

## Federal District Court and 8th Circuit Update

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## EIGHTH CIRCUIT

### I. RETALIATION

#### a. *Williams v. Tucker*, 857 F.3d 765 (8th Cir. 2017)

##### i. Relevant Facts:

1. City employee sued the county judge, Tucker and the sheriff under 42 U.S.C. § 1983 for retaliation because of her support for an opposition candidate in a county judge election. The alleged retaliation required Jenkins to leave her full-time bailiff position and lose her health insurance coverage, social security, and retirement benefits.
2. Jenkins sued Tucker and the county sheriff under 42 U.S.C. § 1983, alleging that they retaliated against her for supporting Prewitt in the circuit judge election.

##### ii. Relevant Procedural Posture:

1. Both defendants moved for summary judgement on the basis of qualified immunity.
2. The district court granted summary judgment for the sheriff but denied summary judgment for Tucker on the basis that his post-election statement to Jenkins about wanting “somebody who supports [him]” was direct evidence of a retaliatory motive.

##### iii. Relevant Holding:

1. The Eighth Circuit determined that state officials are entitled to summary judgment on the basis of qualified immunity, unless the facts show a violation of a clearly established constitutional right.
2. The court also concluded it is clearly established that employers cannot retaliate against employees for exercising their First Amendment rights, retaliation is a “clearly established” constitutional right that is not subject to the defense of qualified immunity.

3. Also, the Eighth Circuit found the loss of all these benefits amounted to material changes in the terms of her employment. See *Meyers v. Starke*, 420 F.3d 738, 744 (8th Cir. 2005) (stating that changes in “salary, benefits, or responsibilities” exemplify adverse employment actions). Transfer to a position held by many others and less prestigious constitutes a “tangible change in duties....”
4. Therefore, the Eighth Circuit upheld the district court’s decision to deny summary judgment.

**b. *Morgan v. Robinson*,  
881 F.3d 646 (8th Cir. 2018)**

i. Relevant Facts:

1. Morgan, the plaintiff, was a deputy in the Washington County, NE Sheriff’s Department. He ran against ran against Robinson, the defendant, who was also the elected Sherriff.
2. During his campaign, Morgan made public statements regarding the operations of the sheriff’s department and his plans to improve them.
3. Six days after Robinson won the election, he terminated Morgan’s employment, claiming the statements Morgan made during the election violated the department’s rules of conduct.

ii. Relevant Procedural Posture:

1. Morgan filed suit in district court alleging retaliation, deprivation of due process, and breach of labor contract.
2. Robinson filed a motion for summary judgment, claiming that he was entitled to qualified immunity in regard to Morgan’s retaliation claims.
3. The district court denied this motion, ruling that Robinson was not entitled to qualified immunity because there were genuine disputes of material fact concerning the public value of Morgan’s statements and whether those statements caused disruption in the operation of the sheriff’s department.
4. Robins appealed to the 8th Cir.

iii. Relevant Holdings:

1. The 8th Circuit found that the plaintiff's speech was protected because it addressed a matter of public concern, the statements were important to the community as a whole, and the form of these statements demonstrated their public importance.
2. Because these statements were on matters of public concern, Robinson faced a higher burden to justify Morgan's termination. Because the defendant failed to show the actual impact of Morgan's speech on the Sheriff's department, the defendant failed to show adequate justification for the plaintiff's termination.
3. Because Morgan's termination violated a right secured by the First Amendment and it was clearly established at the time of Morgan's termination that a public official could not sanction an employee for uttering protected speech when that speech neither impacted the employees official duties nor detracted from the office efficiency, the Defendant is not entitled to qualified immunity.

c. *Sellner v. MAT Holdings, Inc.*,  
859 F.3d 610 (8th Cir. 2017)

i. Relevant Facts:

1. Stark, a general manager of MAT allegedly told Sellner to produce a report showing no major issues with a pump. Sellner says that he told Stark that no units performed without major issues.
2. Stark said, "well, if you don't do this, we're all going to be on the street—no, you're going to be on the street." Sellner states that when he told Stark that he would not falsify any testing data and that his request was illegal, Stark said he should "get creative with [his] documentation."
3. A month later, Sellner was terminated. MAT maintains it fired Sellner for "unacceptable conduct" including "inappropriate and offensive statements made to and about his colleagues, and inability to maintain positive and productive relationships with his co-workers and engaging in conduct that adversely affected the productivity of the workplace."

ii. Relevant Procedural Posture:

1. Sellner sued MAT for wrongful termination under the Minnesota Whistleblower Act (MWA), Minn. Stat. § 181.932.
2. The district court granted MAT summary judgment on the MWA claim. Sellner also brought five other claims, which the district court dismissed and Sellner does not appeal. He appeals the dismissal of his MWA claim.

iii. Relevant Holding:

1. The Eighth Circuit reversed and remanded the MWA claim.
2. The court reasoned that falsifying test data is a state-law violation; reporting it is protected conduct under the MWA, and termination is an adverse employment action. The issue is the causal connection between Sellner's protected conduct and his firing.
3. The court found that Stark's remark that Sellner would "be on the street" forecasted how MAT would deal with Sellner's refusal to "get creative with [his] documentation." Stark's comment provides a specific link between Sellner's protected conduct and his termination. The Court rejected MAT's allegation of any intervening event that broke the specific link; the comments made by the decision-maker present evidence of employers motives for termination.
4. Whether the presence of a mixed motive defeats the plaintiff's claim is a trial issue, not an issue for summary judgment.

## II. SEXUAL HARRASSMENT

a. *Dindinger v. Allsteel, Inc.*,  
853 F.3d 414 (8th Cir. 2017)

i. Relevant Facts:

1. Three female plaintiffs sued their employer alleging it paid them less than their male colleagues performing equal work. All three brought claims under the Equal Pay Act, and two brought wage discrimination claims under the Iowa Civil Rights Act (ICRA). Each alleged that they were paid less than male employees performing equal work in the same position.

ii. Relevant Procedural Posture:

1. The district court instructed the jury that Allsteel could establish an affirmative defense if it proved that some factor other than sex justified the pay differences. However, the district court also instructed the jury that Allsteel may not rely on economic conditions to establish the affirmative defense.
2. The jury found in favor of the plaintiffs, and Allsteel moved for a new trial. Allsteel argued that district court improperly instructed the jury on its affirmative defenses. The district court denied the motion, and Allsteel appealed.

iii. Relevant Holding:

1. The Eighth Circuit did not decide the question of whether economic conditions could serve as a legitimate factor justifying a sex-based pay differential.
2. The court found that Allsteel did not provide sufficient evidence to establish such a defense in the first place. Although Allsteel presented evidence that it experienced economic hardship, it did not show that any cost-saving measures caused the plaintiffs to be paid less than male employees.

