MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

In this Issue ...

Federal

State

Other

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

Age Discrimination in Employment Act

By Stephen J. Snyder and Craig A. Brandt
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Refusal to Work for Demanding Supervisor Legitimate Reason for Termination

Haigh v. Gelita USA, Inc**.**, 632 F.3d 464 (8th Cir. 2011): Haigh was sixty years of age when hired. He received "good" but not high rankings during his first five years on the job. After being assigned to a new supervisor (Skibinski), Haigh was cited for performance deficiencies in multiple areas. He then complained to the company's HR director about Skibinski and claimed he was unable to meet Skibinski's job expectations because he did not understand them. The company terminated Haigh a few days later, when he was sixty-six.

The Eighth Circuit upheld the lower court's order granting the employer's motion for summary judgment. Assuming that Haigh established a prima facie case, the Eighth Circuit held that the employer articulated a legitimate, non-discriminatory reason for Haigh's termination, i.e., his failure to meet the employer's reasonable expectations by his refusal to work for Skibinski. Haigh failed to demonstrate that this reason was a pretext. The court rejected Haigh's argument that a fact issue was raised based on Haigh's belief that Skibinski "was setting him up to fail." On the pretext issue, the court observed that circumstances must "permit a reasonable inference of discriminatory animus" and found no evidence to support such an inference. Haigh presented no direct evidence, and the employer had hired him at age sixty.

The court also discussed the level of proof a plaintiff must submit to meet the third element to establish a prima facie case, i.e., that he was meeting his employer's reasonable expectations at the time he was terminated. Noting that "there appears to be somewhat conflicting case law in this circuit," the court pronounced that it favored the approach adopted in *McGinnis v. Union Pacific Railroad*, 496 F.3d 868, 874 n.2 (8th Cir. 2007): this element is satisfied if the plaintiff shows that "he possesses the basic skills necessary for performance of the job, not that he was doing it satisfactorily" (quotation marks omitted). The court went on to note that it did not need to resolve any potential conflict on this point because, even if the court assumed that Haigh established a prima facie case, the employer was still entitled to summary judgment.

Disparate Impact Claim Rejected

Clark v. Matthews International Corp., 628 F.3d 462 (8th Cir. 2010): The court upheld summary judgment for the employer on the single plaintiff's ADEA disparate impact and disparate treatment claims. The court reversed the dismissal of an age discrimination claim under Missouri state law, holding that it raised "a novel or complex issue of state law" and therefore should be pursued in state court.

Clark was hired at age forty-three to design corrugated-cardboard packaging. A number of years later, the employer decided to focus its efforts at designing multi-color primary packaging, a more profitable line of work. When members of the employer's art department were divided into teams by work area, Clark was not selected for the team that focused on multi-color primary packaging. In following years, Clark was criticized in performance reviews for not working quickly enough and not meeting productivity standards.

The employer implemented a reduction-in-force (RIF) between August 2006 and January 2007. Clark, then age fifty-seven, was selected for termination. Fourteen of the fifteen employees terminated during that RIF were over age forty.

The court first addressed Clark's disparate impact claim, which required statistical evidence of a kind and degree sufficient to show that a facially neutral employment practice caused a disparate impact on workers age forty or over. Concluding that the relevant pool of workers consisted not of those terminated but rather all non-management employees at the facility where Clark was employed, the court found that the percentage of employees over age forty in this pool dropped from 81.4% to 76.5% as a result of the RIF. The court held this decrease was not "sufficiently substantial to create an inference that Clark and other employees were terminated because of their age."

On the disparate treatment claim, the court first noted that Clark was required to prove that his age was the but-for cause of the employer's decision. While observing that the Supreme Court in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), had declined to answer whether use of the *McDonnell Douglas* framework is appropriate under the ADEA, the court noted that other circuits have continued to apply that framework in ADEA cases after *Gross*. Nonetheless, the court declined to apply the *McDonnell Douglas* framework because Clark had failed to invoke it in his submissions to the district court, nor had he argued on appeal that he established a prima facie case that the employer's asserted reasons for his termination were pretextual.

Accordingly, the court focused on whether Clark had raised a genuine issue of material fact about whether his age was the but-for cause of his termination without use of the *McDonnell Douglas* framework. The court first noted that Clark did not dispute a number of important points, including that multi-color primary packaging design was the employer's new focus and that Clark had no experience in that area. Clark also did not dispute that he received low marks for productivity on three of his performance reviews in years prior to the RIF. The court rejected Clark's argument that the employer's sending of unsolicited mailings from the AARP to company workers when they turned fifty-six years old was evidence of age discrimination, deeming it instead a "reasonable way for an employer to try to determine the retirement plans of employees." The court also rejected Clark's argument that a fact issue was raised by a remark made to him by his supervisor, who asked Clark if he was “just trying to make it to retirement.” This remark was not made in the context of the termination decision.

The court also rejected Clark’s argument that the company’s retention of two younger employees who also had some poor performance reviews raised a fact question. These younger employees were different from Clark in a very important respect as they had primary packaging design experience, whereas Clark did not.

As for Clark’s state law claim, the court said Clark could prevail if he proved that his age was a “contributing factor” in his termination, a standard different than the but-for standard applicable to his ADEA claim. The court explained, “Thus, the difference between the ADEA and the MHRA is that the former requires that age must have been ‘the reason’ for the adverse employment action, while the latter merely requires that age was ‘a reason’ for the action.” Next, after noting that Missouri courts had only recently developed the contributing-factor standard, the court concluded that it was unsure whether a Missouri court would find a genuine issue of material fact regarding whether Clark’s age was a contributing factor. Because this was a novel or complex issue of state law, the court decided to allow Missouri courts to address the matter and accordingly remanded the case with directions to dismiss the state law claim without prejudice.

Supervisor’s Comments about Employee Age Raise Fact Issue

Steen v. Target Corp., Civ. No. 09-2108, 2011 WL 825527 (D. Minn. Mar. 7, 2011): Steen was employed with Target in its information technology area from 1996 until his termination in 2006. In support of its decision to terminate Steen, Target relied on his performance reviews for the years from 2001 to 2006. Steen contested the validity of these evaluations and alleged that his supervisor in 2001 constantly made comments about his age. He claimed also that, in 2004, Target transferred most other older information technology employees to work under his supervisor and began a scheme to force out the older employees in this group.

The court first noted that the parties were in agreement that the *McDonnell Douglas* burden-shifting framework applied. The court denied Target’s motion for summary judgment, finding that Steen’s evidence raised questions as to whether Target’s negative performance reviews of Steen were a pretext for age-based discrimination.

The court also denied Target’s motion for summary judgment premised on the argument that Steen had failed to timely file his administrative charge. While the parties agreed that Steen was required to file the charge within 300 days of his termination, the court found a disputed issue of fact concerning the date of termination. While Target’s counsel had sent a letter referring to “Target’s intention to terminate [Steen’s] employment,” Steen alleged that he was never officially terminated.

Court Authorizes Distribution of Notice of Collective Action

Hageman v. Accenture LLP, Civ. No. 10-1759, Doc. 113 (D. Minn. Mar. 13, 2011): Overruling objections by the employer to an earlier order by Magistrate Judge Noel, Judge Kyle conditionally certified an ADEA collective action being pursued by seventeen plaintiffs and authorized the plaintiffs’ counsel to send notice of the action to other persons similar to the plaintiffs who were terminated from the same department during 2009 or 2010. The fundamental inquiry presented by the motion was whether the plaintiffs are “similarly situated,” a term not defined in the ADEA. The court followed the two-stage process described in earlier cases to determine whether a collective action was appropriate.

At the initial stage, the plaintiffs are subject to a burden only to establish a colorable basis for their claim. The court held that the plaintiffs had submitted facts to satisfy this standard, including evidence that all plaintiffs were employed in a single department at a single location as well as statements from Accenture’s careers website touting its “young, dynamic work environment” and emphasizing opportunities to “meet new graduates and young professionals” in each company office.

While the employer argued that a collective action would be unmanageable, the court found that this issue was more properly considered at the second stage, when discovery is complete and the defendant generally moves to decertify. The court also observed that “the limited size and scope of the proposed class (fewer than 100 employees, terminated from one department at one location) alleviates many manageability concerns that might otherwise give the Court pause.”

