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ANNUAL EMPLOYMENT LAW UPDATE

by

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United States Court of Appeals for the District of Columbia Circuit

1) *Rochon v. Gonzales*, 2006 U.S. App. LEXIS 5028 (D.C. Cir. 2006).

Chief Judge Ginsburg delivered the opinion for the court, joined by Judge Tatel and Senior Judge Edwards. The employee brought suit against his employer, the Federal Bureau of Investigation (FBI), alleging retaliation and discrimination under Title VII and in violation of a 1990 settlement agreement in which the FBI agreed to not take any retaliatory action against the employee in the future. He alleged that the FBI's refusal to investigate death threats against he and his wife, contrary to policy constituted discrimination and retaliation. The district court dismissed his claim because he did not demonstrate an adverse employment action and did not show a causal link between his protected activity and the retaliation.

The court first held that Congress clearly had waived sovereign immunity from retaliation claims in 42 U.S.C § 2000e-3(a) which allows a court to award equitable relief when the employer "intentionally engaged…in an unlawful employment practice." The court further held that, like the private employers in Passer v. American Chemical Society, 935 F.2d 322 and Robinson v. Shell Oil Co., 519 U.S. 337, the government is also liable under Title VII for retaliation that is not related to the plaintiff's employment. The court was not concerned that this ruling would lead to lawsuits alleging retaliation based on trivial actions, such as the "misdelivery of a letter" by the Postal Service because the requirement that retaliation be "material" or "significant" would preclude such claims. The court held that, to state a retaliation claim, the "employer's challenged action would have been material to a reasonable employee." The court found that failing to investigate a death threat meets this threshold of significance required in a Title VII retaliation claim.

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2) *Broderick v. Donaldson*, 2006 U.S. App. LEXIS 3248 (D.C. Cir. 2006).

Judge Brown filed the opinion for the court, in which Judges Henderson and Rogers joined. Previously, the employee had won a sexual harassment lawsuit against her employer and was awarded a position at GM-15 level. In the court's order she was to receive appropriate work assignments and "increased responsibilities over time as she acquires the training and experience and as she demonstrates the capabilities to assume such responsibilities." She brought suit alleging retaliation under Title VII and violations of the previous court order. The district court granted summary judgment against the employee on the retaliation claim. They found that she had not exhausted her administrative remedies, she did not demonstrate a casual connection between her protected activity (the previous lawsuit) and the adverse action (the denial of promotions) and that the SEC had offered non-discriminatory considerations for its actions. The court further refused to hold the SEC in contempt for alleged violations of the previous order because discriminatory motives were not proven.

The D.C. Circuit did not decide whether a memo sent to the employee's supervisors and the EEO office, stating she found "being treated as a staff attorney after nineteen years" to be "embarrassing, humiliating and downright insulting" constituted protected activity. The protected activity element of retaliation was already satisfied by her previous lawsuit. However, the court held that she did not suffer adverse action. Based on the employee's counsel at oral argument, the court found that her claimed injury was merely the denial of the promotion with respect only to having her work reviewed by a more senior attorney. She was not claiming injury resulting from the denial of new duties or a pay increase. The court held that merely denying to send the employee's briefs to a more senior attorney for review was not an adverse employment action within the meaning of McDonnell Douglas. The court further noted that even if the employee had not conceded away her adverse action, her claim still would have failed, as the SEC had a legitimate, non-discriminatory motive for not giving her the promotion.

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3) *Lutkewitte v. Gonzales*, 2006 U.S. App. LEXIS 2664 (D.C. Cir. 2006).

Per curiam opinion in favor of the defendant. Plaintiff, an FBI agent, claimed to have been sexually harassed by her supervisor. The court found that although the plaintiff demonstrated that the harassment was severe there was no proof that the plaintiff suffered any tangible employment action. The court ruled that the coercion that is inherent in a supervisor-employee relationship is not alone sufficient to create strict liability for the employer. The plaintiff must show that threats of demotion or promises of benefits were conditioned on plaintiff's submission to sexual advances of a supervisor. The subjective impressions of the plaintiff are not sufficient to show tangible employment action.
Notes:

4) *Bennett v. Chertoff*, 2006 U.S. App. LEXIS 2662 (D.C. Cir. 2006).

Judge Rogers wrote the opinion affirming the lower court's dismissal of plaintiff's claim of Title VII discrimination for lack of jurisdiction. Plaintiff was fired from her position as a criminal investigator with the Transportation Security Administration (TSA) after it was discovered that she lied on her application for employment. Plaintiff failed to acknowledge that she had been terminated from her previous position at the Department of Defense for improperly using government research databases for personal use. Plaintiff's dishonesty made it impossible for her to obtain the security clearance required for her position at TSA. Plaintiff maintained that she was fired because of a determination that she was unsuitable for the position and not for her inability to obtain security clearance.

The Court held that under *Ryan v. Reno* an adverse employment action which is based on a denial of security clearance is not actionable under Title VII because determination of security clearance is committed by law solely to the Executive branch. The plaintiff contended that the lower court improperly dismissed the claim for lack of jurisdiction because it did not consider whether

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her inability to obtain security clearance was the actual reason for her termination. The Court held that the record adequately demonstrated that plaintiff's position with TSA required security clearance, and that plaintiff was unable to obtain security clearance. Therefore, it was reasonable for the lower court to determine that *Ryan* was controlling and dismiss for lack of jurisdiction.

Notes:

5) *Hussain v. Nicholson*, 2006 U.S. App. LEXIS 2290 (D.C. Cir. 2006).

Judge Tatel wrote the opinion affirming the lower court's refusal to reopen discovery and grant of summary judgment to defendant. Plaintiff, a Muslim, brought a claim under Title VII claiming discrimination and retaliation because the defendant denied him a promotion because of his race, religion, and national origin. Plaintiff replaced his counsel during the trial and argued that the court should allow him to reopen discovery when his previous attorney admitted "some lack of diligence" in court. The trial court denied plaintiff's motion to reopen discovery and granted defendant's motion for summary judgment finding that plaintiff had failed to provide sufficient evidence of discrimination.

The Court of Appeals affirmed the lower court's denial to reopen discovery holding that while lack of diligence by plaintiff's chosen counsel is grounds for malpractice it is not grounds to reopen discovery. The Court also affirmed the lower court's grant of summary judgment finding that plaintiff did not rebut the legitimate reason offered by defendant for not promoting plaintiff. The court held that the plaintiff failed to show that he was "significantly better qualified" than the person who did receive the promotion. Plaintiff also claimed that defendant had retaliated against him by creating a hostile work environment. The court found that plaintiff's work environment was not ideal, but did not rise to the "abusive" standard laid out in *Harris v. Forklift Sys., Inc.* and therefore did not give rise to a Title VII claim of retaliation.

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6) *Holcomb v. Powell*, 2006 U.S. App. LEXIS 520 (D.C. Cir. 2006).

Judge Brown wrote the opinion affirming the lower court's grant of summary judgment on plaintiff's discrimination claim and reversing the grant of summary judgment on plaintiff's retaliation claim. Plaintiff filed suit against her employer, the FDIC, claiming two Title VII violations. Plaintiff alleged she was not promoted because of her race, and that her employer reduced her work responsibilities in retaliation for her discrimination complaint.

The court found that the trial court's grant of summary judgment on the discrimination claim was proper because plaintiff did not demonstrate that she was "significantly better qualified" for the position than the recipient. Plaintiff also failed to offer any proof of discriminatory animus or intent on the part of her employer. The court reversed the trial court's grant of summary judgment on plaintiff's retaliation claim because plaintiff offered uncontroverted evidence that her duties declined in both quantity and quality following her complaint.

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7) *Smith v. District of Columbia*, 430 F.3d 450 (D.C. Cir. 2005).

Judge Brown wrote the opinion affirming grant of summary judgment with respect to plaintiff's retaliation claims, but reversing grant of summary judgment for plaintiff's discrimination claims. Plaintiff claimed that the defendant/employer failed to provide reasonable accommodation as required by the ADA for health problems stemming from a bacterial infection. Plaintiff also claimed that disciplinary action was taken in retaliation for her complaint. The defendant offered unrebutted testimony that changes in plaintiff's work requirements were due to her request, and that disciplinary action was in response to plaintiff's negligence and insubordination. The court found that plaintiff's claim failed under the *McDonnell Douglas* framework because the defendant presented legitimate, non-discriminatory reasons for its actions. The court reversed the District Court's grant of summary judgment respecting plaintiff's discrimination claims because the District Court abused its discretion by allowing defendant to file a motion after the deadline without an extension.

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8) *Jones v. District of Columbia Department of Corrections*, 429 F.3d 276 (D.C. Cir. 2005).

Judge Brown wrote the opinion of the court, in which Chief Judge Ginsburg and Judge Tatel joined. Plaintiff appealed a decision of the U.S. District Court for the District of Columbia granting summary judgment in favor of defendants. Plaintiff alleged violations of Title VII of the Civil Rights Act and the District of Columbia Human Rights Act.

Petitioner claimed that statements made by her supervisor contributed to creating a hostile work environment, and that she was retaliated against for reporting such behavior. The court held that petitioner had failed to meet the

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Faragher v. Coa Raton, 524 U.S. 775 (1998) standards required to find an employer vicariously liable for the actions of an employee. Specifically, petitioner could not demonstrate tangible employment action, which provides the necessary link between a supervisor's harassing conduct and the employer at large. Petitioner attempted to demonstrate such a link through changes in her schedule. The court, however, dismissed such claims, in that the schedule change was effected prior to the alleged harassment.

The court also affirmed the district court's grant of summary judgment on the retaliation claim. The court noted that Jones' allegations of retaliation occurred a month before she submitted her complaint with her supervisors. Even if the temporal proximity was not reverse, continued the court, evidence of one instance of harassment does not support a retaliation claim. Rather, the action taken by the employer must be substantial. Furthermore, the court affirmed summary judgment on retaliation based on the change in work schedule. Because the shift change applied to each member of petitioner's crew, and because the change was completed and approved more than two weeks prior to petitioner's harassment complaint, there was no evidence that petitioner was "singled out." Because of these facts, the court affirmed the district court's rulings on retaliation

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9) *Thompson v. District of Columbia*, 428 F.3d 283 (D.C. Cir. 2005).

Judge Tatel wrote the opinion reversing, remanding and vacating in part the judgment of lower court. Plaintiff brought an action against his former employer alleging that he was fired for engaging in activities protected by the First Amendment, denied a hearing as required by the Due Process Clause of the Fifth Amendment, and that the behavior of his former supervisors was so outrageous that it rose to the level of intentional infliction of emotional distress. The lower court dismissed all the claims on the pleadings.

The Court found that First Amendment claims by public employees require "an individualized and searching review of the factors asserted by the employer to justify the discharge." The Court determined that the pleading were

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insufficient in to conduct this kind of in-depth review and therefore the lower court erred in dismissing the claim based on the pleadings alone. Similarly, the Court found that review of plaintiff's Fifth Amendment claim required a determination of whether the governmental interest justified depriving plaintiff of a hearing and that the pleadings did not contain sufficient evidence to make this determination. Finally, the Court held that the Comprehensive Merit Personnel Act removed the court's jurisdiction over plaintiff's IIED claim and therefore the lower court's judgment on that claim was vacated.
Notes:

10) *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

Judge Roberts wrote the opinion upholding the lower court's decision to severe an offensive punitive damages clause from an agreement to arbitrate instead of invalidating the entire agreement. The plaintiff brought a claim of racial discrimination under the District of Columbia Human Rights Act (DCHRA). Under the terms of the employment contract the any disputes were to be handled by arbitration, and punitive damages were limited. The Court held that it was proper for the lower court to severe the limitation on punitive damages and enforce the rest of the arbitration clause. The court found that although the limit on punitive damages was unenforceable because it interfered with the DCHRA it did not infect the arbitration clause as a whole. The plaintiff also argued that arbitration would not adequately address his discrimination claims, but the court found that this argument was without merit because the plaintiff did not offer any evidence other than speculation about how an arbiter would rule. In its ruling the court noted a strong federal policy to "rigorously enforce" arbitration agreements.

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11) *Porter v. Natsios*, 414 F.3d 13 (D.C. Cir. 2005).

Judge Rogers delivered the opinion for the court. The employee brought suit against his employer under Title VII, alleging racial discrimination and retaliation when he was passed over for three promotions to GS-15 positions. Neither party raised the issue of whether the mixed motive provisions of the 1991 Act apply to retaliation claims, which allow an employee to establish a violation of Title VII without showing that the impermissible consideration was the sole reason for the employment action. Thus, even though the court noted that every other circuit has held that they do apply to retaliation claims, they did not decide the issue. The question remains open in the D.C. Circuit.

Notes:

12) *Hansson v. Norton*, 411 F.3d 231 (D.C. Cir. 2005).

Judge Brown wrote the opinion in which the court found that a claim for breach of a Title VII settlement agreement is a contract under the Tucker Act, and that contract claims against the government which exceed $10,000 are the exclusive jurisdiction of the Court of Federal Claims. Plaintiff's claim was found to be a "straightforward contract issue" because it did not require an interpretation of Title VII and did not seek equitable relief therefore the claim is the exclusive jurisdiction of the Court of Federal claims. The court remanded the case with instructions to transfer it to the Court of Federal Claims.