**b. *Hales v. Casey's Mktg. Co.*,  
16-3770, 2018 WL 1597783 (8th Cir. 2018)**

i. Relevant Facts:

1. Hales was employed at Casey's Summer Street store in Burlington, Iowa.
2. On May 29, 2013, a male customer entered Casey's West Avenue store. The customer told Hales about where he lived, where he worked, what kind of vehicle he drove, that there was a dashboard camera on his vehicle, and, using a sexually suggestive tone, that he liked to film things.
3. Hales tried to take a smoke break to get away from the male customer. She told him to back away and extended her lit cigarette to get him to move away. Instead, he stepped forward and burned his left arm.

4. The next day, the man returned to the store to tell the manager. The manager spoke to Hales and she told him that she burned him in self-defense. However, the manager terminated Hales's employment.

ii. Relevant Procedural Posture:

1. In 2015, Lauren Hales sued Casey's Marketing Company, for hostile work environment, sexual harassment (hostile work environment) and retaliatory termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (Title VII) and the Iowa Civil Rights Act (ICRA), Iowa Code § 216.1, et seq.
2. Hales sought to introduce evidence that she had been sexually assaulted in the past and had been undergoing therapy.
3. Casey's moved to dismiss the issue as time barred because Hales was outside the 90 days requirement of the EEOC.
4. The district court dismissed the ICRA claim as time-barred and rejected the Title VII claims on summary judgment. It also excluded evidence of previous sexual assaults and expert testimony.

iii. Relevant Holding:

1. The Eighth Circuit Court of Appeals affirmed the district court holding that the pendency her EEOC review does not toll a state civil rights claims and that Hales's ICRA claim is time barred.
2. The court also concluded that the district court did not abuse its discretion in excluding the evidence of the sexual assault or testimony. The court stated that it is not required to delve into a plaintiff's personal backgrounds when assessing the objective severity of harassment.

### III. DISCRIMINATION

a. *Stone v. McGraw Hill Financial, Inc.*,  
856 F.3d 1168 (8th Cir. 2017)

i. Relevant Facts:

1. After being discharged for his “poor performance,” employee alleged that his employer discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and the Missouri Human Rights Act.
2. In addition to asserting a claim of discriminatory discharge, Stone also alleged he was unfairly compensated compared to his white co-workers and subject to a race-based hostile work environment.

ii. Relevant Procedural Posture:

1. The United States District Court for the Eastern District of Missouri granted the employer’s motion for summary judgment on all claims.

iii. Relevant Holding:

1. The Eighth Circuit affirmed, finding that the employee’s wage discrimination claim failed because no similarly situated employee outside of the protected class received more favorable treatment.
2. The discriminatory termination claim failed, because the employee did not prove that the employer’s basis for terminating him was pretext for discrimination.
3. The Eighth Circuit agreed with the district court's conclusion that the one race-related comment of, “I should have never hired his black \*\*\*.” Which Stone allegedly overheard does not constitute harassment sufficiently severe and pervasive to support a hostile work environment claim.
4. The court cited *Singletary v. Missouri Dept. of Corr.*, 423 F.3d 886, 893 (8th Cir. 2005) (holding that colleagues' use of racial epithets referring to the plaintiff did not create a hostile work environment and stating that “our cases require that a plaintiff show more than [a] few occurrences over a course of years”).

**b. *Faidley v. United Parcel Service of America, Inc.*,  
853 F.3d 447 (8th Cir. Apr. 4, 2017) (rehearing en banc granted, opinion  
vacated (June 16, 2017))**

i. Relevant Facts:

1. Former driver brought actions alleging that parcel delivery company failed to provide accommodation for his disability in 2012 and 2013.
2. 2012: UPS offered Faidley a part-time position that would have reduced his seniority. He sued under the ADA and Iowa Civil Rights Act (ICRA).
3. 2013: Plaintiff received another set of work restrictions. UPS reinitiated the accommodation process, but no full-time positions fit his restrictions. UPS offered a part-time position. Plaintiff sued UPS for a second time under ICRA for disability discrimination and retaliation.

ii. Relevant Procedural Posture:

1. The U.S. District Court for the District of Southern Iowa consolidated his two actions and granted summary judgment for UPS.

iii. Relevant Holding:

1. On appeal, the Eighth Circuit treated Faidley's claims as two distinct actions.
2. 2012: The Eighth Circuit reversed the district court. The court concluded that Faidley had presented a genuine issue of material fact as to whether he suffered an adverse employment action.
3. 2013: The Eighth Circuit affirmed the district court. The court decided that Faidley had not presented evidence that he was qualified to perform the essential functions of any available job or that UPS failed to engage him in the accommodation process required by the ADA.
4. Rehearing en Banc Granted. Opinion was Vacated June 16, 2017.

**c. *Tovar v. Essentia Health*,  
No. 16-3186, 2017 WL 2259632 (8th Cir. 2017)**

i. Relevant Facts:

1. Tovar, the plaintiff, had a teenage son who was a beneficiary of her health insurance plan. The son was diagnosed with gender dysphoria and his health providers recommended treatment.
2. The insurance company HealthPartners, denied coverage because the plan categorically excluded coverage of services and surgery for gender reassignment.

ii. Relevant Procedural Posture:

1. Tovar filed a lawsuit against her employer, Essentia, alleging discrimination based on sex under Title VII and the MHRA.
2. Tovar also charged HealthPartners, Inc. (the insurance provider) with discrimination in violation of the ACA.
3. The district court granted the defendants' motion to dismiss, concluding that Tovar's claims against Essentia failed due to lack of statutory standing and that her claim against HealthPartners failed for lack of Article III standing.
4. Tovar appealed to the 8th Cir.

iii. Relevant Holdings:

1. The 8th Circuit affirmed the district court's ruling on the Title VII and MHRA claims. Tovar's Title VII and MHRA claims failed because she did not fall within the class of plaintiff's the statutes are designed to protect. The discrimination occurred against her son, not her.
2. The 8th Cir reversed the district court's ruling on the Article III claim. There was Article III standing because, if HealthPartners provided Essentia with a discriminatory plan document, Tovar's alleged injuries could be traceable and redressable through damages to HealthPartners.

3. Tovar suffered injury because the defendants' discriminatory conduct denied her the benefits of her insurance policy by forcing her to pay out of pocket for some of her son's prescribed medications.

*a. Blake v. MJ Optical, Inc.*

**870 F.3d 820 (8th Cir. 2017), cert. denied, 17-1015, 2018 WL 514150 (U.S. Apr. 2, 2018)**

i. Relevant Facts:

1. For decades Blake, a female employee worked for M.J. Optical as a bench technician, fitting eyeglass lenses into frames. Marty Hagge was the VP of MJ Optical and had a long-established work relationship with Blake.
2. After Blake's husband died, Blake became subject to many sexual comments and inappropriate touching on behalf of Marty. She never verbalized a complaint to Marty or anyone else because she felt it would not change the situation. Blake would also be subject to age-related comments and allegations.
3. One day, Marty yelled and screamed at Blake, claiming she was the reason that he had to quit school. Blake told this to Mary Hagge, the president of MJ Optical and mother of Marty Hagge.
4. Mary told Blake that she would talk to Marty about his anger and requested that Blake go home. Blake never complained about the age or sexual harassment she felt on behalf of Marty.
5. Blake resigned the next day claiming that her and Marty's relationship is getting worse everyday and she felt "compelled to resign" because she was reaching retirement age.

ii. Relevant Procedural Posture:

1. Blake sued MJ Optical, Inc., alleging she was the victim of sex discrimination, age discrimination, and a hostile work environment.
2. Blake testified her decision had nothing to do with any of Marty's sexual or age-related conduct. She also had no idea how her pay compared to younger employees' rates.

