BARRAN LIEBMAN LLP
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Case Law & Legislative Update

Oregon Labor Law Conference

Portland, Oregon
January 29, 2016

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CASE LAW AND LEGISLATIVE UPDATE

I. STATUTES, REGULATIONS AND PROPOSED LEGISLATION

A. Enacted Statutes and Rules

1. New NLRB Rules on Representation Elections

On December 12, 2014 the NLRB issued a new set of regulations relating to representation elections. The new rules went into effect on April 14, 2015 and amend the current rules to provide the following: (1) unions may file election petitions electronically; (2) within seven days of filing of the petition, the employer must provide the union with a list of employees eligible to vote along with a list of job classifications, shifts and work locations in order to assist the union in presenting the regional director with its arguments as to the appropriate unit for the election; (3) after the presentation of arguments relating to the nature of the proposed bargaining unit, the regional director will determine whether an election will be held with the regional director's opinion eligible for appeal to the full board; and (4) within seven days of the regional director's order of an election, the employer must provide to the union phone numbers and email addresses as well as home addresses for the employees in the proposed unit. The former Board recommendation was that elections be held within 42 days of the filing of the petition. Under the new rules, those elections could be held within 10-14 days after the filing of the petition.

2. Measure 91 and Recreational Marijuana Usage

- Measure 91 changes in marijuana usage and possession.
    - Until July 1, 2015, possession of 1 to 4 ounces is a misdemeanor and more than that is a felony.
    - Effective July 1, 2015, people 21 and older will be allowed to possess up to 1 ounce in a public place and 8 ounces in their home. The law also allows up to four marijuana plants per household. It also allows up to 1 pound of solid edibles; 72 ounces of marijuana-infused liquid; and 1 ounce of marijuana extract.
    - The law says that an adult 21 or older will be able to give away an ounce to someone else 21 or over after July 1, 2015.
    - Oregon Liquor Control Commission has until January 1, 2016, to draft rules and regulations for production, processing, and selling.
    - The state must start receiving licensing applications by January 4, 2016.
- What has not changed?

- Federal Controlled Substances Act still lists marijuana as a Schedule 1 Drug
  - Finds high potential for abuse, and no currently accepted medical use
  - Possession and use of marijuana remain illegal under federal law
- Drug Free Workplace Act
  - Applies to employers who receive federal funds
  - Requires a zero tolerance drug policy
  - No requirement to drug test
- Omnibus Transportation Testing Act
  - Applies to trucking industry and generally to those industries involving commercial driver licenses
  - Requires drug and alcohol testing
- Occupational Safety and Health Act
  - General Duty clause – protect employees from known risks
- Oregon Medical Marijuana Act
  - Health care professional must "recommend" use
  - Patient must register
  - Decriminalized possession of small quantities of marijuana
  - Use must be in a private place
  - Washington's medical marijuana law is similar
- No duty to accommodate medical marijuana
  - Oregon Supreme Court and Washington Court of Appeals have both ruled that an employer does not have to accommodate an employee's use of medical marijuana.

3. Oregon Ban-the-Box

The Fair Chance Act would block federal agencies and government contractors from using an applicant's criminal history before making a conditional employment offer. The bill is expected to pass fairly easily.

On January 1, 2016, it will be unlawful for employers in Oregon to solicit information from an applicant about criminal convictions prior to an initial interview. If the employer does not conduct an initial interview, then the employer cannot ask about criminal background before making a conditional offer of employment. The law seeks to provide individuals with a criminal background a better opportunity for employment by allowing them to discuss and explain past issues with the employer. The law does not change what employers can screen for when making a hiring decision; only when employers can consider an applicant's criminal background. For example, an employer is free to ask an applicant about his or her criminal background during the initial interview and run a background check after the initial interview. BOLI has been charged with developing administrative rules for enforcing the new law.

4. Oregon Wage Discussions

On January 1, 2016, Oregon's Paycheck Fairness Act will go into effect making it unlawful for employers to discriminate against an employee for inquiring about, discussing or disclosing the wages of the employee or of another employee. The law also forbids discrimination based on an employee making a wage claim after learning of wage information from another employee. The goal of the law is to eliminate discrimination in pay by allowing an open discussion of wages among employees. One important exception relates to employees who have access to wage information of other employees as part of their job function and disclose that information to someone not authorized to access it on their own. In other words, someone in HR cannot print everyone's pay information and distribute it around the office; the initial disclosure must have been voluntary and authorized.

B. Pending Legislation and Potential Statutory and Case Law Changes

EEOC v. UPS, Inc., E.E.N.Y., No. 15-4141 (Complaint filed 7/15/15). The EEOC alleges that since 2004, UPS has violated Title VII in failing to hire or promote individuals whose religious practices conflict with the company's grooming and appearance policies. Those policies require that male employees' hair not grow below collar length. Title VII requires employers to accommodate the religious belief of employees and applicants unless doing so would cause "undue hardship" to the employer.

EEOC Revises Pregnancy Bias Guidelines. In response to the Supreme Court's decision in *Young v. UPS, Inc.*, the EEOC has issued new guidance that reflects the court's holding that women may prove unlawful pregnancy discrimination if the employer accommodated some workers but not pregnant women. The guidelines repeat the court's holding that even facially neutral employer policies may violate the Pregnancy Discrimination Act if they impose

significant burdens on pregnant employees without a sufficiently strong justification.

EEOC Brings Claims on Behalf of Transgender Employee for Gender Discrimination. On June 5, 2015, the EEOC filed a lawsuit charging a financial services corporation in St. Paul Minnesota of gender discrimination against a transgender employee. It was the third lawsuit of its kind and is part of the EEOC's Strategic Enforcement Plan adopted in December 2012, which includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions." The lawsuit's most recent claim includes allegations the employer subjected the employee to a hostile work environment because of sex and had a company-wide policy or practice that discriminated against transgender female employees by precluding their use of a restroom that is consistent with their sex.

On April 1, 2015, the EEOC issued a ruling that the Army had discriminated against a transgender civilian employee by denying her access to the women's restroom and creating a hostile work environment by allowing a supervisor to intentionally misuse her former name and male pronouns.

Complainant v. Foxx, EEOC, Appeal No. 012013080 (7/16/15). The EEOC Commission ruled that discrimination based on sexual orientation—in federal sector jobs—violates Title VII. The ruling cleared the way for a male air traffic controller to proceed with Title VII gender discrimination claims that the Department of Transportation denied him a promotion because he is gay. The EEOC takes the position that sexual orientation discrimination is gender discrimination because it has its foundation in gender stereotypes. The administrative decision is not binding on private sector employers, but the agency's interpretation of Title VII can have a persuasive effect with the courts.

Paycheck Fairness Act. President Obama has promised to push for statutory changes to remedy pay disparities based upon gender and national origin. Senate bill (S. 2199) would make it easier for workers to get information about pay disparities and sue for wage discrimination. Republicans have opposed the measure and Democrats, as of April 9, 2014, did not have sufficient votes to move the measure forward. (Similar versions of the Bill had previously passed the House when there was a Democratic majority, but were blocked in the Senate.) The legislation would provide protections against retaliation for sharing pay information and would place a burden on employers to show that disparities in pay were based on a bona fide factor other than sex, as well as providing for punitive damages.

Congressional Lawmakers Reintroduce the Protecting Older Workers Against Discrimination Act (POWADA). On July 30, 2013, bipartisan lawmakers in both chambers introduced legislation that would change the burden of proof and causation standards for a number of discrimination claims. HR 2852 and S 1391 would overturn the Supreme Court decisions of *Gross v. FBL Financial Services, Inc.* (holding that a plaintiff bringing an age discrimination claim must show by a preponderance of the evidence that age was a but-for cause of the employer's adverse

employment decision) and *University of Texas Southwestern Medical Center v. Nassar* (holding that Title VII retaliation claims must be proved using a but-for causation standard as well). Under the proposed POWADA, Congress would roll back those heightened standards and instead provide that the more lenient "motivating factor" standard apply to age discrimination claims as well as to retaliation claims involving race, sex, national origin, religion, or claims brought under the Americans with Disabilities Act.

Budget Amendments Dealing With Wellness Plans and Employee Use of Email. As of the end of March 2015, the Senate had begun discussion of budget resolution amendments that would ban the EEOC from issuing rules and regulations limiting wellness programs and prohibit the NLRB from requiring employers to turn over workers' private email and cell phone contact information as part of the Board's election process.

C. Executive Orders, Minimum Wage, Fair Pay, LGBT Bias

Uptick in FLSA Litigation Expected Through 2016. Federal wage and hour litigation has been on the rise and will likely continue to rise through 2016. Federal courts saw 8,781 FLSA lawsuits in 2015 and early predictions are that there will be more than 9,000 such claims in 2016. Over the long term, wage and hour cases filed in federal court have increased about 450 percent in the last 15 years. The additional expected increase is based, in part, on the DOL's stated intention to crack down on misclassification of employees and will likely be further bolstered by proposed rules to double the salary floor for classifying employees as exempt, which is now expected to take effect in late 2016.

Proposed Rule: Worker Must Make More Than $50,440 to be Exempt from Wage and Hour Laws. Currently, employees that make less than $23,660 are entitled to overtime wages under the FSLA; however, proposed new rules from the White House labor secretary would more than double that threshold to $50,440 a year. Additionally, under the proposal, the salary threshold would be indexed to guard against erosion. The salary increase is expected to re-classify approximately 5 million "exempt" managerial employees into non-exempt employees entitled to overtime. The proposed rule changes are subject to public comment and are not yet final.

The Department of Labor Looks to Crack Down on Misclassification of Employees. On July 15, 2015, the DOL issued guidance asserting that employers are misclassifying workers as "independent contractors" rather than "employees" to avoid FLSA regulation, including wage and hour and overtime rules. The consequences of misclassifying employees as contractors may include an award of back pay, back taxes and other damages. When reviewing these issues, the courts will use the "economic realities test" which looks to six factors to determine whether the worker is actually an independent business person or an employee dependent on the employer to make a living.

Executive Actions on Compensation Information. On April 8, 2014, President Obama issued an Executive Order on Non-Retaliation for Disclosure of Compensation Information and a Presidential Memorandum ordering the Department of Labor to issue regulations that would require federal contractors to report summary employee compensation data, including by race and by sex. The memorandum instructs the Secretary of Labor to propose new rules within 120 days. Thus, we can expect the regulatory proposals in August 2014. The Executive Order amends Section 202 of Executive Order 11,246, to include a new provision that prohibits contractors from discharging or in any other manner discriminating against employees or applicants because they "inquired about, discussed, or disclosed" their own compensation information or the pay information of another employee or applicant.

Fair Pay and Safe Workplaces (7/31/14). The Executive Order requires companies seeking more than $500,000 in federal contracts to disclose labor law violations for the three year period prior to the contract and to obtain and collect similar information from their subcontractors. The Order also gives federal agencies guidance on how to consider the information.

Minimum Wage for Contractors (2/12/14). Effective January 1, 2015, the minimum wage for employees of federal contractors will be $10.10 with additional raises annually thereafter to be set by the Secretary of Labor.

Executive Order Banning LGBT Bias. On July 21, 2014, President Obama signed an executive order which prohibits federal contractors from discriminating on the basis of sexual orientation or gender identity. This protection extends to most companies that perform work for the government, and for the first time also protects transgender employees or applicants. Future government contracts are likely to require recipients to certify that they do not discriminate on the basis of sexual orientation or gender identity. The executive order also expressly prohibits federal government agencies from discriminating against their employees based on gender

identity (by modifying an existing executive order forbidding federal agencies from discriminating against their employees on the basis of sexual orientation).

While the executive order does apply to religiously-affiliated federal contractors (who had pressed for an exemption), it does not affect rules allowing such employers to take workers' religious beliefs into account when making employment decisions for religious roles.

D. ADA

Revised Requirements for Service Animals. A service animal is now defined as: (1) A dog; (2) trained to do work or perform tasks for an individual with a disability; and (3) the task performed must relate to the disability. A dog that merely provides comfort or emotional support does not qualify as a service animal under the ADA. Oregon law leaves open the possibility that an "emotional support" animal may qualify as a service animal. A service animal may be used to prevent anxiety attacks, but it must be trained to do something, not simply provide comfort. Oregon law more broadly defines service animal as a "dog or other animal designated by administrative rule" that is trained to do work or perform tasks for the benefit of the individual. That definition would seemingly put it in line with the federal standards as Oregon does not yet have administrative rules broadening the scope of service animal to more than a dog.

A business owner may not ask a person with a service animal what his or her disability is; rather, it can only inquire regarding: (1) whether the animal is required because of a disability; and (2) what work or task the animal has been trained to perform. Businesses may not ask for and the person is not required to provide documentation supporting his or her entitlement to use a service animal. The animal can be removed from the business if it is not house broken or if its owner is not able to adequately control it. Businesses may not charge extra fees for a person's use of a service animal.

E. Leave Laws

FMLA. The DOL posted new model forms for FMLA with two changes, (1) the forms do not expire until May 31, 2018, and (2) they include notice that information about genetic testing and diseases or disorders need not be disclosed pursuant to the Genetic Information Nondiscrimination Act (GINA). Employers can update their forms by going to the DOL's website, www.dol.gov/whd/fmla. Corresponding Oregon leave forms for OFLA can be found at http://www.oregon.gov/boli/TA/docs/OFLA_SHC_Cert_template.pdf.

Oregon Sick Leave. Starting June 1, 2016, Oregon employers must implement a sick leave policy that will allow an employee to earn and use up to 40 hours of sick time per year. Sick time is protected and employers must not retaliate or discriminate against an employee who inquires about, requests, or uses protected time.

Accrual: Sick time must accrue at a rate of at least one hour for every 30 hours worked, unless the employer elects to frontload sick time. Employees begin to earn and accrue sick time on the first day of employment.

Carryover: An employee may carry over up to 40 hours of unused sick time from one year to the next but an employer may limit an employee to accruing no more than 80 hours of sick time and to using no more than 40 hours of sick time in a year.

Use: Employees may use sick time beginning their 91st day of employment and it may be used for the employee's own physical or mental illness, injury, or health condition (including routine doctor or dentist appointments), for the care of a family member, for absences due to domestic violence, or in the event of a public health emergency. The employee cannot be required to find a replacement worker or work an alternate shift as a condition of, or to make up for, the use of sick time.

