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RECENT DEVELOPMENTS IN FEDERAL EMPLOYMENT LAW

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Title VII – Lateral Transfer as Possible Unlawful Segregation

Subsection (a)(2) of Title VII requires proof that segregation by race or other protected characteristic deprived or tended to deprive claimant of job opportunity

***EEOC v. AutoZone, Inc.*, 860 F.3d 564 (7th Cir. 2017)**

Background: Kevin Stuckey worked as a sales manager for AutoZone for four years, during which he was transferred between Chicago-area stores several times. None of the transfers entailed any loss in pay, benefits, or job responsibilities. In July 2012 he was transferred again, *away* from a store on Kedzie Avenue—an area largely populated by Hispanics. This transfer, too, involved no reduction in his pay, benefits, or job responsibilities. Stuckey's supervisor and AutoZone's area manager both later testified that Stuckey had not been getting along with his supervisor and asked to be transferred elsewhere. In his own later testimony, Stuckey said he did not recall asking for a transfer; he contended the area manager explained the transfer as an attempt to keep the Kedzie store predominantly Hispanic. Stuckey admitted he actually "didn't mind" being transferred from the Kedzie store, and that the area manager never made any comments about Stuckey's race or that of other company employees. Nevertheless, rather than accept the transfer, Stuckey chose to abandon his job and file a charge with the EEOC claiming the company discriminated against him because of his race. Stuckey, his supervisor, and the area manager are all black. After Stuckey's departure, the Kedzie store hired and promoted both Hispanic and black employees.

District Court: The EEOC filed suit on Stuckey's behalf, alleging the transfer violated 42 U.S.C. § 2000e-2(a)(2) ("subsection (a)(2)") because the purpose of the transfer was to create a predominantly Hispanic workforce at the Kedzie store. Subsection (a)(2), an infrequently litigated provision of Title VII, makes it unlawful for an employer "to limit, segregate, or classify his employees … in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[1] The district court granted summary judgment in favor of AutoZone, holding that the transfer was not an adverse employment action.

Seventh Circuit Decision: The Seventh Circuit affirmed. To begin its analysis, the Court assumed, for the sake of argument, that the evidentiary record, viewed in Stuckey's favor, revealed a material factual dispute about whether AutoZone intentionally segregated Stuckey because of his race. This narrowed the Court's analysis to the question whether the EEOC presented sufficient evidence from which a reasonable jury could conclude the transfer adversely affected Stuckey's employment. The answer to that question, the Court stated, was no.

[1] 42 U.S.C. 2000e-2(a)(1) ("subsection (a)(1)") makes it unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the terms, conditions, or privileges of employment because of the individual's race, color, religion, sex, or national origin.

The EEOC argued that a subsection (a)(2) claimant, unlike a subsection (a)(1) claimant, is not required to prove that the challenged action adversely affected his employment opportunities or had a tendency to do so. In other words, in the EEOC's view, any action to limit, segregate, or classify employees because of race *automatically* violates subsection (a)(2). The Seventh Circuit disagreed, because the EEOC's position would eliminate the purpose of the statutory language "deprive or tend to deprive" the employee of employment opportunities, "or otherwise adversely affect his status as an employee." The Court read subsection (a)(2) to require case-specific proof that the challenged employment action had these effects.

While thus disagreeing with the EEOC, the Seventh Court also rejected AutoZone's argument, which had been accepted by the district court, that the lack of an "adverse employment action" necessarily defeats a suit under subsection (a)(2). The Court stated that subsection (a)(2) casts a wider net than subsection (a)(1) because it makes it unlawful to segregate employees by race even if that action has only *a tendency* to deprive a person of employment opportunities. But the Court noted that purely lateral job transfers, with no reduction in pay and no more than minor changes in working conditions, normally do not give rise to Title VII liability under subsection (a)(1) because they do not constitute materially adverse employment actions; the same reasoning, the Court stated, applies to subsection (a)(2). In Stuckey's case, there was no evidence that the lateral transfer away from the Kedzie store would have deprived or even tended to deprive him of any employment opportunities or otherwise adversely impacted his employment status. Accordingly, the Seventh Circuit found the district court had properly entered summary judgment in favor of AutoZone.

Take Home. The Seventh Circuit's decision in *AutoZone* clarifies what is required by a plaintiff to bring a "segregation" claim under the infrequently litigated § 2000e-2(a)(2) of Title VII. Although subsection (a)(2) casts a "wider net" than subsection (a)(1), which speaks more concretely in terms of actions that discriminate against an individual, a subsection (a)(2) claimant must still produce case-specific proof that the challenged employment action "deprived" or "tended" to deprive him or her of job opportunities. *AutoZone* further indicates that, at least in the Seventh Circuit, lateral transfers and other employment actions such as job assignments—even if arguably done to segregate employees by race, gender, or some other protected class—will not violate subsection (a)(2) if they do not deprive or tend to deprive employees of job opportunities.

Title VII – Denial of Lateral Transfer as Possible Adverse Employment Action

Denial of lateral transfer may be discriminatory adverse action if it negatively impacts terms and conditions of employment or future employment opportunities

***Ortiz-Diaz v U.S. HUD*, 867 F.3d 70 (D.C. Cir. 2017)**

Background: Samuel Ortiz-Diaz was a criminal investigator for the Office of the Inspector General ("OIG") of the U.S. Department of Housing and Urban Development ("HUD"). After two years he sought and received a transfer to Hartford, Connecticut, to be nearer his wife, who had taken a job in Albany, New York. In 2009, he applied for and received a promotion to a senior special agent position in Washington, D.C. Assistant Inspector General John McCarty approved that promotion, which came with a raise. A few months later, Ortiz-Diaz applied to be an Assistant Special Agent in Charge ("ASAC") in New York but was not selected. He believed that was because of his race. The individual chosen—whom McCarty approved—was, like Ortiz-Diaz, Hispanic. McCarty, aware of Ortiz-Diaz's disappointment, asked if he would be interested in other positions, including as an ASAC in Chicago. Ortiz-Diaz did not pursue those options.

Instead Ortiz-Diaz requested a transfer to a field investigator position in Albany or Region I (New England). Although such a position might involve a demotion and pay cut, Ortiz-Diaz believed a return to the field would offer valuable experience and establish relationships with field supervisors who could support his future promotional efforts, and he also understood from others that there was important high-profile work being done in that Region. Ortiz-Diaz also wanted to return to Albany because he and his wife had a home there. McCarty denied Ortiz-Diaz's transfer request without explanation. (During the litigation that later ensued, McCarty said the denial was based on the lack of an investigative office in Albany or an open position in Hartford. However, many investigators were allowed to work remotely, and there was an open position in Hartford that was filled shortly after Ortiz-Diaz's transfer request was denied.) Ortiz-Diaz resigned from the OIG a few months later and took a lower-paying job elsewhere at HUD.

Initial Proceedings: Ortiz-Diaz sued HUD in federal court, alleging race and national origin discrimination in violation of Title VII. The district court granted summary judgment to HUD. The court found Ortiz-Diaz had failed to offer sufficient evidence that he suffered an adverse employment action—his inability to live closer to his wife was only a personal, subjective disappointment, and he provided only speculation that the denied transfer would have improved his career opportunities. The D.C. Circuit initially affirmed, but after Ortiz-Diaz filed a petition for rehearing *en banc*, the original three-judge appeal panel decided *sua sponte* to reconsider the case.