3. The district court granted MJ Optical’s motion for summary judgment, finding Blake’s evidence insufficient to support her federal and state law claims. Despite noting Marty’s behavior was “without a doubt disgusting,” the district court granted MJ Optical’s motion and dismissed Blake’s claims with prejudice

iii. Relevant Holding:

1. The Eighth Circuit Court of Appeals affirmed the district court’s grant of summary judgment.
2. For the three counts of sex discrimination, age discrimination, and hostile work environment, the court found that Blake did not give MJ Optical a “reasonable chance” to remedy the alleged mistreatment here, as she never told anyone there was a problem in need of fixing. The only time Blake complained about Marty came one day before she quit, and that was about conduct unrelated to her sex.
3. Before being held responsible for whatever problem there was, MJ Optical was entitled to a reasonable chance to address it. MJ Optical did not get such a chance. Thus, Blake did not suffer an adverse employment action, meaning her claims for disparate treatment on the basis of sex, age, and hostile work environment all fail.

#### IV. MISCELLANEOUS

a. *McLeod v. General Mills, Inc.*,  
856 F.3d 1160 (8th Cir. 2017)

i. Relevant Facts:

1. General Mills terminated 850 employees and offered severance packages in exchange for signing agreements that released the company from claims related to their termination.
2. Thirty-three employees who signed the agreement later sued General Mills, seeking declaratory judgment that they did not sign the release agreement knowingly and voluntarily. The employees also alleged that General Mills violated the Age Discrimination and Employment Act in terminating their employment.

ii. Relevant Procedural Posture:

1. General Mills moved to dismiss the employees' claims and compel arbitration.
2. The United States District Court for the District of Minnesota dismissed General Mills' motion.

iii. Relevant Holding:

1. The Eighth Circuit determined that a jury trial was not a ADEA "right" and that the right to bring a class action was waivable in a valid arbitration agreement. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). Ruling the district court erred and should have granted General Mills' motion to dismiss the employees' ADEA claims.
2. The Eighth Circuit rejected the employees' argument that the release was not signed "knowingly and voluntarily." Finding that their claim did not present an Article III case or controversy. Specifically, the court reasoned that a case or controversy does not exist when plaintiffs seek declaratory judgment as to the validity of a defense that a defendant "may or may not raise" in future proceedings.
3. Therefore, the district court did not have jurisdiction over the former employees' request for declaratory judgment concerning the validity of their release agreements.

**b. *Boswell v. Panera Bread Co.*,  
879 F.3d 296 (8th Cir. 2018)**

i. Relevant Facts:

1. Panera created a program under which qualifying managers were eligible to receive a one-time bonus.
2. A few years after creating the program, Panera asked its managers to sign an employment agreement that incorporated this bonus into a compensation plan.
3. In 2010, Panera decided that it would set a \$100,000 cap on the bonus. Panera informed the managers and received no complaints until 2014 when Mark Boswell raised concerns before receiving

his bonus.

ii. Relevant Procedural Posture:

1. Mark Boswell and other similarly situated managers sued Panera for breach of contract, claiming that Panera had violated the agreement by imposing a cap on the bonus amount.
2. Panera responded that the parties had terminated and replaced (novated) the agreement because the managers had assented to the new agreement containing the cap. In addition, Panera claimed that the managers waived any claims they had regarding the cap by continuing to work.
3. The district court granted summary judgment to the managers. It concluded that Panera had extended an offer to enter a unilateral contract and the offer had become irrevocable because all the class members had rendered a substantial part of the requested performance by working at least a year after signing the agreements.
4. Panera appealed to the 8th Circuit.

iii. Relevant Holdings:

1. At-will employment is a unilateral contract because there is a promise that the employer will pay if the employee works.
2. The contract cannot be modified after the employees have begun performance (rather than complete a substantial portion of performance).
3. Continued at-will employment cannot be consideration, therefore the parties did not form a new contract when Panera changed the bonus terms.

# FEDERAL DISTRICT COURT

## I. WHISTLEBLOWER

### 1. *Sellner v. MAT Holdings, Inc.*, No. 13-1289 ADM/LIB (D. Minn. Feb. 08, 2018) (Judge Montgomery)

In 2011, MAT Industries hired Sellner as a lab-quality technician. Sellner was responsible for conducting product quality testing. One of MAT's products, the "Honbase" pump, experienced issues with oil leakage during testing, which Sellner observed. MAT added New O-rings to the units in an attempt to resolve the oil leakage issue, and additional performance testing was requested. Sellner assisted with the testing, which was later compiled into a report by another employee. Upon viewing the report, Sellner alleged it "did not accurately reflect" the test results. Later, MAT's General Manager, Stark, asked him to collect all testing data on the Honbase pump and assemble it for delivery to a customer. After compiling the report, Sellner alleged the Engineering Lab Manager told him that the test results were "shit" and could not be used. Shortly thereafter, on March 29, 2012, Sellner alleged that Stark entered his office and instructed Sellner to produce a report indicating that the pumps had no major issues. When Sellner responded that the tests did not support those results, he alleged Stark stated, "Well, if you don't do this, we're all going to be on the street—no, you're going to be on the street." When Sellner refused to falsify records, he alleged Stark urged him to "get creative with [his] documentation." Later, an anonymous email was sent to MAT's HR Director accusing Sellner of "inappropriate conduct," and requesting an investigation be completed. Acting on the email, MAT conducted an investigation during which it was determined that Sellner "made disparaging comments about female employees," "was difficult to work with," and had a "condescending attitude toward other employees." MAT subsequently terminated Sellner on April 26, 2012, for his "unacceptable conduct," including "inappropriate and offensive statements made to and about his colleagues."

Sellner filed suit alleging multiple claims, including a claim of wrongful termination under the Minnesota Whistleblower Act (MWA). The District Court dismissed all claims, but the 8th Circuit Court of Appeals reversed and remanded the dismissal of Sellner's whistleblower claim, on the grounds that the 27-day gap between the protected activity and the adverse action was sufficient evidence to support an inference of discrimination.

On remand, MAT moved to dismiss Sellner's claim for punitive damages, two related co-defendants moved to be dismissed on the grounds that they were not proper party defendants, and MAT moved to disqualify Sellner's expert witness.