Increments of Use: Employers must allow employees to use sick time in hourly increments unless to do so would impose an undue hardship on the employer and the employer has a policy that allows an employee to use at least 56 hours of paid leave per year that may be taken in minimum increments of four hours.

Paid Sick Time: Employers with 10 or more employees must provide paid sick time. However, the threshold number of employees for paid sick time drops to 6 for employers that maintain any office, store, restaurant or establishment within the City of Portland. Sick time must be paid at the employee's regular rate of pay.

Unpaid Sick Time: Employers with fewer than 10 employees (or fewer than 6 for Portland employers) must offer unpaid sick time, but may elect to offer it as paid.

Vacation/PTO: Employers are free to provide for more generous sick leave policies and may comply with the law through vacation or paid time off policies so long as the minimum requirements are met.

Employee Notice Requirements: For planned sick time use, employers may require that employees comply with the usual notice and procedural requirements for absences and requesting time off so long as those requirements do not interfere with the employee's ability to make use of accrued sick time. However, an employer may not require more than 10 days' advance notice of foreseeable leave and the employer must allow leave without notice for unplanned absences.

Limited Union Exception: the law provides a limited exception for employees whose terms and conditions of employment are covered by a collective bargaining agreement, who are employed through a hiring hall or similar referral system, and whose employment benefits are provided by

a joint multi-employee trust or benefit plan. Other unionized workers who do not fall within this exception must be provided sick time in accordance with the law.

Local Ordinances Preempted: Oregon sick leave will preempt local governments from setting any sick leave requirements. That means that, as of January 1, 2016, Portland's Sick Time Ordinance will no longer be in effect, leaving employers to focus just on the Oregon state-wide requirements. Employers subject to the Portland Ordinance should continue to comply with it through the end of the year. A Eugene ordinance was slated to go into effect July 1, 2015; however, the City Council voted to repeal it as a result of state wide sick leave.

Implementation/enforcement: BOLI has been charged with developing regulations and drafting required notices for the law.

DOL Amendment of FMLA Definition of Spouse. Effective March 27, 2015, the DOL has issued a final rule under the FMLA's definition of "spouse" where the definition is based on the state law where the marriage was performed ("state of celebration" rule) as opposed to the state in which the employee resided when the employee applied for leave based upon a same-sex marriage (the "state of residence" rule). The new definition expressly includes both same-sex and common-law marriages and provides that when a person meets the definition of spouse, the employee may have additional rights to care for a stepchild or stepparent of the spouse without having to establish an "in loco parentis" relationship.

F. Current Supreme Court Docket

Green v. Brennan, 2015 U.S. Lexis 4584. The plaintiff worked for the USPS and had made various claims regarding alleged discrimination and retaliation. Ultimately, he was given the option of giving up his position and either retiring or moving to a much lower paying position. He chose to retire and filed the claim for constructive discharge. The issue before the court is the date for the commencement of a statute of limitations, whether the statute begins to run on the date of the resignation or whether it begins to run on the last date of discrimination that led to the resignation.

MHN Gov't Servs, Inc. v. Zaborowski, U.S. No. 14-1458, cert. granted 10/1/15. The Supreme Court will hear a contractor's petition as to whether the Federal Arbitration Act preempts a state court ruling regarding the enforcement of contracts containing unconscionable provisions that allegedly discriminates against arbitration agreements. The Ninth Circuit had ruled that an arbitration agreement was not saved by a severability rule when more than one unconscionable provision has been found.

Tyson Foods, Inc. v. Bouaphakeo, U.S. No. 14-1146, cert. granted 6/8/15. The U.S. Supreme Court granted review of an Eighth Circuit decision upholding the class certification of over 3,000 Iowa meat-processing workers on their wage and hour claims that resulted in a $5.8 million jury

award. The issue is whether class certification was appropriate using an average estimated time for how long it took employees to don and doff protective equipment and walk to and from the production floor, or whether individual differences in employee routines should have disqualified class status. Some employees took no time to change and get to their workstations, while others took upwards of 30 minutes. The employer argued that the employees that took less than the "average" time devised by the plaintiffs' expert would be getting an undeserved windfall based on the class certification.

Dept. v. Homeland Sec. v. MacLean, 714 F.3d 1301 (2013). The court will determine whether the Whistleblower Protection Act may shield a federal air marshal who was terminated for disclosing "sensitive security information" to the media. The security information was an internal email where the Department of Homeland Security said it was temporarily canceling air marshal assignments on flights requiring overnight stays.

Summers v. Altarum, No. 13-1645 (4th Cir. 2014). An employee had asked to work remotely after breaking both legs and being unable to walk for at least seven months. When the employer declined the request, since they believed his disability was "temporary," an action was filed pursuant to Section 1630.2(j)(l)(ix) of the EEOC's regulations that provides that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting," sufficient to create a disability under the statute. The court found the disability was "sufficiently severe" and ruled for the plaintiff. The EEOC's regulation actually refers to 20 pounds and "several months," and therefore the plaintiff's disability clearly fit within the statute.

II. DECISIONS OF THE SUPREME COURT

France v. Johnson, 795 F.3d 1170 (2015). The Ninth Circuit adopted the Seventh Circuit's approach that an age difference of less than 10 years between a plaintiff and his or her replacements creates a rebuttable presumption that the age difference was insubstantial. However, in the case of France, he was able to rebut the presumption by showing that his employer had considered age in general to be significant and a supervisor's comment made it appear that age had been a factor.

Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (4/29/15). The Supreme Court held that courts have authority to review whether the EEOC has fulfilled its Title VII duty to attempt conciliation between employers and claimants prior to bringing claims against employers. To comply with Title VII's conciliation provision, the EEOC must inform the employer of the allegation and describe what the employer has allegedly done wrong and which employees have been affected. Then the EEOC must try to engage the employer in a discussion so as to provide an opportunity to remedy the allegedly discriminatory practice. The EEOC can show that it met the conciliation requirement by submitting a sworn affidavit detailing its efforts. The remedy for a finding of insufficient conciliation is an order to undertake additional conciliation, not dismissal of the discrimination charge.

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (6/1/15). The Supreme Court held that to prevail on a disparate treatment religious bias claim under Title VII, a job applicant must only show that her need for an accommodation was a motivating factor in the employment decision, not that the employer had actual knowledge that the applicant would need a religious accommodation. The case involved a female applicant who was rejected because she wore a Muslim head scarf, or hijab, for her interview. She was not offered a job because her head scarf violated Abercrombie's "look policy" that disallowed hats or other head coverings. Abercrombie claimed it had no actual knowledge that the head scarf was indicative of a need for a religious accommodation from that policy. The Supreme Court held that when the employment decision is "motivated" by the employee's need for a religious accommodation, here an exception to the "look policy," then the employer's action violates Title VII regardless of whether it had actual

knowledge of the need for an accommodation. Abercrombie subsequently settled the case for $44,600.

King v. Burwell, 135 S. Ct. 2480 (7/7/15). The Supreme Court upheld the government's interpretation of the Affordable Care Act ("ACA"), which provided for health care subsidies to residents of states that opted out of creating a health care exchange. The case centered on a phrase of the law that provided for subsidies on insurance purchased from "an Exchange established by the State." The court agreed that the plain meaning of the words suggested that individuals obtaining insurance through the federal exchange would not be entitled to subsidies. However, the court held that such a ruling would destabilize the individual insurance markets in those states and such a result "would likely create the very economic 'death spirals' that Congress designed the ACA to avoid through its interlocking requirements." Looking at the broader context of the law, the majority held that the seven words at issue must be understood in such a way to be consistent with Congress' intent to "improve health insurance markets, not to destroy them."

In a strong dissent, Justice Scalia argued that the majority was improperly re-writing the ACA because as stated it would not work as well as hoped. Based on the fact that the law has twice been upheld by controversial Supreme Court decisions, he further suggested that the nickname of the law be changed from Obama Care to "SCOTUS care."

Integrity Staffing Solutions, Inc. v. Busk et. al., ---S.Ct.---, 2014 WL 6885951 (2014). In a class action lawsuit for violations of the FLSA and Nevada labor laws, employees alleged that they were entitled to compensation for undergoing warehouse security screenings that could last up to 25 minutes. Reversing the Ninth Circuit, the Supreme Court held that the security screenings were not compensable postliminary activities because they were not principal activities the employees were employed to perform (i.e., the workers were not employed to undergo security screenings, but rather to retrieve products from the warehouse shelves). Nor was the security clearance procedure "integral and indispensable" to those activities. The Supreme Court noted that the Ninth Circuit's test, which focused on whether the particular activity was required by the employer rather than whether it was tied to the productive work that the employee was employed to perform, would sweep into "principal activities" – the very activities that the Portal-to-Portal Act was designed to exclude from compensation. The Supreme Court also rejected the employees' argument that time spent waiting to undergo the security screenings is compensable under the FLSA because the employer could have reduced that time to a de minimis amount.

Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014). The Steelworkers brought a collective action under the FLSA against an employer, alleging that the employer violated the FLSA by failing to compensate them for the time spent donning and doffing protective gear. In a unanimous opinion, the court held that the time spent donning and doffing protective gear was time spent "changing clothes" under a section of the FLSA allowing parties to collectively bargain over compensability of such time. Because the collective bargaining agreement did not require U.S.

Steel to compensate the employees for this time, it had no obligation to do so. Justice Scalia said that the time spent putting on safety gear was not subject to compensation because it was not

sufficiently different from "changing clothes" and noted that a lower court had found that the time spent changing clothes was minimal.

Harris v. Quinn, 134 S. Ct. 2618 (2014). In a 5-4 ruling, the U.S. Supreme Court denied the right of a union to require union dues or fair share fees from personal care assistants who were not "full-fledged" public employees. The "employee" provided personal care for her disabled son and was paid for her services by the State of Illinois through a medical-waiver program. The court called "questionable" the 37-year-old ruling in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), permitting the charging of fair share fees to public sector employees.

Lane v. Franks, 134 S. Ct. 2369 (2014). When the plaintiff, a public employee, terminated another employee whom he alleged was a state representative receiving pay as a "ghost employee," he was ultimately terminated. The Supreme Court reversed the appellate court and felt that a termination for giving his testimony was a termination for "citizen speech" on a "public matter" and therefore he was not testifying as part of his employment responsibilities. Therefore, the plaintiff's testimony had qualified immunity and his discharge was found unlawful. (Unfortunately, the testimony did not have qualified immunity when the discharge originally occurred, and he was denied either reinstatement or back wages.)

Riley v. California, 134 S. Ct. 2473 (2014). In this criminal case, the Supreme Court held that the warrantless search and seizure of a cell phone during a traffic stop and arrest is unconstitutional. The broad and compelling language of both the decision and the arguments of the parties raise serious questions as to the applicability of the case to employment cases, particularly in the public sector.

Burrage v. United States, 134 S. Ct. 881 (2014). The petitioner appealed from a criminal conviction, including a penalty enhancement under a federal statute which provides a 20-year mandatory minimum sentence where the defendant's unlawful distribution of heroin results in death. The Supreme Court held that the government was required to prove that the petitioner's actions were the but-for cause, and not merely a contributing cause, of the heroin purchaser and user's death. The Court relied on its earlier decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. __, 133 S. Ct. 2517 (2013), in which it held that Title VII's anti-retaliation provision requires proof that retaliatory intent was a but-for cause of a challenged employment action. Status-based discrimination claims under Title VII, however, require proof only that discriminatory intent was a motivating factor. The court also relied on *Gross v. FBS Financial Services, Inc.,* 557 U.S. 167 (2009), in which it held that proof of age discrimination under the ADEA requires a showing of but-for causation. In this criminal case concerning sentencing provisions under the Controlled Substances Act, the court clearly defined the "but for" test with several useful analogies. The case would be useful for defining the same test in federal age and retaliation cases.

M&G Polymers USA, LLC v. Tackett, U.S., No. 13-1010 (6th Cir. 2015). Courts deciding

whether union retirees have lifetime healthcare benefits should apply ordinary contract principles rather than special interferences or presumptions, primarily based on ERISA statutes. The court's decision finds inapplicable a judicial reference in the "*Yard-Man*" defense where the Sixth Circuit had found that retiree healthcare benefits are vested for life in the absence of specific language to the contrary in either a collective bargaining agreement or a health plan document. The decision was unanimous and the matter has been remanded to the Sixth Circuit for further consideration under "ordinary principles of contract interpretation."

Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (2015). On March 25, 2015 the United States Supreme Court vacated the judgment of a lower court which had dismissed a claim against UPS by a driver whose pregnancy led to medical restrictions. Her doctor had limited her to lifting no more than 20 pounds (whereas drivers are typically required to be able to lift up to 70 pounds). The plaintiff requested a light-duty assignment, but the company denied the request. She asserted that such assignments were available to other workers such as drivers who had been injured on the job, or who had been provided with an accommodation for a disability, or who had lost their Department of Transportation certifications, and that the company was in violation of the Pregnancy Discrimination Act by refusing to provide her light duty.

One major issue in the lawsuit was the proper comparison. Instead of apples to apples, the plaintiff and the company argued over whether the plaintiff was entitled to a work adjustment even if it was available only to a subset of employees. To state it more precisely, who are the "other persons" in this language taken from the statute?

"[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*."

The lower court held that UPS's denial of the request did not discriminate on the basis of sex, because UPS's policy treated pregnant workers and nonpregnant workers alike, and that the plaintiff could not compare herself to workers who were accommodated for on-the-job injuries, ADA accommodations, or the loss of DOT certifications because her situation was dissimilar. The statutory language is not simple, even though it seems so; the Supreme Court split 5-4, and the case will return to the lower court for trial. But both sides of this kind of dispute have caveats to consider.

For the plaintiffs asserting such a claim, the court cautioned that pregnancy did not create a sort of "most favored nation" status through which the pregnant employee automatically became entitled to any adjustment provided to any other employee. Or, as Justice Breyer commented, the law "does not say that the employer must treat pregnant employees the 'same' as '*any* other persons' (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind."

For the employers defending such a claim (or making pregnancy-related decisions), the court instructed that they will have to be able to justify a refusal to accommodate a pregnant employee by citing legitimate, nondiscriminatory reasons, and that those reasons "cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." Instead, the employer's reasons must be sufficiently strong to overcome the intent of this important law, and the plaintiff can challenge the explanation by, for example, showing that the employer accommodates a large percentage of non-pregnant workers but, at the same time, fails to accommodate a large percentage of pregnant workers.

