XI. 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 decisions under all the major federal employment statutes. Of particular note are three U.S. Supreme Court decisions—one finding that the question whether the U.S. Equal Employment Opportunity Commission (EEOC) had satisfied its pre-suit obligation to pursue conciliation is subject to judicial review; another, authored by the late Justice Scalia, clarifying the standards for a religious discrimination claim under Title VII; and a third setting the standard for a disparate treatment claim under the Pregnancy Discrimination Act. The labor law section of the report addresses an important National Labor Relations Board (NLRB) decision expanding the joint-employer concept. Finally, the employee benefits section of the report reviews post-*Dudenhoeffer* developments in the employer stock drop area, including a Supreme Court decision confirming that *Dudenhoeffer* established stringent pleadings standards for such claims and summarily reversing a decision of the Ninth Circuit for misapplying them. It also discusses a Supreme Court decision addressing, for a fourth time, issues faced by Employee Retirement Income Security Act (ERISA) health funds in attempting to enforce their subrogation rights against participants. The Court's decision involving the duty of ERISA fiduciaries to monitor plan investments is also reviewed.

B. Employment Law Developments

1. Title VII

a. *Supreme Court Rules That Courts May Review Whether the EEOC Has Satisfied Its Obligation to Attempt Conciliation Before Filing Suit*

In *Mach Mining, LLC v. EEOC*,[1] the Supreme Court held that courts may review whether the Equal Employment Opportunity Commission (EEOC) has fulfilled its statutory obligation to attempt conciliation before filing a Title VII suit. The scope of that review, the Court held, includes verifying that the EEOC has (1) notified the charged employer about the specific discriminatory practice and the person or class involved, and (2) provided an opportunity to discuss the claims. In so holding, the Court resolved a circuit split over the level of scrutiny courts may use in reviewing the EEOC's statutorily mandated conciliation efforts.

After investigating a sex discrimination charge, the EEOC found reasonable cause to believe that the employer had refused to hire a female applicant as a coal miner because of her sex and had similarly discriminated against a class of women applicants. The EEOC sent the employer an initial determination

1. 135 S. Ct. 1645 (2015).

letter and invited the parties to participate in informal resolution attempts. About a year later, the EEOC sent the employer a second letter stating that the requisite conciliation efforts had been unsuccessful and that further efforts would be "futile."[2]

Following the second letter, the EEOC filed suit, alleging that the company had engaged in an unlawful hiring process. The employer asserted as an affirmative defense that the EEOC had failed to conciliate in good faith and argued that the court should consider the overall reasonableness of the EEOC's conciliation efforts. The EEOC moved for summary judgment arguing that its conciliation efforts are not subject to judicial review. The district court agreed with the employer. The Seventh Circuit reversed, holding that the EEOC's "statutory directive to attempt conciliation" is entrusted "solely to the EEOC's expert judgment" and therefore provides courts with no meaningful standard to apply.[3]

The Supreme Court unanimously vacated and remanded. The Court first held that the EEOC's conciliation efforts were subject to judicial review. The Court explained that it typically applies a "strong presumption" against immunizing agency actions from judicial scrutiny.[4] While the EEOC has broad leeway regarding conciliation, the statute does not leave this process entirely to its unreviewable judgment. The Court further observed that courts routinely review whether other statutory prerequisites to a Title VII suit, such as the requirements that an employee file a timely charge and secure a right-to-sue notice, have been satisfied.

The Court then rejected both parties' proposed review standards. Instead, it concluded that the level of scrutiny must include verifying that the EEOC has: (1) informed the employer about the "specific allegation" by outlining "both what the employer has done and which employee (or what class of employees) have suffered as a result," and (2) attempted to "engage the employer in some form of discussion (whether written or oral)" to resolve the allegedly discriminatory practice.[5] Such review would allow courts to confirm that the EEOC has fulfilled its statutory obligation to "tell the employer about the claim" and to "provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance."[6] Generally, a sworn affidavit from the EEOC stating that it performed these obligations would suffice. Finally, the Court held that the appropriate remedy for the EEOC's failure to carry out its duties is a court order requiring it to undertake the required conciliation and a stay of litigation.

2. *Id.* at 1650. The record in the case was unclear as to what had transpired during the intervening year.
3. *Id.* at 1650–51.
4. *Id.* at 1651.
5. *Id.* at 1655–56.
6. *Id.* at 1652, 1655.

b. *Supreme Court Rules That Religious Discrimination Inquiry Turns on Employer's Motive, Not Actual Knowledge*

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court held that Title VII prohibits an employer from making "an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."[7] The Court clarified that Title VII protections extend even where an applicant has never informed the employer of the need for an accommodation. Instead, an applicant must only show that the need for an accommodation is a motivating factor in the employer's decision.

Abercrombie imposed a "look policy" that prohibited "caps" as "too informal."[8] A practicing Muslim who wore a headscarf applied for a store position. The store's assistant manager interviewed her and rated her as qualified for hiring. The interviewer was concerned however that the headscarf violated the store's look policy. After consulting superiors and advising them of her belief that the applicant wore the headscarf because of her faith, the interviewer was informed that the headscarf would violate the policy, "as would all other headwear, religious or otherwise," and instructed her not to hire the applicant.[9]

The district court granted summary judgment to the EEOC and awarded $20,000 in damages. On appeal, the Tenth Circuit reversed, holding that ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with notice of the accommodation need.

The Supreme Court reversed in a unanimous decision authored by Justice Scalia. The Court explained that Title VII's disparate treatment provision forbids employers from failing to hire applicants because of their religion and religious practices. The Court rejected the employer's argument that an applicant cannot show disparate treatment without first demonstrating that the employer had actual knowledge of the applicant's need for an accommodation. Rather, an applicant must only show that the accommodation need was a motivating factor in the employer's decision. The Court explained that under Title VII the term "because of" is not limited to "but-for" causation and includes any instance where a protected characteristic is a "motivating factor" in an employment decision.[10] It further clarified that Title VII does not impose a knowledge requirement in defining discrimination, but instead prohibits certain motives "regardless of the state of the actor's knowledge."[11]

The Court also rejected the employer's argument that its generally applicable look policy was neutral on its face and thus could not violate Title VII. In the Court's view, Title VII requires a higher standard for religious practices. Employers must assure not just neutrality, but rather preferential or "favored

7. 135 S. Ct. 2028, 2033 (2015).
8. *Id.* at 2031.
9. *Id.*
10. *Id.* at 2032.
11. *Id.* at 2033.

treatment" of religious applicants and employees.[12] Otherwise neutral policies must "give way to the need for an accommodation" of religious practices.[13]

c. The Third Circuit Holds That a Paid Suspension Is Not an Adverse Action Under the Substantive Discrimination Provisions of Title VII

In *Jones v. Southeastern Pennsylvania Transportation Authority*,[14] the Third Circuit held that a paid suspension pending investigation of an employee's purported wrongdoing does not constitute an adverse action under the substantive discrimination provisions of Title VII. The Third Circuit joined the Second, Fourth, Fifth, Sixth, and Eighth Circuits on this issue.[15]

The plaintiff was an administrative assistant for the employer. Her supervisor suspended her with pay after discovering apparent fraud in her timesheets and referred the matter to the employer's Office of Inspector General (OIG). After investigation, the OIG determined that the employee had submitted fraudulent timesheets. The employee's suspension was converted to one without pay and she was terminated shortly thereafter. She then filed suit, alleging gender discrimination and retaliation under Title VII.