#### a. Punitive Damages

Sellner argued that because the Honbase pump posed a risk to consumer safety, punitive damages were appropriate. The Court held that the danger to the public was irrelevant to the issue of punitive damages; to warrant punitive damages in a whistleblower employment case, there must be "clear and convincing evidence that Defendants knew of facts or intentionally disregarded facts that created a high probability that [the Plaintiff's] right to be free from

retaliatory employment consequences under the whistleblower statute would be injured, and deliberately proceeded to act in conscious or intentional disregard or with indifference to the high probability of such injury.” However, the Court noted that there was “sufficient evidence in the record to preserve a claim for punitive damages because a reasonable jury could conclude that the decision-makers involved in Sellner’s termination deliberately disregarded his right to be free from unlawful retaliatory discharge.” The Court therefore denied MAT’s partial summary judgment motion.

#### b. Dismissal of Defendants

Defendant MAT Industries argued the co-defendants must be dismissed because they were not the proper defendants. Sellner argued that the Eighth Circuit’s “*Baker test*” must be used to examine the issue. Under *Baker v. Stuart Broad Co.*, 560 F.2d 389, 391 (8th Cir. 1977), four factors are utilized to determine whether co-defendants are single or joint employers including: (1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. MAT argued *Baker* did not apply because it was decided in a Title VII context, which “uses a broader definition of employer” than the MWA. Ultimately, the Court concluded using the *Baker Test* was appropriate for examining joint employment in regards to MWA claims, because Title VII and the MWA use similar language to carry out their similar intention of protecting employees. Applying the test, the Court dismissed Defendants MAT Holdings, Sanborn, and Midwest Air.

#### c. Expert Witness

MAT also sought to bar testimony from Sellner’s expert witness, who was going to testify (primarily) as to the underlying illegality. The Court reiterated that the underlying illegality was not the point of the lawsuit: the issue was whether MAT had terminated Sellner for engaging in protected activity. As such, the expert’s testimony was not relevant and, moreover, would be unduly prejudicial. The Court also ruled that the expert could not testify as to whether MAT told Sellner to falsify data, because that was a credibility-based determination for the jury.

### **2. *Smith-Bunge v. Wis. Cent., Ltd.*, No. 15-cv-4383 (RHK/LIB) (D. Minn. Aug. 31, 2017) (Judge Magnuson)**

Smith-Bunge worked for Wisconsin Central for six years, most recently as a welder. His duties included driving a welding truck. In the course of completing work on a railroad, Smith-Bunge, while driving the truck, was struck by a train. An accident investigation revealed the truck’s brakes were in working order, and that Smith-Bunge had seen and heard the oncoming train. Wisconsin Central subsequently terminated Smith-Bunge for falsely reporting the truck’s brakes were out and violating four railroad safety rules. Over a year after the accident, Smith-Bunge filed a lawsuit claiming retaliation under the Federal Railroad Safety Act (FRSA), and that the railroad’s negligence caused the accident. Wisconsin Central moved for summary judgment.

The FRSA prohibits rail carriers from retaliating against employees who engage in protected, safety-related activities. Smith-Bunge argued his termination was in retaliation for a previous lawsuit he filed against Wisconsin Central, and for his filing of a report about the accident. As to the first claim, he failed to provide evidence that his current supervisors were aware of the prior lawsuit, and, moreover, the accident was an intervening event that cut off any causal connection. As to the second claim, his accident was nearly a year before his termination, again cutting off any causal connection. Thus, the Court dismissed his FRSA claim.

**3. *Lemieux v. Soo Line R.R.*, No. Civil No. 16-1794 (JRT/HB) (D. Minn. Aug. 16, 2017) (Judge Tunheim)**

Lemieux was a train conductor for Soo Line Railroad, who alleged he made good-faith reports of unsafe brakes on railroad cars and was subsequently terminated. Lemieux filed a complaint, which was later amended, alleging retaliation under the Federal Railroad Safety Act (FRSA). Soo Line moved for a motion to dismiss under Rule 12(b), and, alternatively, for summary judgment, arguing Lemieux failed to exhaust his administrative remedies because his complaint with OSHA did not identify each of his protected actions. The Court disagreed, noting, “The exhaustion requirement may be satisfied if the civil claim grows out of, or is like or reasonably related to the substance of the allegations in the administrative charge.” Further, the charge must “be sufficient to give the employer notice of the subject matter of the charge and identify generally the basis for a claim.” Here, the Court held the earlier OSHA complaint satisfied these requirements. Thus, Lemieux could proceed with his retaliation claim.

**4. *Engelhardt v. Qwest Corp.*, No. 15-4591 ADM/SER (D. Minn. June 05, 2017) (Judge Montgomery)**

CenturyLink hired Engelhardt in 2000 as an independent contractor with the title of installation and maintenance technician. During that time, Engelhardt joined a class-action lawsuit against CenturyLink which alleged CenturyLink’s performance metrics violated the FLSA. He received a settlement payment when the action settled. In 2008, Engelhardt was terminated for low productivity. In 2011, Engelhardt learned CenturyLink was hiring, and applied for a position as a technician. A staffing agency which supplied independent contractors to CenturyLink hired Engelhardt. On his sixth day working at CenturyLink, the staffing agency dismissed Engelhardt when it discovered he was on a “Do Not Rehire” list maintained by CenturyLink. Next, in 2015, Engelhardt again applied for and was hired as an independent contractor at CenturyLink, after receiving assurances from a former union steward that there would be no reason to prevent him from working there. Shortly after Engelhardt’s return, the Technician Supervisor received complaints from other employees regarding Engelhardt’s quality of work. Ultimately, CenturyLink determined Engelhardt was underperforming and requested his dismissal from the assignment. Engelhardt then filed a whistle-blower claim against CenturyLink, alleging the 2011 and 2015 dismissals were in retaliation for his earlier participation in the class-action lawsuit.

The Court held Engelhardt lacked standing to file a retaliation claim under the Minnesota Whistleblower Act (MWA) because he was not an “employee” under the statute. Specifically, Engelhardt was an independent contractor, the MWA’s definition of “employee” excludes. Additionally, the Court held that Engelhardt’s retaliation claim would fail under the MWA and

the Fair Labor Standards Act (FLSA) because he failed to establish CenturyLink’s decision to terminate him was pretextual. Thus, the Court granted CenturyLink’s motion for summary judgment.

## II. DISCRIMINATION

### 1. *Miller v. Bd. of Regents of Univ. of Minn.*, No. 15-CV-3740 (PJS/LIB), (D. Minn. Feb. 01, 2018) (Judge Schiltz)

Three female coaches filed lawsuits against the University of Minnesota Duluth (UMD), one alleging her employment contract had been “non-renewed,” and two that they were constructively discharged, because of their sex (female), sexual orientation (lesbian), and in retaliation for accusing UMD of violating Title IX. UMD moved for summary judgment. The Court dismissed Plaintiffs’ sexual orientation claim under federal law, noting that it was bound to follow Eighth Circuit precedent holding that “Title VII does not prohibit discrimination against homosexuals.” *Citing Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989). Similarly, the Court dismissed Plaintiffs’ sexual orientation claims under state law pursuant to the 11th Amendment, which bars federal lawsuits against states; in doing so, the Court chastised Plaintiffs’ counsel for bringing those claims in federal Court rather than state Court.