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Notes:

13) *Scott v. Johannis*, 409 F.3d 466 (D.C. Cir. 2005).

Judge Tatel wrote the opinion affirming the lower court's ruling. The plaintiff brought a claim of discrimination against the Department of Agriculture under Title VII. Plaintiff took his case to an Administrative Judge who determined that plaintiff had been discriminated against and awarded his heirs back pay, legal fees, and compensatory damages. Plaintiff then sought to challenge the amount of compensatory damages in District Court. The Court affirmed the lower court's determination that plaintiff could not challenge the award without again proving liability. The court found that administrative decisions may be admitted in a civil trial as evidence, but they are not conclusive of liability. The court found that the Equal Employment Opportunity Act extended the right to de novo trials of administrative decision to federal workers such as plaintiff. However, de novo review is for both liability and awards, not awards only.

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14) *Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005).

Judge Henderson delivered the opinion of the court. Plaintiff employee Shea appeals the trial court's dismissal of his employment discrimination suit against Colin Powell, then-Secretary of State and sued in his official capacity. Current Secretary of State Condoleezza Rice was substituted into the suit pursuant to Fed. Rule App. Pro. 43(c)(2). The trial court ruled the case to be time-barred.

Shea is Irish and white. He claims that his pay scale was calibrated disproportionately lower than others in the workplace on account of a diversity program that hindered him due to his race and ethnicity, a violation of Title VII of the Civil Rights Act of 1964 and the Fifth Amendment's equal protection clause.

The court reversed the dismissal of the suit holding that each disproportionately lower paycheck constituted a "discrete discriminatory act" and kept the case within the statute of limitations.

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15) *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359 (D.C. Cir. 2005).

Judge Edwards delivered the opinion of the court. Plaintiff casino appealed the district court's grant of a motion to dismiss on ripeness grounds in favor of defendant Equal Employment Opportunity Commission.

Plaintiff sued the EEOC on the grounds that the EEOC follows an unlawful disclosure policy by which the agency may release privileged documents submitted to the EEOC without that party's knowledge. Plaintiff claims a substantial probability that it will be harmed by this disclosure policy, namely in regard to trade secrets and other confidential information. In response to age-discrimination suits brought as a part of a mass-hiring process, plaintiff submitted this type of sensitive document to the EEOC

The court reversed the district court and held the case ripe for review. To be ripe for review, a reviewing court should evaluate the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The court found the case fit for review because 1) the clear legal question

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involved and 2) the hardship shouldered by Venetian outweighs any institutional interest in deferring review.

Notes:

16) *Roebuck v. Washington*, 408 F.3d 790 (D.C. Cir. 2005).

Judge Ginsburg delivered the opinion of the court. Appellant employee challenged the trial court's judgment in favor of defendant employer in appellant's sexual harassment action; appellant's supervisor was liable for sexual harassment, but the employer was not.

Corbett, for whom Roebuck worked as an administrative assistant, repeatedly engaged in sexually harassing behavior. He visited her at home and tried to kiss her, made the "hourglass" figure with his hands, and told her that she should wear her hair up because she was "sexier that way" and pants instead of skirts because her legs were "distracting." After complaining to another male employee, Corbett changed the locks to his office in an apparent attempt to bar Roebuck's entry.

The court affirmed the trial court's judgment for employer. Employer succeeded at trial by proving it 1) exercised reasonable care to proscribe and promptly remedy any sexually harassing behavior and 2) Roebuck had unreasonably failed to utilize internal corrective measures in a timely fashion because a reasonable person would have complained earlier. Roebuck claimed that Corbett had taken a "tangible employment action" against her by changing the locks. The commission of a tangible employment action against an employee by a supervisor makes the employer vicariously liable for the supervisor's actions because they smack of official action. *See Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 761. This court held that the mere changing of the lock for which another employee had a key did not affect Roebuck's ability to do her job.

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17) *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005).

Judge Edwards delivered the opinion of the court. Plaintiff employee appeals trial court's award of summary judgment to defendant federal employer as to plaintiff's claims of a hostile work environment; discriminatory discharge on the basis of race, sex, and national origin; and retaliation.

George is an African-American woman originally from Trinidad and Tobago. Her work initially rated high, but the office environment soon began to sour.

The court affirmed the judgment of the trial court on all counts except the discrimination claim which they reversed. To state a prima facie case of disparate discrimination, the plaintiff must establish 1) she is a member of a protected class; 2) she suffered an adverse employment action; and 3) the unfavorable action gives rise to an inference of discrimination. A prima facie claim also must show that the dismissal was not the product of substandard work or the elimination of the position. Applying these factors to the case at hand, the court concluded that George created a genuine issue of material fact as to whether her work was satisfactory, and the grant of the motion for summary judgment should be reversed.

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18) *Murray v. Gilmore*, 406 F.3d 708 (D.C. Cir. 2005).

Judge Tatel wrote the opinion affirming in part and reversing in part. Appellant brought several claims against her former employer, the D.C. Housing Authority. Appellant claimed race and sex discrimination under Title VII, violation of the District's Comprehensive Merit Personnel Act, and deprivation of due process in violation of 42 U.S.C. § 1983. Appellant's claims stemmed from her firing as part of a reduction-in-force (RIF). Appellant argued that the RIF was pretextual and discriminatory and offered evidence that another worker was moved into her position after her dismissal, and that the only two employees adversely affected by the RIF were two black women even though the original RIF called for 16 people to be terminated. The lower court granted summary judgment to the appellee on all claims except the due process claim which it dismissed without prejudice. The Court found that the lower court was correct in respect to its grant of summary judgment on appellant's Title VII race claim, even though a reasonable jury could find that the RIF was pretextual, because appellant was replaced with a person of her same race and therefore no presumption of racial discrimination existed. However, the Court found that the lower court erred in granting summary judgment on the sex discrimination claim because appellant was replaced by a man, and the only other worker affected by the RIF was also a woman. The Court reversed the lower court's grant of summary judgment in respect to appellant's Title VII sex discrimination claim and affirmed the lower court's grant of summary judgment in respect to appellant's other claims.
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19) *Battle v. Fed. Aviation Admin.*, 393 F.3d 1330 (D.C. Cir. 2005).

Judge Rogers wrote the opinion affirming the judgment of the lower court which granted summary judgment to the defendant in plaintiff's action to enforce an arbitration award. Plaintiff was terminated by defendant after not reporting to work for 17 months due to a generalized anxiety disorder. Plaintiff challenged his termination alleging he was discriminated against because of his race, and because of his participation in the EEOC process. Plaintiff and defendant entered into arbitration according to defendants Guaranteed Fair Treatment (GFT) rules. The GFT prohibited the plaintiff from raising discrimination claims in the

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arbitration, and the defendant terminated the arbitrator and moved the proceeding to the Merit Systems Protection Board when it became apparent she intended to address discrimination issues. Notwithstanding her termination the arbitrator issued an opinion and awarded damages to the plaintiff and ordered the defendant to reinstate him. The defendant refused to recognize the arbitrator's decision, and the plaintiff brought a claim that the defendant's refusal constituted an *Accardi* violation.

The D.C. Circuit Court of Appeals found that the defendant's actions were not an *Aacardi* violation because the GFT prevented the arbitrator from considering discrimination claims and therefore the defendant was within its rights to terminate arbitration when the arbitrator violated the GFT. Further, the Court found that the defendant was correct in transferring the case to the MSPB because it has jurisdiction over "mixed cases" involving claims of discrimination.

Notes:

20) *Koszola v. Fed. Deposit Ins. Corp.*, 393 F.3d 1294 (D.C. Cir. 2005).

Judge Roberts wrote the opinion affirming the lower court's judgment for the defendant. The plaintiff worked for the defendant for two years before being terminated. The plaintiff claimed that he was disciplined and then fired for disclosures which were protected by the RTC Whistle-blower Act and the First Amendment. The Court found that even though the plaintiff had made a prima facie showing of his claims the lower court was correct in ruling for the defendant because the defense showed by a preponderance of the evidence that plaintiff would have been terminated regardless of any protected activity. The Court held that the First Amendment protection for public employees does not overcome a showing by the government that plaintiff would have been fired notwithstanding disclosures protected by the First Amendment.

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21) *Hutchinson v. CIA*, 393 F.3d 226 (D.C. Cir. 2005).

Judge Tatel wrote the opinion affirming the lower court's grant of defendant's motion for summary judgment. The plaintiff brought claims against her former employer claiming that its alleged failure to include an affidavit in her internal appeal violated her rights under the Privacy Act, and that her termination violated her right to due process. Plaintiff worked for the defendant for four years as an imagery analyst before being terminated for poor performance. In accordance with CIA procedure plaintiff appealed her termination. Plaintiff claimed that an affidavit from her EEOC hearing she sent to the official in charge of her hearing was not delivered to the official and that this was a violation of the Privacy Act. The Court agreed with the lower court in determining that there was no proof that the document had not been delivered, and therefore summary judgment was correctly granted because the Privacy Act claim was based on speculation. The Court also noted that plaintiff failed to show that the alleged omission was in any way a proximate cause of her termination. Plaintiff's second claim was that the defendant had violated her right to due process by publicizing her termination for poor performance to other employers. The Court held that there is no constitutional protection from injuries caused by disclosure of deficient job performance. Therefore the lower court was correct in granting summary judgment to the defendant in respect to plaintiff's due process claim.

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22) *Alegria v. District of Columbia*, 391 F.3d 262 (D.C. Cir. 2004).

Judge Rodgers wrote the opinion affirming the lower court's decision to deny appellants' request for awards of attorneys' fees for a private settlement. The plaintiff/appellant brought an action against the defendant/appellee under the Individuals with Disabilities Education Act. The parties settled out of court, but plaintiff sought attorneys' fees under the IDEA fee-shifting clause which grants attorneys' fees to "prevailing parties." The Court held that under *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.* a fee-shifting statute requires a judicial decision and cannot be enforced pursuant to a private settlement. Therefore plaintiff's request for attorneys' fees was correctly denied by the lower court.

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23) *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251 (D.C. Cir. 2004).

Judge Tatel wrote the opinion affirming and reversing in part. The plaintiff brought a claim under the False Claims Act and a claim under act's protection for whistleblowers. Plaintiff worked as a contract negotiator for defendant for five years before he was allegedly fired for advising the government that the defendant was improperly overcharging them for ejection seats for Navy airplanes. The plaintiff claimed that his employer was giving the government fraudulent information regarding the cost of the seats. The lower court dismissed the False Claims Act claim for failure to plead fraud with particularity and the whistleblower claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The D.C. Circuit Court of Appeals found that the pleadings of the plaintiff were vague and general in their allegations and lacked specificity as to individuals

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and facts. Therefore the court affirmed the district courts grant of summary judgment in respect to the False Claims Act claim for lack of specificity. However, the court held that the whistleblower portion of the statute did not have as stringent requirements for the pleadings and therefore, in respect to the whistleblower claim, the pleadings were sufficiently specific. The court noted that less stringent pleading requirements were necessary in whistleblower cases because whistleblowers often do not have access to documents from their employers to use as evidence.

Notes:

24) *Carter v. George Washington University*, 387 F.3d 872 (D.C. Cir. 2004).

Judge Tatel wrote the opinion affirming the lower court's grant of summary judgment. The plaintiff brought claims of race and age discrimination, retaliation, constructive discharge, and breach of contract against her former employer after being denied three different promotions over the course of one year. In respect to the first denial of promotion the University claimed that the plaintiff did not receive the position because she interviewed poorly. The Court found that this was not pretextual because the plaintiff offered no evidence that this particular interview went well, or that she interviews well in general. Both of the other two positions the plaintiff sought involved fundraising and the plaintiff was denied them because she did not have any fundraising experience. The Court found that because plaintiff's claims were brought under Title VII, and the ADEA the *McDonnell*-Douglas framework applied to all claims. The Court held that plaintiff did not satisfy the second prong of the *McDonnell-Douglas* framework for discrimination claims because she was not "qualified for the job for which the employer was seeking applicants." Both positions were filled by applicants with far more experience in fundraising.

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25) *Coleman v. Potomac Elec. Power Co.*, 2004 U.S. App. LEXIS 21820 (D.C. Cir. 2004).

Per curiam opinion granting defendant's motion for summary affirmance of District Court's decision which determined plaintiff's complaints were barred by res judicata. At trial the plaintiff brought claims under Title VII and the D.C. Human Rights Act claiming that the defendant had retaliated against him for exercising his rights. The defendant filed a motion to dismiss claiming plaintiff's claims were time barred by the one year statute of limitations for DCHRA claims. The District Court determined, sua sponte, that plaintiff's claims were barred because they had formed the basis for a previous suit against the defendant. The court held that the District Court was not in error to raise the res judicata issue sua sponte and that the District Court was correct in not granting plaintiff's motion for appointment of counsel because the positions of the parties was "so clear."

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26) *Keyes v. District of Columbia*, 372 F.3d 434 (D.C. Cir. 2004).