D.C. Circuit Decision: After reconsideration, the D.C. Circuit reversed the summary judgment and remanded the case for trial. The Court noted that to make out a claim, Ortiz-Diaz had to show he suffered an adverse employment action. Purely subjective injuries, such as dissatisfaction or humiliation, are not enough. Rather, there

must be some "materially adverse consequence affecting the terms, conditions, or privileges of employment or future employment opportunities" to support a finding of objectively tangible harm. Although lateral transfers offering the same pay and benefits usually are not considered adverse, the Court reasoned, a discriminatory denial of a lateral transfer away from a biased supervisor, to work with a supervisor under whom the employee's career could advance based solely on merit, could be an unlawful adverse action.

Applying that reasoning, the Court found Ortiz-Diaz had presented sufficient evidence to create genuine issues of fact on his claim and thus avoid summary judgment. To support this conclusion, two judges accepted and relied on assertions in Ortiz-Diaz's declarations, including that: McCarty had involuntarily transferred Ortiz-Diaz and an African-American investigator to Mississippi after Hurricane Katrina, while non-minority investigators who similarly protested having to transfer were not required to move; McCarty made remarks about Latino employees that Ortiz-Diaz believed demonstrated bias against minorities; a former HUD employee contended it was "common knowledge" that McCarty repeatedly denied or attempted to deny promotion opportunities to minorities; Region I was viewed more favorably at HUD headquarters than other Regions; and the Special Agent in Charge of Region I thought Ortiz-Diaz would be a good fit for the work there. Addressing the apparent inconsistency of Ortiz-Diaz seeking a transfer that might involve a demotion, the majority noted that HUD did not dispute, as a general matter, that investigative experience in the field could help prospects for advancement in OIG, and there was some evidence that Ortiz-Diaz's requested transfer would not necessarily have resulted in a demotion and/or pay decrease.

The third judge on the D.C. Circuit panel found the evidence of discrimination slight and countered by facts such as McCarty's approval of Ortiz-Diaz's earlier promotion. This judge surmised the majority had cherry-picked the record for facts to support a holding—counter to prior circuit authority on the issue—that denial of a lateral transfer *could* constitute an unlawful adverse action. Nevertheless, the third judge reasoned, HUD's transfer program could be considered a term, condition, or privilege of employment, and the denial of Ortiz-Diaz's transfer request without explanation was sufficient to the take the claim to the jury. On that basis, the third judge concurred in the denial of summary judgment.

Take Home: *Ortiz-Diaz* demonstrates that lateral transfers—even when they involve no demotion or pay reduction, or conversely no promotion or pay increase—may serve as the basis for discrimination (and retaliation) claims, depending on the circumstances. *Cf. Williams v. R.H. Donnelley, Corp*., 368 F.3d 123 (2d Cir. 2004) (denial of transfer that would have resulted in pay reduction and demotion, without more, does not constitute adverse employment action). In Ortiz-Diaz's case, the Court held that despite the possible demotion and pay reduction involved, denial of his request could be found an adverse action because the transfer arguably offered an escape from an allegedly discriminatory superior and the potential for career advancement sometime in the future. *Ortiz-Diaz* is notable for the Court's willingness to accept what appear to have been speculative and third-hand assertions in the plaintiff's declarations as sufficient to

avoid summary judgment. In the wake of *Ortiz-Diaz*, employers should be aware that lateral transfers, even ones that do not involve changes in employment level or pay, are not risk-free methods of meeting business needs and may lead to claims of discrimination. Thus, as with other employment actions, lateral transfers (or their denial) should be carefully considered and supported with legitimate reasons.

Disability Discrimination and Accommodation – No Duty to Excuse Past Misconduct

Employer is not required to excuse misconduct that occurred before employee revealed a disability and need for accommodation

***Alamillo v. BNSF Railway Company*, 869 F.3d 916 (2017)**

Background: Antonio Alamillo was a locomotive engineer for BNSF. He had a choice of a five-day-per-week schedule, or to be on the "extra board," in which case he would be required to work only when called. He chose to be on the "extra board." BNSF's policy provided that an extra-board employee who failed to respond to three calls in a 15-minute period would be considered to have "missed a call," and that a fifth missed call in any twelve-month period might result in dismissal. Alamillo missed ten calls during the first half of the year, for which he received two suspensions and then was subject to an investigation and hearing. After the last missed call but before the hearing, Alamillo informed a supervisor he intended to undergo testing for a possible sleep disorder and asked if he could switch to a job with set hours. He was allowed to switch to a regular five-day-per-week schedule, after which he had no attendance problems. But the prescheduled hearing on his past attendance went forward.

Before the hearing, Alamillo was diagnosed with obstructive sleep apnea ("OSA"), was prescribed a CPAP machine, and quickly improved. At the hearing on his missed calls, he submitted his doctor's diagnosis and opinion that not being awakened by a ringing phone is "well within the array of symptoms" of OSA. But he did not produce a medical opinion that his OSA had caused his last two missed calls. BNSF concluded he should be dismissed based on those two incidents. Alamillo's union prevailed in its appeal of the dismissal, and he was reinstated. Nevertheless, he filed suit for wrongful termination under California's Fair Employment and Housing Act ("FEHA"), alleging BNSF discriminated against him, failed to accommodate his disability, and failed to engage in an interactive process to determine a reasonable accommodation.

District Court: The district court granted summary judgment to BNSF on the ground that Alamillo's attendance violations occurred before he was diagnosed with a disability or requested accommodation.

Ninth Circuit Decision: The Ninth Circuit affirmed. First addressing Alamillo's discrimination claim, the Court found there was no evidence his disability was a substantial motivating reason for the termination decision, as BNSF didn't know about the

disability when it initiated disciplinary proceedings. Nor was there evidence that BNSF's reason for the dismissal—his attendance violations—was false or pretextual. The Court rejected Alamillo's argument that, under the holding in *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001), his absenteeism was caused by his disability and therefore his termination based on his absences was "because of his disability." Unlike Alamillo, Humphrey had presented to her employer, months before the final absences that led to her termination, medical evidence that her absenteeism directly resulted from her disabling condition. Further, Alamillo had several ways he could have attended work despite his disability, including choosing the option of regular hours, setting his alarm for 5:00 a.m., when the extra-board calls usually were made, having his wife wake him when the calls came in, and providing BNSF with a backup landline number (he had not done the latter because he was having an affair and did not want his wife to know he was not at work). Thus although his OSA may have contributed to Alamillo's attendance violations, the Court concluded, it would have done so "*only* due to his own non-OSA-related carelessness and inattention."

The Ninth Circuit next found BNSF had not unlawfully failed to provide a reasonable accommodation or to engage in the interactive process. Under California law, reasonable accommodation "'does not include excusing a failure to control a controllable disability or giving an employee a second chance to control the disability in the future.'" Similarly, EEOC Enforcement Guidance states, "Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability." Therefore, Alamillo's assertion that BNSF should have accommodated him by being lenient and not terminating him for prior misconduct was meritless. With regard to his claim of a deficient interactive process, Alamillo had to identify a reasonable accommodation that would have been available at the time the process should have occurred; FEHA does not impose liability for failure to engage in an interactive process when no reasonable accommodation is possible. But Alamillo's claim was based on BNSF's failure to engage in an interactive process *after* his attendance violations had already occurred. At that point, no *reasonable* accommodation could have cured his prior absenteeism.