While this case was pending, the EEOC issued a Guidance on pregnancy discrimination. The Court declined to view that Guidance as authoritative; so, expect a revision.

The case would not be complete without a few pithy comments from the dissent:

"Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts, instead, a new law that is splendidly unconnected with the text and even the legislative history of the Act. To 'treat' pregnant workers 'the same . . . as other persons,' we are told, means refraining from adopting policies that impose 'significant burden[s]' upon pregnant women without 'sufficiently strong' justifications. Where do the 'significant burden' and 'sufficiently strong justification' requirements come from? Inventiveness posing as scholarship —which gives us an interpretation that is as dubious in principle as it is senseless in practice."

III. DECISIONS OF THE FEDERAL COURTS

A. Employment Discrimination

1. Arbitration Agreements

Brennan v. Opus Bank, 40 IER Cases 924 (9th Cir. 2015). A senior bank executive had signed an arbitration agreement which incorporated California law with respect to procedural rules, rights and remedies during arbitrations. However, since the agreement said nothing about whether California law governed the question of arbitrability, the matter was covered by the Federal Arbitration Act and therefore an arbitrator would be entitled to determine whether the agreement was "unconscionable."

Ashbey v. Archstone Property Mgmt., 785 F.3d 1320 (5/12/15). The Ninth Circuit enforced an employer's dispute resolution policy, including mandatory binding arbitration, contained in its policy manual (handbook). The court distinguished this case from previous cases where handbook arbitration agreements were not enforced by noting that: (1) the employee received a copy of the policy before signing the acknowledgment; (2) the acknowledgment included reference to the dispute resolution policy; and (3) the employee agreed to abide by that policy.

Lorenzo v. Prime Commc'ns, LP, 2015 U.S. App. Lexis 20400 (November 24, 2015). The Fourth Circuit declined to enforce an arbitration agreement contained in an employee handbook reasoning that the employer had failed to show that the employee contracted, implied or otherwise, to arbitrate employment disputes because the handbook contained multiple provisions asserting that the handbook's terms were not binding.

Int. Longshore and Warehouse Union v. Columbia Grain, 2015 WL 4065812 (D. Or., 7/2/15). The Oregon district court found that a local union lacked the authority to compel arbitration of a lost work grievance after the original employer subject to the collective bargaining agreement dissolved and the international union had entered into a memorandum agreement that discharged the claims against the previous company.

Couch Investments v. Peverieri et al., ---P.3d---, 2015 WL 1500253 (2015). ORS 36.695(3) provides that "an arbitrator may order remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." One party to the arbitration argued that the arbitrator exceeded his powers by issuing rulings beyond the scope of the parties' stipulation. However, the Court of Appeals found that the arbitrator could issue such rulings pursuant to the Oregon statute since the parties did not agree in their stipulation to "waive" or "vary the effect of" ORS 36.695(3) and therefore the arbitrator did not exceed his powers.

Savant v. APM Terminals, ---Fed. Appx.---, 2014 WL 6845808 (5th Cir. 2014). Instead of filing a grievance, the plaintiff, a long time union member, brought claims in federal court under the Age Discrimination in Employment Act. The defendant argued that the plaintiff failed to exhaust the CBA's grievance procedures and won summary judgment at the district court level. On appeal, the plaintiff argued that he had not waived his right to sue under the ADEA. Although the CBA did not specifically reference the ADEA, it did state that grievance and arbitration were the exclusive remedy for all disputes arising under the agreement. A memorandum of understanding, which supplemented the CBA, did specifically reference the ADEA. The Fifth Circuit held that this was a "clear and unmistakable" waiver of Savant's right to circumvent the grievance and arbitration process, a standard established by two Supreme Court cases (*Penn Plaza* and *Ibarra v. United Parcel Service*). The MOU specifically identified the ADEA, and the court saw no reason not to extend the same standard to a MOU or other agreement binding on the union and the employer.

Johnmohammadi v. Bloomingdale's Inc., 755 F.3d 1072 (9th Cir. 2014). The employer offered at time of hire two options: (1) a mandatory arbitration agreement to arbitrate employment disputes which prohibited class actions; or (2) the right to opt out of the arbitration agreement without penalty. The employee did not choose to opt out but later challenged the class action prohibition by bringing a class claim for wages in court. However, the Ninth Circuit held that the class claim prohibition did not violate § 8(a)(1) of the NLRA since the employee made her decision without employer restraint or coercion.

MediVas, LLC v. Marubeni Corp., 741 F.3d 4 (9th Cir. 2014). An order compelling arbitration is not appealable when a district court neither explicitly dismisses nor explicitly stays claims when ordering arbitration. Such an order constitutes an implied stay, and is therefore not a final decision with respect to an arbitration under the Federal Arbitration Act. A rebuttable presumption exists that an order compelling arbitration, but not explicitly dismissing the underlying claims, stays the action as to those claims pending the completion of the arbitration.

The Ninth Circuit also urged district courts to be as clear as possible about whether they intend to dismiss, stay, or "do something else entirely" when they order arbitration.

Oxford Health Plans v. Sutter, No. 12-135, 133 S. Ct. 2064 (2013). The arbitrator construed an arbitration agreement to authorize class arbitration regarding the plan's alleged failure to make prompt and accurate reimbursement payments to physicians participating in a primary care physician agreement. The court held that as long as the arbitrator was arguably construing provisions of the agreement, then the court will not disturb the arbitrator's interpretation of an arbitration agreement, in light of the limited judicial review allowed under the Federal Arbitration Act.

American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013). The provisions of an arbitration agreement between a credit card company and a merchant included that there "shall be no right or authority for any claims to be arbitrated on a class action basis." The court held that, under the Federal Arbitration Act, such a waiver of class arbitration is enforceable even if the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

2. Proof

EEOC v. Freeman, 778 F.3d 463 (4th Cir. 2015). In the Fourth Circuit's decision in this case and in the Sixth Circuit's decision in *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749 (6th Cir. 2014), the court found that the EEOC had to provide both relevant and reliable statistical testimony to support a disparate impact claim where such statistical evidence is the foundation of the claim. In both the Fourth Circuit and the Sixth Circuit decisions, the court found that the testimony of the EEOC's expert, industrial/organizational psychologist Kevin Murphy, provided unreliable testimony due to the "sheer number of mistakes and omissions in his analysis."

Anderson v. Hibu, Inc., 38 IER Cases 880 (D. Or., 6/12/14). Judge McShane found that a federal court sitting in diversity jurisdiction applies state substantive law and federal procedural law, citing *Snead v. Metro. Prop. & Cas.*, 237 F.3d 1080 (9th Cir. 2001). He then held that the *McDonnell Douglas* burden-shifting scheme is federal procedural law. The court then held that under ORS 659A.043 and employee need not apply for reinstatement when the employer "made it known … that reinstatement [would] not be considered." The employee was not required to apply when the employer had notified her that her application would be part of a competitive hiring process.

Conti v. Corporate Servs. Grp., Inc., No. C12-245RAJ, 2013 WL 6095564 (W.D. Wash. Nov. 20, 2013). A federal court ruled that an employer may call the EEOC investigator as a witness at trial where the investigator filed a declaration on behalf of the employee and the employee was allowed to introduce a copy of a reasonable cause determination at trial. However, the employee was not allowed to offer evidence at trial of the EEOC statistics regarding the outcome of

discrimination cases. The court also relied on the Ninth Circuit decision in *Plummer v. Western Int'l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981) that a plaintiff has a right to introduce an EEOC probable cause determination regardless of whether the case is tried before a judge or a jury. It is insufficient to merely rule that the probable cause finding only be mentioned in jury instructions.

Keller v. Wal-Mart Stores, Inc., No. 1:12-cv-01231-CL, 2013 WL 5723261 (D. Or. Oct. 21, 2013). Defendant retailer maintained a drug-free workplace policy which, among other things, advised employees that use of prescription drugs without a valid prescription was grounds for discipline including termination; and that, upon sustaining a workplace injury, employees would be subject to a drug test. Plaintiff was injured at work when a box struck her on the head and shoulder. However, plaintiff did not seek treatment immediately. Instead, she went home at the end of her shift, and took a pill that she believed to be codeine that a doctor had prescribed to her following a surgery years earlier. The following day she informed her supervisor of the need to see a doctor. Defendant was ultimately approved for worker's compensation. However, when a drug test came back positive for oxycodone and oxymorphone, both Schedule II controlled substances, and she was unable to furnish a valid prescription for either substance, defendant terminated her for violating its drug free workplace policy. Plaintiff sued, claiming worker's compensation discrimination and retaliation. The district court granted defendant's motion for summary judgment. Defendant terminated plaintiff pursuant to a valid workplace policy.

Siring v. Or. State Bd. of Higher Educ., 927 F. Supp. 2d 1058 (D. Or. 2013). In this action against the state board of education alleging employment discrimination based on age and perceived disability, the district court made several rulings on causation standards and admissibility of evidence. The court held that in ADA discrimination claims, it applies the "motivating factor" causation standard rather than a "but-for" causation standard. On claims under the Age Discrimination in Employment Act and the Rehabilitation Act, the court applies a "but-for" causation standard. On Oregon state law claims of employment discrimination, ORS 659A.030, the court applies a "substantial factor" test which, under Oregon case law is tantamount to a "but-for" standard. The court also made two rulings on the admissibility of specific evidence.

3. Procedure

UFCW v. Fresh and Easy Neighborhood Market, 2015 U.S. App. Lexis 19763 (November 13, 2015). The Ninth Circuit held that, despite the Union's failure to follow procedural rules requiring service of a subpoena on the employer's counsel of record, under 29 CFR §102.113(f), the employer was still required to file an objection or produce documents as it had notice of the subpoena and the procedural misstep did not prejudice the employer's ability to respond or contest the request.

EEOC v. McLane Company, 2015 WL 6457965. In this subpoena enforcement action, the EEOC

was attempting to determine whether a strength test had a discriminatory impact on women. In a traditionally broad approach to EEOC subpoenas, the Ninth Circuit held that the EEOC was entitled to compel production of "pedigree information" of other applicants who took the test. Such information included names, social security numbers, last known addresses and telephone numbers which would have allowed the EEOC to contact the applicants.

Escobedo v. Applebee's, 787 F.3d 1226 (6/4/06). The Ninth Circuit held that an employee's Title VII sexual harassment and discrimination claim was timely when she filed it within the 90-day limitation period but was denied relief from her filing fee. The Court stated that it was reasonable to allow her time to come up with the money for the filing even if it that did not happen within the 90 days. Further, the district court abused its discretion when it denied the relief from the filing fee based on employee's husband's social security income without taking into consideration his liabilities and expenses.

EEOC v. Peters' Bakery, 2015 WL 4481786, (7/22/15). A district court in California granted a preliminary injunction against the employer enjoining it from terminating an employee that raised Title VII claims. The court stressed that a preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." In this case, the court the court granted the injunction after considering the offending conduct of the employer, previous history with the employee and the likelihood that the employee would prevail on her claims and based on the substantial weight of the evidence.

Reyes v. Dollar Tree Stores, ---F.3d---, 2015 WL 1447271 (9th Cir. 2015). A case was originally removed to the federal court and then remanded to the state court based upon an evaluation of the amount of money at stake if class certification was granted. However, when the class was actually certified, the amount at stake exceeded the removal floor and the employer moved again for removal. The Ninth Circuit supported the claim since the certification "created a new occasion for removal" and therefore the second removal was in fact permissible and timely since it was done within 30 days of the class certification order.

Romulus et al v. CVS Pharmacy, Inc., 770 F.3d 67, 23 WH Cases 2d 1190 (1st Cir. 2014). Under the Class Action Fairness Act, federal courts have jurisdiction over a class action if, among other requirements, the amount in controversy exceeds $5 million. In this case, the First Circuit set out to resolve when the two time limits in Section 1446(b) mandate removal within 30 days. In line with other circuits that have adopted a bright line approach, the First Circuit held that the time limits apply when the plaintiff's pleadings or the plaintiff's other papers provide the defendant with a clear statement of the damages sought or with sufficient facts from which damages can be readily calculated. The court reiterated that the defendant does not have a duty to investigate facts outside those provided by the plaintiff, and held that in this case the plaintiff's complaint lacked essential facts that would have allowed the defendant to ascertain removability. The court also clarified that the statutory term "other papers" should be interpreted broadly, and an email from the plaintiff to the defendant that had sufficient information to allow defendant to calculate

damages at over $5 million and thus ascertain removability. The test is not whether the information is new, as much of the information contained in the plaintiff's email was available to the defendant, but rather when the plaintiff's papers first enable the defendant to make the requisite merits of removal to the district court. The defendant's notice of removal was timely filed within 30 days of receiving this email.

Ventress v. Japan Airlines, 747 F.3d 716, (9th Cir. 2014). The plaintiff, a former flight engineer, alleged that the defendants retaliated against him for reporting safety concerns and constructively terminated him for reasons related to his medical and mental fitness. As a ruling on the plaintiff's claims would necessarily "require the finder of fact to consider whether or not [the plaintiff] was medically fit to carry out his duties as a flight engineer," the district court reasoned, a ruling on the merits "would intrude in the area of airmen medical standards," which Congress intended to occupy exclusively through the Federal Aviation Act. Accordingly, the trial court granted the employer's motion for judgment on the pleadings on preemption grounds. The Ninth Circuit affirmed on the same basis.

Family PAC v. Ferguson, 564 Fed. Apx. 341 (9th Cir. 2014). The Ninth Circuit held in a civil rights case that the term "costs" under Rule 39 of the Federal Rules of Appellate Procedure does not include attorneys' fees recoverable as part of costs under 42 USC § 1988 and similar statutes. The court determined that the trial court properly concluded that "each party shall bear its own costs of appeal" and did not preclude the plaintiff, as the prevailing party, from obtaining an award of appellate attorneys' fees under § 1988. The appellate court did, however, reduce the fee award because the plaintiff's counsel billed a flat 10 hours each for the day of argument and the days before and after argument, and such a practice of flat billing rates, regardless of the amount of work performed, is not consistent with law firm practice in the relevant legal market.

