

[See All Issues](#)

Headlines

TOP STORY

[See Articles](#)

TOP STORY—10th Cir.: Employee's affidavit revealing confidential information was not protected speech

STRATEGIC PERSPECTIVES—Ogletree Deakins reviews the key NLRB developments of 2016

CASES

[See Articles](#)

ARBITRATION—D. Kan.: No change in controlling law to render arbitration agreement unenforceable

CONTRACT CLAIMS—D. Minn.: Despite rejected applicant's change of heart, agreement to settle his tort claims enforced

DISCHARGE—E.D. Mich.: Employees prosecuted for embezzlement failed to state civil rights or conspiracy claims against employer

DISCRIMINATION—DISABILITY—6th Cir.: Home Depot employee forced to undergo psych exam didn't state a 'perceived as' claim

DISCRIMINATION—N.D. Tex.: States and faith-based healthcare providers get preliminary injunction against HHS rule

EMPLOYEE STATUS—D.D.C.: Handyman for real estate company was employee, not independent contractor

LABOR—UNFAIR LABOR PRACTICES—NLRB: Nonemployer trade group unlawfully restricted members' Facebook activity

REMEDIES, DAMAGES—Conn. Sup. Ct.: Punitive damages not authorized under Fair Employment Practices Act

In the News

LAW FIRMS

[Adams, Hayward & Welsh Barr & Camens](#)
[Brown Jacobson](#)
[Butzel Long](#)
[Eaton Peabody, PA](#)
[Fisher, Patterson, Saylor & Smith](#)
[Frantz Ward LLP](#)
[Greenberg Traurig](#)
[Hawks Quindel](#)
[Jackson Lewis](#)
[Jellinger Law Office](#)
[Law Office of Ted H.S. Hong](#)
[Law Offices of D.C. Taylor and Associates](#)
[Law Offices of Daniel Wemhoff](#)
[Lewis Brisbois Bisgaard & Smith](#)
[Lippman, Semsler & Salb](#)
[Littler Mendelson](#)
[Marr Jones & Wang](#)
[McAnany, Van Cleave & Phillips](#)
[McGuire Woods](#)
[Messer, Caparello & Self, P.A.](#)
[Morgan, Lewis & Bockius](#)
[NLRB](#)
[Ogletree Deakins \[1, 2\]](#)
[Richard E. Johnson PA](#)
[The Becket Fund for Religious Liberty](#)
[The Hoppock Law Firm](#)
[Thompson, Bull, Furey,](#)

RETALIATION—D. Me.: Sacked employee who declined free passes to strip club proceeds with retaliation claim

RETALIATION—D.D.C.: Fannie Mae must litigate FCA, FMLA claims of employee who questioned figures given to U.S. Senator

RETALIATION—N.D. Fla.: Truthful, negative job references could be retaliatory, but not in case of displaced principal

STATE-LAW CLAIMS—E.D. Wis.: Exotic dancer advances claim club improperly deducted fines for 'faulty workmanship'

WAGE-HOUR—D. Haw.: Settlement due approval even if plaintiff did not okay specific payment formula

NEWS

[See Articles](#)

EEOC NEWS—Suits alleging sexual harassment, pay and national origin discrimination resolved

FEDERAL LEGISLATION—New bill recycles old proposals to curb regulatory action

INDUSTRY NEWS, TRENDS—Morgan Lewis beefs up employee benefits, executive compensation services

OSHA NEWS—Jersey City Medical Center cited for \$174K in penalties after worker fatality related to electrical shock

STATE REGULATIONS—NEW YORK—Multi-agency unit launched to police new minimum wage rules

[Bass & MacColl, LLC, P.A.](#)
[Vinson & Elkins](#)
[Winston & Strawn](#)
[Zipin, Amster & Greenberg](#)

COMPANIES

[Aerotek, Inc.](#)
[Christian Medical and Dental Society](#)
[Federal National Mortgage Association](#)

[See All In the News](#)

TOP STORY

TOP STORY—10th Cir.: Employee's affidavit revealing confidential information was not protected speech

By [Lorene D. Park, J.D.](#)

Given that an employee worked closely with the police chief and maintained the department's confidential records, the city's interest as a public employer outweighed her First Amendment interest in providing an affidavit in an officer's lawsuit, revealing confidential information. Affirming summary judgment against her Section 1983 retaliation claims, the Tenth Circuit noted the importance of loyalty and confidence in the law enforcement setting and found it significant that the employee was unaware of any actual wrongdoing by the city at the time she signed the affidavit, which revealed no city misconduct. Chief Judge Tymkovich also wrote a concurring opinion rejecting the employee's assertion that her affidavit involved a "per se" public concern. To the contrary, even assuming a per se rule was recognized, the context and

form of her affidavit excluded it from automatic protection ([Helget v. City of Hays, Kansas](#), January 4, 2017, Tymkovich, T.).

Employee provides affidavit to fired officer. The employee worked for the city for ten years as an administrative secretary in the police department. She worked closely with the police chief and assistant chief, and maintained the department's confidential records and files. She also acted as the department's purchasing agent. In early December 2010, when she presented a list of officers for whom new ballistic vests would be purchased, the assistant chief had her remove the name of one officer. In January 2011, that officer was fired for an incident that had occurred in late December. Though he was accused of unprofessional conduct, he filed suit claiming he was wrongfully discharged for union activity. In the officer's case, the employee agreed to provide an affidavit stating she was instructed to remove him from the ballistic vest order before the incident that the department held out as the reason for his termination.

Employee is fired. On May 1, 2012, before city officials learned of her affidavit, the police chief and assistant chief met with her to discuss her job performance. She was counseled for excessive personal internet use and her demeanor. On May 10, the chief learned about her affidavit and city officials exchanged emails discussing whether they could discipline or terminate her over it. The chief testified that he no longer trusted her with confidential information and that was why, on May 14, he recommended to the city manager that the employee be fired. The list of reasons for termination included: (1) lack of communication and interaction with command staff; (2) negative interactions with staff; (3) violations of the city's personal-internet-use policy; and (4) disclosing confidential information in the officer's litigation. She was fired two days later.

Summary judgment against First Amendment claims. The employee filed suit against the city, city manager, and police chief under Section 1983, alleging that they violated her First Amendment rights by retaliating against her for exercising her right to testify truthfully and for speaking out on a matter of public concern in providing the affidavit. Granting summary judgment for the defendants, the district court concluded that the city's interest as a public employer outweighed the employee's interest in her speech regarding a former employee's litigation. The court also granted qualified immunity to the individual defendants.

City's interest outweighed speech interest. The Tenth Circuit relied on the *Garcetti/Pickering* test, which considers whether: (1) the speech was pursuant to official duties; (2) was on a matter of public concern; (3) the government's interests outweighed the plaintiff's free speech interests; (4) the speech was a motivating factor in the termination; and (5) the defendant would have reached the same employment decision absent the protected conduct. Here, the parties agreed that the employee's speech was not in response to her official duties and the district court found in the city's favor on the second and third questions, which ended its analysis.

Affirming, the appeals court explained that it has long recognized that loyalty and confidence among employees is especially important in law enforcement. The employee worked closely with the chief and assistant chief, handling confidential information. Thus, protecting the department's confidences was crucial to her job performance and any diminution in trust by the chief or assistant chief because she failed to maintain confidences could have affected her working relationship with her direct supervisors. The chief testified that after she disclosed confidential information in her affidavit, he no longer trusted her with confidential information. In the appellate court's view, absent trust and loyalty, if the chief and assistant chief had been compelled to continue working with the employee, the strained relationship would have certainly interfered with the regular operation of the department. And if the chief refused to convey confidential information to her, it would impede her ability to perform her essential duties. Thus, the city's interests as a public employer were strong here.

On the other hand, the employee's interest was not as significant as claimed. While she

claimed her interest was significant because her statements disclosed city misconduct, she admitted that, at the time she signed the affidavit, she did not know why department officials had removed the officer from the ballistic vest order. Also, a plain reading of her affidavit did not reveal any improprieties by the city; she simply attested that the officer was generally known to be active in the union and that she was told to remove his name from the ordering list in early December 2010. Moreover, the manner in which she aired her discourse about the officer's termination minimized her interest. She did not raise the issue with superiors despite several opportunities.

Considering the circumstances as a whole, the appeals court agreed with the district court that the city's strong interests as a public employer outweighed the employee's interests in supplying the affidavit. She therefore could not satisfy the *Garcetti/Pickering* test.

Concurring opinion. Chief Judge Tymkovich wrote a separate opinion asserting that he would reject an additional argument raised by the employee: that her voluntary affidavit in the officer's litigation was a per se matter of public concern because of its form and context. Circuit courts are unsettled on whether trial testimony is per se a matter of public concern. Regardless, the employee's speech was in the form of an affidavit and was one step removed from the adversarial process that ensures reliability. Moreover, her speech was completely voluntary. She had not been subpoenaed and she was not faced with a Catch-22 situation. Thus, even if the court recognized a per se rule, the affidavit in this case was not of the form and context that would necessarily compel per se protection.

The case is [No. 15-3093](#).

Attorneys: Matthew L. Hoppock (The Hoppock Law Firm) for Firma Helget. Jessica L. Skladzien (Lewis Brisbois Bisgaard & Smith) for Toby Dougherty and Donald Scheibler. Amy J. Luck (Fisher, Patterson, Sayler & Smith) for City of Hays, Kansas.

MainStory: TopStory PublicEmployees IndividualRights Retaliation ColoradoNews
KansasNews NewMexicoNews OklahomaNews UtahNews WyomingNews

[Back to Top ^](#)

STRATEGIC PERSPECTIVES—Ogletree Deakins reviews the key NLRB developments of 2016

The NLRB continued making life more difficult for employers in 2016. The agency issued a host of decisions significantly expanding the number and type of individuals that unions can seek to organize and that make the process of organizing faster and easier for unions. For those employers already grappling with a unionized workforce, the Labor Board issued a large number of decisions affording greater leverage to unions both at the bargaining table and, thereafter, in the administration and enforcement of collective-bargaining obligations. In large measure, the NLRB continued to receive support by reviewing federal appellate courts that traditionally accord the agency's decisions a high degree of deference. Compounding the problem for employers, the Board made the resolution of unfair labor practice claims more difficult and the litigation and consequence of such claims more costly.

In the [latest issue](#) of Ogletree Deakins' *The Practical NLRB Advisor*, attorneys in the firm's Traditional Labor Relations Practice Group look back at the key developments at the NLRB in 2016 and discuss the consequences for employers.

Attorneys: (Ogletree Deakins).