Judge Rogers wrote the opinion joined by Judge Sentelle and Judge Edwards. The D.C. Circuit Court affirmed the district court's grant of summary judgment to defendant . Plaintiff, a civil servant, claimed that her constitutional rights and the D.C. whistleblower statute were violated when she resigned in response to a notice of adverse proceedings against her. Plaintiff was being investigated on charges that she failed to perform her duties to fully investigate deaths of MRDDA customers. Plaintiff was given 15-day notice, and after conferring with a personnel advisor decided to take early retirement. Plaintiff was erroneously told she could continue to fight the charges against her after taking early retirement. After her resignation the charges were dropped. Plaintiff contends that her resignation was involuntary and under duress.

The district court found that no reasonable jury could find that plaintiff's resignation was involuntary, and that the voluntariness of her resignation was dispositive, and therefore granted summary judgment. On *de novo* review the D.C. Circuit Court found that plaintiff did not properly raise her claim of duress in the district court and dealt only with one of the three Schultz criteria for establishing an involuntary resignation. Schultz v. United States Navy, 810 F.2d 1133 (Fed. Cir. 1987.) The court also rejected plaintiff's claim that her resignation was based on her employers misrepresentations because she was represented by counsel, was in an unusually good position to know the truth, had several days to verify the statement's of the personnel advisor and received written notice of her rights.

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District of Columbia Court of Appeals

1) *Sanchez v. Magafan*, 2006 D.C. App. LEXIS 82 (D.C. 2006).

Associate Judge Farrell wrote the opinion reversing the lower court's grant of summary judgment in favor of the defendant. The plaintiff brought suit under the D.C. Wage Payment Act for unpaid wages pursuant to an oral agreement with defendant. The defendant argued that because the plaintiff was an independent contractor and not his employee he was not entitled to relief under the act. The court held trial court erred in determining that there was no triable issue of fact. The court found that a reasonable trier of fact could determine that the defendant was plaintiff's employer under the act because he "reserved the right to, and did, exercise substantial control over the means and manner of [plaintiff's] job performance." The court remanded for a trial to determine whether defendant was plaintiff's employer.
Notes:

2) *Shecter v. Merchants Home Delivery, Inc.*, 2006 D.C. App. LEXIS 30 (D.C. 2006).

Judge Schwelb wrote the opinion reversing the trial court's granting of judgment as a matter of law to the defendant. The plaintiff brought suit against Circuit City and Merchants Home Delivery for items which were stolen from her house when employees of the latter delivered goods plaintiff purchased from Circuit City pursuant to a delivery contract between the two defendants. The trial court granted judgment as a matter of law after determining that the two men were independent contractors and therefore not employees of Circuit City, and that they were not acting within the scope of their employment when they stole form plaintiff so Merchants was not liable for the theft.

The D.C. Court of Appeals reversed the district court's grant of JMOL holding that because Circuit City had a significant amount of control over the nature of the work done by the delivery men a reasonable jury may have found that they were employees of Circuit City, not independent contractors. Further, the Court found that plaintiff had offered sufficient evidence of negligent hiring, training and supervision by Circuit City. The Court remanded the case to allow a

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jury to determine the nature of the relationship between Circuit City and the delivery men, and to determine if Circuit City was negligent in the management of its delivery personnel.

Notes:

3) *Crawford v. District of Columbia*, 2006 D.C. App. LEXIS 15 (D.C. 2006).

Judge Kramer delivered the opinion of the court. Crawford appealed the trial court's ruling denying him injunctive and declaratory relief and attorney's fees and costs. This court affirmed the trial court's ruling and held that Crawford misconstrued the District of Columbia Whistleblower Protection Act.

The jury found as fact that Crawford 1) made disclosures protected by the DCWPA; 2) that his employer "took or threatened to take a prohibited personnel action against" Crawford; 3) Crawford's "protected disclosure" was a "contributing factor" in his dismissal; and 4) his removal would have occurred independent of his protected disclosure.

The case's outcome turned on the fourth finding. Once an employee makes a prima facie case that his "protected disclosure" was a "contributing factor" to his dismissal, the employer must show by clear and convincing evidence that the dismissal would have occurred for "legitimate, independent reasons" aside from the employee's engagement in activities protected under the Act.

Crawford claimed that the third finding entitled him to declaratory and injunctive relief and attorney's fees and costs. In reviewing *de novo*, the court found basic statutory interpretation flaws with Crawford's arguments. First, his strained interpretation of the statute made sections redundant. Second, his reading rendered sections superfluous. Finally, the court held that the DC Council specifically delineated between civil liability for the employer and grounds for triggering the employer's internal discipline system.

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4) *Allworth v. Howard Univ.*, 2006 D.C. App. LEXIS 4 (D.C. 2006).

Judge Reid delivered the opinion of the court. Allworth appealed the trial court's award of summary judgment to Howard University, her employer, regarding the denial of her application for tenure in the College of Medicine. The court affirmed.

Howard denied Allworth's application for tenure on the grounds that it "considered Dr. Allworth's research productivity weak." It was suggested that she take another year to fortify her research. The period was extended two more years by votes of the committee deciding tenure. Allworth alleged breach of contract and breach of the covenant of good faith and fair dealing. The trial court found that the University Handbook, the basis for Howard's contracts for employment, allowed Allworth to be eligible for tenure and not that she would be awarded tenure.

Reviewing *de novo*, the court addressed Allworth's claim that Howard breached the covenant of good faith and fair dealing by not allowing her the opportunity to conduct enough research to gain tenure. Howard is liable if they "evade[d] the spirit of the contract, willfully render[ed] imperfect performance, or interfere[d] with performance by the other party." "Fair dealing" is grounded in reasonableness and not arbitrary or capricious actions. Citing that a court should not improperly trample the academic judgment of the school, a showing of negligence or lack of diligence is not enough to overcome a motion for summary judgment. Dr. Allworth's claim that Howard did not allow for the proper conduct of research did not adduce more than negligence; hence the ruling for Howard.

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5) *Lipscombe v. Crudup*, 888 A.2d 1171 (D.C. 2005).

Judge Farrell delivered the opinion of the court. Rev. Lipscombe appealed the trial court's denial of a motion to dismiss for lack of subject matter jurisdiction. The court affirmed.

Crudup's complaint alleged that Rev. Lipscombe falsely stated at a public event that a sexual harassment suit was pending against Crudup. Crudup further alleges that Rev. Lipscombe made the claim to deflect mounting pressure from an investigation into his possible misuse of church funds. Reverend Lipscombe asserted that Crudup's complaint did not allege with sufficient specificity to overcome the First Amendment's protection of his statements given his clergy status.

The court, acknowledging Rev. Lipscombe's liability for defamation would surmount his protected role if the statements were made with malice, stated that Crudup's complaint was specific enough to withstand a motion to dismiss. In conclusion, the court noted its role to exercise jurisdiction over the secular matters of the church and let alone the religious doctrine. Reverend Lipscombe's actions were secular and not protected by the court's constitutional bar against inquiring into religious matters.

Notes:

6) *Harding v. District of Columbia Office of Employee Appeals*, 2005 D.C. App. LEXIS 636 (D.C. 2005).

Judge Schwelb wrote the opinion affirming the lower court's determination to uphold the decision of an Administrative Law Judge. The plaintiff was terminated from his position with the defendant pursuant to a RIF. The plaintiff argued that the RIF was invalid because the defendant did not give the plaintiff the required 30 days notice that his position was being eliminated. The ALJ found that the defendant committed a harmless error by not giving plaintiff 30 days notice, and awarded plaintiff damages in an amount equal to the

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pay he would have received had the defendant given proper notice. The plaintiff appealed the decision seeking invalidation of the RIF. The Court found that the defendant's failure to give proper notice was a harmless error and upheld the ALJ's award finding that it was a sufficient remedy for defendant's failure to give adequate notice.

Notes:

7) *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109 (D.C. 2005).

Judge Ferren wrote the opinion reversing the judgment of the trial court and remanding the case to determine if any material issue of fact remained. The landlord alleged that the tenant's unclean and unkempt apartment created a health and safety hazard. The tenant argued that the condition of the apartment was the result of her mental impairment and therefore she was entitled to reasonable accommodation under the FHA. The court held that the "health and safety" exception to the reasonable accommodation requirement of the FHA can only be applied after a factual inquiry has determined that no accommodation could sufficiently ameliorate the health and safety concerns. The court found that the trial court had erred by not allowing any inquiry into whether any reasonable accommodation could be made based on the facts.

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8) *McCamey v. D.C. Dep't of Empl. Servs.*, 886 A.2d 543 (D.C. 2005).

Judge Schwelb delivered the opinion of the court. Petitioner employee appealed the ruling of respondent Director of the DC Department of Employment Services denying her request for worker's compensation benefits for emotional injuries under D.C. Code Ann. § 1-623.02 (2001); petitioner claims that the application of the "objective" test was inapposite.

McCamey sustained injuries to her lower back, neck, and forehead when a table she was moving collapsed. As a result, she suffered severe headaches, depression, panic attacks, confusion, auditory hallucinations, and memory loss. McCamey had a "pre-existing psychosis" that was exacerbated by the injuries.

The court affirmed the panel's ruling. Although McCamey 1) presented substantial evidence of a cognizable injury; 2) the injury happened in the course of employment; she did not qualify for worker's compensation because 3) a "person of normal sensibilities with no history of mental illness would have suffered a similar psychological injury." This "objective" test may not be overruled except by the court sitting *en banc*.

Notes:

9) *McGregor v. Grimes*, 884 A.2d 605 (D.C. 2005).

Judge Steadman wrote the opinion affirming the lower court's grant of summary judgment for the defendant. The plaintiff brought a claim for damages stemming from a workplace accident caused by defendant/fellow employee's negligence under the D.C. Workers Compensation Act. Both plaintiff and defendant were employed by a Maryland employer, and plaintiff was injured while working on a job site in the District of Columbia. The plaintiff collected

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compensation from the employer under the Maryland Worker's Compensation Act, and then sought to also collect from the employee. Because the accident occurred in D.C. the action was under the DCWCA which has an exclusivity provision that prevents an injured employee from collecting from both the employer and the employee who caused the injury. The plaintiff argued that the DCWCA did not apply because the company and the employees were from Maryland which allows an injured worker to collect from both the employer and the negligent employee. The Court held that the DCWCA did apply, and therefore because the plaintiff had already collected benefits from the employer he was not entitled to sue the defendant as well.

Notes:

10) *Artis-Bey v. District of Columbia*, 884 A.2d 626 (D.C. 2005).

Judge Ruiz wrote the opinion reversing the lower court's grant of summary judgment to the defendant. The plaintiff brought a claim alleging that he had been beaten by guards while a prisoner in the D.C. jail. The lower court granted summary judgment to the defendant on the grounds that the plaintiff did not exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA). The Court found that the plaintiff made an effort to pursue his claims through the proper administrative channels but his efforts were ignored by the defendant. The Court held that the plaintiff's efforts "substantially complied" with the PLRA requirement that the plaintiff exhaust all administrative remedies before bringing a civil suit.

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11) *Oparaugo v. Watts*, 884 A.2d 63 (D.C. 2005).

Judge Wagner delivered the opinion of the court. Plaintiff husband appealed the trial court's dismissal for failure to state a claim his defamation action against his wife and other defendants.

Oparaugo and his wife had a rocky marriage. His wife and her attorneys drafted a letter to influential Nigerians. Oparaugo sued for defamation.

A plaintiff must prove four elements to establish defamation: 1) that the defendant made a false and defamatory statement concerning the plaintiff; 2) that the defendant published the statement without privilege to a third party; 3) that the defendant's fault in publishing the statement amounted to at least negligence; and 4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. The court held that Oparaugo sufficiently stated his claim to overcome a motion to dismiss for failure to state a claim. The case was reversed and remanded for further facts.

Notes:

12) *District of Columbia v. District of Columbia Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005).

Chief Judge Washington wrote the opinion reversing the judgment of the trial court. The trial court held that the dismissal of civilian appellee from the police department violated administrative law because the action was not taken within 45 days of the conclusion of a criminal investigation. The trial court determined that the 45 days began to toll when the Inspector General issued his report. The court found that the trial court's interpretation of the language of the statute was in error and that "conclusion of a criminal investigation" must involve action taken by an entity with the authority to prosecute which the Inspector General did not have.

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13) *Jung v. George Wash. Univ.*, 883 A.2d 104 (D.C. 2005).

The court granted a rehearing to amend its opinion in 875 A.2d 95 (D.C. 2005) to include a footnote dealing with a recent change in the distinction between direct and circumstantial evidence. The court found that the change did not affect the outcome of the original case and reaffirmed its holding that "remarks which are remote in time and unrelated to the decisional process, even when uttered by a decision maker, are insufficient to support a claim of discrimination."

Notes:

14) *Pierce v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 882 A.2d 199 (D.C. 2005).

Judge Ruiz wrote the opinion of the court, in which Judge Farrell and Judge Glickman joined. Petitioner Pierce sought review on the decision made by the D.C. Police & Firefighter's Retirement & Relief Board ("the Board"), which held that although Pierce suffered from a permanent mental disability, she is not

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entitled to the more generous benefit package because such injury was not incurred on the job. The D.C. Court of Appeals affirmed the Board's findings.