The court also rejected the employer’s argument that a stricter standard should apply because some discovery had been conducted in the case. The court noted that discovery was not yet complete and that, even in cases where the parties have engaged in some discovery, courts routinely authorize motions for certification under the first-stage standard of review.

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

Disability Discrimination

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EEOC Issues Regulations under ADA Amendments Act

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing the ADA Amendments Act (ADAAA). The new regulations become effective on May 24, 2011. Although the EEOC regulations address some of the concerns raised regarding the proposed rules, for the most part, the final rule closely tracks the ADAAA, which went into effect on January 1, 2009. Consistent with the ADAAA, the rule emphasizes that the disability definition must be construed in favor of broad coverage, making it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

The ADAAA and regulations still define "disability" as an impairment that substantially limits one or more major life activities, but the definitions of "major life activity" and "substantially limits" have changed. The final regulations contain a nonexhaustive list of examples of major life activities that follows the ADAAA and several activities not mentioned in the act, such as "interacting with others." The final regulations also supplement the ADAAA's examples of "major bodily functions" as a major life activity by including nearly every physiological function. Thus, the following functions are covered: the immune system; special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

Consistent with the ADAAA, the final regulations adopt "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction include the following:

- "Substantially limits" should be construed as broadly the ADA permits.
- An impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting."
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
- The primary focus of the ADA is on whether discrimination occurred; the determination of disability should not require extensive analysis.

- The determination of whether an impairment substantially limits a major life activity as compared to the general population will not usually require scientific, medical, or statistical evidence.
- Only one major life activity need be substantially limited.
- The ameliorative effects of mitigating measures are not to be considered when determining whether someone has a disability.
- Impairments that are episodic or in remission are disabilities if they would "substantially limit" major life activities when active.
- The effects of impairments that last or are expected to last less than six months may be substantially limiting.

Under the ADAAA and the final regulations, persons who are regarded as disabled must show only that the employer takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the covered entity believes the individual has, unless the impairment is transitory (lasting or expected to last for six months or less) and minor. The EEOC rules make the "transitory and minor" exception an affirmative defense, placing the burden of proof on the employer.

The changes mean that the law will cover a significantly larger group of workers, and the number of disability discrimination claims is expected to increase. Future litigation will likely focus on the adequacy of the interactive process and reasonable accommodations.

District of Minnesota: Subordinate Employee's Bias Not Imputed to Employer

Hubbell v. Better Business Bureau of Minnesota, No. 09-1173, 2011 WL 5421328 (D. Minn. Dec. 27, 2010): The court granted Better Business Bureau's motion for summary judgment, rejecting Albert Hubbell's claim that cat's-paw liability extended to a subordinate employee's action under the Americans with Disabilities Act and the Minnesota Human Rights Act.

BBB initiated an investigation regarding Hubbell, its then-president and CEO, after one of Hubbell's subordinate employees made several allegations of improper conduct to the board chair-elect, including that Hubbell had invoiced members more frequently than standard practice, misstated future income, asked the employee to stay away from board meetings, ended or reduced meetings, used BBB materials to make color copies for non-BBB business, and gave business to a person with whom an employee was having an affair. Following an investigation, the executive committee voted unanimously to terminate Hubbell's employment.

Hubbell subsequently filed a disability discrimination action against BBB, claiming that the subordinate employee who complained about him regarding him as disabled, and therefore her discriminatory animus was imputed to the executive committee through a cat's-paw theory of liability. The court rejected the argument, holding that the cat's-paw theory was inapplicable because the subordinate employee had no authority to take any action against Hubbell. The court also held that, even if cat's-paw liability extended to subordinate employees who act outside their scope of authority, Hubbell's claim failed because the executive committee performed an independent investigation, during which Hubbell admitted to several allegations of improper conduct.

This decision will not likely be affected by the United States Supreme Court's recent decision in *Staub v. Proctor Hospital*, 562 U. S. ___ (2011), in which the Court recognized the cat's-paw theory of liability and announced a broad framework to be applied in such cases under USERRA. The Court explicitly declined to address whether an employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

Equal Pay Act

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Affirmative Defense Not Apt Where On-the-Job-Training

Nelson v. City of Canton, Case No. 09-4175, 2011 WL 1135911 (D.S.D. Mar. 29, 2011): The defendant, the city of Canton, in its motion for summary judgment, did not dispute that plaintiff Nelson could establish a prima facie case of pay discrimination based upon her sex. Nelson claimed that despite being promoted from bartender to head bartender, she still made less ($12 per hour) than her male peer, who was paid $17 per hour.

Instead, Canton sought to rely upon one of the four affirmative defenses. The four defenses are: (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, and (4) a differential based on any factor other than sex.

Canton relied upon the fourth affirmative defense, arguing plaintiff was paid less because she lacked the experience and education of her male counterpart. In response, the district court cited *Simpson v. Merchants & Planters Bank*, 41 F.3d 572 (8th Cir. 2006), where the Eighth Circuit rejected the employer's similar argument. In both cases, the skills needed were not predicated on experience or education, but on-the-job training. Canton attempted to distinguish *Simpson* by arguing the employer in *Simpson* disputed that the employee had met her prima facie case. The court rejected that argument as well as Canton's attempt to cite cases outside of the Eighth Circuit. The court held that *Simpson* was binding. In addition, there was sufficient evidence to show that the pay differential was based upon sex. The court denied Canton's motion for summary judgment.

Pay Gap Not Conclusive Evidence of Discrimination

***Price v. Northern States Power Co*.**, Case No. 09-1921, 2011 WL 338451 (D. Minn. Jan. 31, 2011): In a multiple-plaintiff EPA claim, defendant Northern State Power Company brought a motion for summary judgment. The claimants were field representatives for NSP. Although claimants shared the same job title, their duties differed based on their location, training, and experience. Some of the field representatives were bill collectors, while others performed such tasks as reestablishing power to customers and investigating certain billing concerns. The field representatives' compensation increases were based upon a merit/performance-based system called Individual Performance and Development (IPAD). The system measured a variety of work-related factors including statistics as to the amount of money collected and the number of disconnects, reconnects, and lockbox installations.

NSP argued that none of the plaintiffs satisfied their prima facie case under the EPA. Further, NSP asserted that it had demonstrated an irrefutable affirmative defense by utilizing a merit-based system and additional differentials other than sex. The district court agreed with NSP. The court held that there was no dispute that all the field representatives entered the positions at different salaries for legitimate reasons. Further, there was no argument that NSP could legally give salary increases based upon a merit-based system that utilizes factors other than sex. The court also noted that a mere widening of a pay gap, without more, is not evidence of discrimination. The court acknowledged that protected-class members sometimes do better and sometimes do worse than their competitors, which by itself is not evidence of discrimination.

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

Family and Medical Leave Act

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Employer Prevails on Summary Judgment for Employer in Pregnancy Termination Case

Wierman v. Casey's General Stores, No. 10-1665, 2011 WL 1166706 (8th Cir. Mar. 31, 2011): Affirming the district court's dismissal of Wierman's FMLA retaliation claim on summary judgment, the Eighth Circuit held that Wierman had not shown that Casey's proffered non-retaliatory reason for terminating Wierman when about four months pregnant was pretextual. (The court also affirmed summary judgment for Casey's on Wierman's Title VII claim for the same reasons but reversed and remanded Wierman's Missouri Human Rights Act claim because, as required by that Act, Wierman had shown that her pregnancy was "a contributing factor" to her termination even if not a "substantial or determining factor.")

The Eighth Circuit evaluated Wierman's FMLA retaliation claim under the familiar *McDonnell Douglas* framework, requiring (1) protected conduct, (2) a materially adverse employment action, and (3) a causal connection between the two to establish the required prima facie case. Casey's argued that Wierman did not meet the first and third prongs because Wierman had never returned her FMLA paperwork despite two different requests by Casey's. The Eighth Circuit rejected this argument, finding that Wierman and her area supervisor separately inquired of Casey's human resources (HR) office about those rights, Casey's had sent Wierman the FMLA paperwork for completion, and HR understood that Wierman would be working reduced hours as a result of her pregnancy. The Eighth Circuit also found that Casey's had terminated Wierman *before* the second deadline (set by Casey's) had expired for Wierman to return the required FMLA paperwork, thus showing the causal connection between the termination and Wierman's FMLA rights.

