IX. Labor

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A. Introduction

The Labor Committee's report reviews important decisions over the past year in federal employment, labor, and employee benefit laws. The report's employment law section reviews significant federal court decisions and agency actions under all the major federal employment statutes. Of particular note are two Supreme Court decisions, one extending the scope of Sarbanes-Oxley whistleblower protections to employees of non-public companies that are contractors to public companies and another holding that time spent by employees for security screening is not compensable under the Fair Labor Standards Act (FLSA). The labor law section addresses, among other things, an important Supreme Court decision that holds unconstitutional President Obama's recess appointments to the National Labor Relations Board (NLRB), but otherwise suggests that the president has broad authority in this area. Finally, in the employee benefits area, the report addresses two important Supreme Court decisions. The first is a decision involving retiree medical benefits that holds that the question whether such benefits extend beyond the duration of a collective bargaining agreement is to be determined under traditional contract law principles. The second is an ERISA decision that rejects the so-called *Moench* presumption of prudence that had provided significant protections to fiduciaries in employer stock drop litigation and won widespread approval by the federal appellate courts. However, while the plaintiffs' bar has applauded the rejection of the presumption, the analytical framework erected by the Supreme Court in its place may prove to be an equally formidable barrier to the prosecution of stock drop cases.

B. Employment Law Developments

1. Sarbanes-Oxley Whistleblower Protections

a. The Supreme Court Extends Sarbanes-Oxley's Whistleblower Protections to Employees of Privately Held Companies That Are Contractors or Subcontractors of a Publicly Held Company

In *Lawson v. FMR LLC*, the Supreme Court held in a six-to-three decision that the whistleblower protections afforded by 18 U.S.C. § 1514A of the Sarbanes-Oxley Act of 2002 (SOX) extend to employees of contractors and subcontractors of public companies.[1] To guard against overbroad application of its rule, however, the Court referenced "various limiting principles" advanced by the plaintiffs and the Solicitor General. Those limiting principles included the fact that an entity may not be considered a "contractor" unless its "performance of [the] contract will take place over a significant period of time" and that SOX would "protect[] contractor employees only to the extent that their whistleblowing relates to

1. 134 S. Ct. 1158, 1161 (2014).

the contractor fulfilling its role as a contractor for the public company, not the contractor in some other capacity."[2]

The plaintiffs filed separate complaints with the Occupational Safety & Health Administration (OSHA) of the U.S. Department of Labor (DOL), alleging unlawful retaliation under § 1514A by their respective former employers, privately held companies that provide advisory and management services to a family of SOX-covered mutual funds. The plaintiffs sought de novo review of their complaints in district court after the 180-day period specified in § 1514A (b)(1) concluded without a final DOL decision.

A divided panel of the First Circuit overturned a district court decision holding that § 1514A extends to employees of private agents, contractors, and subcontractors to public companies. The First Circuit concluded that § 1514A unambiguously confined its reach to employees of companies that have a class of securities registered under § 12 of the Securities Exchange Act of 1934 or those that file reports with the SEC pursuant to § 15(d) of the 1934 Act.

The Supreme Court reversed. It held that § 1514A "shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors."[3] Justice Ginsburg, writing for the majority, based this decision on several factors, including the fact that the majority of mutual funds, like the one at issue in the case, are public companies with no employees; therefore any purported whistleblowing must be made by an employee on "another company's payroll."[4] If § 1514A did not apply, all possible persons equipped to raise concerns of fraud on investors with respect to such mutual funds would be left unprotected by SOX. The majority believed that such a reading of the statute would be contrary to Congress's intent to protect and encourage corporate whistleblowers.

b. The Fifth Circuit Finds Violation of Sarbanes-Oxley's Whistleblower Protections in Disclosure of Whistleblower's Identity

In *Halliburton, Inc. v. Administrative Review Board*,[5] the Fifth Circuit affirmed the decision of the DOL's Administrative Review Board (ARB) that an employer's disclosure of a whistleblower's identity in a document retention notice constitutes an adverse employment action under SOX.

A Halliburton employee complained both internally and to the SEC about Halliburton's accounting practices. The SEC notified Halliburton that it was investigating the company's accounting practices and that Halliburton should retain certain documents. Neither the employee nor the SEC disclosed the identity of the whistleblower, but Halliburton's general counsel inferred who it was from the employee's internal reports and identified him by name as the person who made allegations to the SEC in the document preservation notice sent to the

2. *Id.* at 1169, 1173.
3. *Id.* at 1161.
4. *Id.*
5. 771 F.3d 254 (5th Cir. 2014).

employee's supervisor. The supervisor forwarded the preservation notice to fifteen members of the employee's work group, thereby informing them of who had complained to the SEC.

The employee filed a SOX claim, but the DOL administrative law judge dismissed the case, concluding that disclosing the whistleblower's identity was not an adverse action. The ARB reversed on appeal, finding that Halliburton's breach of the employee's confidentiality rose to the level of material adversity. The issue ultimately found its way to the Fifth Circuit on appeal.

Applying the framework established by the Supreme Court in *Burlington North & Santa Fe Railway Co. v. White*,[6] the Fifth Circuit held that the disclosure of the whistleblower's identity under the circumstances rose to the level of materially adverse action because such disclosure would likely dissuade a reasonable worker from engaging in protected conduct. Specifically, the court noted that "[t]he undesirable consequences, from a whistleblower's perspective, of the whistleblower's supervisor telling the whistleblower's colleagues that he reported them to authorities for what are allegedly fraudulent practices, thus resulting in an official investigation, are obvious."[7] The court further observed that "[i]t is inevitable that such a disclosure would result in ostracism, and, unsurprisingly, that is exactly what happened to [the employee] following the disclosure."[8] The court relied on the fact that the employee's supervisor informed his coworkers that he was the cause of the SEC investigation because "the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high."[9]

As to whether the employee's whistleblowing was a "contributing factor" in the disclosure of his identity, the court rejected Halliburton's argument that the employee had to show that the company had a "wrongful motive" for its actions.[10] Relying on *Allen v. Administrative Review Board*,[11] it held that a contributing factor is "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[12]

c. The Third Circuit Rules That Certain Whistleblower Retaliation Claims Remain Arbitrable Even After Dodd-Frank

In *Khazin v. TD Ameritrade Holding Corp.*,[13] the Third Circuit held that although Dodd-Frank amended other laws to shield whistleblower claims from predispute arbitration, claims brought under Dodd-Frank itself remain arbitrable. The plaintiff alleged his employer fired him after he reported securities

6. 548 U.S. 53 (2006).
7. *Halliburton*, 771 F.3d at 262.
8. *Id.*
9. *Id.*
10. *Id.* at 263.
11. 514 F.3d 468, 476 n.3 (5th Cir. 2008).
12. *Id.* at 263.
13. 773 F.3d 488, 489 (3d Cir. 2014).

violations to his supervisor and brought a claim for whistleblower retaliation under Dodd-Frank. The employer argued that the plaintiff's suit was precluded by an arbitration agreement in which he agreed to arbitrate all claims arising out of his employment. The plaintiff maintained that Dodd-Frank "nullified" his arbitration agreement as to his whistleblower claim, relying on a Dodd-Frank provision stating "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."[14] The employer argued that the anti-arbitration provision did not apply to the plaintiff's particular whistleblower claim (a Dodd-Frank cause of action) and, that even if applicable, it did not apply retroactively. The district court found that the anti-arbitration provision did not apply retroactively, dismissed the complaint, and compelled arbitration.