On appeal, the Third Circuit affirmed the district court's grant of summary judgment for the employer. The court ruled that the employee's initial suspension with pay did not constitute an adverse action in the substantive discrimination context. The Third Circuit began with the statutory text of Title VII, which "prohibits discrimination in hiring, firing, and 'compensation, terms, conditions, or privileges of employment,' " reasoning that paid leave "where there is no presumption of termination" was "neither a refusal to hire nor a termination, and by design it does not change compensation."[16] The court also determined that a paid suspension did not alter the "terms, conditions, or privileges of employment" because such terms "ordinarily include the possibility that an employee will be subject to an employer's disciplinary policies."[17] Thus, a paid suspension, by itself, did not fall within the adverse actions prohibited by Title VII.[18]

12. *Id.* at 2034.
13. *Id.*
14. 796 F.3d 323 (3d Cir. 2015).
15. *See* Joseph v. Leavitt, 465 F.3d 87, 91 (2d Cir. 2006); Von Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001); Breaux v. City of Garland, 205 F.3d 150, 158 (5th Cir. 2000); Peltier v. United States, 388 F.3d 984, 988 (6th Cir. 2004); Singletary v. Mo. Dep't of Corr., 423 F.3d 886, 891–92 (8th Cir. 2005).
16. *Jones*, 796 F.3d at 326 (quoting 42 U.S.C. § 2000e-2(a)(1)).
17. *Id.* (quoting *Joseph*, 465 F.3d at 91).
18. The Third Circuit expressly noted, however, that it was not addressing "whether a paid suspension constitutes an adverse action in the retaliation context." *Id.* at 325. The employee had not presented any evidence that her initial paid suspension was caused by a protected activity.

d. Third Circuit Uses Common Law Employer-Employee Test to Find That Staffing Firm Clients Could Be "Employers" Under Title VII

In *Faush v. Tuesday Morning, Inc.*,[19] the Third Circuit found that an employee of a staffing agency could sue the company operating the work site where the employee was temporarily assigned as his "employer" under Title VII. In so holding, the Third Circuit joined other courts in determining that a staffing firm's client could constitute an "employer" under Title VII based on a common law employment analysis.

The plaintiff, an employee of a staffing company that provided temporary services to a number of clients, including the defendant retailer, was assigned on a temporary basis to assist the defendant with a new store. During his ten days at the retailer, he alleged that he and other African American temporary workers were subject to racial discrimination, including the use of racial slurs. The plaintiff sued alleging race discrimination under Title VII, the Pennsylvania Human Rights Act (PHRA), and 42 U.S.C. § 1981. The district court granted the defendant's motion for summary judgment, holding that it was not the plaintiff's employer and thus not liable under Title VII or the PHRA. The court further held that the plaintiff could not pursue his Section 1981 claim because he had not attempted to enter into a contract with the defendant.

On appeal, the Third Circuit vacated and remanded the district court's Title VII and PHRA ruling. The Third Circuit announced that the appropriate test to analyze employment relationships under Title VII is the common law "*Darden* test" articulated in *Nationwide Mutual Insurance Co. v. Darden*.[20] Although *Darden* dealt with the definition of "employee" under the ERISA, the Third Circuit found it applicable to Title VII. Under *Darden*, courts analyze whether a person is an employee under the common law of agency by considering the "hiring party's right to control the manner and means by which the product is accomplished" under a variety of factors, including "which entity paid the employees' salaries, hired and fired them, and had control over their daily employment activities," as well as the totality of the circumstances, with no one factor being decisive.[21]

Applying *Darden*, the Third Circuit concluded that a reasonable jury could find that the retailer was the plaintiff's joint employer. While the retailer paid the staffing firm, these payments were "functionally indistinguishable from direct employee compensation" because the retailer essentially paid the employees' wages plus an administrative fee to the staffing firm.[22] In addition, while the retailer could not fire employees of the staffing firm, it could determine who worked at its store. It also gave temporary employees assignments, supervised them, provided training and equipment, and recorded their hours, all of which favored an employment relationship.

19. 808 F.3d 208, 209, 219 (3d Cir. 2015).
20. *See id.* at 213 (citing Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992)).
21. *Id.*
22. *Id.* at 215–16.

e. Transgender Title VII Claim in the Eleventh Circuit

In *Chavez v. Credit Nation Auto Sales, LLC*,[23] the Eleventh Circuit held that an employee presented sufficient circumstantial evidence to state a Title VII claim that her transgender status was a motivating factor in her termination. While Title VII claims by transgender persons have been increasingly recognized, the Eleventh Circuit had not previously addressed mixed-motive theories in a case involving a transgender employee.

The plaintiff informed her supervisor that she intended to transition from male to female. After a period of initial support, her supervisor changed his attitude, stating that he was "very nervous" about her transition and its "possible ramifications" and that "he did not want any problems created for [the plaintiff] or any of his other employees" due to her "condition."[24] The plaintiff was also instructed that she could no longer use a unisex bathroom and that she needed to "tone it down" with regard to her conversations about upcoming surgeries because other co-workers were "uncomfortable."[25] Three months after announcing her transition, the plaintiff was terminated after a supervisor photographed her sleeping in a car during working hours.

The plaintiff brought a sex-based Title VII discrimination claim, alleging that she was unlawfully terminated because of her transgender status. The district court rejected her claims, holding that (1) that there was no direct evidence of discriminatory intent or pretext in her termination, and (2) her circumstantial evidence did not create a triable issue as to whether discriminatory animus was a motivating factor in her termination.

On appeal, the Eleventh Circuit affirmed the district court's conclusions regarding the absence of direct evidence of discrimination intent or pretext. The court found, however, that the plaintiff's circumstantial evidence was sufficient to raise a Title VII mixed-motive claim. Under Title VII, unlawful discrimination may be proven with evidence that "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision."[26] The court considered evidence that the employer had bypassed its discipline policy in terminating her and the existence of an email exchange between the employer and an attorney about how to raise and document performance issues concerning her. That circumstantial evidence was sufficient to create a triable issue as to whether discriminatory animus existed and was at least "a motivating factor" in her termination.[27]

23. No. 14-14596, 2016 WL 158820 (11th Cir. Jan. 14, 2016).
24. *Id.* at *6.
25. *Id.* at *7.
26. *Id.* at *5.
27. *Id.* at *7–8.

2. Wage and Hour

a. Third Circuit Adopts "Predominant Benefit" Test to Determine Compensable Meal Breaks Under the FLSA

In *Babcock v. Butler County*, the Third Circuit held that corrections officers were not entitled to compensation under the Fair Labor Standards Act (FLSA) for an agreed-upon uninterrupted fifteen minute mealtime during which they were not primarily engaged in work-related duties because they received the "predominant benefit" of such period.[28] In so holding, the court for the first time established a test in the Third Circuit to determine whether a meal period is compensable under the FLSA.

The plaintiff, a corrections officer at the Butler County Prison, brought a putative class action claiming that Butler County failed to properly compensate for overtime in violation of the FLSA. The applicable collective bargaining agreement (CBA) provided that corrections officers work eight and one-quarter hour shifts that include a one-hour meal period, of which forty-five minutes are paid and fifteen minutes are unpaid. The plaintiffs complained that they should be compensated for the fifteen minute period because they could not leave the prison without permission, had to remain in uniform, and were on call to respond to emergencies. The plaintiffs further complained that as a result of this meal policy, they could not engage in personal activities, e.g., run personal errands, and thus should be compensated for the full hour.

The district court dismissed the complaint, finding that the corrections officers' meal periods were not compensable work because they received the predominant benefit of such period. The plaintiffs argued on appeal that they had established a plausible claim under both tests used in other circuits that ask whether the employee (1) has been relieved from "all duties," or (2) received the "predominant benefit" of the break.

The Third Circuit joined eight other circuits in adopting the predominant benefit test.[29] Applying that test, the court found that although the plaintiffs faced a number of restrictions during their meal period, the district court correctly found on balance that "these restrictions did not predominantly benefit the employer."[30] In contrast to cases where police officers were required to "receive permission to take meal period[s]," the plaintiffs could eat lunch away from their desks and only needed permission to "leave the prison."[31] Further, the CBA assumed that the plaintiffs generally did not work during a meal period and provided for appropriate compensation when an officer actually did work

28. 806 F.3d 153, 155 (3d Cir. 2015).

29. *Id.* at 156 (citing Reich v. S. New England Telecomm'cns Corp., 121 F.3d 58, 61 (2d Cir. 1997); Roy v. Cty. of Lexington, 141 F.3d 533, 544–45 (4th Cir. 1998); Bernard v. IBP, Inc. of Neb., 154 F.3d 259, 264–65 (5th Cir. 1998); Hill v. United States, 751 F.2d 810, 814 (6th Cir. 1984); Alexander v. City of Chicago, 994 F.2d 333, 335 (7th Cir. 1993); Henson v. Pulaski Cty. Sheriff Dep't, 6 F.3d 531, 534 (8th Cir. 1993); Armitage v. City of Emporia, 982 F.2d 430, 432 (10th Cir. 1992); Avery v. City of Talladega, 24 F.3d 1337, 1347 (11th Cir. 1994)).