Nonetheless, the court found that Casey's had other reasons for terminating Wierman. In early April, Wierman had told her supervisor, Gregory Johnson, that she was pregnant and would need time off for doctor's appointments. However, on May 6, Johnson gave Wierman three notices of corrective action: (1) the first, dated April 29, regarding Wierman's failures to accurately track cigarette inventory totals per Johnson's earlier instructions; (2) the second, dated April 30, regarding Wierman's excessive absenteeism and tardiness and her failure to give appropriate notice; and (3) the third, dated May 2, regarding Wierman's admitted consumption of store merchandise without following company policy. On May 6, Johnson also gave Wierman an employee separation form which identified “Unauthorized Removal of Co. Property” as the reason for termination. The Eighth Circuit rejected Wierman’s arguments that the company’s reason for termination was pretextual.

Employee Needing Unpredictable Intermittent Leave for Six Months or Longer Not Protected by FMLA

Wisbey v. City of Lincoln, 612 F.3d 667 (8th Cir. 2010): The Eight Circuit affirmed summary judgment for the city of Lincoln on Wisbey’s FMLA interference and retaliation claims (and her claim of disability discrimination under the Americans with Disabilities Act), ruling that the employee did not have a right to unscheduled, unpredictable, and cumulatively substantial FMLA absences.

Wisbey began working for the city of Lincoln in 1979 as an emergency dispatcher II. Wisbey took emergency service and dispatch calls and needed to function accurately while working under considerable pressure and to think and act quickly and calmly in emergency situations. Wisbey had not been disciplined prior to 2007.

In January and February 2007, Wisbey used unpaid sick leave for an upper respiratory infection (she had previously used all allotted sick leave). The city gave Wisbey a written warning for her excessive leave. Per the city’s recommendation, Wisbey applied for intermittent FMLA leave. The medical certification from Wisbey’s physician stated that Wisbey suffered from depression and anxiety that interfered with her sleep, energy level, motivation and concentration. Wisbey’s physician also stated that, “‘although Wisbey was able to perform any one or more of the essential functions of [her] job,’ . . . she would need to take time off work intermittently over the ‘next 6 months or longer.’” The physician gave no anticipated return-to-work date.

Due to concerns regarding Wisbey’s concentration and motivation, the city scheduled a fitness-for-duty examination for Wisbey with a psychiatrist, Dr. Eli Chesen. Dr. Chesen determined that Wisbey suffered from “‘chronic relapsing depression (unipolar depression) which intermittently interferes with her ability to function at full capacity at work vis-à-vis tiredness’ and that she was not ‘fit for duty as described in her job description, especially as related to tiredness, her ability to concentrate and her ongoing propensity to likely miss work.’”

Thereafter, Wisbey’s physician provided the city a letter wherein he disagreed with Dr. Chesen’s conclusion. Also, Wisbey testified at a hearing before the city’s personnel board stating, among other things, that she would “‘never endanger anybody on the street by going [to work] tired or unprepared mentally.’”

The city terminated Wisbey’s employment on April 3, 2007 based on Dr. Chesen’s determination that she was not fit for duty and stated, “‘For your own safety it is important that you not continue in your present position.’”

Wisbey filed suit, alleging FMLA interference and retaliation claims. As to Wisbey’s FMLA interference claim, the Eighth Circuit ruled that the city could not have interfered with her FMLA rights because Wisbey was not entitled to FMLA leave. She requested intermittent leave for six months or longer. In reaching this conclusion, the Eighth

Circuit quoted from its 2002 decision in *Spengler v. Federal Home Loan Bank of Des Moines* as follows:

> The FMLA does not provide an employee suffering from depression with a right to unscheduled and unpredictable, but cumulatively substantial, absences or a right to take unscheduled leave at a moment's notice for the rest of her career. On the contrary, such a situation implies that she is not qualified for a position where reliable attendance is a bona fide requirement . . . .

278 F.3d 847, 853 (8th Cir. 2002) (quotation omitted).

The Eighth Circuit also affirmed summary judgment for the city on Wisbey's FMLA retaliation claim. The city relied on the fitness-for-duty exam, not her FMLA application. Wisbey had not provided any evidence of a retaliatory discharge other than the timing of the termination approximately one month after her application for FMLA, which was not sufficient.

FMLA Absence Used as Part of Termination Decision Not Wrongful Interference

Estrada v. Cypress Semiconductor (Minnesota) Inc., 616 F.3d 866 (8th Cir. 2010): Upholding summary judgment for the employer, the Eight Circuit ruled that even if one of the absences Cypress used as a basis for terminating Estrada was FMLA-protected, the company did not violate the FMLA.

Cypress used a detailed attendance policy, assigning points to employees based on their attendance infractions and applying progressive discipline to employees as they accumulated points. Cypress did not, however, assign points for FMLA-protected absences. Cypress terminated Estrada under the attendance policy after a long and complicated series of absences, late starts, early quits, and no call/no show's, culminating in an unauthorized, hour-long break just after a manager had warned her about her ongoing attendance infractions. At issue was whether Estrada's absence on February 24, which was part of the company's termination decision, qualified as an FMLA absence and, if it did, whether her termination therefore was wrongful.

Assuming, without finding, that Estrada's February 24 was FMLA-protected, the Eighth Circuit affirmed summary judgment for Cypress, ruling that Cypress would have made the decision to terminate regardless of the February 24 absence. In support, the court cited the company's pre-termination written warning to Estrada, which Estrada signed, stating that continued accumulation of attendance points would be grounds for termination. The court also noted the manager's testimony that the company actually and habitually enforced the attendance policy and the HR director's testimony that Estrada provided no explanation for her overly long break on the very same day that the manager had warned her about continuing to accumulate attendance points.

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

Federal Labor Management

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Board Authorization to Seek 10(j) Relief

Manitex Load King, 18-CA-19491 and 18-CA-19532: On January 10, 2011, the Board authorized the Region's request to seek a § 10(j) injunction in this matter. The Region filed a petition with the United States District Court, District of South Dakota, on January 28, 2011, and the court ordered a hearing for March 11, 2011. Prior to the hearing, Respondent and United Electrical, Radio and Machine Workers of America, Local 1187 resolved the unfair labor practice charges.

Respondent purchased a manufacturing plant located in Elk Point, South Dakota. It continued to manufacture the same product and hired many of the supervisors and managers of the predecessor employer. However, Respondent refused to hire a number of employees in the unit represented by the union. In addition, Respondent refused to recognize and bargain with the union.

Following an investigation of the charges, the Region concluded that Respondent refused to hire certain of the predecessor employees in order to prevent the union from attaining majority status. Therefore the Region issued a complaint alleging unlawful failures to hire predecessor unit employees who applied for jobs and alleging that, but for the illegal refusals to hire, the union would have had majority status. The complaint also alleged that Respondent's refusal to recognize and bargain with the union violated the Act.

The resolution by the parties included instatement offers to the employees denied employment, recognition of the union, and agreement on the terms of a collective bargaining agreement.

Board Decisions Involving Region 18 Unfair Labor Practice Complaints

American Firestop Solutions, Inc., 356 N.L.R.B. No. 71 (Jan. 4, 2011): The Board affirmed a March 1, 2010 decision by Judge Michael Rosas that the Respondent illegally withdrew recognition of the International Association of Heat & Frost Insulators and Allied Workers Local No. 74, illegally refused to bargain with the union for a successor contract, and illegally changed employees' wages and other terms and conditions of employment. The remedy includes rescinding unilateral changes and making employees whole for all losses incurred from August 1, 2009, until the changes are rescinded.

Benjamin Franklin Plumbing & Michael J. Mueller, 356 N.L.R.B. No. 99 (Feb. 25, 2011): Granting the Region's motion for partial default judgment, the Board ordered Respondent to make whole two employees found to have been discharged in violation of the Act in an earlier Board proceeding. In this matter, the Board ordered Respondent to pay backpay totaling $62,085, plus interest (which is now compounded daily). In addition, the Board found Michael Mueller, the owner of Respondent, personally liable for the backpay in view of allegations that Mueller comingled Respondent's assets with his personal assets and created a new corporation to avoid Respondent's obligations under the Act.

