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## Inside This Issue

**Organization of Pilots that Negotiated with Airline Concerning Pilots' Working Conditions Not a Bargaining Representative under Railway Labor Act**

N. Peter Lareau (p. 289)

**Discrimination Cases Involving H-1B Immigration Status: an Updated Review and Analysis**

Stan Malos (p. 295)

**Sixth Circuit Affirms Board's Assertion of Jurisdiction over Tribal-Owned Casinos**

N. Peter Lareau (p. 302)



## Organization of Pilots that Negotiated with Airline Concerning Pilots' Working Conditions Not a Bargaining Representative under Railway Labor Act

By N. Peter Lareau

### Introduction

In *Teamsters v. Allegiant Air*,<sup>1</sup> the Ninth Circuit held that a pilot advocacy group—the Allegiant Air Pilots Advocacy Group (“AAPAG”)—initially formed at the suggestion of Allegiant Air’s management and that existed for the purpose of: (1) negotiating with Allegiant concerning Allegiant’s policies that affected pilots’ working conditions; and (2) representing Allegiant’s pilots in disputes over working conditions between the airline and its pilots—was not a bargaining representative under the Railway Labor Act (“RLA”).<sup>2</sup> In doing so, the court resolved tricky issues concerning its jurisdiction, the role of the National Mediation Board (“NMB”) under the RLA, and employee “representative” status under the RLA. This article attempts to elucidate the principles that may be derived from the decision and how those principles differ from those under the National Labor Relations Act.

### Facts

In 2004, Allegiant, impatient about having to deal with 50-some pilots’ individual complaints about their working conditions, approached several senior pilots and suggested they form an organization that could channel employee grievances and provide pilot input to Allegiant. Shortly thereafter, the pilots met and formed the AAPAG. Over the next few years, as Allegiant grew rapidly (doubling the number of pilots and expanding its flights to new destinations), the pilots annually elected officers for AAPAG, who helped interview applicants, advocated for employees during grievance disputes, and discussed pay and work conditions with Allegiant’s management.

AAPAG’s stated mission was to communicate pilot concerns to management, and it described itself as a “consulting agency on issues relating to the pilot group.” For several years, pilots and management enjoyed a good relationship. Allegiant allowed AAPAG to give Power Point presentations to new hires, and when pilots had pay or leave problems, AAPAG officers advocated on the pilots’ behalf. AAPAG and Allegiant also negotiated Pilot Work Rules and other documents articulating the airline’s policies on leave, pay, scheduling, and other issues that mattered to the pilots. Allegiant generally adhered to the Work Rules and, when questions arose about the meaning

<sup>1</sup> 2015 U.S. App. LEXIS 9506 (9th Cir. June 8, 2015).

<sup>2</sup> 45 U.S.C.S. § 151 *et seq.*

**CONTENTS:**

**Organization of Pilots that Negotiated with Airline Concerning Pilots' Working Conditions Not a Bargaining Representative under Railway Labor Act** ..... 289

**Discrimination Cases Involving H-1B Immigration Status: an Updated Review and Analysis** ..... 295

**Sixth Circuit Affirms Board's Assertion of Jurisdiction over Tribal-Owned Casinos** ..... 302

**RECENT DEVELOPMENTS** ..... 308

*ADA* ..... 308

*Affordable Care Act* ..... 310

*ERISA* ..... 311

*FLSA* ..... 312

*NLRA* ..... 314

*Tile VII* ..... 316

**CALENDAR OF EVENTS** ..... 320

**EDITORIAL BOARD CONTACT INFORMATION** ..... 323

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**Organization of Pilots that Negotiated with Airline Concerning Pilots' Working Conditions Not a Bargaining Representative under Railway Labor Act**  
By N. Peter Lareau

(text continued from page 289)

or application of the Work Rules, Allegiant and AAPAG worked together to find a solution.

At the time the case arose, the Work Rules in effect had been negotiated in 2010, and were embodied in a forty-nine page document signed by both AAPAG's President and Allegiant's Vice President of Flight Operations. The introduction states that "[t]he Flight Operations Department of Allegiant Air will develop, refine, and clarify changes to the Pilot Work Rules, Benefits and Compensation in coordination with the Allegiant Air Pilot's Advocacy Group (AAPAG), the elected and representative body of the pilot group of Allegiant Air." It also states Allegiant would "meet with AAPAG to consider revisions and updates to the Work Rules" and that they would "coordinate with AAPAG" to resolve questions about the Work Rules application. Bold lettering at the bottom of the page read: "Nothing contained in these Work Rules should be interpreted as giving rise to a contract or a promise of employment for any period of time."

In 2012, the Teamsters sought to organize the pilots and AAPAG's officers campaigned on the Teamsters' behalf. During the organizing effort, AAPAG's president provided the pilots with a brochure stating they were operating "without a current contract," that the pilots needed more than "a legal version of our 40 page work rules," and outlined the benefits of Teamsters representation. When the Teamsters petitioned the National Mediation Board ("NMB") to certify it as the pilots' RLA representative, it listed the pilots as presently unrepresented. The AAPAG did not contest that categorization.

After the pilots voted in favor of the Teamsters in an NMB-supervised election, the NMB certified it as the pilots' RLA bargaining representative. Two weeks after the certification, the Teamsters notified Allegiant that it intended to negotiate a new collective bargaining agreement. The notice stated that the Teamsters expected Allegiant not to unilaterally change any of the conditions in the Work Rules while they negotiated a new contract. Shortly thereafter, Allegiant announced changes that diminished pilot benefits and implemented a new scheduling system.

In response, the Teamsters filed suit in the United States District Court for the District of Nevada, seeking to enjoin the changes while the parties negotiated a collective bargaining agreement. The district court concluded that

AAPAG was a bargaining representative under the RLA and that the Pilot Work Rules negotiated by the AAPAG and Allegiant constituted a collective bargaining agreement that could not be unilaterally altered by Allegiant. Accordingly, it enjoined Allegiant from making several policy changes until Allegiant and the Teamsters had completed RLA mandated mediation, and ordered the parties to create a Board of Adjustment to arbitrate the remaining issues.<sup>3</sup> Allegiant appealed to the Ninth Circuit, which vacated the district court's injunction and remanded.<sup>4</sup>

### **Pertinent Provisions of the RLA**

Under the RLA, employees may designate a representative to negotiate agreements concerning rates of pay, rules, and working conditions. When a conflict arises "among a carrier's employees as to who are the representatives of such employees," the NMB has the sole power to determine when a group or person is a valid representative.<sup>5</sup> The NMB is also authorized "to take a secret ballot of the employees," and may take steps to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."<sup>6</sup> After the Board determines the employees' preferred representative, the Board certifies the representative, and "the carrier shall treat with the representative so certified."<sup>7</sup>

Federal courts review of the NMB's certification decision is extremely limited. They may not independently determine whether a particular labor organization represents employees,<sup>8</sup> and have only limited jurisdiction to ensure the NMB acts constitutionally and within the scope of its statutory authority. NMB "factual findings have preclusive effect under traditional principles of estoppel."<sup>9</sup> Once a bargaining agreement has been negotiated, a party that wants to change the agreement must give advance written notice.<sup>10</sup> After such notice has been given, the parties are required to meet in a good faith attempt to voluntarily settle any disagreement.<sup>11</sup> Failing

<sup>3</sup> *Teamsters v. Allegiant Air*, 2015 U.S. App. LEXIS 9506, at \*4-5.

<sup>4</sup> 2015 U.S. App. LEXIS 9506, at \*5.

<sup>5</sup> 45 U.S.C.S. § 152, Ninth.

<sup>6</sup> 45 U.S.C.S. § 152, Ninth.

<sup>7</sup> 45 U.S.C.S. § 152, Ninth.

<sup>8</sup> *Teamsters v. Allegiant Air*, 2015 U.S. App. LEXIS 9506, at \*10 (citing *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 300 (1943)).