Examining the “weaker” claims of sex discrimination, the Court dismissed two of the coaches’ claims in their entirety, and dismissed some but not all of the third coach’s claims, as follows.

#### a. Sex Discrimination under Title VII

Plaintiff Miller’s sex discrimination claim survived summary judgment because she presented sufficient evidence of pretext under the *McDonnell-Douglas* test, namely, that UMD used different standards for evaluating her performance than it used for the comparable male coach, and that UMD’s explanation for the non-renewal was inconsistent and not credible. The other Plaintiffs, however, failed to establish sufficient evidence of pretext to survive summary judgment.

#### b. Retaliation under Title VII

The Court held that Plaintiff Miller’s evidence of retaliation was “thin,” but sufficient to preclude summary judgment, based on temporal proximity. The Court dismissed the other coaches’ retaliation claims, finding insufficient evidence of pretext and that there was no adverse action with regard to one of them.

#### c. Sexually Hostile Work Environment

The Court dismissed all of the Plaintiffs’ hostile work environment claims, ruling that as a matter of law, the negative treatment they claimed to have received did not meet the high threshold necessary to maintain such a claim under Eighth Circuit precedent.

#### d. Equal Pay Act

Two of the three Plaintiffs also asserted claims under the federal Equal Pay Act, and the Court dismissed those claims. With regard to Plaintiff Miller, the Court held that coaching men's hockey and women's hockey were not comparable positions, and the resulting pay differential was not based on the coaches' genders, but the sport (i.e., gender) they coached. With regard to the other Plaintiff, the Court found no evidence of a meaningful disparity in pay.

#### **2. *Doyle v. O'Reilly Auto Enterp., LLC*, No. Civ. No. 16-4062 (PAM/FLN), (D. Minn. Jan. 25, 2018) (Judge Magnuson)**

Two Plaintiffs, Doyle and Weber, claimed O'Reilly Auto denied them promotions because of their age, in violation of the Age Discrimination in Employment Act (ADEA) and Minnesota Human Rights Act (MHRA). The Court analyzed the claims using the *McDonnell Douglas* burden-shifting approach. Regarding Plaintiff Doyle, the Court found that the only promotion he had actually applied for was beyond the statute of limitations, and there was no evidence of any sort of ongoing bias against older employees. The Court found that Plaintiff Weber, in contrast, could at least establish a prima facie case, but that he could not show any evidence of pretext. Weber did not dispute O'Reilly's evidence that he interviewed poorly, and that the decision-maker reviewed objective criteria including candidates' prior performance evaluations. Notably, Weber argued that an email discussing potential replacements for the candidate who was ultimately awarded the job, when the search was still going, was a "smoking gun," showing O'Reilly had already decided to give him the job. The Court disagreed, holding that the email simply showed that the company was attempting to plan for backfilling whomever received the promotion. The Court granted summary judgment dismissing all claims.

#### **3. *Tekler v. Minnesota*, No. 17-cv-3336 (JNE/DTS) (D. Minn. Jan. 08, 2018) (Judge Ericksen)**

Tekler, a housecleaner, could not proceed on her national origin discrimination claim because she did not file suit until more than 90 days after the EEOC sent her right to sue letter. Additionally, Tekler made only conclusory allegations in her complaint. Tekler argued the 90 day requirement should not apply because she had moved and did not receive the letter. The Court held it was her responsibility to notify the EEOC of any such address change.

#### **4. *Dahir v. UPS Mail Innovations, Inc.*, No. Civ. No. 17-2121 (PAM/HB) (D. Minn. Dec. 18, 2017) (Judge Magnuson)**

Plaintiffs were employees of Doherty, a temporary employment agency, and were assigned to work for UPS. Plaintiffs are Muslim, and sought time for prayer throughout the day as a religious accommodation. Plaintiffs claimed UPS hired a new Operations Manager, who was not only hostile to Muslims, but instructed other Supervisors to be so as well. Plaintiffs also claimed management implemented fixed break times, and stated prayer was not allowed

outside fixed breaks. During the meeting informing employees of the change, Plaintiffs alleged a Muslim employee asked about time for prayer, and the Manager asked all Muslim employees to raise their hands if they needed time for prayer. Plaintiffs alleged the Manager then said he “wanted to replace all of the employees who had raised their hands.” Later, Plaintiffs filed claims against UPS and Doherty citing religious discrimination, failure to accommodate the Plaintiffs’ religious beliefs, and retaliation in violation of the MHRA and Title VII.

The Court dismissed Plaintiffs’ retaliation claim, noting that the Plaintiffs’ request for religious accommodation was not a protected activity under Title VII, because “Title VII defines protected activity as opposing an unlawful employment practice or making a charge, testifying, or participating in an investigation or other proceeding under Title VII and “[r]equesting an accommodation is not opposing a practice nor is it participating in an investigation or other proceeding. ...” *Citing EEOC v. N. Mem’l Health Care*, F. Supp. 3d, 2017 U.S. Dist. LEXIS 104482 (July 6, 2017).

Next, Defendants argued Plaintiffs other MHRA claims should be dismissed because the MHRA requires a plaintiff to file suit within 90 days of giving notice of the lawsuit to the MDHR, and here the plaintiffs had filed their suits before giving such notice. The Court denied that argument, ruling that nothing in the MHRA prohibited a plaintiff from filing suit before providing notice to the MDHR.

Finally, the Court dismissed Plaintiffs’ failure to accommodate claims against UPS, because “a bare allegation that UPS and Doherty were ‘co-employers’ is wholly insufficient to raise a plausible claim that UPS was in fact Plaintiff’s employer...” However, the Court denied Doherty’s motion for summary judgment on the Plaintiffs’ failure-to-accommodate claim, based on the statute of limitations, ruling Plaintiffs brought the claim within 300 days of their termination.

**5. *Winkelman v. AgStar Fin. Servs.*, ACA, No. 16-3134 ADM/DTS (D. Minn. Nov. 07, 2017) (Judge Montgomery)**

Winkelman, a senior business analyst, began working for AgStar in 1994 as a records technician. She filed a charge of discrimination with the EEOC in 2011, which was cross-filed with the Wisconsin Equal Rights Division (ERD), alleging her supervisor made salary and promotion decisions based upon her gender and age. AgStar investigated claims and determined no discrimination took place. Later, the EEOC dismissed the charge finding no probable cause, and in 2014, Winkelman withdrew the cross-filed ERD charge. In 2014, Winkelman received a performance review from her new supervisor noting average performance and recommending she not be promoted. In February 2015, she reiterated her requests for a raise and a promotion, which Agstar denied. Winkelman eventually filed a second charge with the EEOC, claiming that AgStar had retaliated against her for her 2011 charge, her 2014 withdrawal of her ERD charge, and her complaints in February 2015. In 2016 the EEOC closed its investigation, concluding Winkelman’s retaliation charge lacked merit. Winkelman filed a complaint against AgStar alleging retaliatory discrimination in violation of the ADEA by refusing to promote her and not increase her salary. AgStar moved for summary judgment.