MainStory: Labor PracticeTip AgencyNews UnfairLaborPractices IndustryNewsTrends
LitigationNewsTrends

CASES

ARBITRATION—D. Kan.: No change in controlling law to render arbitration agreement unenforceable

By [Ronald Miller, J.D.](#)

Finding that the Tenth Circuit's ruling in [Nesbitt v. FCNH, Inc.](#), did not amount to a change in the controlling law sufficient to support a motion for reconsideration, a federal district court in Kansas declined to find the arbitration provisions of employment agreements signed by certain employees were unenforceable so as to forestall an order to compel arbitration of their overtime pay claims ([Torgerson v. LCC International, Inc.](#), January 3, 2017, Crabtree, D.).

Employees working in a Migration Analyst position alleged that their employer improperly classified them as exempt from the FLSA's overtime requirements. They sought to recover unpaid overtime compensation. Each employee signed an employment agreement containing nondisclosure and confidentiality provisions, as well as agreeing to assign inventions. The employees also agreed to arbitrate certain employment disputes. In response, the employer filed a motion to dismiss, or in the alternative stay proceedings and compel arbitration. In its August 10, 2016 order, the court concluded that each employee signed an employment agreement that required them to arbitrate their FLSA claims, and granted the employer's request to stay the case and compelled the parties to proceed to arbitration.

Change in controlling law. The employees filed a motion for reconsideration. According to them, the Tenth Circuit decision in *Nesbitt* presented a change in controlling law that rendered the parties' arbitration agreement unenforceable. In *Nesbitt*, the appeals court applied the "effective vindication exception" to the Federal Arbitration Act (FAA) to invalidate an arbitration agreement. The Tenth Circuit explained in *Nesbitt* that the effective vindication exception "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights," and "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."

Here, the employees asserted that the employment agreement's fee-shifting and cost-shifting provisions exposed them to a substantial risk that they would have to bear the costs and fees of arbitration if their claims failed. Accordingly, they claimed that those provisions prevented them from effectively vindicating their statutory rights under the FLSA. However, the employer argued that *Nesbitt* was not a change in the controlling law and thus provided no basis for reconsideration.

Arbitrator to decide questions of arbitrability. Under the facts of this case, the court could not find that *Nesbitt* amounted to a change in the controlling law sufficient to support a motion for reconsideration. In its August 10, 2016 order, the court held that the parties' arbitration agreement "clearly and unmistakably requires the arbitrator to decide questions of arbitrability." The court thus determined that the arbitrator must decide whether plaintiffs can arbitrate this dispute as a class. For the same reasons, the court, in agreement with the employer, determined that the arbitrator was to decide whether the fee-shifting and cost-shifting provisions of the employment agreement render it unenforceable under the effective vindication exception.

In deciding whether an issue is one for the court or the arbitrator to decide, the court first must determine whether the issue is substantive or procedural. Substantive issues include questions of arbitrability, or "certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." Typically, it is the court's responsibility to decide substantive issues unless the parties "clearly and unmistakably provide otherwise." In contrast, a

procedural issue encompasses "whether parties have satisfied conditions that allow them to arbitrate." The arbitrator decides procedural issues.

In this instance, the court had already determined that the parties' arbitration agreement conferred broad authority on the arbitrator to decide not only procedural issues, but also substantive ones. Thus, even if the effective vindication issue qualified as a substantive one, the arbitrator must decide this issue because the parties "clearly and unmistakably" agreed that the arbitrator would decide questions of arbitrability. As a consequence, the court could not decide this issue.

No basis for reconsideration. Finally, the court determined that even if it properly could decide the issue, the employees failed to meet their burden to show that *Nesbitt* provides a basis for the court to reconsider its August 10, 2016, order compelling the parties to arbitrate this dispute. Here, the employees provided no information about their inability to pay the fees associated with arbitration. Without sufficient evidence to support their assertion that the arbitration costs prevented them from vindicating their statutory rights, the employees failed to carry their burden.

The case is [No. 16-cv-2495-DDC-TJJ](#).

Attorneys: Gregory P. Goheen (McAnany, Van Cleave & Phillips) for Richard Torgerson.
Adam R. Roseman (Greenberg Traurig) for LCC International, Inc.

Companies: LCC International, Inc.

Cases: Arbitration WageHour Overtime ClassActions KansasNews

[Back to Top ^](#)

CONTRACT CLAIMS—D. Minn.: Despite rejected applicant's change of heart, agreement to settle his tort claims enforced

By [Lorene D. Park, J.D.](#)

By extending a counteroffer to settle his claims that Aerotek tortiously induced him to move to Minnesota for a job that never materialized, a plaintiff indicated his intent to be bound by the terms, as did Aerotek when it accepted his counteroffer. Because there was a meeting of the minds on material terms, the agreement was enforceable despite the plaintiff's subsequent change of heart and refusal to sign the final written document. Consequently, a federal district court in Minnesota granted Aerotek's motion to enforce the settlement agreement ([Ayala v. Aerotek, Inc.](#), January 3, 2017, Davis, M.).

According to the plaintiff, Aerotek contacted him while he was working as a safety coordinator in Afghanistan and they entered negotiations for a position in Minnesota. Allegedly relying on the staffing company's representations, the plaintiff resigned his position and incurred expenses to travel to Minnesota for a job with Aerotek. After he arrived, he was informed that the position they discussed was no longer available, though positions paying less might become available. He filed suit alleging state-law claims of false inducement of employment, negligent representation, and promissory estoppel.

Settlement counteroffer accepted. Thereafter, the parties entered settlement negotiations. Defense counsel sent the plaintiff's attorney a settlement offer via email. The offer specified the amount of money Aerotek would pay in exchange for a general release and confidentiality. The attorneys discussed the offer by phone and the plaintiff's counsel indicated he was having difficulty reaching the plaintiff. About a week later he communicated a counteroffer on behalf of the plaintiff, which increased the monetary amount but otherwise did not change the

agreement. Aerotek's attorney accepted that offer by phone, indicated she would memorialize the agreement in writing and send it, and reminded plaintiff's counsel that the confidentiality obligations began immediately. She sent the written agreement four days later.

Plaintiff changes his mind. After a week had passed, Aerotek's attorney called the plaintiff's attorney to inquire about the status of the agreement. After further delays due to communication issues, she was informed that the plaintiff no longer wanted to settle the claims and that he was now working in Africa and would be unavailable for deposition for a few months.

Court finds a meeting of the minds. Granting Aerotek's subsequent motion to enforce the settlement agreement, the court explained that under Minnesota law, a court may enforce an agreement that contemplates the execution of documents at later time and leaves "insubstantial matters" for later negotiation. The important thing is that there be a meeting of the minds on material terms.

Here, the parties' actions showed a meeting of minds on all material terms of the settlement agreement. Aerotek accepted the plaintiff's counter-offer (which had changed only the originally offered payment) and provided a final written agreement. Aerotek promised to pay a certain amount and the plaintiff promised to dismiss pending claims. Both promised to keep the settlement terms confidential. There was no evidence of a disagreement about the terms and the plaintiff's actions in conveying a counteroffer indicated he intended to be bound by the terms of the agreement. Furthermore, there was no assertion that his attorney had no authority to settle on his behalf. Because there was a meeting of minds on all material terms the agreement was enforceable and the plaintiff's change of heart and refusal to sign made no difference. Aerotek's motion was therefore granted.

The case is [No. 15-3095 \(MJD/SER\)](#).

Attorneys: Richard Thomas Jellinger (Jellinger Law Office) for Christopher Ayala. Stephanie D. Sarantopoulos and Joseph D. Weiner (Littler Mendelson) for Aerotek, Inc.

Companies: Aerotek, Inc.

Cases: [ContractClaims](#) [TortClaims](#) [StateLawClaims](#) [MinnesotaNews](#)

[Back to Top ^](#)

[DISCHARGE—E.D. Mich.: Employees prosecuted for embezzlement failed to state civil rights or conspiracy claims against employer](#)

By [Ronald Miller, J.D.](#)

Discharged cashiers at an MGM casino failed to state claims for violation of their civil rights, conspiracy and breach of employment contract against the employer after their acquittal on embezzlement charges, ruled a federal district court in Michigan. Because the employees failed to allege state action, their claim under Section 1983 failed. Further, the employees failed to demonstrate that the defendants engaged in a conspiracy that was motivated by racial or other class-based, discriminatory animus to support a Section 1985 claim. Moreover, as union workers, the employees' breach of contract claim was preempted by Section 301 of the LMRA ([Burrell v. MGM Grand Casino Detroit](#), January 3, 2017, Steeh, G.).

Embezzlement and prosecution. On February 21, 2013, four cashiers at the casino's sundry shop were told to report for "training." When they reported for the "training," they were separated, detained, and informed that they were being investigated for wrongdoing. They were required to have their photographs and fingerprints taken, and were asked to give

statements without their labor representative present. The employees were terminated for embezzlement, and several months later were charged with embezzlement and/or theft, and faced criminal prosecution. They were not convicted.

Following acquittal, the employees brought a federal civil rights suit under 42 U.S.C. Sec. 1983 and Sec. 1985, and state-law claims against their former employer and individual defendants. At the time they were terminated, the employees were earning close to \$20 an hour. They alleged that after their discharge their union president informed them that the employer was looking for an excuse to fire them, so that they could be replaced with workers at a lower pay rate. In fact, the employees were replaced with workers earning only \$13.50 per hour. The employer filed a motion to dismiss.

Section 1983 claim. In order to state a claim under Section 1983, plaintiffs must allege two elements: "(1) the defendant acted under color of state law; and (2) the defendant's conduct deprived the plaintiff of rights secured under federal law." Because the employees failed to allege state action, their Section 1983 claim could not survive a motion to dismiss. Section 1983 does not generally prohibit the conduct of private parties, acting in their individual capacities, but prohibits the government from infringing on an individual's constitutional rights. The employees did not allege that the casino's security officers were licensed under Michigan law and it was undisputed that they were not. Moreover, the Sixth Circuit has held that pervasive gaming regulation does not transform casinos and their employees into state actors. Accordingly, the employees' failure to allege state action was fatal to their claim.

Section 1985 claim. To state a claim under Section 1985(3), plaintiffs must allege "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." Plaintiffs must make specific factual allegations showing the existence of the conspiracy as well as allegations that the defendants acted with the specific intent to deprive a plaintiff of equal protection or equal privileges and immunities.

According to the complaint, the defendants "conspired to wrongfully detain and imprison plaintiffs against their will," and "illegally, unlawfully, maliciously, and wrongfully conspired with one another and/or engaged in concerted activities with one another, with intent to, and for the illegal and unlawful purpose of, depriving plaintiffs of their Constitutionally protected civil rights." The complaint also alleged that the individual defendants "secretly and collectively put surveillance tapes and material together to 'create' the impression of wrongdoing by Plaintiffs at the behest of MGM." Further, the complaint alleged that two of the individual defendants "conspired and/or concerted action [sic] collectively to have Plaintiffs detained and their property seized against their will, their purses and persons searched and cellphones taken."