30. *Id.* at 157.

31. *Id.* (citing *Alexander*, 994 F.2d at 335).

during a meal period. Finding that the officers thus were not "primarily engaged in work-related duties" during their meal periods under the predominant benefit test, the Third Circuit affirmed dismissal of the case.[32]

b. The Ninth Circuit Rejects Long-Standing Rule Regarding Managerial Complaints Under the FLSA

In *Rosenfield v. GlobalTranz Enterprises, Inc.*,[33] the Ninth Circuit found that determining whether a manager has "filed a[] complaint" sufficient to invoke the anti-retaliation protections of the FLSA involves a more "nuance[d]" analysis than merely asking whether the manager had "stepped outside" of his or her role representing the company when making the relevant allegations.[34] The Ninth Circuit concluded that the "stepped outside" test was not controlling for manager complaints in light of the Supreme Court's decision in *Kasten v. Saint-Gobain Performance Plastics Corporation*.[35] The Ninth Circuit thus created a potential circuit split regarding what conduct a manager must demonstrate to establish a FLSA retaliation claim.

The plaintiff was a human resources manager. Over the course of her year long employment, she repeatedly complained to management that the company was not in compliance with the FLSA. Her boss consistently and openly "disapproved of" and "expressed frustration" with her complaints.[36] The plaintiff was terminated shortly after she documented the company's continuing failure to implement FLSA compliance measures.

The plaintiff filed suit against her employer and certain of its executives, alleging violations of the FLSA's anti-retaliation provisions and state law. The district court granted summary judgment to the defendants on the FLSA claim. Citing decisions from the First, Fifth, Sixth, and Tenth Circuits, the court found that the plaintiff had not "step[ped] outside . . . her role of representing the company" in asserting FLSA non-compliance and therefore had not made a protected "complaint" under the FLSA.[37]

The Ninth Circuit reversed and remanded. The court held that under *Kasten*, the test for determining whether any employee has made a complaint under the FLSA is a case-by-case analysis of whether the employee's conduct "in light of both content and context" put the employer on "fair notice" that the employee was asserting FLSA rights and calling for protection.[38] While recognizing that several circuits had applied a manager-specific test, the court held that those

32. *Id.* at 158.

33. 811 F.3d 282 (9th Cir. 2015).

34. *Id.* at 287–88.

35. *Id.* (citing Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) (holding that that oral complaints were sufficient to invoke protection under the FLSA's anti-retaliation provisions)).

36. *Id.* at 288.

37. Rosenfield v. GlobalTranz Enters., Inc., No. 2:11-cv-02327, slip op. at 2–3 (D. Ariz. Nov. 7, 2012).

38. *Rosenfield*, 811 F.3d at 286.

decisions lacked "the benefit of *Kasten*'s generalized 'fair notice' rule."[39] The court "decline[d]" to narrow or reformulate the *Kasten* rule as applied to the complaints of a manager, ruling that managerial status is just "one consideration" to be considered.[40]

Applying the *Kasten* test, the court held that the company had been on fair notice that the plaintiff was making an FLSA complaint. The court relied heavily on the fact that monitoring FLSA violations was not part of the plaintiff's regular job duties and that her boss considered himself to be solely responsible for ensuring FLSA compliance. The court also noted that even after her boss had agreed to take some actions to address the plaintiff's concerns, he had made clear to her "that he did not want or expect [her] to determine whether the company was actually implementing those changes."[41] The Ninth Circuit therefore reversed and remanded the case for further proceedings.

3. Whistleblower Protections

In *Berman v. Neo@Ogilvy LLC*,[42] the Second Circuit created a circuit split by finding ambiguity in Section 21F of the Dodd-Frank Act and deferring to the interpretation of the Securities and Exchange Commission (SEC) that expands retaliation protections to internal whistleblowers. Under the Second Circuit's interpretation, a whistleblower who raises claims only with his or her employer, but does not report them to the SEC, is protected from retaliation by Dodd-Frank.

The plaintiff was the defendant employer's finance director. While employed, he discovered various practices that he alleged amounted to accounting fraud. He reported these violations internally and was fired by a senior officer. Thereafter, he reported his allegations to the SEC after the statute of limitations had expired on one of his Sarbanes-Oxley Act (SOX) claims. Still later, the plaintiff filed suit, alleging that he was discharged in violation of the whistleblower protection provisions of Section 21F of Dodd-Frank and in breach of his employment contract. The district court granted the defendant's motion for summary judgment because the plaintiff had been terminated before he reported the alleged violation to the SEC.

On appeal, the Second Circuit reversed and remanded, stating that the plaintiff "was entitled to pursue Dodd-Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination."[43] After laying out the governing statutory sections and the SEC's guidance on the topic, the Second Circuit defined the issue as one of statutory interpretation. It then examined whether the definition in one subsection of 21F applied to another subsection or if it was sufficiently unclear as to

39. *Id.* at 287.
40. *Id.*
41. *Id.* at 288 (internal citations omitted).
42. 801 F.3d 145 (2d Cir. 2015).
43. *Id.* at 155.

warrant *Chevron* deference to the SEC's regulations on the topic. After noting that the application of the definition to another subsection would result in a "sharply limiting effect," such that Dodd-Frank would protect only whistle-blowers who reported to the SEC,[44] the court concluded the tension between the two subsections rendered Section 21F "sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute."[45]

4. The Pregnancy Discrimination Act, the Americans with Disabilities Act, and Due Process and Equal Protection Under the Fourteenth Amendment

a. Supreme Court Strikes Middle Ground on Pregnancy Accommodation, but Refuses to Defer to EEOC's 2014 Pregnancy Accommodation Guidelines

In *Young v. United Parcel Service*,[46] the Supreme Court held that employers may be required to accommodate pregnant employees in some circumstances. The Court struck a middle ground between requiring employers to accommodate pregnant employees while also refusing to defer to the employee-friendly Pregnancy Accommodation Guidelines published by the EEOC.

The plaintiff, a UPS driver, requested light duty after becoming pregnant. UPS denied her request and instead provided her with an extended leave of absence because she did not fit into any of its three categories of employees for whom light duty is permitted: (1) those injured on the job, (2) those who have lost their Department of Transportation certification, and (3) those who are disabled under the Americans with Disabilities Act (ADA). The plaintiff filed suit, alleging race and sex discrimination in violation of Title VII, pregnancy discrimination in violation of the Pregnancy Discrimination Act (PDA), and disability discrimination in violation of the ADA. Both the district court and the Fourth Circuit rejected her claims.

Before the Supreme Court, the plaintiff argued that the PDA requires employers to provide pregnant employees with all accommodations provided to other employees with similar physical restrictions. The EEOC's Pregnancy Accommodation Guidelines, promulgated after the Supreme Court granted certiorari, explicitly adopted the plaintiff's reading of the statute. The Court rejected this argument as too broad, concluding that such a reading of the statute would grant pregnant women a "most favored-nation status."[47] Such treatment was inconsistent with "disparate treatment law [which] normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as

44. *Id.* at 151–52.
45. *Id.*
46. 135 S. Ct. 1338 (2015).
47. *Id.* at 1349.

long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so."[48]

The Court also rejected UPS's argument that the PDA only requires that pregnant employees be treated the same as similarly situated non-pregnant employees. The Court explained that Congress passed the PDA to overrule case law holding that it is lawful to provide benefits arising from sickness and other injuries while excluding such benefits for disabilities arising from pregnancy.