Petitioner claimed that she had endured a hostile work environment due to humiliation and embarrassment suffered at the hands of her supervisor. The events of harassment, according to petitioner, resulted in a diagnosis of severe depression, and she was placed on sick leave. He psychologist diagnosed her with Major Depressive Disorder, Severe Single Episode. An attempt to return to work proved futile, and a determination was made that her illness was incurred in performance of her duties. She requested disability retirement, where it was determined that she had incurred her illness not in the performance of duty, and thus was not able to receive the more generous retirement benefits.

The court articulated the Board's burden shifting framework, in which a person seeking to be classified as incurring illness while on duty has the initial burden. After substantiating a claim that an illness was incurred on duty, the burden shifts to the government, which then must submit evidence which tends to show that the disability arose from off duty activities. Here, the court noted that petitioner met her initial burden. The government, relying on petitioner's personnel file, proffered evidence that questioned whether the alleged incidents of harassment had ever occurred. The court held that claims of harassment must be proven and that they were in excess of normal workplace quarrels. Because no evidence existed confirming the occurrence of such events, and because petitioner's diagnosis was in large part a result of such allegations, the Board concluded that petitioner's illness was not the result of on duty injuries. Such evidence shifted the burden back to petitioner, who failed to meet adequately convince the Board that the disability was due to injuries suffered while on duty.

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15) *D.C. Hous. Auth. v. D.C. Office of Human Rights*, 881 A.2d 600 (D.C. 2005).

Judge Glickman wrote the opinion affirming the lower court's decision to uphold the determination of the Department of Human Rights that the Department of Public and Assisted Housing discriminated against plaintiff/employee on the basis of age and national origin. The Court found that plaintiff established a prima facie case that he was discriminated against when the defendant passed him over for a promotion in favor of two workers from Africa. Further, the Court held that because defendant's non-discriminatory reason for passing over plaintiff was found to be false it was rational for the trier of fact to presume that discrimination occurred. Therefore the lower court was correct in finding that the Department of Human Rights was justified in finding that defendant discriminated against plaintiff.

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16) *New Econ. Capital, LLC v. New Mkts. Capital Group*, 881 A.2d 1087 (D.C. 2005).

Judge Reid delivered the opinion of the court. Plaintiff consultant appealed the trial court's grant of summary judgment to defendant equity fund firm on plaintiff's breach of contract and quantum meruit claims.

Plaintiff said that she provided consulting services to defendant and sued for $241,000 although no written or oral agreement was reached regarding plaintiff's fee.

The court upheld the trial court's ruling on the breach of contract claim but reversed and remanded the quantum meruit claim. No contract existed between the parties; plaintiff never showed that a consensus was reached on the final terms of the contract. Indeed, for an enforceable contract to exist there must be 1) agreement as to all material terms; and 2) intent to be bound by those terms. Quantum meruit claims may be both quasi-contractual or implied-in-fact contracts and require four showings: 1) valuable services rendered; 2) for the person sought to be charged; 3) which services were accepted and enjoyed by the person sought

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to be charged; 4) under such circumstances as reasonably notified the person sought to be charged expected to be paid.

Notes:

17) *Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc.*, 875 A.2d 669 (D.C. 2005).

Judge Farrell wrote the opinion affirming the lower court's determination that the ministerial exception to the Free exercise clause of the First Amendment barred plaintiff's claim. Plaintiff brought a Title VII claim after being fired from her job as principal of a parochial school in Washington D.C. due to a policy of having only African American principals at inner-city schools. The court determined that because a parochial school principal's primary responsibility was to further the mission of the church the principal is similar to a minister and therefore is barred by the ministerial exception. The court found that the ministerial exception extended to plaintiff's good faith and fair dealing claims as well.

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18) *News World Communications., Inc. v. Thompsen*, 878 A.2d 1218 (D.C. 2005).

Judge Schwelb delivered the opinion of the court. Defendant employer appealed from the trial court's awarding to plaintiff employee of damages for unjust enrichment and the denial of a post-trial motion for judgment as a matter of law.

Thompsen approached NWC with an idea for developing a family magazine to be inserted with defendant's newspaper. NWC was initially excited by the idea, but later informed Thompsen that her idea would not be used and she would not continue working with NWC. Three years after her dismissal NWC ran a magazine Thompsen claims is similar to and based upon her work.

A claim for unjust enrichment must show that the defendant was unjustly enriched at the plaintiff's expense and the circumstances suggest that the defendant, in good conscience, should make restitution. The application of the statute of limitations to a claim of unjust enrichment was an issue of first impression for this court. The court decided that the statute of limitations for an unjust enrichment claim begins to run when the "plaintiff's last service had been rendered and compensation had been wrongfully withheld." Applying this to the instant case, the court reversed.

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19) *Psychiatric Inst. of Washington v. District of Columbia Comm'n on Human Rights*, 871 A.2d 1146 (D.C. 2005).

Petitioners, the Psychiatric Institute of Washington brought suit to review the decision of the District of Columbia Commission on Human Rights. The Commission had awarded a former employee of petitioner $900,000 in compensatory damages stemming from a sexual harassment claim. Here, the court affirmed the decision of the Commission.

The court first reviewed the Commission's decision regarding the former employee's sexual harassment claim, filed under the District of Columbia Human Rights Act, *D.C. Code Ann. § 2-1401.01* (2001). Petitioner argued that the

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Commission should not have taken the employee's claims of retaliation into consideration when determining compensatory damages, as petitioner had stipulated to sexual harassment. The Commission disagreed. It found that the employee had been the subject of sexual discrimination, and as a result, suffered from a major depressive disorder. The Commission awarded the employee $700,000 in damages for the permanent mental disorder, $50,000 for embarrassment resulting from the sexual harassment, and $150,000 for the retaliatory conduct on the part of the employer.

The court next reviewed the facts. Ric Birch, a homosexual and former employee of petitioner, was the subject of consistent sexual harassment at the hand of his supervisor, Brenda Harris. Harris repeatedly made lewd sexual remarks over the phone to Birch during work hours, physically harassed Birch at his desk, and made inappropriate comments concerning homosexuals in general. Birch reported this behavior to Debbie Draper, Harris' supervisor, who then referred Birch to Marie O'Donnell, the Director of Human Resources. After complaining to Draper and O'Donnell, Harris' attitude became more intense and critical towards Birch. She made frequent, unannounced changes to his work schedule and also embarrassed him in front of co-workers. Such treatment contributed to Birch's eventual mental state.

Petitioner argued against the Commission's use of such retaliatory conduct in determining a damage award, as well as the $700,000 reward given for non-physical injuries. It argues that such actions should be considered under a separate claim. The court disagreed, saying "all adverse conduct is relevant so long as it would not have taken place but for the gender of the victim." *Psychiatric Inst. of Washington*, 871 A.2d at 1151. The court determined that for a sexual harassment claim to succeed, the conduct in question does not necessarily have to be sexual. Finding that one must examine the entirety of the behavior involved, the court concluded the Commission did not err in considering the retaliatory conduct. Concerning the damage award, the court found that there is no sliding scale which to follow in these situations. However, the guidelines of the Commission require that awards for mental and physical anguish have foundations in medical examination. The court here was satisfied by the findings that Birch suffered from a major depressive disorder and that such a condition, in this case, was permanent. The ruling of the Commission was sustained.

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20) *Shore v. Groom Law Group*, 877 A.2d 86 (D.C. 2005).

Judge Terry wrote the opinion affirming the lower court's decision not to reconsider an arbitration award. The plaintiff, in accordance with her employment agreement, voluntarily submitted to an arbitration of her claims of discrimination against defendant, her former employer. The arbitration awarded the plaintiff one month's back pay and other severance pay, significantly less that plaintiff asked for. The court found that the lower court was correct in refusing to review the arbitration award and that the plaintiff was not protected by Title VII from being fired for bad-mouthing her employer to a client.

Notes:

21) *Sacco v. United States*, 63 Fed. Cl. 424 (D.C. 2004).

Judge Williams wrote the opinion granting the defendant's motion to dismiss for lack of jurisdiction. Plaintiffs brought action under the Back Pay Act against their respective agencies of the United States for attorney's fees they accrued when fighting adverse employment actions before the Merit Systems Protection Board (MSPB). The Court found that although the Tucker Act authorized suits against the government for monetary damages it requires a separate statute authorizing damages for the alleged governmental wrongdoing. The Court held that the Civil Service Reform Act gave jurisdiction to claims under the Back Pay Act to the MSPB. Therefore the Court did not have jurisdiction for the plaintiff's claims.

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United States Court of Appeals for the Fourth Circuit

1) *Warch v. Ohio Casualty Ins. Co.*, 2006 U.S. App. LEXIS 2242 (4th Cir. 2006).

Judge Traxler wrote the opinion, in which Judge Motz and Judge Shedd joined. Petitioner Warch alleged discrimination based on age when his employer, Ohio Casualty Insurance, Co. ("OCIC"), terminated his employment. The U.S. District Court of Maryland granted summary judgment in favor of defendant, which the Fourth Circuit confirmed.

Warch was fired from OCIC on April 26, 2002, at the age of 59. Prior to his termination, he had consistently received negative reports from supervisors regarding his performance, beginning at least as far back as 2000. In 2001, Warch was put on six months probation by OCIC, and was required to take action to produce a more acceptable work product. Because he did not adequately improve his performance, his probation was extended. Following his termination in April 2002, Warch filed suit under the Age Discrimination in Employment Act, asserting that OCIC's reason terminating him amounted to pretext for age discrimination, and a mixed motive claim alleging that age was a motivating factor in his determination.

The court denied Warch's mixed motive claim, finding that no genuine dispute of material fact existed, based on circumstantial or direct evidence, that age contributed in any way to OCIC's decision to terminate his employment. Addressing Warch's pretext claim, the court followed the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which provides that a plaintiff alleging an improper employment action must show that such action was pretext for discrimination. Warch argued that he should only be required to show that he was qualified for the job in which he was hired, not that he failed to meet his employer's expectations. Otherwise, he claimed, the second stage of the *McDonnell-Douglas* frame work would be destroyed. The Fourth Circuit disagreed, holding that when an employer terminates a current employee, the decision is more likely to be focused on factors such as job performance an other aspects of employment. The court also held that when an employee is

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terminated for unsatisfactory job performance, the employer may introduce evidence illuminating the scope of expectations, and that the employee failed to meet them. Discussing the flexibility of the *McDonnell-Douglas* framework, the court noted that an employee is free to assert that the expectations themselves are illegitimate.

The court concluded by examining evidence presented to determine whether Warch had met the legitimate expectations of OCIC. Finding that Warch had failed to establish that he had met or exceed the legitimate expectations of OCIC, and that he failed to demonstrate that such expectations were pretextual, the court granted OCIC's motion for summary judgment.

Notes:

2) *Doe v. Chao*, 2006 U.S. App. LEXIS 1668 (4th Cir. 2006).

Judge Williams wrote the opinion affirming and reversing in part the decision of the lower court. Plaintiff brought a claim for attorney's fees and costs for his suit against the government for violations under the Privacy Act. Plaintiff was part of a group seeking damages under the government's use of social security numbers of Black Lung benefit claimants. In his suit against the Secretary of Labor for emotional distress due to violations of the Privacy Act plaintiff was awarded no damages because he was unable to prove any actual harm from the violation. The lower court found that the Privacy Act did allow plaintiffs to recover attorney's fees and costs even if they were not awarded damages as long as they could show "an adverse effect cause by an intentional or willful act." The Fourth Circuit found that this was a correct interpretation of the Privacy Act, and that the plaintiff had shown that he was adversely affected by the government's willful release of his social security number. The Court concluded that the lower court was correct in awarding attorney's fees and cost. However, the Court held that the lower court had abused its discretion in awarding the plaintiff an unreasonable fee and remanded the case for a recalculation of the award.

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3) *Baqir v. Principi*, 2006 U.S. App. LEXIS 1376 (4th Cir. 2006).

Judge King wrote the opinion affirming the lower court's grant of summary judgment to the defendant. The plaintiff brought a claim of discrimination under Title VII and a claim of age discrimination under the ADEA. The plaintiff, a doctor, claimed that the defendant had discriminated against him because he is a Pakistani Muslim and because of his age. The lower court granted defendant's motion for summary judgment finding that the plaintiff's on the job performance did not meet the legitimate expectations of the defendant employer. The Fourth Circuit affirmed the judgment of the lower court finding that the plaintiff did not satisfy the third prong of the *McDonnell-Douglas* discrimination test because his performance did not meet the legitimate expectations of his employer. The Court found that the plaintiff did make out a prima facie case of age discrimination under the ADEA, but that the evidence of age discrimination was irrelevant because plaintiff was legitimately discharged for poor performance.

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4) *Heiko v. Colombo Savings Bank*, 2006 U.S. App. LEXIS 523 (4th Cir. 2006).

Judge Wilkinson wrote the opinion affirming, reversing and remanding in part. The plaintiff brought a claim of failure to promote and constructive discharge under the ADA against his former employer after being passed over for a promotion. Plaintiff suffered from end-stage renal disease that required him to undergo dialysis three afternoons a week. Plaintiff was passed over for a promotion, and was told that the position required a significant time commitment that he would be unable to meet in his "situation."