Rea v Michaels Stores Inc., 742 F.3d 1234 (9th Cir. 2014). Employees brought a class action lawsuit alleging that the employer improperly classified the managers as exempt from overtime. The employer removed the case under the Class Action Fairness Act (CAFA), but the federal court remanded, finding that CAFA's $5 million amount in controversy was not met because the plaintiffs expressly disclaimed recovery over $5 million. The employer removed again because, in the interim, the U.S. Supreme Court decided in *Standard Fire Ins. v. Knowles* that attempted damage waivers are ineffective and will not defeat removal under CAFA. The employer attempted to remove again, but the federal court remanded on the basis that removal ran afoul of CAFA's 30-day time limit or, in the alternative, that the employer failed to carry its burden to demonstrate that the amount in controversy exceeded $5 million.

The Ninth Circuit reversed the order remanding, and held that CAFA's amount in controversy requirement was met. The court also held that the second removal was timely under CAFA because the time period only begins to run when the pleading affirmatively reveals on its face the facts necessary for federal court jurisdiction, and if the pleading does not do so, the time period never starts to run, and at the time the employer received the complaint, it did not reveal on its

face the facts necessary for federal court jurisdiction. The court also held that the employer established that the potential damages could exceed CAFA's $5 million jurisdictional amount.

4. Gender Discrimination

Teamsters Local Union No. 117 v. Washington Dep't of Corr., 789 F.3d 979 (6/12/15). The Ninth Circuit held that female-only correctional officers at women's prison facilities, though a discriminatory gender based hiring practice, was acceptable because it was a bona fide occupational qualification to improve security, protect inmate privacy and prevent sexual assaults.

Ambat v. City and County of San Francisco, 123 FEP Cases 773 (9th Cir. 2014). The City and County of San Francisco have been denied summary judgment on a BFOQ defense relating to a policy of the county prohibiting male deputies from supervising female inmates in single-sex housing units at jails. Specifically, the court held that an employer who seeks to justify discrimination under the BFOQ defense must prove by a preponderance of the evidence: (1) that the job qualification justifying the discrimination is reasonably necessary to the essence of its business, and (2) that sex is a legitimate proxy for the qualification because (a) it has a substantial basis for believing that all or nearly all people of a particular sex lack the qualification or (b) it is impossible or highly impractical to ensure by individual testing that its employees will have the necessary qualifications for the job. The court explained that an employer that seeks to justify gender discrimination by relying on the BFOQ defense, "must show a high correlation between sex and ability to perform job functions." In addition, the court found that to prove a BFOQ defense, the employer would almost surely be required to show that "alternative approaches … are not viable." In practice, this rule means that while an employer may prove that a qualification is reasonably necessary, the employer is likely to have a difficult time proving that a person's gender "is a legitimate proxy for the qualification." The court concluded that discrimination on the basis of sex is almost always disfavored under Title VII and "thus … our test for whether an employer is entitled to a BFOQ defense … is purposely difficult to satisfy."

Lespron v. Tutor Time Learning Ctr., LLC, 550 Fed. Appx. 509 (9th Cir. 2013). At the summary judgment stage, the requisite degree of proof necessary to establish a prima facie case of pregnancy discrimination is minimal, and does not even rise to the level of a preponderance of the evidence. The plaintiffs raised a triable issue of fact as to whether the defendants' legitimate, nondiscriminatory reasons for reducing the plaintiffs' hours were merely a pretext for discrimination: The defendants' shifting and questionable explanations for their actions precluded summary judgment.

5. Discriminatory Harassment

McCall v. Oregon et al., No. 3:12-cv-00465-PK (D. Or., 8/9/13). The plaintiff, a former

employee of the Umatilla District Attorney's Office, brought a series of claims arising out of alleged sexual harassment by defendant, former Umatilla District Attorney Dean Gushwa. The plaintiff named the state, Umatilla County and Gushwa as defendants. On motions for summary judgment, United States Magistrate Judge Paul Papak held that the plaintiff's claims under 42 U.S.C. § 1983 against Gushwa for conduct in his official capacity were the equivalent of claims against the state and therefore were subject to state immunity under the Eleventh Amendment. Additionally, the plaintiff's claims against the state under Title VII failed because Gushwa was not acting on behalf of the state when carrying out his administrative functions as a supervisor of the plaintiff and other county employees. The court also dismissed section 1983 claims against the county alleging that Gushwa was carrying out county policy when he allegedly committed his harassing behavior. Nor did the plaintiff present evidence that Gushwa's allegedly harassing behavior amounted to an informal county policy or custom. The court further held that the plaintiff failed to meet her burden to establish a claim of First Amendment retaliation against the county. However, the court denied the county's motion for summary judgment on Title VII and state laws prohibiting discrimination. Despite that, as an elected official, Gushwa was not a county "employee" for purposes of Title VII. As the plaintiff's supervisor, Gushwa acted as an agent of the county when he allegedly committed his harassing behaviors. As a consequence, the plaintiff's Title VII and state law discrimination claims against the county were allowed to proceed. Summary judgment was granted on the plaintiff's claim of negligent retention against the state on the basis of sovereign immunity. Against the county, the claim of negligent retention was dismissed because as an elected official, the county did not have authority to retain or terminate Gushwa.

McCall v. Oregon et al., No. 3:12-cv-00465-PK, 2013 WL 6196966 (D. Or., 11/27/13). District Judge Michael Simon adopted the findings and recommendations of Magistrate Judge Papak.

Arizona v. Asarco LLC, 543 Fed. Appx. 702 (9th Cir. 2013). The defendant is a large copper mining and refining company. The plaintiff, Angela Aguilar, worked for the company for several months in 2006. During that time, the plaintiff was subjected to a male supervisor who "asked her out in some fashion 'every day' and refused to train or to help her when she rejected him." To get away from him, the plaintiff bid for and received a job with another crew. On that crew, she had another male supervisor who had a reputation as a "rude bully" who told her that her "ass was mine" and that she would be "spending more time with him than his 'lady.'" Additionally, during the time that the plaintiff worked at the defendant company, workers had vandalized a porta-potty with pornographic material directed at her. In September 2006, the plaintiff quit and filed a lawsuit alleging sexual harassment under Title VII. At trial, a jury awarded nominal damages of $1.00 and punitive damages of $868,750. The district court reduced the punitive damages amount to the statutory maximum of $300,000. Asarco appealed, alleging that a punitive damages award with a ratio of $300,000 to $1 of compensatory damages was an unconstitutional violation of Asarco's due process rights. The Ninth Circuit evaluated the award against the "guideposts" that the Supreme Court announced in its seminal punitive damages case, *BMW of North America v. Gore*.

The appellate court found that the conduct of the defendant was highly reprehensible, but that the award lacked a reasonable relationship to the compensatory damages in the case. The court then compared the punitive damages award against comparable civil and criminal penalties that could have been imposed. In light of those factors the court concluded that the $300,000 punitive damages award was unconstitutionally excessive. It therefore reduced the punitive damages award to $125,000, which the court held was the maximum that could pass due process scrutiny under the facts of the case.

6. Disability Discrimination

Davis v. Bombardier Transportation Holding, Inc., 2015 WL 4460729 (7/22/15). The Second Circuit held that an employee's disability discrimination claims raised after the 300-day time limits for bringing such claims could not survive under the "Lilly Ledbetter Fair Pay Act" exception. That rule makes every paycheck the basis for a claim of compensation discrimination. The court distinguished the employee's claim, however, by noting that she was not making a compensation discrimination claim, but rather that the demotion to the lower paying position was discriminatory, which is not covered by the Lilly Ledbetter rule.

Casteel v. Charter Commc'ns Inc., 30 AD Cases 1452, 2014 WL 5421258 (W.D. Wa. 2014). The plaintiff was granted two extensions of her unpaid leave for cancer treatment after her FMLA leave expired. In denying the defendant's motion for summary judgment, the court held that she could proceed with her failure to accommodate claim under the Americans with Disability Act based on her discharge when she requested a third extension, even though she remained medically unable to work. Although medical leave is not a reasonable accommodation when it is indefinite, the record indicated that her third requested extension had a definite return date. Additionally, there was no evidence that the employer conducted an individualized inquiry into the extent of her disability or that granting the requested extension would pose an undue hardship. Accordingly, the court denied the defendant's motion for summary judgment because questions of fact remained as to whether the plaintiff was a "qualified individual," whether she could have performed the essential functions of her job with the requested accommodation of a medical leave of absence, whether the accommodation would have been reasonable, and whether it would have posed an undue hardship on the employer. Finally, the court held that the plaintiff's subsequent receipt of Social Security disability benefits did not bar her claim, as the determination of whether she was a qualified individual must be made at the time of her discharge.

EEOC v. Orion Energy Sys., Inc., E.D Wis., No. 14-1019 (filed 8/20/14). While the EEOC is developing a proposed rule regarding wellness plans which are encouraged by the Affordable Care Act, the agency has filed a federal court action alleging that an employer violated federal law by a financial penalty imposed on an employee for declining to participate in a wellness program.

EEOC to Address Wellness Plan Incentives. On May 28, 2014, the EEOC stated it planned to issue proposed rules on how employer wellness plan incentives should be treated under the ADA and the GINA. The primary issue under the ADA is whether an employer is entitled to offer financial incentives or impose financial penalties when the inquiry into the employee's health under a wellness program is not based upon business necessity. The primary issue under GINA involves inducements to spouses and family members regarding their current medical conditions on health risk assessments which are normally part of wellness programs.

7. Religious Discrimination

Fort Bend Cnty. v. Davis, U.S., No. 14-847*, cert. denied* 6/8/15. The Supreme Court denied review of a Fifth Circuit ruling that allowed a county employee's religious discrimination claims to proceed. The employee was terminated after she refused to work because of a "previous religious commitment," which consisted of a "feed the community" event. The issue was whether the event was "motivated" by a religious belief (protected) or simply "associated with" her religious institution. In finding an issue of fact for trial, the 2-1 majority of the court held that there was enough evidence for a jury to find that the church event was a "religious practice" that conflicted with work requirements and that the county failed to reasonably accommodate the practice. In so holding, the court emphasized that judicial inquiry into the sincerity of a person's religious belief "must be handled with a light touch, or judicial shyness," lest the court "stray into the realm of religious inquiry, an area into which we are forbidden to tread."

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, __ U.S. __, 132 S. Ct. 694 (2012). The First Amendment "ministerial exception" allows religious organizations the freedom to determine without government interference whom to employ to perform religious work. The exception has traditionally been applied to the hiring and firing of ministers, rabbis, priests, and other religious leaders. Nonetheless, in this case a unanimous Supreme Court held that the exception protected a religiously affiliated school from an ADA suit filed by a former teacher who, although she had completed religious training and was considered a "commissioned" minister, spent the majority of her time teaching secular subjects.

Ockletree v. Franciscan Health Sys., 179 Wash. 2d 769, 121 FEP Cases 987 (Wash S.C. 2014). Ockeltree worked for St. Joseph's Hospital and was fired after a stroke impaired the use of his non-dominant arm. The Washington Supreme Court ruled that religious nonprofits that discriminate against employees performing secular duties can be sued under state law. In a 5-4 opinion, the court upheld the constitutionality of the Washington Law Against Discrimination's exclusion of religious nonprofits from its definition of employer, finding that it does not violate the privileges and immunities clause of the State Constitution, but a different five-justice majority found the exclusion unconstitutional as applied to the case of a security guard who was not performing any function related to the organization's religious practice. Writing as the swing vote, Justice Wiggins noted that the constitutionality of the exemption depends entirely on

whether the employee's job responsibilities relate to the organization's religious practices. When the exemption is applied to a person who does not fit that role, there is no reasonable ground for distinguishing between a religious organization and a purely secular organization.

8. Family Medical Leave

Lane v. Grant Co., 2015 BL 242500 (unpublished, 7/29/15). The Ninth Circuit held that an award of front pay and liquidated damages to an employee that prevailed on her FMLA claim was proper on the basis that the defendant employer failed to prove that it had acted in "good faith" or that it had "reasonable grounds for believing that [its action] was not a violation" of the FMLA.

Aboulhousn v. Merrill Lynch, 606 Fed. Appx. 377 (6/16/15) (unpublished). The Ninth Circuit held that FMLA leave may be appropriate for an employee that requested time to care for his father's chronic high blood pressure. The issue was whether high-blood pressure qualified as a serious health condition under the law. The court held that there was a triable issue of fact based on a doctor certification that the father needed 24-hour care to monitor his blood pressure and ensure he took the proper medications.

Larmanger v. Kaiser Found. Health Plan of the Northwest, 23 WH Cases2d 1214, 2014 WL 5421585 (9th Cir. 2014). Larmanger appealed the judgment entered in favor of the defendants on her claims for interference with FMLA and OFLA leave, retaliation, and common law wrongful discharge. The Ninth Circuit held that proximity alone is insufficient to establish a triable issue given that: (1) there is no other direct or circumstantial evidence of a causal nexus; (2) the corrective action and termination were put in motion before Larmanger requested or used medical leave; and (3) the adverse actions were amply supported by legitimate concerns about her work performance. Her other two claims also failed due to a similar lack of evidence.

Escriba v. Foster Poultry Farms Inc., 743 F.3d 1236 (9th Cir. 2014). The plaintiff sued alleging violations of FMLA and state law after she was terminated for violating the employer's "three day no-show, no-call rule." She claimed to have sought leave to care for her father in Guatemala, and the dispositive issue was whether the trial court erred in agreeing with the employer's contention that Escriba did not intend to take FMLA leave. The Ninth Circuit held that the trial court did not err in denying Escriba's motion for summary judgment on the basis that the employer cited evidence demonstrating that Escriba was given the option and was prompted to exercise her right to take FMLA leave, but she unequivocally refused to exercise that right. The court concluded that there was substantial evidence supporting the verdict that she chose to take vacation time to preserve her full 12 weeks of FMLA leave, and held that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection."

City of Portland Sick Leave. Effective January 1, 2014, private-sector employers with six or more employees must provide up to 40 hours (or five days) of paid sick leave per year; smaller employers (those with five or fewer employees) must provide up to 40 hours of unpaid sick leave.

Employees—no matter the size of the employer—will be eligible for sick leave if they work in Portland at least 240 hours in a calendar year. Employees who work more than 240 hours will accrue one hour of paid (or unpaid—depending on the size of the employer) sick leave for every 30 hours worked within the Portland city limits (maxing out at 40 hours).