The Court then articulated a new prima facie burden for a plaintiff who alleges disparate treatment under the PDA. A plaintiff must show "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.' "[49] Ultimately, the Court vacated and remanded the Fourth Circuit's decision, finding that the plaintiff had created a genuine dispute as to whether UPS provided more favorable treatment to employees who were similarly situated to her in their "ability or inability to work."[50]

b. The Seventh Circuit Holds That Employers Are Not Required to Continue Exempting a Position from a Bona Fide Seniority System as a Reasonable Accommodation Under the ADA

In *Dunderdale v. United Airlines, Inc.*,[51] the Seventh Circuit held that the ADA does not require an employer to accommodate a disabled individual by continuing to exempt a position from an otherwise consistent seniority bidding system. The decision suggests that, even in a jurisdiction that requires employers to grant preferential treatment to employees seeking a job transfer as a disability accommodation,[52] the special circumstances under which employers must violate existing seniority systems remain narrow.

The plaintiff worked for the defendant airline as a ramp serviceman. Ramp servicemen were covered by a collective bargaining agreement that contained a seniority-based job bidding system. However, ramp servicemen with permanent work restrictions could bypass this system by "bidding" to work in the "product sort" area, upon which the company would assign them to a less strenuous position scanning luggage tags (the matrix position). The plaintiff was reassigned to the matrix position pursuant to this procedure after he suffered a back injury.

Several years later, the company changed its policy to allow any ramp serviceman, not just those with permanent work restrictions, to bid for the matrix position. The justification for the change was that the more limited bidding system conflicted with the collective bargaining agreement's provisions on seniority-

48. *Id.* at 1350.
49. *Id.* at 1354.
50. *Id.* at 1355.
51. 807 F.3d 849 (7th Cir. 2015).
52. *See* Equal Emp't Opportunity Comm'n v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

based work placement. The plaintiff, who lacked seniority to retain the matrix position, brought suit, alleging unlawful discrimination and retaliation under the ADA. The district court granted the company summary judgment on the plaintiff's claim that it discriminated against him by failing to reasonably accommodate his disability.

On appeal, the Seventh Circuit reversed. The court relied heavily on the Supreme Court's ruling in *U.S. Airways, Inc. v. Barnett*[53] that it is unreasonable, absent "special circumstances," to assign an employee to a position as an accommodation if doing so would violate the employer's seniority system. The court rejected both of the plaintiff's arguments that such special circumstances were present.

First, the court rejected the proposition that "special circumstances" should include a previous status quo of exempting a particular position from an existing seniority system. The court cited the two examples of special circumstances that the Supreme Court had articulated in *Barnett*: when there were "unilateral[] and frequent[]" changes to that seniority system, or where the seniority system already contained a significant number of exceptions.[54] Neither situation applied. While the matrix position had been exempted, employees otherwise had an expectation of "unilateral, consistent treatment" regarding that bidding system.[55] Once the employer decided to subject the matrix position to that bidding system, employees likewise had an expectation of unilateral and consistent treatment regarding bidding for that position.

Second, the court disagreed that the suddenness of the constituted "special circumstances."[56] The plaintiff had argued that no formal grievance had been filed challenging the position's exemption, and thus there was no particular reason for the sudden change in practice. The court reasoned that an employer does not have to "maintain positions or job structures that provide reasonable accommodations" if it has reasonable business reasons for eliminating that position or job structure.[57] The court declined to second-guess the company's efforts to increase the reliability and consistent application of the seniority bidding system.[58]

5. Medical Leave

a. *Seventh Circuit Holds That FMLA Statute Of Limitations Runs from Denial of Leave, Not Later Termination for Excessive Absences*

In *Barrett v. Illinois Department of Corrections*,[59] the Seventh Circuit interpreted the statute of limitations of the Family and Medical Leave Act (FMLA) in the context of an employer's no-fault absenteeism policy and held

53. 535 U.S. 391 (2002).
54. *See Dunderdale*, 807 F.3d at 855.
55. *Id.*
56. *Id.* at 855–56.
57. *Id.* at 856.
58. *Id.* at 855–56.
59. 803 F.3d 893, 895–97 (7th Cir. 2015).

that the limitations period begins to run when leave requests are denied and not when an employee later is terminated based on his overall attendance record. The Sixth and Eighth Circuits also have addressed the question and reached contrasting results.

The plaintiff worked as account technician for the Illinois Department of Corrections (IDOC). The IDOC maintained a progressive discipline system for absenteeism under which an employee could be terminated after twelve unauthorized absences. The plaintiff was terminated in October 2010 after she accumulated her twelfth unauthorized absence; she filed suit less than two years later, claiming that IDOC violated the FMLA by denying her protected leave. The plaintiff alleged that her first, fifth, and sixth absences, which all occurred before 2006 and which she unsuccessfully had challenged as authorized before the IDOC's Employee Review Board, were protected by the FMLA and should not have been counted. The district court granted summary judgment to IDOC, holding that the plaintiff's claims were barred by the FMLA's two-year statute of limitations.

The Seventh Circuit affirmed, finding that the plaintiff's termination did not begin the running of the limitations period. The court explained "there is little authority on this question elsewhere, and it points in divergent directions."[60] The FMLA requires suits to be brought "not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought."[61] The court reasoned that the "last event" that allegedly violated the FMLA was not the plaintiff's termination. Instead, "[w]hen an FMLA plaintiff alleges that his employer violated the Act by denying him qualifying leave, the last event constituting the claim ordinarily will be the employer's rejection of the employee's request for leave."[62] Thus, each time that the Employee Review Board ruled that the plaintiff's leave was unauthorized, her rights under the FMLA were allegedly impaired and an actionable FMLA claim accrued, starting the limitations period. Although the ultimate consequence of these absences did not materialize until her termination, the FMLA's language required the filing of suit within two years of the employer's "last event" denying the plaintiff allegedly FMLA-protected leave. As a result, her claim was time-barred.

b. "But For" Standard Utilized for FMLA Retaliation in the Fifth Circuit

In *Wheat v. Florida Parish Juvenile Justice Commission*,[63] the Fifth Circuit held that a detention officer, who had alleged that she was terminated in retaliation for taking protected leave, could pursue a retaliation claim under the

60. *Id.* at 896 (*comparing* Reed v. Lear Corp., 556 F.3d 674, 681 (8th Cir. 2009) (holding that FMLA limitations clock runs from denial of leave, not when employee is later fired for absenteeism), *with* Butler v. Owens-Brockway Plastics Prods., Inc., 199 F.3d 314, 317 (6th Cir. 1999) (holding that plaintiff could challenge termination for excessive absenteeism even though absences she claimed were protected occurred more than two years before she filed suit)).

61. *Id.* at 896 (quoting 29 U.S.C. § 2617(c)(1)).

62. *Id.* at 897.

63. 811 F.3d 702, 704 (5th Cir. 2016).

FMLA. The Fifth Circuit for the first time applied the "but for" standard to a FMLA claim. Neither the Supreme Court nor any other circuit had previously done so.

The plaintiff had been a juvenile detention officer at the Florida Parish Juvenile Justice Commission since 2000. In 2009, she took FMLA leave to undergo surgery. After her surgery, she was terminated for failure to return to work after her FMLA leave expired. She filed suit under the FMLA and was reinstated after a settlement. The plaintiff alleged that following her reinstatement, the Commission retaliated against her by assigning her janitorial duties and denying her a raise and a transfer request. She was terminated in 2012 after a physical incident with an inmate. The plaintiff then filed suit, alleging claims under the FMLA and Title VII, and various retaliation claims.

On appeal, the Fifth Circuit affirmed the grant of summary judgment for the defendant on all but the plaintiff's FMLA retaliatory termination claim. The Fifth Circuit noted that "[n]either this Court, nor the Supreme Court, has decided whether the heightened 'but for' causation standard required for Title VII retaliation claims applies . . . to FMLA retaliation claims."[64] Under the "but for" analysis, a plaintiff must prove that the unlawful retaliation would not have occurred without the plaintiff exercising his or her protected activity. Applying that standard, the court concluded that a genuine fact issue existed as to whether the plaintiff's discharge would have occurred "but for" her exercise of her protected FMLA rights in light of evidence indicating that the Commission had terminated some employees for excessive force but not others. The court therefore vacated and remanded the plaintiff's FMLA retaliatory termination claim.