The District Court granted defendant's motion for summary judgment finding that elimination of bodily waste is not a major life activity and therefore plaintiff was not disabled under the ADA. The Fourth Circuit reversed, holding that waste elimination is a major life activity and therefore plaintiff was disabled under the ADA. Furthermore, the court found that the plaintiff was "discernibly better qualified" for the promotion than the person who did receive the position and therefore there was no non-discriminatory basis for defendant's decision. The Court reversed the lower court's grant of summary judgment on plaintiff's ADA discrimination claim, but affirmed the grant of summary judgment on plaintiff's constructive discharge claim.

Notes:

5) *Stone v. Duke Energy Corp.*, 2005 U.S. App. LEXIS 27415 (4th Cir. 2005).

Judge Niemeyer wrote the opinion reversing the lower court's dismissal of plaintiff's claim for lack of subject matter jurisdiction. The plaintiff filed a claim under the whistle-blower protection provisions of the Sarbanes-Oxley Act alleging that his employer had retaliated against him for filing complaints of potential corporate fraud. The plaintiff filed an administrative complaint with the Department of Labor and then a civil complaint with the district court. The district court dismissed plaintiff's claim for lack of jurisdiction when the

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Secretary of Labor issued findings and a preliminary order suggesting the defendant had not violated the Sarbanes-Oxley Act. The district court believed the preliminary order to be a "final decision" that required plaintiff to appeal directly to the Court of Appeals. The Fourth Circuit found that the district court erred in construing the preliminary order as a final decision, and that jurisdiction had vested in the district court prior to the preliminary order because plaintiff filed his civil complaint before the Secretary of Labor issued his findings and preliminary order. The Court remanded the case for further proceedings.

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6) *Chacko v. Patuxent Inst.*, 429 F.3d 505 (4th Cir. 2005).

Judge Wilkinson wrote the opinion reversing the lower courts denial of defendant's motion for judgment as a matter of law. The plaintiff brought a claim under Title VII after taking his claim to the EEOC and receiving a right to sue letter. The EEOC found the plaintiff had been discriminated against by his employer because of his national origin. At trial the jury returned a verdict for the plaintiff in the amount of $1.16 million. Based on Title VII damage caps the district court reduced the damages award to $300,000. The defendant moved for JMOL claiming that much of the evidence of harassment by fellow employees and ethnic slurs was not raised at the EEOC haring and therefore could not be used as the basis for the civil lawsuit. The trial court denied defendant's motion. The Fourth Circuit found that the lower court erred in not granting the motion. The Court found that Title VII requires a plaintiff to exhaust administrative remedies before pursuing civil suits. In this case the court found that many of the facts used by the plaintiff in his civil case were different from the facts relied on in his EEOC proceeding therefore they were too vaguely connected to the EEOC finding of discrimination. The Court found that the plaintiff had not exhausted his administrative remedies in respect to the allegations he made at trial and therefore reversed the lower court's denial of defendant's motion for JMOL.

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Notes:

7) *Colucci v. AGFA Corp. Severance Pay Plan*, 431 F.3d 170 (4th Cir. 2005).

Judge Niemeyer wrote the opinion reversing and remanding the judgment of the lower court. The plaintiff brought a claim under ERISA against his former employer challenging the calculation of severance benefits awarded to him by the plan administrators. The plaintiff worked for the defendant for 17 years and then voluntarily quit to work for another employer. After three months the plaintiff returned to work for the defendant. Two years after plaintiff rejoined defendant he was terminated. According to defendant's severance pay plan plaintiff was entitled to severance pay based on the amount of time he worked for defendant calculated from his "first day of employment." The administrators calculated plaintiff's benefits from the day he rejoined the company, not from his original hire day 19 years previous.

The trail court found the language of the plan to be unambiguous and instructed the plan administrators to calculate plaintiff's severance pay based on his original hire date. The Fourth Circuit reversed the lower court's decision finding that the language of the plan was ambiguous, and that the plan granted the plan administrators broad authority to interpret ambiguities. The Court ruled that the plan administrators did not err in interpreting the language of the plan and remanded the case.

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8) *Miles v. Dell Inc.*, 429 F.3d 480 (4th Cir. 2005).

Judge Luttig wrote the decision vacating and affirming in part. The plaintiff brought a Title VII discrimination claim alleging sex discrimination, pregnancy discrimination, and retaliation. Plaintiff alleged that her work supervisor tried to have her fired and reduced her work responsibilities because she was pregnant. She also alleged that her employer retaliated against her when she reported the harassment of her supervisor. One year after delivering her child plaintiff was fired.

The trial court granted defendant's motion for summary judgment on all three claims finding that plaintiff failed to establish a prima facie case of discrimination because she was replaced by another woman. The Fourth Circuit overturned the lower court and created an exception to the fourth prong of the *McDonnell-Douglas* test. The Court held that when the firing of the plaintiff was done by a different decision-maker than the hiring of the new employee the fact that the new employee is of the same protected class as the fired employee is not proof of non-discrimination. Applying the new different decision maker exception the court reversed the trial court's grant of summary judgment in respect to plaintiff's sex and pregnancy discrimination claims, and affirmed the grant of summary judgment in respect to plaintiff's retaliation claim.

Notes:

9) *Taylor v. Federal Express*, 429 F.3d 461 (4th Cir. 2005).

Judge Motz wrote the decision in which Judge Traxler and Judge Shedd joined. The Fourth Circuit upheld the district court's grant of summary judgment to the defendant on plaintiff's ADA reasonable accommodation claim. Plaintiff, a courier, brought a claim after defendant employer discontinued benefits and required plaintiff to return to work as a courier or take a leave of absence. The court found that a lifting restriction that disqualified an individual with back pain

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from 1,871 kinds of jobs was not a significant limitation on the major life activity of working. The court noted that there were 130,000 jobs in plaintiff's area that he could perform and therefore defendant was not required to make a reasonable accommodation to allow plaintiff to continue working as a courier.

Notes:

10) *Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392 (4th Cir. 2005).

Judge Widener delivered the opinion, in which Judges Motz and Payne concurred. In this non-employment case, plaintiff moved to compel arbitration and the district court denied said motion on the ground that the plaintiff was a non-signatory to the arbitration agreement and therefore could not enforce it.

Notes:

11) *Varghese v. Honeywell Int'l Inc.*, 424 F.3d 411 (4th Cir. 2005).

Judge Gregory wrote the opinion reversing, affirming, and remanding in part. The plaintiff brought a claim under the Maryland Wage Payment and Collection Law alleging that the defendant failed to pay him vested stock options upon his voluntary termination. Plaintiff took a one year leave of absence from

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his employment with defendant to pursue an advanced degree. Before beginning his leave plaintiff was informed that defendant would make an effort to employ him upon completion of his degree, but could not guarantee him a position. Upon completion of his degree plaintiff sought employment with defendant but was not offered a position. Plaintiff then voluntarily resigned. After his termination plaintiff tried to exercise the discretionary stock options he had earned during his employment with defendant. Defendant refused to allow plaintiff to exercise these options claiming that they were not wages, and that they had expired because plaintiff had failed to exercise them in the requisite 90 days.

The district court found that the stock options were wages and at trial the jury returned an award of $337,000 for the plaintiff and pursuant to the MWP&CL the court enhanced this award. The Fourth Circuit reversed the judgment of the court and vacated the jury award. The Court found that for compensation to be a wage under the MWP&CL it must be a promised as remuneration for the labor of the plaintiff. In this case the stock options were not promised compensation to the plaintiff. His work had made him eligible to exercise the options, but they were not compensation for the work he had performed for the defendant. The court held that because the stock options were not wages they were not subject to the recovery and enhancement provisions of the MWP&CL.

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12) *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397 (4th Cir. 2005).

Judge King delivered the opinion, in which Judge Gregory and Senior Judge Hamilton joined. The district court granted summary judgment to the employer on the grounds of laches as well as on the ground that its claim of retaliation was insufficient. The court found sufficient evidence that the employee, on whose behalf EEOC sued, had a reasonable belief that certain actions of the employer violated Title VII. In this case, the employee attended a meeting where a supervisor, after another employee had filed a discrimination complaint, stated that she would "get [the complaining employee] on principle."

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Thereafter, the employee participated in a conference call in which the employer's lawyer suggested that the employer "just fire the bitch." The lawyer went further in the conference call to advise that an unfavorable evaluation of the complaining employee could potentially support a retaliation complaint. Thereafter a plan was put in place to engage in heightened surveillance of the complaining employee and to write a misleading performance evaluation. The employee on whose behalf EEOC sued objected to the heightened surveillance and refused to sign the misleading evaluation. The court found that this constituted "protected activity" as she could reasonably believe that she was opposing unlawful retaliation. On the laches issue which the district court relied upon as an alternative ground for summary judgment, the Fourth Circuit found that the district court erred in imputing the actions/delay by the Fairfax County Human Rights Commission to the EEOC on the ground that the FCHRC is neither the agent nor alter ego of EEOC.

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13) *Provident Life and Acc. Ins. Co. v. Cohen*, 423 F.3d 413 (4th Cir. 2005).

Judge Traxler wrote the opinion affirming and reversing in part the lower court's decision. Plaintiff, an insurance company, brought an action against the defendant insured for recovery of disability benefits paid under a theory of unjust enrichment, and a declaration that the policy was void because of defendant's fraud. The plaintiff brought the action after discovering that the defendant's health had improved, and that the defendant was working for his son despite his claim that he was unable to work. The defendant filed a counter-claim for reinstatement of his disability benefits, or residual disability benefits. The Court found that the lower court was correct in denying defendant's counter-claim because his work for his son demonstrated that he was not totally disabled. However, the Court reversed lower court's declaration that the policy was null and void due to the defendant's misrepresentation of his health status. The Court

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found that the plaintiff's claim of unjust enrichment failed because the defendant did not fraudulently induce plaintiff into entering the contract, rather, defendant's misrepresentations occurred after the policy was issued. The court also found that the plaintiff's claim could not be sustained under ERISA because declaratory relief is not an explicitly authorized form of relief.

Notes:

14) *Mudd v. Barnhart*, 418 F.3d 424 (4th Cir. 2005).

Judge Michael wrote the opinion affirming the district court's award of attorney fees to appellee's attorney. Appellant, the Commissioner of Social Security, appealed the decision of the district court to grant appellee's attorney his contingent fee of 25 percent of past-due Social Security benefits awarded. The appellant argued that the district court was wrong to consider the work done by appellant's attorney at the administrative level of the proceedings.

The Fourth Circuit found that a contingent fee of 25 percent is standard in Social Security cases. The district court is not authorized to make awards for work done at the administrative level, only for court-related work. When considering whether or not the contingency fee collected by appellee's attorney was a "windfall" the district court considered the time spent on the case at the administrative level. The court found that this was not an error because the district court considered the work done at the administrative level only to better understand the complexity of the work done by the attorney. The Fourth Circuit ruled that the district court had correctly limited the award to work done at trial therefore the contingency fee was upheld.

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15) *Nye v. Roberts*, 145 Fed. Appx. 1 (4th Cir. 2005) (per curium).

A panel of Judges Williams, Michael and Duncan held that a reprimand letter and a subsequent performance evaluation, in the context of the defendant's progressive disciplinary system, could result in a material change in the plaintiff's employment status, such that a reasonable jury could conclude that they amounted to a tangible, adverse consequence for the plaintiff. So finding that an "adverse employment action was present, the court reversed the lower court's grant of summary judgment on her retaliation claim.

Notes:

16) Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005).

Judge Wilkinson delivered the opinion, in which Chief Judge Wilkins and Judge Gregory joined. This was a Title VII racial discrimination case against the CIA in which the court concluded that the case would require disclosure of highly classified information concerning the identity, location, and assignments of CIA operatives, and thus the claim was barred by the "state secrets doctrine."

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17) *Carolina Power and Light Co., v. Dynegy Mktg. and Trade*, 415 F.3d 354 (4th Cir. 2005).

Judge Niemeyer wrote the opinion regarding an appeal from a lower court decision awarding damages to the appellee. Appellee filed a breach of contract claim in the district court when appellant refused to buy coal from appellee as required by their contract. Appellant argued that changes to appellee's financial situation made it impossible for them to provide all incentives provided in the contract and therefore the contract was void. The trial court found for the appellee and awarded them $10 million in damages according to the liquidated damages provision of the contract. Appellee also sought damages under the legal costs provision of the contract, but the trial court reserved that issue for a later date. 31 days after the trial court awarded damages to appellee the appellant filed an appeal of the decision. The appellee argued that the appeal was untimely under Fed. R. App. P. 4(a)(1)(A) which required all appeals to be filed within 30 days of the final judgment. The appellant argued that the lower court's award of damages was not a final judgment because the court had not yet resolved the issue of legal cost. The Fourth Circuit found for the appellant and held that the appellee's claim for legal cost was a substantive, on-contract claim, and that a decision that leaves open such a claim is not a final decision and therefore not appealable under Fed. R. App. P. 4(a).

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18) *Taylor v. Progress Energy*, 415 F.3d 364 (4th Cir. 2005).