Employees can use sick leave for a variety of reasons, including:

- For an employee's personal mental or physical illness, including pregnancy, childbirth and preventive medical care;
- To care for a family member with an illness, injury or medical appointment;
- If the employee's place of business closes for a public health emergency, or to care for a child whose school or day care closes for a similar reason; and
- For reasons related to domestic violence, harassment, sexual assault or stalking.

If an employee uses three or more consecutive sick days, his or her employer can request reasonable documentation (e.g. documentation signed by a licensed health care provider, a signed personal statement from the employee) showing the employee is out for an approved reason.

Employees can accrue hours at the start of employment. However, they cannot use their accrued time until after they have worked for 90 days.

If an employer already provides employees with five days (or 40 hours) or more of paid time off (or 40 hours of unpaid time off for smaller employers) during the calendar year, such employers will not be required to provide employees with additional sick leave, as long as the employer's policy allows leave to be taken for the same reasons as provided above.

Employers must establish a written policy or standard for an employee to notify his or her employer of the employee's use of sick time (e.g. calling a designated number). Employees are required to follow such policy and, when the need for leave is foreseeable, comply with such policy as soon as practicable. If the need for leave is not foreseeable, employees should provide notice as soon as possible.

Employers may not require an employee to:

- Find a replacement as a condition of using sick time; or
- Verify absences lasting fewer than three days (except in limited circumstances).

In addition, employers may not discriminate or retaliate against employees who request, use, or complain that they are not receiving sick leave.

Employers must provide and post a notice of an employee's rights to sick leave. The City will provide employers with a template for this notice. The notice must be posted in a conspicuous and accessible location where employees work, such as break rooms or bulletin boards, where other types of notices are posted.

9. Affirmative Action

Fisher v. University of Texas, __ U.S. __, 133 S. Ct. 2411 (2013). Abigail Fisher, a white high school graduate, applied for admission to the University of Texas's 2008 class and was rejected. At the time that she applied, the University had identified what it considered a compelling interest in having a "critical mass" of minority students enrolled. To achieve that goal, it used race as an explicit plus factor in its application process. Fisher filed suit alleging that the University's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment. Applying the strict scrutiny test that the Supreme Court articulated in *Grutter v. Bolinger*, 539 U.S. 306 (2003) for race-conscious admissions programs, the district court granted summary judgment to the University. On appeal, the Fifth Circuit affirmed, holding that, under earlier Supreme Court affirmative action cases, the court was required to give substantial deference to the University both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. The Supreme Court vacated and remanded the case back to the Fifth Circuit, holding that the appellate court failed to apply the strict scrutiny standard correctly. The Supreme Court explained that "some, but not complete" judicial deference was proper in evaluating the University's stated goal of diversity. "However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to that goal. On this point, the University receives no deference." The Fifth Circuit erred in showing any deference in step two of the strict scrutiny test.

41 C.F.R. 60.250; 41 C.F.R. 60.300. In August 2013, the US Department of Labor's Office of Federal Contract Compliance Program issued its final rule regarding contractor affirmative action and nondiscrimination policies towards protected veterans. The rule amends regulations to require that Federal contractors and subcontractors conduct more substantive analyses of recruitment and placement actions taken under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Among other things, the rule imposes the following obligations:

- The VEVRAA Final Rule requires contractors to adopt annual hiring benchmarks based on the national percentage of veterans in the workforce (currently 8%) or their own benchmark based on data provided by the Bureau of Labor Statistics.

- The OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ veterans. A compliance evaluation may include a comprehensive analysis of the contractor's hiring practices, a desk audit, an off-site review of records, or a more focused review restricted to one or more components of the contractor's organization or employment practices. Where the OFCCP finds deficiencies, it shall make efforts "to secure compliance through conciliation and persuasion."
- When listing job openings, contractors must provide that information in a manner and format permitted by the appropriate state employment service agency, so the agency can access and use the information to make the job listings available to job seekers.

41 C.F.R. 60.741. In August 2013, the Office of Federal Contract Compliance Program issued its final rule regarding affirmative action requirements in federal contracting for individuals with qualifying disabilities. Among other things, the rule sets for businesses with at least 50 employees and $50,000 or more in government contracts a single "utilization goal" of 7% for the employment of individuals with disabilities for each separate job group. Additionally, the rule bolsters affirmative action requirements, describes the specific actions a contractor must take to satisfy its obligations, and increases the contractor's data collection obligations.

10. Retaliation

Dossat v. F. Hoffmann-La Roche LTD., 600 Fed. Appx. 512 (4/9/15) (unpublished). The Ninth Circuit affirmed a jury verdict that a supervisor intentionally inflicted emotional distress on an employee after he filed an age discrimination charge. The supervisor's conduct consisted of making a trigger pulling gesture to indicate that the employee would be fired, yelling and cursing at him, and reprimanding him and docking his pay despite positive work reviews.

Shepherd v. McGee, et al., 986 F. Supp. 2d 1211 (D. Or. 2013). The plaintiff was a Child Protective Services worker for defendant Department of Human Resources. In that capacity, the plaintiff was routinely called upon to testify in court regarding child placement issues in juvenile dependency matters. The plaintiff also maintained a Facebook account in which she posted several comments that were viewable by her "friends," whom included a Polk County Circuit Court Judge, at least three deputy district attorneys, several defense attorneys and over a dozen law enforcement officers. On that Facebook page, the plaintiff posted several comments critical of parents whose children come under the jurisdiction of the juvenile court, and parents on public assistance. After reviewing the comments, defendant DHS made the determination that the plaintiff, through her Facebook comments, had irreparably damaged her credibility for purposes of testifying in dependency matters. Following an internal administrative process, the DHS terminated the plaintiff. The plaintiff filed suit, bringing a claim under 42 USC § 1983 for First Amendment retaliation. The defendants moved for, and the court granted, summary judgment. The court held that even if the plaintiff's comments on Facebook were comments on matters of public concern and her comments were made as a private citizen rather than in her official

capacity as a state employee, the state's "legitimate administrative interests outweigh the employee's First Amendment rights."

University of Texas Southwestern Medical Center v. Nassar, __ U.S. __, 133 S. Ct. 2517 (2013). The plaintiff alleged that the defendant employer retaliated against him for complaining about workplace discrimination in violation of Title VII. The court considered the issue of the proper causation standard for such claims. Writing for the five conservative members of the court, Justice Kennedy concluded that it was not enough for an employee to show that "the motive to discriminate was one of the employer's motives" in taking an employment action adverse to the employee. While this lessened "motivating factor" standard applies to status-based discrimination claims under Title VII (discrimination because of race, color, religion, sex or national origin), the standard for retaliation claims is different. Under Title VII, retaliation occurs when an employer takes an adverse employment action "on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination." The court held that to make a claim for unlawful employment retaliation under Title VII, an employee "must establish that his or her protected activity [in opposing discrimination] was a but-for cause of the alleged adverse action for the employer." In other words, Title VII retaliation claims require proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action(s) of the employer.

11. Remedies and Settlements

EEOC v. Allstate Ins. Co., 778 F.3d 444 (3d Cir. 2015). The defendant allowed its employees to move from employee status to independent contractor status, selling the defendant's products. As part of the requirement for the move, the employees were required to sign a release of all pending claims. The EEOC argued that there should be a concern when a release forecloses new business opportunities, but the court found that the EEOC failed to explain why such financial pressure is "more offensive" than the pressure one is bound to feel when required to sign a release in exchange for severance pay.

Teegarden v. State ex rel. Oregon Youth Authority, ---P.3d---, 2015 WL 1731311 (2015). The parties settled a pending court action with a release of all claims. Following the resolution, the defendant refused to stop proceeding with new claims and actions, even though the defendant had been aware of the underlying conduct which was the basis of such claims at the time the original settlement was rendered. The Court of Appeals found that the claimed "intentional" torts that arose after the settlement agreement could not have been blocked by the original settlement agreement, even though the underlying facts supporting the employer's actions had already occurred.

January v. Dr. Pepper Snapple Group, Inc., ---Fed. Appx.---, 2014 WL 6790454 (9th Cir. 2014). The Ninth Circuit reversed and remanded a $2.4 million compensatory and punitive damages verdict in plaintiff's favor on his claims that he was given extra and more difficult work to get

him to quit or injure himself in violation of California's Fair Employment and Housing Act. The Ninth Circuit found two reversible errors committed by the trial court. First, although the defendants stipulated that they were both plaintiff's employer, the district court erred in interpreting that stipulation as establishing Dr. Pepper's joint liability with ABC for compensatory and punitive damages. On retrial, the stipulation will not be interpreted to relieve the plaintiff of proving each defendant's liability for compensatory and punitive damages. The trial court also erred in excluding evidence that ABC paid hundreds of thousands of dollars to settle plaintiff's workers' compensation claim, which would have been highly probative and could have led the jury to discredit the plaintiff's "profits over people" theory of the case. On retrial, defendants will be permitted to introduce evidence of the existence and amount of their settlements of plaintiff's workers' compensation claims.

Arizona v. ASARCO LLC, ---F.3d---, 2014 WL 6918577 (9th Cir. 2014). The plaintiff, a mine worker, alleged that she was subjected to sexual harassment, retaliation, intentional infliction of emotional distress, and was constructively discharged. On appeal, the question presented was whether a $300,000 punitive damages verdict in a Title VII sexual harassment case in which only nominal damages were awarded, comports with due process. The Ninth Circuit held that, because its provisions meet the constitutional concerns underlying the U.S. Supreme Court's decisions in *BMW of North America v. Gore* and *State Farm Mutual Auto. Ins. v. Campbell*, § 1981a's punitive damages regime comports with due process. Although the court declined to rigidly apply *Gore* and *State Farm's* three guideposts to the award in this case (which only involved nominal and not compensatory damages and thus the normal comparison of compensatory damages and punitive damages was inapplicable), it nonetheless held that the district court did not err in concluding that sufficient evidence supported a punitive damages award of $300,000.

Morgan v. Jim Sigel Enters., Inc., 30 AD Cases 1510, 2014 WL 4925839 (D. Or. 2014). The court held that an employer who prevailed at a jury trial was not entitled to attorney fees or costs under federal or state law in the claimant's claims for discrimination under the Americans with Disabilities Act and state disability discrimination claims. The court noted that it had previously denied the employer's motion for summary judgment, which shows that the claims were not without merit or frivolous. Even if state law would allow an award of costs under these facts, Ninth Circuit precedent concluded that preemption barred an award of costs under a state law claim when the ADA would not allow such an award on the federal claim brought by the same party.

EEOC v. CollegeAmerica Denver, Inc., U.S.D.C. Colorado 1:14-cv-01232-LTB (filed 4/30/14). The EEOC has filed a federal court action alleging that CollegeAmerica violated Title VII by including provisions in releases requiring a separated employee not to disparage it and not to file complaints against it with any government agencies, which would include the EEOC and the NLRB. Both the EEOC and the NLRB have previously stated that provisions prohibiting filing charges with those agencies are independent violations of their supporting statutes, even though

the charging party may have lawfully waived any personal momentary or equitable relief such as reinstatement.

Moore v. Health Care Authority, ____ P.3d _____, 2014 WL 4109425 (2014). Employees legally denied health care benefits are not restricted to immediate out-of-pocket claim costs as a remedy. The employees may also recover for damages such as those caused by deferred treatment or a failure to obtain preventative care.

12. EEOC and Administrative Agencies and EEOC Rules

EEOC Proposed Rule Regarding the ADA and Wellness Programs. The EEOC has filed three actions in the Midwest concerning voluntary health programs, alleging that they can violate the ADA by the required disclosure of health information and conducting a medical examination without business necessity. The cases also allege a violation of GINA with regard to disclosure of medical information by or regarding family members. The three cases are: *EEOC v. Orion Energy Systems* in the Eastern District of Wisconsin; *EEOC v. Flambeau, Inc.*, in the Western District of Wisconsin; and *EEOC v. Honeywell International, Inc.*, in the federal district court in Minnesota. The EEOC has received criticism from both employer representatives and republicans in Congress for challenging such programs before issuing an ADA guidance or a GINA guidance addressing such programs, and for challenging such programs when they are generally recommended by the Affordable Care Act. As a result of that criticism, the EEOC has now issued a proposed guidance on the issue of incentives and whether an incentive interferes with the voluntary nature of a medical exam. Medical examinations are permitted under the ADA without business necessity, if they are voluntary. The EEOC defines "voluntary" as excluding penalties but also provides that a reward does not interfere with the voluntary nature of the examination if it does not exceed 30% of the total cost of employee-only coverage. (The EEOC proposed rule does not address the GINA issue.)

13. Wage and Hour

Bucklin v. Zurich Am. Ins. Co., 2015 BL 230670 (unpublished) (decided 7/20/15). Interpreting the FSLA and California Labor Code, the Ninth Circuit held that insurance company claim adjusters were properly classified as "administrative" and exempt from overtime pay requirements. Under the administrative exemption to the FLSA, the employer must establish several elements showing that the employees performed management work with minimal supervision and had broad discretion to perform their duties, in addition to minimum salary requirements, which were not in dispute. The court noted that the employees met all the requirements of the test because their work directly related to the company's management policies, their authority was broad and included setting reserves and settling claims by regularly exercising discretion and independent judgment.

Velazquez v. Costco, 603 Fed. Appx. 584 (3/25/15). The Ninth Circuit affirmed a trial court

judgment awarding damages to employees that had been mischaracterized as "managers" and exempt from the FLSA based on how the employees actually spent their time, not the employer's job description or understanding of the employees' positions. In interpreting the California Labor Code, the court held that the employer failed to prove that the employees "spent more than half of their time on managerial duties" and therefore they were entitled to overtime wages. The court reversed an award of continuing wages after the employees' positions were terminated as the misclassification was not "willful." Further, the employer was not entitled to an offset for the employees' alleged failure to mitigate based on the employees' failure to raise the issue of misclassification to the employer's attention.

Green v. Federal Express Corp., 2015 WL 3825302 (6/22/15) (unpublished). The Ninth Circuit affirmed the federal court's denial of class-action status to employees in holding that an employer has no obligation to police employee meal breaks to confirm that they are not performing work while on break. Further, the employer had no duty to sift through volumes of electronic data to confirm that employees were actually taking authorized breaks.