In order to be liable under Section 1985(3), the employees must demonstrate that "the conspiracy was motivated by racial or other class-based, invidious discriminatory animus." Here, the employees asserted that they were all members of a "racial minority classification," but they failed to allege facts supporting the theory that the defendants had discriminatory animus against them on that basis, nor did they plead any facts suggesting that the defendants conspired to deprive them of their constitutional rights because of their minority status. Rather, they alleged that MGM sought to terminate them wrongfully in order to replace them with workers at a lower rate of pay, and in fact did so. Accordingly, the employees' Section 1985(3) claim against MGM could not survive the employer's motion to dismiss for failure to state a claim.

Breach of employment contract claim. Finally, the employees alleged that the employer was liable for breach of employment contract because they were terminated without just cause. According to the employees they had a just cause employment contract based on their labor contract with the employer. However, the employer argued that because the employees

were members of a union, their breach of contract claim was preempted by the LMRA.

The law is well settled that where resolution of a state-law claim requires interpretation of the terms of a labor contract, or where the rights claims by a plaintiff were created by the labor contract, the plaintiff's claim is preempted by Section 301. Because the employees' claimed that their labor agreement gave rise to a just cause employment contract, their state-law breach of contract claim was preempted by Section 301. Further, in order for a union employee to maintain an action for breach of a labor contract against her employer, she must also establish that her union breached its duty of fair representation. Moreover, the employees' claim was time-barred because their lawsuit was not filed within six months of their acquittal.

The case is [No. 16-cv-10568](#).

Attorneys: Delicia Coleman (Law Offices of D.C. Taylor and Associates) for Marcia Burrell. Brett J. Miller (Butzel Long) for MGM Grand.

Companies: MGM Grand Casino Detroit

Cases: Discharge Labor StateLawClaims ContractClaims MichiganNews

[Back to Top ^](#)

DISCRIMINATION—DISABILITY—6th Cir.: Home Depot employee forced to undergo psych exam didn't state a 'perceived as' claim

By Brandi O. Brown, J.D.

A Home Depot manager whose words "this is bullshit" were reported as a threat and who was forced to go on leave pending a psychiatric evaluation failed to state a "perceived as" disability discrimination claim under the Kentucky Civil Rights Act (KCRA). In an unpublished decision, the Sixth Circuit agreed with the district court that asking the employee to undergo a psychological evaluation was not enough to suggest that the employer regarded him as mentally disabled ([Krueger v. Home Depot USA, Inc.](#), January 3, 2017, Cole, R.).

"This is bullshit." The employee, a store manager at a Louisville Home Depot store, reported that his supervisor was abusive towards employees. The supervisor was fired, but, according to the employee, the regional vice president who fired the supervisor then began to micro-manage the employee. A few months later, a district manager informed the employee that he would be fired within the next three weeks. A few days later, the employee reported that district manager for undertaking prohibited projects. A couple of weeks later, he asked the district manager when he would be fired, and was told they would talk again a few days later. The employee responded with "this is bullshit," which the district manager then reported to the employer as a threat of violence.

The employee was placed on leave and told he would have to undergo a psychological evaluation before he could return. He completed the evaluation two days later and was declared not to be a threat. He was not allowed to return, though; he was fired instead. He filed suit asserting violations of the KCRA based on perceived disability discrimination, among other claims. The district court granted Home Depot's motion to dismiss.

Proper standard applied. On appeal, the employee argued that the district court erroneously required him to meet the prima facie standard rather than the plausibility pleading standard. While the employee correctly pointed out that the prima facie standard was not the correct pleading standard, the lower court had actually used the proper standard, the appeals court explained. Requiring the employee to plead facts sufficient to state a claim on the basis of a

perceived disability did not require him to make a prima facie case; rather, it properly required him to meet the plausibility pleading standard. And the facts alleged did not support his conclusory statement that he was regarded as having a mental disability.

Psych evaluation not enough. In order to state a claim, the employee had to allege that the employer regarded him as disabled. However, although he alleged that the employer regarded him as being of unsound mind, the only factual assertions to support the claim that he was regarded as mentally disabled were that he was placed on leave, required to undergo a psychological evaluation, and that his statement was reported as a threat of violence. But asking an employee to undergo a psychological evaluation is not enough to establish that the employee was regarded as having a mental disability, the appeals court concluded. Nor did reporting the employee's statement as a threat of violence indicate that he was regarded as having a mental disability. At most, the appeals court reasoned, it indicated that the employer "considered him dangerous."

ADA amendment didn't apply. The appeals court also rejected the employee's argument that the "regarded as" standard was no longer applicable to the KCRA, noting the 2008 amendments to the ADA. The language of the KCRA, adopted in 1992, reflected the language of the ADA at that time, not its later amendments and, therefore, retained the ADA's former definition of disability.

Other claims properly dismissed. The district court properly dismissed the employee's retaliation and hostile work environment claims as well, the appeals court found. With regards to the retaliation claim, the lower court rightly held that the employee's complaint against his former supervisor's abusive remarks did not constitute protected activity. The same reasoning applied to his hostile work environment claim.

The case is [No. 16-5174](#).

Attorneys: Samuel G. Hayward (Adams, Hayward & Welsh) for Scott Krueger. Wendy V. Miller (Ogletree Deakins) for Home Depot USA, Inc.

Companies: Home Depot USA, Inc.

Cases: DisabilityDiscrimination Discrimination Retaliation StateLawClaims KentuckyNews MichiganNews OhioNews TennesseeNews

[Back to Top ^](#)

DISCRIMINATION—N.D. Tex.: States and faith-based healthcare providers get preliminary injunction against HHS rule

By Jeffrey H. Brochin, J.D.

Eight states and three faith-based private healthcare providers were granted preliminary injunctive relief from enforcement of a U.S. Department of Health and Human Services (HHS) regulation implementing a section of the Patient Protection and Affordable Care Act (ACA). According to a federal district court in Texas, the regulation violated the Administrative Procedures Act by contradicting existing law and exceeding statutory authority, and likely violated the Religious Freedom Restoration Act (RFRA) ([Franciscan Alliance, Inc. v. Burwell](#), December 31, 2016, O'Connor, R.).

Background. HHS enacted a regulation pursuant to the ACA forbidding healthcare providers from discriminating on the basis of "gender identity" and "termination of pregnancy." Eight states and three faith-based private healthcare providers filed suit against HHS, challenging the new rule entitled 'Nondiscrimination in Health Programs & Activities', claiming that the

agency exceeded its authority under the ACA in its interpretation of sex discrimination, and on the basis that the regulation violated the RFRA as applied to the private providers (see [Lawsuit argues HHS overstepped requiring provision of transition procedures, redefining 'sex'](#), Health Reform WK-EDGE, August 24, 2016). The HHS rule was enacted purportedly to implement Section 1557 of the ACA, which prohibits discrimination by any health program or activity receiving federal financial assistance on the grounds prohibited by four federal nondiscrimination statutes incorporated by Section 1557.

The issue before the court was Section 1557's incorporation of prohibited sex discrimination under Title IX of the Education Amendments of 1972. The states and providers challenged HHS' interpretation of discrimination "on the basis of sex" under Title IX as encompassing "gender identity" and "termination of pregnancy." They argued that because Section 1557 incorporated the statutory prohibition of sex discrimination in Title IX, its scope should have been limited by Title IX's unambiguous definition of "sex" as the immutable, biological differences between males and females as acknowledged at or before birth. They further asserted that the rule's definition of sex should not apply to them because the text of Section 1557 incorporated the religious and abortion exemptions of Title IX, and the rule's failure to incorporate those exemptions rendered it contrary to law. The court granted the parties' motion for preliminary injunction.

Examining the rule. The challenged HHS rule took partial effect on July 18, 2016, however, its insurance provisions were scheduled to take effect on January 1, 2017. The states and providers contended that the rule's interpretation of sex discrimination would pressure doctors to deliver health care in a manner that would violate their religious freedom and thwart their independent medical judgment, and would require burdensome changes to their health insurance plans come January 1, 2017. They also argued that HHS defined prohibited sex discrimination to include: (1) refusing to provide abortion-related services and health insurance coverage of abortion-related services; and (2) refusing to provide transition-related services and health insurance coverage of transition-related services. HHS countered that the rule did not mandate any particular procedure; rather, it only required that covered entities provide nondiscriminatory health services and health insurance in a nondiscriminatory manner.

Prohibited discriminatory actions. Among the "discriminatory actions prohibited" under the rule was having or implementing a categorical insurance coverage exclusion or limitation for all health services related to gender transition. The rule also declared that categorizations of all transition-related treatment as cosmetic or experimental were deemed to be outdated and not based on current standards of care. Although the faith-based providers provided standard medical care to every individual, including those who identified as transgender, their religious beliefs did not allow them to perform or cover transition-related procedures. They also cited the fact that their religious beliefs prevented them from being able to participate in, refer for, or cover elective sterilizations or abortion-related procedures.

State party facing investigation. Texas, one of the state parties to the lawsuit, was already under investigation by HHS's Office for Civil Rights and faced a potential loss of more than \$42.4 billion in federal health care funding, a move which it claimed would jeopardize the availability of health care for the nation's most vulnerable citizens.

Establishing injury in fact. HHS argued that the states and providers lacked standing to bring the lawsuit due to the absence of any discernible injury in fact, and that claimed injuries were merely conjectural and hypothetical. The court rejected that argument and found that the injuries alleged were particularized and affected each of the parties. For example, the rule would affect the faith-based providers' ability to continue operations because with no assurance that they would be exempt from the rule's provisions that contradict their religious beliefs, they would be forced to either maintain their current insurance coverage plan that violates the rule and risk debilitating consequences or violate their religious beliefs. As to the state parties, the court found that because the states enforce categorical exclusions of transition-related procedures, and have no religious defense to assert, the rule would mandate

revision of their policies and force the states to conduct individualized inquiries into whether a particular transition procedure was medically necessary. The rule would also force the states to cooperate with ongoing investigations, expend millions on training personnel under the rule, and adjust physical facilities to accommodate what the rule described as "an array of possible gender identities."

Fear of penalties. The fear of being subjected to penalties under the challenged rule was deemed reasonable by the court given that the parties were all covered entities whose insurance plans included a categorical exclusion of transition-related procedures that is forbidden by the rule. The court also noted that the likelihood that the parties would suffer further harm from the rule was strengthened by the current HHS investigation into potential noncompliance. Accordingly, the parties had sufficient concrete evidence to support their fears that they would be subject to enforcement under the rule.

Associational standing. HHS argued that one of the faith-based medical associations which participated in the lawsuit lacked associational standing because its members had not established their religious or conscience-based objections to performing transition-related or abortion services. However, the court ruled that a representative organization need only establish that one member would suffer harm under the rule, and that the organization satisfied that requirement by providing the declaration of a physician-member that the organization's ethical statements were consistent with his own medical and religious beliefs.