Judge Michael delivered the opinion, in which Judge Duncan and District Judge Payne joined. The employee in this FMLA case signed a severance agreement and release which purported to release any and all claims against the employer, without specifically mentioning FMLA claims. The release did include a catch all category for all claims based on federal laws. After signing the release, plaintiff sued under the FMLA, and did not return some $12,000 that she had received pursuant to the severance agreement. The employer filed a motion for summary judgment, arguing that the release was valid and foreclosed any claim by plaintiff under the FMLA. Plaintiff contended that 29 C.F.R. § 825.220(d) barred enforcement of the release insofar as her FMLA claims were concerned. The aforesaid regulation provides that "employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." The Fourth Circuit held that the aforesaid regulation prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the DOL or a court. The Fifth Circuit in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (2003) has held that the regulation prohibits only the prospective waiver of substantive FMLA rights. The court, using the *Chevron* 2-step deferential review, approved of the regulation. In doing so, the court rejected the argument that such a holding would cast doubt on its decision in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997) in which the court held that a general arbitration clause in an employment agreement applied to FMLA claims. The court stated that an agreement to submit a claim to arbitration is entirely different from an agreement to waive a claim, thus distinguishing *O'Neil*. The court also rejected the employer's argument that the employee's retention of the consideration, the some $12,000, constituted a ratification of the release, saying that an FMLA claim is not waivable by agreement nor is it waivable by ratification.

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19) *Chao v. Rivendell Woods, Inc*., 415 F.3d 342 (4th Cir. 2005).

Judge Motz delivered the opinion of the court reversing the district court's dismissal of plaintiff's claim and remanding for further proceedings. Plaintiff, Secretary of Labor, sued defendants for alleged violations of overtime and record keeping provisions of the FLSA. The district court granted defendants motion to dismiss for failure to state a claim.

The Fourth Circuit found that the plaintiff's complaint sufficiently established that defendant is an employer covered by the FLSA. It also sufficiently identified the employees who were alleged to have worked overtime without the time-and-one-half pay required by the Act. Plaintiff's complaint described both the specific time period and manner of the alleged violations and therefore it satisfied the requirements of FRCP 8(a). The district court erred in dismissing for failure to state claim.

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20) *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005)

Judge Wilson wrote the opinion affirming the district court's refusal to quash a grand jury subpoena requesting documents from AOL for an SEC investigation. The appellants were employees of AOL. AOL conducted an investigation into the actions of appellants in respect to AOL's business relationship with PurchasePro, Inc. Shortly after AOL began its internal investigation the SEC also began investigating transactions between AOL and PurchasePro. AOL's investigation included interviews with the appellants conducted by the general counsel to AOL and attorney's AOL retained from local law firms. A grand jury in the SEC investigation issued a subpoena for AOL's records of the interviews. AOL waived its attorney-client privilege regarding the interviews, but the appellants moved to quash the subpoena on the grounds that they had an attorney-client relationship with the attorneys conducting the interviews, and, alternatively, that AOL the documents were protected from subpoena because the appellants and AOL had a common interest agreement with AOL.

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The Fourth Circuit found that the district court was correct to refuse to grant the motion to quash the subpoena. The Court found that the interview transcripts showed that the appellants were informed before the interviews that the attorneys represented AOL, and that AOL retained the attorney-client privilege in respect to the interviews. The Court found that the appellants could not have reasonably believed that the investigating attorney's personally represented them in light of these statements. The Court also found no evidence that a common interest agreement existed between AOL and the appellants prior to the interviews therefore the interviews were not protected by joint defense privilege.

Notes:

21) *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005).

Senior Judge Hamilton delivered the opinion, in which Judges Motz and Gregory joined. The Fourth Circuit vacated and remanded the district court's judgment with instructions to grant the employer's motion to compel arbitration of the employee's discrimination claim. The issue was whether the arbitration agreement was a valid contract under Maryland law, particularly the question whether it was supported by consideration. The employee argued that there was no consideration because the promise to arbitrate was illusory as the employer had reserved the right to change the program "without notice." The employee argued that the reservation of right to change allowed PeopleSoft to eliminate the arbitration altogether and thus rendered its promise to arbitrate illusory. The court distinguished this case from *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003) on the ground that the reservation of rights in *Cheek* was contained in the arbitration policy itself. Thus, in *Cheek*, looking at the four corners of the arbitration policy, the Maryland court concluded that the policy was an illusory promise; whereas here looking at the four corners of the arbitration agreement, the agreement contained no such illusory promise, the reservation of rights being in a separate document, the Internal Dispute Solution program documents. *Cheek* held that, in determining whether the contract is illusory, the court is to look within the four corners of the arbitration agreement and is not

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allowed to review other documents like the IDS program here. In a footnote, the court rejected the employee's procedural and substantive unconscionability arguments as well as an argument that PeopleSoft had waived its right to arbitration.

Notes:

22) *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643 (4th Cir. 2005).

Judge Gregory wrote the opinion reversing the decision of the district court granting defendant's motion for summary judgment. Plaintiff retirees brought a claim of additional pension benefits under ERISA. The district court found that the plaintiffs claim was barred by res judicata and by its determination that the Plan Administrator had correctly calculated the benefits of all plan participants.

The Fourth Circuit found that the trial court had erroneously applied a more liberal standard of virtual representation than the court espoused. Under the correct virtual representation standard the plaintiffs were not barred from bringing their suit even though a previous employee had litigated the same issue because they did not give their tacit approval to being represented by the other employee in his suit. Without this approval there was no identity between the parties and therefore no virtual representation. The court remanded the case for further determination on whether the benefits were properly calculated by the Plan Administrator.

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23) *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005).

Judge Widener wrote the opinion wherein the Fourth Circuit affirmed the District Court's grant of summary judgment to defendant on plaintiff's two Title VII and § 1981 claims of promotion and compensation disparate impact based on race, and reversed in part the District Court's refusal to certify the class. The court found that the District Court did not abuse its discretion by excluding expert opinion under FRE703 that used EEO categories instead of actual job categories and a Department of Energy report that the district court found was hearsay under FRE803(8). Plaintiff did not establish a prima facie case because evidence of causation was excluded, evidence did not include performance at interviews, or any discussion of experience and education. Plaintiff did not establish that use of other criteria was pretextual. Plaintiff lacked standing and was not adequate to represent the class because summary judgment was granted as to the disparate impact pay and her promotion claims. Case remanded to remain on district court calendar for a reasonable period of time to allow a new representative plaintiff to pursue.

Notes:

24) *Garofolo v. Donald B. Heslep Associates, Inc.*, 405 F.3d 194 (4th Cir. 2005).

Judge Duncan delivered the opinion in which Judges Niemeyer and Michael joined. The Fourth Circuit affirmed the district court's award of summary judgment to the defendant employer in this FLSA overtime case, finding that the plaintiff's were fully compensated under the terms of a reasonable employment agreement between the employee and the employer. The employees lived at the worksite. They had agreed to maintain and be compensated based

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upon, a 40 hour schedule per week. Plaintiffs argued that they regularly worked more than 40 hours per week and that accordingly the agreement was unreasonable. The plaintiffs submitted time charts that they had created after the fact which estimated their time, estimates which included every hour that the employer's facility was open for business. The court found that the estimates failed to address the presumption contained in 29 C.F.R. § 785.23 that employees living on a worksite were not working the entire time that they were on the premises.

Notes:

25) *J.G. Furniture Group v. Great West Life and Annuity Ins. Co.*, 405 F.3d 191 (4th Cir. 2005).

Judge Luttig wrote the opinion affirming the district court's judgment which upheld a bankruptcy court's order that insurer's claim against the plaintiff be given priority status under 11 U.S.C.S. § 507(a)(4). The insurance company managed the plaintiff's employee benefit plan. Plaintiff closed its operations in Pennsylvania, and several employees then submitted COBRA forms to continue medical insurance. Plaintiff then filed for Chapter 7 bankruptcy. Plaintiff claims that it does not owe insurer money for healthcare costs accrued by employees who filed for COBRA coverage because they were not employees for the 180 days preceding the bankruptcy filing. The court rejected this argument on the grounds that § 507(a)(4) gives priority for services rendered in the 180-day period, whether or not the services were to current employees. The insurer did provide healthcare and administrative services during the 180 days preceding the bankruptcy therefore their claim does receive § 507(a)(4) priority.

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26) *Mercer v. Goldsmith*, 401 F.3d 199 (4th Cir. 2005).

Judge Traxler wrote the opinion affirming the lower court's grant of attorney's fees. The plaintiff brought a Title IX discrimination suit against the defendant for cutting her from the football team. At trial the plaintiff was awarded nominal damages and attorney's fees in the amount of $350,000. The defendant appealed the award of attorney's fees arguing that attorney's fees are only appropriate when one party prevails and that because plaintiff was only awarded nominal damages she cannot be seen as a prevailing party. The Court held that the plaintiff was the prevailing party even though she received only nominal damages. The court found that a party is found to have prevailed when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. That standard is satisfied by a judgment for damages in any amount, whether compensatory or nominal." The Court further stated that the issue of law presented by the plaintiff was not trivial and presented a new standard for the Title IX contact sports exception. Under the rule established at trial a university cannot prohibit women who have been allowed to participate in other contact sports from participating in all such contact sports. This new rule materially altered the legal relation ship between the two parties and therefore the plaintiff was the prevailing party and eligible for attorney's fees.

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27) *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo*, 123 Fed. Appx. 558 (4th Cir. 2005).

Judge Shedd delivered the opinion, in which Chief Judge Wilkins joined. Judge Niemeyer dissented. Plaintiff, an associate at the defendant law firm, was terminated for alleged poor performance. Plaintiff sued claiming under Title VII gender discrimination, sexual harassment and retaliation as well as a claim under the Equal Pay Act. The case went to trial on plaintiff's retaliation claim, and at the close of the evidence, the law firm moved pursuant to Rule 50 for judgment as a matter of law which was denied. The jury returned a verdict in plaintiff's favor. The district court denied plaintiff's claim for reinstatement and front pay. The law firm appealed the denial of its Rule 50 motion on the retaliation claim and plaintiff cross-appealed the dismissal of her punitive damages claim and the denial of her front pay claim.

The court disposed of the front pay claim in a footnote, concluding that the trial court did not abuse its discretion. The majority found sufficient evidence to support the jury's verdict on the retaliation claim. The majority reversed the trial court on the punitive damages claim, finding that plaintiff presented sufficient evidence for a reasonable jury to find that the law firm perceived the risk of violating federal law through its retaliation. The court emphasized that a reasonable jury could have found the members of a prominent law firm, especially one with an employment law section, to have perceived the risk of violating federal law in retaliating against an employee. Further, the majority found that the law firm did not proffer sufficient evidence such that a reasonable jury could only conclude that the firm engaged in good-faith efforts to comply with Title VII, finding that there was no evidence that the law firm had any specific policy regarding retaliation, but rather only a sexual harassment prevention training manual.

The dissent found that the plaintiff failed to satisfy both the subjective and objective components of the "protected activity" element of a retaliation claim. Judge Niemeyer contended that plaintiff had failed to present evidence upon which a reasonable jury could have found that she actually believed that the firm's conduct violated Title VII and that such a belief would have been objectively reasonable. Judge Niemeyer relied heavily on Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) in which the Supreme Court said that a single, isolated incident is insufficient to support a finding that the plaintiff "reasonably believed" that the conduct was severe and pervasive.

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28) *Phelps v. C.T. Enter., Inc.*, 394 F.3d 213 (4th Cir. 2005).

Judge Titus wrote the opinion in which Judge Wilkinson and Judge Williams joined vacating the district court's grant of summary judgment and remanding for further proceedings. The district court granted summary judgment upon finding that defendants did not have a fiduciary duty to plaintiffs and therefore could not have violated their rights under the Employee Retirement Income Securities Act, (ERISA.) 29 U.S.C. § 1001.

The plaintiffs claim that the defendants breached their fiduciary duty under ERISA by not providing payments to the company health plan. After failing to pay the money due to the employee health care provider the defendants gave their employees 7-day notice of the end of all healthcare benefits. The defendants took money from plaintiff's paychecks each week but never paid that money to the healthcare provider. The district court found that the defendant's decision not to pay the money to the health care provider was a business function not a fiduciary function. The Fourth Circuit found this "revealed an incomplete understanding of the legal theory under which Employees are proceeding." Because defendants accepted the money taken out of the plaintiff's paychecks they voluntarily became fiduciaries and therefore had a responsibility to transfer the funds to the health care provider.

Notes:

29) *EEOC v. Seafarers Int'l Union*, 394 F.3d 197 (4th Cir. 2005).

Judge Wilkinson delivered the opinion, in which Judges Michael and King joined, approving the validity of the EEOC's 1996 ADEA regulations applicable to apprenticeship programs. The court held that the regulations were promulgated

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pursuant to an explicit congressional delegation and were entitled to the deferential standard of review articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) rather than the far less deferential standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Notes:

30) *Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005).

Judge Widener delivered the opinion in which Judge Luttig and District Judge Herlong concurred. This is a petition for review of an NLRB decision dismissing the complaint of two individuals employed by BellSouth who were required to wear both the BellSouth logo and the Communication Workers of America union logo. The two argued that this requirement violated Section 7 of the NLRA in that it interfered with their right to refrain from concerted union activity, violating the employees' freedom of speech and association under the First Amendment. The court held that the BellSouth-CWA policy violated Section 7, and did not reach the First Amendment issue. BellSouth argued that the display of the union logo on employees' uniforms signified a labor-management partnership which made service interruptions due to labor disputes less likely and represented that their employees are well-trained, well paid, and more experienced with a stable work environment. The court held that there was no evidence that the display of the union insignia conveyed BellSouth's intended message. Indeed, the court opined that rather than view the union logo as BellSouth hoped, the public might view it "with suspicion and associate it with service disruptions and labor disputes…" In conclusion, the court held that non-union members had a right to refrain from union activities and could choose not to display the union logo on their uniforms, and in doing so, would not unreasonably interfere with BellSouth's public image because there is no evidence that a particular image is conveyed by the display of the union logo in the first instance.

