduciary duty by using discretion and control in the administration of the plan to obtain revenue sharing payments from mutual funds and to earn other compensation from self-dealing.	All administrators of employee pension benefit plans covered by ERISA subject to IRS §§ 401(a), (k) with which Union Central has maintained a contractual relationship based on a group annuity contract or group funding agreement.	

Stock Drop

***West v. WellPoint, Inc.*, No. 08-CV-00486 (S.D. Ind.) (filed April 15, 2008) Docket**		
Plaintiffs allege that WellPoint, Inc. and four executives breached their ERISA fiduciary duties to the WellPoint 401(k) Retirement Savings Plan by concealing how rising medical costs and medical enrollment levels were negatively affecting WellPoint's profits. The complaint alleges that the defendants filed false earning statements and distributed false and misleading communications about its financial performance that caused the participants in the retirement plan to acquire and hold WellPoint stock at inflated prices when it was imprudent to do so. 29 U.S.C. § 1132(a)(2)	All persons who are participants in or beneficiary of the WellPoint 401(k) Retirement Savings Plan (a/k/a WellPoint Retirement Savings Plan), formerly known as the Anthem 401(k) Long Term Savings Investment Plan, at any time from 2007 through the present and whose accounts held company stock or securities.	Feb. 28, 2012: Order denying plaintiffs' motion for leave to amend complaint and dismissed case with prejudice. Mar. 30, 2011: Order granting defendants' motion to dismiss amended complaint. June 30, 2008 Order consolidating actions; collectively shall be referred to as *West v. WellPoint, Inc.*, No. 08-CV-0486 (S.D. Ind.).

Cash Balance Plans

***Tomlinson v. El Paso Corp.*, No. 11-795 (U.S.) (filed Dec. 22, 2011) Docket; *Tomlinson v. El Paso Corp.*, No. 10-CV-1385 (10th Cir.) (filed Aug. 25, 2010) Docket; *Tomlinson v. El Paso Corp.*, No. 04-CV-02686 (D. Colo.) (filed Dec. 29, 2004) Docket**

Plaintiffs allege that El Paso set the initial cash balance accounts for older, longer-service employees at levels significantly below the value of their accumulated annuities under the old plan.

Participants in the El Paso Corporation's defined pension, which was converted to a cash balance plan.

Feb. 21, 2012: U.S. Supreme Court denied petition for a *writ of certiorari*.

Dec. 27, 2011: Petition for *writ of certioriari* filed.

Oct. 3, 2011: Notice of appeal to the 10th Circuit.

Aug. 11, 2011: Order affirming district court ruling.

Health & Welfare Plans

Payment of Benefits

***Edmondson v. Lincoln National Life Insurance Co.*, No. 10-CV-04919 (E.D. Pa.) (filed Sept. 21, 2010) Docket**

Plaintiffs allege that defendant's practice of investing death benefits due under ERISA-governed employee benefit plans insured by defendants for their own account without accounting fully to the beneficiaries for the profits defendant earns through such investments is a breach of defendant's fiduciary duties and constitutes prohibited transactions under ERISA.

All persons who: (i) within the six year period prior to the filing of this complaint and continuing to the present; (ii) were beneficiaries under ERISA-governed employee welfare benefit plans that were insured by group life insurance policies issued by Lincoln Financial Group companies; and (iii) under which Lincoln Financial Group "paid" death benefits through the creation of an LFG SecureLine account.

Feb. 29, 2012: Notice of appeal to the Third Circuit.

Feb. 3, 2012: Order granting defendant's motion for summary judgment.

Apr. 1, 2011: Order denying defendant's motion to dismiss.

Labor & Employment

Selected Cases

Employment Law

– *Alternative Dispute Resolution*

Mayers v. Volt Mgmt. Corp., No. G045036, 2012 BL 48534 (Cal. Ct. App. Feb. 27, 2012): A California appellate court affirmed a trial court's denial of an employer's motion to compel arbitration on the grounds that the arbitration agreement was unconscionable. Stephen Mayers sued his former employer, Volt Management Corp., and its parent corporation (collectively, Volt), alleging several violations of the California Fair Employment and Housing Act, Gov. Code § 12940, *et seq.* including disability discrimination, failure to accommodate, and retaliation for taking leave. Volt moved to compel arbitration pursuant its employment agreement with Mayers, which contained an arbitration provision, and its employee handbook, which included a mandatory arbitration provision. The trial court denied the motion and Volt appealed. The Court began by noting that, to be unenforceable, arbitration agreements must be found to be both procedurally and substantively unconscionable. It then ruled that the arbitration provisions at issue were procedurally unconscionable because they constituted contracts of adhesion, Volt offered them to Mayers on a take-it-or-leave-it basis, and, most importantly, they required Mayers to submit to final and binding arbitration pursuant to an unspecified set of rules promulgated by the American Arbitration Association. It further ruled that they were substantively unconscionable because they were harsh and one-sided and because they permitted the arbitrator to award prevailing party attorney fees to Volt, which would not have been recoverable in court.