Administrative Law Judge Decision Involving Region 18 Unfair Labor Practice Complaint

Laborers District Council of Minnesota & North Dakota, 18-CC-1485 (Nov. 1, 2010): Administrative Law Judge Mark Rubin sustained complaint allegations that the union refused to allow Lake Area Fence, Inc. to sign an industry-wide collective bargaining agreement in order to pressure Lake Area Fence to cease doing business with Century Fence Company, a company with which the union has a primary dispute. Judge Rubin concluded that the union's goal was to force Lake Area Fence to cease doing business with Century. Judge Rubin ordered the union to cease engaging in this type of secondary conduct but refused to grant the Region's request that the union be ordered to sign the collective bargaining agreement with Lake Area Fence.

Regional Director Decisions Involving Representation Issues

DAJA Inc., d/b/a New Hope Automotive, 18-RC-17724 (Sept. 22, 2010): Garage Maintenance, Machine Warehousemen, Repairmen, Inside Men and Helpers and Plastic Employees Local Union 974 sought to represent a unit of mechanics, technicians and service writers. The employer sought to delay the payroll date used to determine voter eligibility, contending that it was attempting to hire at least one additional unit employee. Rejecting the employer's position, the Regional Director held that the employer's argument was inconsistent with the Board's goals to conduct orderly and prompt elections and to promote stability in the election process.

Lake Region Healthcare Corp., 18-UC-430 (Nov. 17, 2010): Granting a request by AFSCME Council 65, the Regional Director held that a newly created position—maintenance technician—should be clarified into an existing service and maintenance unit. In doing so, the Regional Director rejected employer claims that the maintenance technician had different skills than a prior engineer II position (which the employer had eliminated). Therefore, the Regional Director found that the maintenance technician was a unit position, using the analysis in *Premcor, Inc.*, 333 N.L.R.B. 1365 (2001). In any event, even if use of the *Premcor* analysis were rejected by the Board, the Regional Director concluded that maintenance technicians shared a close community of interest with existing unit employees and that, under the Board's health care rules, they belonged in the service and maintenance unit.

ECUMEN d/b/a Ecumen Scenic Shores, 18-RD-2724 (Feb. 23, 2011): The Regional Director rejected AFSCME Council 15's argument that the petition in this matter should be dismissed pursuant to the successor bar doctrine. The decision notes that the employer recently purchased a long-term health care facility in Two Harbors, Minnesota; that the employer hired a majority of the predecessor employer's employees; and that the employer recognized Council 15 as the employees' collective bargaining agent. Therefore, the employer is a successor to the predecessor employer obligated to bargain with Council 15 over the terms of a contract. However, the decision also states that under current Board law the filing of a decertification petition is not barred in order to give a union and an employer in a successor situation time to bargain for a contract.

The decision rejected Council 15's argument that, because the Board granted a request to reconsider the successor bar doctrine in another representation matter, this petition should be dismissed. Council 15 has filed a request for review with the Board asking the Board to delay election in this case until the Board issues a decision pursuant to its reconsideration of the successor bar doctrine.

MSBA Sections
Labor & Employment Law Section
Labor & Employment Law News
Vol 24, No 3 | Summer 2011

Title VII

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Retaliation: Third-Party Reprisal and Direct Evidence

Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011): The Supreme Court issued yet another opinion deciding the scope of Title VII's anti-retaliation provision, giving Title VII an expansive reading favorable to employees.

The employee, Thompson, and his fiancée worked for the same employer. Thompson's fiancée, Miriam Regalado, filed a sex discrimination charge with the EEOC against their employer. Three weeks after the employer learned of Regalado's charge, the employer fired Thompson. Thompson alleged that he had been terminated in order to retaliate against for Regalado's having filed a charge.

The district court granted summary judgment on the ground that Thompson was not protected by Title VII's anti-retaliation provision because he was not a party to Regalado's EEOC charge. The Court of Appeals for the Sixth Circuit affirmed.

The Supreme Court reversed, stating, "[W]e have little difficulty concluding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII." The Court relied on its prior holding in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), that Title VII's anti-retaliation provision encompasses any employer behavior that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court thought it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancée would be fired."

The Court then addressed the question of whether Title VII provided Thompson a cause of action. The statute provides that a civil action may be brought by the person claiming to be aggrieved. The Court noted that, if the aggrievement referred to in the statute required nothing more than constitutional standing (injury in fact caused by the defendant and remediable by the court), then Thompson could easily meet that standard. The Court declined to adopt that standard, however, as well as a standard that would permit suit only by the person who engaged in the protected activity. Instead, the Court looked to the Administrative Procedure Act, under which a plaintiff may sue if he falls within the "zone of interests" sought to be protected by the statutory provision forming the legal basis of the complaint. Adopting that view, the Court held that Thompson fell within the zone of interests protected by Title VII, because he was an employee and the purpose of Title VII is to protect employees from their employer's unlawful actions.

Young-Losee v. Graphic Packaging International, Inc., 631 F.3d 909 (8th Cir. 2011): The long-debated question of what kind of evidence might be considered direct evidence sufficient to permit a plaintiff to survive summary judgment without proceeding under the *McDonnell Douglas* three-step analysis has been answered by the Eighth Circuit.

In this case, the plaintiff alleged that she was retaliated against for making a claim of harassment. She alleged that she gave a written complaint of harassment to her employer. In a meeting with two managers to discuss the complaint, she alleged that one manager wadded up the complaint; threw it in the garbage can; and said the complaint was "total bullshit," "I want you out of here," and he never wanted to see her again.

Upon review of the district court's grant of summary judgment, the Eighth Circuit reversed and held that Young-Losee had presented direct evidence of retaliation.

Previously, the Eighth Circuit had clarified in the case of *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004), that the concept of "direct evidence" refers to the causal strength of the proof, not whether it is circumstantial evidence, and encompasses any type of evidence showing a specific link between the alleged discriminatory animus and the challenged employment decision. The court had seldom, however, found direct evidence to be present.

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

Wage and Hour

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Supreme Court: Oral Complaints Can Give Rise to Retaliation Claim

***Kasten v. Saint-Gobain Performance Plastics Corp*.**, --- S. Ct. ----, 2011 WL 977061 (2011): In a six-two decision, the Court ruled on what types of "complaints" can give rise to a Fair Labor Standards Act retaliation claim.

Plaintiff Kevin Kasten claimed that he repeatedly made oral complaints to management about the location of the timeclock. The timeclock was located so employees were not compensated for time spent donning and doffing protective gear. The plaintiff claimed he told management and human resources that the location of the timeclock "was illegal" because it excluded "the time you come in and start doing stuff" and was contemplating a lawsuit. The plaintiff claimed that he was discharged because of his oral complaints about the timeclock's location. The company disputed that the plaintiff made such complaints.

Indeed, in a related suit initiated by the plaintiff, the Western District of Wisconsin agreed that the location of the timeclock violated the FLSA. *Kasten v. Saint-Gorbain Performance Plastics Corp.*, 556 F. Supp. 2d 941 (W.D. Wis. 2008).

On a motion for summary judgment, the district court assumed that plaintiff did complain as he alleged but ruled in favor of the employer because it concluded the FLSA did not protect *oral* complaints. The Seventh Circuit affirmed the district court.

The Supreme Court granted certiorari to resolve a conflict among the circuits as to whether an oral complaint is protected by the FLSA anti-retaliation provision. The FLSA prohibits discriminating against an employee "because such employee has filed any complaint . . . under or related to [the FLSA]." 29 U.S.C. § 215(a)(3).

Beginning with the text of the statute, the Court noted that the dictionary gives "filed" different meanings depending on the context, which could include oral statements. Further, legislators, administrators, and judges "have all sometimes used the word 'file' in conjunction with oral statements," and some federal regulations permit complaints to be “filed” orally. Case law from the 1920s and 1930s, contemporaneous to the FLSA’s passage, also suggest that “oral filings were a known phenomenon.”

The Court reasoned that interpreting “filed” to exclude oral complaints would undermine the FLSA’s purpose: “Why would Congress want to limit the enforcement scheme’s effectiveness by inhibiting use of the Act’s complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?” The Court also gave some weight to the Secretary of Labor’s long-standing view that the words “filed any complaint” includes oral complaints.