On appeal, the Third Circuit held that the plaintiff's Dodd-Frank whistleblower claim was arbitrable because it was not among the whistleblower claims that Dodd-Frank exempted from predispute arbitration agreements. Dodd-Frank amended a number of other laws, including Sarbanes-Oxley, and whistleblower claims brought pursuant to those amendments are subject to Dodd-Frank's anti-arbitration provision. Whistleblower claims brought under Dodd-Frank itself, however, are not exempted because its language makes clear that it applies only to the Sarbanes-Oxley cause of action and not the Dodd-Frank cause of action. The Third Circuit refused to read into Dodd-Frank a "broader purpose of enhancing protections for whistleblowers."[15] The Third Circuit did not address, and therefore left undisturbed, the district court's holding that the anti-arbitration provision did not apply retroactively.

2. Title VII

a. *The Tenth Circuit Finds That Constructive Discharge Claims Accrue on the Date of the Last Discriminatory Action*

In *Green v. Donahoe*, the Tenth Circuit held that an employee's claim that he was constructively discharged accrued on the date of the last discriminatory employment action and not on the date that the employee announced his resignation.[16] In so holding, the Tenth Circuit joined a circuit split on the issue. The majority of courts have held that a constructive discharge claim accrues when the employee gives notice of departure.

The plaintiff, an African-American, was employed by the U.S. Postal Service as a manager and later as a postmaster until his retirement in 2010. He made employment discrimination claims with the Postal Service's Equal Employment Opportunity Office, alleging that he was denied a promotion because of his race. He later claimed that the Postal Service retaliated against him by threatening him with criminal prosecution and putting him on unpaid leave. On

14. 18 U.S.C. § 1514A.
15. *Khazin,* 773 F.3d at 492–94.
16. 760 F.3d 1135, 1145 (10th Cir. 2014).

December 16, 2009, he signed a settlement agreement that provided him with paid leave and the choice to retire or work in a lesser paying position 300 miles away. Thereafter, on March 22, 2010, the employee initiated EEO counseling for alleged constructive discharge.

The district court dismissed his claim that he had been constructively discharged in retaliation for asserting his Title VII rights on the ground that his claim was time-barred by his failure to contact an EEO counselor about the alleged constructive discharge within forty-five days of signing the settlement agreement. On appeal, the plaintiff argued that the forty-five day limitations period did not commence until he announced his resignation, even though it was well after the last alleged discriminatory act against him. The Tenth Circuit recognized that the majority of courts considering the issue had held that a constructive discharge claim accrues when the employee gives notice of the departure.[17] The Tenth Circuit declined to follow those decisions, explaining that "we cannot endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer."[18] Since the Postal Service did not engage in any discriminatory acts against the plaintiff after December 16, 2009, the date of his settlement agreement, and he initiated EEO counseling on the constructive discharge claim more than forty-days after that date, his claim was time-barred.

b. *First Circuit Expands* Faragher-Ellerth *Negligence Theory of Liability to Quid Pro Quo Sexual Harassment by Co-Workers*

In a case of first impression, the First Circuit in *Velazquez-Perez v. Developers Diversified Realty Corp.* held that liability for quid pro quo sexual harassment can include circumstances where the alleged harasser was a co-worker and not the plaintiff's supervisor.[19] The plaintiff alleged that a female human resources representative targeted him for termination after he rebuffed her sexual advances. When the plaintiff complained to his supervisors about the issue, the supervisors did not take the complaint seriously. The employer also did not have a formal complaint procedure for sexual harassment or Title VII claims. The district court granted summary judgment to the employer on the plaintiff's sexual harassment claim under Title VII ruling that he could not establish a prima facie case because the human resources representative was not his supervisor.

On appeal, the First Circuit concluded that a reasonable jury could find that the female human resources representative threatened the plaintiff to engage in a sexual relationship or suffer adverse consequences, including potential termination, based on her influence. The court held, however, that the employer

17. *Id.* at 1144. *See* Jeffrey v. City of Nashua, 48 A.3d 931, 936 (N.H. 2012); Patterson v. Idaho Dep't of Health & Welfare, 256 P.3d 718, 725 (Idaho 2011); Whye v. City Council, 102 P.3d 384, 387 (Kan. 2004); Hancock v. Bureau of Nat'l Affairs, Inc., 645 A.2d 588, 590 (D.C. 1994).
18. *Id.*
19. 753 F.3d 265 (1st Cir. 2014).

could not be vicariously liable for the human resources representative's actions because she was not the plaintiff's supervisor.

The court then went on to find that the employer could be liable on a different theory, i.e., for negligently allowing the discriminatory acts to cause the plaintiff's firing. The First Circuit acknowledged that "[t]he Supreme Court has not yet ruled on the precise question of whether employer liability premised on a finding of negligence can be limited to cases of 'hostile workplace' discrimination, as opposed to discriminatory termination."[20] However, the court explained that the Supreme Court has noted that the distinction between hostile workplace claims and quid pro quo claims is "of limited utility."[21] Accordingly, the First Circuit ruled that there was no basis to

> permit a negligent employer to escape (or incur) liability on one type of claim but not the other. The same considerations of simplicity touted in *Vance* that counsel against heightening the potential for liability on quid pro quo claims, counsel as well against lessening the potential for liability.[22]

Because a reasonable jury could find that the plaintiff's termination was a result of quid pro quo harassment and that the employer was negligent in response to that harassment, a trial was warranted.

3. Fair Labor Standards Act

a. *Unanimous Supreme Court Rules That Screening Time Is Not Compensable Under the FLSA*

In *Integrity Staffing Solutions, Inc. v. Busk*,[23] the Supreme Court held that employees' time spent waiting for and undergoing security screening after their shifts is not compensable under the FLSA. Security screenings are neither a "principal activity" that the workers were employed to perform nor "integral and indispensable" to their principal activities.[24] In so holding, the Court for the first time defined what it means for a preliminary or postliminary activity to be "integral and indispensable."[25]

The plaintiffs worked for Integrity Staffing Solutions, Inc., which provides warehouse staffing at various Amazon.com fulfillment centers. Their responsibilities were to retrieve products from shelves and package them for delivery to Amazon customers. The plaintiffs alleged that they were required to undergo antitheft security screening after clocking out from their shifts, both before lunch breaks, and at the end of the day.

20. *Id.* at 273.
21. *Id.* (citing Burlington Indus. v. Ellerth, 524 U.S. 742, 751 (1998)).
22. *Id.* (citing Vance v. Ball State Univ., 133 S. Ct. 2434 (2013)).
23. 135 S. Ct. 513, 515 (2014).
24. *Id.* at 519.
25. *Id.* at 517.