The Court analyzed Winkelman's claim using the *McDonnell-Douglas* burden-shifting framework. The Court found Winkelman's 2011 charge, while constituting protected activity, was too far removed from AgStar's salary and promotion decisions in February 2015 to support a retaliation claim. The Court next found that Winkelman's voluntary withdrawal of her ERD charge was not protected activity. Finally, the Court found that Winkelman's complaints in February 2015 could not support a retaliation claim because the adverse action at issue had occurred prior to those complaints, and that the "cat's paw" theory did not apply because the decision-makers did not know about her prior protected activity. Thus, the Court granted AgStar's motion for summary judgment.

**6. *Hustvet v. Allina Health Sys.*, No. 16-CV-551 (JNE/HB), (D. Minn. Aug. 22, 2017) (Judge Ericksen)**

Hustvet worked in healthcare as an Independent Living Specialist. When her employer, Courage Center, merged with Sister Kenny, a part of Allina, a condition of her continued employment was maintaining immunity to Mumps, Measles, and Rubella (MMR). Allina discovered she lacked an immunity to rubella, and therefore asked Hustvet to take a MMR vaccine. She refused to do so, stating that she had previously experienced severe cases of mumps and measles and did not want to risk exposure. Although she was willing to take a rubella-only vaccine, such a vaccine is not available in the United States. Allina terminated her employment for failure to comply with its immunity requirements.

Hustvet brought suit alleging disability discrimination under the ADA and MHRA stating Allina denied her employment on the basis of disability, that Allina utilized discriminatory qualification standards, and Allina failed to make reasonable accommodation. The Court noted that "although "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting . . . . not every impairment will constitute a disability." The Court thereby held that Hustvet's claim failed because she could not demonstrate that she was disabled within the meaning of the ADA or MHRA because none of her medical conditions (which included a seizure disorder and history of measles and mumps) limited her ability to perform a major life activity in any way. Thus, the Court concluded she had failed to establish a prima facie case of discrimination. In addition, the Court also found that in any event, there was no evidence that Allina's refusal to employ her was due to her claimed disabilities.

**7. *Brinkman v. Nasseff Mech. Contractors Inc.*, 251 F. Supp. 3d 1266 (D. Minn. 2017) (Judge Kyle)**

Brinkman worked in construction as a sprinkler fitter for nearly 20 years. She alleged she experienced harassment and other discriminatory conduct (such as receiving no work assignments) from Nasseff Mechanical Contractors, based upon her gender in violation of the MHRA and Title VII. She subsequently filed two charges with the Minnesota Department of Human Rights (DHR), which referred them to the EEOC for processing. Brinkman received right-to-sue letters from the EEOC on July 18, 2016, which stated she must file any claims based on the allegations in the charges within 90 days of receipt. Ninety days later, on October 16,

2016, Brinkman’s counsel attempted to file the complaint via the Court’s electronic case filing (ECF) system. The Court had recently transitioned to electronic filing, and Brinkman’s attorney was unfamiliar with the procedures, but familiarized herself with them based upon the Court’s website. Brinkman’s attorney believed she successfully filed the complaint, although she did not receive a notice of electronic filing (NEF) indicating the complaint was filed, nor did co-counsel, whose ECF account was used. On October 17, Brinkman’s attorney and co-counsel checked the “new cases” list on the Court’s website, but did not see Brinkman’s action listed. Next, they called the Court clerk’s office, who advised that “everything had been correctly filed,” but the complaint still needed to be docketed. As of October 21, Brinkman’s counsel still had not received a NEF, and inquired again with the Court’s electronic filing help desk. The help desk advised that the complaint had not been electronically uploaded on Sunday, the 16<sup>th</sup>, and the prior information received from the clerk’s office was incorrect. Thus, Brinkman’s counsel decided to re-file the Complaint, and successfully submitted it on October 21, 2016. Nasseff moved to dismiss the claim, arguing it was untimely because it was filed more than 90 days after receiving the right-to-sue letters from the EEOC. Brinkman argued that her filing should be “deemed” timely, and that the doctrine of equitable tolling applied.

Examining the Federal Rules of Civil Procedure in conjunction with Title VII’s statutory language, the Court first determined that an action must be “brought” within 90 days of notice by the EEOC, which means Brinkman was required to “file a complaint with the Court” (i.e., deliver it to the clerk) within 90 days. Because Brinkman’s counsel received no NEF for the October 16 filing, the action was not brought—rather, the case was not successfully filed until October 21. The Court refused to “deem” the filing timely, because the failure was not caused by a technical problem with the Court’s ECF system; it was caused by counsel’s failure to properly upload the Complaint.

Regarding equitable tolling, the Court held it did not apply. Equitable tolling is appropriate where (1) “the plaintiff pursued her claims diligently, but (2) some extraordinary circumstance stood in her way.” Here, the Court stated that the test’s second prong could not be satisfied—Brinkman’s counsel waited until the “eleventh hour” to file the complaint, and her counsel offered no reasons as to why this was so. Because “equitable tolling is predicated on excusable neglect” it “rings hollow when a plaintiff... despite being represented by several experienced attorneys — sits on her claims without explanation and then races to Court just before the filing deadline.” Thus, the Court dismissed Brinkman’s Title VII claims, and declined to exercise jurisdiction over the MHRA claim.

**8. *Wells v. BNSF Ry.*, No. 17-cv-807 (JNE/FLN) (D. Minn. Nov. 16, 2017) (Judge Ericksen)**

Wells applied for a track laborer position with Defendant, BNSF Railway. After interviewing, Wells received a conditional offer pending medical examination. During the examination, Wells confirmed he had a history of spinal surgeries, and BNSF ultimately found he “was not medically qualified” for the position. BNSF therefore rescinded the offer. Wells brought suit, alleging discrimination in violation of the ADA. BNSF filed a 12(b)(6) motion to dismiss, arguing Wells offered insufficient facts to show he was disabled as per the ADA. Examining the claim, the Court noted that “an impairment that disqualifies a person from only a narrow range of

jobs is not considered a substantially limiting one.” Using this standard, the Court found the BNSF deemed Wells only unable to work in the singular, “safety sensitive” job of a track laborer—not a broad class of jobs. Thus, the Court dismissed Wells’ ADA discrimination claim.

Notably, the Court recognized that the MHRA includes a less stringent definition of disability – a “material” impairment as opposed to a “substantial” impairment – but opined that Minnesota Courts have “offer[ed] little elaboration on the difference,” concluding that “analysis of an ADA claim applies equally to a MHRA claim.” Therefore, the Court dismissed the MHRA claim on the same basis.