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31) *Malghan v. Evans*, 118 Fed. Appx. 731 (4th Cir. 2004).

In a per curiam opinion the Fourth Circuit upheld the lower court's grant of summary judgment to the defendant. The plaintiff brought a suit under Title VII claiming the defendant discriminated against him when he did not receive a promotion he interviewed for. The Court found that the plaintiff had established a prima facie case of discrimination, but did not offer any argument to rebut the logical reasons the defendant offered to support its hiring decision. The defendant employer used a panel to interview all candidates and asked each candidate the same question. The applicants were scored and their scores were given to the hiring committee who then chose an applicant to promote. The applicant who received the promotion scored higher than the plaintiff. The Court found that this method of interviewing and scoring was sufficient to carry the burden of showing that the promotion decision was not discriminatory.

Notes:

32) *Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2004).

Judge Traxler delivered the opinion, in which Judges Luttig and King joined. This was a Title IX case alleging that the University discriminated against plaintiff when the football coach cut her from the football team. The jury found in plaintiff's favor, and the district court concluded that the plaintiff-student was

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entitled to an award of attorney's fees of $350,000 despite the fact that her recovery had been reduced to a nominal damages award. The Fourth Circuit affirmed and found that the fee award was appropriate, despite the limited relief, as the legal issue on which she prevailed was an important one since her case established that the contact-sports exemption under Title IX did not permit the University to discriminate against women.

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33) *Stup v. Unum Life Ins. Co. of Am.*, 390 F.3d 301 (4th Cir. 2004).

Judge Motz wrote the opinion affirming the district court's order of summary judgment in favor of plaintiff's ERISA claim. The district court found that the defendant company had acted unreasonably in denying plaintiff's disability claim because defendant had a conflict of interest in being both the plan administrator and benefit provider. The defendant did not show that its decision that plaintiff could continue working despite her medical condition was based on substantial evidence arrived at after a deliberate, principled reasoning process.

Plaintiff was diagnosed with both lupus and fibromyalgia which prevented her from performing all the duties of her work. In accordance with defendant's health care plan plaintiff was given two years of disability pay. After two years her disability benefits were stopped upon defendant's determination that plaintiff could participate in some sedentary jobs.

The Fourth Circuit determined that when discretionary authority of the sort granted to defendant is given it is the court's job to decide if the use of that discretion was reasonable. A decision is reasonable if it is the result of a deliberate, principled reasoning process and supported by substantial evidence. Additionally, the court employed a sliding scale standard of review to determine the impact of any conflict of interest the defendant may have had when making the decision. Applying these standards the court found that defendant's decision to stop disability benefits was not supported by substantial evidence and was not the product of a principled reasoning process. The evidence offered by the defendant was not sufficient to overcome the overwhelming evidence of

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plaintiff's condition and the preference given to her because of defendant's conflict of interest.

Notes:

34) *Wheatley v. Wicomico County*, 390 F.3d 328 (4th Cir. 2004).

Judge Wilkinson delivered the opinion, in which Judge Luttig and District Judge Hudson joined, affirming the District Court's (Hon. J. Frederick Motz) grant of the County's motion for judgment as a matter of law on an Equal Pay Act claim. The plaintiffs were supervisors in the Emergency Services Department which includes the 911 call center. They claimed that male department supervisors were paid significantly more than female department supervisors, despite the fact that allegedly all performed substantially equal managerial work. The court rejected the plaintiff's argument that employees with the same titles and only the most general similar responsibilities must be considered "equal" under the EPA. The court found this to be "a classic example of how one can have the same title and the same general duties as another employee, and still not meet two textual touchstones of the EPA – equal skills and equal responsibility." The court found that the employees had jobs that demand the performance of quite different functions, and therefore were not equal, that is, virtually identical… very much alike or closely related to each other for the purposes of the EPA.

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35) *Newsom v. Barnhart*, 116 Fed. Appx. 429 (4th Cir. 2004).

In a per curiam opinion the Fourth Circuit affirmed the lower court's decision not to reopen discovery and to grant summary judgment to defendant. The plaintiff, a lawyer for the Social Security Administration filed a Title VII sexual discrimination suit claiming that she had not been given a promotion because she was a woman. Because the promotion was given to a man the Court found that the plaintiff had established a prima facie case for discrimination, but had offered no rebuttal to the legitimate, non-discriminatory reasons the defendant offered for its decision to promote a man instead of the plaintiff. Because the defendant carried its burden to show that the promotion decision was non-discriminatory and the plaintiff offered no rebuttal the Court held that grant of summary judgment to the defendant was proper. The Court also found that the plaintiff's motion to reopen discovery was properly denied because the plaintiff did not show that further discovery would change the fact that there was no issue of material fact.

Notes:

36) *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004).

Judge Wilkins wrote the opinion affirming the district court's order granting summary judgment to defendants. Plaintiff, a police officer, claimed that defendants violated his First Amendment rights to free speech and free association when they reprimanded and demoted him for testifying against another officer at a City Personnel Committee hearing concerning the officer's maintenance of his patrol car.

The Fourth Circuit found that the district court was correct in holding that the plaintiff's testimony was not a matter of public concern and therefore not

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speech protected by the First Amendment. The court held that plaintiff's claim of disparate treatment in retaliation for his testimony did have merit, and did involve a matter of public concern. However, the claims against defendants were dismissed on grounds of qualified immunity because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

Notes:

37) *Harless v. CSX Hotels*, 389 F.3d 444 (4th Cir. 2004).

Judge Hudson, a District Court judge sitting by designation, delivered the opinion for a panel consisting of Judges Wilkins and Motz. This is a Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), preemption case in which the defense, The Greenbrier Hotel, argued that a claim under the West Virginia Human Rights Act and the West Virginia Worker's Compensation Act were preempted under federal law, arguing that as the hotel's defense to such state law claims would require analysis of the collective bargaining agreement, the claims were preempted. The court found that, as the only potential for federal preemption came in the form of an affirmative defense, the defense could not convert the state law claims into ones preempted under federal law by merely injecting a defense that may require analysis of the collective bargaining agreement. The court emphasized that the presence of absence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint without consideration of any potential defenses.

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38) *Schupp v. Jump! Info. Tech., Inc.*, 65 Fed. Appx. 450 (4th Cir. 2003).

In a per curiam opinion the Fourth Circuit found that the lower court properly granted defendant's motion for summary judgment. The plaintiff sued his former employer for commissions owed to him and claiming that the employer misrepresented material facts to him.

The plaintiff worked for a small company and as part of his compensation package was given stock options. Shortly after hiring the plaintiff the company was acquired by a corporation. The corporation paid the plaintiff the same salary and converted his stock options from the company into options for stock of the corporation. The corporation also paid the plaintiff a retention bonus. Soon after the acquisition the plaintiff quit. The corporation gave the plaintiff the commission he had earned, but withheld an amount equal to the retention bonus. The plaintiff claimed the corporation could not withhold the money from the retention bonus from his commissions. The Court found that the language of the retention bonus agreement clearly explained that the bonus would be withheld if the plaintiff left the company within a specified time period, which he did. The Court also found no evidence that the defendant had misrepresented any issue of material fact to the plaintiff. Therefore the Court held that the lower court was correct in granting summary judgment to the defendant.

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Court of Appeals of Maryland

1) *Design Kitchen & Baths v. Lagos*, 882 A.2d 817 (Md. 2005).

Chief Judge Bell wrote the opinion of the court, in which Judges Raker, Wilner, Cathell, Harrell, Battaglia, and Greene joined.. Judge Harrell wrote a dissenting opinion. The case is an appeal from the Circuit court for Montgomery County, which granted summary judgment in favor of Diego E. Lagos, an undocumented alien who was granted compensation for sustaining a work related injury. Petitioner appealed.

Lagos suffered a hand injury while operating a say while under employment with Design Kitchen & Bath. The injury required immediate medical attention, including multiple surgeries. In turn, Lagos filed a workers' compensation claim with the Maryland Workers' Compensation Commission ("the Commission"), which, among other issues, was to determine Lagos's eligibility as an undocumented alien. The Commission ruled in Lagos's favor.

On appeal, the court noted that the Workers' Compensation Act ("the Act") does not speak directly to the issue on the effect undocumented alien status has on coverage under the Act itself. Noting that the Act is subject to the rule that it "should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes", the court held that "[a]ny uncertainty in the law should be resolved in favor of the claimant." *Design Kitchen & Bath*, 882 A.2d at 724, quoting *Harris v. Board of Education of Howard County*, 825 A.2d 365, 387 (2003). Because the act in question failed to identify the specific class of persons at issue in this case, the court adopted the liberal interpretation of the rule. Furthermore, legislative history enforced the court's interpretation of the statute.

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2) *Manor Country Club v. Flaa*, 874 A.2d 1020 (Md. 2005).

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Judge Cathell wrote the opinion reversing the lower court's decision. The court found that the panel which calculated attorney's fees improperly applied the lodestar method. The court held that the lodestar method is only applicable if there are no statutes governing the calculation of fees and in this case Md., Code § 27-7(k)(1) should have been used.

Notes:

3) *Edwards Sys. Tech. v. Corbin*, 841 A.2d 845 (Md. 2004).

Judge Eldridge wrote the opinion affirming the intermediate court's reversal of the trial court's dismissal. The plaintiff brought a claim of discrimination under a county law that imposed stricter rules for discrimination cases. The county law was authorized by the "home rule rights" given to counties by the Maryland Constitution art. XI-A. The home rule provision allows counties to create their own laws as long as they were local laws. The defendant employer challenged the county law3 under which plaintiff brought her claim arguing that it was not a local law and therefore was not valid under the Maryland Constitution. The trial court granted defendant's motion to dismiss, and the intermediate court reversed. The Court of Appeals found that the intermediate court was correct in finding that the law was local even though it could impact people outside of the county in which it was enacted.

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Court of Special Appeals of Maryland

1) *Ridgely v. Montgomery County*, 883 A.2d 182; 2005 (Md. Ct. Spec. App. 2005).

Judge Eyler authored the opinion, in which Judges Hollander and Barbera joined. Ridgely, a Montgomery County fire captain, brought this action under Montgomery County, Md., Code art. I, ch. 27 (2001), alleging employment discrimination based on disability. Ridgely was diagnosed with narcolepsy and cataplexy. Although his personal physician cleared him for full duty, upon a Montgomery County's Fire and Rescue Occupational Medical Services ("OMS") doctor's recommendation, Ridgely was placed on light duty. Ridgely argued that he was disabled under the MCC because the County "regarded [him] as" having a having an actual physical impairment which substantially limited one or more of his major life activities. The court held that Ridgely failed to show that he was "regarded as" having an actual physical impairment which substantially limited him in the major life activities of working, maintaining motor control, balance or consciousness. The mere fact that the County felt that Ridgely could not perform his job as a firefighter did not show they perceived him as being unfit for "a broad range of jobs in various classes" or a "class of jobs," and thus substantially limited in the major life activity of working.

Notes:

2) *Kensington Volunteer Fire Dep't v. Montgomery County*, 878 A.2d 662 (Md. Ct. Spec. App. 2005).

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Judge Adkins wrote the opinion affirming the intermediate court's ruling and remanding the case to the trial court. The plaintiff brought a claim for attorney's fees against the county. The County brought charges against the plaintiff in an administrative proceeding and lost. The County then appealed the administrative decision to the civil courts. The plaintiff asked the county to pay for his attorney's fees for the civil appeal pursuant to a County statute that provided attorney's fees for civil claims by the county against merit employees. The County claimed that a volunteer firefighter was not a merit employee and therefore not entitled to the attorney's fees. The court found that the plaintiff was a merit employee because of a County statute requiring that volunteer firefighters be treated "as if" they were merit employees. Therefore the County was required to pay his attorney's fees.

Notes:

3) *Smelkinson Sysco v. Harrell*, 875 A.2d 188 (Md. Ct. Spec. App. 2005).

Judge Thieme wrote the opinion vacating the decision of the trial court and remanding the case. The trial court awarded the appellant employer one dollar in nominal damages for appellee employee's breach of a non-disparagement clause in a settlement agreement. Under the terms of the settlement agreement the appellee's breach permitted the appellant to recover all $185,000 paid to appellee in the settlement. The trial court found that this was a liquidated damages clause and constituted an impermissible penalty. The appellate court reversed finding that the clause was a stipulated damage clause that was reasonable and enforceable.

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4) *Holloman v. Circuit City Stores, Inc.*, 873 A.2d 1261 (Md. Ct. Spec. App. 2005).