C. National Labor Relations Act (NLRA)

1. NLRB Vastly Expands Its Joint-Employer Standard

In *Browning-Ferris Industries of California, Inc.*,[65] the NLRB (or Board) expanded its joint-employment standard, clarifying that joint-employment relationships can be found where the purported employer has indirect or future theoretical control over a worker. The Board made clear that "direct and immediate control" is not required.[66] In so holding, the NLRB broke from prior case law articulated in *TLI, Inc.*[67] and *Laerco Transportation*,[68] which, according to the Board, "significantly and unjustifiably narrow[ed] the circumstances where a joint-employment relationship [could] be found."[69]

The case arose from a recycling facility owned by Browning-Ferris Industries (BFI) and operated by BFI and staffing agency employees. The Teamsters filed

64. *Id.* at 706.
65. 2015 NLRB LEXIS 672 (Aug. 27, 2015).
66. *Id.* at *33.
67. TLI, Inc., 271 NLRB 798 (1984), *enf'd mem.*, Gen. Teamsters Local Union No. 326 v. N.L.R.B., 772 F.2d 894 (3d Cir. 1985).
68. Laerco Transp. & Warehouse, 269 NLRB 324 (1984).
69. *Browning-Ferris Indus.*, 2015 NLRB LEXIS 672, at *4.

an election petition seeking to represent the agency employees and named BFI and the agency as the employer.

The Regional Director applied the Board's prior precedent and found that no joint employment relationship existed because the staffing agency (1) set its employees' pay, although, by contract, it could not pay more than BFI employees who performed similar work; (2) was the sole provider of its employees' benefits; (3) had sole control over recruitment, hiring, counseling, discipline, and termination of its employees; (4) scheduled its employees' shifts and overtime; and (5) administered sick leave and vacation. In addition, the Regional Director found that BFI did not "control or codetermine employees' daily work" because BFI did not determine "how many employees work[ed] on the line, the speed at which the employees work[ed], where they st[ood] on the stream, or how they pick[ed] material off the stream."[70]

The Board reversed, explaining that a joint-employment relationship will exist if two or more entities "share or codetermine those matters governing the essential terms and conditions of employment."[71] The Board highlighted the following aspects of BFI's relationship with the staffing agency's employees to establish a joint employer relationship:

- *Hiring*. BFI had a contractual right to require that the agency's applicants take and pass drug tests and have "the appropriate qualifications (including certification and training)."[72] BFI also retained the right to reject an applicant referred by the agency "for any or no reason."[73]
- *Wages*. The agency was prohibited from paying its employees more than BFI paid its employees for performing comparable work and BFI reimbursed it for labor costs on a cost-plus basis.
- *Discipline*. BFI had the right to "discontinue the use of any personnel for any or no reason."[74]
- *Supervision*. BFI controlled the hours and production lines in its facility, required that agency employees obtain the signature of an authorized BFI representative attesting to their "hours of services rendered" each week, held a pre-shift meeting to advise agency supervisors of what lines would be running and what tasks they should do on those lines, and monitored the productivity of the agency employees.[75]

In analyzing whether a joint-employment relationship existed, the Board announced that it would no longer require direct and immediate control by an

70. *Id.* at *27.
71. *Id.* at *118.
72. *Id.* at *13.
73. *Id.* at *15.
74. *Id.*
75. *Id.* at *19.

alleged joint employer over the terms and conditions of employment. Instead, the right to control terms and conditions of employment, even if indirect, unexercised, or both, may be sufficient. In the Board's view, the concept of "essential terms and conditions of employment" should not be limited to the core subjects of wages, hours, hiring, firing, and discipline; instead, it should include subjects like the number of workers to be supplied, scheduling, overtime, work assignments, and "the manner and method of work performance."[76]

As part of its analysis, the Board clarified that it would consider whether the alleged joint employer's control is confined to subjects that are "too limited in scope or significance to permit meaningful collective bargaining."[77] The Board also stated that a joint employer will be required to bargain "only with respect to such terms and conditions which it possesses the authority to control."[78] Further, the Board recognized that a case-by-case, fact-intensive evaluation of the allocation and exercise of control in the workplace must be undertaken. The Board acknowledged that it could not predict how its newly articulated joint-employment standard would be applied in the future cases, given the diverse nature of relationships with workers, but it would instead need to be analyzed in the context of future cases.

2. Fifth Circuit Again Holds That Class and Collective Action Waivers in Arbitration Agreements Do Not Violate the NLRA

In *Murphy Oil USA, Inc. v. National Labor Relations Board*,[79] the Fifth Circuit affirmed again that an employer does not violate the NLRA by maintaining and enforcing an arbitration agreement precluding employees from bringing class or collective actions.

The employer required employees to sign an agreement to arbitrate all disputes arising out of their employment and to waive the right to pursue class or collective claims, in either arbitral or judicial forums.[80] After employees who had signed the agreement filed a collective action under the FLSA, the employer moved to dismiss and compel individual arbitration under its arbitration agreement. While that motion was pending, one of the employees filed an unfair labor practice charge with the NLRB alleging that the arbitration agreement's restriction on filing class or collective claims interfered with her right to engage in protected concerted activity under Section 7 of the NLRA. The Board ruled that the employer violated Section 8(a)(1) of the NLRA by "requiring its employees to agree to resolve all employment-related claims through individual arbitration."[81] The employer petitioned the Fifth Circuit for review.

76. *Id.* at *26.
77. *Id.* at *72.
78. *Id.* at *73.
79. 808 F.3d 1013, 1018 (5th Cir. 2015).
80. *Id.*
81. Murphy Oil USA, Inc., 361 NLRB No. 72 (Oct. 28, 2014).

The Fifth Circuit overturned the Board's ruling, which "disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are enforceable and not unlawful."[82] Rather than repeating the analysis of its recent *D.R. Horton* ruling, the court simply held that the employer "committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here."[83] The Fifth Circuit noted that several other circuits have indicated or expressly stated that they agreed with the holding in *D.R. Horton*.[84] However, the court rejected the employer's request for a court writ or sanctions against the Board for its "nonacquiescence practice" regarding *D.R. Horton*, reasoning that the Board could not be certain which circuit's law would be applied on a petition for review.

3. NLRB Finds Employer's Rules Prohibiting Recording in Workplace To Be Overly Broad and Therefore Unlawful

In *Whole Foods Market, Inc.*,[85] the NLRB held that the employer's rules prohibiting the recording of conversations, phone calls, images, or company meetings without prior management approval were overbroad and in violation of Section 8(a)(1) of the NLRA. The Board explained that maintenance of the recording rules reasonably could be anticipated to chill employees in the exercise of their Section 7 rights.

During the underlying hearing, the employer argued that its recording rules were designed to encourage workers to "speak up and speak out" on many issues, work-related or not, and were intended to ensure that all workers felt comfortable voicing opinions, particularly during job-related meetings. The administrative law judge agreed, holding that such rules did not "prohibit employees from engaging in protected, concerted activities, or speaking about them" and that making recordings in the workplace was not a protected right.[86]

The Board reversed. It explained that photography and recording in the workplace and postings of these on social media "are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present."[87] The Board observed that case law is replete with examples of the use of covert photography and recording to vindicate Section 7 rights. Thus, in its view, a rule that prohibits workplace recording with no qualifications, even if part of protected concerted activity, goes too far. Unlike,

82. *Murphy Oil*, 808 F.3d at 1018 (citing D.R. Horton, Inc. v. Nat'l Labor Relations Bd., 737 F.3d 344, 362 (5th Cir. 2013)).

83. *Id.*

84. *Id.* at 1018 n.3 (citing Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053–55 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013)).

85. 363 NLRB No. 87 (Dec. 24, 2015).

86. *Id.* at *2.

87. *Id.* at *3.

for example, hospitals that had patient privacy concerns, a grocery store did not have legitimate business reasons for such broadly written rules.

D. Employee Retirement Income Security Act

1. *Tibble v. Edison International*: Plan Fiduciaries Have "Continuing Duty to Monitor Trust Investments," But Does That Mean Anything Important?

In *Tibble v. Edison International*,[88] the Supreme Court held that an ERISA fiduciary "has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."[89] While some ERISA observers have suggested that the Court's ruling represents a heightening of the standard of care imposed on plan fiduciaries, such a result is difficult to glean from the decision itself.