**9. *Brunckhorst v. City of Oak Park Heights*, No. 16-455 (DWF/TNL) (D. Minn. Sept. 28, 2017) (Judge Frank)**

Brunckhorst, an accountant for the City of Oak Park Heights, went on an extended medical leave because of a life-threatening infection, which resulted in permanent nerve damage. During his leave, the City eliminated his position and absorbed it into other functions. The City offered Brunckhorst another position, however, at a lower salary. After the end of his leave (which the City extended several times), Brunckhorst requested a return to his former position, as well as an accommodation allowing him to work from home. The City advised it had eliminated his former position and rejected the proposal to work from home, but offered to allow him to return to work, in a different position, on a graduated work schedule. Brunckhorst rejected the City’s proposal, and rejected the City’s request to meet. Consequently, the City discharged him.

Brunckhorst filed suit alleging discrimination under the ADA and the MHRA. The Court granted the City’s motion for summary judgment. The Court held that “an employer is not required to provide an accommodation that is requested or preferred by an employee—instead, the accommodation need only be ‘reasonable.’” Further, the Court noted that other courts have concluded that working from home under some circumstances imposes an undue burden on the employer.

### **III. REPRISAL/RETALIATION**

**1. *Benner v. Saint Paul Pub. Sch.*, No. 17-01568 (SRN/KMM) (D. Minn. Dec. 04, 2017) (Judge Nelson)**

Benner, an African American male, was a fourth-grade teacher at Saint Paul Public Schools (SPPS). SPPS has a policy of “racial equity” which Benner alleged requires teachers to discipline African American students less severely than Caucasian students. Benner opposed the policy, and voiced his opposition during school board meetings. Benner alleged his opposition resulted in retaliatory actions by the school (including multiple investigations against him), culminating in his constructive discharge, and he asserted claims of race discrimination, hostile work environment, and reprisal. SPPS brought a Rule 12(b)(6) motion to dismiss for failure to state a claim. The Court granted SPPS’ motion for the hostile work environment claim, but denied for the other counts.

With regard to the race discrimination claim, the Court found that Benner had sufficiently pled adverse action (in the form of a constructive discharge) and circumstances that permitted an inference of discrimination, in that Benner claimed SPSS treated three similarly-situated Caucasian employees more favorably than he was. Notably, the Court chastised SPPS for arguing the McDonnell-Douglas standard on a Rule 12 motion, noting that McDonnell-Douglas is intended to dispose of unmeritorious claims on summary judgment, not on a motion to dismiss.

Similarly, the Court ruled that Benner had sufficiently pled his retaliation claim, again criticizing SPPS for relying on a summary judgment standard.

Finally, examining the hostile work environment claim, the Court noted the Benner asserted that SPPS' actions "were an insult," but provided no further evidence that they were severe or pervasive. "To survive a motion to dismiss, the facts alleged in Benner's complaint must show harassment so severe or pervasive that they satisfy the high threshold for a [racial] harassment claim based on hostile work environment." The Court held that being insulted alone does not meet this standard, and therefore dismissed the hostile work environment claim.

**2. *Harrell v. Handi Med. Supply, Inc.*, No. 16-737 (JRT/FLN) (D. Minn. Sept. 28, 2017) (Judge Tunheim)**

Harrell worked as a lead customer service representative for Handi Medical Supply. During her tenure, Harrell applied for and was granted intermittent FMLA leave to care for her husband who had a "serious mental health illness." Handi routinely approved her use of FMLA. During her employment, Harrell received above average performance reviews, and was "generally respected" in the workplace. However, she had incidents of unprofessional conduct, including disrespecting co-workers. When Handi organized changes to Harrell's department, she grew upset and called her husband about the changes. This upset him, and Harrell stated to her supervisor she needed to leave, using her FMLA. Co-workers alleged she used profanity and was visibly angry with the supervisor during the exchange. In a subsequent meeting to discuss her behavior, Handi alleged Harrell made derogatory comments about its corporate mission statement, and Handi ultimately terminated Harrell for her inappropriate behavior.

Harrell filed suit alleging Handi's reason for the termination was pretext to terminate her in retaliation for her FMLA usage, and for associating with, and being married to, a disabled person. Handi moved for summary judgment.

The Court found that Harrell had established a prima facie case of retaliation and discrimination under the FMLA, and reprisal and marital status discrimination under the MHRA, based primarily on temporal proximity – the adverse action followed "a matter of minutes" after the protected activity. She did not, however, establish a prima facie case of reprisal under the MHRA for associating with disabled persons, because she presented no evidence that her husband was disabled under the MHRA.

The Court found that Handi had articulated a legitimate, non-discriminatory and non-retaliatory reason for terminating Harrell, and that Harrell did not present sufficient evidence of pretext to

survive summary judgment. As to the FMLA claims, the Court noted that Handi had replaced Harrell with another employee on intermittent FMLA leave, and had always permitted her to take leave when requested. Moreover, evidence that Harrell's supervisor responded angrily to her protected activity, and that Handi did not follow its normal policies in failing to investigate the complaint, was not sufficient to establish pretext. Finally, Harrell's own conduct weighed against a finding of pretext. Thus, the Court granted Handi's motion for summary judgment.

**3. *EEOC v. North Mem'l Health Care*, 262 F. Supp. 3d 863 (D. Minn. 2017) (Judge Doty)**

Emily Sure-Ondara applied for a position as a registered nurse with North Memorial, and, after interviewing, North Memorial extended a conditional offer. The terms and conditions of the position were governed by a collective bargaining agreement, and required her to work every other weekend. After receiving the offer, Sure-Ondara advised she was unable to work Friday evenings because she is a Seventh Day Adventist. North Memorial advised her that working every other weekend was a requirement of the position, and if she was unable to do so the offer would be rescinded. Sure-Ondara proposed that she could find someone to cover her shift or come in if she could not, but North Memorial decided it was not feasible and rescinded the offer. Sure-Ondara filed a Title VII religious discrimination claim with the EEOC, which found probable cause and filed suit on Sure-Ondara's behalf.

North Memorial moved for summary judgment. Applying the plain language of Title VII, the Court concluded that neither of the statute's definitions of protected activity – the "opposition" clause or the "participation" clause – covered a request for religious accommodation. The Court declined to follow *Heisler v. Metro Council*, 339 F.3d 622 (8<sup>th</sup> Cir. 2003), in which the Eighth Circuit held that requesting an accommodation for a disability was protected activity under the ADA. The Court noted that the Eighth Circuit itself had recently questioned *Heisler*, in *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898, 907-08 (8<sup>th</sup> Cir. 2010), and that ADA precedent did not apply because the ADA has a broader scope than Title VII. Consequently, the Court granted North Memorial's motion for summary judgment.