The Court noted, however, that an employee must be provided with fair notice of a complaint. Therefore, “[t]o fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.” The Court vacated the judgment and remanded the case.

Eighth Circuit: Dismissal of Anti-retaliation Complaint Where Plaintiff Merely Recorded Overtime Hours

Ritchie v. St. Louis Jewish Light, 630 F.3d 713 (8th Cir. 2011): The Eighth Circuit Court of Appeals affirmed the lower court’s dismissal of the plaintiff’s claim that her employment was terminated in violation of the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

The plaintiff’s complaint alleged, in pertinent part: (1) the plaintiff was asked to perform work formerly performed by two other employees; (2) the plaintiff was instructed to not record overtime hours; (3) the work the plaintiff performed required overtime, which the plaintiff recorded; (5) the plaintiff was told again to not record overtime hours; and (6) when she continued to record her overtime, her employment was terminated. She was paid for her overtime work.

As an initial matter, the court declined to decide whether informal complaints constituted protected activity under the FLSA. Instead, assuming this to be so, the court held that the plaintiff did not make any sort of complaint to either her employer or supervisor. The plaintiff’s “recording of her overtime could be nothing more than mere insubordination, she having been instructed to the contrary,” and “insubordination is not sufficient to trigger the anti-retaliation provision in 29 U.S.C. § 215(a)(3).”

District Court: Dismissal of Minnesota FLSA and Whistleblower Claims

Mellon v. Hospice Preferred Choice, Inc., Civ. No. 09-932, 2011 WL 70612 (D. Minn. Jan. 10, 2011): The plaintiff’s workload required her to work through lunch breaks and from home in order to complete her work tasks. While the defendant employer had a policy requiring employees to record their hours accurately and take scheduled breaks, the plaintiff did not record the extra time on her time card. The plaintiff’s supervisor learned that she was not taking scheduled breaks and informed the plaintiff that she needed to do so. In a later meeting, the plaintiff complained that her time card had been altered—that an hour had been removed from her workday—and that altering her timecard was “against the law.” When she complained, the plaintiff was not aware of any violation of law, but her statement was based on company policy. The plaintiff had another meeting to discuss performance problems, and she raised her voice and swore. The next day, the plaintiff’s employment was terminated.

The court dismissed the plaintiff’s claims under the Minnesota Fair Labor Standards Act. The court held that the plaintiff had failed to produce evidence from which the court could draw a “just and reasonable inference” for the time Mellon worked without compensation. The court also granted summary judgment as to the plaintiff’s record-keeping claim, finding there was no evidence that the altered time card constituted the official record of the plaintiff’s hours.

The court further held that the plaintiff’s complaints regarding the timecard action were not protected activity under the Minnesota Whistleblower Act. The court stated that the plaintiff’s reports were not based on a suspected violation of law but were based instead on a suspected violation of a company policy. The plaintiff did not engage in statutorily protected activity when she reported that she could not complete her duties without working overtime and through breaks. There was no evidence that the plaintiff’s complaints were based on suspected violations of law. Instead, the plaintiff's report reflected her concerns about her well-being and conformance to company policy.

MSBA Sections

Labor & Employment Law Section

Labor & Employment Law News

Vol 24, No 3 | Summer 2011

State Discrimination Cases

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MHRA Exclusivity and Whistleblower Claim

Nelson v. County of St. Louis, No. A10-676, 2011 WL 382630 (Minn. Ct. App. Feb. 8, 2011) (unpublished decision): The Minnesota Court of Appeals, on an appeal after a bench trial, rejected arguments that a nurse's whistleblower claim against the county was barred by the exclusivity provision of the Minnesota Human Rights Act and affirmed judgment on both claims. The court determined that, while the plaintiff's whistleblower and MHRA claims were predicated on the same injury—termination, each arose out of distinct facts and distinct unlawful behavior.

Nelson is an RN who was employed with the county from 1978 until her termination in 2005, holding various nursing and supervisory positions throughout the years. Nelson's last job was unit supervisor in the Chris Jensen Health and Rehabilitation Center. She filed a vulnerable adults report in 2003 with the head of the department, which resulted in a finding of neglect but also a finding that the center had taken corrective action. Nelson's workload was thereafter increased significantly, and Nelson complained to her supervisor and the union. In 2004, Nelson filed a gender-harassment grievance against her supervisor. The county, after an investigation, concluded that the grievance was unfounded but that "administrative concerns" were identified. Nelson took a medical leave.

Upon her return to work filed another vulnerable adults report. She was ultimately suspended for two months without pay. She grieved the suspension, and the arbitrator found in the company's favor but reduced the length of the suspension.

She returned to work and filed gender discrimination and reprisal claims with the Minnesota Department of Human Rights in August 2005. The center received notice of the charges in early September, and she was implicated in another incident days thereafter. Nelson was terminated after an investigation of the incident, but another supervisor who was also involved in the incident was not disciplined. She grieved the termination, and the arbitrator reduced the discipline to an unpaid suspension for the duration of the arbitration process, a period of about three years. She filed additional claims with the MDHR, and less than two weeks later, negative employee evaluations were put in Nelson's personnel file and sent to the board of nursing.

The district court allowed claims under the Whistleblower Act and the MHRA to proceed and entered summary judgment in favor of the county on a number of other claims. After a bench trial, the court found in favor of Nelson.

On appeal, the court of appeals ruled that the MHRA's exclusivity provision did not bar Nelson's whistleblower claims, relying on the principles articulated by the Minnesota Supreme Court in *Williams v. St. Paul Ramsey Medical Center, Inc.*, 551 N.W.2d 483 (Minn. 1996). The injury—termination—was identical in both instances. However, the claims were not predicated on the same facts or the same unlawful practice. The whistleblower claim arose from actions taken against Nelson for having filed vulnerable adults reports, and the MHRA claim was based on actions taken for having complained of gender discrimination and harassment.

Disability Threshold and "Materially Limiting" Impairment

In two unpublished decisions, the court of appeals continues to tackle the threshold for establishing a "disability" under the Minnesota Human Rights Act. The facts in both cases occurred prior to the passage of the federal Americans with Disabilities Act Amendments Act ("ADAAA").

In one case, the court of appeals ruled that the allegations of plaintiff's complaint regarding her diabetes were sufficient to survive a Rule 12 challenge. ***Walker v. Hennepin County***, No. A10-1703, 2011 WL 1237567 (Minn. Ct. App. Apr. 5, 2011) (unpublished decision). The plaintiff had alleged, among other matters, that she had to test her blood sugar several times a day and administer insulin from a pump and that she was hospitalized due to complications from her diabetes and placed on work restrictions. The court of appeals cited only to Minnesota cases in its discussion as to whether the plaintiff had met the "disability" threshold for Rule 12 purposes. (The Rule 12 motion was based on the defense of official immunity.)

In another case, the court upheld summary judgment in favor of the employer in a case involving lower back, shoulder, and knee problems, as well as a stroke. ***Schmitz v. United States Steel Corp.***, No. A10-633, 2010 WL 4941668 (Minn. Ct. App. Dec. 7, 2010) (unpublished decision). The court in *Schmitz* referenced pre-ADAAA federal cases and standards in its discussion, while noting that the "substantially limits" standard is more stringent than the "materially limits" standard.

We are all watching closely for how Minnesota courts will address the "materially limited" threshold (which seems to have been historically difficult to define in relation to the federal standard) in the post-ADAAA environment in the months and years ahead.

Mixed-Motive Analysis on Summary Judgment

Farmers Insurance Exchange v. Tomczik, No. A10-1189, 2011 WL 1119843 (Minn. Ct. App. Mar. 29, 2011) (unpublished decision): The court of appeals affirmed summary judgment in favor of Farmers Insurance, rejecting mixed-motive arguments in regard to plaintiff's disparate treatment claim and ruling that plaintiff had neither identified a specific policy nor presented viable statistical evidence to survive summary judgment on his disparate impact claim.