Take Home: Although *Alamillo* involved claims and case law under FEHA, the case provides principles and reasoning that could be helpful in disability cases under federal or Washington law. In particular, when an employer initiates disciplinary action based on an employee's misconduct, including absenteeism, with no knowledge that the employee has a disability that may have contributed to the conduct, the employee's later disclosure for the first time that a disability may have been involved should not prevent the employer from following through with the discipline. This result is likely to be different, however, if the employee has previously notified the employer of the disability and its impact and has sought reasonable accommodations that would allow the employee to perform the essential functions of the job.

ADA – Long-Term Leave as a Reasonable Accommodation

The Seventh Circuit holds long-term medical leave generally is not a reasonable accommodation under the ADA

***Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017)**

Background: Raymond Severson suffered from a back condition that at times caused flare-ups and made it difficult or impossible for him to work. Over time, Heartland promoted him several times, but when he performed poorly as an operations manager, the company decided to demote him to a lead position. In that position, he would be required to perform a variety of physical tasks, including frequently lifting material weighing 50 pounds or more. Severson accepted the new position. However, earlier on the morning he learned of the demotion he had hurt his back at home, and he left work early that day. Later, he requested and received FMLA leave retroactive to the date of his demotion.

Over the course of his FMLA leave, Severson provided doctors' notes, and Heartland approved his requests for continuation of leave. After two months, Severson notified Heartland that his condition had not improved and he would undergo surgery on the last day of his FMLA leave; the recovery time would be at least another two months. He requested an extension of his leave. The day before his FMLA leave ended, Heartland managers told Severson his employment would end when his FMLA leave expired, but they invited him to reapply with the company when he recovered from surgery and was medically cleared to work. Two months later, Severson's doctor partially cleared him to return to work so long as he did not lift anything heavier than 20 pounds. After another two months, his doctor fully cleared him to return to work with no restrictions. Instead of reapplying for a position, Severson filed suit against Heartland.

District Court: Severson filed suit under the ADA, alleging that Heartland failed to accommodate his physical disability. He suggested three accommodations that Heartland could have offered him: (1) a two- or three-month leave of absence; (2) a transfer to a vacant job; or (3) a temporary light-duty position with no heavy lifting. The district court granted Heartland's motion for summary judgment on the ground that Severson's proposed accommodations were not reasonable.

Seventh Circuit Decision: The Seventh Circuit affirmed the district court's decision. At the heart of its analysis was its interpretation of the language and purpose of the ADA: "The ADA is an antidiscrimination statute, not a medical-leave entitlement," the Court announced. Inasmuch as a "qualified individual" under the ADA is someone who can perform the essential functions of the job, with or without reasonable accommodation, a "reasonable accommodation" is "expressly limited to those measures that will enable the employee to work." If proposed accommodations do not make it possible for the employee to perform his job, then the employee is not a "qualified individual." Putting these principles together, the Court concluded a long-term leave of absence *cannot* be a reasonable accommodation, as allowing an employee *not* to work

does not provide a means for the employee to perform the essential functions of a job; it just excuses his not working. And the "inability to work for a multi-month period removes a person from the class protected by the ADA."

Relying on circuit precedent in *Byrne v. Avon Prods., Inc*., 328 F.3d 379 (7th Cir. 2003), the Court acknowledged that in some instances intermittent or short-term leave may be an apt accommodation—for example, when an employee can do a job except for brief periods when a condition flares up. (*Byrne* noted, though, that spotty attendance by itself may establish lack of qualification.) But *long-term* leave is the domain of the FMLA, which protects employees when they are *unable* to perform their job due to a serious health condition. In contrast, the Court asserted, quoting *Byrne*, "the ADA applies only to those who can do the job."

Supporting Severson, the EEOC argued that a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is: (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential functions of the job upon his return. The Court found the EEOC's position mistakenly equated a "reasonable accommodation" with an "effective" one. Although effectiveness is a necessary condition for a reasonable accommodation under the ADA, it is not a sufficient one; a demand for an *effective* accommodation may be unreasonable. Particularly problematic, the Court found, accepting the EEOC's interpretation would transform the ADA into a medical-leave statute, an open-ended extension of the FMLA.

The Court briefly discussed Severson's other proposed accommodations. Although reassignment to a vacant position may be a reasonable accommodation, the burden was on Severson to prove there were, in fact, vacant positions available at the time of his termination. He did not do so. As to Severson's suggestion of a light-duty position, the Court quoted EEOC guidance for the proposition that "an employer need not create a light duty position for a non-occupationally injured employee with a disability as a reasonable accommodation." If an employer *has* a policy of creating light-duty positions for employees injured on the job, then the same benefit must be extended to other disabled employees, unless the company can show undue hardship. However, Heartland had no such policy.

Take Home: The Seventh Circuit's decision in *Severson* is one that employers in the Ninth Circuit currently can only dream of. While the case still leaves some uncertainty as to how long a requested leave may be before it crosses over into unreasonable territory—the Court found even the two or three months Severson requested to be unreasonable—employers in the Seventh Circuit can now be more confident about moving forward with filling a position when an employee seeks extended medical leave that is not covered by the FMLA.

By contrast, the Ninth Circuit opined in *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied* (2002), that "the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a

reasonable accommodation;" if a leave could "plausibly" enable an employee to perform his job upon return to work, then the employer may be liable for failing to try that accommodation. The Ninth Circuit has also held that even an extended leave may be reasonable, if it doesn't create an undue hardship for the employer. *Nunes v. Wal-Mart Stores*, *Inc*., 164 F.3d 1243 (9th Cir. 1999). Further, the EEOC continues to prosecute employers that have fixed caps on disability leave, including where employees are allowed as much as 12 months of leave. Employers in the Ninth Circuit should therefore continue to consider whether a leave of absence, even an extended one, may be a reasonable accommodation that would allow the employee to perform the essential functions of his or her job in the future.

Title VII – Notice of Termination as Adverse Action, Even if Rescinded

Notice of termination itself constitutes adverse action and may also interfere with FMLA rights, even if the notice is later rescinded

Shultz v. Congregation Shearith Israel, 867 F.3d 298 (2d Cir. 2017)

Background: Alana Shultz worked as Program Director for Congregation Shearith Israel, a synagogue, for over 10 years. The complaint she later filed alleged the following. On June 28, 2015, Shultz was married. Before departing on her honeymoon, she informed the Congregation's Executive Director ("ED") she was pregnant and asked the ED to convey that fact to the Congregation's rabbis. On July 20, Shultz returned to work, visibly pregnant. On July 21, the ED, one of the rabbis, and a member of the Congregation's Board of Trustees met with Shultz and informed her that her employment was terminated, effective August 14, due to a staff restructuring. The ED presented a severance agreement that would provide six weeks' pay in exchange for a full waiver of Shultz's "right to commence an action for pregnancy or gender discrimination or a claim pursuant to the FMLA." Shultz refused to sign.

On July 30, counsel Shultz had retained in connection with her termination notified the Congregation about the representation. On August 5, the ED presented Shultz, who had continued to work in the interim, with a letter stating the Congregation had reinstated her position and she would not be terminated on August 14. After she received the letter, Shultz was subjected to a "pattern and practice" of discrimination by the ED, the rabbi, and the Trustee, including: a conversation loud enough for Shultz to hear, in which the ED disparaged Shultz and her attorney and said the Congregation had a right to disapprove of Shultz's premarital pregnancy; Shultz's name was removed from Congregation newsletters and the employee list displayed outside the synagogue; the ED demanded that Shultz complete her assigned tasks and transition her responsibilities to other employees before August 14, her previously-scheduled termination date; and the rabbi and the Trustee refused to speak with her. Shultz did not return to work after August 14. But the Congregation continued to issue her paychecks (which she did not deposit) and listed her in publications as the Program Director. Shultz filed suit on September 22. The Congregation then sent its membership an email denying her claims and saying it

did not terminate her employment and had continued to pay her even though she stopped coming to work.