<sup>9</sup> 2015 U.S. App. LEXIS 9506, at \* 10 (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991)).

<sup>10</sup> 45 U.S.C. § 156.

<sup>11</sup> 45 U.S.C. § 152.

settlement at that stage, either party may request the services of the NMB to mediate the dispute.<sup>12</sup> If mediation fails, the parties may consent to binding arbitration.<sup>13</sup> If mediation fails and the parties reject arbitration, the RLA imposes a thirty-day cooling off period before an employer may change an agreement or a labor organization may engage in a strike.<sup>14</sup>

If, instead of seeking to change the agreement, a dispute concerning the meaning or proper application of the agreement arises, the parties must exhaust the grievance procedure specified in the collective bargaining agreement.<sup>15</sup> If parties are still unable to resolve the dispute, it must be submitted to binding arbitration before a board of adjustment agreed to by the parties.<sup>16</sup>

### **Jurisdiction**

#### **Jurisdiction of the District Court**

Allegiant argued that the district court lacked jurisdiction to issue injunctive relief because, in order to issue the injunction it was required to determine that AAPAG was an RLA representative when it negotiated the work rules, and that the NMB has sole and exclusive jurisdiction over the determination of RLA representative status. The Ninth Circuit disagreed, holding that, while the NMB has exclusive jurisdiction to determine the *current* bargaining representative of a group of employees under the RLA, “there is no jurisdictional bar preventing a district court from finding that a previous advocacy group was a representative within the meaning of the RLA.”<sup>17</sup> Allegiant also argued that, as part of the representation proceedings that led to the NMB’s certification of the Teamsters, the NMB had determined that, at the time the Teamsters filed its petition, Allegiant’s pilots were unrepresented, and that that determination was not reviewable by the district court. Again, the Ninth Circuit disagreed:

We hold that when a party is challenging *an action* taken by the Board—like its certification of a labor representative or its efforts to prevent employer interference with an election—district court review is limited to ensuring that the Board acted constitutionally and within the scope of its statutory authority. But when a party brings a claim that does not challenge an action taken by the Board,

the district court has jurisdiction, even if the claim denies the Board’s legal or factual conclusion. And the district court should then review the Board’s findings under principles of estoppel.<sup>18</sup>

It reasoned that § 152, Ninth of the RLA gives the NMB exclusive jurisdiction to resolve any dispute that arises “among a carrier’s employees as to who are the representatives of such employees.”<sup>19</sup> And, in the case before it, there was no dispute about the employees’ current representative; the NMB had certified the Teamsters and no party challenged that certification. The status of AAPAG, at the time it negotiated the Work Rules was irrelevant to a determination of current representative status. Accordingly, the Ninth Circuit held that the case did not involve a representation dispute within the exclusive jurisdiction of the NMB and the district court had jurisdiction over the matter.<sup>20</sup>

#### **NMB’s Finding of No Representative Status**

In the election conducted by the NMB that resulted in the certification of the Teamsters, the ballot gave the employees the option of voting for the Teamsters, of writing in other candidates, or to remain unrepresented. The choices that appeared on the ballot necessarily implied that the NMB had determined that AAPAG was not an RLA representative; otherwise the ballot would also have included an option for employees to choose to be represented by the AAPAG. Allegiant argued that that factual determination could not be overturned by the district court.

The Ninth Circuit conceded that judicial review of the NMB’s *actions* are “limited to ensuring the Board acted constitutionally and within the scope of its statutory authority.”<sup>21</sup> However, when, as in the case before it, a party “does not challenge a Board action but . . . raises an issue the Board has already addressed, courts apply principles of estoppel[.]”<sup>22</sup> and the issue becomes whether the NMB’s determination is entitled to preclusive effect. Because Allegiant did not argue in its opening brief that NMB’s determination should have preclusive effect

<sup>12</sup> 45 U.S.C. § 155, First.

<sup>13</sup> 45 U.S.C. § 157.

<sup>14</sup> 45 U.S.C. § 155.

<sup>15</sup> 45 U.S.C. § 184.

<sup>16</sup> 45 U.S.C. § 184.

<sup>17</sup> *Teamsters v. Allegiant Air*, 2015 U.S. App. LEXIS 9506, at \*12.

<sup>18</sup> 2015 U.S. App. LEXIS 9506, at \* 12-13 (emphasis in original).

<sup>19</sup> The RLA initially covered only railroads and their employees. It was later extended to the air transport industry. All covered employers—railroads and airlines—are referred to as carriers.

<sup>20</sup> 2015 U.S. App. LEXIS 9506, at \*17.

<sup>21</sup> 2015 U.S. App. LEXIS 9506, at \*18.

<sup>22</sup> 2015 U.S. App. LEXIS 9506, at \*18.

and did not cite relevant authority or press the point in its reply brief, the court held that Allegiant had waived the argument.<sup>23</sup>

### **AAPAG's Representative Status**

The Ninth Circuit reviewed the district court's determination of AAPAG's representative status *de novo*. Observing that the RLA defines a "representative" under the RLA as one "designated" by the employees and, relying on numerous policy considerations that dictated a need for certainty and clarity in identifying the employee representative, the court held:

that employees can "designate" an RLA representative in two ways. Employees may petition the Board to certify a labor representative. Or, a labor organization can seek voluntary recognition, which requires a) it to unequivocally demand RLA recognition from the carrier, b) for the carrier to unequivocally grant recognition, and c) for the labor organization to make a contemporaneous showing that it enjoys majority support amongst the relevant workforce.<sup>24</sup>

Having concluded that representative status could be obtained only by NMB certification or voluntary recognition, and AAPAG having never sought or obtained NMB certification, the Ninth Circuit looked to whether Allegiant had ever voluntarily recognized the AAPAG as an RLA representative. It concluded that it did not because the AAPAG had never sought voluntary recognition. Instead, said the court, the evidence established that RLA representative status was a non-issue in the dealings between AAPAG and Allegiant. Thus:

AAPAG's status did not come up in pilots' discussions among themselves or with Allegiant. AAPAG did not mention the Railway Labor Act in presentations to new pilots. AAPAG's Constitution and by-laws are silent about its status under the Act. AAPAG's officers testified that they were unfamiliar with the RLA and that they never sought outside legal advice about the status of the group or the enforceability of the Work Rules. The officers never discussed whether they could appeal grievances beyond upper management, or whether they could lead the pilots out on strike. The officers never satisfied statutory filing requirements with the Department of Labor. Materials written by AAPAG's president state that the group was operating "without a current contract" and that the pilots needed more than "a legal version of our 40 page

work rules." And the Teamsters, who worked in concert with a pilot organizing committee that included AAPAG officers, took the position during the Board election process that AAPAG was not an RLA representative. AAPAG's officers, who were working with the Teamsters, did not contest their categorization.

There is no evidence . . . (much less an unequivocal demand for recognition) that AAPAG officers ever told Allegiant they were bargaining as an RLA representative instead of as a non-RLA employee committee. Both AAPAG's officers and Allegiant's management agreed that AAPAG never presented itself as an RLA bargaining agent. Allegiant's filings with the SEC describe AAPAG as an "inhouse association" and the Work Rules as a "mutually acceptable arrangement."<sup>25</sup>

The court summarized its conclusions regarding AAPAG's representative status as follows:

If a labor organization wants to be an RLA representative, it must demand recognition from a carrier; if the carrier will not give it, the group must seek Board certification. Because AAPAG did neither, it was not an RLA representative.<sup>26</sup>

### **Legal Implications of No Representative Status**

Because the court concluded that AAPAG was not an RLA representative, the negotiated Work Rules did not constitute a collective bargaining agreement. Therefore, Allegiant's unilateral departure from the Work Rules did not give rise to a breach of contract. And, because the Ninth Circuit had previously held that the RLA "does not require a carrier to maintain the status quo during negotiations of an initial labor agreement[.]"<sup>27</sup> Allegiant was not precluded from changing the Work Rules. Therefore, the district court erred in issuing an injunction requiring Allegiant to rescind the changes pending completion of mediation.<sup>28</sup>

### **Comment**

The Ninth Circuit's conclusion that the NMB did not have sole and exclusive jurisdiction over the matter is certainly correct. But its determination regarding the preclusive effect of the NMB's "no RLA representative

<sup>23</sup> 2015 U.S. App. LEXIS 9506, at \*20.