14. Class Action

Allen v. Bedolla, 787 F.3d 1218 (6/2/15). The Ninth Circuit reversed a district court's approval of a class action settlement on the basis that it had failed to meet heightened procedural standards. To survive appellate review of a class action settlement, a court must show it had comprehensively explored all factors relating to the proposal. In this case, the Ninth Circuit questioned the lack of support in the record for the settlement that included over $1 million in attorney fees and only $20-25 dollars per class member.

15. Sexual Harassment

Boyer-Liberto v. Fontainebleau Corporation, 786 F.3d 264 (5/7/15). The Fourth Circuit held that a single incident of a supervisor's use of racial slurs, and an employee's subsequent termination for reporting the conduct, was actionable race discrimination under Title VII. The supervisor allegedly called the black employee a "porch monkey" twice during separate arguments on the same day. The employee reported it to a superior and she was terminated five days later. The court held that the use of a term as offensive as "porch monkey" could rise to the level of "severe" actionable conduct or a reasonable belief that a hostile work environment was "in progress." Further, the court held that her termination was actionable retaliation by the employer, even if the workplace had not yet devolved into a hostile environment, because early reporting should be encouraged and not punished.

Maliniak v. City of Tucson, 607 Fed. Appx. 626 (4/9/15). The Ninth Circuit held that a single incident within the 300-day statute of limitations could be combined with an incident occurring before the statute of limitations to constitute, under the totality of the circumstances, a hostile work environment. A female employee had complained about a sign she found at work, which

was not directed toward her, that used the word "B!*tch" [sic]. In bringing gender discrimination claims against her employer, she combined that incident with other incidents that predated the statute of limitations, relating to men at her work using the women's restroom. The court held that the incidents could be part of the same actionable hostile work environment claim for limitations purposes.

16. Whistleblower

U.S. ex rel. Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121 (2015). The Ninth Circuit has eliminated one of the requirements for whistleblowers to be able to recover under the False Claims Act ("FSA") as an "original source." Specifically, the court eliminated a previous requirement that the whistleblower must also have had a hand in the public disclosure of the fraud, as such a requirement does not appear in the language of the rule. The FSA allows persons and entities with evidence of fraud against federal programs to potentially earn a financial recovery if the fraud is proven. To recover, the whistleblower must be an "original source." The court held that the law requires that an original source meet only two criteria: (1) voluntarily inform the government of the facts underlying the complaint's allegations before filing an action; and (2) must have direct and independent knowledge of the allegations underlying the complaint. This ruling is in line with other circuit courts on this issue.

B. Traditional Labor Law

Marina Del Rey Hosp., 363 NLRB No. 22 (October 22, 2015). The NLRB held that rules limiting employees from entering a workplace after working hours is not facially invalid if uniformly enforced and it contains reasonable exceptions for access otherwise permitted to the public. The Marina Del Rey Hospital had a policy barring off-duty access to the facility except when an employee was being treated or as a patient visitor. The NLRB held that the policy was not facially invalid; however, if the policy was used to selectively prevent employees from being on the premises for union activities, then it would be unlawful in application.

Three D, LLC v. NLRB, 2015 U.S. App. Lexis 18493 (October, 21, 2015). The Second Circuit held that a sports bar illegally fired two employees after they criticized the bar in a public Facebook discussion. In so doing, the court affirmed that NLRB rules protecting employee discussions of working conditions also protected Facebook comments, even when those comments are public, highly critical, and contain profanity. The Court distinguished it from an earlier case where an employer properly dismissed an employee for an in-store obscenity laced outburst in front of customers by reasoning that limiting online conversations between employees about working conditions would have a chilling effect on almost all online conversations about working conditions. Importantly, employees must be engaged in concerted activity to rely on this protection, thus a single employee's online comments are not protected "concerted activity." Such a comment, however, can quickly become protected concerted activity if and when another employee "likes" it or comments on that posting.

Hyundai Am. Shipping Agency, Inc. v. NLRB, 204 LRRM 3557 (11/6/15). The D.C. Circuit upheld NLRB rulings blocking three employer rules since they interfered with Section 7 rights. The decision invalidated rules barring employees from discussing matters currently under investigation by the employer, limiting information disclosure from electronic systems within the company and prohibiting certain non-work activities during working hours. However, the

Circuit Court reversed the NLRB as to a rule that urged employees to make complaints to supervisors rather than their coworkers. The court found that merely encouraging and not requiring to take actions potentially implicating their Section 7 rights does not interfere with 8(a)(1).

Browning-Ferris Indus. of Calif., Inc., 326 NLRB No. 186 (8/27/15). The Board has now altered the test it will apply to joint employer cases. The Board will now apply a common law test on right to control and will apply the standard if the right exists rather than how the right has been exercised. The Board will find that two or more entities are joint in employers if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of that control, the Board will consider the "various ways in which a joint employer may 'share' control over terms and conditions of employment or 'codetermine' them." The Board stated that it will not base its decision on the "bare rights to dictate the results of a contracted service or to control or protect its own property," but rather "will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work or terms of employment, either directly or through an intermediary."

College Athletes' Petition to Unionize Dismissed (8/17/15). The NLRB has dismissed a petition by Northwestern football players who were seeking to unionize, effectively denying their claim that they are university employees and should be allowed to collectively bargain. The unanimous decision was a victory for the college sports establishment in supporting the NCAA's contention that college athletes are primarily students. In failing to assert jurisdiction, the NLRB avoided the central issue of the case—that is, whether players are university employees. Instead, it found that the novelty of the petition and its potentially wide-ranging impacts on college sports would not have promoted "stability in labor relations."

Sabo, Inc., 362 NLRB No. 81 (4/30/15). The NLRB held that co-worker's discussion of other job opportunities is protected concerted activity, even when not directly involving a call for group action. The conduct was "inherently concerted" because other job opportunities involves a subject of mutual and obvious concern to employees.

FedEx Freight Inc., 362 NLRB No. 91 (5/19/15). The NLRB ordered the employer to bargain with the Local 701 International Brotherhood of Teamsters (IBT) after workers in New Jersey chose IBT representation. IBT has made efforts to unionize large numbers of FedEx employees with mixed results. In this case, the Board rejected FedEx's argument for failing to bargain; namely, that dock workers and drivers must be included in the same bargaining group.

Bosh Imports, Inc., 362 NLRB No. 83 (4/30/15). The NLRB indicated that simply changing unlawful employment policies is not sufficient to avoid an 8(a)(1) violation; rather, an employer must take proactive steps to inform employees of any policy changes. Those steps include posting notices to employees of the change and assuring them that the company will not maintain or enforce the offending provisions.

Chickasaw Nation dba Winstar World Casino, 362 NLRB No. 109 (6/4/15). The NLRB ruled that, based on an 1830 treaty between the tribe and the U.S. Government, the tribes at issue were not subject to the NLRB's jurisdiction. Importantly, tribes that do not have a similar treaty or agreement in place are generally subject to the NLRB's jurisdiction under the "San Manuel" test which grants the NLRB authority to regulate Indian-owned businesses unless the business touches on "purely intramural matters," *i.e.* matters that relate solely to internal Indian affairs. Currently, the U.S. Senate and House are considering similar bills that would eliminate the San Manuel test and exclude tribes from the NLRB's authority as a matter of Indian sovereignty.

AT&T, 362 NLRB No. 105 (6/2/15). The NLRB affirmed an ALJ finding that an employer cannot prohibit employees from wearing allegedly offensive union insignia, including buttons and stickers reading: "WTF Where's the fairness," "FTW Fight to win," "Cut the Crap! Not My Healthcare." Contrary to the employer's argument, the Board did not find that any of the buttons or stickers contained content so vulgar or offensive so as to lose the protection of the NLRA.

S. New England Telephone Co. v. NLRB, 2015 WL 4153873 (D.C Cir. Ct. of App., 6/10/15). The D.C. Court of Appeals overturned an NLRB ruling that the employer could not prohibit employees from wearing "inmate" type shirts while at work. In part the shirts stated that the employee was a prisoner of the company. The court held that the NLRB had misapplied the "special circumstances" exception, which allows employers to forbid messages that might harm its relationship with customers or its public image. The NLRB had improperly held that the message had to cause fear or alarm among customers to be disallowed.

G4S, 362 NLRB No. 134 (6/25/15). The NLRB ruled that two security lieutenants were employees under the NLRA and not exempt supervisors, holding that "to prove supervisory status by a preponderance of the evidence, a party must present detailed, specific evidence." The key issue was the employer's unsupported argument that the employees were supervisors because they had the authority to discipline employees. However, the evidence was that in practice, that was not a part of their work.

Wal-Mart Stores, Inc. v. United Food and Commercial Workers, 2015 WL 3985812 (6/30/15). The Washington Court of Appeals affirmed a trial court's ruling that Walmart's trespass claim against union organizers was preempted by the NLRA. A party asserting that a state law claim is preempted by the NLRA must present sufficient evidence for a court to conclude that the conduct at issue is potentially subject to the NLRA. The union did so by showing that Walmart had availed itself of the NLRB's jurisdiction on the same issue. The exceptions to the NLRA's jurisdiction did not apply to Walmart as (1) the NLRA matter was not merely a peripheral concern; and (2) the conduct at issue did not involve actual violence, threats of violence or property damage.

American President Lines, Ltd. v. Int. Longshore and Warehouse Union, 721 F.3d 1147 (7/12/13).

The Ninth Circuit held that an employer properly raised a claim that it had suffered damage by reason of a union's unfair labor practice, even though the claim was raised after the arbitrator's award in the underlying matter. The issue was whether an employer could challenge a prohibited "hot-cargo" agreement after the agreement had already been arbitrated. The court reasoned that if the agreement was an unfair labor practice then the employer was not precluded from bringing claims, even if the claims were only raised after arbitration.

Southwestern Bell Tel. Co., NLRB Div. of Advice, No. 14-CA-141000 (2/6/15). A technician claimed that a union representative was required to be present during a search of her vehicle, as part of the investigation of alleged misconduct. However, the Division of Advice found that such a search was not an investigative interview, and therefore a union representative was not required to be present under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

NLRB General Counsel Report on Lawful and Unlawful Work Rules. On March 18, NLRB General Counsel Dick Griffin issued a thorough report on the legality of employer rules and policy statements that would help employers "review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful." The 30-page memorandum covers rules in the categories of confidentiality, conduct towards employers and supervisors and employees, communications/interaction with third parties, use of logos, copyrights and trademarks, photography and recording, leaving or walking off from work, and conflicts of interest. The most helpful portion of the report is a section with examples of language that is not considered to be violative of the Act and includes proper language on such items as social media, handbook disclosure, conflicts of interest, employee conduct, solicitation/distribution and threats, harassment, and inappropriate language.

Verizon v. New England, Inc., 362 NLRB No. 24 (3/9/15). The Board overturned an arbitrator's award and found that employees did have a right to display picket signs in their cars in a company parking lot, despite the existence of a no picketing clause in the current and enforceable collective bargaining agreement.

Americold Logistics, LLC, 362 NLRB No. 58 (3/31/15). The one-year bar to a petition for the ouster of a newly "recognized" union (as opposed to the one-year bar on decertification following a certification vote) begins with the first bargaining session rather than the date of voluntary recognition.

Howard Industries, Inc., Transformer Division and International Brotherhood of Electrical Workers, Local 1317, 362 NLRB No. 35, 2015 WL 1308545 (2015). Under the decision in *Weingarten*, an employer is entitled to investigate alleged misconduct without interference from union officials and is "free to insist on hearing the employees' own account of the matter." However, the NLRB found that an employee may lack the ability to express himself or may be too fearful or inarticulate to raise extenuating circumstances and therefore a union steward was free to interrupt questioning to ask clarifying questions, advise the employee to refrain from

answering questions, and use a notebook providing clarification and counseling to the employee by reminding him of his lack of training defense.

Babcock & Wilcox Construction Company, 361 NLRB No. 132 (12-15-14). Under the "Spielberg standard" as enunciated in *Olin Corp.*, 268 NLRB 573, 115 LRRM 1056 (1984), the Board would defer to an arbitrator's award if the contractual issue under the collective bargaining agreement was "factually parallel" to the ULP issue, the arbitrator had been presented with relevant facts to resolve the issue, and the arbitrator's award was not "clearly repugnant" to the NLRA. However, the Board has now stated, through a 3-2 decision, that it will require that an arbitrator be specifically empowered by the parties to decide the statutory issue before the Board will defer to the arbitration process. Therefore, the Board now requires that the party urging deferral show that: (1) the arbitrator was explicitly authorized to decide the ULP issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award that was ultimately rendered.

Purple Communications, Inc., 361 NLRB No. 126 (12-11-14). In a long expected reversal of the NLRB's decision in *Guard Publishing Company*, 351 NLRB 1110 (2007), the Board found that the earlier ruling was "flawed" by analogizing email to physical equipment without recognizing that email has become the predominant means of employee-to-employee communication. Therefore, employees who have been allowed to utilize an employer's email system are presumptively allowed to use the system during nonworking time for communications protected by the NLRA. However, the Board did place certain limitations on that usage and on the scope of its decision: (1) the decision addresses only email systems, but does not address other communications systems; (2) the decision applies to employees only and does not address the possibility that nonemployees may use the system; (3) the decision does not require that an employer grant employees the right to use its email system where it has not previously allowed the employees to do so; (4) the new rule applies only to nonworking time; (5) the employer may still prevent the transmission of large attachments or audio/video segments if the employer can demonstrate that they would interfere with the email system's efficient operation; (6) an employer may still monitor computers and email systems for legitimate management reasons such as productivity and the prevention of harassment; and (7) the new policy will apply retroactively and therefore will include cases currently involved in the NLRB's processes or within the 10(b) period.

Fresh & Easy Neighborhood Market, 361 NLRB No. 8 (7/31/14). A Board majority found unlawful a rule that required employees to: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained." The Board found that employees "would reasonably construe" the admonition to keep "employee information" secure would prohibit employees from discussing wages and terms and conditions of employment.

HTH Corp. et al, and International Longshore and Warehouse Union, Local 142, 361 NLRB 65, 201 LRRM 1457, 2014 WL 5426174 (2014). An employer's egregious, pervasive, and continuing violations of employees' rights under the NLRA led the NLRB to amend the ALJ's ruling to add additional remedies. These remedies included: (1) awarding litigation expenses and costs to the General Counsel and the union; (2) awarding the union its bargaining expenses; (3) requiring the posting and mailing of the notice, Board decision, and explanation of rights for a 3-year period (compared to the standard 60 days), and including notice to all new hires; (4) general publication of the notice and explanation of rights in two local publications (usually reserved for egregious cases); (5) requiring the attendance of supervisors and managers at the notice reading; (6) rescission of the employer's unlawful unilateral changes to the terms and conditions of employment; and (7) guaranteed access for union and NLRB representatives to the employer's premises. The NLRB declined to award front pay in lieu of reinstatement for an employee that had twice been unlawfully terminated based on his protected activities, adopting instead the ALJ's recommended remedies of reinstatement and make-whole relief for any lost earnings and benefits.