District Court: Shultz's lawsuit asserted claims against the Congregation, the ED, the rabbi, and the Trustee ("Congregation") for sex discrimination, retaliation, constructive discharge, interference with her exercise of rights under the FMLA, and violations of state law. The district court granted the Congregation's motion to dismiss the action for failure to state a claim.

Second Circuit Decision: The Second Circuit reversed the dismissal with respect to Shultz's discrimination and FMLA claims. Addressing the first of those claims, the Court cited two U.S. Supreme Court cases holding that a cause of action for discriminatory termination accrues when the termination decision is made and communicated to the employee, even though the designated termination date is sometime later. Those cases, the Second Circuit reasoned, imply that the *notification of termination, itself*, qualifies as an adverse employment action. Subsequent rescission of the notice would not eliminate the adverse action or negate an accrued claim for relief based on it. Nevertheless, the Court stated, a good-faith, unconditional rescission of a previously-announced termination may toll the running of back-pay damages if the employee unreasonably rejects the offer of reinstatement. Whether rescission was offered in good faith or an employee's rejection of the offer was reasonable are fact-intensive inquiries, which the Court could not address in the context of the Congregation's motion to dismiss, which was based only on the pleadings. The Court noted other circumstances that also might impact its analysis, for example if the time between the notice of termination and the rescission was so short as to be *de minimis*, or the alleged adverse action were something short of termination, such as placement of a counseling letter in an employee's file followed by its removal. Based on Shultz's allegations, however, the notice of termination constituted an adverse employment action sufficient to support her discrimination claim.

Shultz asserted that her termination "mere weeks" before she was scheduled to commence FMLA leave was also an action that clearly deterred exercise of her FMLA rights. The district court had dismissed the FMLA claim on the ground that Schultz's employment had not been effectively terminated. For the same reasons applicable to Shultz's Title VII claim, however, the Second Circuit held the notice of termination could be considered an adverse employment action sufficient to deter or interfere with Shultz's exercise of FMLA rights.

The Court affirmed the dismissal of Shultz's constructive discharge and retaliation claims. It reasoned that the conduct she alleged as offensive and retaliatory was insufficient to establish a reasonable person would have felt compelled to resign, and similarly was insufficient to dissuade a reasonable worker from making or supporting a charge of discrimination.

Take Home: *Shultz* demonstrates that a notice of termination can be a point of no return when an employee believes there is discrimination involved. Even if the notice is

later rescinded and the employee is invited back to work, the employee may pursue a discrimination claim and seek damages for emotional distress and other possible adverse consequences of the termination notice. Further, if the rescission and offer of reinstatement do not appear to be made in good faith, or the conditions of employment will be less favorable upon the employee's return, the employee may be found justified in refusing the offer. Employers should therefore fully consider their reasons for termination and the risks involved *before* they give an employee notice. And if an employer decides to rescind a notice of termination—before or after the termination takes effect—the employer should be aware that factors such as good faith and respectful treatment of the employee may impact whether the offer will serve to cut off back pay and minimize other damages.

Title VII – Social Hugging Can be a Form of Harassment

Hugs, depending on the kind, number, frequency, and persistence, may create a hostile work environment

Zetwick v. Cnty. of Yolo, 850 F.3d 436 (2017)

Background: Victoria Zetwick was a county correctional officer with the Yolo County Sheriff's Department. In 1999, Edward Prieto was elected county sheriff and was in charge of the Sheriff's office, including correctional officers. Zetwick alleged that between 1999 and 2012, Prieto subjected her to numerous unwelcome hugs and at least one unwelcome kiss that, taken as a whole, created a sexually hostile work environment. Specifically, Zetwick estimated that between 1999 and 2002, Prieto hugged her at least two dozen times, and between 2003 and 2011 he hugged her at least a hundred times. In addition, during an awards ceremony in 2003, Prieto kissed Zetwick, ostensibly to congratulate her on her recent marriage, but the kiss landed partially on Zetwick's lips. Zetwick contended that from 1999 to 2013, she also saw Prieto hug and kiss several dozen other female employees. Zetwick expressed her concern to her co-workers, husband, and supervising lieutenants, but not to Prieto. In early 2012, she filed an administrative claim against Prieto. Zetwick stated that due to his conduct, it was difficult for her to go to work, she was always stressed, she suffered from anxiety, and she took a sleep aid to help her sleep.

District Court: Later in 2012, Zetwick filed suit in federal court, asserting claims of sexual harassment under Title VII and California state law. The County and Prieto moved for summary judgment, arguing among other things that: due to their work schedules, Zetwick rarely encountered Prieto during some of the relevant time period; most of the incidents in which Prieto hugged Zetwick occurred at parties involving other employees and in any case never when Prieto and Zetwick were alone; and Prieto also occasionally hugged male employees. The district court granted summary judgment to the defendants, noting that courts have considered hugs and kisses on the cheek to be within the realm of common workplace behavior, and finding that Prieto's conduct was not severe *and* pervasive.

Ninth Circuit Decision: The Ninth Circuit reversed. First, the Court found that the district court had applied incorrect legal standards in assuming that hugs and kisses on the cheek could never create a hostile or abusive workplace, and also in requiring that Prieto's conduct be both severe *and* pervasive. Rather, the Court noted, hugs and kisses on the cheek may create a hostile or abusive workplace when they are unwelcome and pervasive. Further, offensive conduct must be only severe *or* pervasive; accordingly, summary judgment would be appropriate only if the alleged conduct was *neither* severe *nor* pervasive enough to alter the conditions of the victim's employment. The Court concluded that application of these improper legal standards may have impacted the district court's decision.

Second, the Ninth Circuit held the district court had not properly analyzed the evidence in the record, both by ignoring its import and effectively making credibility determinations about conflicting testimony. For example, the district court had averaged the total number of alleged hugs over the period in question to find there were only seven or eight a year, each of which lasted only a couple of seconds. But there is no mathematical test to determine whether conduct gives rise to liability, the Ninth Circuit stated. In averaging the number of hugs per year, the district court failed to consider the totality of the circumstances, including whether the hugs were concentrated during certain periods, and whether a reasonable juror could find their kind, number, frequency, and persistence created a hostile environment. Additionally, the district court had failed to recognize that the acts of supervisors have greater power to alter the work environment, and that sexual harassment of employees other than the plaintiff (in this case Prieto's alleged hugging and kissing of Zetwick's female coworkers), if shown to have occurred, is probative of a defendant's general attitude toward females and possible sexual objectification of them. The record also contained evidence that Prieto hugged women more frequently than men, suggesting differences in his treatment of the two genders.

In sum, summary judgment had been improper, and the Court remanded the case for trial.

Take Home: Some people are comfortable hugging, touching others, or being hugged or touched in the workplace, and some workplaces allow for or even encourage such conduct as a form of team building. However, *Zetwick* makes clear that even conduct that generally appears acceptable in the workplace, such as occasional social hugging, may create a sexually hostile work environment depending on the circumstances. Particularly when hugging or other touching is initiated by a superior, employees may not feel safe objecting to the conduct even if it is unwelcome. To avoid potential misunderstanding and possible liability, employers should be sure that supervisors avoid any conduct that might be construed as harassment, and should follow up on any reports of such conduct. For their part, employees should report concerns about hugging or other similar conduct—whether by supervisors or coworkers—to a third party such as human resources staff, who can help address the issue before it poisons the work environment.