<sup>24</sup> 2015 U.S. App. LEXIS 9506, at \* 21-22 (citations omitted).

<sup>25</sup> 2015 U.S. App. LEXIS 9506, at \*27-28.

<sup>26</sup> 2015 U.S. App. LEXIS 9506, at \*28.

<sup>27</sup> 2015 U.S. App. LEXIS 9506, at \*29 (citing *Int'l Bhd. of Teamsters v. N. Am. Airlines*, 518 F.3d 1052, 1057-58 (9th Cir. 2008)).

<sup>28</sup> 2015 U.S. App. LEXIS 9506, at \*29.

status” will not serve as reliable precedent on the merits of the issue, based, as it is, on the court’s conclusion that Allegiant waived the argument. That conclusion was an easy one for the court to make because it did not alter its ultimate decision on the merits of the case. But, because the court did not decide the issue, a party is free to argue, in a future case, that the decision of the NMB on an issue that was raised by an opposing party in an earlier case is preclusive in a later case involving the same parties.

Turning to the merits of the case, there is room to question the court’s conclusion on at least two grounds. First, the court held that, under the facts and circumstances of the case, Allegiant had not recognized AAPAG as an RLA representative of the pilots—because AAPAG never demanded recognition as such from Allegiant. One might be more comfortable with the court’s conclusion in this regard had there been some discussion of AAPAG’s majority status. Under the National Labor Relations Act, for example, voluntary recognition may be established implicitly by an employer’s statements or conduct

evinced a commitment to enter into negotiations.<sup>29</sup> Therefore, it is entirely possible that, on the facts of this case, the National Labor Relations Board would have concluded the AAPAG was the employees’ bargaining representative.

Second, the court concluded that the RLA “does not require a carrier to maintain the status quo during negotiations of an initial labor agreement.” That legal principle is contrary to prevailing law under the National Labor Relations Act, which, with exceptions not here relevant, precludes an employer from making unilateral changes in terms and conditions of employment during the negotiation of an initial agreement, whether those terms and conditions are established under a collective bargaining agreement or are simply a matter of past practice.

*Peter Lareau is the author of “NLRA: Law and Practice” and numerous other books and articles in the field of labor law and is the Editor-in-Chief of “Bender’s Labor & Employment Bulletin.”*

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<sup>29</sup> See N.P. Lareau, National Labor Relations Act: Law and Practice, ch. 12, § 12.03[2] (Matthew Bender, 2d ed.).

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# Discrimination Cases Involving H-1B Immigration Status: an Updated Review and Analysis

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By Stan Malos

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## Introduction

Issues involving H-1B visas came to the forefront during the recent economic downturn, and have continued to receive media attention. For example, Disney recently found itself subject to negative publicity for allegedly planning to replace its U.S. IT workers with less expensive foreign replacements.<sup>1</sup> On the other hand, anecdotal evidence from Silicon Valley tech industry sources suggested the possibility that foreign guest professionals might bring discrimination claims if they felt that employers were favoring their American counterparts in layoffs, reductions in force, compensation, or other staffing decisions. A 2012 review of federal court cases reported in LEXIS<sup>2</sup> suggested that employers had been largely successful in escaping liability for claims involving the confluence of immigration status, citizenship, and nationality in these situations, although often on procedural grounds such as blown filing deadlines or lack of jurisdiction. The few that were addressed on the merits did not fare well, but whether more of these claims might have succeeded if properly presented remains an open question. What is clear, however, is that such claims continue to arise and are not always conclusively disposed of at the administrative level. This article updates the earlier case law review and reexamines whether substantive liability for such claims should remain a matter of ongoing concern.

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<sup>1</sup> See J. Preston, *Pink Slips at Disney: But First, Training Foreign Replacements*, New York Times, June 3, 2015; but see also J. Preston, *In Turnabout, Disney Cancels Tech Worker Layoffs*, New York Times, June 17, 2015.

<sup>2</sup> S.B. Malos, *Employment Discrimination Based on Immigration Status: Recent Cases Involving H-1B Visas*, 24 Employee Responsibilities and Rights Journal, 23-36 (2012) (hereinafter “Malos”).

## Multiple Sources of Potential Discrimination Liability in Cases Involving H-1B Visas

As many readers will know, the H-1B program allows U.S. businesses to temporarily employ foreign guest professionals in a specialty occupation. A “specialty occupation” requires the application of a body of specialized knowledge and a bachelor’s degree or its equivalent in the relevant specialty (e.g., science, medicine, health care, education, or areas of business). Perhaps depending on the politics or economics of the time, this program may generate complaints both from foreign guest professionals and from American workers. For example, during economic downturns, foreign guest professionals may claim that they were targeted for dismissal during layoffs whereas similarly or less qualified American workers were retained. On the other hand, when hiring picks up, foreign guest professionals may allege that they were paid less than their U.S. counterparts for similar work, while politicians or the press may assert that American workers were displaced because an employer had shifted jobs to foreign guest professionals.<sup>3</sup>

As discussed more fully elsewhere,<sup>4</sup> Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on national origin; in this context, national origin means a worker’s place of birth or that of his or her ancestors, and includes ethnicity, language or accents, as well as the assumption that someone or their ancestry is of a certain national origin even if they are not. The EEOC has administrative jurisdiction over complaints in this area, but only for those firms employing 15 or more workers. It does not handle immigration or citizenship claims, nor does Title VII apply to such claims.

In contrast, the Immigration and Nationality Act (INA) *does* prohibit employment discrimination based on citizenship or immigration status by employers of more than 4

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<sup>3</sup> A bipartisan group of U.S. senators recently initiated an investigation into whether *both* types of practices are being used by a large Southern California utility and its staffing contractors. See K. Freking/Associated Press, *Use of Visa Program Being Investigated: Companies Accused of Firing Americans to Hire Foreigners*, San Jose Mercury News, April 10, 2015, at B.4. Meanwhile, the Department of Justice Office of Special Counsel continues to announce on its website settlements with companies alleged to have improperly preferred foreign guest professionals over American workers (e.g., IBM, Sept. 27, 2013; Avant Healthcare Professionals, Feb. 8, 2013; Iflowsoft, LLC, May 17, 2011. Infosys, the Indian staffing and IT consulting firm, paid a record \$34 million (Oct. 30, 2013)) to settle similar allegations.

<sup>4</sup> See Malos, note 2, *supra*.

workers. The Justice Department's Office of Special Counsel ("OSC") for Immigration-Related Unfair Employment Practices has administrative jurisdiction for handling these types of claims. It also handles national origin claims against employers of 4-14 employees but not more. This anomaly can create potential confusion for litigants given that the EEOC also has jurisdiction over national origin claims but only for employers of 15 or more workers.

Results of the earlier case law review suggested that the incidence of employer successes in defending these claims through the years should be interpreted with caution in that many were filed by *pro se* plaintiffs who failed to navigate the confusing administrative topography outlined above. Many failed to exhaust administrative remedies, failed to file with the proper tribunal, or failed to do so in a timely manner. It is thus possible to speculate whether future plaintiffs might obtain more favorable results in cases where knowledgeable legal counsel could help them avoid these types of errors. Of course, it is also possible that prior *pro se* plaintiffs had indeed sought legal counsel but were unsuccessful due to prohibitive cost, lack of resources, pending deportation, or lack of a claim deemed viable by the attorneys they consulted.