On appeal, the Ninth Circuit reversed a district court decision holding that waiting for and undergoing security screening was not an "integral and indispensable" part of the plaintiffs' principal job activities and thus not compensable under the FLSA.[26] The Ninth Circuit held that postliminary activities *are* integral and indispensable if they are "necessary to the principal work performed" and "done for the benefit of the employer."[27] The Ninth Circuit concluded that, because the alleged purpose of the security screenings was to prevent employee theft, they were necessary to the employees' primary work and done for Integrity's benefit and therefore could be compensable under the FLSA.[28]

The Supreme Court reversed, first explaining that the Portal-to-Portal Act amendment to the FLSA was a "swift" response by Congress to the "flood of litigation" that had been "provoked" by a prior overly broad judicial interpretation of the FLSA "in disregard of long-established customs, practices, and contracts between employers and employees."[29] The Court then addressed the exemption at issue, i.e., that "activities which are preliminary to or postliminary to" the "principal activity or activities which [an] employee is employed to perform" are not compensable under the FLSA.[30] Interpreting and applying that exemption, the Court reasoned that the words "integral and indispensable" are to be used "in their ordinary sense," announcing, for the first time, a clear test for what is integral and indispensable.

The Court concluded that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[31] The Court distinguished activities that are an "adjunct or appendage" to the employee's primary job responsibilities.[32] The security screenings at issue were not the "principal activity or activities which [the] employee is employed to perform" because Integrity "did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment."[33] The security screenings were also not "integral and indispensable" to the plaintiffs' principal duties because "[t]he screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment," and Integrity "could have eliminated the screenings altogether without impairing the employees' ability to complete their work."[34] The Court also held that "[t]he Court of Appeals erred by focusing on whether an employer *required* a particular activity. . . . If the test could be satisfied merely by the fact that an employer required

26. *Id.* at 516.
27. *Id.* (citing Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525, 530–31 (9th Cir. 2013)).
28. *Integrity Staffing Solutions*, 135 S. Ct. at 516.
29. *Id.*
30. *Id.* at 517–19.
31. *Id.* at 517.
32. *Id.*
33. *Id.*
34. *Id.* at 518.

an activity, it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address."[35]

b. Ninth Circuit Scrutinizes FLSA Pleading Standards

In *Landers v. Quality Communications, Inc.*,[36] the Ninth Circuit added to an existing circuit split in holding that "generalized allegations" are insufficient to plead wage claims under the FLSA. The plaintiff, a cable installer in Nevada, filed a putative class action complaint in which he alleged that he and similarly situated employees were compensated on a piecework basis and not paid overtime for work in excess of forty hours per week.[37] Applying the heightened pleadings standards set forth in *Bell Atlantic Corp. v. Twombly*[38] and *Ashcroft v. Iqbal*,[39] the Ninth Circuit affirmed a district court decision that these allegations were insufficient, holding that it is not enough for a worker to merely allege that an employer failed to pay required overtime and minimum wage.[40] As the court explained, "[n]otably absent from the allegations . . . was any detail regarding a given workweek when [the employee] worked in excess of forty hours and was not paid overtime for that given workweek and/or was not paid minimum wages."[41]

In so holding, the Court analyzed opinions from other circuits addressing the issue. The Eleventh Circuit had ruled that allegations of an employer's repeated failure to pay employees minimum wage and overtime pay were sufficient to state a plausible claim.[42] The Ninth Circuit, however, was "persuaded by the rationale espoused in the First, Second, and Third Circuit cases," which had found that *Twombly* and *Iqbal* require some level of specificity regarding a workweek in which the employer had not paid the required wages.[43] While acknowledging that an employee does not have to provide detailed allegations about the number of overtime hours worked, "conclusory allegations that merely recite the statutory language" are inadequate.[44]

c. Widening a Circuit Split, the Ninth Circuit Adopts a Week-by-Week Approach to Calculate Overtime Payment Offsets

In *Haro v. City of Los Angeles*, the Ninth Circuit joined the Sixth and Seventh Circuits in adopting the week-by-week method of calculating overtime offsets when determining liability for prior misclassification.[45] Under this method, overtime wages owed are calculated by multiplying the number of hours worked

35. *Id.* at 519.
36. 771 F.3d 638 (9th Cir. 2014).
37. *Id.* at 639–40.
38. 550 U.S. 544 (2007).
39. 556 U.S. 662 (2009).
40. *Landers*, 771 F.3d at 641–47.
41. *Id.* at 646.
42. Sec'y of Labor v. Labbe, 319 F. App'x 761, 763 (11th Cir. 2008).
43. *Landers*, 771 F.3d at 644–45.
44. *Id.* at 644.
45. 745 F.3d 1249, 1252, 1260–61 (9th Cir. 2014).

over forty in a workweek by one and one-half the regular rate. Any overtime paid is credited against the overtime owed. In so holding, the Ninth Circuit declined to join the Fifth and Eleventh Circuits in applying the cumulative method. Under the cumulative method, all overtime offsets over the time period in question, three years in the instant case, would be compared to the total overtime due over the time period to determine whether any additional amount was due.[46]

The plaintiffs, fire department dispatchers and aeromedical technicians, alleged that the city had misclassified them as exempt employees. On appeal, the Ninth Circuit first affirmed the lower court's determination that they were nonexempt employees entitled to damages for unpaid overtime. The Ninth Circuit then considered the proper method for calculating offsets for previously paid overtime.[47] The city presented three different methodologies for calculating credits and offsets, arguing that credits and offsets should be applied either (1) cumulatively over the entire three year period of liability, (2) within the twenty-seven day period the city used to calculate overtime, or (3) on a two-week pay period basis. The plaintiffs argued that credits and offsets should be applied on a week-by-week basis.

The district court applied the week-by-week method. In affirming the district court's decision, the Ninth Circuit explained that, under this method, "compensation already paid for work done within one workweek [is not] transferrable and offset against overtime due in another workweek. This makes sense because Plaintiffs are owed what they should have been paid had the City obeyed the law."[48]

d. Sixth Circuit Holds That Separation Agreement Did Not Waive Employee's Right to Participate in FLSA Collective Action

In *Killion v. KeHE Distributors, LLC*,[49] the Sixth Circuit held that a collective action waiver in a separation agreement was void because it limited an employee's rights under the FLSA. In so holding, the Sixth Circuit was the first circuit to squarely address the issue outside of the arbitration context.

The plaintiffs were employed as sales representatives. In 2012, the employer discharged sixty-nine sales representatives as part of a restructuring and notified them by mail. The notification also contained a separation agreement that promised the affected employees a $2,000 retention bonus in exchange for their continuing to work an extra month and their agreement to release all employment-related claims against their employer. The agreement also bound the employees "not to consent to become a member of any class or collective action in a case in which claims are asserted against the Company that are related in any way to

46. *Id.* at 1255.
47. *Id.* at 1259. Under 29 U.S.C. § 207(h)(2), an employer is permitted to credit any previous overtime payments to an employee against the overtime wages owed; however, Section 207(h)(2) does not specify the method of calculation.
48. *Id.* at 1260.
49. 761 F.3d 574, 590–92 (6th Cir. 2014).