The case arose from a challenge to the prudence of including retail class mutual funds on the investment menu of Edison International's participant-directed 401(k) plan. The plaintiffs alleged that the plan could have substituted institutional class funds with lower fees, saving participants money without any impact on investment returns.

The lower courts agreed that offering participants higher priced retail options was inconsistent with ERISA's fiduciary standards when nearly identical and cheaper institutional funds were available. The dispute that eventually reached the Supreme Court arose from the fact that three of the funds were included on the plan menu long before the start of ERISA's six-year statute of limitations for fiduciary breach claims.[90] The lower courts held that any prudence challenge to their inclusion was time-barred and that the plan fiduciaries had done nothing that could be characterized as a new breach that might start the limitations period running again.

The Supreme Court reversed. The case turned on a seemingly narrow question: does a fiduciary have a duty to revisit the prudence of investments even if the original circumstances have remained the same? The Ninth Circuit said no. The Supreme Court answered in the affirmative but offered minimal guidance as to when and with what degree of scrutiny an ERISA fiduciary is to review prior decisions. The closest that it came was to quote a standard treatise for the proposition that trustees must "systematic[ally] conside[r] all the investments of the trust at regular intervals."[91]

88. 135 S. Ct. 1823, 1828 (2015).
89. *Id.*
90. Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1113.
91. Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 684 (3d ed. 2009).

Rather than going any further, the Court remanded the case, leaving it to the court below to fill in the scope of that monitoring responsibility. The Court also left open a second question for consideration on remand: whether a monitoring claim was even properly in the case. The defendants argued in the Court that the plaintiffs had waived any such claim by failing to raise it in the district court. The Court left it to the Ninth Circuit to determine whether the plaintiffs had forfeited any such claim by not raising it in a timely manner.[92]

2. The Supreme Court Again Addresses Subrogation in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*

In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*,[93] the Supreme Court returned once more to subrogation and equitable liens, the topics of three previous cases of particular importance to ERISA-covered health plans. These plans typically contain subrogation clauses, under which participants agree to reimburse the plan to the extent that they recover expenses from a third party that the plan has already paid on their behalf. The Supreme Court's prior decisions were:

- *Great-West Life & Annuity Insurance Co. v. Knudson*,[94] which held that the plan's claim against the participant is equitable rather than legal and therefore is not enforceable through a money judgment against him.
- *Sereboff v. Mid Atlantic Medical Services, Inc.*,[95] holding that a subrogation clause creates an equitable lien that may be enforced against funds that pass from a third party tortfeasor into the participant's possession.
- *US Airways, Inc. v. McCutchen*,[96] which held that, because the lien is "by agreement," the terms of the agreement, i.e., the terms of the plan, may override doctrines such as the "double recovery" and "common fund" that otherwise limit the extent of equitable liens.

Montanile, the fourth case in this series, delves into the substance of the remedy, and in particular whether the plan is limited to recovering only those assets that are traceable to the funds actually paid by the third party to the participant. The Court held that the principle of tracing is an integral part of the equitable remedy available in this context. It then remanded the case for fact finding as to whether the defendant still had traceable assets in his possession.

92. On remand, the Ninth Circuit held that the plaintiffs forfeited the monitoring claim by failing to raise it properly in the district court or the initial appeal. Tibble v. Edison Int'l, Case No. 10-56406, 2016 U.S. App. LEXIS 6684 (9th Cir. Apr. 13, 2016).
93. 136 S. Ct. 651 (2016).
94. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).
95. Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006).
96. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

The participant in *Montanile* was the victim of an automobile accident caused by a third party. The plan paid more than $120,000 of his medical expenses. As required by the plan's terms, he signed an agreement promising to reimburse that amount if he recovered damages from third parties. A lawsuit against the driver responsible for the accident led to a settlement that, after attorney fees, court costs, loan repayments, and some remaining out-of-pocket medical costs, left the plaintiff with a net recovery of just under $200,000, which his lawyer initially held in a client trust account during negotiations with the plan about its subrogation rights. After negotiations broke down, the lawyer notified the plan that he would release the trust account to his client unless the plan filed a lawsuit within fourteen days. When the plan did not respond, he sent a check to the participant. Some months later, the plan sued the participant, who responded that the entire settlement proceeds were gone, having been spent on living costs, services, travel, and the like.

The Eleventh Circuit ruled in the plan's favor,[97] and the Supreme Court granted certiorari on the question of whether the plan's equitable lien could be enforced against the participant's general assets without the need to identify a specific fund that could be traced to his third party recovery. The circuits were divided on this question. Like the Eleventh Circuit, a majority took the view that "[w]hen an ERISA plan creates an equitable lien by agreement between the insurer and the beneficiary, the insurer's ownership of the overpaid funds is established regardless of whether the insurer can satisfy strict tracing rules."[98] Therefore, the fact that the participant dissipated the funds was irrelevant.

The Supreme Court sided with the minority view. The plan in *Montanile* was seeking "appropriate equitable relief" under section 502(a)(3) of ERISA, which, as the Court had held in *Mertens v. Hewitt Associates*, includes only "those categories of relief that were *typically* available in equity" before the law and equity courts were merged.[99] Justice Thomas's opinion for an eight-to-one majority summarizes succinctly this approach to the question raised by *Montanile*:

> To resolve this issue, we turn to standard equity treatises. As we explain below, those treatises make clear that a plaintiff could ordinarily enforce an equitable lien only against specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds (*e.g.*, identifiable property like a car). A defendant's expenditure of the entire identifiable fund on

97. Bd. of Tr. of Nat'l Elevator Indus. Health Benefit Plan v. Montanile, 593 F. App'x 903 (11th Cir. 2014), *vacated by*, Case No. 14-11678, 2016 WL 850877 (11th Cir. Mar. 4, 2016).

98. Thurber v. Aetna Life Ins. Co., 712 F.3d 654, 664 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2723 (2014); *see also* Funk v. CIGNA Grp. Ins., 648 F.3d 182, 194 (3d Cir. 2011); Cusson v. Liberty Life Assurance Co. of Boston, 592 F.3d 215, 230–32 (1st Cir. 2010); Longaberger Co. v. Kolt, 586 F.3d 459, 466–67 (6th Cir. 2009); Gutta v. Standard Select Tr. Ins. Plans, 530 F.3d 614, 621 (7th Cir. 2008); *contra,* Treasurer, Tr. of Drury Indus., Inc. Health Care Plan & Trust v. Goding, 692 F.3d 888, 895–97 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1644 (2013); Bilyeu v. Morgan Stanley Long Term Disability Plan, 683 F.3d 1083, 1091–96 (9th Cir. 2012), *cert. denied sub nom.*, First Unum Life Ins. Co. v. Bilyeu, 133 S. Ct. 1242 (2013).

99. 508 U.S. 248, 256 (1993) (emphasis in original).

> nontraceable items (like food or travel) destroys an equitable lien. The plaintiff then may have a personal claim against the defendant's general assets—but recovering out of those assets is a *legal* remedy, not an equitable one.[100]

The opinion then proceeds through a brisk summary of black letter equity law, concluding:

> In sum, at equity, a plaintiff ordinarily could not enforce any type of equitable lien if the defendant once possessed a separate, identifiable fund to which the lien attached, but then dissipated it all. The plaintiff could not attach the defendant's general assets instead because those assets were not part of the specific thing to which the lien attached. This rule applied to equitable liens by agreement as well as other types of equitable liens.[101]

The Court then went on to reject a number of counter-arguments advanced by the plan. One of the arguments of greatest general interest, that the Supreme Court's expansive discussion of equitable remedies in *CIGNA Corp. v. Amara*,[102] effectively overruled its prior narrow construction of such remedies, received no more attention than a footnote: "[t]he Board also interprets *CIGNA Corp. v. Amara* . . . as all but overruling *Mertens v. Hewitt Associates* . . . and *Great-West Life & Annuity Ins. Co. v. Knudson*, . . . in favor of the Board's broad interpretation of 'equitable relief' under § 502(a)(3). . . . In any event, the Court's discussion of § 502(a)(3) in *CIGNA* was not essential to resolving that case. . . ."[103] This treatment suggests that at least some Justices may have concerns over some lower courts' reading of *Amara* as authoritative, rather than dictum.