For this article, the LEXIS database was again used to identify published employment discrimination cases involving H-1B visas reported since the last review. The results yielded ten noteworthy cases from various federal jurisdictions.<sup>5</sup> These cases are reviewed below in reverse chronological order, followed by some practical recommendations based upon them.

### **Updated Case Law Review**

*Abraanel v. Starwood Hotels and Resorts Worldwide, Inc.*<sup>6</sup> presents a case involving wrongful termination, national origin, and retaliation claims by an Israeli national working in the United States. Starwood retained a law firm at its own expense to handle Abraanel's H-1B status and permanent resident application, but due to the length of

time involved in seeking permanent resident status, Abraanel's H-1B visa expired. He was then granted a leave of absence pending possible change in his work status. Eventually, he was terminated by Starwood when his leave ran out, and returned to Israel. He later married a U.S. citizen and consequently obtained permanent resident status and work authorization. However, by this time, his position had been filled—twice—first by a Venezuelan national with permanent resident status and later by a U.S. citizen of Mexican ancestry.

In dismissing Abraanel's national origin claim on summary judgment, the court found those claims were based solely on the plaintiff's "feeling or perception that he was treated differently" because he was from Israel. Although able to make out a *prima facie* case under the well-known *McDonnell-Douglas* burden shifting procedure,<sup>7</sup> Abraanel was unable to rebut Starwood's asserted defense that it terminated him because his H-1B visa had expired and, along with it, his legal authorization to work in the United States. Abraanel argued that this defense was pretextual because of delays in processing his permanent resident application. The court, however, found no evidence to support this claim given that Starwood had paid the attendant legal fees and allowed Abraanel to use leave during the application's pendency in an attempt to retain him. The court also dismissed the derivative retaliation claim for lack of evidence.

*Ritz v. Wipro Limited Corp.*<sup>8</sup> presents citizenship and national origin claims by a Hispanic U.S. citizen that he was displaced in favor of less expensive workers from India, the home country of Wipro. Ritz had signed an at-will agreement with Wipro as a senior business analyst, and went to work for Wipro's client, Citibank, as part of the latter's efforts to increase efficiency and reduce costs in its global IT systems. When Citibank decided to scale back its operations in North and South America, Ritz was let go after he was unable to generate further billings within the maximum allowable time. However, Ritz asserted that Citibank had retained Wipro business analysts of Indian ethnicity with less experience and lower billing rates to do the same work. More specifically, Ritz sought to establish that Wipro systematically preferred hiring "and/or sponsoring visas for foreign nationals or hiring of American resident aliens or citizens of South Asian descent . . . including but not limited to [those on] H-1B, B-1, or other visas."

<sup>5</sup> Five others mentioned H-1B status peripherally but did not appear to turn on its involvement. These are, in reverse chronological order, *Sodipo v. Rosenberg*, 2015 U.S. Dist. LEXIS 3277 (N.D. Cal. Jan. 12, 2015); *Shukh v. Seagate Technology, L.L.C.*, 2014 U.S. Dist. LEXIS 42909 (D. Minn. Mar. 31, 2014); *Karamsetty v. Wells Fargo & Co.*, 967 F. Supp. 2d 1305 (N.D. Cal. 2013); *Hajizadeh v. Vanderbilt University and Wonder Drake, M.D.*, 879 F. Supp. 2d 910 (M.D. Tenn. 2012); *Guimaraes v. SuperValu, Inc.*, 2010 U.S. Dist. LEXIS 129813 (D. Minn. Dec. 8, 2010).

<sup>6</sup> 2015 U.S. Dist. LEXIS 38768 (D. Puerto Rico, Mar. 26, 2015).

<sup>7</sup> *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

<sup>8</sup> 2015 U.S. Dist. LEXIS 23337 (S.D. Fla. Feb. 26, 2015).



In summarily dismissing Ritz' claims, the court noted that, after substantial discovery, Ritz had been unable to present any evidence that similarly situated comparators of Indian ancestry had been more favorably treated by Wipro. Rather, such workers, "though less experienced, could perform the remaining work at a lower cost" after Citibank had scaled down its global IT project. The court further noted that "no evidence suggests that Indian employees who were non-billable for nearly a year and a half, as Ritz was, were retained by Wipro instead of being terminated" pursuant to company policy.

*Walia v. Veritas Healthcare Solutions, L.L.C.*<sup>9</sup> revisits the context of *pro se* litigants who find their claims dismissed on procedural grounds (here, failure to exhaust administrative remedies and lack of subject matter jurisdiction). In contrast to Ritz (above), Walia, a citizen and resident of India, asserted that although Veritas induced him to come to the U.S. from the U.K. to work as a clinical research assistant, and obtained an H-1B visa for him on that basis, Veritas paid him less than promised for work other than that expected and for a shorter length of time than allegedly agreed. Veritas moved to stay the lawsuit, which alleged fraud, breach of contract, and retaliation among other rather unusual assertions (see note 11, *infra*), on the ground that the claim for underpayment of wages in violation of the INA was pending in an administrative proceeding with the Department of Labor.

In fact, Walia had previously brought a successful complaint with the DOL's Wage and Hour Division for violation of the INA's H-1B provisions, but refused to accept an award of \$1,956 in back wages against Veritas that he felt was insufficient. He then filed an appeal on several issues with the Administrative Review Board as well as the instant lawsuit. In reaffirming prior case law affording no private cause of action to challenge an employer's compliance with the INA's H-1B regulations,<sup>10</sup> the court dismissed Walia's claims for unpaid wages, retaliation, and fraud under the INA, and denied Veritas' motion for a stay as essentially moot. The court expressed concern, however, that Walia's other allegations, if true, "seriously implicate Plaintiff's rights and potentially those of other visa applicants."<sup>11</sup>

<sup>9</sup> 2014 U.S. Dist. LEXIS 176809 (S.D.N.Y. Dec. 23, 2014).

<sup>10</sup> See, e.g., *Shah et al. v. Wilco Systems*, 126 F. Supp. 2d 641 (S.D.N.Y. 2000), discussed in *Malos, supra*, n.2.

<sup>11</sup> Walia had also brought claims for "Trafficking, Extortion, Blackmail, Involuntary Servitude, Mental Torture" and a variety of sundry other allegations. These included assertions that Veritas was essentially in the business of selling fraudulent H-1B visas and threatened to fire

*Dandamudi v. Tisch*<sup>12</sup> is the only case reviewed here to have made it to the Circuit Court appellate level. Dandamudi was one of numerous nonimmigrant aliens with H-1B visas who were licensed as pharmacists in New York pursuant to a waiver of state law that would otherwise have restricted pharmacy licenses to U.S. citizens or legal permanent residents.<sup>13</sup> When this waiver provision was about to expire, the pharmacists sued based on violations of the Equal Protection and Supremacy Clauses of the U.S. Constitution. The district court granted the plaintiffs' motion for summary judgment on these issues, and permanently enjoined the defendants from enforcing the law's citizenship restrictions.<sup>14</sup> On appeal, the Second Circuit also held alienage as applied in this case to be a suspect classification and thus subject to strict scrutiny based on applicable Supreme Court precedent. It therefore found the state law provision restricting pharmacy licenses to only U.S. citizens or legal *permanent* residents, but not legal *temporary* residents such as those holding H-1B visas, to be unconstitutional as violating equal protection. The court saw no practical distinction between permanent resident aliens and temporary resident aliens for purposes of licensing pharmacists, and thus would not allow the state "to prohibit aliens from engaging in the very occupation for which the federal government granted the alien permission to enter the United States."