[their] employment or the termination of [their] employment with the Company."[50]

The plaintiffs filed a lawsuit alleging that their employer violated the FLSA by failing to pay them overtime wages even though they regularly worked in excess of forty hours per week. Two other employees filed a similar lawsuit, and the plaintiffs moved to conditionally certify a collective action under the FLSA. The plaintiffs also moved to void the collective action waivers in the severance agreements for those sale representatives who had signed them. The district court issued an order permitting employees who modified their agreements to excise the waiver provision to join the collective action. The district court later issued an order refusing to void the separation agreement's waiver provision for those employees who had signed unmodified agreements and denied a motion for reconsideration of that order. While the interlocutory appeal was pending from that decision, the district court granted summary judgment to the employer holding that the plaintiffs were properly classified as outside sales employees and therefore exempt from the FLSA's overtime requirements. The plaintiffs filed a second notice of appeal challenging the grant of summary judgment.

On appeal, the Sixth Circuit dismissed the plaintiffs' interlocutory appeal for lack of jurisdiction, but affirmed and reversed, in part, the district court's decision based on their second notice of appeal. The Sixth Circuit held that the district court erred in granting the employer summary judgment on the exemption issue and further erred in excluding from the collective action those employees who had signed waivers.

Regarding the validity of the collective action waivers, the plaintiffs argued that the Sixth Circuit's decision in *Boaz v. FedEx Customer Information Services, Inc.*[51] controlled, because it held that an "employee will not be bound by a contract entered into with his employer that has the effect of limiting his rights under the FLSA."[52] The Sixth Circuit agreed, distinguishing cases involving agreements that required employees to submit to arbitration on an individual basis. In the court's view, because no arbitration agreement was present in the case, there was no "countervailing federal policy that outweighs the policy articulated in the FLSA."[53] Rather, *Boaz* was controlling because it was based on "the general principle of striking down restrictions on the employees' FLSA rights that would have the effect of granting their employer an unfair advantage over its competitors."[54]

50. *Id.* at 579.
51. 725 F.3d 603 (6th Cir. 2013).
52. *Killion*, 761 F.3d at 590.
53. *Id.* at 592.
54. *Id.*

4. Family and Medical Leave Act

In *Paylor v. Hartford Fire Insurance Co.,*[55] the Eleventh Circuit enforced an employee severance agreement waiving Family and Medical Leave Act (FMLA) claims, despite a DOL regulation preventing employees from waiving or releasing their "prospective" rights under the FMLA. In its decision, the Eleventh Circuit defined for the first time "prospective rights" that may not be waived under the DOL's regulations.

The plaintiff had a history of repeated FMLA use as well as job performance issues. At the demand of her employer, and while an FMLA leave request was in process, she signed a severance agreement in lieu of a performance improvement plan and waived any FMLA claims in exchange for a cash payment. Thereafter, she filed a complaint alleging that her employer had interfered with her FMLA rights and retaliated against her for exercising them. The plaintiff argued that the severance agreement waiver was invalid under a DOL regulation providing that "[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA."[56] The regulation also states that "[t]his does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the [DOL] or a court."[57]

The plaintiff asserted that "prospective rights" should be interpreted as "unexercised rights" under the FMLA. She argued that because she had an outstanding request for FMLA leave at the time she signed the severance agreement, she had prospective FMLA rights that the severance agreement could not abrogate.[58] The court rejected that reading and found that the FMLA regulation was intended only to prohibit, as an example, a cash payment in exchange for a waiver of future FMLA entitlement. In other words, the regulation "means only that an employee may not waive FMLA rights, in advance, for violations of the statute that have yet to occur."[59] Because the waiver at issue applied only to potential past liability for FMLA-related requests and allegations, such as retaliation or interference with the plaintiff's past FMLA requests before she signed the severance agreement, the waiver in the agreement was valid.

5. Arbitration of Employment Disputes

In *Huffman v. Hilltop Cos.*, the Sixth Circuit held that the omission of an arbitration clause from an employment agreement's survival clause did not constitute a "clear implication" that the parties intended their agreement to arbitrate to

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55. 748 F.3d 1117 (11th Cir. 2014).
56. 29 C.F.R. § 825.220(d).
57. *Paylor*, 748 F.3d 1117.
58. *Id.* at 1121–22.
59. *Id.* at 1124.

expire with the agreement.[60] The Sixth Circuit is the first circuit to hold that such an omission did not clearly imply that the parties intended their agreement to arbitrate to expire with the contract.

The plaintiffs, former Hilltop employees, alleged that their employer had misclassified them as independent contractors and failed to pay them overtime wages under the FLSA and the Ohio Minimum Fair Wage Standards Act. Each plaintiff was subject to an employment agreement that included an arbitration clause and a survival clause. The arbitration clause was not listed in the survival clause. When the plaintiffs filed a collective action in federal court, Hilltop filed a motion to dismiss and compel arbitration. The district court held that the arbitration clause did not survive the agreement and denied the motion to dismiss.

On appeal, the Sixth Circuit reversed. The court grounded its analysis in the "strong federal policy in favor of arbitration."[61] The Sixth Circuit also deemed the survival of an arbitration provision as "intuitive" because otherwise, a party that wished to avoid its duty to arbitrate could simply wait until after the contract expired to bring a claim.[62] Where a contract contains a broadly worded arbitration clause, the plaintiff must rebut the strong presumption in favor of arbitration " 'by clear implication' " and with " 'positive assurance.' "[63]

c. National Labor Relations Act Developments

1. The Supreme Court Unanimously Invalidated President Obama's 2012 Recess Appointments to the National Labor Relations Board but Broadly Interpreted the President's Recess Appointments Power in a Split Decision

In *NLRB v. Canning*, the Supreme Court unanimously invalidated President Obama's recess appointments of Sharon Block, Richard Griffin, and Terence Flynn to the National Labor Relations Board (NLRB).[64] In doing so, the Court voided hundreds of decisions of the National Labor Relations Board, including several recent controversial ones. Although the ruling to strike down the appointments was unanimous, the Court split five-to-four on the scope of the president's recess appointment power.

The issue arose after President Obama used his recess appointment power to fill several vacancies on the NLRB. Article II, Section 2, of the U.S. Constitution, referred to as the Recess Appointments Clause, provides as follows: "The President shall have Power to fill up all Vacancies that may happen during

60. 747 F.3d 391, 393 (6th Cir. 2014).
61. *Id.* at 394.
62. *Id.* at 395 (citing Zucker v. After Six, Inc., 174 F. App'x 944, 947–48 (6th Cir. 2006)).
63. *Id.* (quoting Litton Fin. Planning Div. v. NLRB, 501 U.S. 190, 204 (1991)).
64. 134 S. Ct. 2550 (2014).

the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[65] The Recess Appointments Clause provides an exception to the ordinary "advice and consent" role for the Senate and permits appointments without Senate confirmation.