Judge Davis wrote the opinion affirming the lower court's decision to stay the proceedings and compel arbitration. The plaintiff claimed that she had been discriminated against and constructively discharged because defendant had created an unsafe work environment by not preventing a coworker from sexually harassing her. The defendant/employer argued that plaintiff should be bound by the arbitration agreement she signed when she applied for work. Plaintiff argued that because the terms of the agreement allowed the defendant to alter the agreement at any time there was no consideration for the agreement and it was therefore void. The court found that the terms of the agreement required the defendant to notify the plaintiff before making any changes and therefore the defendant did offer some consideration for the agreement. The court held that the arbitration agreement supported by consideration and valid so the lower court was correct to compel arbitration.

Notes:

5) *Bond v. Dep't of Pub. Safety & Corr. Servs.*, 867 A.2d 346 (Md. Ct. Spec. App. 2005).

Judge Bond wrote the opinion reversing the lower court's affirmation of an administrative law judge's decision. Plaintiff brought a claim of wrongful termination against her former employer after being terminated for testing positive to a drug test. Plaintiff's manager was informed that plaintiff had failed a drug test during the application process with another employer. Plaintiff's manager then asked plaintiff to submit to a drug test, even though company policy

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only allowed for drug test when there was some reason to believe that an employee was using drugs. The plaintiff took the drug test, failed, and then was terminated. The Court reversed the lower court and found that evidence from another drug test was not sufficient basis for requiring plaintiff to take a drug test. Further, the court found that company policy distinguished between on-the-job and off-the-job drug use and did not require termination for off-the-job drug use such as plaintiffs.
Notes:

6) *King v. Marriott Int'l, Inc.*, 866 A.2d 895 (Md. Ct. Spec. App. 2005).

Judge Eyler delivered the opinion of the court. The Circuit Court for Montgomery County granted summary judgment in favor of defendant employer on the grounds that plaintiff employee showed neither a violation of public policy – an exception to the rule barring wrongful termination claims for at-will employees – nor preemption of state law by federal law.

King claimed that she was fired for disputing the legality of her manager's decision to place certain pension funds into general corporate funds, possibly in violation of federal law. King argued that Maryland public policy protected whistleblowers in situations such as hers.

The court found her argument deficient and did not reach the preemption claim. Maryland public policy does protect whistleblowers, but only when they go to government officials with a more serious claim; at-will employees who resort to internal corporate processes to address possible illegalities of this degree are not protected by Maryland public policy.

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7) *Abrams v. Am. Tennis Courts, Inc.*, 862 A.2d 1094 (Md. Ct. Spec. App. 2004).

Judge Salmon wrote the opinion affirming the lower court's grant of summary judgment to the defendant. The plaintiff prevailed in a worker's compensation claim he brought before the Maryland Worker's Compensation Commission in which he claimed he had been injured when he fell down stairs at work. Plaintiff then pursued a civil claim for the same injury claiming he had been injured when he was hit by a truck driven by a negligent co-worker. The Court found that the plaintiff's civil claim was barred by judicial estoppel because he had secured a judgment in another case and was now changing his position. The plaintiff argued that because he had been forced to return the money awarded him by the MWCC he had not secured a favorable judgment and his civil claim was not barred. The Court found that the plaintiff had been forced to return the money awarded him by the MWCC because the commission had discovered his fraud, but, the commission had entered a favorable judgment for plaintiff and that was sufficient to bar his civil claim.

Notes:

8) *Anne Arundel County Bd. of Educ. v. David Norville*, 887 A.2d 1029 (Md. 2005).

Judge Raker wrote the opinion vacating and remanding the judgment of the Maryland Court of Special Appeals. The plaintiff brought an ADEA claim in federal court claiming he had been dismissed from his employment with the defendant because of his age. The federal district court dismissed the plaintiff's claim with prejudice holding that the board was an arm of the state government

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and that the ADEA did not abrogate the sovereign immunity provided state governments through the 11th and 14th Amendments. The plaintiff then brought a state court claim asserting that a Maryland statute (Md. Code Ann., Cts. & Jud. Proc. § 5-518(c)) waived the defendant's sovereign immunity for disputes of less than $100,000. The Maryland Court of Special Appeals found that the Maryland statute did waive sovereign immunity and the defendant appealed.

The Fourth Circuit did not rule on whether the Maryland statute effectively waived sovereign immunity instead it determined, sua sponte, that the plaintiff's claim was barred by res judicata. The Court held that plaintiff's claim involved the same facts and claim of discrimination as the claim that had been dismissed by the federal district court with prejudice and therefore could not be brought again in state court, even under a different theory.

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9) *Stevenson v. Branch Banking and Trust Corp.*, 861 A.2d 735 (Md. Ct. Spec. App. 2004).

Judge Adkins wrote the opinion vacating the decision by the lower court and remanding. The plaintiff brought a complaint against her former employer for breach of her employment contract and violation of the Maryland Wage Payment and Collection Law. Plaintiff claimed that her severance pay should include stock options she earned before her termination because the Termination Compensation clause of her contract required the company to pay her all "cash benefits". The court determined that under the Wage Payment Act non-payment of severance pay can include deferred compensation for services performed during employment, but that that in this case the compensation was not "wages for work performed before termination." The court found that the term "cash benefits" in the employee's contract was ambiguous and therefore the trial court should have let the jury determine if it included the stock options.

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Supreme Court of Virginia

1) *Gov't Micro Res., Inc. v. Jackson*, 624 S.E.2d 63 (Va. 2006).

Judge Lacy delivered the opinion of the court. Plaintiff employee sued defendant employer for breach of contract and defamation. GMR appealed the trial court's award of compensatory damages on the breach of contract claim and the award of compensatory and punitive damages on the defamation claim. A remitter reducing the award totals was granted. Jackson appealed.

GMR is a technology resale and services company which hired Jackson to be the president and chief executive officer. Jackson soon realized the financial stability of the company was not what he was led to believe when he was hired. After several months as president and CEO, GMR terminated Jackson's employment for cause asserting "gross financial mismanagement." Jackson was hired at a company with which GMR did business soon thereafter. Jackson alleged that GMR made statements to his new employer that he lost a large amount of money and was fired as a result.

The court affirmed the trial court in all respects except the portion of the judgment which limited the compensatory damage award on the employee's defamation claim. Jackson satisfied the requirement that the defamatory words "must be substantially proven as alleged." A proving of actual malice by clear and convincing evidence is a necessary antecedent to awarding punitive damages; Jackson satisfied this by showing GMR made statements with knowledge of their falsity.

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2) *Omniplex World Serv. Corp. v. US Investigations Serv., Inc.*, 618 S.E.2d 340 (Va. 2005).

Judge Lacy delivered the opinion of the court. A restrictive covenant between an employer and an employee that stipulated that the employee could not work for a business that was related in any way to the task for which the employee was hired was overbroad and unenforceable.

Notes:

3) *Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Jones*, 603 S.E.2d 920 (Va. 2004).

Judge Koontz delivered the opinion of the court. Defendant union moved the court to set aside the trial court's award for Mr. Jones because he could not prove that the statement made by the union was false, and thus Mr. Jones could not support a claim of defamation. The court ruled in favor of the union.

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4) *Parr v. Alderwoods Group, Inc.*, 604 S.E.2d 431 (Va. 2004).

Judge Lacy wrote the opinion affirming and reversing in part. Plaintiff lessee brought a claim against defendant lessor after the defendant began operating a funeral home in violation of a non-compete clause in the lease. The defendant argued that the plaintiff had violated one of the four agreements that had been signed contemporaneously with the lease, that the agreements were integrated, and therefore plaintiff's breach of one agreement rendered all the agreements void. The lower court found that the agreements were integrated, but enforced the restrictive covenant preventing defendant from operating a funeral home. The Court found that the lower court was correct in finding that the agreements were integrated, but found that the lower court erred in enforcing the restrictive covenant. The Court held that plaintiff's breach of the agreements rendered the entire agreement void and therefore the restrictive covenants were not enforceable.

Notes:

5) *Microstrategy, Inc. v. Li*, 601 S.E.2d 580 (Va. 2004).

Judge Keenan wrote the opinion affirming the lower court's judgment in favor of the defendant. The plaintiff company brought a claim under the Virginia Uniform Trade Secrets Act against the defendant former employees claiming they had breached their agreement not to disclose company secrets. The plaintiff claimed that the defendants had used trade secrets acquired during their employment with plaintiff to develop software for their new employer. The Court found that the plaintiff did carry its burden of proving that the defendants used trade secrets and not publicly available programs to develop their software. The

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Court found that the witnesses offered by the defense were far more convincing than those offered by the plaintiff. The Court held that the lower court was correct in determining that the plaintiff had not shown that the defendants had appropriated trade secrets from them.

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Court of Appeals of Virginia

1) *Cirrito v. Cirrito*, 605 S.E.2d 268 (Va. Ct. App. 2004).

Judge Frank delivered the opinion of the court. Twelve days prior to the parties' marriage, Mr. Cirrito signed a non-compete agreement with a telecom company whereby he would be paid $1 million one year after the date of the agreement. Mrs. Cirrito contends that the payment is marital property and the trial court's treatment of the payout as separate property was erroneous. Because the money was not awarded immediately at the signing of the non-compete agreement but was contingent on Mr. Cirrito's conduct during the course of the coming year – the time in which he was married – the money was in effect earned while he was married and thus should be treated as marital property under Virginia statute. The court noted that severance agreements were analogous to such a non-compete agreement in the instant case.

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Virginia Circuit Courts

1) *Appleton v. Bondurant & Appleton, P.C.*, 68 Va. Cir. 208 (2005).

Judge Davis wrote the opinion. The plaintiff, an attorney, brought a claim against his former law firm to recover proceeds from settled cases he had worked on before leaving, and recovery of a loan he made to the firm. The firm counterclaimed for a portion of proceeds from cases the attorney took with him when he left, and for reimbursement of expenditures the firm made in pursuing the cases while the plaintiff was with the firm. The Court ruled that the plaintiff was not entitled to proceeds from cases that had been settled since he left, but that he was entitled to recovery of the loan. The Court also held that the defendant was entitled to a portion of the proceeds from the settlements of the cases the plaintiff took when he left the firm.

Notes:

2) *Jarrett v. Goldman*, 67 Va. Cir. 361 (2005).

Judge Davis delivered the opinion of the court. Mr. Jarrett claimed to have been called names by his supervisors in violation of Virginia's insulting word's statute, but the court denied his claim on the grounds that the words spoken were relative and depended largely on the speaker's viewpoint. Nor did his claim for defamation survive; the court found that the supervisors' words were given in the context of providing reasons for Mr. Jarrett's discharge. Mr. Jarrett also claimed that he was wrongfully terminated, but the court did not rule in his

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favor on this claim because the employee handbook he read did not convert his employment contract from at-will to termination-for-cause.

Notes:

3) *Better Living Components, Inc. v. Coleman*, 67 Va. Cir. 221 (2005).

Judge Hogshire delivered the opinion of the court. In 1997, Mr. Coleman was employed by Better Living and signed a contract with a two-year non-compete agreement that began at the termination of Mr. Coleman's employment. In 2004, Mr. Coleman quit working at Better Living and began working for Blue Ridge where he sold the same products in the same geographical area. The court looked at three factors in determining whether non-compete agreements are to be upheld in equity: 1) did the employer write the agreement so as to reasonably protect a justifiable business interest; 2) is the agreement not so unduly harsh as to impair the employee's ability to obtain a livelihood; 3) is the restraint reasonable from the standpoint of a sound public policy? The court found that the demurrers lodged at the trial level by Mr. Coleman and Blue Ridge should be sustained.

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4) *James, Ltd. v. Saks Fifth Avenue, Inc.*, 67 Va. Cir. 126 (2005).

Judge Alper delivered the opinion of the court. James, Ltd. is a high-end men's clothing retailer located in Tysons Galleria mall. An employee who did almost $1 million of business – and who also had a non-compete agreement – was solicited by Saks Fifth Avenue to jump ship and take his clientele with him. James, Ltd. sued for injunctive relief when the employee actually left to work for Saks Fifth Avenue. The court found the restrictive covenant to be valid and enforceable, and the court awarded treble damages and attorney's fees under Virginia Code § 18.2-499 *et. seq* for malicious interference with business.

Notes:

5) *Martino v. Bank of Am. Servs.*, 66 Va. Cir. 268 (2004).

Judge Hogshire delivered the opinion of the court. Plaintiff employee worked at defendant bank. He was accused by a coworker of attempting to steal bank property as he cleared out his desk after his termination, but a subsequent police investigation cleared him of any wrongdoing. Later, he entered the bank to do some personal banking and a coworker asked if he was allowed to be on the premises. Plaintiff sued for defamation per se, defamation, and conspiracy to injure business reputation. Defendant's motion to compel arbitration and stay proceedings was granted.

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6) *Bridge Tech. Corp. v. The Kenjya Group, Inc.*, 65 Va. Cir. 23 (2004).

Judge Ney delivered the opinion of the court. The Kenjya Group filed a cross-bill to Bridge Tech's charge that TKG improperly interfered with business, and a host of other violations; TKG alleged that Bridge Tech improperly told the National Security Administration about a possible problem with one of their employees which resulted in a revocation of the security clearance and damage to business reputation. The court upheld Bridge Tech's demurred on this because of a federal regulation requiring the disclosure of information that might result in a security breach. The court, however, did not allow Bridge Tech's demurrer as to allegations of statements made to other corporations in the defense contracting industry.

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