Next is a case involving both education and work visas. In *Brown v. Department of Education of the City of New York*,<sup>15</sup> the plaintiff found herself unable to pursue numerous discrimination, harassment, and retaliation claims because the employer was held to have properly terminated her upon loss of her right to work in the U.S. Brown, a 53 year-old woman born in Jamaica, first obtained a J-1 visa as part of a work-study exchange program sponsored by the DOE to allow her to teach in the New York City public school system. She later

him, revoke his visa, and assault or kill him and members of his family in India if he revealed their operations. The Court did not address the merits of any of these allegations in the instant action, but, as noted, did express concern about their possible validity.

<sup>12</sup> 2012 U.S. App. LEXIS 14090; 686 F.3d. 66 (2d Cir. 2012).

<sup>13</sup> Some of the plaintiff pharmacists held "TN" status, which grants citizens of Canada or Mexico the temporary right to engage in professional level business activities under the North American Free Trade Agreement (NAFTA).

<sup>14</sup> See *Adusumelli v. Steiner*, 740 F. Supp. 2d 582 (S.D.N.Y. 2010).

<sup>15</sup> 2012 U.S. Dist. LEXIS 59291(S.D.N.Y. Apr. 11, 2012).

obtained an H-1B visa, but ran into performance issues involving inappropriate sexual and other remarks to students that led to her “reassignment” (suspension) to non-classroom duties. Based on overall unprofessional conduct including alleged neglect of her duties and verbal abuse, the DOE sought to withdraw Brown’s then-pending permanent resident application as well as revoke her H-1B status due to her suspension and loss of employment. Much like the court in *Abravanel* (discussed above), the court summarily dismissed Brown’s discrimination claims as based on speculation and surmise, along with her harassment claim which it found time-barred.<sup>16</sup>

*Childs v. Microsoft Corp.*<sup>17</sup> presents another case where citizenship and national origin discrimination claims appear to have been conflated and confused by the plaintiff, here even with the assistance of counsel. Childs, a citizen of the U.K., was recruited by Microsoft in Canada as a software developer. Microsoft then applied for an H-1B visa so Childs could work for them in the U.S. Childs preferred to seek permanent residency status in Canada, but reluctantly agreed to relocate to Redmond, Washington pending possible internal transfer to a Canadian job within Microsoft. Disputes arose over the terms of an employment agreement Microsoft had asked Childs to sign, and eventually his performance deteriorated to the point where Microsoft terminated him. Childs then sued Microsoft in state court for minimum wage law violations, as well as national origin discrimination and alleged misrepresentations about promised immigration assistance. The case was later removed to federal court.

The district court dismissed Childs’ minimum wage claims, which were based on delays in implementing his higher expected salary upon relocation to the U.S., as already having been disposed of in an administrative proceeding with the Department of Labor. More importantly, the court dismissed Childs’ national origin claims as misplaced because they actually implicated his citizenship status, not his nationality. By refusing to sign Microsoft’s proffered employment agreement, Childs’

H-1B eligibility was lost, as was his right to remain and work in the U.S. The court found these circumstances no different than those faced by workers of *any* national origin, and not specific to those from the U.K. The Court also dismissed Childs’ misrepresentation claims regarding failure to obtain H-1B status as having resulted from his own refusal to accept the terms of Microsoft’s employment agreement once he relocated to the U.S.

*Shibeshi v. Philander Smith College*<sup>18</sup> involves a *pro se* instructor’s various claims including that the College violated the INA by reducing his compensation and denying him health insurance benefits. In essence, the plaintiff argued that the College had run afoul of the INA’s requirements that H-1B visa holders be paid “the actual wage level paid by the employer to all other individuals of similar experience and qualifications for the specific employment in question.” After the court found lack of subject matter jurisdiction based on the well-established principle that individuals do not have a private cause of action to enforce violations of the INA,<sup>19</sup> Shibeshi attempted to refashion his claim as one for breach of contract. The court, however, rejected the argument that an employer’s Labor Condition Application (LCA) to the DOL to obtain an H-1B visa constitutes an employment contract with the visa holder, and dismissed Shibeshi’s complaint with prejudice for failure to state a cognizable claim.

*Kutty v. United States Department of Labor*<sup>20</sup> also involves failure to pay H-1B visa holders the prevailing wage rate applicable to the specific employment in question. The case sustained the findings of an administrative law judge that Kutty, a medical doctor, had violated both the anti-discrimination and “no benching” provisions of the INA, which require payment at the full required rate for non-productive down time brought about by actions of the employer. Dr. Kutty had opened five health care clinics in rural Tennessee and staffed them by hiring seventeen alien doctors who held J-1 visas while receiving graduate medical training. He later applied for H-1B visas on their behalf, but ran into financial difficulties and reduced the salaries of some of the doctors. When eight of them hired a lawyer to seek unpaid back compensation, Kutty stopped paying those doctors entirely. Eventually, the administrative law judge found Kutty liable for INA violations of willfully failing to pay legally required wages and discriminating and retaliating against those doctors who

<sup>16</sup> Brown had first challenged her dismissal in state court based on denial of due process for failure to allow review of her performance-based disciplinary actions under New York education laws. However, the New York Supreme Court, in somewhat circular reasoning, concluded that Brown was not entitled to such review because her suspension had not been performance-based but rather was based on loss of her work visa—notwithstanding that loss of that visa had been due to performance-based issues. See *Brown v. Bd. of Educ.*, 2009 N.Y. Misc. LEXIS 5475 (July 22, 2009).

<sup>17</sup> 2011 U.S. Dist. LEXIS 145753 (W.D. Wash. Dec. 16, 2011).

<sup>18</sup> 2011 U.S. Dist. LEXIS 113293 (E.D. Ark. Sep. 30, 2011).

<sup>19</sup> See *Walia, supra*; *Shah*, note 10, *supra*; and fuller discussion in *Malos, supra* at n.2.

<sup>20</sup> 2011 U.S. Dist. LEXIS 93190 (E.D. Tenn. Dec. 19, 2011).

complained. Kutty was ordered to pay back wages and penalties, and barred from employing H-1B visa holders for two years. He subsequently appealed based on invalidity of the LCAs and H-1B petitions that had enabled him to hire the alien doctors. The court, however, found Kutty estopped from making those allegations given that he was the one who had filed those very documents on his own clinics' behalf.

*Green v. Tandberg, Inc.*<sup>21</sup> presents claims by an H-1B visa holder for religion and national origin discrimination based on alleged failure by the employer to help him obtain his green card as rapidly as took place for other employees. Green, a Jewish Canadian citizen, had worked for Tandberg as a sales engineer but was accused of sexual harassment and intoxication while attending an out-of-town sales meeting. After an investigation by the company, Green was counseled for alcohol-related issues and signed a disciplinary finding based on harassment, allegedly under duress. He then sued for constructive discharge, religion, and national origin discrimination, but had his claims dismissed for lack of evidence. Although immigration issues were not centrally involved, the case does illustrate the danger of potential implied contract and other liability in situations where an employer agrees to help a temporary foreign guest worker try to gain permanent resident status.<sup>22</sup>

Finally, *Sarin v. Poojan, Inc.*<sup>23</sup> also presents immigration-related minimum wage claims along with national origin discrimination and harassment claims. Sarin, a citizen of India and an H-1B visa holder, was fired by his employer for abusive conduct toward another employee. He filed various claims with the Pennsylvania Human Relations Commission, including those for harassment, discrimination, and wrongful discharge based on national origin, but did not include any claims for wage discrimination. The PHRC had found probable cause on the national origin issues and issued a right-to-sue letter based in part on alleged racial epithets including "crazy Indian," "dot head," "stupid Indian," "dumb fucking Indian" and "sand nigger." The district court found likewise, and therefore denied Poojan's summary judgment motion on these issues. However, the court found any wage claims based on Sarin's foreign guest worker status

barred by failure to exhaust his administrative remedies in proceedings with the PHRC.