On January 4, 2012, President Obama made three recess appointments to the NLRB, Sharon Block, Richard Griffin, and Terence Flynn. Those appointments were made when the five-member Board had only two confirmed members and lacked the three-member quorum necessary to issue decisions; they represented an apparent effort to avoid an effective shutdown of the Board during what likely would have been an extended Senate confirmation process for new appointees. At the time of the appointments, the Senate was holding pro forma sessions every three days during which it could transact business through unanimous consent. Parties subject to NLRB actions or decisions involving Members Block, Griffin, and Flynn thereafter challenged the validity of the recess appointments, arguing that the Board lacked the authority to either prosecute cases or issue decisions where part of the necessary three-member quorum was composed of a recess appointee.

In *Canning v. NLRB*,[66] the D.C. Circuit held that President Obama improperly exercised his recess appointment power and invalidated his NLRB recess appointments. It reasoned that the term "the Recess" in the Recess Appointments Clause refers only to intersession breaks between formal sessions of Congress and not to mere intrasession breaks or adjournments. The court also held that the Recess Appointments Clause only covers vacancies that actually arise during the Recess, and not to vacancies that simply "happen to exist"[67] when that recess begins.[68]

The Supreme Court unanimously affirmed the D.C. Circuit's decision invalidating the three January 4, 2012, appointments to the Board. The Court, in a five-to-four decision, disagreed, however, with the D.C. Circuit's rationale. The Court majority, with Justice Breyer writing for Justices Kennedy, Ginsburg, Sotomayor, and Kagan, broadly interpreted the president's recess appointment power and held as follows:

- The Recess Appointments Clause applies to both intersession and intrasession breaks, provided the intra-session break is of "substantial length." The majority explained that intrasession breaks and adjournments lasting

65. U.S. Const. art II, § 2.

66. 705 F.3d 490 (D.C. Cir. 2013).

67. *Id.* at 507–14.

68. Four months after the *Canning* decision, the Third Circuit in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), concluded that President Obama's March 27, 2010, recess appointment of Member Becker was also unconstitutional, agreeing with the D.C. Circuit's analysis of the Recess Appointments Clause's scope. The Fourth Circuit reached a similar conclusion several months later in *NLRB v. Enterprise Leasing Co. SE, LLC,*722 F.3d 609 (4th Cir. 2013). The Obama administration eventually sought certiorari from the *Canning* decision.

only three-to-ten days are "presumptively too short" to satisfy the requirements of the Recess Appointments Clause.[69]

- The Recess Appointments Clause applies with respect to vacancies that occur both during and prior to the recess in question.
- For purposes of the Recess Appointments Clause, the Senate is in session when it says it is, as long as it retains the capacity to conduct Senate business.

In examining the three recess appointments at issue, the Court concluded that the Senate was not actually in recess between January 3 and January 6 because the short break was not of substantial length. The Court also explained that the pro forma sessions of the Senate that were occurring during the relevant period prevented a longer recess from occurring. Thus, the Recess Appointments Clause did not give the president the authority to make the appointments.

Justice Scalia's opinion concurring in the judgment, joined by the Chief Justice and Justices Thomas and Alito, sharply disagreed with the majority's resolution of the other two questions presented. Although agreeing that the recess appointments were unconstitutional, he criticized the majority opinion as "transform[ing] the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates."[70] In addition, he argued that "[t]he majority replaces the Constitution's text with a new set of judge-made rules to govern recess appointments."[71]

2. The National Labor Relations Board Gives Employees the Right to Use Their Employer's E-mail for Union Organizing

In *Purple Communications, Inc.*, the National Labor Relations Board (NLRB) adopted

> a presumption that employees who have been given access to the employer's e-mail system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions.[72]

The Board rejected its prior decision in *Register Guard*, where it had held that an employer does not violate Section 7 by maintaining a policy that limits the use of electronic communications systems for "nonjob-related solicitations."[73]

69. *Canning*, 134 S. Ct. at 2561–67.
70. *Id.* at 2592 (Scalia, J., concurring).
71. *Id* at 2617.
72. 361 NLRB No. 126, slip op. at *6, 2014 NLRB LEXIS 952 (Dec. 11, 2014).
73. *Id.* at *19–20 (citing *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part and remanded sub nom.* Guard Publ'g v. NLRB, 571 F.3d 53 (D.C. Cir. 2009)).

Relying on the evolving and increasing role of e-mail as "a critical means of communication" and information sharing, the Board in *Purple Communications* differentiated e-mail systems from other employer communications-related equipment and deemed e-mail as effectively "a 'natural gathering place,' pervasively used for employee-to-employee conversations."[74]

The Board went on to explain that an employer has the burden of rebutting the presumption by showing that "special circumstances necessary to maintain production or discipline justify restricting employees' rights."[75] Notably, the Board will apply the *Purple Communications* decision retroactively to cases currently pending. The Board reasoned that employers with e-mail policies have the ability to rebut the presumption on remand by presenting evidence of relevant special circumstances, thereby lessening any potential injustice caused by retroactive application of the new standard.

The Board's decision, however, is not without limits. For example, employers are not required to provide e-mail access to employees; the presumption applies only to those employees to whom the employer has granted access. Nor does the decision require that employers grant nonemployees access to e-mail systems.

The Board also acknowledged that, although likely a rare occurrence, an employer also may justify a total ban on nonwork use of e-mail, including Section 7 use, if the employer is able to demonstrate that the ban is necessary to maintain production or discipline. Absent special circumstances that justify a total ban on nonwork use of e-mail, an employer may apply limitations and controls on its e-mail system to the extent that they are necessary to maintain production and discipline or to prevent interference with the e-mail system's efficient functioning, as long as the restrictions are uniform and consistently enforced, e.g., prohibiting "large email attachments or audio/video segments" if they interfere with the e-mail system.[76] Finally, the Board's decision does not prevent employers from monitoring computers and e-mail systems for "legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability."[77]

D. Retiree Health Benefits and Section 301 of the LMRA

In *M&G Polymers USA, LLC v. Tackett*,[78] the U.S. Supreme Court vacated and remanded a decision by the Sixth Circuit requiring M&G to pay lifetime health benefits for a class of retirees, along with their surviving spouses and

74. *Id.* at *7.
75. *Id.* at *14.
76. *Id.*
77. *Id.* at *15.
78. 135 S. Ct. 926 (2015).

dependents. The Court held that ordinary contract principles, without any inferences drawn from the context of labor negotiations, were to be applied in determining whether a collective bargaining agreement created a vested right to lifetime health care benefits. This holding abrogated the so-called *Yard-Man* inference, articulated by the Sixth Circuit in *International Union, United Automobile, Aerospace, and Agriculture Implement Workers of America (UAW) v. Yard-Man, Inc*.[79]

In *Yard-Man*, the Sixth Circuit considered whether retiree medical benefits would outlive the termination of the union contract. Finding the applicable collective bargaining agreement language to be ambiguous, the Sixth Circuit looked to other language in the agreement and the context in which the benefits arose for evidence of the parties' intent. The decision gave rise to the Sixth Circuit's *Yard-Man* inference, an inference that benefits are intended to vest beyond the agreement's life in the absence of specific language to the contrary. Other circuit courts did not follow suit, making forum choice a significant factor in retiree health cases.[80]

The plaintiffs in *Tackett* were retirees who had worked for an M&G plant under a collective bargaining agreement providing that M&G would provide free health care for certain retirees and that the benefits would be provided for the duration of the agreement. Following the agreement's expiration, M&G announced that it would require retirees to contribute to the cost of their health benefits. The retirees sued, alleging the original agreement had created a vested right to lifetime free health care benefits.