Protections for religious freedom. HHS contended that the lawsuit failed the ripeness test because the alleged injuries were too speculative to warrant injunctive relief. They based this on the fact that the rule incorporated applicable federal statutory protections for religious freedom and conscience. The court disagreed with that position and found that the rule's prohibition of categorical exclusions of transitions and abortions forced the private providers to make an individualized assessment of every request for performance of such procedures or coverage of the same. The rule therefore placed substantial pressure on those providers to perform and cover transition and abortion procedures.

Administrative Procedure Act. The providers claimed that the rule violated the APA because it was contrary to and exceeded statutory authority by interpreting Title IX's prohibition of sex discrimination to include gender identity. HHS argued that under the Administrative Procedures Act, the interpretation was subject to the agency's interpretation of Section 1557 of the ACA. However, the court held that because Congress clearly addressed the question at issue by incorporating Title IX's existing legal structure, HHS had no authority to interpret a significant policy decision of the scope of sex discrimination under Title IX.

For the foregoing reasons, the court found that the motions for preliminary injunction should be granted, and they enjoined HHS from enforcing the rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy. HHS's Office for Civil Rights issued a statement expressing disappointment with the court's decision, but noting it would "continue to enforce the law . . . to the full extent consistent with the Court's order."

The case is [No. 7:16-cv-00108-O](#).

Attorneys: Luke Goodrich (The Becket Fund for Religious Liberty) for Franciscan Alliance, Inc., Christian Medical and Dental Society, and Specialty Physicians of Illinois, LLC. Adam Anderson Grogg, U.S. Department of Justice, for Sylvia Burwell and U.S. Department of Health and Human Services.

Companies: Franciscan Alliance, Inc.; Christian Medical and Dental Society; Specialty Physicians of Illinois, LLC

Cases: Discrimination SexDiscrimination ReligiousDiscrimination Procedure AgencyNews TexasNews

EMPLOYEE STATUS—D.D.C.: Handyman for real estate company was employee, not independent contractor

By Dave Strausfeld, J.D.

A handyman for a real estate company was an "employee," as shown by the economic reality of the relationship, and the company misclassified him as an independent contractor willfully, held a federal magistrate judge in the District of Columbia after a bench trial. But despite the company's failure to post notices in its workplace regarding the right to overtime wages, the company's actions were not egregious enough to justify equitably tolling the statute of limitations, extending the period for which he could recover unpaid overtime wages back to the beginning of his employment, in this suit under the FLSA and D.C. Minimum Wage Act Revision Act (DCMWA) ([Escamilla v. Nuyen](#), December 30, 2016, Kay, A.).

Independent contractor or employee? For about five years the handyman performed maintenance work on rental properties in Washington, D.C.—cleaning, painting, doing minor repairs, and completing plumbing and carpentry tasks. After his employment ended, he brought suit alleging he was owed overtime compensation because he averaged 66 hours per week and was never paid time-and-a-half for work beyond a 40-hour workweek. The company denied that he was owed any overtime pay, arguing he was hired as an independent contractor.

Economic reality test. The court found after a bench trial that the handyman was an "employee" under the FLSA and the DCMWA. First, the real estate company controlled the manner in which he performed his duties. While the company insisted he worked autonomously, the court, in weighing witnesses' credibility, found it "hard to believe that Plaintiff was able to determine his own work schedule and decide how to complete tasks."

Other factors also weighed in favor of "employee" status, including the fact that the handyman did not have any specialized certifications for his skills and came in as a relatively "low-skilled worker." Also, he worked for the company full-time for about five years, and the permanence of the position tended to support employee status. Plus, his building maintenance work clearly was an integral part of the real estate company's business. As a matter of economic reality, then, the handyman was the real estate company's employee.

Willful violation. In concluding otherwise, the company failed "to pay attention to legal precedent or to any recommendation from the U.S. Department of Labor regarding the issue of overtime compensation." The company "may have ignored the appropriate laws" when it decided the handyman was an independent contractor, which "makes for a willful violation and thus extends the limitations period to three years." The court considered it irrelevant that the handyman had signed an agreement acknowledging he was an independent contractor.

Liquidated damages. Likewise, the company could not demonstrate it acted in good faith. Accordingly, the handyman was entitled to recover liquidated damages of \$20,200, in addition to \$20,200 for his unpaid overtime wages.

Equitable tolling. One small bright spot for the employer involved equitable tolling. The handyman argued that the statute of limitations should be tolled back to the beginning of his employment in 2008 because the company had failed to post notices in the workplace about overtime laws and protections, and otherwise had misled him about his eligibility for overtime. The handyman based his argument for equitable tolling on a 2015 decision from the same district, *Ayala v. Tito Contractors, Inc.*

But the court was not convinced. Equitable tolling is proper where a complainant has been

induced or tricked into allowing the filing deadline to pass. But "the lack of notices in the workplace is not necessarily enough to establish a basis for this Court to toll Plaintiff's claims to the beginning of his employment," the court wrote, citing *Ayala* itself.

"Without more records or more of a paper trail," the handyman's request for equitable tolling of the statute of limitations was "too speculative." Equitable tolling is a "rare remedy to be applied in unusual circumstances," the court stressed. Here, it was not certain whether the company's "words and failure to post notices are an extraordinary or uncommon circumstance" of sufficient magnitude to justify equitable tolling, so the court declined the handyman's request to toll the limitations period on his overtime claims back to the start of his employment.

The case is [No. 14-0852](#).

Attorneys: Jason D. Friedman (Zipin, Amster & Greenberg) for Jose Milton Bautista Escamilla. Daniel M. Wemhoff (Law Offices of Daniel Wemhoff) for David Nuyen dba USA Home Champion Realty, Inc. dba Opmax., Opmax Management, LLC., Opmax, LLC, and USA Home Champion Realty, Inc.

Companies: USA Home Champion Realty, Inc.; Opmax Management, LLC; Opmax, LLC

Cases: EmployeeStatus WageHour Overtime StateLawClaims RemediesDamages
DistrictofColumbiaNews

[Back to Top ^](#)

LABOR—UNFAIR LABOR PRACTICES—NLRB: Nonemployer trade group unlawfully restricted members' Facebook activity

By [Lisa Milam-Perez, J.D.](#)

A trade association of interpreters for deaf individuals violated the NLRA by maintaining an overly broad antitrust policy and "civility policy" and by applying that policy to the Facebook group that it administers for its members, an NLRB law judge has found. The association, which is not the statutory employer of the association members—and was not the target of the underlying union organizing drive at issue here—also improperly interfered with members' Section 7 rights by removing posts critical of certain employers and supportive of the union as a means of improving interpreters' professional plight ([Registry of Interpreters for the Deaf, Inc.](#), December 29, 2016, Biblowitz, J.).

The association. The respondent is a national trade and professional association of interpreters for deaf individuals, with more than 16,000 dues-paying members, including professional interpreters, transliterators, interpreting students, and educators. The membership also includes individuals who are deaf, deaf-blind, or hard-of-hearing, as well as organizations that promote and support the association's mission. Some of the association's members are employees within the meaning of NLRA Section 2(3), but employed by *other* entities; other members are freelance or independent interpreters or students who do not have an employment relationship with *any* entity. The association maintains Facebook pages for its various member sections to provide information to members and a forum for members to share industry-related information. The "video interpreter member section" (VIMS) Facebook page was at issue here.

Association policies. The association maintains an antitrust policy and a civility policy, which apply to its members and their discussions in all association-sponsored forums and events, including the VIMS Facebook page. The rationale for the antitrust policy: The association must comply with federal and state antitrust laws and, to that end, must avoid "explicit or implicit understandings among its competitor-members that they will act in concert to control prices,

fees, or other economic terms." Accordingly, the policy barred members from discussing prices, fees, wages, salaries, contract terms, and related topics in online discussion groups, social media, or association events and programs.

The civility policy notes the association's expectations that posts will be "polite and respectful and fall within our operating guidelines." It also makes clear that it routinely monitors the page and does not permit posts that are "off-topic," include "solicitation" among other no-no's, and that the association reserves the right to delete inappropriate posts, including "comments that threaten or harm the reputation of any person or organization" or posts in violation of the antitrust policy.

Unfair labor practice charge. A union seeking to organize interpreters throughout the industry filed unfair labor practice charges after the association deleted comment chains critical of specific industry employers. The comments discussed the "trauma" of working for one company in light of its "daily unethical, dishonest and even illegal trampling on the rights of interpreters." Over the next several days, other members offered follow-up responses; some were supportive, others registered their disagreement. Some overtly suggested unionization was the best way to improve their working conditions.

The association removed the entire conversation from the Facebook page, stating that the forums could not be used to promote unionization "or ways to restrict competition" and citing the antitrust policy and civility policy. "Portions violating antitrust and civility include the references to the union, referral to its website, photos of the union leaders, and specifically naming companies and their practices," the association admonished in a post. "While these forums are available to discuss the VRS Industry in general, including your experiences, thoughts and insights, they cannot promote unionization or ways to restrict competition."

A no-brainer? "It requires little discussion to state that, in a normal employer-employee situation, a restriction on the discussion or communication of wages and salaries would violate Section 8(a)(1) of the Act," the law judge said. "There could be no better example of an unlawful restriction under Section 8(a)(1) of the Act than a prohibition against discussing wages and salaries. Employees could hardly miss the inference that it would curtail their right to engage in protected concerted activities by discussing wages and salaries with their fellow employees."

The association argued that Section 7 was not implicated here, though, because there was not a direct employer-employee relationship between the members and the association. The ALJ rejected that notion, noting that the members who participated in the Facebook postings were statutory employees (of *some* employer), and their postings were intended to air concerns about working conditions in the industry in hopes of improving them. "While the restriction herein relates to the Respondent's members, not its employees, the Act and the case law are clear that even when this restriction does not apply to its employees, this limitation on nonemployee member's postings still violates the Act."

Antitrust concerns unfounded. The association also urged that the restrictions were necessary because "unchecked Facebook postings" ran the risk of antitrust violations. While this argument might have merit in some circumstances, it did hold sway here, the ALJ said. The member's Facebook postings were not intended to regulate prices charged by employers, and therefore could not violate antitrust laws. Moreover, neither of the statutory employers whose employees posted on the Facebook page were members of the association, so they didn't have access to the Facebook group. Had that been the case, and the antitrust policy restricted the *employers* from discussing their pricing, then the association's policy would have been properly deployed to guard against antitrust violations, but that's not what happened here.

Rescinded. Having found that the association's policies unlawfully restricted the Section 7 rights of statutory employees, the ALJ recommended the association be ordered to rescind

them and provide notice to members nationwide that the policies will no longer be enforced —"and that they are free to post messages on the Facebook page about their terms and conditions of employment without fear that these postings will be removed."