Another argument, "that ERISA's objectives—of enforcing plan documents according to their terms and of protecting plan assets—would be best served by allowing plans to enforce equitable liens against a participant's general assets," was answered by a quotation from *Mertens*: "[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration."[104]

The plan's remaining arguments fared no better. The Court rejected the plan's contention, expressed in various ways, that courts of equity did, in fact, sometimes issue judgments against a defendant's general assets when property subject to an equitable lien was insufficient to make the claimant whole. The cases cited

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100. *Montanile*, 136 S. Ct. at 658 (emphasis in original).
101. *Id.* at 659. In reaching this conclusion, the Court distinguished its prior decision in *Sereboff*, which some lower courts had read to indicate that an equitable lien by agreement attaches to all of the participant's assets rather than just to the portion that can be shown to have been derived from his recovery. In the Court's view, *Sereboff* did not address the specific issue before it, i.e., whether "equitable liens must be enforced against a specifically identified fund in the defendant's possession." *Id.* at 660 (discussing Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006)).
102. CIGNA Corp. v. Amara, 563 U.S. 421 (2011).
103. *Montanile*, 136 S. Ct. at 660, n.3 (citations omitted).
104. *Id.* at 661 (quoting *Mertens*, 508 U.S. at 261 (emphasis in original)).

for this proposition fell into two categories, those in which the court found a money judgment necessary in order to make the equitable remedy fully effective and those predicated on a theory known as swollen assets.

The Court found the first set of cases inapposite because the relief granted was purely legal, a judgment for money owed. *Mertens* recognized that courts of equity had the power to grant legal remedies, but held that "relief *typically* available in equity" did not mean "whatever relief a court of equity is empowered to provide in the particular case at issue."[105] It thus was not available as equitable relief under ERISA § 502(a)(3).

The swollen assets theory is a tracing rule that allows the claimant to reach the entirety of any fund with which assets subject to an equitable lien have ever been commingled. The Court dismissed this argument because the swollen assets theory was not widely accepted by courts of equity and, in any event, led to no more than a claim against a particular fund rather than against defendant's general assets.

Having concluded that the courts below erred, the Court sent the case back. The fact that the defendant expended nearly $200,000 in six months without acquiring any tangible assets was supported solely by his assertion in his pleadings. It was left to the district court to determine what happened to the recovery after it left the lawyer's client trust account.

The first reaction of many commentators to *Montanile* was that health plan participants now have an incentive to quickly spend third party recoveries. Be that as it may, several morals emerge from *Montanile*:

- Plans need to act promptly and diligently to enforce their subrogation rights.
- The Court's footnote treatment of *Amara* hints that some of the expansive interpretations of remedies like reformation and surcharge may have trouble surviving its scrutiny.
- *Montanile*'s insistence on adherence to equitable tracing rules may spill over into other actions brought by plans against participants, including, for example, attempts by pension plans to recover overpayments of benefits to participants.

3. *Amgen, Inc. v. Harris*: The Supreme Court Instructs the Ninth Circuit to Take *Dudenhoeffer* Seriously

A per curiam order by the Supreme Court in *Amgen, Inc. v. Harris*[106] has for the second time returned to the Ninth Circuit a long running dispute over the propriety of allowing 401(k) plan participants to continue investing in employer stock during a period when the plan fiduciaries allegedly possessed material,

105. *Id.* at 567 (quoting *Mertens*, 508 U.S. at 256).
106. 136 S. Ct. 758 (2016).

adverse inside information. The summary reversal is notable for its somewhat sharp tone, perhaps prompted by the appellate panel's response to the previous remand, which directed the lower court to reconsider the case in the light of *Fifth Third Bancorp v. Dudenhoeffer*.[107] The response was a slightly amended version of the panel's prior opinion, followed by a denial of rehearing en banc, from which four judges issued a vigorous dissent authored by Judge Kozinski.[108]

The case stems from events in 2007, when Amgen's management allegedly covered up unfavorable clinical trial results for one of the company's best-selling drugs. When the results emerged, Amgen stock declined by about 30 percent. Shareholders brought a class action charging that corporate insiders had violated the securities laws, while participants in the company's 401(k) plans brought a separate lawsuit asserting that the plan fiduciaries had violated their duties of prudence and loyalty under ERISA by allowing investments in employer stock at a time when they knew or should have known that the stock price was substantially inflated above its true fair market value as a consequence of the alleged fraud.

One of the plaintiffs' arguments in *Dudenhoeffer* had been that the plan fiduciaries "behaved imprudently by failing to act on the basis of *nonpublic* information that was available to them."[109] The Court acknowledged that such a claim might be tenable but undertook to "divide the plausible sheep from the meritless goats"[110] through strict adherence to pleading requirements. In particular, the Court held

> [L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases, which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment, or publicly disclosing negative information 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.[111]

Upon remand, the Ninth Circuit, in concluding that the plaintiffs' complaint satisfied the new *Dudenhoeffer* pleading standard, effectively reinstated its prior opinion. On the "more harm than good" test, it declared that halting future plan purchases of Amgen stock could not have done "more harm than good" because the bad news would inevitably have become public with at least as severe an impact on the stock price as a purchase moratorium.[112] The dissent from the denial of rehearing strongly disagreed, arguing that the panel's opinion, contrary to the Supreme Court's instructions, would create "almost unbounded liability

107. 134 S. Ct. 2459 (2014).
108. Harris v. Amgen, Inc., 788 F.3d 916 (9th Cir. 2015).
109. *Dudenhoeffer*, 134 S. Ct. at 2472 (emphasis in original).
110. *Id.* at 2470.
111. *Id.* at 2473.
112. *Id.*

for ERISA fiduciaries."[113] It went on to predict that the "Supreme Court will promptly correct our error."[114]

The Supreme Court did just that, summarily reversing the Ninth Circuit. The Court made clear that it meant what it said in establishing stringent pleading standards for these types of cases in *Dudenhoeffer*. As the Court succinctly explained, the lower court

> failed to assess whether the complaint in its current form "has plausibly alleged" that a prudent fiduciary in the same position "*could not* have concluded" that the alternative action "would do more harm than good." . . .
>
> The Ninth Circuit's proposition that removing the Amgen Common Stock Fund from the list of investment options was an alternative action that could plausibly have satisfied [*Dudenhoeffer*'s] standards may be true. If so, the facts and allegations supporting that proposition should appear in the stockholders' complaint. Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence.[115]

The Court therefore reversed and remanded the case for further proceedings.

4. *Pfeil v. State Street Bank and Trust Company*: Plaintiffs Search for an End Run Around *Dudenhoeffer*

As the plaintiffs' bar is coming to realize, the Supreme Court's *Dudenhoeffer* decision, which struck down the so-called *Moench* presumption of prudence and erected strict new pleadings standards in its place, was no unambiguous victory for stock-drop plaintiffs. *Amgen* is one glimpse of the post-*Dudenhoeffer* landscape. *Pfeil v. State Street Bank and Trust Company* is another.[116] In a two-to-one decision, the Sixth Circuit rejected claims that continuing to invest in General Motors (GM) stock up to the eve of the company's bankruptcy was imprudent. The case differs from *Amgen* in that the charge against the defendant fiduciaries was that they failed prudently to act on public, rather than inside, information.

GM's 401(k) plans allowed participants to invest in GM common stock. State Street Bank served as trustee of the employer stock fund and had established an elaborate system under which a hierarchy of three committees periodically reviewed whether, based on GM's economic performance, participants should be allowed to continue to acquire or hold the company's shares. Between January 2008 and March 2009, these committees discussed GM's situation regularly (fifty-eight times, according to the Sixth Circuit's opinion). On November 2, 2008, State Street suspended new investments in GM stock. On March 31,

113. *Harris*, 788 F.3d at 923 (Kozinski, J. dissenting).
114. *Id.*
115. Amgen Inc. v. Harris, 136 S. Ct. 758, 760 (2016) (emphasis added).
116. 806 F.3d 377 (6th Cir. 2015).