United Brotherhood of Carpenters and Joiners of America v. Bldg & Constr. Trades Dep't, AFL-CIO, 770 F.3d 834, 201 LRRM 3257 (9th Cir. 2014). At issue in this case was whether a labor union's use of economic pressure is extortion under RICO. The Carpenters alleged that the Building Trades used intense economic pressure to coerce them into reaffiliation and paying dues, including organizing a unity rally, repeated public criticism of the Carpenters, filing frivolous regulatory claims, stealing confidential information, forcing the Carpenters' legal counsel to terminate its relationship, orchestrating the termination of a solidarity agreement between the Carpenters and another union, vandalism and threats of force, including public dissemination of video footage of a violent attack on the Carpenters' members. The Ninth Circuit concluded that the Carpenters' complaint failed to state a claim under civil RICO or the LMRDA against the Building Trades, and that the district court did not abuse its discretion in denying leave to amend. The complaint failed to allege that the Building Trades demanded any sort of personal payoffs, and although in the Carpenters' opinion, the Building Trades' services were "unrequested, unwanted and unnecessary," that is not enough for a Hobbs Act conviction. Additionally, the Carpenters' claims regarding frivolous regulatory claims and misuse of confidential membership information are more properly pursued though state-law contract and tort claims, not civil RICO. Finally, the complaint merely contained formulaic and conclusory allegations of conspiracy and agency regarding attempts to acquire Carpenters' property through violence or threats and thus failed to allege any action by the Building Trades directly.

United Brotherhood of Carpenters and Joiners of America v. Metal Trades Dep't, AFL-CIO, 201 LRRM 3270, 2014 WL 5438504 (9th Cir. 2014). The Ninth Circuit affirmed the district court's dismissal of the Carpenters' complaint against the union alleging a violation of the duty of fair representation. The complaint failed to state a claim for relief, largely because it failed to suggest any agency relationship between the Metal Trades union and the affiliated unions, to whom the Carpenters assigned most of the alleged threatening conduct. The complaint also

failed to allege that the Carpenters had brought a grievance to the union's attention, so the Carpenters' claim for failing to process a grievance also fails to state a claim. On the Carpenters' claim alleging that the union denied information to its members, the complaint failed to allege that the union had an obligation to provide such information, nor did it allege any substantial prejudice to the members.

United Brotherhood of Carpenters and Joiners of America v. Metal Trades Dep't, AFL-CIO, 770 F.3d 846, 201 LRRM 3265 (9th Cir. 2014). The Carpenters' complaint alleges that the Metal Trades violated the duty of fair representation by removing the Carpenters' members from their positions as stewards based on union affiliation. The question presented, whether the duty of fair representation forbids consideration of union affiliation in the appointment and removal of stewards, was one of first impression amongst the federal appellate courts. The court pointed out that if the Carpenters' contention that the Metal Trades breached its duty when it removed stewards because of their union affiliation is correct, it follows that a union would breach its duty by appointing stewards based on their union affiliation, and for good reason, no court has suggested that the duty of fair representation requires unions to appoint or remove union officers and representatives without regard to union affiliation. The court similarly concluded that the duty of fair representation does not prevent unions from appointing or removing stewards based on union affiliation, and held that the Carpenters' complaint thus failed to state a claim.

Flyte Tyme Worldwide, NLRB ALJ, No. 4-CA-115437 (6/3/14). The NLRB has announced that it will not appeal the Fifth Circuit's opinion in *D.R. Horton*, 737 F.3d 344, 197 LRRM 2637 (2013), but will continue to follow its own opinion in *D.R. Horton, Inc.*, 357 NLRB No. 184, 192 LRRM 1137 (2012), in all other circuits. Consistent with that position, the ALJ in *Flyte Tyme* held that an arbitration agreement violated the NLRA by precluding employees from pursuing class claims in court or under the arbitration agreement.

American Water Works Co., 361 NLRB No. 3 (7/31/14). Section 8(d)(1) of the NLRA requires that a party desiring to modify or terminate a contract notify both the FMCS and the state mediation agency of its intent. While American notified and utilized the FMCS, it failed to send notices to the state agencies in the states where the contract applied. The absence of such notices meant that American could not implement its final offer with unilateral changes.

Wolfe v. BNSF Railway Company, 749 F.3d 859 (9th Cir. 2014). The Ninth Circuit held that the Railway Labor Act ("RLA") did not preempt an employee's claim for negligent mismanagement since the claim was independent of the collective bargaining agreement with the union and did not require the interpretation of the collective bargaining agreement. However, a claim for the disciplinary proceedings that arose under the agreement were in fact preempted by the RLA.

Pac. Bell Tel. Co., NLRB ALJ, No. 20-CA-080400 (4/23/14). An ALJ found that a company's prohibition on the wearing of certain union buttons was unlawful, citing *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), as establishing the right of employees to wear buttons except in

circumstances where the buttons interfered with production and discipline, created a safety problem or maintained an image that alienated customers. The ALJ found that the acronyms ("WTF" and "FTW") were not "so vulgar and offensive to take it outside the protection of the Act," specifically stating that the acronym was defined on the button as having a meaning that was not obscene. The ALJ also found that the use of the word "crap" on a separate button in allegedly brown ink, was in fact displayed with orange ink and therefore the ALJ was "unable to tell if the word 'crap' represents feces, cheese, or Cheetos."

Kroger Co. of Mich., NLRB ALJ No. 7-CA-98566 (4/22/14). An ALJ held that the company violated Section 8(a)(1) with a communications policy that required employees to supplement on-line postings about employment with a statement that the company "did not necessarily share their views." The ALJ found the rule was "manifestly broader" than the company's legitimate interest in avoiding confusion and called the disclaimer a burden that would inhibit the exercise or protected Section VII rights. On the other hand, the ALJ found lawful broadly worded prohibitions on the use of intellectual property, confidential and proprietary information, as well as the rule forbidding "inappropriate" behavior on-line.

Int'l Longshore and Warehouse Union v. ICTSI Or., Inc., __ F. Supp. 2d __, No. 3:12-cv-01058-SI., 2014 WL 1218116 (D. Or. 2014). This case is one of six separate lawsuits arising from a labor dispute at Terminal 6 at the Port of Portland. The dispute arose over who is entitled to perform the work of plugging in, unplugging, and monitoring refrigerated shipping containers at Terminal 6. The International Longshore and Warehouse Union ("ILWU") and the multiemployer collective bargaining association Pacific Maritime Association ("PMA") contend that ICTSI (a PMA member) must assign this work to ILWU members. ICTSI, the Port of Portland, and the International Brotherhood of Electrical Workers ("IBEW") contend that the work must be assigned to IBEW members.

The court here found that ICTSI failed to plead sufficient facts from which the court could reasonably infer that PMA acted in bad faith with respect to ILWU work stoppages and slowdowns, but spared ICTSI's claim that PMA breached its fiduciary duty to ICTSI by acting in bad faith with respect to certain arbitration and committee meetings and to the dispatch of workers from the ICTSI hiring hall. However, given the numerous related contemporaneous actions proceeding in multiple forums, the court saw fit to stay the claim. The Port brought tortious interference counterclaims that were also dismissed because they failed to state a claim and were preempted by Section 303 of the LMRA. The court did not rule on whether the disputed work must be awarded to the ILWU, and the question is not likely to be definitively decided in the near future as the several related cases proceed.

First Transit, Inc., 360 NLRB No. 72 (April 2, 2014). The NLRB ruled on the legality of several provisions in the employer's handbook. The Board held that a policy restricting use of company property was not so broad as to create the impression that employees could not use the employer's premises for protected activity relating to a union organizing campaign. The Board

also found that a loitering ban is part of a rule on "work habits" that does not imply limits on worker activities protected by the National Labor Relations Act. However, the Board found that a rule against having a "discourteous or inappropriate attitude" was unlawful because it could inhibit employee expression during their communications with coworkers about employment-related matters. A "freedom of association" policy did not cure the other policy's incursions on protected worker activities.

Hills and Dales General Hospital, 360 NLRB No. 70 (2014). The NLRB held that the employer's no-negativity policy that required employees to represent the hospital in a "positive and professional manner in the local community" and prohibited employees from making "negative comments about our fellow team members" impermissibly interfered with employees' rights to concerted activities under Section 7 of the National Labor Relations Act.

C. Wage and Hour

Loucks v. Beaver Valley's Back Yard Garden Products, (Oregon 11/12/15). When an employee died on the job, the personal representative for his estate argued that ORS 652.140(2) applied since the employee had "quit employment" and therefore the decedent's estate was entitled to the penalty payment for unpaid wages under 652.140(2). The court dismissed the case since it held that quitting was not the same as dying and the statute does not apply to employees to die on the job. Therefore, the timing of payments is governed by ORS 652.120(1) rather than 652.150(1) or 652.140(2).

Landers v. Quality Communications, 771 F.3d 638 (9th Cir. 2015). Unfortunately for the plaintiff, his complaint did not make factual allegations providing an approximation of the overtime hours worked, his hourly wage, or the amount of unpaid wages. The court concluded that those allegations fell short of the plausibility of an entitlement to relief under Rule 8 and, for an unexplained reason, the plaintiff expressly declined to amend the complaint. Significantly, the court did not require the plaintiff to approximate the number of hours worked without compensation but found that, at a minimum, a plaintiff must state that in at least one workweek he worked in excess of 40 hours and was not paid either overtime or minimum wage for that week.

Navarro v. Encino Motorcars, LLC, 780 F.3d 1267 (9th Cir. 2015). The Ninth Circuit held that FLSA language exempting "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" is ambiguous with respect to "service advisors" who meet customers to evaluate service and repair needs and solicit repairs, and since such an exemption must be clearly stated, service advisors were held to be covered by the terms of the FLSA.

Alexander v. FedEx Ground Package System, Inc., ___ F.3d ___, 2014 WL 4211107 (2014) and *Slayman v. FedEx Ground Package System, Inc.*, ___ F.3d ___, 2014 WL 4211422 (2014). In companion cases, the Ninth Circuit ruled that certain drivers of the defendant were employees

rather than independent contractors under both California and Oregon state law tests. In the Oregon case, the court held that the drivers were employees under the "economic realities test" governing injunctive relief and unpaid overtime claims under ORS 653.261. The defendant argued that significant entrepreneurial opportunity for gain or loss should be the determinative factor, but the Ninth Circuit found that entrepreneurial opportunities do not necessarily undermine a finding of employee status based on the right to control. While FedEx argued that its independent contractor agreement with each driver stated that FedEx did not have the authority to direct the driver as to the manner or means employed for delivering packages, the reality of the arrangement showed that FedEx did control manner and means through dress codes, grooming codes, the assignment of service areas and work schedules and the identification of trucks. The court also held that under Oregon's four part right-to-control test, the court must first weigh the most important factor – which is direct evidence of the right to or exercise of control – before moving on to considerations of the furnishing of equipment, payment methods and the right to fire. The drivers were also held to be employees under Oregon's broader "economic realities test." FedEx also has explained that it no longer uses the system covered by the independent contractor agreements but now, instead, actually hires independent companies to provide the service.

Haro v. City of Los Angeles, 745 F.3d 1249 (9th Cir. 2014). The City classified dispatchers and aeromedical technicians as employees engaged in fire protection. As such, the City argued, those employees were not eligible for standard overtime pay under the FLSA. Instead the City used a distinct overtime calculation provided for workers engaged in fire protection, which requires employees to work a total of 212 hours during a 28-day work period before earning any overtime wages. The trial court held that the City had incorrectly classified the workers, because the workers do not have the legal authority or responsibility to work in fire suppression. The court further found that the City's violations of the FLSA were willful and therefore extended the statute of limitations from two years to three years. The Ninth Circuit affirmed the decision of the trial court in all respects.

Helton v. Factor 5, Inc., __ F. Supp. 2d __, 2014 WL 555806 (N.D. Cal. 2014). The court held that three former employees did not lose their FLSA claims by refusing to accept a payment from their employer that allegedly would have provided them with the full amount of their minimum wage plus interest in the employer's Rule 68 offer of judgment. The employer argued that the claims were precluded under the U.S. Supreme Court's 2013 split ruling in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The court said that the justices in *Genesis* assumed without deciding that an unaccepted settlement offer under Rule 68 is sufficient to render an employee's FLSA claim moot. Because the *Genesis* decision did not resolve the split among the federal appeals courts, the court decided to follow Ninth Circuit precedent to find that the unaccepted settlement offer did not moot their FLSA minimum wage claims. The court also found that the employees— a programmer, a technical artist, and a producer— did not fall within the FLSA's creative professional or executive employee exemption.

EEOC v. Fred Meyer Stores, Inc., 954 F. Supp. 2d 1104, *on recon.* (D. Or., 9/9/2013). In June 2013, the district court denied the plaintiff's motion for summary judgment on the defendant's affirmative defense of failure to mitigate emotional damages. The plaintiff sought reconsideration of the ruling. Title VII is silent on the question of whether plaintiffs are obligated to mitigate emotional damages. In its initial opinion, the court relied on common law decisions in which such mitigation was required. On reconsideration, the court reversed itself. It noted that Title VII explicitly requires plaintiffs to mitigate damages for back pay, but not for other forms of compensatory damages. "Congress' deliberate decision to carve out this duty to mitigate damages [for back pay] clearly signifies that Congress did not intend to create a duty to mitigate all compensatory damages." Therefore, the plaintiff was entitled to summary judgment on the defendant's affirmative defense of failure to mitigate emotional damages.