### **Recommendations**

This article updates an earlier investigation of discrimination issues in situations involving H-1B visas. Based on further review of these types of cases, it seems clear that the issues remain important both to H-1B workers and to those who employ them. They also remain important to American workers who claim to have lost their jobs to foreign guest professionals. Indeed, it is these claims that appear to have garnered much of the political and media attention in this area.<sup>24</sup> However, although there may be other cases in the pipeline, only one of those reported here (*Ritz*) involved immigration-related discrimination claims by a U.S. citizen. While those particular claims were unsuccessful, they do implicate a common but potentially problematic fact pattern for employers who seek to save labor costs by downgrading certain work and then re-staffing it with less expensive foreign guest professionals. If pretextual, liability may accrue.

Most of the cases found involved discrimination claims by foreign guest professionals against their primary employers. It is worth noting, however, that three of them (*Ritz*, *Walia*, and *Kutty*) brought claims against entities functioning essentially as staffing agencies or labor contractors (Wipro, Veritas, and Dr. Kutty) who were accused of unfair conduct in their recruitment of or payments to the workers involved. When considered together with OSC activity, such as its \$34 million settlement with Infosys,<sup>25</sup> it may be that both government enforcement and private litigation will increasingly target these bigger players in the foreign guest worker arena. In fact, Wipro, Infosys, and Tata are among those having been sued for discriminatory practices including more favorable treatment for workers of Indian or South Asian descent even when hiring from local U.S. labor markets.<sup>26</sup> Employer positions regarding alleged INA violations involving the H-1B program could then be subject to additional attacks by those who claim that the employer knowingly used a surrogate agent guilty of

<sup>21</sup> 2010 U.S. Dist. LEXIS 107253 (S.D. Ohio Oct. 7, 2010).

<sup>22</sup> See also *Abravanel* and *Childs*, above; similar issues were raised in *Liu v. BASF*, 609 F. Supp. 2d 828 (S.D. Iowa 2009) and other cases digested in *Malos*, *supra* at n.2.

<sup>23</sup> 2010 U.S. Dist. LEXIS 63784 (M.D. Penn. Apr. 30, 2010).

<sup>24</sup> See, e.g., *Pink Slips at Disney, etc.*, and other examples discussed in note 2, *supra*; see also *American Workers Wage Legal Battle against Imported Workers*, The Times & Transcript (New Brunswick), July 7, 2014.

<sup>25</sup> Note 3, *supra*.

<sup>26</sup> See, e.g., J. Preston, *Outsourcing Companies under Scrutiny over Visas for Technology Workers*, New York Times, June 12, 2015; P. Thibodeau, *IT Worker's Lawsuit Accuses Tata of Discrimination*, and *IT Workers Win Key Ruling against Visa-Using Firm*, Computerworld (April 15 and May 26, 2015 respectively).

improper practices. Businesses employing foreign guest professionals might therefore want to exercise greater caution, including the use of stronger liability indemnification agreements, when using IT consultancies or staffing agencies to hire such workers. At minimum, the risk of negative publicity in this area warrants caution as developments continue to emerge; in at least one case mentioned above, bad publicity coupled with political scrutiny appears to have led Disney to reverse its earlier decision to replace most of its American IT staff with foreign guest professionals.<sup>27</sup>

Notwithstanding that only two of the cases reviewed here involved *pro se* plaintiffs (*Walia* and *Shibeshi*), those and several others were again disposed of in favor of the employer on procedural grounds such as failure to exhaust administrative remedies, lack of subject matter jurisdiction, or estoppel (*Walia*, *Sarin* and *Kutty*). Of those that reached substantive disposition, a number failed for lack of evidence to support the claims asserted (*Abravanel*, *Ritz*, *Brown*, and *Green*). Other plaintiffs continued to find their claims dismissed for want of an individual cause of action to challenge the propriety of LCA and H-1B filings under the INA.

The cases also continued to demonstrate often fatal confusion by plaintiffs among related but distinct immigration, citizenship, and national origin-based causes of action (*Ritz*, *Childs*, *Green*, and *Shibeshi*). However, a cautionary note may be in order; although the immigration and citizenship claims did not generally fare well for plaintiffs (*cf.* *Dandamudi*, *Kutty*), some of these cases did let stand the national origin, wage and hour, or other claims brought against the employer as part of the same lawsuit (*e.g.*, *Walia*, *Sarin*). Further, cases like *Kutty* illustrate the danger of knee-jerk reactions to employee complaints of discrimination or INA violations that can generate derivative liability for retaliation even where the underlying source claim may have been unsuccessful.

To be sure, many of the companies who use the services of foreign guest professionals are experienced and savvy in managing the issues discussed in this article. That said, at least ten such employers found themselves forced to incur the expense, disruption, and risk of litigating these matters in federal court. Although some of the following recommendations may be familiar to immigration attorneys who plumb the depths of these issues on a daily basis, the same may not be true for general managers or HR personnel; even knowledgeable lawyers whose

practice does not regularly involve citizenship or nationality claims might want to engage specialized help in this area. The following recommendations are thus drawn from the cases to highlight issues where the expertise of immigration or employment counsel might be more fully brought into play:

- Make sure that staffing decisions involving foreign guest professionals are defensible based on valid, well-documented performance standards, disciplinary policies, or other legitimate employment practices (*see, e.g., Abravanel, Ritz, Brown, Childs, and Green*);
- Avoid stating or applying hiring preferences for foreign guest professionals over U.S. workers (*see, e.g., Ritz* and settlements cited in note 3, *supra*);
- Avoid paying foreign guest professionals differently than U.S. workers for the same or similar types of jobs even where the work may have been “downgraded” from prior levels of skill or expertise (*see, e.g., Walia, Kutty, Ritz and Sarin*);
- Avoid actual or implied promises regarding length of employment or assistance obtaining green cards that may be hard to fulfill in the face of changing economic circumstances or the future availability of other qualified workers (*see, e.g., Abravanel and Green*);
- Train managers and other employees to avoid implicitly or overtly loaded language involving race, ethnicity, national origin, religion, citizenship, or immigration status (*see, e.g., Ritz, Green and Sarin*) as well as potentially retaliatory conduct where the rights of foreign guest professionals and other workers are implicated (*Kutty*);
- Have staffing decisions involving foreign guest workers, as well as the related practices of IT consultants, staffing agencies, and labor contractors, reviewed by HR professionals and immigration or employment counsel on a regular basis to minimize risks of liability for citizenship, national origin, wage and hour, and related types of discrimination claims.

### **Conclusion**

Employers, for the most part, appear to have continued their overall historical success in defending discrimination and related claims involving H-1B visas. However, as the cases digested here demonstrate, not all such claims are easily disposed of and the risk of litigation in court and consequent bad publicity remains real. Given the unpredictable nature of the politics in this area and ongoing (if sporadic) oversight by administrative and legislative bodies, organizations should continue to include proactive

<sup>27</sup> See J. Preston, *Senator Seeks Inquiry into Visa Program Used at Disney*, June 5 2015; J. Preston, *In Turnabout, Disney Cancels Tech Worker Layoffs*, New York Times, June 17, 2015.

attention to these issues in staffing decisions that involve H-1B visa holders and other types of foreign guest workers.

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# Sixth Circuit Affirms Board's Assertion of Jurisdiction over Tribal-Owned Casinos

By N. Peter Lareau

## Introduction

In *NLRB v. Little River Band of Ottawa Indians Tribal Government*,<sup>1</sup> a three-judge panel<sup>2</sup> of the Sixth Circuit affirmed a decision of the National Labor Relations Board ("Board"), extending jurisdiction over tribal-owned casinos. Less than one month later, in *Soaring Eagle Casino & Resort v. NLRB*,<sup>3</sup> a different panel of the Sixth Circuit,<sup>4</sup> constrained by the panel decision in *Little River Band* also held that the Board had jurisdiction over a different tribal-owned casino. The *Soaring Eagle* court, however, did not agree with the reasoning of *Little River Band* and went on to explain why it would have decided the case differently were it not shackled by the earlier decision.