**4. *Anderson v. Hearing Lab Tech., LLC*, No. 17-CV-5527 PJS/FLN (D. Minn. April 3, 2018) (Judge Schiltz)**

Anderson worked for Hearing Lab Tech (HTL) as an audiologist, with job duties including administering hearing tests and hearing-aid demonstrations. He alleged HTL required him to demonstrate hearing aids for every patient undergoing a hearing test, whether the patient had hearing loss or not, which he claimed "falsely gave [patients] the impression [that] their hearing was impaired and [that they] needed a hearing device." Anderson alleged HTL terminated him in violation of the Minnesota Whistleblower's Act (MWA) after he advised his superiors that this process was "fraudulent." HTL moved to dismiss under FRCP 12(b)(6) for failure to state a claim. The Court noted that to succeed on an MWA claim, a plaintiff must report facts that, "if true, constituted an actual violation of the law." Because HTL's protocol for the hearing tests required the audiologists to "use his professional judgment to explain the test results," and did not prevent him from making a recommendation about whether a hearing aid was necessary, the Court concluded that Anderson was "free to ensure that his patients were not misled in any way."

Thus, the Court held Anderson had failed to plead a plausible claim that HTL’s hearing test protocols were “fraudulent or otherwise violated the law.” The Court granted HTL’s motion to dismiss.

#### **IV. NON-COMPETE**

1. ***Mid-America Business Systems v. Sanderson et al.*, Case No. 17-3876 (Dist. Minn. Oct. 6, 2017) (Judge Tunheim)**

Plaintiff Mid-America Business Systems employed Sanderson as a service technician. Mid-America initially hired Sanderson as a temporary employee subject to an “unwritten” probationary period, and later converted him to a permanent position, at which time Mid-America required Sanderson to sign a non-compete agreement. Later, Sanderson resigned and began working for a competitor as a service technician. Mid-America sought to enforce a non-compete agreement with Sanderson, and moved for a Temporary Restraining Order.

Because Sanderson was not required to sign the non-compete as a condition of employment, the Court noted the Mid-America “must show there was independent consideration given in exchange for the non-compete agreement.” Mid-America argued being hired as a permanent employee and provided training constituted sufficient consideration. The Court agreed that those things *could* constitute adequate consideration to support a non-compete, but that they did not in this case, because Mid-America had not “shown that these benefits were bargained for in exchange for Sanderson’s Non-Compete Agreement” since the existence of a probation period was an unwritten rule that Mid-America had not communicated to Sanderson.

Moreover, the Court found that there was insufficient evidence of any violation. The fact that Sanderson’s new employer performed services for some of Mid-America’s customers was insufficient to tie Sanderson to that work, and in any event, “solicitation requires some element of attempted persuasion,” beyond simply responding to a client’s service calls or telling an employee that the pay was better elsewhere. The Court also noted that “Minnesota Courts do not grant injunctive relief solely because a former employer presumes that disclosure and solicitation are inevitable.” Therefore, since Mid-America had not “demonstrated sufficient likelihood of success” on the claim, the Court denied the TRO motion.

#### **V. HARASSMENT**

1. ***Pung v. Regus Mgmt. Grp., LLC*, No. 16-6 (DWF/DTS) (D. Minn. Dec. 21, 2017) (Judge Frank)**

Ginger Pung began dating and had a sexual relationship with her supervisor, Scott Ravenscroft, when they both worked for Regus. Eventually, she ended the relationship, after which Pung alleged Ravenscroft began treating her worse than co-workers, and threatened to put her on a coaching plan. Pung reported her concerns to Regus’ HR Director, informing him of her relationship with Ravenscroft and the behavior she was experiencing after ending it. The HR Director conducted an investigation, finding improper conduct did not occur, but issuing a warning to the supervisor. Additionally, Regus assigned Pung’s performance management to a

different supervisor. Subsequently, Pung alleged Ravenscroft's behavior worsened and Regus placed her on a performance improvement plan. Soon thereafter, Regus terminated Pung during a reduction in force.

Pung filed suit alleging sexual harassment and reprisal in violation of Title VII and the Minnesota Human Rights Act (MHRA).

Regarding Pung's quid pro quo harassment claim, the Court found there was sufficient evidence that Ravenscroft took actions to cause Pung to suffer an adverse employment action, even if he was not the ultimate decision-maker. However, the Court dismissed her hostile work environment claim, finding that the conduct at issue was not sufficiently abusive to state a claim. Finally, the Court denied summary judgment as to Pung's reprisal claim, holding that there was sufficient evidence that Ravenscroft had taken actions against her because she had complained about him to Human Resources.

## **VII. WAGE & HOUR**

### **1. *Farah v. Alpha & Omega USA, Inc.*, No. 16-996 (PAM/DTS) (D. Minn. Nov. 27, 2017) (Judge Magnuson)**

Plaintiffs were drivers for Travelon, which offered transportation services to disabled and elderly persons. Plaintiffs filed claim alleging Travelon failed to pay overtime and minimum wage in violation of the Fair Labor Standards Act. Travelon argues Plaintiffs failed to show evidence Travelon was aware, or should have been aware, they were working overtime, and thus moved for summary judgment.

The Court held that Travelon should have known Plaintiffs were working overtime because they submitted weekly trip logs. While Travelon argued the logs only showed pick-up and drop-off times, and the gaps between "cannot be counted as hours worked," the Court held that those "gaps" were compensable travel time between jobs, and were also too short to allow the drivers to follow their own pursuits. Moreover, the logs "were the very records used to document the work Plaintiffs performed and which formed the basis for their compensation." Thus, the Court denied summary judgment, as the records could arguably be used to demonstrate that Travelon had "constructive knowledge of unpaid overtime work."

### **2. *Harris v. Chipotle Mexican Grill, Inc.*, No. 13-cv-1719 (SRN/SER) (D. Minn. June 12, 2017) (Judge Nelson)**

Plaintiffs sued Chipotle for unpaid wages, claiming they were routinely required to work off the clock. Chipotle moved for decertification of the class, arguing that the class members were not similarly situated for various reasons, and that there were conflicts of interest within the class, e.g., some class members allegedly directed other class members to work off the clock. The Court rejected those arguments, finding "managers working the closing shift worked as a team with crew members, largely performing the same tasks."

**3. *Schmidt v. DIRECTV, LLC*, No. 14-3000 (JRT/TNL) (D. Minn. Aug. 17, 2017)  
(Judge Nelson)**

Plaintiffs were satellite technicians, working for contractors of Defendants DirectSat and DIRECTTV. Plaintiffs filed suit for overtime under the Fair Labor Standards Act (FLSA). They alleged that the Defendants were their joint employers, along with the “Subordinate Entities” that employed them. The Court utilized the “economic reality” test to determine joint employment status, examining “(1) who had the power to hire and fire the employee; (2) who supervised or controlled the employee's work schedule or conditions of employment; (3) who determined the rate or method of payment; and (4) who maintained [the employee's] employment records.” The Court found sufficient evidence of joint employment to preclude summary judgment because the Defendants played a role in hiring and firing the Plaintiffs by specifying eligibility criteria, and the Defendants also played a role in supervising and controlling the Plaintiffs. The Court also found sufficient evidence that the Defendants should have known the Plaintiffs worked overtime based on information available through their scheduling software.

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