The district court concluded that the language in the agreement did not create a vested right to lifetime benefits and dismissed. The Sixth Circuit reversed the district court based on *Yard-Man*. On remand, the district court found for the retirees based on the Sixth Circuit's ruling. On appeal for a second time, the Sixth Circuit affirmed.

In a unanimous opinion authored by Justice Thomas, the Supreme Court vacated the judgment and remanded the case back to the Sixth Circuit to review the agreement under ordinary principles of contract law. The Court rejected the *Yard-Man* inference, finding that it "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."[81] Justice Thomas added that "the Court of Appeals derived its assessment of likely behavior not from record evidence, but instead

79. 716 F.2d 1476 (6th Cir. 1983).

80. *See, e.g.*, Senior v. NSTAR Elec. & Gas Corp., 449 F.3d 206, 218 (1st Cir. 2006) (rejecting argument that a claim for benefits creates a presumption regarding vesting); Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., U.A.W. v. Skinner Engine Co., 188 F.3d 130, 139 (3d Cir. 1999) (expressly rejecting presumption enunciated in *Yard-Man*); Dist. 29, United Mine Workers of Am. v. Royal Coal Co., 768 F.2d 588, 590–91 (4th Cir. 1985) (finding that benefits did not continue beyond the term of the agreement where language read "benefits for . . . employees . . . as well as pensioners . . . shall be guaranteed during the term of this Agreement"); Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1517 (8th Cir. 1988) (expressly stating "we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest").

81. *Tackett*, 135 S. Ct. at 935.

from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits."[82] Further, the Sixth Circuit's interpretation of the contract "failed even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises" and that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."[83] Thus, the Court concluded, the *Yard-Man* inferences "conflict with ordinary principles of contract law."[84]

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg issued a concurring opinion. She agreed that *Yard-Man* improperly favored the existence of vested retiree health benefits. However, she also suggested that vesting could be derived from an expired collective bargaining agreement's "implied terms" and that a provision stating that "retirees will receive' health-care benefits if they are receiving a monthly pension' " might support that implication, despite an explicit limitation of benefits to "the duration of this Agreement."[85] Thus, while *Tackett* rejects *Yard-Man* in favor of ordinary contract law principles, further retiree health benefits litigation is likely addressing just how those ordinary principles are to be applied.

E. Employee Retirement Income Security Act

1. *Fifth Third Bancorp v. Dudenhoeffer*: The Death of the *Moench* Presumption May Be a Pyrrhic Victory for Stock Drop Plaintiffs

In *Fifth Third Bancorp v. Dudenhoeffer*,[86] a unanimous Supreme Court held that fiduciaries of an employee stock ownership plan (ESOP) are not entitled to a special presumption that their decision to do what the plan mandates, i.e., buy and hold employer stock, is prudent. The decision thus put to rest the so-called *Moench* presumption of prudence, which federal appellate courts uniformly had adopted, albeit in somewhat different forms, and the lower courts increasingly had used to dismiss employer stock drop claims.

The facts of *Dudenhoeffer* were typical of many stock drop complaints. Fifth Third Bank maintained a 401(k) plan that allowed participants to choose among more than twenty investment options, one of which was the company stock fund. The subprime real estate lending crisis that emerged in the first part of 2007 had a dramatic impact effects on many banks, including Fifth Third: the bank's stock price declined by almost 75 percent between July 2007 and September 2009. The complaint alleged that the plan fiduciaries were aware of Fifth Third's potentially dangerous subprime exposure and that their ERISA duties to act prudently and for the exclusive benefit of participants required them to discontinue

82. *Id.*
83. *Id.* at 936–37.
84. *Id.* at 933.
85. *Id.* at 937–38.
86. 134 S. Ct. 2459 (2014).

further investments in the employer stock fund and to divest the plan of Fifth Third stock.

The fiduciaries' first line of defense was the *Moench* presumption under which a fiduciary's continued investment in company stock is presumed prudent, absent an abuse of discretion.[87] The district court found that the plaintiffs failed to allege sufficient facts to overcome the presumption and dismissed the complaint.

The Sixth Circuit reversed. Although it was an early follower of the *Moench* presumption,[88] the court had recently held that its version of *Moench* was not as defendant- friendly as that applied elsewhere, and, in addition, that it was merely an evidentiary presumption rather than a standard of review. Based on that later point, the Sixth Circuit had held that the presumption was not applicable on a motion to dismiss.[89] Applying that rule in *Fifth Third*, the Sixth Circuit concluded that the district court erred in dismissing the complaint. It then went on to find that, without the presumption, the complaint's allegations regarding the plan's continued acquisition and holding of company stock adequately pled a fiduciary breach claim.

The defendants sought review by the Supreme Court, which granted certiorari limited to the seemingly narrow question of whether a motion to dismiss could be granted on the basis of *Moench*. However, because the question of whether the presumption exists logically precedes any determination of the proper stage of litigation for applying it, the issue of the presumption's existence became the focus of both briefing and argument.

The Supreme Court, in a unanimous decision authored by Justice Breyer, concluded that no presumption of prudence exists to protect fiduciaries eligible individual account plans (EIAPs). The Court found no basis for the presumption in ERISA's text. Rather, ERISA subjected EIAP fiduciaries to the same standard of prudence set out in ERISA § 404(a) with the exception that they were exempted from ERISA's diversification requirements with respect to the plan's company stock holdings.

While the Court rejected the *Moench* presumption, its decision was clearly not as sweeping as the plaintiffs' bar had hoped. Far from leaving a wide-open door for future stock drop suits, the Court left fiduciaries with other defensive arguments on which to seek dismissal of such claims. Indeed, the Court reversed the Sixth Circuit's decision that the plaintiffs' complaint stated a viable claim and remanded for reconsideration in light of the new standards it crafted. First, it opined that

> [W]here a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or

87. This presumption was named after the case that introduced it, *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

88. Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995).

89. Pfeil v. State Street Bank & Trust Co., 671 F.3d 585 (6th Cir. 2012).

> undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. . . . ERISA fiduciaries, may, as a general matter, likewise prudently rely on the market price.[90]

Second, the Court made clear that ESOP fiduciaries have no duty to violate securities law prohibitions against trading on inside information. The Supreme Court expressly held that "ERISA's duty of prudence cannot require an ESOP fiduciary to perform an action, such as divesting the fund's holdings of the employer's stock on the basis of inside information, that would violate the securities laws."[91] Thus, it rejected as a matter of law a key claim made by plaintiffs in stock drop cases.