This article, after reviewing the history of cases involving the Board's assertion of jurisdiction over tribal operations, explores the opinions in *Little River Band* and *Soaring Eagle*, attempting to distill the issues that produced such a divergence of opinion.

## Tribal-Owned Businesses

### Early Cases

In *Fort Apache Timber Co.*,<sup>5</sup> the Board held that an Indian tribe that owned and operated a mining company that was located on reservation lands was implicitly excluded from the definition of employer under Section 2(2) of the National Labor Relations Act ("Act") "as a

governmental entity recognized by the United States, to whose employees the Act was never intended to apply."<sup>6</sup> However, in *Sac & Fox Industries, Ltd.*, the Board asserted jurisdiction over a tribally-owned manufacturing business that was located off-reservation. In doing so, the Board first concluded that its decision in *Fort Apache* was "limited to situations in which the tribal enterprise is located on the reservation."<sup>7</sup> Once it determined that, because the business in the case before it was not located on the reservation, it was not constrained by its decision in *Fort Apache*, the Board held that the Act was a statute of general applicability and therefore applicable to tribal enterprises in accord with the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*.<sup>8</sup> In *Yukon-Kuskokwim Health Corp Corporation*,<sup>9</sup> the Board asserted jurisdiction over a hospital owned by a corporation formed by a group of Alaska Native Tribes, relying primarily on the fact that the hospital was located on non-reservation land. Subsequently, the D.C. Circuit affirmed that holding, although it remanded the case to the Board for consideration of a second issue raised by the hospital.<sup>10</sup>

### San Manuel Indian Bingo and Casino

At the time the D.C. Circuit issued its decision remanding *Yukon-Kuskokwim Health Corp. v. NLRB*, the Board had pending before it a motion to dismiss for lack of jurisdiction in the case of *San Manuel Indian Bingo and Casino*.<sup>11</sup> There, the San Manuel Band of Serrano Mission Indians (the "Tribe") owned and operated a gambling

<sup>6</sup> 226 N.L.R.B. at 506. See also *Southern Indian Health Council*, 290 N.L.R.B. 436 (1988) (consortium of seven Indian tribes operating nonprofit health care clinic on the reservation of one of the tribes, not an employer within the meaning of the Act).

<sup>7</sup> *Sac & Fox Indus., Ltd.*, 307 N.L.R.B. at 245.

<sup>8</sup> 362 U.S. 99 (1960). In *Tuscarora Indian Nation*, the Supreme Court, arguably, held that statutes of "general application" apply to the conduct and operations of Indian tribes absent an express exemption in their favor.

<sup>9</sup> 328 N.L.R.B. 761 (1999). 234 F.3d 714 (D.C. Cir. 2000).

<sup>10</sup> *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C. Cir. 2000). On remand, the Board, now informed by its decision in *San Manuel* (discussed immediately below), decided not to exercise jurisdiction because, among other things, the tribal undertaking—providing health care to Native Alaskans fulfills "the Federal Government's trust responsibility to provide free health care to Indians." *Yukon Kuskokwim Health Corporation*, 341 N.L.R.B. at 1076.

<sup>11</sup> 341 N.L.R.B. 1055 (2004).

<sup>1</sup> 788 F.3d 537 (6th Cir. 2015).

<sup>2</sup> The panel consisted of Judges Gilbert S. Merritt, Julia Smith Gibbons and David W. McKeague.

<sup>3</sup> 2015 U.S. App. LEXIS 11306 (6th Cir. 2015).

<sup>4</sup> The panel consisted of Judges Helene N. White, Bernice B. Donald, and Kathleen M. O'Malley. Judge O'Malley, Circuit Judge for the United States Court of Appeals for the Federal Circuit, was sitting by designation and delivered the opinion of the court.

<sup>5</sup> 226 N.L.R.B. 503 (1976).

casino on the Tribe's reservation in San Bernardino County, California. In dismissing the motion, and asserting jurisdiction, the Board first reviewed its jurisdictional precedent in cases involving tribal operations and decided that they had been wrongly decided.

Two premises can be discerned from . . . Board precedent. First, in *Sac & Fox* and *Yukon Kuskokwim*, the Board firmly established that location is the determinative factor in assessing whether a tribal enterprise is excluded from the Act's jurisdiction . . . The second premise is that the text of Section 2(2) of the Act supported the geographically based distinctions made by the Board. Thus, in *Fort Apache* and *Southern Indian* the Board found that the text of Section 2(2) precluded the assertion of jurisdiction, while in *Sac & Fox* and *Yukon Kuskokwim* it did not.<sup>12</sup>

Both these premises, the Board stated, were "faulty[]"<sup>13</sup>—that nothing on the face of the statute expressly excludes Indian tribes from the definition of employer;<sup>14</sup> that "nothing in the Act's legislative history suggests that Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes[;]"<sup>15</sup> and that the location of a tribal enterprise was irrelevant to a tribe's status as an employer under the Act.<sup>16</sup> It, therefore, overruled prior cases to the extent they held otherwise.<sup>17</sup>

Having determined that Indian tribes were not exempt from coverage by virtue of being excluded from the definition of "employer" under the Act, the Board held that the proper standard for analysis of Indian jurisdiction cases was that set forth in *Federal Power Commission v. Tuscarora Indian Nation* (absent an express exemption, statutes of general applicability govern the conduct of Indian tribes) as interpreted by the Ninth Circuit's decision in *Donovan v. Coeur d'Alene Tribal Farm*.<sup>18</sup> In the latter case, the Ninth Circuit carved out exceptions to *Tuscarora Indian Nation's* general rule, favoring coverage, where:

(1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.<sup>19</sup>

Applying *Tuscarora Indian Nation/Coeur d'Alene* principles to the facts in *San Manuel*, the Board decided to assert jurisdiction. It found that none of the three exceptions recognized in *Coeur d'Alene* precluded the exercise of jurisdiction. It held that the operation of a gaming casino did not implicate sovereign rights of self government, that the Board's assertion of jurisdiction did not abrogate any treaty rights, and that neither the express language of the Act nor its legislative history indicated an intent on the part of Congress to exclude tribal commercial enterprises from the Act's coverage.

On appeal, the D.C. Circuit affirmed the Board's decision in *San Manuel* using a somewhat different analytical approach.<sup>20</sup> The issues, said the appellate court, boiled down to whether the Board's assertion of jurisdiction would impinge on tribal sovereignty and, if not, whether "employer" as defined in the Act "reasonably encompass[es] Indian tribal governments operating commercial enterprises?"<sup>21</sup> The tribal sovereignty issue was made difficult by two seemingly conflicting Supreme Court cases: *Federal Power Commission v. Tuscarora Indian Nation*<sup>22</sup> and *Santa Clara Pueblo v. Martinez*.<sup>23</sup> In the former, the Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." In the latter, the Court held that "[i]n the absence . . . of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA [the Indian Civil Rights Act of 1968] are barred by its sovereign immunity from suit."<sup>24</sup>

The D.C. Circuit suggested an explanation for this apparent inconsistency, observing that tribal sovereignty interests are at their strongest when expressly protected by treaty or "when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe" such as when it regulates the status of tribe members in relation to one another.<sup>25</sup> "Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest."<sup>26</sup> As such, "tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint."<sup>27</sup>

<sup>12</sup> 341 N.L.R.B. at 1057.

<sup>13</sup> 341 N.L.R.B. at 1057.

<sup>14</sup> *San Manuel*, 341 N.L.R.B. at 1058.

<sup>15</sup> *San Manuel*, 341 N.L.R.B. at 1058.

<sup>16</sup> 341 N.L.R.B. at 1059.

<sup>17</sup> 341 N.L.R.B. at 1059.

<sup>18</sup> 751 F.2d 1113 (9th Cir. 1985).