IV. DECISIONS OF THE OREGON COURTS

A. Employment Discrimination

Ambrose v. J.B. Hunt Transp., Inc., 2014 WL 585376 (D. Or. 2014). A truck driver with a heart condition was discharged six days after an on-the-job accident. He had not previously disclosed his medical condition. The employer sought summary judgment on plaintiff's claims for violation of OFLA, disability discrimination, failure to engage in the interactive process, and workers' compensation discrimination. The court granted summary judgment on the OFLA interference claim because the employee was not medically able to return to work until after his leave expired, and an employer is not liable for discharging after the 12-week period expires, even if the employee cannot return to work for medical reasons. The court found that the plaintiff had made out a prima facie case for disability discrimination, and that it was up to the jury to decide whether the defendant had proffered a legitimate, nondiscriminatory reason for plaintiff's discharge, and denied summary judgment. Based on this same reasoning, the court denied defendant's motion for summary judgment on the workers' compensation claim. The court also denied summary judgment on the interactive process, noting that the defendant did not appear to claim that it had engaged in any interactive process. Finally, the court held that the

after-acquired evidence doctrine does not completely bar the plaintiff's claims, and while summary judgment is inappropriate, that evidence may limit damages.

Weaving v. City of Hillsboro, __ F.3d __, 2014 WL 3973411 (9th Cir. 2014). A police officer with ADHD was terminated for severe interpersonal problems with other officers, citing the major life activities of working and interacting with others. By a split decision which reversed a jury ruling, the Ninth Circuit held: (1) the plaintiff's technical competence and the absence of evidence that he was affected in his ability to work compared to most people in the general population, his disability did not affect his ability to work; and (2) the plaintiff did not get along with his peers and subordinates but had no difficulty "comporting" himself appropriately with his supervisors, and therefore was not substantially limited in his interacting with others. The defendant's motion for judgment was granted as a matter of law.

Bova v. City of Medford, 262 Or. App. 29, 324 P.3d 492 (2014). ORS 243.303(2) provides that the governing body of any local government offering health insurance to its employees "shall, insofar and to the extent possible, make that coverage available for any retired employee…" Bova prevailed on summary judgment, and the Court of Appeals reversed because of the standard articulated by the Oregon Supreme Court in *Doyle v. City of Medford*, 347 Or. 564, 227 P.3d 683 (2010), which issued after the trial court's summary judgment ruling. In *Doyle,* the Oregon Supreme Court interpreted ORS 243.303(2) to require a factual inquiry into whether or not a local government can be excused from its obligation to offer health insurance to retirees; the statute is neither an absolute mandate nor a grant of total discretion.

B. Breach of Contract

Association of Oregon Corrections Employees v. State of Oregon, ---P.3d---, 2014 WL 6806890 (Or. App. 2014). In an earlier decision in this case, the Oregon Court of Appeals held that the Employment Relations Board erred in concluding that the Department of Corrections committed an unfair labor practice under ORS 243.672(1)(e) in making mid-term, unilateral changes to employee schedules without first bargaining on the subject. The Oregon Supreme Court reversed that decision, and held that under ORS 243.650(7) and the terms of the CBA, such changes were mandatory subjects of bargaining, and remanded the case back to the Court of Appeals to decide whether the ERB erred in rejecting the DOC's affirmative defense that the union waived its right to bargain by not making a timely demand to bargain within 14 days. The Court of Appeals affirmed the ERB's conclusion that the DOC did not establish its defense of waiver, and therefore affirmed the ERB's order. The Court of Appeals concluded that in light of the ERB's implicit finding that the DOC did not give the union written notice of the proposed changes that would trigger a requirement to demand bargaining, the ERB had correctly determined that the union did not waive its right to bargain, and thus did not need to reach the DOC's additional contentions that the ERB erred in concluding that a demand to bargain could be made orally, or the ERB's application of the *fait accompli* exception to the demand to bargain.

C. **Wage and Hour**

Dosanjh v. Namaste Indian Restaurant, 272 Or. App. 87 (2/11/15). The Oregon Court of Appeals held that a trial court erred when it failed to instruct the jury that an employer could not withhold an employee's wages based on allegations of theft. At trial, the employee argued that she was withheld wages from her serving job. The employer argued that the employee had been paid by others "under the table" (essentially theft) and thus was not entitled to back wages. The court found error in the trial court's refusal to instruct the jury that the theft claim was not a defense to the wage claim, but rather must be raised as a completely separate counterclaim.

McCormick v. Cable Communications, Inc., (7/9/15, Mosman, M.). The Judge granted summary judgment against the employee's claim that the employer wrongfully deducted weekly commissions from overtime wages. In so deciding, the Judge noted that FLSA overtime provisions do not regulate how bonuses should be calculated.

Norris v. R&T Manufacturing, LLC, 265 Or. App. 672, 338 P.3d 150 (2014). Norris obtained a judgment against his employer Action Accessories, LLC for unpaid wages, penalties, and attorney fees. A week later, the owners of Action Accessories dissolved that company and formed R&T Manufacturing, transferring all of the company assets to the new business, but retaining title until a formal purchase was consummated 15 months later. Six months after obtaining the initial judgment, Norris obtained a default judgment against Action Accessories for additional damages and attorney fees, and challenged the transfer as fraudulent under the UFTA. The court noted that R&T Manufacturing began doing business immediately on its formation in the same location, under the same management, with the same equipment, personnel, and customers, and was merely operating under a different business plan. R&T argued that the equipment transferred had zero value because they were fully encumbered. The court found that the purchase price paid for the equipment failed to take into account the goodwill and other intangible assets that accompanied what was essentially the transfer of an entire business from one entity to another, and that the total value of all of the assets transferred exceeded any encumbrance. Based on this, the Court of Appeals affirmed the trial court's findings that R&T Manufacturing had not paid the reasonably equivalent value for the transfer of the assets, and thus had transferred assets in violation of the UFTA to avoid the obligation to Norris.

Blachana LLC v. BOLI, 354 Or. 676, 318 P.3d 735 (2014). When a predecessor employer incurred liability for wage violations, the company went out of business and a new company occupied the same space. In the BOLI decision, affirmed by the Supreme Court, the successor employer was liable for the predecessor's violations under ORS 652.414(3) and ORS 652.310(1) based upon the following factors: (1) the name and identity of the business; (2) the location; (3) the brief lapse of time between the previous operation and the new operation; (4) the business employed substantially the same workforce; (5) the same service was offered and product utilized; and (6) the same machinery, equipment and methods of production were used. In this case, the successor employer did not employ any of the predecessor's employees and the

predecessor employer had signed a release agreement releasing itself from any obligations under the lease and sales agreement.

Delgado v. Del Monte Fresh Produce, N.A., Inc., 260 Or. App. 480, 317 P.3d 419 (2014). A class of minimum-wage production workers at defendant's fresh-cut produce plant brought claims under Oregon's wage and hour law alleging failure to pay wages for time spent donning and doffing protective clothing. At the close of evidence at trial, the defendant made a motion to decertify the class, which the trial court denied. The jury returned a verdict for the plaintiffs, finding that the defendant was a joint-employer. The court then awarded plaintiffs' statutory penalty wages and attorneys' fees. The Court of Appeals concluded that the trial court did not abuse its discretion by declining to decertify the class, in light of the predominance of common issues and other factors supporting class litigation, and the timing of the motion to decertify. The Court of Appeals affirmed on statutory penalty wages, holding that the defendant's failure to demand submission to the jury on whether defendant was an employer under the statutory penalty wages statute entitled the trial court to enter a judgment consistent with the jury's verdict.

D. Retaliation

Hall v. State of Oregon, 2015 WL 6164436. A wrongful discharge claim cannot stand if the original report by the employee was not "objectively reasonable." In the case of the plaintiff, in hindsight the report he had made was not objectively reasonable based upon video surveillance which was produced. However, at the time the plaintiff made his claim, the video was not available to him and he had presented evidence sufficient to create a question of fact as to the objective reasonableness of his original report. A subjective good faith report may be sufficient to support a wrongful discharge claim.

Monico v. City of Cornelius, 2015 WL 1538786 (D. Or., 4/6/15). The district court held that a police chief hanging "inspirational posters" could be interpreted as criticizing officers that raised corruption claims and might constitute unlawful retaliation based on the officers' exercise of a protected first amendment right. The posters were placed in the restrooms and included messages of: "don't second-guess the chain of command" and how to be "successful as followers." The court held that the posters could reasonably be understood as intended to shame the officers that had exercised their rights and therefore may deter employees from exercising their constitutionally protected rights in the future.

E. ADA

Dunlap v. Liberty Natural Prods., Inc., 2015 BL 112481 (D. Or., 4/20/15). The district court held that a former shipping clerk with a heavy lifting restriction was able to perform essential job functions with reasonable accommodation, and had been wrongfully terminated. The employee was able to show that the employer was aware of her need for an accommodation even though she had not expressly requested one because she had filed a previous workers' compensation

claim relating to the same injury. The court held that, at the least, the employer's knowledge was enough to trigger its duty to have a discussion with the employee regarding the nature of her condition and potential accommodations.

F. Miscellaneous

Bernard v. SB, 270 Or. App. 710 (5/6/15). The Court of Appeals held that, though an employee's non-compete may have been voidable, it was not void at the time the employer threatened to enforce it and therefore the employer's actions were not improper. The employee had quit her job with the employer and gone to work for a competitor. The employer sent her and her new employer correspondence reminding both of the non-compete agreement that the employee had signed. The employee argued that the employer's actions were improper because the non-compete agreement was not valid based on procedural issues. The court held that even if a non-complete is "voidable" doesn't mean that it is "void," and the employer was entitled to bring the existence of the agreement to the employee and her employer's attention.

Murphy v. Gross, 2015 WL 1757182 (D. Or., 5/18/15). The Oregon district court dismissed, on summary judgment, claims of an anesthesiologist who alleged that his section 1983 due process rights had been violated after he had a glass of wine while on call and it was reported as potentially affecting the health or welfare of patients. The court found that the employee's civil rights claims failed to meet the "stigma plus" standard required to prevail on due process claims under the 14th Amendment. The key shortcomings of the employee's claims were that he had not been terminated—a threshold issue for a due process employment claim—and the reporting was not sufficiently egregious to trigger a protected liberty interest. The employee's appeal to the Ninth Circuit is pending.

McManus v. Auchincloss, 271 Or. App. 765 (6/17/15). The Court of Appeals overturned a trial court dismissal of a live-in personal assistant's common law wrongful discharge and IIED claim on the basis that the employee had been discharged for exercising an important public duty; specifically, reporting his employer's possession and display of child pornography. In expanding the basis for a wrongful discharge claim, the court attempted to narrow its decision by noting that a new exception to the at-will employment rule was warranted based on the public's special interest in the reporting of crimes of child abuse.

B&R Sales v. Labor & Industries, 344 P.3d 741 (2015). The employer was required to make workers' compensation tax payments under RCW 51.08.180 since its contractors were held to be workers rather than independent contractors. The primary object of their contracts was held to be personal labor despite the fact that they did in fact utilize expensive specialized tools and equipment.

City of Portland v. Portland Fire Fighters' Association, ---P.3d---, 2014 WL 6981334 (Or. App. 2014). The Oregon Court of Appeals affirmed the decision of the Employment Relations Board

that found that the arbitrator granted the fire-fighter a make-whole remedy that required the City to treat him "as though [Hurley] had been reinstated as a fund member and entitled to receive disability benefits from the Fund," as the arbitrator put it. The Court of Appeals held that, in construing that award, the ERB permissibly interpreted the arbitrator's award as including service credit, when the arbitrator ordered the City to compensate Hurley "as though he had been reinstated." Thus, the ERB's determination that the "make-whole" award required the City to

grant service credit towards the employee's retirement and pension during the period that he was not receiving disability benefits was within its authority and not in error.

V. DECISIONS OF OTHER STATE COURTS

A. Gender Discrimination/Retaliation/Standard of Proof

Boyd v. State of WA; Department of Social and Health Services; and Western State Hospital, 2015 WL 26531 (2/3/15, Wa. Ct. of Appeals, Div. II). Retaliation by supervisor is "materially adverse" if several actions taken together would have been enough to dissuade a reasonable worker from making a similar complaint. The Washington Court of Appeals affirmed a verdict in favor of a male nurse that alleged he was retaliated against after rejecting the advances of a female supervisor of the Ward adjacent to his. Though she was not his direct supervisor, her threats that he would not work again "in any of the 50 states" and her involvement in an investigation of unrelated claims against him that resulted in his suspension was enough, taken together, to constitute retaliation.

B. ADA

Oberti v. Pacific Maritime Association, 2015 BL 90185 (W.D. Wa., 3/27/15). The district court allowed an employee's disability discrimination claim to proceed to trial after he was fired for failing to provide a urine sample for drug testing. He alleged he was unable to provide the sample because of a single incident of "shy bladder" syndrome that prevented him from urinating before a male observer. He alleged the condition was a disability under Washington law and that he was entitled to reasonable accommodations. The court noted that Washington State had an especially broad definition of disability that would include "shy bladder" and that if the employee could prove that his condition prevented him providing a urine sample, then he was entitled to an accommodation. The court did note some doubt about the existence of his alleged condition, however.

Steenmeyer v. Boeing Co., 2015 BL 68964 (W.D. Wa., 3/12/15). The court found that an employee's alleged disability of frequent urinary tract infections that required she sit near a restroom was a qualifying condition and allowed her claims to proceed to trial.

Higgins-Williams v. Sutter Med. Found., Cal. Ct. App. No. C073677 (5/26/15). The California Court of Appeals affirmed summary judgment of an employee's claim that she was disabled because she was unable to work under her supervisors without feeling anxious. Her concern was that her managers had an abrupt management style and her requested accommodation was to be assigned to new managers indefinitely. The court held that the inability to get along with one's supervisors was not, as a matter of law, a qualifying disability under California law.

C. Wage and Hour

Demetrio v. Sakuma Bros. Farms, Inc., 2015 WL 4366459 (7/16/15). The issue was whether agricultural employees paid "piece-rate" based on their rate of production must be paid for break time, and if so, at what rate. Although the employees were allowed breaks, they would often skip them because they only got paid for what they produced. The Washington Supreme Court held that pursuant to Washington law, the employees must be compensated at a rate of minimum wage or their average rate of pay for production, whichever is higher. The goal was to set the incentive such that employees would not benefit from skipping mandatory breaks.

D. Age Discrimination

Barnes v. Hershey Co., 2015 BL 221590 (N.D. Ca., 7/9/15). A California district court dismissed age discrimination claims of older employees on the basis that they were not entitled to the additional protections provided for "group terminations" because each termination was independent, conducted by different supervisors, and noted individual reasons for the termination.