Third, the Court erected significant obstacles to claims that plan fiduciaries, on the basis of inside information, should have taken alternative actions short of divestment, most notably halting future plan purchases of company stock or disclosing the adverse inside information to the general market, to protect plan participants in EIAPS against potential additional harm. The Court held that for such an ERISA-based claim to be viable, the alleged alternative had to be consistent with the federal securities laws, a matter that was not clear to the Court given the absence of SEC guidance in this area. In addition, a plaintiff would have to

> plausibly allege[] that a prudent fiduciary in the defendant's position could not have concluded that [such alternative] . . . would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund."[92]

Thus, the Court's position is that such alternatives will do more harm than good unless the plaintiff can plausibly allege that a prudent fiduciary could not have so concluded.

Finally, recognizing the dilemma faced by EIAP fiduciaries if they took action and the employer stock subsequently rose in value, the meritless and costly nature of many stock drop cases, the inherent conflict between ERISA stock drop claims and the federal securities laws, and Congress's encouragement of company stock investment in ERISA, the Supreme Court emphasized that stock drop complaints remained subject to motions to dismiss. It thus directed the lower courts to carefully scrutinize a stock drop complaint's allegations under *Twombly/Iqbal* pleading standards. In conducting that scrutiny, the lower courts were to take into account the three principles noted above to determine whether the plaintiff had stated a viable claim.

While the *Moench* presumption had been increasingly used to dismiss employer stock drop complaints, the Court's rejection of the presumption likely

90. *Fifth Third Bancorp.*, 134 S. Ct. at 2471.
91. *Id.* at 2472.
92. *Id.* at 2472–73.

will not turn back the tide of such dismissals. The Court made clear that stock drop complaints remained subject to motions to dismiss and that the lower courts should test their sufficiency under a strict application of *Twombly/Iqbal* pleading standards. Moreover, the three principles the Supreme Court articulated to guide the lower court's analysis effectively reject the key arguments that plaintiffs have advanced in the stock drop arena and should make it difficult to state a viable claim for relief, at least where publicly traded securities are involved. Nonetheless, the decision could lead to an uptick in stock drop litigation while the lower courts sort out the impact of the decision.

2. *Tatum v. RJR Pension Investment Committee*: The "Coulds" and "Woulds" of Prudence

Tatum v. RJR Pension Investment Committee[93] raises the bar on the standard of "objective prudence" that applies in determining whether loss resulted from a fiduciary's procedural imprudence. On its facts, the case was the mirror image of run-of-the-mill stock drop litigation. The alleged offense was not holding stock too long but selling it too quickly.

Tatum arose out of RJR Nabisco's spinoff of its tobacco subsidiary, R.J. Reynolds. Before the spinoff, RJR Nabisco established a new 401(k) plan for R.J. Reynolds that initially offered the same Nabisco stock funds that RJR Nabisco's 401(k) plan offered. After the spinoff, R.J. Reynolds froze the Nabisco stock funds to new investments and eventually eliminated them from the R.J. Reynolds plan. The price of Nabisco stock rose substantially after the funds were eliminated, and participants in the R.J. Reynolds 401(k) plan brought an ERISA action against the plan's fiduciaries claiming that they breached their fiduciary duties in eliminating the Nabisco stock funds as investment options.

Following a bench trial, the district court held that the defendants acted as fiduciaries in deciding to eliminate the Nabisco stock funds and failed from a procedural prudence standpoint to adequately investigate their decisions.[94] The court acknowledged that a non-employer, single stock fund is inherently high risk, but emphasized that this fact alone did not obviate the need for a thorough investigation "once an investment option is part of a plan's investment portfolio."[95]

The district court then addressed "objective prudence," explaining that a fiduciary can only be liable for a breach that "actually caused a loss to the plan."[96] The court placed the burden on the defendant fiduciaries to prove that their decision to remove the Nabisco funds from the plan without conducting a prudent investigation was "one which a reasonable and prudent fiduciary could have made after performing such an investigation" and concluded that the defendants had carried that burden.[97] For purposes of this analysis, the court found it highly

93. 761 F.3d 346 (4th Cir. 2014).
94. Tatum v. R.J. Reynolds Tobacco Co., 926 F. Supp. 2d 648, 673–82 (M.D.N.C. 2013).
95. *Id.*
96. *Id.* at 682.
97. *Id.* at 651.

relevant that single stock funds are high risk for retirement plans because of their undiversified nature. Considering this and other factors bearing on the stock's risk, the district court concluded that the decision to liquidate was one that a hypothetical prudent fiduciary could have made after conducting a thorough investigation.

The court agreed that the defendants had acted imprudently by failing to adequately investigate their decision to remove the Nabisco funds from the plan, but the panel majority over a vigorous dissent vacated and remanded the district court's decision, declaring that it had applied the wrong test of objective prudence. It concluded that the district court should have asked whether a procedurally prudent fiduciary "would" have made the same decision, not whether he "could" have done so.[98] According to the majority, the court should have "determin[ed] whether the evidence established that a prudent fiduciary, more likely than not, would have divested the Nabisco Funds at the time and in the manner in which RJR did."[99]

In his dissent, Judge Wilkinson warned that the majority's rule would add a "treacherous" twist to ERISA's fiduciary regime:

> Reading the plaintiffs' "would have" standard to permit fiduciaries to escape monetary liability only if they make the decision that the majority of hypothetical prudent fiduciaries would "more likely than not" have made is all too treacherous. It seeks to shift the standard of objective prudence to one of relative prudence: whether prudent fiduciaries would "more likely than not" have come to "the same [investment] decision" that defendants did. . . . The only possible effect of such language is to squeeze and constrict and, once again, to ignore the fact that there is not one and only one "same decision" that qualifies as objectively prudent.[100]

3. *Amara* Returns to the Second Circuit, Where the Plaintiffs Prevail Again on a Slightly Reformulated "Contract Reformation" Theory

In its 2011 *Amara* decision, the Supreme Court rejected the lower courts' decision that representations allegedly made to participants in the summary plan description could be treated as the "terms of the plan" and enforced in a benefits claim action under ERISA § 502(a)(1)(B), even those representations differed from the terms of the actual plan document.[101] However, after an extended discussion regarding the availability of "appropriate equitable relief" under ERISA § 502(a)(3), the Court remanded the case to give the plaintiffs the opportunity to argue that they were entitled to equitable relief under that provision to redress the sponsor's purported failure to describe the plan terms accurately. On remand,

98. The verb "would" comes from an earlier Fourth Circuit decision, which stated: "Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway." Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 218 (4th Cir. 2011) (internal quotation omitted).

99. *R.J. Reynolds*, 761 F.3d at 364.

100. *Id.* at 377–78.

101. 131 S. Ct. 1866 (2011).

the district court granted the *Amara* plaintiffs the same relief as before, utilizing "reformation" as the basis for its decision.