– *Breach of Fiduciary Duty Claim*

Gracetech Inc. v. Perez, No. 96913, 2012-Ohio-700 (Ohio Ct. App. Feb. 23, 2012): An Ohio appellate court held that a former employee breached his fiduciary duty to his former employer when he quit and incorporated a new company and took over a contract that had previously been held by his former employer. Theodore Perez was employed as an independent contractor providing security services for Gracetech, a company held by John Grace. Perez was bound by a non-compete agreement pursuant to which he was not permitted to compete with Gracetech for a one-year period after termination of his employment. When Grace died, Perez agreed to take charge of the daily affairs of Gracetech but based on information he obtained in his capacity as the "go-to person" for Gracetech, he learned that Gracetech would lose its security license if it did not provide a name to replace Grace's as the holder of the insurance license. Perez then began filing the appropriate applications to form his own security agency and ultimately succeeded in acquiring the supermarket account. Gracetech brought suit alleging, among other things, breach of contract, breach of fiduciary duty and tortious interference with a business relationship. A jury found in Gracetech's favor on the breach of contract claim and the trial court denied Gracetech's motion for a directed verdict on the breach of fiduciary duty and tortious interference claims. On appeal, the Ohio Court of Appeal held that the trial court erred in denying the motion for directed verdict on the breach of fiduciary duty claim as the evidence at trial established that Perez owed a fiduciary duty to Gracetech and its principal when he undertook the management of Gracetech, and erred in denying the motion for directed verdict on the tortious interference claim relative to the supermarket account, because there was no evidence to suggest that the account would have been taken from Gracetech absent Perez's interference.

– *Disability Discrimination*

EEOC v. Burlington Northern Santa Fe R.R., No. 11-CV-1121, 2012 BL 46865 (10th Cir. Feb. 27, 2012): The Tenth Circuit affirmed a district court decision declining to enforce an EEOC subpoena on the grounds that it sought information not relevant to the charges at issue. Gregory Graves and Thomas Palizzi filed separate EEOC charges against Burlington Northern Santa Fe Railroad (BNSF) alleging discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C § 12101, *et seq*. Specifically, each man alleged BNSF made him a conditional offer of employment but then failed hire him following a medical screening because of a perceived disability. BNSF denied the charges and claimed that it rescinded the employment offers because the medical information indicated that Graves and Palizzi did not meet the medical requirements of the position for which they had applied. The EEOC issued a subpoena requesting nationwide record-keeping information on current and former BNSF employees from 2006 to the present. BNSF refused to comply with the subpoena and the district court denied the EEOC's petition to enforce it. On appeal, the EEOC argued that the district court erred in ignoring six other pending charges against BNSF, which together demonstrated a likely pattern or practice of discrimination. Affirming the decision, the Tenth Circuit said the subpoena mentioned no charges besides those filed by Graves and Palizzi and that BNSF's nationwide recordkeeping data was not relevant to those charges. It therefore ruled that the district court did not abuse its discretion in refusing to enforce the subpoena.

– *Employment Litigation - Discovery*

Moore v. Publicis Groupe, No. 11 Civ. 1279 (ALC) (AJP), 2012 BL 44145 (S.D.N.Y. Feb. 24, 2012): A New York federal court ordered the parties in an action involving alleged gender-based discrimination, pregnancy discrimination, unequal pay and interference claims brought under Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, the Equal Pay Act of 1963 and state law to employ computer-assisted reviews to conduct pre-trial discovery. Five female plaintiffs brought suit alleging that their employer, Publicis Groupe, engaged in systemic, company-wide gender discrimination against female employees by, among other things, paying them less than their male counterparts; failing to promote or advance them at the same rate as their male counterparts;

and carrying out discriminatory terminations, demotions and/or job re-assignments. Defendants sought to streamline the discovery process by employing "computer-assisted review" -- an alternative method of document review that involves the coding of a "seed" set of documents so as to identify the properties of those documents and use those properties to code other documents, instead of the traditional manual reviews of individual documents. Plaintiffs did not oppose the use of computer-assisted review, but expressed concern, among other things, about the individuals whose emails would be searched so as to cull those key properties and the "confidence level" or percentage rating that would be used to create a random sample. In a decision that appears to be the first of its kind, the court directed the parties to use computer-assisted review, specifically rejecting the plaintiffs' concerns about reliability as premature. According to the court, computer-assisted review is "an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.