First Amendment – Public Employee's Speech Not Protected by First Amendment

The First Amendment does not protect public employee-attorney who speaks to press about case for which she is responsible.

***Brandon v. Maricopa County*, 849 F.3d 837 (9th Cir. 2017)**

Background: Maria Brandon was employed by the Maricopa County (the "County") Attorney's Office ("MCAO") as a civil litigation attorney for several decades. She left the MCAO to take a job with a "Special Litigation" department formed by the County. During her tenure in the Special Litigation department and while still representing the County as an attorney, Brandon received a call from a newspaper reporter inquiring about a lawsuit she was handling for the Sheriff's Department, which alleged brutality by the Department toward protestors. Brandon authorized the newspaper to publish her oral comments. The newspaper subsequently published an article suggesting the County substantially increased its settlement offers to avoid having key officials testify. The article cited Brandon as saying, in relation to that issue, "I don't know why they did what they did, and I'm sure they have their reasons."

The Special Litigation department was later disbanded, and Brandon was rehired by MCAO, subject to a probationary period. Officials responsible for overseeing risk management and civil lawsuits against the County thought Brandon's discussion with the newspaper reporter had been unprofessional for a lawyer representing the County and, based on the resulting concerns about her judgment, asked MCAO not to assign her cases involving risk management in which the County was a party. During Brandon's probationary period, MCAO terminated her employment, ostensibly because of an altercation she had with another staff member.

District Court: Brandon filed a lawsuit against the County and certain County officials alleging, among other things, that: the County and her MCAO supervisor retaliated against her for exercising her First Amendment rights by talking to the newspaper reporter; and, after her return to MCAO, two County risk management officials tortiously interfered with her employment contract by asking the MCAO to reassign her cases to another lawyer. Following a trial, the jury found for Brandon on those claims, awarding her nominal damages of $1 on the First Amendment claim, and $638,147.94 on the tortious interference claim.

Defendants filed a motion for judgment as a matter of law or, alternatively, for a new trial. The district court denied the motion, entered judgment on the basis of the jury's verdict, and awarded Brandon attorney fees based on her First Amendment claim.

Ninth Circuit Decision: The Ninth Circuit unanimously reversed on both the First Amendment and contract interference claims. Beginning with the tortious interference claim, the Ninth Circuit held that the risk managers' interference with Brandon's employment contract was not "improper." Citing earlier case law, the Court noted: "One

is privileged to interfere with a contract between others when he does so in the bona fide exercise of his own rights or when he possesses an equal or superior interest in the subject matter." Because County risk managers had a legitimate interest in ensuring the MCAO provided quality legal services to the County, their request that MCAO remove Brandon from certain cases—based on their reasonable perception she had been unprofessional and betrayed her duty of loyalty to the County—could not be considered improper.

In analyzing the First Amendment claim, the Ninth Circuit held that Brandon's speech to the newspaper reporter fell under the broad set of official duties she owed to the County as its attorney. The Court noted the trial court erred by failing to undertake a "practical inquiry" of Brandon's job duties, as required by *Garcetti v. Cebellos*, 547 U.S. 410 (2006). As an attorney, Brandon had a broad fiduciary duty of loyalty to her client—the County—which required her to protects its interests. Moreover, Arizona's rules of professional conduct anticipate public statements to media outlets to be part of an attorney's duties representing a client. The Ninth Circuit then applied the three "guiding principles" set out in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), to determine that Brandon was speaking as a public employee—not a private citizen. First, Brandon was inevitably speaking as a lawyer representing the County, as her comments touched on the very matter on which she represented the County. Second, although her quoted comment implied the client was acting unprofessionally, she did not allege corruption or other serious misconduct. Third, Brandon's statements to the media did not violate any MCAO policy, which, according to *Dahlia*, was relevant to the analysis of whether Brandon's speech was made in an official capacity. Therefore, Brandon was not entitled to First Amendment protection.

Take Home: Public employees like Brandon do not speak as private citizens when they make statements pursuant to their official duties. Attorney-employees for public entities should keep in mind that they have a broad fiduciary duty to their client and must protect their client's interests. While public attorney-employees may sometimes disagree with their employer's decisions, expressing their personal view publicly in the course of their duties—for example in making statements to the press or answering reporters' question about their cases—may well be a violation of their fiduciary duty to their client, and not speech entitled to First Amendment protection.

First Amendment – Public Employee's Speech Not Protected by First Amendment

First Amendment does not protect public school coach who kneels and prays on football field in view of students and public immediately after games

***Kennedy v. Bremerton Sch. Dist.,* 869 F.3d 813 (2017)**

Background: Joseph Kennedy was hired by the Bremerton School District ("District") as a high school football coach. Kennedy is a practicing Christian. He asserts

his belief requires him to give thanks at the end of each game, through prayer, for the players' accomplishments and the opportunity to be part of their lives. Pursuant to this "calling," Kennedy had a practice, immediately after a game was over, of kneeling at the 50-yard line and offering a quiet prayer lasting about thirty seconds. While doing so, he wore a top with the school logo. Initially, he prayed alone. Then players asked to join him. He did not object. Eventually, almost the entire team joined in the prayer, and sometimes even the opposing team joined. Eventually, Kennedy progressed to giving motivational speeches with religious content at midfield after games, while attendees kneeled around him. He acknowledged that the speeches likely constituted prayers.

After learning of his activity, the District informed Kennedy his conduct was "problematic" under the Establishment Clause. The District stressed he was free to engage in religious activity, but it must be physically separate from any student activity and students could not join in it. After complying for a few weeks, Kennedy requested a religious accommodation that would allow him to continue his former practice. He contended his religious expression occurred after his official coaching duties ceased, and he had neither encouraged nor discouraged student participation in his prayers. Without obtaining District approval, Kennedy resumed his practice, now with media coverage.

The District again forbade Kennedy's conduct, explaining that his coaching duties included activities after games until players were released, he was on the field only by virtue of his employment, and observers would perceive his praying as overtly religious. Again the District attempted to accommodate Kennedy by providing other options for his after-game prayer that would not involve a public display with players and parents present. Kennedy disobeyed the District's instructions and continued his practice. The District responded by placing him on administrative leave. When he was no longer engaging in on-field prayers, players did not engage in such prayers on their own. Kennedy did not reapply for a coaching position the following season.

Lower Court: Kennedy filed suit in federal court under the First Amendment and Title VII. Arguing that he would succeed on the merits of his claim that the District retaliated against him for exercising his First Amendment right to free speech, he moved for a preliminary injunction ordering the District to reinstate him as a coach and allowing him to kneel and pray on the field immediately after games. The district court denied an injunction. The court found Kennedy was unlikely to prevail on the merits of his First Amendment claim because he spoke as a public employee, and the District's conduct was justified by its need to avoid violating the Establishment Clause.

Ninth Circuit Decision: The Ninth Circuit affirmed. The Court focused on whether Kennedy's speech (his on-field prayers) was that of a private citizen or a public employee; if he spoke as a public employee, he could not show a likelihood of success on his First Amendment claim. To make this decision, a factual determination of the scope and content of Kennedy's job responsibilities was required first, after which the constitutional significance of those facts would be determined as a matter of law. At the first step, it was necessary to determine whether the speech occurred while Kennedy was performing a function within the scope of his position. When assessing the constitutional

significance of the facts, the Court considered whether the speech owed its existence to Kennedy's position, or whether he spoke just as any non-employee citizen could have.