The case is [No. 20-CA-164088](#).

Attorneys: Christopher Michalik (McGuire Woods) for Registry of Interpreters for the Deaf, Inc. Richard McPalmer (NLRB) for the General Counsel. Michael Melick (Barr & Camens) for Pacific Media Workers Guild Local 39521.

Companies: Registry of Interpreters for the Deaf, Inc.

Cases: Labor UnfairLaborPractices Privacy AgencyNews

[Back to Top ^](#)

REMEDIES, DAMAGES—Conn. Sup. Ct.: Punitive damages not authorized under Fair Employment Practices Act

By [Joy P. Waltemath, J.D.](#)

The Connecticut Fair Employment Practices Act (CFEPA), though ambiguous, does not authorize an award of punitive damages, the Connecticut Supreme Court ruled, affirming an appellate court ruling that set aside a jury's award of \$500K in statutory punitive damages ([Tomick v. UPS, Inc.](#), officially released December 30, 2016, Robinson, R.).

The underlying litigation involved a disability discrimination claim of a package delivery driver who was terminated after a dispute over a work-related injury and what UPS claimed was "workplace violence." A jury found for the driver and awarded \$300,000 for negligent infliction of emotional distress, \$100,000 for a violation the state drug-testing law, and \$100,000 for disability discrimination. It also awarded punitive damages. On appeal, the [appellate court agreed](#) with the trial court, which had set aside the jury's award of punitive damages. The state supreme court affirmed, concluding that punitive damages are not an available remedy under CFEPA Sec. 46a-104.10.

Plain text. Beginning with the plain text of the statute, the Supreme Court quoted Section 46a-104: "The court may grant a complainant in an action brought in accordance with section 46a-100 such legal and equitable relief which it deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney's fees and court costs." Although UPS agreed that this language is expansive, it argued that the phrase "including, but not limited to" did not implicitly include relief—i.e., punitive damages—for which express authorization was otherwise required. But the employee pointed out that the term "legal . . . relief" in fact includes punitive damages, and so textually, Sec. 46a-104 provides for punitive damages. Both interpretations were plausible, said the high court, which made Sec. 46a-104 ambiguous.

Legislative inconsistency. It was also true that some statutes expressly provide for awards of punitive damages, while others appear to expressly prohibit punitive damages, yet the CFEPA section here was silent with respect to punitive damages. That required the court to look to common law, other related statutes, and the circumstances surrounding its enactment for guidance.

Controlling case law. The controlling case the court relied on was *Ames v. Commissioner of Motor Vehicles*, its own case from 2004 in which it concluded that "[a]n award of multiple damages . . . is an extraordinary remedy that is available only when the legislature expressly provides for such damages by statute Accordingly, as with attorney's fees, we require explicit statutory language to support an award of punitive damages. Put simply, just as the

legislature knows how to authorize an award of attorney's fees when it wishes to do so ... it also knows how to authorize an award of punitive damages." On its face, Sec. 46a-104 does not expressly authorize an award of punitive damages. If it were to construe this language as encompassing punitive damages without expressly saying so would be inconsistent with its approach to the statutory construction within *Ames*, the court reasoned.

Other evidence. Nor was there "extratextual evidence" that made the court change its approach. A review of the legislative history behind Sec. 46a-104 revealed no legislative intent to allow for punitive damages as a remedy for employment discrimination; instead the stated intent of the provision was to help alleviate the backlog of cases at the commission. That meant to the court that the remedies expressly authorized in the act, including back pay, compensatory damages, attorney's fees, and costs, were believed to be sufficient to carry out the CFEPAs remedial purpose. And reading the section in conjunction with related human rights statutes further supported the court's view, because the legislature expressly authorized punitive damages in other human rights statutes but did not do so here. "To allow punitive damages despite the fact that [the section] does not explicitly authorize such damages would render those express authorizations for punitive damages superfluous," concluded the court.

Not excluding punitives not enough. However, the court did acknowledge the employee's argument that the legislature did not expressly *exclude* punitive damages in the act or in related human rights statutes, including Sec. 46a-104. But the court found that in the human rights context, the legislature expressly authorized punitive damages when it intended for that type of relief to be afforded. Finally, the court dismissed the employee's reliance on Title VII and other federal laws, noting that had the legislature intended for Sec. 46a-104 to provide for statutory punitive damages, it could have amended the state statute to reflect the changes to its federal counterpart, but it did not.

The case is [No. SC 19505](#).

Attorneys: Michael D. Colonese (Brown Jacobson) for Michael Tomick. Michael C. Harrington (Vinson & Elkins) for United Parcel Service, Inc.

Companies: United Parcel Service, Inc.

Cases: Remedies Damages State Law Claims Discrimination Disability Discrimination Discharge Safety Connecticut News

[Back to Top ^](#)

RETALIATION—D. Me.: Sacked employee who declined free passes to strip club proceeds with retaliation claim

By Brandi O. Brown, J.D.

Two employees who allegedly were fired for making a false report about a threatening coworker will proceed with their Maine Human Rights Act and other claims against their former employer, a federal district court in Maine ruled. One of the employees was already on the outs with his boss for refusing free passes to a strip club; his act of declining the passes could amount to opposition, the court explained. It also permitted the employees to go forward with their whistleblower and defamation claims, denying the employer's motion for summary judgment ([Porietis v. Tradesmen International, LLC](#), January 3, 2017, Singal, G.).

Declined passes, called "a pain in the ass." One of the plaintiffs, a part-time recruiter for the construction labor support company, declined complimentary passes to a strip club offered to him by the highest-ranking employee in the office. He told his superior, in so many words, that his wife would not like it. Although the superior appeared "shocked," they did not discuss

the matter further. However, the superior did discuss it with another employee—a field representative in the office (and the second plaintiff in the lawsuit). The superior told that employee that the recruiter was "a pain in the ass" and that they needed to get rid of him. In fact, the superior did reduce the recruiter's hours.

The next day, the recruiter contacted corporate counsel and told her about the offered strip club passes, among other things. He told her he was going to contact the state's Human Rights Commission concerning his belief that he had been retaliated against for refusing the passes. In fact he did call the Commission. Meanwhile, the employer investigated the matter and disciplined the superior. Also during that time period the superior told the field representative that he believed the recruiter was going to file a retaliation lawsuit and that he was a "troublemaker."

Fired after reporting erratic employee. Around the same time, the recruiter and the field representative attended a job fair with a third employee. According to both, the other employee was acting very erratically. On the drive there, he screamed at the recruiter about not being a "team player," and the recruiter switched to the car driven by the field representative. At the fair, he transferred his focus to the field representative: he got into the field representative's face and spit and cursed at him. The recruiter feared for the field representative's safety.

The field representative later called the superior and told him that the third employee had been violent and that he was afraid that he was going to hit him. The recruiter made an incident report about the altercation, which he referred to as "the brawl at the mall." The field representative also reported the matter to human resources after other attempts to resolve the matter failed. The employer investigated, but did not speak to any of the job applicants who were actually at the table. Nevertheless, the employer concluded that both employees had made a false report and fired them for misconduct. It reported this decision to persons in human resources and payroll, and also to various outside parties, including potential employers.

No res judicata. The field representative applied for unemployment benefits and after a hearing the state's labor department found that the employer failed to show he had engaged in misconduct. Both employees later filed suit, jointly, alleging violations of the MHRA and the Maine Whistleblowers' Protection Act. They also asserted claims for defamation. In a motion for partial summary judgment, the employees contended that the employer was barred from arguing that the reports were false because of administrative res judicata. The court denied the motion, explaining that the statutory language of the Maine Employment Security Law explicitly provided that findings of fact in unemployment benefits proceedings could "only have preclusive effect in *other unemployment proceedings*." Moreover, the present action and the prior proceeding have "essential dissimilar burdens," the court said.

"Trialworthy" evidence of retaliation. However, the court also denied the employer's summary judgment motion. With regards to the recruiter's retaliation claim, there was a "trialworthy" issue whether his response to the offer of free strip club passes amounted to opposition to what the employee "believed was improper and unlawful activity." A belief that the offer was inappropriate was not sufficient; still, the court nevertheless found there was "trialworthy evidence that retaliation was the result of a complaint tied to one of the MHRA's protected categories, such as sex." There was also disputed evidence regarding the decision to cut the recruiter's hours and a triable issue on pretext.

Whistleblower claims. A jury also could conclude that the employees' reporting of the third employees' behavior was made in good faith and supported by "reasonable cause." Contrary to the employer's assertions, there was sufficient evidence for a reasonable jury to find that they both "*subjectively* believed" that the third employee "had acted aggressively and posed a danger of future violence" and that their belief was "*objectively* reasonable." Moreover, they presented evidence of a causal connection—they were fired for making false reports—and

there was evidence from which a reasonable jury could conclude that this reason was pretextual, including the weakness of the investigation and the prior comments by the superior "suggesting antipathy" towards the recruiter.

Defamation claims. Their defamation claims also survived. Although some of the statements were subject to a privilege, some of the statements were subject "only to a *conditional* privilege." A reasonable jury could conclude that the employer abused that privilege and was, therefore, liable for defamation.

The case is [No. 2:16-cv-00049-GZS](#).

Attorneys: Marshall J. Tinkle (Thompson, Bull, Furey, Bass & MacColl, LLC, P.A.) for Kimis A. Porietis. Andrew M. Szilagyi (Frantz Ward LLP) and Thad B. Zmistowski (Eaton Peabody, PA) for Tradesmen International LLC.

Companies: Tradesmen International LLC

Cases: Retaliation Whistleblowers TortClaims Discharge SexDiscrimination MaineNews

[Back to Top ^](#)

RETALIATION—D.D.C.: Fannie Mae must litigate FCA, FMLA claims of employee who questioned figures given to U.S. Senator

By Harold S. Berman J.D.

A Fannie Mae employee terminated after he questioned the veracity of information Fannie Mae sent to a U.S. Senator, and after he took medical leave, can proceed with his False Claims Act and FMLA claims against his former employer, a federal court in the District of Columbia ruled. The court denied the parties' cross-motions for summary judgment, finding disputed issues of fact regarding whether the employee reasonably believed Fannie Mae was defrauding the government, whether he put Fannie Mae on notice he was engaging in protected activity, whether he had access to the information on which the fraud claims were based, and whether Fannie Mae denied him the right to return to work after his leave expired ([Skrynnikov v. Federal National Mortgage Association](#), January 3, 2017, Kessler, G.).

Data discrepancy. The Senior Financial Analyst for Fannie Mae prepared a monthly report that included executive incentive compensation information. In March 2009, a U.S. Senator requested that Fannie Mae account for its retention bonus programs. The employee learned of the request and Fannie Mae's response, and allegedly became concerned that the data reported to the Senator did not match the numbers in his monthly reports. He purportedly raised his concerns with his supervisor, who told him the numbers would be updated.