Tomczik was employed as an insurance agent with Farmers Insurance from 1975 until his termination in 2006 for allegedly having diverted business to a competitor. Following the termination, Farmers brought action against Tomczik and his subsequent employer, alleging that Tomczik had breached a post-termination nonsolicitation provision. Tomczik countered with age discrimination claims under the Minnesota Human Rights Act, among other claims. The district court granted summary judgment to Farmers on the age discrimination claims, and Tomczik appealed.

In regard to the disparate treatment claim, the court of appeals determined that Tomczik failed to show a genuine issue of material fact as to the fourth element of the prima facie case, replacement by a nonmember of the protected class. Tomczik was fifty-six at the time, and his work was distributed to other agents, half of whom were over the age of fifty-two. The court emphasized that a person is not replaced when work is redistributed to other existing employees already performing related work.

Tomczik apparently attempted to present statistical evidence to raise an inference of discrimination for purposes of the prima facie case. The court however ruled that *Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319 (Minn. 1995), limits the use of statistical evidence to cases involving a bona fide reduction in force.

Tomczik also argued that the court should apply a mixed-motive analysis citing *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619 (Minn. 1998), and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The court of appeals rejected the argument, reasoning that both cases dealt with the post-trial stage, not summary judgment, and *Anderson* specifically rejected a mixed-motive analysis.

In regard to the district impact claim, Tomczik failed to identify a facially neutral employment practice that adversely affected the workforce based on age. Farmers had a right to terminate agents who placed business with competitors and notified the agents in writing of their intention to do so. The court also upheld the district court's exclusion of the statistical evidence proffered by Tomczik. The expert had concluded that Farmers terminated a disproportionately high number of agents age forty and older. The conclusions were, however, based on a comparison of the workforce in the general population, rather than the actual composition of Farmer's workforce. The expert's opinion was based on the assumption that the ages of Farmer's workforce mirrored that of the U.S.

Sexual Harassment Must Be Sexual in Nature, Not Gender-Based

LaMont v. Independent School District No. 728, No. A10-543, 2011 WL 292131 (Minn. Ct. App. Feb. 1, 2011) (unpublished decision): The court of appeals upheld summary judgment in favor of the school district on claims of sexual harassment where plaintiff failed to proffer evidence that the supervisor engaged in unwelcome *sexual* advances or physical contact or other *sexual*, as opposed to gender-based, behavior. Although she proffered evidence of one statement by the supervisor with sexual content, her allegations centered on sexist statements regarding the role of women and restrictions placed on women and not men.

Plaintiff argued that the district court erred in limiting its consideration to evidence of harassment of a sexual nature. The court rejected plaintiff's arguments, which were largely based on Title VII case law. In doing so, the court of appeals emphasized that the statutory language of the MHRA and Title VII differ in the treatment of sexual harassment, as the MHRA specifically prohibits sexual harassment while Title VII prohibits sex discrimination. The opinion does not address the EEOC's regulatory definition of sexual harassment for purposes of Title VII or federal case law relying on the EEOC definition.

Section 1981 Employer Liability to Customer for Actions of Employee

Udofot v. Seven Eights Liquor, No. A10-431, 2010 WL 5071313 (Minn. Ct. App. Dec. 14, 2011) (unpublished decision): The court of appeals affirmed summary judgment in favor of Seven Eights Liquor on claims of race discrimination under 42 U.S.C. § 1981 arising out of a physical altercation between a store employee and the plaintiff, a customer. Plaintiff was beaten by the store employee during the altercation, which occurred after plaintiff had purchased beer and returned to request a receipt for the purchase. He pursued a number of claims, including a § 1981 claim.

The court reviewed the threshold for a prima facie case under § 1981, noting that first and foremost the plaintiff must identify "an impaired contractual relationship." The issue for the court was whether the purchase of the beer and other items concluded the contractual transaction or relationship, or whether the transaction or relationship concluded with the provision of a receipt.

Plaintiff alleged that the racial epithet that began the altercation occurred before or in connection with plaintiff's request for a receipt, and that the attempt to obtain a receipt should be viewed as an act to enforce a benefit, privilege, term or condition of the contractual relationship under § 1981.

The court of appeals rejected this argument, relying on UCC definitions of a conclusion of a sale ("A 'sale' occurs when title passes from the seller to the buyer for a price." Minn. Stat. § 336.2-106(1) (2008)), and an analysis of federal and state cases outside Minnesota, which either confirm that purchase of goods consummate the contract or that the provision of a receipt is not a benefit, privilege, term or condition of a retail sales contract.

MSBA Sections
Labor & Employment Law Section
Labor & Employment Law News
Vol 24, No 3 | Summer 2011

Minnesota Tort and Contract Cases

By Charles F. Knapp and Julie M. Giddings
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World-Wide Non-Compete Agreement for Medical Device Sales Manager Reasonable

Medtronic, Inc. v. Hughes, No. A10-998, 2011 WL 134973 (Minn. Ct. App. Jan. 18, 2011): In this case, the Minnesota Court of Appeals upheld the enforcement of a non-compete agreement that restricted a medical device sales manager from working with competitive products. The court rejected the defendants' arguments that the agreement was unenforceable due to its world-wide scope because the employee's new employer competed with his former employer globally and the product-specific limitations in the agreement struck a reasonable balance in the absence of a geographic restriction.

Defendant James Hughes began working at plaintiff Medtronic, Inc. in 1995. Over the years, Hughes was promoted to various positions, culminating in his final position as district sales manager for cardiac rhythm disease management (CRDM) devices for Medtronic's Alabama district. In 2002, in exchange for over $50,000 in restricted stock, Hughes signed a non-compete agreement that prohibited him from working on competitive products for a period of two years following the termination of his Medtronic employment. In 2008, Hughes accepted a position with St. Jude, a direct competitor of Medtronic, as regional sales director for CRDM devices in the Orlando, Florida area.

Medtronic filed suit against Hughes for anticipatory breach of contract. Upon Hughes' commencement of work in St. Jude's CRDM division, Medtronic amended its pleadings to assert a claim against St. Jude for tortious interference with contract. Hughes counterclaimed for declaratory relief, seeking that the agreement be reformed to a "reasonable geographic boundary" that would not include Hughes' employment in Florida with St. Jude and that the time limitation be reformed to no longer than one year.

Following a trial, the district court held that Medtronic's non-compete was enforceable because it reasonably served to protect Medtronic's legitimate business interests. However, the district court found the two-year duration to be overbroad and reduced the restriction to one year. The district court also found in favor of Medtronic on the tortious interference claim, finding that St. Jude intentionally procured Hughes's breach of the non-compete and was not justified in doing so.

On appeal, Hughes and St. Jude challenged the district court's findings that the non-compete was reasonable and that St. Jude had tortiously interfered with Hughes' contract.

The court of appeals noted that non-compete agreements will be enforced to the extent necessary to protect legitimate business interests, including the company's good will, trade secrets, and confidential information. Although Medtronic's agreement did not contain a geographic limitation, Medtronic operates on a global scale in its sale of CRDM products and competes with St. Jude in that market globally. The court noted that the confidential information that Hughes had access to as a Medtronic sales manager was not limited to the specific geographic areas that he covered and could be applied to markets anywhere in the world. In addition, the non-compete was restricted to certain cardiology products, allowing Hughes to work for a competitor in other divisions. The product-specific limitation struck a reasonable balance between Medtronic's need to protect its confidential information and Hughes' need to earn a living.

The court of appeals also upheld the district court's finding of tortious interference by St. Jude. St. Jude challenged the finding that St. Jude had intentionally procured Hughes' breach, but the court relied on *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356 (Minn. 1998), in upholding that finding. As in *Kallok*, St. Jude had met with Hughes multiple times to discuss a potential position and had procured the breach by offering Hughes the position that he was prohibited from accepting due to his non-compete agreement. In addition, St. Jude was not justified in its interference. Although St. Jude argued that it had a good-faith belief that the agreement was unenforceable and therefore its actions in procuring the breach were justified, the court of appeals upheld the district court's conclusion that St. Jude had presented no evidence to support its argument. St. Jude refused to disclose the basis for its assertion on the grounds of attorney-client privilege and made no attempt to introduce non-privileged evidence to support its justification argument.