The Court looked to a past case, *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954, 966 (9th Cir. 2008), in which a teacher claimed he spoke as a private citizen when he decorated his classroom with two large banners that conveyed a religious message. The Court held there that expression is a teacher's stock in trade, that the speech occurred while performing a function within the scope of the job, and that since an ordinary citizen could not have walked into the teacher's classroom and decorated the walls, the speech owed its existence to his position as a teacher. Further, because teachers hold a position of trust and authority, they can take advantage of that position to press their views upon impressionable and captive minds of students. Thus, the teacher spoke as a public employee, not as a private citizen.

Similarly, Kennedy's role was not confined to simply instructing and supervising players before and during games. He was expected to be a coach, mentor, and role model while acting in an official capacity in the presence of students and spectators, and his conduct carried special weight with them. Like the teacher in his classroom, Kennedy also was not just an ordinary citizen when he prayed on the field with students and parents present: if he was not the coach, he would not have been permitted on the field to conduct his prayer. Thus, the Court concluded, Kennedy's prayers fell with the scope of his professional obligations and were made possible by his position. As a result, he spoke as a public employee, not a private citizen, and his speech (prayers) was not protected by the First Amendment. Because that conclusion barred Kennedy's right to a preliminary injunction, the majority did not reach the question whether the District's restrictions on his speech were justified by its need to avoid violating the Establishment Clause.

Take Home: *Kennedy* addresses one aspect of a topic currently being debated in multiple contexts: to what extent are individuals and even corporations entitled to express or act on their religious views when doing so may conflict with the rights of others. *Kennedy* recognizes individuals' right to follow and express their religious beliefs, and employers' need to accommodate those beliefs when possible. However, the case reaffirms that when speaking within the scope of their duties—and enabled to speak by their position—public employees should not expect their speech will be constitutionally protected. In such circumstances, public employers generally may restrict their employees from using the authority and access of their positions to promulgate their religious or other personal views.

First Amendment – Public Employer May Not Issue Blanket Ban on Speech

A public employer generally may not subject all employee speech regarding a particular government program to a blanket ban

***Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2016)**

Background: Nevada Highway Patrol ("NHP") Major Kevin Tice announced via email a policy prohibiting officers from talking about the canine drug interdiction program ("K9 program") with anyone outside the department, and requiring that all communication with anyone outside the department be forwarded for approval through the chain of command. Managers or commanders would then accomplish the communication if it was deemed appropriate. Tice asserted the K9 policy's intent was to forbid direct contact with representatives of Friends for K9—a private organization that, according to Tice, was "intentionally meddling into how the unit was run." Matt Moonin—a trooper in the NHP K9 program—challenged the K9 policy on First Amendment grounds. The amended complaint asserted ten claims for relief pursuant to 42 U.S.C. §§ 1983 and 1985, including a First Amendment "prior restraint" claim.

District Court: Moonin moved for partial summary judgment on the "prior restraint" issue. The district court determined "Tice's email was not a lawful prior restraint," and Tice was not entitled to qualified immunity because "a reasonable supervisor would have known that such a mandate was an unconstitutional intrusion into Plaintiffs' established First Amendment rights." The court granted Moonin's motion for partial summary judgment on the First Amendment claim and denied Tice's cross-motion in relevant part. Tice appealed.

Ninth Circuit Decision: The Ninth Circuit affirmed. Applying the framework set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court found that Tice's sweeping K9 edict barred speech that went beyond troopers' official duties and interfered with their right to speak as citizens on a matter of public concern. Under *Pickering*, courts first ask whether the restriction at issue impacts a government employee's speech "as a citizen on a matter of public concern." Then the question becomes "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public, as by disciplining or discharging him on the basis of speech."

Undertaking the first inquiry, the Ninth Circuit concluded the broad language of Tice's email could reasonably be understood to forbid, on penalty of employment discipline, speech by K9 troopers, not only within the scope of their duties as public employees, but also in their capacities as citizens. Moreover, the K9 policy restricted speech on matters of public concern, as demonstrated by Moonin's contention that, absent the prohibition, he would have spoken about NHP's misuse of funds, the "sabotage" of the K9 program, and the promotion of unconstitutional searches—all of which are within the public interest.

Under the second *Pickering* prong, Tice asserted three justifications for the K9 policy: (1) protecting sensitive law enforcement information related to drug interdiction; (2) controlling official communications about the K9 program; and (3) ensuring effective operation of the agency without disruption by non-law-enforcement groups. The Ninth Circuit concluded that even if these interests were legitimate, the expansive policy was not adequately tailored to protect them—Tice's email did not distinguish between speech that reasonably could be expected to disrupt operations and speech that would not, or would do so only by engendering legitimate public debate about the K9 program. As such, the policy did not bear a "close and rational relationship" to the department's legitimate interests.

Having concluded that Tice's restriction on speech violated the First Amendment, the Ninth Circuit addressed whether the right he violated was clearly established at the time he sent his email in 2011; if it was, then Tice would not be entitled to qualified immunity. According to the Court, qualified immunity might have attached if the K9 policy merely mandated notice to the employer, or supervisor approval, before speaking, as those types of policies have survived scrutiny in some cases when sufficiently tailored to legitimate government interests. However, the policy announced by Tice barred *all* discussion of certain topics with the public. At the time of his email, the "Supreme Court and Ninth Circuit had emphatically signaled that a policy prohibiting public discussion of matters of public concern by employees of a particular government program, without a countervailing showing of substantial workplace disruption, was much too broad to be constitutional." Accordingly, Tice was not entitled to qualified immunity.

Take Home. The key takeaway is summarized well in *Moonin*'s conclusion. While acknowledging that public employers have legitimate interests in managing their employees' speech, particularly where the speech relates to their work, the Ninth Circuit stated: "We make clear today . . . that a public employer generally may not subject *all* employee speech regarding a particular government program—whether fact or opinion, and whether liable to disrupt the workplace or not—to a blanket ban." Public employers that believe it necessary to limit their employees' speech on matters of public concern outside the scope of their duties will need to show that the harm sought to be prevented is specific and real and the restriction is carefully tailored to avoid or alleviate that harm.

National Labor Relations Act vs. Title VII – Racist Comments During Picketing

Termination of employee for racist comments during picketing violates NLRA

Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885 (8th Cir. 2017)

Background: Cooper Tire & Rubber Company locked out union employees after negotiations to renew the collective bargaining agreement ("CBA") were unsuccessful. Union workers picketed outside the plant. Cooper continued to operate with replacement workers, who crossed the picket line when arriving and leaving. Many of the replacement workers were African-American.

While picketing on one occasion, a locked-out worker, Anthony Runion, yelled at a van of replacement workers who had just crossed the line: "Hey, did you bring enough KFC for everybody?" Someone (not identifiable on the recording of the incident) then yelled "Go back to Africa, you bunch of f***ing losers." Runion continued, "Hey anybody smell that? I smell fried chicken and watermelon." Runion's hands were in his pockets at the time of his comments and he made no overt movements or gestures. Although people in the crowd heard Runion's remarks, there was no evidence the replacement workers in the van did.

When Cooper began calling back locked-out employees the following month, it did not call Runion, but instead discharged him for his comments during the picketing. The union grieved his termination, arguing that it violated the CBA. An arbitrator found Cooper had just cause to fire Runion.