Job performance warning and leave request. The employee claimed he raised his concerns with his supervisor again in April, and she responded angrily and subsequently questioned his job performance. Fannie Mae denied these conversations ever took place. In July, the supervisor issued the employee a written warning for unsatisfactory job performance, telling him he would be terminated if his performance did not improve. Later that month, he requested medical leave due to stress. Fannie Mae directed him to an outside company that administered its leaves of absence. The company approved his request for FMLA and District of Columbia FMLA (DCFMLA) leave, and he took the full 12 weeks allowed under the FMLA.

The employee alleged that Fannie Mae's and the company's communication about the paperwork supporting his leave differed from Fannie Mae's normal practices. In late October, the company retroactively approved four additional weeks of leave permitted under the DCFMLA, as well as short-term disability leave. The employee claimed he was ready to return

to work when his leave ended on October 26. Nevertheless, he wrote to Fannie Mae's HR representative on October 21 requesting to use vacation time for up to one week due to a new rib injury, and was told to speak to management and the company, and that he would need to be cleared to return to work for his conditions.

Termination. He did not return when his leave ended on October 26, or provide a doctor's clearance to return. Fannie Mae instructed the company to place "the highest level of scrutiny" on the employee regarding his rib injury. On October 30, the employee sent the company a doctor's clearance to return to work on November 2, and he was retroactively granted leave until then. Also on October 30, the employee received a letter from Fannie Mae, informing him he had exhausted his FMLA and DCFMLA leave, and his position would not be held open. Fannie Mae then terminated him. On November 15, he sent a letter to the Senator, detailing his concerns about Fannie Mae's reporting.

Several years later, he filed a complaint against Fannie Mae, alleging retaliation under the FCA, and interference with his rights under the FMLA and DCFMLA.

Retaliation under the FCA. The court denied the employee's summary judgment motion on his FCA claim, finding genuinely disputed facts concerning whether he had an objectively reasonable belief that Fannie Mae was defrauding the government based on the facts known to him at the time. Fannie Mae had argued that the employee had no good faith basis to believe it was defrauding the government, because he was not privy to the details of the Senator's request or the information relevant to Fannie Mae's response, and neither the employee nor his supervisors were involved in the response. Additionally, it was disputed whether the employee had put Fannie Mae on notice that he was engaging in FCA-protected activity, as the employee and Fannie Mae disagreed over whether he even raised his concerns to his supervisor.

The court also denied Fannie Mae's motion for summary judgment on the FCA claim, as it was disputed whether the employee had access to the information the Senator sought or had notified Fannie Mae that he suspected fraud. The employee claimed his monthly report contained data relevant to the Senator's request, and that the numbers he saw in Fannie Mae's response were only 20 percent of that contained in his report. Although Fannie Mae contended the employee could not sustain his FCA claim because he did not notify Fannie Mae of suspected fraud and did not do so outside the scope of his job, he testified he raised his concerns twice with his supervisor. It was also disputed whether Fannie Mae terminated him because he exhausted all his job-protected leave or because of his poor performance, or instead that his supervisor and Fannie Mae acted differently toward him after he raised his concerns.

Interference with employee's FMLA leave. The court also denied the parties' summary judgment motions on the employee's FMLA interference claim. The employee claimed that Fannie Mae denied him his right under the FMLA and DCFMLA by preventing him from returning to work on December 2, 2009, and terminating his employment. Those claims were reasonably disputed, as Fannie Mae offered testimony that the employee was terminated because his work had been automated, and Fannie Mae's budget pressures prevented it from creating a new position for him. It was also disputed whether the employee could not return to work due to lack of proper medical certification.

It was also disputed whether Fannie Mae terminated the employee for legitimate reasons or as a pretext, and the employee had presented facts showing he did not want to be placed on DCFMLA leave for his rib injury, but instead requested to use his vacation days. Fannie Mae had claimed the employee could not return to work when his leave expired because he lacked proper return-to-work certification, but DCFMLA did not require return-to-work certification for his new rib injury before Fannie Mae had approved DCFMLA leave for that injury.

The case is [No. 11-609 \(GK\)](#).

Attorneys: Dennis Chong (Lippman, Semsler & Salb) for Timothy Skrynnikov. Mary M. Lenahan (Winston & Strawn) for Federal National Mortgage Association.

Companies: Federal National Mortgage Association

Cases: Retaliation Whistleblowers Employee Leave Discharge District of Columbia News

[Back to Top ^](#)

RETALIATION—N.D. Fla.: Truthful, negative job references could be retaliatory, but not in case of displaced principal

By Brandi O. Brown, J.D.

Although willing to recognize that in some cases, a truthful negative reference could constitute a retaliatory act, a federal district court in Florida ruled such references were not actionable in the case of a school principal who filed suit after his former employer sent would-be employers arguably unflattering references. The court noted that in the school context there was a greater interest in keeping references unfettered and in the case of the plaintiff in this case, there were good reasons for a "less-than-unequivocally-positive job reference." The court granted the employer's motion for summary judgment on the retaliation claim ([Knapp v. Gulf County School Board](#), December 29, 2016, Hinkle, R.).

Ousted. During the 2013-14 school year, the employee, a principal at one of the defendant's schools, was out for most of the year because of back surgery. During his absence an assistant superintendent and former principal of the school filled in for him. At the end of the school year, the school board retained that former principal in the position and did not renew the employee's contract. He filed suit, alleging that the nonrenewal constituted disability discrimination. (The court denied the employer's motion for summary judgment on this claim.)

Negative reference. The employee also alleged retaliation, claiming that his former employer gave negative references to would-be employers because of his charge of discrimination. Specifically, he claimed two negative references had been given. In one, the superintendent, although he gave a generally favorable report, stated that the employee would do a good job if he was able to get his life together. In another instance, the superintendent failed to respond to a question regarding whether the employee was available for rehire. The employee also contended that school districts in other states told him that he was denied the job after a reference check had been done.

Could be actionable. The court granted the employer's summary judgment motion with regards to the retaliation claim. While it is clear that a "false negative job reference can be retaliatory" the court noted that it is "less clear" whether a "truthful negative job reference" could be. There are nonbinding cases supporting either possible answer, but no binding authority on the issue, and "a good argument can be made on each side of the question."

In some cases, providing truthful information which might otherwise have been withheld could be seen as retaliatory. For example, the court explained, the employer might provide information that it would have otherwise kept to itself because it is angered by a sexual harassment charge levied by the employee. In such a circumstance, the causal relationship is no different than when a false negative reference is given because of the charge. The "motivation and effect on the employee are, by the terms of the hypothetical, precisely the same."

But not in this case. That said, there is "much to be said in support of the assertion that a *truthful* negative reference is rarely or perhaps never actionable," the court said. This is so, it explained, because an employer should feel free to respond in a candid way to job reference

requests, without fear of liability. In fact, common law affords an employer a qualified privilege in circumstances where it is responding to requests for references. The U.S. Supreme Court has also recognized that common-law principles can inform civil rights statutes and there is "little reason to suppose" that "Congress intended to curtail an employer's ability to give candid job references."

The school context. Certainly, a court should not discourage employers from providing truthful references, the court continued—particularly in the school context. Although the principal in this case might not have engaged in the worst behaviors of which school teachers and employees have sometimes been accused, there were reports that he came to school with alcohol on his breath and that he smoked marijuana with students at parties. There were also performance concerns. It was unsurprising that someone aware of those reports "would provide a less-than-unequivocally-positive job reference."

Therefore, even if a truthful negative reference could constitute an actionable retaliatory action, in this case the employee could not withstand summary judgment on his retaliation claim. Moreover, the court concluded that, on the evidence, it could not be said that the employee's charge of discrimination was a but-for cause of the references.

The case is [No. 5:16cv20-RH/GRJ](#).

Attorneys: Richard Errol Johnson (Richard E. Johnson PA) for Jeremy Knapp. Bob Lynn Harris (Messer, Caparello & Self, P.A.) for Gulf County School Board.

Companies: Gulf County School Board

Cases: Retaliation DisabilityDiscrimination Discrimination Privacy FloridaNews

[Back to Top ^](#)

STATE-LAW CLAIMS—E.D. Wis.: Exotic dancer advances claim club improperly deducted fines for 'faulty workmanship'

By [Kathleen Kapusta, J.D.](#)

Refusing to dismiss an exotic dancer's claim that an adult entertainment club improperly deducted fines for poor workmanship from her pay in violation of state law, a federal district court in Wisconsin found that assuming her allegations were true, her services fell within the definition of "workmanship" as intended by the legislature and the fines imposed constituted deductions for faulty workmanship. Given the plain language of the statute and the strong public purpose of protecting all employees from arbitrary decisions in their hard-earned wages, it would be illogical, said the court, to conclude that the legislature intended to limit the type of employees eligible for protection to those in manufacturing or production jobs or to allow deductions as long as no actual loss occurred ([Stevens v. Oval Office, LLC dba Oval Office Gentlemen's Club](#), December 29, 2016, Griesbach, W.).

Fined. Asserting violations of the FLSA, Wisconsin wage and hour laws, and Wisconsin Statute Sec. 103.455, the dancer brought a putative collective action against the Oval Office Gentlemen's Club claiming it improperly classified her as an independent contractor, failed to pay minimum wages, and improperly deducted fines for poor workmanship from her pay. The fines, she claimed, were imposed for alleged policy violations, including getting to the stage late; starting a routine late; leaving the stage before the next dancer arrived; failing to spend enough time on the floor with customers to sell additional services; failing to fully remove all clothing, except for underwear, by the end of the first song when dancing on stage; spending too much time in the dressing room; and not dressing according to the club's dress code.

Moving to dismiss her Section 103.455 claim of illegal and unauthorized deductions from wages, the club argued that the fines to incentivize good performance did not violate the statute, which provides in part that "No employer may make any deduction from the wages due or earned by any employee, who is not an independent contractor, for defective or faulty workmanship, lost or stolen property or damage to property, unless the employee authorizes the employer in writing to make that deduction . . ."

Workmanship? The dancer argued that the definition of "workmanship" was sufficiently broad to encompass the deductions made for failing to perform exotic dances in compliance with the club's requirements while the club countered that the statute only prohibits employers from making deductions from wages to recoup actual business losses. The plain language of the statute, however, did not support the club's position, said the court, noting there is no requirement that the faulty workmanship caused a loss to the employer. Indeed, the court observed, "It would be patently unreasonable for the legislature to prohibit employers from reducing an employee's wages for faulty workmanship that did result in an actual loss, while allowing reductions for faulty workmanship that did not. Absent an actual loss, why should the employer be allowed to deduct anything?"

And while at least one of the three exceptions to the statute's general prohibition would appear to cover situations where there was an actual loss to the business, the court found this did not narrow the prohibition's scope. Rejecting the club's construction of the statute, the court noted that it would allow employers to arbitrarily reduce their employees' wages based on the employers' subjective assessment of the quality of their work.