Statute of Limitations Restarts with Each Pay Period of Continued Employment

Hamann v. Park Nicollet Clinic, 792 N.W.2d 468 (Minn. Ct. App. 2010): In this case, the Minnesota Court of Appeals found that a plaintiff's breach of contract action brought four and one half years after an employer's repudiation of a physician call-exemption policy was timely because the action accrued each pay period that the physician remained employed. The court applied the rule that a contractual cause of action for lost wages accrues each time a payment is due, but is not paid, in making its ruling. Furthermore, the employer did not satisfy its obligations under the policy.

Plaintiff Arlyn Hamann has been employed by defendant Park Nicollet Clinic since 1974. According to Hamann, in 1995, Park Nicollet adopted a policy under which all physicians in Hamann's department could qualify to be exempt from working night call without incurring any salary reduction upon meeting certain eligibility requirements, including being at least sixty years old and having worked night call for at least fifteen years.

Hamann alleged that in spring 2004, several months before turning sixty, Hamann advised Park Nicollet that he intended to elect the night-call exemption. Hamann's department chair requested that Hamann wait until April 2005 to elect the exemption because several physicians in the department were on maternity leave at the time, and

Hamann agreed. But in April 2005 when Hamann renewed his request to elect his night-call exemption, Park Nicollet informed him that the policy no longer existed and that his salary would be reduced if he did not work night call. Hamann continued working night call for several years. When he discontinued night call in 2008, his salary was reduced.

Hamann initiated an action for breach of contract, unjust enrichment, and related claims in October 2009. Park Nicollet moved to dismiss Hamann's action on statute of limitations grounds, and the district court granted the motion. On appeal, the Minnesota Court of Appeals reversed the district court's dismissal, finding that Hamann's claims had accrued within the statute of limitations.

Minnesota Statutes section § 541.07 requires that actions for the recovery of wages or damages respecting the payment of wages must be brought within two years, except that when the nonpayment is willful, the action may be brought within three years. Park Nicollet successfully argued to the district court that the limitations period began at the latest in April 2005, when Park Nicollet repudiated the policy by telling Hamann he would not be permitted to elect the night-call exemption. Hamann argued that each time he was required to work night call between 2005 and 2008 and each time his salary was reduced after 2008 was a separate breach that restarted the limitations period.

Relying on *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801 (Minn. 1989), the court of appeals held that each pay period during which Park Nicollet failed to satisfy its obligations under the policy constituted a separate alleged breach restarting the statute of limitations. In *Levin*, the Minnesota Supreme Court held that a contractual cause of action for lost wages arises each time a payment is due but not paid. Hamann's claims were not limited to compensation for a single pay period following Park Nicollet's repudiation of its policy. Rather, the court found that Park Nicollet had a future obligation to pay or provide specific benefits to Hamann at certain stated intervals (pay periods) for an indefinite period of time into the future. The benefits continued to accrue because of Hamann's continued service to Park Nicollet. The court noted that its ruling was consistent with FLSA case law that a new cause of action accrues with each payday following an alleged unlawful pay period.

MSBA Sections
Labor & Employment Law Section
Labor & Employment Law News
Vol 24, No 3 | Summer 2011

Unemployment Compensation

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Ineligible for Benefits if Terminated for Material Misrepresentation During Hiring Process

Santillana v. Central Minnesota Council on Aging, 791 N.W.2d 303 (Minn. Ct. App. 2010): Relator worked as a grants manager at the Central Minnesota Council on Aging (CMCA). Relator had previously worked at a nursing home. While there, she wrote personal checks to herself from a resident's checkbook. She was terminated for theft. At the time she was terminated, Relator was under a criminal investigation. While interviewing for the position at CMCA she was asked why she left the nursing home and responded that she left because she was looking for part-time work. After being hired by CMCA, Relator was charged with felony exploitation of a vulnerable adult and pled guilty. Relator did not disclose this to CMCA, and CMCA had no policy requiring such disclosure. CMCA fired Relator after seeing her conviction in the newspaper.

The unemployment law judge (ULJ) determined that while CMCA may have had "an excellent business reason" to fire Relator, her actions did not amount to misconduct. CMCA requested reconsideration, and the ULJ reversed the decision, finding that Relator's "misrepresentation and failure to disclose a material fact in her interview was a serious violation of employer's reasonable expectation" so that Relator's conduct amounted to employment misconduct. The ULJ also found Relator was discharged for "aggravated employment misconduct."

On appeal, the Minnesota Court of Appeals looked at the statutory definitions of both "employment misconduct" and "aggravated employment misconduct." As for misconduct, the court held that "a material misrepresentation during the hiring process" fits within the definition because "intentionally misrepresenting a fact that is material to employment shows a substantial lack of concern for the employment." Thus, "a person making a material misrepresentation during the hiring process is therefore ineligible for unemployment benefits if he or she is later discharged because of the misrepresentation." Here, Relator made a material misrepresentation: in her position as a grant writer, Relator had access to confidential client information including names, addresses, and social security numbers; it was unlikely that CMCA would have hired Relator if she had disclosed the real reason for her separation from the nursing home.

Aggravated employment misconduct is "the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act . . . had a significant adverse effect on the employment." Minn. Stat. § 268.095 subd. 6(a)(1) (2008). The court disagreed with the Minnesota Department of Employment and Economic Development's position that a crime committed prior to employment can form the basis for a discharge due to aggravated employment misconduct. The court held that "an employee cannot be discharged for aggravated employment misconduct based on an act or conduct that would amount to a gross misdemeanor or a felony if the act or conduct occurred before the employment at issue."

Viewing Porn on Employer's Computer Is Misconduct

***Brisson v. City of Hewitt*,** 789 N.W.2d 694 (Minn. Ct. App. 2010): Relator worked as a utility-maintenance supervisor for the city of Hewitt. After a city resident reported seeing Relator viewing pornography on his work computer, the city conducted an investigation. The investigation found more than 150 pornographic images on Relator's computer. The city then terminated Relator. During the hearing before the ULJ, Relator admitted to using his work computer to open pornographic email attachments and to access pornographic websites. Relator argued that his actions were not misconduct because the city did not have a policy prohibiting such conduct.

The Minnesota Court of Appeals found that Relator's job duties did not relate to his viewing pornographic material. Based on the large number of images on the Relator's computer, Relator could not have accessed the images inadvertently or because of his inability to operate a computer. The court held that Relator's use of his employer's computer to open pornographic email attachments and to access pornographic websites seriously violated a standard of behavior that the employer had a right to reasonably expect, even though the employer had not adopted a policy that prohibited the conduct.

Exception for Quitting for Better Job

***Sykes v. Northwest Airlines, Inc.*,** 789 N.W.2d 253 (Minn. Ct. App. 2010): Relator quit her job at Northwest Airlines for a higher-salaried position with another employer. Relator quit after Northwest Airlines offered her and other employees a voluntary early-out program. Under the program, employees who quit their employment would continue to receive subsidized health insurance through Northwest Airlines. Relator quit and accepted a position at another employer, earning $10,000 more per year, but no health insurance. After two weeks the new employer informed her that it lacked the funds to pay her.

Relator applied for unemployment benefits arising from her employment with Northwest Airlines and was denied because she quit. The ULJ determined that Relator was ineligible for unemployment benefits because, when Northwest Airline's contribution toward the cost of Relator's health insurance is included in the comparison, the position with the new employer was not substantially better than Relator's position at Northwest Airlines.

The Minnesota Court of Appeals affirmed. The court held that because Relator did not quit to accept substantially better employment, she was ineligible for benefits. Under the statutory definition, a quit-for-a-better-job exception exists where

> the applicant quit . . . to accept other covered employment that provided substantially better terms and conditions of employment, but the applicant did not work long enough at the second employment to have sufficient subsequent earnings to satisfy the period of ineligibility that would otherwise be imposed . . . for quitting the first employment.

Minn. Stat. § 268.095 subd. 1 (Supp. 2009).

The court noted that terms and conditions of employment are not limited to wages. They also include "benefits such as advancement opportunities, union representation, and group health, life, and disability insurance coverage." Whether a new opportunity is substantially better is based on an objective comparison of the positions' terms and conditions, not a comparison of which position is more suitable to the personal needs of the employee. Furthermore, the focus is on the objective value of the terms and conditions offered by each employer, regardless of whether the employee chooses to take advantage of the terms and conditions offered.