National Labor Relations Board: The union submitted the case to an NLRB administrative law judge, who concluded Cooper violated the National Labor Relations Act ("NLRA") by firing Runion. The NLRB upheld the judge's decision and ordered reinstatement of Runion with back pay.

Eighth Circuit Decision: The Eighth Circuit denied Cooper's petition for review of the NLRB decision. The two-judge majority began its analysis with recognition that picketing generally involves confrontational and impulsive behavior by striking union members toward strike breakers. The majority cited *Clear Pine Mouldings, Inc*., 268 NLRB 1044 (1984), as providing the applicable standard for picket-line misconduct: unless the conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the [NLRA]," a firing for such misconduct is an unfair labor practice. The majority also asserted that the Eighth Circuit generally defers to NLRB reinstatement orders if they are factually supported. In this case, the majority noted, Runion's comments were not directed at any one individual and were not "on display for an extended period." Further, evidence supported the NLRB's conclusion that Runion's statements were "not violent in character, and they did not contain any overt or implied threats to replacement workers or their property." Nor did he engage in any threatening physical behavior. For these reasons, while indicating the NLRB should not assume racist comments or conduct to be a normal part of labor relations, the majority deferred to the NLRB's conclusion that Runion's termination violated the NLRA.

The majority also rejected Cooper's argument that reinstating Runion conflicted with the company's obligations under Title VII. Not only were Runion's comments made outside the workplace, the majority noted, but they were not severe or pervasive enough to create a hostile work environment. In support of this conclusion, the majority cited two cases where comments about fried chicken and watermelon were found insufficient to establish a hostile work environment, and contrasted those cases with two others involving repeated racial slurs and threats of physical violence, in one instance, and chicken-and-watermelon comments *by a supervisor* in the second. Additionally, the

majority reasoned, Title VII did not require Cooper to *fire* Runion, but only to take prompt and sufficient remedial action reasonably calculated to end the harassing conduct.

Finally, the majority held that the NLRB did not improperly require reinstatement of Runion after the arbitrator found he had been discharged "for cause," because the term "for cause" "effectively means the absence of a prohibited reason." In this case, the NLRB concluded Runion was discharged for engaging in picketing—a protected activity—and the termination was therefore prohibited and not "for cause." Inasmuch as the arbitrator's decision was inconsistent with established law, the NLRB could disregard the award without abusing its discretion.

The third panel judge strongly dissented. This judge disputed that the statutes allowing employees to engage in concerted activities permit "outright racial insult and bigotry as expressed by Runion" at the entrance to Cooper's property. In the third judge's view, the arbitrator's decision reflected that Runion's comments went beyond the rough-and-tumble atmosphere tolerated on the picket line and created a possibility of coercion, intimidation, and even violence; as such, the arbitral award upholding Runion's termination based on his comments did not violate the NLRA, and the NLRB abused its discretion in failing to defer to the award.

Take Home: *Cooper Tire* is an example of the Obama-era NLRB's broad view of protected concerted activities, and at least some of the federal courts' acceptance of that view, even when it appears to put employers at risk of violating obligations under other federal laws such as Title VII. The decision correctly notes that Cooper wasn't required by Title VII to *fire* Runion, but only to take prompt and effective remedial action to prevent future similar conduct. At the same time, the case is silent on what the company could have done to meet that obligation without running afoul of Runion's rights under the NLRA, as defined by the NLRB. While a lower level of discipline or a strong warning might have been reasonable if Runion had no history of racist comments, even those actions may have been considered a violation of his rights under the NLRA. It remains to be seen whether the reconstituted NLRB will reverse course on issues of this nature. Regardless, until these issues are clarified employers must proceed cautiously when taking any disciplinary action for conduct that could be considered "concerted" and thus protected under the NLRA.

National Labor Relations Act—Confidentiality Rules' Overbreadth

Banner Health System v. NLRB, 851 F.3d 35 (D.C. Cir. 2017)

Background: During its investigation into an employee's unfair labor practice charge, the National Labor Relations Board ("NLRB") discovered that Banner Health System ("Banner") had two practices that, in the NLRB's view, violated the National Labor Relations Act ("NLRA"). First, Banner required employees to sign a confidentiality agreement, which defined "confidential information" to include "[p]rivate employee information (such as salaries, disciplinary action, etc. that is not shared by the employee."

The agreement stated that failure to keep "this kind of information" private and confidential would result in corrective action, including termination. Second, Banner had its human resources consultants use a form when interviewing employees as part of an investigation that was to be read to witnesses, stating, "I ask you not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors." Banner challenged the NLRB's enforcement order in federal court.

D.C. Circuit Decision: The D.C. Circuit agreed with the NLRB that Banner's confidentiality agreement was overbroad. The Court noted that the NLRA protects employees' rights to discuss the terms and conditions of their employment, to criticize them, and to enlist others in addressing employment matters. Those principles have been found to include the right to discuss salary information, as well as discipline and disciplinary investigations. Maintaining a rule that is reasonably likely to chill such protected activity is an unfair labor practice unless the employer can show a legitimate and substantial business justification for the rule that outweighs the rule's adverse effect on employees. Here, the Court found, the confidentiality agreement's language expressly prohibited discussions of terms and conditions of employment that are protected under the NLRA. The exception for discussion of information "shared by the employee" did not save the rule. First, that language was ambiguous in that it did not make clear whether discussions of a coworker's situation had to come directly from the coworker, or would require the coworker's authorization. Second, the term "shared" did not seem to cover situations where information was inadvertently leaked and innocently obtained by another employee—which the Court indicated would not destroy NLRA protection for discussions of that information. Although the Court acknowledged Banner had an interest in protecting information covered by antidiscrimination and privacy laws, the confidentiality rule was not tailored for those purposes. The Court upheld the NLRB's order requiring Banner to post remedial notices at all facilities where it used the confidentiality agreement.

The Court came out differently on the issue of Banner's use of a rule requiring nondisclosure related to workplace investigations. The NLRB argued that Banner maintained a categorical rule prohibiting disclosure of information related to investigations. Such a rule was in violation of the NLRB's precedents requiring employers to determine on a case-by-case basis that confidentiality is necessary "based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised" without it. The Court found the record did not clearly establish categorical application of the nondisclosure rule, however. Rather, the human resources consultant who testified indicated she only asked witnesses to keep things confidential in more sensitive situations, such as those involving sexual harassment, and even then it was not clear she did so in all such cases. Absent evidence to show a categorical rule, the Court said, it would not enforce this aspect of the NLRB's order.

Take Home: *Banner Health* is one of the more recent cases in which the NLRB's confidentiality rules have reached a court of appeals. The D.C. Circuit's affirmance of the NLRB on the unlawfulness of Banner's confidentiality agreement is a reminder that the exact language of prohibitions on discussion of work-related information is critical.

Banner may have intended to prohibit discussion of salaries and discipline where the source was leaked information from confidential employee personnel files, or may perhaps have wanted to cut off circulation of third-hand rumors about other employees. But the language it chose appeared to target the very kind of information the discussion of which is protected by the NLRA.

With regard to employer directions not to discuss information related to ongoing investigations, the jury is still out. The D.C. Circuit previously indicated, in *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015) that it is dubious about the NLRB's rule that to support such nondisclosure directions, an employer must determine in each case that: (1) a witness needs protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up. At the same time, the *Hyundai Am*. Court found that a broad rule prohibiting employees from revealing matters under investigation was overbroad. In *Banner Health*, the Court did not resolve whether the NLRB's rule on confidentiality in investigations is valid. Thus, to be safe, employers may want to adopt policies that require a case-by-case assessment regarding the need for confidentiality related to investigations. Conversely, employees who are asked not to discuss an investigation may ask for an explanation of the need for nondisclosure.