– *Family & Medical Leave*

Sisk v. Picture People, Inc., No. 10-CV-3398, 2012 BL 46760 (8th Cir. Feb. 28, 2012): The Eighth Circuit affirmed a district court decision granting judgment as a matter of law to Picture People, Inc. on Mary Sisk's claim for retaliation in violation of the Family and Medical Leave Act (FMLA). Sisk underwent hip surgery and took approximately 11 weeks of FMLA from her job as Studio Manager with Picture People. Three days after she returned, two of her supervisors met with her to discuss their concern that she was unable to meet the physical requirements of her job. The parties disputed whether Sisk resigned or the supervisors discharged her during the meeting, however, at the end of the meeting Sisk's employment with Picture People was terminated. Sisk sued, alleging FMLA retaliation. The case went trial and the district court granted Picture People's motion for judgment as a matter of law. On appeal, The Eighth Circuit found that the trial court erroneously ruled that Sisk was required to show more than a prima facie case of retaliation at trial. The Court said that until the defendant articulates a legitimate nondiscriminatory reason for the termination, which Picture People did not, the relevant inquiry is the sufficiency of the prima facie case. However, after examining the sufficiency of the evidence, the Court ruled that Sisk failed to establish her prima facie case.

– *Whistleblowing*

Kolchinsky v. Moody's Corp., No. 10 Civ. 6840 (PAC), 2012 BL 46704 (S.D.N.Y. Feb. 28, 2012). A New York federal court dismissed a former financial services employee's claims for defamation, tortious interference and intentional infliction of emotional distress claims, but permitted his whistleblower claims under the Sarbanes-Oxley Act to move forward. Ilya Eric Kolchinsky brought suit alleging that he was excluded from meetings, was transferred from a key department, and had his base salary and target bonus lowered because he reported his concern that the stock rating methodologies employed by his employer, Moody's, violated securities laws. Kolchinsky also alleged that after he testified before a Congressional committee during Congress' investigation of credit rating agencies, Moody's embarked on a campaign to discredit him and end his career as a financial services professional. On Moody's motion to dismiss, the trial court granted the motion in part and denied it in part. The court dismissed Kolchinsky's defamation claim on the ground that the statements made by Moody's were not defamatory because they simply indicated that company concluded that Kolchinsky's claims were unsupported. The court also dismissed his tortious interference claim (on the ground that he failed to identify a specific business relationship that had been interfered with) and his intentional infliction of emotional distress claims (on the ground that the conduct complained of was not "extreme and outrageous"). However, the court permitted his whistleblower claim to move forward, holding that his complaint articulated the required elements: (1) a plaintiff engaging in protected activity; (2) an employer who knew of the protected activity; (3) an unfavorable personnel action; and (4) circumstances suggesting that the protected activity was a contributing factor to the unfavorable personnel action.

Employee Benefits

– *Breach of Fiduciary Duty*

George v. Kraft Foods, Nos. 07-CV-1713 (N.D. Ill.) (filed Mar. 26, 2007) and 08-CV-3799 (N.D. Ill.) (filed July 2, 2008): In a press release issued on February 24, 2012, it was announced that a tentative settlement reached between Kraft Foods Global and a firm representing its current and former employees in two cases involving alleged breach of fiduciary duty in the administration of an ERISA-governed 401(k) plan. In 2007 and in 2008, current and former participants in the Kraft Foods 401(k) plan brought suit alleging, among other things, that the fiduciaries of the plan violated their fiduciary duties by paying excessive investment management fees. Under the terms of the proposed settlement, class members are to share in a $9.5 million settlement pool. The parties are to secure independent review and approval of the settlement by an independent fiduciary and Kraft is to undertake (or continue to implement) measures designed to increase and enhance communications with employees about their investment options, to follow existing limits on cash holdings in Kraft company stock, and to select a less expensive provider of record-keeping services. By decision dated February 29, 2012, the Illinois federal court before whom the cases had been proceeding directed the parties to proceed with the issuance of notice to class members. The court defined the class as "all persons who participated in [the Kraft 401(k) Plan] at any time between October 16, 2000 and February 23, 2012, including the surviving spouse or designated beneficiary of a deceased person who participated in the Plan at any time between October 16, 2000 and February 23, 2012, and/or, alternate payees, in the case of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time between October 16, 2000 and February 23, 2012." During the course of the litigation, the court had had occasion to examine certification issues including the burden of proof required to meet class certification requirements under Rule 23(b). (*See George v. Kraft Foods Global, Inc.*, No. 08 C 3799, 2011 BL 286770 (N.D. Ill. Oct. 25, 2011). The cases were to proceed to trial this year.