2009, it announced its decision to liquidate the common stock fund, a process that was completed by late April. GM filed for bankruptcy on June 1, 2009.

With hindsight, it is obvious that the participants would have been better off if the stock had been sold sooner. The upshot was a class action suit against State Street. The plaintiffs alleged "that, in response only to various *public* announcements about GM's future, State Street's investment strategy failed to function as a prudent process if it did not recognize 'that the market was over- or undervaluing' GM common stock."[117]

Since the plaintiffs did not claim that State Street possessed material inside information, *Dudenhoeffer* posed a formidable challenge. Reflecting the efficient market thesis, the *Dudenhoeffer* Court opined "[i]n our view, where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."[118]

The corollary is that, absent "special circumstances," which have yet to be defined by the Supreme Court, the purchase or retention of publicly traded company stock cannot be imprudent in and of itself. While the purchase or retention of such stock might be considered imprudent from a lack of diversification standpoint under standard investment principles, investments in company stock by "eligible individual account plans,"[119] such as the GM's 401(k) plans, are exempted by ERISA § 404(a)(2) from ERISA's diversification requirement and the duty of prudence to the extent it requires diversification.

The Sixth Circuit did not expressly state that, absent special circumstances, investments by eligible individual account plans in publicly traded employer stock effectively carry with them a presumption of prudence that immunizes them from a prudence challenge based on the failure to act on publicly available information. However, the opinion comes close to doing so in response to following argument advanced by the dissent:

> One can concede that the market is generally efficient in pricing stocks without concluding that all decisions to buy, sell, or hold are therefore prudent. The market includes participants with various levels of risk tolerance and various types of portfolios. What is prudent for one type of investor and one type of portfolio may be imprudent for others. Further, the fact that a stock's price accurately reflects the company's risk of failing does not mean that it is prudent to retain the stock as that possibility becomes more and more certain and buyers are willing to pay less and less for a stake in the upside potential.[120]

117. *Id.* at 386 (emphasis and internal quote marks in original).
118. Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2471 (2014).
119. An eligible individual account plan is a plan that provides for individual accounts for participants and by its terms allows those accounts to be invested in qualifying employer securities and meets other conditions that the plans at issue in *Pfeil* complied with. ERISA, § 407(d)(3). Employee stock ownership plans (ESOPs) are the most common form of eligible individual account plan.
120. *Pfeil*, 806 F.3d at 389.

The majority found such argument unavailing:

> But an ESOP's investment goals are to maintain, within reason, ownership of a particular employer's security. Whatever evils the dissent identifies are endemic to the ESOP form established by Congress. A benefit of employees investing in their employer is that when the employer does well, the employees do well. A risk is that when the employer goes bankrupt, the employees do poorly.
>
> Congress has exempted ESOP fiduciaries from the duty to diversify; indeed, Congress created ESOPs so that they would *not* diversify. The Supreme Court coupled its recent judgment that ESOPs are not entitled to a special presumption of prudence with a reminder that, absent extraordinary circumstances, public markets for stocks like GM incorporate all of the public information about those companies.[121]

Thus, *Pfeil* underscores the difficulties that plaintiffs face post-*Dudenhoeffer* in mounting a cognizable prudence challenge to investment in publicly traded employer stock where only public information is at issue, even where a company goes into bankruptcy. Indeed, it suggests that, for publicly traded stock, *Dudenhoeffer*'s new standard presumption will be as formidable an obstacle as the *Moench* standard it replaced.

5. *McCaffree Financial Corporation v. Principal Life Insurance Co.*: Hard Bargaining Does Not Create ERISA Fiduciary Duties

Among the many lawsuits challenging allegedly excessive fees charged by 401(k) plan investment providers, *McCaffree Financial Corp. v. Principal Life Insurance Company*,[122] stands out for the broad sweep of the plaintiff's theory of liability and the Department of Labor's amicus support of that theory. The Eighth Circuit, however, refused to agree that the defendant had breached any fiduciary duty in connection with the fee arrangements it had negotiated with its client. If the fees charged to participants were excessive, that was because the plaintiff itself had agreed to them in arm's-length negotiations before the defendant became a fiduciary. Then, after the bargain was struck and the defendant did assume fiduciary responsibilities, no nexus existed between its actions in that capacity and the fees to which the plaintiff objected.

If the plaintiff had prevailed, the corollary to its theory would have been that parties dealing with ERISA-covered plans must largely eschew self-interest and negotiate their compensation with only the best interests of plan participants in mind. The district and appellate courts rejected that notion.

In 2009, Principal entered into an agreement to provide a menu of investment choices to the participants in McCaffree's plan. The participants were able to select among an array of separate accounts wrapped inside a group annuity contract. Each account invested in a particular Principal-managed mutual fund.

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121. *Id.* at 387 (emphasis in original).

122. 811 F.3d 998 (8th Cir. 2016), *reh'g denied*, 2016 U.S. App. LEXIS 2779 (8th Cir. Feb. 17, 2016).

Principal selected the accounts that would be available out of a universe of sixty-three and received a management fee, which varied among accounts, based on a percentage of assets. It also had the right to change the fees after giving advance notice.

Several years into the arrangement, the employer brought a class action lawsuit on behalf of plan participants, alleging that the fees were unjustifiably high. The gravamen of the complaint was that it was duplicative to charge for managing the separate accounts when Principal already received management fees from its mutual funds. According to the plaintiff, the accounts required no actual management; they simply represented a second layer of cost.

The case never reached the point where Principal had to defend its fee structure. The district court dismissed the case for failure to state a claim on the ground that Principal was not an ERISA fiduciary with respect to the challenged fee arrangement, and the Eighth Circuit affirmed. The Eighth Circuit first held that Principal was not acting as fiduciary in negotiating the fee arrangement because it did not control either the decision to retain it or the terms on which it was retained and thus was exercising no control over plan assets or administration. Rather, those decisions were made on the plan's behalf, not by Principal, but by a plan fiduciary; Principal, effectively, was on the other side from the plan in an arm's length transaction. As the Eighth Circuit explained:

> Up until it signed the agreement with Principal, McCaffree remained free to reject its terms and contract with an alternative service provider offering more attractive pricing or superior investment products. Under such circumstances, Principal could not have maintained or exercised any "authority" over the plan and thus could not have owed a fiduciary duty under ERISA. Because Principal did not owe plan participants a fiduciary duty while negotiating the fee terms with McCaffree, Principal could not have breached any such duty merely by charging the fees described in the contract that resulted from that bargaining process.[123]

The Eighth Circuit further concluded that Principal did not breach any fiduciary duty with respect to the agreed-upon fee arrangement once the contract was in place. While Principal may have been a fiduciary in discharging its investment related responsibilities under the contract, the plaintiff "did not plead a connection between any fiduciary duty Principal may have owed and the excessive fees Principal allegedly charged."[124] The plaintiff's contention that Principal had acted as a fiduciary in winnowing down the accounts available to participants for investment from sixty-three to twenty-nine illustrates the plaintiff's pleading failure in this area. As the Eighth Circuit explained:

> McCaffree contends that this winnowing process, which took place after the parties entered into the contract, gave rise to a fiduciary duty obligating Principal to ensure

123. *Id.* at 1003.
124. *Id.* at 1002–03.

> that the fees associated with those twenty-nine accounts were reasonable. . . . [But] McCaffree failed to plead a connection between the act of winnowing down the available accounts and the excessive fee allegations. At no point does McCaffree assert that only some of the sixty-three accounts in the contract had excessive fees, or that Principal used its post-contractual account selection authority to ensure that plan participants had access only to the higher-fee accounts.[125]

The Eighth Circuit therefore concluded that the district court had properly dismissed the complaint.

125. *Id.* at 1003. A footnote added that documents attached to the complaint showed that McCaffree retained the right to reject accounts that principal had chosen for the investment menu and thus had the ability to prevent abuse. Moreover, the court calculated from the fee schedules in the contract that the average fee for the accounts on the menu was virtually identical to that of those that were not. *Id*. at n.2.