Fair Labor Standards Act – Diminishing Bonuses For Overtime Work

Plan that reduces hourly rate of pay for overtime work violates FLSA regulations

***Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990 (9th Cir.), *cert. denied*, 199 L. Ed. 2d 41 (2017)**

Background: Matteo Brunozzi worked as a technician for Cable Communications, Inc. ("CCI"), installing cable television and internet services. CCI paid technicians on a piecework basis for each task they completed, plus a "Production Bonus." The company followed a multi-step process to calculate technicians' weekly compensation:

1. **Piece rate payments**
    a. Total value of all piecework tasks performed, minus certain adjustments = **Piece Rate Total**
    b. If over 40 hours worked, then
        i. **Piece Rate Total** divided by total hours worked = A**verage Hourly Rate**
        ii. **Average Hourly Rate** divided by two, multiplied by overtime ("OT") hours = **Piece Rate OT Premium**
2. **Bonuses**
    a. **Piece Rate Total** divided by 60, multiplied by 70, minus the **Piece Rate Total** and any **Piece Rate OT Premium** = **Production Bonus**. Thus,

i. In weeks with no OT, the **Production Bonus** = 1/6 the **Piece Rate Total**

ii. In weeks with OT, the **Production Bonus** = 1/6 the **Piece Rate Total**, minus the **Piece Rate OT Premium**

b. In weeks with OT, **Production Bonus** divided by total hours worked, divided by two, multiplied by OT hours = **Production Bonus OT Premium**

Brunozzi complained to his supervisors that he was not being properly compensated for overtime and eventually refused to work a Saturday for that reason. He was terminated soon afterward.

District Court: Brunozzi asserted several claims, including one for violation of the FLSA's overtime provisions. The district court granted summary judgment in favor of CCI on that claim.

Ninth Circuit Decision: The Ninth Circuit reversed. The Court initially cited basic FLSA principles long established by case law: the "regular rate" of pay, which must be used to calculate overtime, is "the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed;" and, in determining the "regular rate," all payments, wages, piece work rates, bonuses, or other things of value that are part of the normal weekly income must be included. The Court then cited FLSA regulations providing that piece-rate workers must be paid at the "regular rate" for all hours worked, plus one-half the regular rate for hours worked over 40 in a week. According to Brunozzi, CCI's compensation plan violated these principles in that the Production Bonus was designed to decrease in proportion to an increase in overtime hours worked. CCI countered that the FLSA does not regulate bonus amounts, and technicians were paid their piece-rate wages, plus overtime premiums at one-half their regular rate.

The Ninth Circuit found that although characterized as a "bonus," the Production Bonus—1/6 of the Piece Rate Total—was actually part of the regular wages technicians were entitled to receive on a weekly basis. Thus that amount had to be included in the total sum that was then divided by the number of hours worked in a given week to determine the regular rate of pay for that week, on which overtime pay would then be based. In weeks when technicians worked overtime, however, CCI reduced the Production Bonus that was paid during a 40-hour week by the amount of the overtime premium due on the piece-rate portion of compensation. The result was that technicians were paid at a reduced hourly rate for the same work when they worked overtime. That practice—a diminishing bonus device—violated several FLSA overtime regulations.

Take Home: Employers are not required to pay bonuses under the FLSA, and the amount of legitimate bonuses they choose to pay *on top of* employees' regular pay is generally up to them. But where, as with CCI, part of employees' regular pay is designated a bonus and is manipulated to allow the employer to pay lower wages for the same work in weeks of overtime hours, the employer is effectively circumventing the obligation to pay time-and-a-half for hours over 40. Such schemes violate the FLSA, and

employers who utilize them may be liable not only for the unpaid overtime that results, but also for double damages if the scheme is shown to be willful.

Equal Pay Act – Prior Salary as "Factor Other Than Sex"

Prior salary, alone, may be a "factor other than sex" that justifies a gender-based pay differential, but that factor must effectuate a business policy and be applied reasonably

***Rizo v. Yovino*, 854 F.3d 1161 (2017), *vacated and en banc rehr'g granted*, 869 F.3d 1004 (2017)**

Background: Aileen Rizo was hired by the Fresno County public school system as a math consultant. Following its usual practice, the County used its Standard Operation Procedure (SOP) 1440 schedule to determine her starting salary. The schedule has levels for specific jobs, each with ten steps. To set employees' initial salary, the County places them in the step corresponding to their most recent prior salary, increased by five percent. Applying this procedure, Rizo's salary would have been lower than Step 1 in her job category, so she was set at Step 1, giving her about a 23-percent raise from her prior job. Three years later, Rizo learned that a new male math consultant was hired at Step 9, and other math consultants, all who were male, were paid more than her. The County rejected Rizo's complaint about the disparity, saying all salaries had been properly set under SOP 1440.

District Court: Rizo filed suit in federal court under the Equal Pay Act, Title VII, and California state law. The County moved for summary judgment, arguing the differences in salaries between Rizo and her male colleagues were based on "any other factor other than sex," an affirmative defense under the Equal Pay Act. Denying summary judgment, the district court concluded that prior salary, alone, could never qualify as a factor other than sex. The court reasoned that "a pay structure based exclusively on prior wages is so inherently fraught with the risk . . . that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose."

Ninth Circuit Decision: The Ninth Circuit vacated the district court's decision. The Court noted that the Equal Pay Act creates a kind of strict liability—discriminatory intent need not be shown. Once the plaintiff shows she has received different wages for equal work, the employer has the burden of proving that the disparity is permitted by one of four statutory exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) "a differential based on any other factor other than sex."

In a past case, *Kouba v. Allstate Insurance Co*., 691 F.2d 873 (9th Cir. 1982), the Ninth Circuit had held that the Equal Pay Act doesn't strictly prohibit use of prior salary, even though that factor could be manipulated to underpay female employees. At the

same time, prior salary didn't automatically qualify as a factor other than sex. Rather, to support a pay differential based on prior salary, an employer must show that use of prior salary effectuates a business policy and is reasonable in light of the employer's stated purpose as well as its other practices. As long as those elements are demonstrated, a salary differential may be based only on prior salary.

In Rizo's case, the County offered four business reasons for using SOP 1440, including that the procedure is objective, prevents favoritism, and leads to a judicious use of taxpayers' money. The Court remanded the case to the district court to consider those reasons and determine whether the County established its affirmative defense.

Take Home: At first glance, *Rizo* allows the use of prior salary as a factor, even the sole factor, for determining new employees' starting compensation. However, the Ninth Circuit has now vacated *Rizo* and will be hearing the case *en banc*—a sign that its original decision in the case may well change. Even as originally decided, the case's reinforcement of the *Kouba* qualifiers—that the factor of prior salary must effectuate a business policy and be used reasonably—means employers must be careful in using past salary to establish incoming employees' starting pay. While relying on past salary may appear objective and consistent, its perpetuation of past gender-based pay differentials for years to come might not be considered reasonable. Recognizing this problem, some states and cities have enacted laws that prohibit employers from asking applicants about past compensation. The Washington State legislature considered but did not pass such a bill in 2017. For now, employers in the Ninth Circuit should be aware that the Court's *en banc* decision in *Rizo* may significantly change the analysis. In the meantime, employers who wish to rely on past salary to determine initial compensation, in whole or in part, should carefully examine their reasons for doing so.