Mimms v. PricewaterhouseCoopers, LLP, No. 11-CV-30 (S.D.N.Y. Feb. 16, 2012): The Southern District of New York granted the motion of AIG Retirement Board (Board) to dismiss a derivative lawsuit of a former American International Group, Inc. (AIG) employee alleging, *inter alia*, that the Board breached its fiduciary duties by failing to sue PricewaterhouseCoopers, LLP (PwC) to recover losses caused by its negligently conducted audits. Wanda Mimms filed the action derivatively on behalf of the AIG Incentive Savings Plan (Plan) against the Board and its individual directors. The Plan acquired and held shares of AIG common stock, which was included as one of its retirement savings options. The Plan suffered substantial losses when AIG's stock significantly declined in value in 2008, which resulted in a depletion of anticipated retirement income for the Plan's participants. In July 2010, Mimms sent the Board a letter demanding that the Board sue PwC for malpractice and/or negligence to recover Plan assets. The Board declined to sue and Mimms commenced this action in January 2011. The Board moved to dismiss, arguing that Mimms failed to state a claim for breach of fiduciary duty. The Court began noted that a decision not to file a lawsuit constitutes an investment decision to be evaluated using the "prudent man" standard. Here, the Court found the Board's actions indicated that it employed appropriate methods to evaluate the merits of the lawsuit and thus, did not breach its fiduciary duty.

– *Disability Benefits*

Lalli v. Van Gilder Insurance et al, No. 1:10-cv-00152, 2012 BL 43427 (D. Utah Feb 23, 2012): A Utah federal court held that a plan administrator acted arbitrarily and capriciously in revoking a claimant's long-term disability benefits based in large part on the video surveillance of the claimant and an independent medical review of the claimant's file commissioned by the insurance company. In June 2006, John Lalli began receiving disability benefits based on a diagnosis of pneumonia and other ailments. In 2009, the insurance company conducted surveillance on Lalli and observed him engaging in activities, including playing golf, that the insurance company believed were inconsistent with Lalli's doctor's diagnosis of extreme fatigue and inability to handle stress. Based on that surveillance and a review of Lalli's file conducted by a board-certified rheumatologist, the insurance company terminated his benefits. On appeal of the decision, the Utah district court held that the insurance company acted arbitrarily and capriciously. According to the court, the fact that the insurance company did not arrange for a physical examination of Lalli raised questions about the thoroughness and accuracy of the benefits determination. The court also faulted the insurance company for its reliance on the video surveillance. According to the court, the fact that Lalli had played four hours of golf was not dispositive since it was "not uncommon for people to conceal disabilities or weaknesses while affiliating with family, friends or business associates," and moreover, Lalli's doctor had in fact prescribed golf as part of Lalli's treatment.

– *Health & Welfare Benefits*

United Steel, Workers Int. Union v. Cookson America, Inc., No. 10-CV-041S, 2012 BL 49349 (W.D.N.Y. Feb. 27, 2012): The Western District of New York ruled that an employer's obligation to pay health care benefits to retired union workers did not end with the expiration of the collective bargaining agreement. Defendant Vesuvius USA Corp. (Vesuvius) operated a steel plant and foundry in Hamburg, New York. Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (USW) represented the workers at the Vesuvius plant. The 2004-2007 collective bargaining agreement (CBA) between Vesuvius and USW contained a provision for a one-time medical benefit called the Retiree Medical Allowance. In August 2007, Vesuvius announced that it intended to close the Hamburg plant. Vesuvius and USW then entered into a "Facility Closure and Collective Bargaining Agreement" (Closure Agreement), which provided that the 2004-2007 CBA would remain in effect until the plant closed and that Vesuvius would honor the Retiree Medical Allowance provision of the CBA. Following the plant's closure in August 2008, Vesuvius paid the Retiree Medical Allowance to six retirees. However, it stopped making payments on January 1, 2011. USW sued Vesuvius, alleging breach of the Closure Agreement. Vesuvius moved for summary judgment, arguing it was free to modify or terminate the any retiree medical benefits provided for in the 2004-2007 CBA. The Court disagreed, stating that the only sensible and lawful interpretation of the Closure Agreement was that it obligated Vesuvius to pay the benefit to all eligible retirees even after the plant closed. It further rejected Vesuvius's argument that the employees who retired after the plant closed were not eligible because they were actually laid off by Vesuvius. The Court said that if the parties meant for the provision to apply only to employees who retired before the plant closed, they would not have needed to include the separate provision in the Closure Agreement. Finally, the Court ruled that USW had standing to sue on behalf of its retired members.