The appeal to the Second Circuit presented two main issues: whether the district court had properly applied the doctrine of contract reformation, and, if so, whether the case could be maintained as a class action in light of *Wal-Mart Stores, Inc. v. Dukes*.[102] That contract reformation was "typically available in equity" was uncontroversial. According to a standard treatise cited by both the district and the appellate courts, "[e]quity has jurisdiction to reform written instruments in [] two well-defined cases," one of which is

> Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties.[103]

Based on these principles, the Second Circuit affirmed the district court's decision that plaintiffs were entitled to reformation as an equitable remedy. The employer had converted its traditional defined benefit plan to a cash balance formula and handled the transition between formulas through the "wearaway" method. Participants would receive the greater of (1) the benefits that they had accrued to the date of the conversion under the old formula or (2) an "opening balance," i.e., a lump sum amount derived from the prior accrued benefit plus the cash balance benefits accrued after the conversion. What the plaintiffs wanted, and maintained had been represented to them, was a two-part (A+B) benefit consisting of the accrual up to the date of the conversion plus the post-conversion credits.

Because interest rates declined after the cash balance conversion, the present value of the pre-conversion benefit grew more rapidly than the "opening balance." Thus, many participants accrued no additional benefits for a time under the wearaway formula.[104] The courts held that, because the employer's "inequitable conduct" had led to a "mistake" on the part of the participants, the plan should be reformed to correspond to what the latter had supposedly been led to expect, namely, an A+B formula. In so holding, the courts rejected the employer's principal counterargument that, because ERISA derives from trust law, reformation could only be directed where the objective of reformation was to reflect accurately the intent of the settlor. Based on that trust law principle, there was no basis for reformation since the plan reflected exactly what the plan sponsor had intended.[105]

102. 131 S. Ct. 2541 (2011).

103. John Norton Pomeroy & Spencer W. Symons, 4 A Treatise on Equity Jurisprudence §1376 (5th ed., 1941) (footnote omitted).

104. If interest rates had gone in the other direction, wearaway would have given a larger benefit than A+B, and there presumably would have been no lawsuit.

105. For an example of the application of trust reformation, see *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808 (7th Cir. 2010), where the doctrine was invoked to rectify a plan drafting error that, if left uncorrected, would have more than doubled some participants' benefits.

In rejecting that argument, the Second Circuit reasoned that because the pension plan was part of a compensation package, trust reformation should be analyzed under contract principles "[w]here consideration is involved in the creation of a trust."[106] The court's analysis effectively ignored the prerequisites for contract reformation where only one party is "mistaken." As the treatise quoted above explains:

> Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is, that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct that alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction.[107]

Here, the pension plan already existed and the employer had the right to amend it unilaterally, subject only to legal constraints, such as the prohibition against retroactive reductions in accrued benefits. Since the participants' consent was not needed for the change, they could not have "acted upon," or been "induced" by, the employer's communications.

In finding that class treatment was appropriate, the Second Circuit rejected the notion that contract reformation based upon a unilateral mistake requires individualized proof of reliance. Although the court acknowledged that the elements of contract reformation must be proven by "clear and convincing evidence," it went on to hold that "generalized circumstantial evidence" can be used to establish a class-wide unilateral mistake where "defendants have made uniform misrepresentations about an agreement's contents and have undertaken efforts to conceal its effect."[108] It then affirmed the district court's finding of a class-wide unilateral mistake based on (1) evidence that the same misleading disclosures had been sent to the class; (2) evidence that employees either read these disclosures or expected to hear through their co-workers if the disclosures revealed anything harmful; (3) the employer's failure to present evidence that any employees understood the impact of wearaway; and (4) an inference drawn by the district court that "informed employees, aware that their pension benefits were less valuable, would have protested the change, requested a higher salary, filed a lawsuit, or left for another employer."[109]

The court disposed of the remaining arguments for decertification in short order. It rejected the employer's contention that the "A+B" remedy would harm some class members for lack of evidence. It also disagreed with the employer's argument that "A+B" would frustrate class members who wanted to

106. 775 F.3d 510, 524 (2d. Cir. 2014) (citing Restatement (Third) of Trusts § 62 cmt. a (2003)).
107. 3 Pomeroy, *supra* note 103, § 890 (footnotes omitted).
108. 775 F.3d 510, 520 (citing Moore v. PaineWebber, Inc., 306 F.3d 1247, 1253 (2d Cir. 2002).
109. *Id.* at 529–30.

take their benefits in lump sum form, stating that "defendants have offered no reason, legal or practical, why any class member seeking a lump sum payment of the whole A+B benefit could not simply convert the Part A portion of the benefit into a lump sum through an ordinary commercial transaction on the open market."[110]

4. First Circuit Again Casts a Skeptical Eye on Equitable Estoppel

Unlike several other appellate courts, the First Circuit has never held that promissory or equitable estoppel is available relief under ERISA § 502(a)(3). Each time it has confronted the issue, the court has ruled that the plaintiff failed to allege the elements necessary for estoppel, making it unnecessary to decide whether the claim existed.[111] In *Guerra-Delgado v. Popular, Inc.*,[112] the court continued on this path, rejecting a participant's attempt to obtain allegedly promised benefits that were not provided under the plan's terms.

When he was recruited by Banco Popular de Puerto Rico, the plaintiff had been told that he would be entitled to pension credit for the seventeen years that he had worked for other banks. His annual benefit statements reflected that credit, and, when the bank froze future accruals for participants with fewer than ten years of credited service, he was placed in the over-ten-years category, even though he had worked there for a shorter time. When he began to consider early retirement, he asked for confirmation of the amount of his pension and was given an estimate of $2,372 per month. Allegedly relying on that figure, he retired in February 2009. Shortly thereafter, he was informed that the plan did not grant credit for his prior work with other banks and that his pension entitlement was only $571 a month. Litigation followed.

The plaintiff's main argument was that the plan was equitably estopped from denying him the benefit that he had been promised repeatedly. As a general proposition, equitable estoppel requires two elements: (1) one party makes a misrepresentation with reason to believe that the other party will rely on it, and (2) the misled party, as a result of the misrepresentation, reasonably changes his position to his detriment. The First Circuit's analysis centered on what constitutes reasonable reliance in an ERISA context.

ERISA requires that employee benefit plans "be established and maintained pursuant to a written instrument," which must include "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan."[113] Courts have long held that these requirements preclude both unwritten plan amendments and written amendments that are not adopted in accordance with the prescribed procedure. Given those principles, the First Circuit concluded that it is "inherently unreasonable" for a participant to rely on statements,

110. *Id.* at 521, n. 8.
111. *See*, *e.g.*, Livick v. Gillette Co., 524 F.3d 24 (1st Cir. 2008).
112. 774 F.3d 776 (1st Cir. 2014).
113. *See* ERISA §§ 402(a)(1), 402(b)(3).

written or unwritten, that contradict a plan's unambiguous terms.[114] If those terms are to be changed, it must be through a properly adopted plan amendment. Only where the terms are unclear might a participant be able to "reasonably rely on an informal statement interpreting an ambiguous plan provision."[115] In this case, the First Circuit held, no ambiguity existed.

114. *Guerra-Delgado*, 774 F.3d at 783.
115. *Id.*