Therefore, the cost of Northwest Airline's health insurance contribution is included in the comparison calculation. The court determined, in comparing Relator's two positions, the new positions only offered a net annual compensation increase of $2,800 or less than 5% over the Northwest position. In *Sunstar Foods, Inc. v. Uhlendorf*, 310 N.W.2d 80 (Minn. 1981), the Minnesota Supreme Court held that a 21% decrease is substantial, but a 2 to 4% decrease is not. Therefore, Relator's actions in quitting Northwest Airlines did not fall into the substantially better position definition.

Judge Minge dissented.

Failure to Follow Employer's Reasonable Policies Is Misconduct

Burkart v. Wisconsin Employment Security Division Combined Wage Claims, A10-422, 2011 WL 68128 (Minn. Ct. App. Jan. 11, 2011): Relator was employed as a mechanical engineer for Bosch Packaging Technology, Inc., starting in October 2008. During his employment, symptoms of Relator's medical condition surfaced, and Relator took medical leave beginning on July 31, 2009. During a phone conversation in mid-August while Relator was on leave, Bosch informed Relator that he needed to complete a return-to-work form in preparation for his return to work. At that time, Relator informed Bosch that his leave had been extended through September 15 and he would provide the form to Bosch on September 15 after his medical appointment. Relator, however, did not return the form on September 15 and did not report to work on September 16. Bosch then contacted Relator who stated he had missed his medical appointment and was expected to return to work on September 18. Bosch asked Relator to call after his doctor's appointment on September 17 and to bring the return-to-work form with him when he reported to work on September 18.

On September 18, Relator did not return to work and did not provide the return-to-work form. Relator did not respond to Bosch's phone calls or messages. On September 22, Bosch sent Relator a certified letter informing that if he did not return to work on September 25, his employment would be terminated. This letter was later returned to Bosch after failed attempts by the postal service to deliver it. On September 30, Relator called the company. Bosch informed Relator that his employment was terminated for failing to keep the employer informed about his medical leave.

The ULJ found that Bosch had reasonable policies for absenteeism and that Relator failed to comply with the policies by not informing Bosch of his medical status between September 16 and 30, thus committing misconduct. The Minnesota Court of Appeals affirmed, finding the record showed that Relator “exhibited a substantial lack of concern for his employment and failed to adhere to Bosch’s reasonable policies and work expectations.”

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U.S. Supreme Court: Privacy Rights

NASA v. Nelson, 131 S. Ct. 746 (2011): NASA did not violate its workers' privacy rights under the U.S. Constitution when it required them to answer questions about previous drug treatment and asked their designated references whether the references had any reason to question the individual's honesty or trustworthiness.

NASA adopted a new policy of requiring its contract workers at the Jet Propulsion Laboratory (JPL) to complete a standard form asking, among other things, whether the employee has "used, possessed, supplied, or manufactured illegal drugs" in the past year. If so, the employee is required to provide detailed information, including information about "treatment or counseling received." In addition, an employee is required to provide references to fill out a questionnaire asking whether the reference has any reason to question the employee's honesty or trustworthiness or has any adverse information concerning a variety of other matters. Shortly before the deadline for the background check, JPL employees brought suit, alleging that this process violated a constitutional right to informational privacy.

The Court assumed, without deciding, that such a right to informational privacy does exist. However, even if such a right exists, the Court found that it did not prevent the government from asking reasonable questions of these sorts in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure. In light of the government interests at stake, the Court found that the background check is reasonable and constitutional.

The concurrence reached the same conclusion on "simpler grounds," asserting that there is no constitutional right to informational privacy.

City of Saint Paul v. Eldredge, 788 N.W.2d 522 (Minn. Ct. App. 2010), rev. granted (Dec. 14, 2010): The Minnesota Court of Appeals held that Minnesota Statutes section 484.01 subdivision 2 establishes the deadline for a first-class city to obtain judicial review of a final decision or order of a civil service commission or board under the Veterans Preference Act.

William Eldredge was a firefighter employed by the city of St. Paul and a veteran entitled to protection under the Veterans Preference Act (VPA), which prohibits a public employer from terminating the employment of an honorably discharged veteran "except for incompetency or misconduct shown after a hearing." Minn. Stat. § 197.46. The city sent Eldredge a notice of intent to terminate his employment, and Eldredge requested a hearing under the VPA. On July 31, the St. Paul Civil Service Commission granted Eldredge's motion for summary disposition on his VPA claim. On September 18, the city petitioned the district court for a writ of certiorari seeking judicial review of this order. Eldredge challenged the review, claiming the request was untimely under section 197.46. The district court granted the motion to dismiss, and the city appealed.

The issue presented on appeal was whether section 197.46, which requires a notice of appeal be served within fifteen days of notice of a decision, or section 484.01 subdivision 2, which gives a sixty-day window to appeal, provides the deadline for a first-class city to obtain judicial review of a final decision or order of a civil service commission or board under the VPA. Section 197.46 provides:

> [t]he veteran may appeal from the decision of the board upon the charges to the district court by causing written notice of appeal, stating the grounds thereof, to be served upon the governmental subdivision or officer making the charges within 15 days after notice of the decision and by filing the original notice of appeal with proof of service thereof in the office of the court administrator of the district court within ten days after service thereof.

Because this section only says "the *veteran* may appeal" (emphasis added) and requires service of the notice of appeal "upon the governmental subdivision or officer making the charges," the court held that this section does not provide the requirements for an appeal by the employer. Rather, section 484.01 subdivision 2 governs the appeal process. It states:

> Notwithstanding any law to the contrary, the district court has jurisdiction to review a final decision or order of a civil service commission or board upon the petition of an employee or appointing authority in any first-class city. The employee and appointing authority have standing to seek judicial review in all these cases. Review of the decision or order may be had by securing issuance of a writ of certiorari within 60 days after the date of mailing notice of the decision to the party applying for the writ . . . .

The VPA does not address appeals by employers or appointing authorities. Thus the directive in section 484.01 subdivision 2 that it "does not alter or amend the application of [the VPA]" does not affect these appeals. Eldredge argued that imposing a shorter deadline on a veteran than the employer is unfair, prejudicial to the veteran, and absurd. The court, however, noted that the veteran stays employed pending the appeal. Furthermore, the statutory language is explicit, unambiguous, and thus controlling.

Murphy v. St. Paul Public Schools, Independent School District No. 625, 795 N.W.2d 30 (Minn. Ct. App. 2011): The reassignment of a teacher from a principal to an assistant principal position is a demotion for purposes of the Teacher Tenure Act, which may be implemented only following notice and a hearing.

Independent School District No. 625 hired Patricia Murphy as a teacher in 2002. She was promoted to the position of principal at Arlington Senior High School in 2005. Due to budgetary problems, the district closed Arlington in 2010 and reassigned Murphy to an assistant principal position at Como Park Senior High School. The district's appointment letter stated that Murphy would retain her rank and level of compensation in the new position. Murphy sought review of the district's decision, arguing that the reassignment constituted a demotion and the district violated the Teacher Tenure Act by failing to provide her with notice and hearing prior to the reassignment. The district responded that the reassignment was not a demotion because Murphy did not suffer a reduction in salary, rank, or seniority.

Under the Teacher Tenure Act applicable to school districts situated in cities with more than 100,000 residents, a teacher with tenure is entitled to notice and a hearing before discharge or demotion. Minn. Stat. § 122A.41 subd. 7. The act defines the word "demote" to mean "to reduce in rank or to transfer to a lower branch of the service or to a position carrying a lower salary or compensation." Minn. Stat. § 122A.41 subd. 1(c).

Because this definition is stated in the disjunctive, the court of appeals agreed with Murphy that only one of the three listed actions needs to be shown to establish a covered demotion. Murphy had established the existence of a demotion based on two separate grounds. First, the court found that the district's action amounted to a lower placement within the overall organizational structure because Murphy now reports to the building leader rather than serving as the building leader. In addition, even though Murphy's actual salary was not reduced, the salary range applicable to the assistant principal position is lower than that applicable for a principal. This latter fact established that Murphy had been demoted "to a position carrying a lower salary." Thus the court ruled that the district acted unlawfully by demoting Murphy without affording the procedures specified by the TTA.

The court remanded the matter back to the Saint Paul Board of Education.