Executive Compensation

– *Employee Stock Purchase Plans*

Beidel v. Sideline Software Inc., No. 2011AP788, 2012 BL 44964 (Wis. Ct. App. Feb. 22, 2012): A Wisconsin appellate court held that an employee seeking to exercise stock option repurchase rights was not entitled to specific performance based on an alleged constructive discharge, but that he may be entitled to specific performance on equitable grounds. Christopher Beidel, co-owner of a software company, was party to a stock repurchase agreement that provided, in pertinent part, that in the event of any controversy concerning the right or obligation to purchase or sell shares, "such rights or obligations would be enforceable by a court of equity by a decree of specific performance." After a dispute arose as to the sale of the business and the valuation of its stock, Beidel alleged that he was directed to document all of the tasks he performed for the company so that those duties could be easily transitioned and was otherwise excluded from a number of company activities. Beidel subsequently provided notice of his intent to exercise his stock options in light of the fact that he had been "stripped of [his] job responsibilities" and had not been paid in more than three weeks. When the company failed to allow the exercise of his options, Beidel brought suit seeking specific performance under the provision quoted above. The trial court

awarded summary judgment to the company based on the fact that Beidel had never in fact resigned, but on appeal, the Wisconsin Court of Appeal affirmed. According to the court, because Beidel never quit (and in fact, he performed other functions for the company even after the date he alleged he was constructively discharged), he had no claim based on constructive discharge, but the court held that he was entitled to consideration of his claim on equitable grounds based on a balancing of the equities.

Government Employees

– *Federal Contractors*

United States ex rel. Matheny v. Medco Health Solutions, Inc., No. 10-15406, 2012 BL 41439 (11th Cir. Feb. 22, 2012): The Eleventh Circuit held that a trial court erred in dismissing claims brought by former employees against their employer, a contractor for the Department of Health and Human Services(HHS), under the False Claims Act (FCA), 31 U.S.C. §3729. Lucas Matheny and Deborah Loveland brought suit alleging that their employer, Medco Health Solutions, violated the FCA by, among other things, failing to refund payments of over $60 million that were made by HHS to Medco in duplicate or in error. The complaint alleged that Medco and several members of its management withheld the monies despite its obligation to disclose them under the terms of the Corporate Integrity Agreement signed with HHS, and despite having been expressly advised of the overpayments. The trial court dismissed the claims on the ground that they failed to allege the required elements of an FCA claim with particularity, but, on appeal, the Eleventh Circuit reversed. According to the Court, the claimants met their burden under Federal Rule of Civil Procedure 9(b) by alleging that there was an obligation to pay the money to the government, that the defendants knowingly submitted a false certification of their compliance with their obligations under the agreement, and that their misrepresentation was material.

Index of Authorities

9 *Berryman v. SuperValu Holdings, Inc.*, No. 10-CV-3590, 2012 BL 44278 (6th Cir. Feb. 24, 2012)

10 *Raedle v. Credit Agricole Indosuez*, Nos. 10-CV-2565/2734, 2012 BL 48455 (2d Cir. Feb. 28, 2012)

12 *Sanders v. Lee County School District No. 1,* No. 10-CV-3240, 2012 BL 46761 (8th Cir. Feb. 28, 2012)

14 *Equal Employment Opportunity Commission v. CRST Van Expedited, Inc.*, Nos. 09-CV-3764, 09-CV-3765, 10-CV-1682, 2012 BL 41485 (8th Cir. Feb. 22, 2012)

17 *Golinski v. U.S. Office of Personnel Management*, No. 10-CV-257, 2012 BL 49822 (N.D. Cal. Feb. 22, 2012)

22 *Tackett v. M&G Polymers USA, LLC*, Case No. 07-CV-126, 2012 BL 45978 (S.D. Ohio Feb. 21, 2012)

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