Nor did the Wisconsin Supreme Court's decision in *Batteries Plus, LLC v. Mohr* support the club's position as it simply held that an overpayment of compensation the employer sought to collect through deductions from future wages was not the result of "defective or faulty workmanship" and did not constitute "lost or stolen property or damage to property." Moreover, the case said nothing about whether an actual loss was required before the statute's general prohibition applied.

Manual labor. The club also relied on *Wisconsin Management Co., Inc. v. Loken*, an unpublished state appeals court decision, for its contention that the statute did not apply because the fines were not for defective or faulty "workmanship" within the meaning of Section 103.455. In *Loken*, a panel majority held that workmanship "is equated with craftsmanship, and applies to objects manufactured or produced by manual labor." Finding this decision unpersuasive, the court found nothing in the statutory text suggested it was intended to limit the general prohibition against taking deductions from employees' wages for faulty workmanship to employees engaged in manufacturing or production.

Moreover, on the same day *Loken* was decided, a majority of a different panel of the same appeals issued an unpublished decision in *State ex rel. Manley v. Windy Hill Foliage*, which expressly rejected *Loken's* narrow definition of the word "workmanship," noting "[a]n intent to use 'workmanship' in a technical, restricted sense cannot be inferred from the statute itself. We should not impose such a construction on a statute when the construction is contrary to the legislative intent as to its purpose."

Like the majority in *Manley*, the court here concluded that workmanship is not limited to manufacturing or production jobs or "a certain class of wage-earning employees." Rather, said the court, the work covered by the statute includes any endeavor individuals are employed to perform.

The case is [No. 16-C-1419](#).

Attorneys: Summer H. Murshid (Hawks Quindel) for Dawn Stevens. Allan S. Rubin (Jackson Lewis) for Oval Office LLC dba Oval Office Gentlemens Club.

Companies: Oval Office, LLC; Oval Office Gentlemen's Club

Cases: StateLawClaims WageHour ClassActions WisconsinNews

[Back to Top ^](#)

WAGE-HOUR—D. Haw.: Settlement due approval even if plaintiff did not okay specific payment formula

By Dave Strausfeld, J.D.

Whether or not an employee in a wage-hour suit was provided an opportunity to approve the specific formula for distributing the settlement fund, he was bound by the settlement because he gave his counsel full authority to act on his behalf to settle this action, in fact signing a mediation "term sheet" agreeing that the payment formula would be determined by plaintiff's counsel ([Kaiaokamalie v. Matson Terminals, Inc.](#), December 29, 2016, Seabright, J.).

One employee objected to settlement. At a mediation session in this FLSA suit, employees reached a settlement with their employer, a company in the marine shipping industry, but several of the employees later refused to sign a formal written settlement agreement. The company then asked a federal magistrate judge to approve the settlement based on the "term sheet" all of the employees had signed reflecting the essential terms of the agreement. Granting the motion, the magistrate judge approved the settlement based on the term sheet.

Concerned about payment formula. Most of the two dozen joint plaintiffs eventually came around to supporting the settlement, but one of them filed an objection to the magistrate's decision. Unlike his peers, he had also brought claims for retaliation and for negligent and intentional infliction of emotional distress, and he was concerned about how the \$625,000 settlement fund would be distributed. He hoped to derail the settlement's approval by arguing he had never been given any chance to approve or disapprove the "formula" used to pay each individual plaintiff's claim.

Not a valid objection here. This was not a valid objection to the magistrate's decision finding that a binding settlement agreement had been reached, the court concluded. Under federal common law, an attorney can bind a client to a settlement without express consent if the attorney has apparent authority. Here, plaintiff's counsel had apparent authority. Further, the objecting plaintiff actually signed the mediation term sheet agreeing that each employee's share would be paid "according to a formula to be provided to Defendant by Plaintiffs' counsel."

In other words, because the objecting plaintiff gave his counsel full authority to settle this action on his behalf, he was bound by his counsel's actions. Moreover, he expressly agreed in the term sheet that his counsel could decide the formula for distributing the settlement fund. There was no evidence of fraud, coercion, or bad faith, the court further noted.

"If anything," the employee's objection to the allocation formula "are a matter between him and his [counsel]."

Consequently, the court overruled the employee's objection in relevant part, adopted the magistrate's recommendation to deem the term sheet a binding settlement of this FLSA suit, and approved the settlement as fair and reasonable—as the other 23 plaintiffs and the employer had requested.

The case is [No. 13-00383 JMS-RLP](#).

Attorneys: Ted H.S. Hong (Law Office of Ted H.S. Hong) for Alden Kaiaokamalie. Barry W.

Marr (Marr Jones & Wang) for Matson Terminals, Inc.

Companies: Matson Terminals, Inc.

Cases: WageHour Overtime ContractClaims RemediesDamages HawaiiNews

[Back to Top ^](#)

NEWS

EEOC NEWS—Suits alleging sexual harassment, pay and national origin discrimination resolved

The EEOC has resolved unrelated lawsuits against employers in California and New Mexico asserting claims of sexual harassment and pay and national origin discrimination, respectively.

Sexual harassment. Mexicali Chicken & Salads will pay \$27,692 to end a suit contending that the El Centro, California-based restaurant violated Title VII when it permitted a manager to sexually harass a young female shift supervisor and then fired her when she complained about it. Shortly after rejecting the manager's advances, the employee complained of the harassing behavior to another manager, [according to the EEOC](#). Within days, she was terminated.

The EEOC filed its lawsuit in the Southern District of California; the case is No. 3:15-cv-02164-AJB-JMA.

Pay and national origin discrimination. In Albuquerque, New Mexico, Kevothermal, LLC, a manufacturer of vacuum insulation panels, has agreed to pay \$60,000 to settle allegations that it violated the Equal Pay Act and Title VII when it paid a female supervisor less than a male supervisor (whom she trained), even though they performed the same job duties and had comparable experience and responsibilities. The company paid the female employee even less after she complained about the disparate wages, the [EEOC said](#).

The EEOC's suit also alleged that the employee, who is Hispanic, was instructed not to speak Spanish on the production floor, even though it was part of her job to do so—she translated for other employees who only spoke Spanish. Kevothermal's restrictive language policy amounted to national origin discrimination in violation of Title VII, the EEOC contended.

In addition to the monetary relief, Kevothermal must also provide training on the EPA, national origin discrimination, and retaliation to non-managerial employees, managers, supervisors, and its HR official; implement a policy prohibiting discrimination based on sex, including unequal wages, and national origin discrimination; ensure that its policy includes an explanation of how to report discrimination and an assurance of non-retaliation to employees who complain; and regularly review its compliance with the EPA and adjust its employees' compensation if there is a disparity between the wages paid to employees of the opposite sex who work in equal positions.

The EEOC brought its lawsuit in the District of New Mexico; the case is No. 1:16-cv-852-MCA-LF.

Companies: Mexicali Chicken & Salads; Kevothermal, LLC

News: AgencyNews Discrimination Discharge NationalOrigin PayDiscrimination SexDiscrimination SexualHarassment Retaliation

[Back to Top ^](#)

FEDERAL LEGISLATION—New bill recycles old proposals to curb regulatory action

By [Pamela Wolf, J.D.](#)

House Judiciary Committee Chairman Bob Goodlatte (R-Va.) has introduced the "Regulatory Accountability Act of 2017," which combines a series of regulatory reform initiatives reported out of the House Judiciary Committee and passed by the House of Representatives during the 114th Congress. The bill, [H.R. 5](#), is aimed at eliminating "overly-burdensome red tape and regulations in order to lift unnecessary burdens on hardworking Americans and to promote jobs, innovation, and economic growth," according to its sponsor. Goodlatte undoubtedly sees an easier route to passage in the now Republican-controlled Congress and Republican President-elect Donald Trump.

Old proposals incorporated. The measure incorporates six separate reform bills that have already passed the House with bipartisan support in previous Congresses, Goodlatte said in a [press release](#). Collectively, its provisions would:

- Require agencies to choose the lowest-cost rulemaking alternative that meets statutory objectives and require greater opportunity for public input and vetting of critical information—especially for major and billion-dollar rules. (Title I—Regulatory Accountability Act)
- Repeal the *Chevron* and *Auer* doctrines to end judicial deference to agencies' statutory and regulatory interpretations. (Title II—Separation of Powers Restoration Act)
- Require agencies to account for the direct, indirect, and cumulative impacts of new regulations on small businesses—and find flexible ways to reduce them. (Title III—Small Business Regulatory Flexibility Improvements Act)
- Prohibit new billion-dollar rules from taking effect until courts can resolve timely-filed litigation challenging their promulgation. (Title IV—REVIEW Act)
- Force agencies to publish online, timely information about regulations in development and their expected nature, costs, and timing. (Title V—ALERT Act)
- Publish plain-language, online summaries of new proposed rules, so the public can understand what agencies actually propose to do. (Title VI—Providing Accountability Through Transparency Act)

REVIEW Act sharply criticized. Although the measures cited above may have enjoyed some bipartisan support, it was far from overwhelming. The REVIEW Act, for example, drew sharp criticism because of the legal uncertainty that would result from delaying regulations until litigation challenging their promulgation is resolved.

At a November 2015 [hearing](#) on the REVIEW Act, Georgetown University Law Center Professor [William W. Buzbee](#) called the proposed legislation a "bad idea." Expressing strong opposition, he said it "could have a devastating effect on the law, while also causing massive economic and health harms and creating legal uncertainty. ... [R]ather than courts reviewing stay motions and later the merits of a regulation under a body of law long developed by the Supreme Court, the mere fact of a challenge would result in a stay 'pending judicial review.'"

Buzbee pointed out that "virtually all high stakes rules will be challenged by someone, so virtually all such rules under a law such as this proposal would receive new statutorily granted stays." He continued, "Since such rules often now generate millions of comments and are issued with lengthy technical documents, Federal Register preambles, and additional legal memoranda, briefing of such challenges itself takes many months, sometimes years."

The law professor also noted that since "rules of broad impact typically are addressing a huge risk to a population or the environment," the "virtually guaranteed stay would mean that the regulated harms might go unchecked for years, potentially resulting in illnesses and deaths or environmental destruction on a huge scale."

Among other things, the REVIEW Act "could be seen as an indirect legislative effort to defeat regulations or render laws a partial nullity when more direct and democratically accountable legislative action would fail," Buzbee suggested. "Under the guise of giving courts a chance to review challenges, laws would be nullified for years even where the courts and Congress have clearly required an agency to undertake the regulatory action and even in settings where the regulation might be rock solid," he said.

Impact on the economy. Goodlatte, however, focused his comments on the economy when he unveiled the Regulatory Accountability Act of 2017. "If we want to see better and faster growth within our economy, reforming our regulatory system must be at the center of our nation's focus," he said. "The runaway regulatory state is creating hidden costs on hardworking Americans and small business owners alike. As these costs grow and continue to burden our economy, we are losing jobs and wages to thousands of regulations.

"The Regulatory Accountability Act is a major step to reverse the negative effects regulations are having on our economy. The bill promotes making the regulatory process more transparent for the American people; increases the power of the people's elected representatives and the courts to stop overreaching new rulemaking; and lets the public have the full say they deserve in the rulemaking process."

"The barriers regulations have built halt economic growth but those burdens can be lifted, and Congress has the opportunity to make our economy work for hardworking Americans again."

News: [FederalLegislation](#) [FederalRegulations](#) [Procedure](#) [AgencyNews](#)

[Back to Top ^](#)

INDUSTRY NEWS, TRENDS—Morgan Lewis beefs up employee benefits, executive compensation services

Morgan, Lewis & Bockius LLP announced that the firm has added three new partners who will beef up its employee benefits and executive compensation services for clients. Rosina Barker and Jonathan Zimmerman will practice in the firm's Washington, DC, office, while Steven Witmer will practice in the Santa Monica, California, office. [Barker](#), [Zimmerman](#), and [Witmer](#) assist clients with their qualified and nonqualified retirement plans, health and welfare plans, fiduciary and investment matters, and employment tax and worker classification issues, according to a firm [announcement](#). The three new partners give advice on complex executive compensation matters and on the benefits and compensation issues arising in mergers and acquisitions, dispositions, and other business transactions.

Rosina Barker provides counseling on ERISA, tax, and securities law aspects of executive compensation and employee benefit plans. Her broad practice includes sophisticated defined benefit pension plan issues, fiduciary counseling, and complex executive compensation matters. Her practice is enhanced by her government service on the tax staff of the U.S. House Ways & Means Committee, where she had primary staff responsibility for all pension and employee benefit legislation.

Jonathan Zimmerman has a broad-based practice with a concentration in executive compensation, qualified retirement plans, and health and welfare plans. He also advises clients on payroll, withholding, and fringe benefits matters, and has handled federal and state audits concerning all types of compensation.

Steven Witmer advises companies on qualified and nonqualified retirement plans, health and welfare plans, and other ERISA and tax matters. He has an extensive benefits outsourcing practice and has negotiated close to 1,000 contracts with payroll and benefits vendors on behalf of plan sponsors. Witmer frequently advises clients on the transfer of plan assets and liabilities, and on other benefit issues arising from dispositions, spinoffs, initial public offerings, and other business transactions up to the multibillion dollar range. He successfully represents clients before the Internal Revenue Service, Department of Labor, and Pension Benefit Guaranty Corporation.

Attorneys: Rosina Barker, Jonathan Zimmerman, and Steven Witmer (Morgan, Lewis & Bockius).

News: IndustryNewsTrends

[Back to Top ^](#)

OSHA NEWS—Jersey City Medical Center cited for \$174K in penalties after worker fatality related to electrical shock

Following its investigation of a worker fatality, OSHA issued citations to Jersey City Medical Center/ RWJ Barnabas Health for one willful and four serious safety violations. The worker had been hospitalized after falling from a ladder as he changed an overhead ballast in a light fixture—he had received an electrical shock. He later died from his injuries. Proposed penalties total \$174,593.

OSHA [issued](#) the willful violation because the facility required employees to change ballasts without the proper lockout/tagout training on practices and procedures necessary to disable machinery or equipment to prevent hazardous energy release, as well as other safety hazards and related unsafe practices. The serious violations involved the medical center's failure to ensure de-energized circuits were locked out, maintain an electrical lockout/tagout program, ensure that only qualified persons worked on live circuits, provide personal protective equipment, and ensure workers did not work on live parts.

Kris Hoffman, director of OSHA's Parsippany Area Office, said the worker's death was preventable. "Jersey City Medical Center did not have basic lockout/tagout safeguards in place to prevent exposure to electrical hazards and failed to train its maintenance workers on these safeguards," he explained. "As a result, the worker sustained an electrical shock while changing the ballast, fell approximately 6 feet off a ladder and died from his injuries."

Jersey City Medical Center/ RWJ Barnabas Health has 15 business days from receipt of its citations and proposed penalties to comply, request a conference with OSHA's area director, or contest the findings before the independent Occupational Safety and Health Review Commission.

Companies: Jersey City Medical Center/ RWJ Barnabas Health

News: AgencyNews Safety

[Back to Top ^](#)

STATE REGULATIONS—NEW YORK—Multi-agency unit launched to police new minimum wage rules

By [Pamela Wolf, J.D.](#)

New York Governor Andrew M. Cuomo announced that a 200-member multi-agency Minimum

Wage Enforcement and Outreach Unit has been launched to ensure that all minimum wage workers are paid the proper rate. The Enforcement and Outreach Unit, which is purportedly the first of its kind in the nation, will also help both businesses and workers understand rights and responsibilities under the new wage regulations. Earlier, Cuomo had signed landmark legislation making New York the first state in the nation to enact a \$15 minimum wage.

The first benchmark of the [phase-in schedule](#) for the minimum wage increase went into effect on December 31, 2016. Businesses in New York City with 11 or more employees are now required to pay at least \$11.00 an hour. Businesses in the city with 10 or fewer employees are required to pay at least \$10.50 an hour. The minimum wage in Long Island and Westchester is now \$10.00 an hour, while in the rest of the state, the minimum wage is \$9.70.

Minimum wage legislation. The \$15 minimum wage legislation was passed as part of the 2016-17 state budget, with a phase-in schedule on a regional basis is as follows:

- For workers in New York City employed by large businesses (those with at least 11 employees), the minimum wage will rise to \$11 at the end of 2016, then another \$2 each year, reaching \$15 on December 21, 2018.
- For workers in New York City employed by small businesses (those with 10 employees or fewer), the minimum wage will rise to \$10.50 by the end of 2016, then another \$1.50 each year, reaching \$15 on December 31, 2019.
- For workers in Nassau, Suffolk and Westchester Counties, the minimum wage will increase to \$10 at the end of 2016, then \$1 each year, reaching \$15 on December 31, 2021.
- For workers in the rest of the state, the minimum wage will increase to \$9.70 at the end of 2016, then another .70 each year until reaching \$12.50 on December 31, 2020—after which the minimum wage will continue to increase to \$15 on an indexed schedule to be set by the Director of the Division of Budget in consultation with the Department of Labor.

The truth about minimum wage workers. Announcing the new Minimum Wage Enforcement and Outreach Unit, Cuomo pointed to some of the myths about minimum wage workers, including that they are young people working their first job in a hamburger place. That, the governor said, is not true. More than 50 percent of minimum wage earners are over 35 years old—40 percent of them are either married or have a child. In the State of New York, there are 730,000 people making a minimum wage. A minimum wage earner supporting two children is below the poverty line.

"How can you have a minimum wage that the state sets, when you know if a person who has two children they are below the poverty line, which means that you then subsidize them with government programs—food stamps, AFDC, etcetera—so really it's a government subsidy for a private sector corporation, which is entirely absurd," [Cuomo said](#). "So, we passed a law last year that raises the minimum wage to \$15. It is phased in over a period of time."

The state has also launched a new [web tool](#) to help workers determine the minimum cash wage that should be paid to them by their employer. Several factors can affect the minimum wage, including the date, the location of employment, and any tips received.

News: StateRegulations MinimumWage WageHour NewYorkNews

[Back to Top ^](#)

In the News

LAW FIRMS

[Adams, Hayward & Welsh](#) | [Barr & Camens](#) | [Brown Jacobson](#) | [Butzel Long](#) | [Eaton Peabody, PA](#) | [Fisher, Patterson, Saylor & Smith](#) | [Frantz Ward LLP](#) | [Greenberg Traurig](#) | [Hawks Quindel](#) | [Jackson Lewis](#) | [Jellinger Law Office](#) | [Law Office of Ted H.S. Hong](#) | [Law Offices of D.C. Taylor and Associates](#) | [Law Offices of Daniel Wemhoff](#) | [Lewis Brisbois Bisgaard & Smith](#) | [Lippman, Semsler & Salb](#) | [Littler Mendelson](#) | [Marr Jones & Wang](#) | [McAnany, Van Cleave & Phillips](#) | [McGuire Woods](#) | [Messer, Caparello & Self, P.A.](#) | [Morgan, Lewis & Bockius](#) | [NLRB](#) | [Ogletree Deakins \[1, 2\]](#) | [Richard E. Johnson PA](#) | [The Becket Fund for Religious Liberty](#) | [The Hoppock Law Firm](#) | [Thompson, Bull, Furey, Bass & MacColl, LLC, P.A.](#) | [Vinson & Elkins](#) | [Winston & Strawn](#) | [Zipin, Amster & Greenberg](#)

COMPANIES

[Aerotek, Inc.](#) | [Christian Medical and Dental Society](#) | [Federal National Mortgage Association](#) | [Franciscan Alliance, Inc.](#) | [Gulf County School Board](#) | [Home Depot USA, Inc.](#) | [Jersey City Medical Center/ RWJ Barnabas Health](#) | [Kevothermal, LLC](#) | [LCC International, Inc.](#) | [Matson Terminals, Inc.](#) | [Mexicali Chicken & Salads](#) | [MGM Grand Casino Detroit](#) | [Opmax Management, LLC](#) | [Opmax, LLC](#) | [Oval Office Gentlemen's Club](#) | [Oval Office, LLC](#) | [Registry of Interpreters for the Deaf, Inc.](#) | [Specialty Physicians of Illinois, LLC](#) | [Tradesmen International LLC](#) | [United Parcel Service, Inc.](#) | [USA Home Champion Realty, Inc.](#)

Follow Us

[WorkDay Blog](#) | [Twitter](#) | [Facebook](#)

Get Our Apps

[iPad](#) | [iPhone](#) | [BlackBerry](#) | [Android](#) | [Kindle](#)

Related Products & Services

[Labor and Employment Law Integrated Research Library](#) | [Employment Law Daily Archives](#)

[Contact Our Editors](#) | [Customer Support](#) | [Manage Settings](#) | [Unsubscribe](#)

[Submit Guest Articles](#) | [Reprint Policy](#) | [Terms & Conditions](#) | [Privacy Statement](#)

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.

This email is provided as part of your subscription to Employment Law Daily and use is subject to the terms of our license

agreement. Notwithstanding the terms of our license agreement, you are hereby granted a limited and revocable right to occasionally forward this email to clients, prospective clients or other third parties in the ordinary course of the practice of your profession and not as part of any mass communication from you or your company. Proprietary notices may not be removed at any time. Except as so expressly permitted, these materials may not be redistributed or retransmitted, in whole or in part, without the prior written consent of Wolters Kluwer Law & Business.