<sup>19</sup> *San Manuel*, 341 N.L.R.B. at 1059 (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d at 1115).

<sup>20</sup> *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

<sup>21</sup> 475 F.3d at 1311.

<sup>22</sup> 362 U.S. 99, 116 (1960).

<sup>23</sup> 436 U.S. 49 (1978).

<sup>24</sup> *Santa Clara Pueblo*, 436 U.S. at 59.

<sup>25</sup> *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d at 1312.

<sup>26</sup> 475 F.3d at 1312.

<sup>27</sup> 475 F.3d at 1314.

Applying this analytical framework, the D.C. Circuit concluded that the Board's assertion of jurisdiction over the Casino, though impinging slightly on governmental activities, would impair tribal sovereignty in a negligible manner because "the Tribe's activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity."<sup>28</sup> The court, therefore, did not have to choose between the seemingly conflicting Supreme Court cases, for, even under the more restrictive standard expressed in *Santa Clara Pueblo*, "the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino."<sup>29</sup> Having concluded that the issue of impairment of tribal sovereignty did not preclude the Board's assertion of jurisdiction, the court turned to the issue of whether Congress had intended to encompass such tribal operations in the Act's definition of "employer." It concluded that this issue was properly within the discretion of the Board and that the Board had not exceeded its authority in holding that the tribe, in its capacity as owner of the casino, was an employer covered by the Act.<sup>30</sup>

### **The Sixth Circuit's Decisions**

#### ***NLRB v. Little River Band of Ottawa Indians Tribal Government***

##### **Majority Opinion**

In *NLRB v. Little River Band of Ottawa Indians Tribal Government*,<sup>31</sup> the Band's tribal council enacted an ordinance to regulate employment and labor-organizing activities of its employees, including casino employees, most of whom are not members of the Band. The Board ordered the Band to cease and desist from enforcing the provisions of the ordinance that conflict with the Act, and the Sixth Circuit enforced that order.

The court's decision turns on whether the *Tuscarora Indian Nation/Coeur d'Alene* analysis enunciated by the Board in *San Manuel* represents a valid interpretation of the law regarding tribal sovereignty. The Band directly challenged that analytical framework, arguing that it "insufficiently protects inherent tribal sovereignty[]" and that "generally applicable congressional statutes cannot preempt any exercise of a tribal government's inherent sovereign authority without a clear expression from

Congress."<sup>32</sup> The Board disagreed and the Sixth Circuit sided with the Board.

In *Federal Power Commission v. Tuscarora Indian Nation*<sup>33</sup>—the case the *San Manuel* Board relied upon for the proposition that "a general statute in terms applying to all persons includes Indians and their property interests[.]"—the issue was whether a portion of land owned by Tuscarora Indian Nation could be condemned under the eminent domain powers of the Federal Power Act. The Nation argued that, because the Federal Power Act was a general act of Congress, it did not apply to Nation lands. The Supreme Court, citing precedent establishing that generally applicable federal statutes *presumptively* reach the property interests of *individual members* of Indians tribes where no provision creates an exception for such property interests, extended that precedent to hold that the comprehensive regulatory scheme of the Federal Power Act encompassed land owned in fee simple by the Tuscarora Indian Nation. Subsequent decisions of the United States Court of Appeals held that *Tuscarora* stands for the "proposition that a federal statute creating a comprehensive regulatory scheme presumptively applies to Indian tribes."<sup>34</sup>

The Sixth Circuit, in *Little River Band*, recognized that, even under *Tuscarora*, a comprehensive regulatory scheme established by statute only creates a *presumption* that it covers tribal property interests, and that exceptions exist.<sup>35</sup> It noted that, in determining whether those exceptions apply, the circuit courts have adopted the analytical framework enunciated in *Coeur d'Alene*.<sup>36</sup> As noted above,<sup>37</sup> the Band argued that the circuit courts had improperly interpreted *Tuscarora* regarding that presumption and that the exceptions to that presumption set forth in *Coeur d'Alene* did not adequately protect tribal interests. "According to the Band, generally applicable congressional statutes cannot preempt any exercise of a tribal government's inherent sovereign authority without a clear expression from Congress."<sup>38</sup>

The Band placed primary reliance on the Tenth Circuit's decision in *NLRB v. Pueblo of San Juan*.<sup>39</sup> There, the Board sought an injunction against the tribe's enforcement of a right-to-work statute that the tribe had adopted. The

<sup>28</sup> 475 F.3d at 1315.

<sup>29</sup> 475 F.3d at 1315.

<sup>30</sup> 475 F.3d at 1315.

<sup>31</sup> 788 F.3d 537, 2015 U.S. App. LEXIS 9585 (6th Cir. 2015).

<sup>32</sup> 2015 U.S. App. LEXIS 9585, at \*23.

<sup>33</sup> 362 U.S. 99 (1960).

<sup>34</sup> *Little River Band*, 2015 U.S. App. LEXIS 9585, at \*20-21.

<sup>35</sup> 2015 U.S. App. LEXIS 9585, at \*21.

<sup>36</sup> 2015 U.S. App. LEXIS 9585, at \*21.

<sup>37</sup> See *supra* at n.32.

<sup>38</sup> 2015 U.S. App. LEXIS 9585, at \*23.

<sup>39</sup> 276 F.3d 1186 (10th Cir. 2002) (*en banc*).



district court declined to issue the injunction, granting the tribe's motion for summary judgment. The appellate court, sitting *en banc*, affirmed, holding that "federal statutes of general applicability do not presumptively apply 'where an Indian tribe has exercised its authority as a sovereign . . . rather than in a proprietary capacity such as that of employer or landowner.'"<sup>40</sup>

Accepting the Band's *Pueblo of San Juan* argument, said the Sixth Circuit, would mean "Indian tribes may avoid the presumptive application of a comprehensive federal regulatory scheme by enacting an ordinance regulating the activities of non-members that directly conflicts with the federal statute."<sup>41</sup> The appellate court rejected that interpretation, noting that "not even the states—whose sovereign powers are explicitly protected by the Tenth Amendment—may avoid the application of federal law by enacting directly conflicting legislation."<sup>42</sup>

The Sixth Circuit then joined its sister circuits in concluding that "the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty."<sup>43</sup> Applying that framework, the court held that, because no treaty rights were in issue, Board jurisdiction existed unless "the Band can show either that the Board's exercise of jurisdiction 'touches exclusive rights of self-governance in purely intramural matters' or that 'there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations.'"<sup>44</sup> It concluded that the Band could establish neither proposition and that the Board properly exerted jurisdiction.

### **Dissent**

Judge McKeague, in a forceful dissent, argues that the lack of evidence of congressional intent to limit tribal sovereignty requires an inference that the sovereignty has been preserved and that "the Board's incursion is unauthorized by law."<sup>45</sup> The heart of Judge McKeague's dissent is that the *Tuscarora* Court's statement upon which the Board relied in *San Manuel*—"that a general statute in terms applying to all persons includes Indians and their property interests[]"—was not essential to the Court's opinion, but "is in the nature of dictum and entitled to little precedential weight."<sup>46</sup> Judge McKeague reasoned that the *Tuscarora* Court had no occasion to opine on the

Federal Power Commission's jurisdiction in the face of congressional silence on the subject because the Federal Power Act "by its terms addressed 'tribal lands embraced within Indian reservations[.]'"<sup>47</sup> The Court, therefore, "enforced Congress's *manifest intent*."<sup>48</sup>

Moreover, inasmuch as the Indian-owned land at issue in *Tuscarora* was not within the reservation, no interest of tribal sovereignty was implicated, but only tribal proprietary interests. And finally, the notion that the *Tuscarora* statement, independent of the Court's actual holding, has any controlling or persuasive weight is negated by subsequent Supreme Court rulings applying traditional Indian law principles and upholding tribal sovereignty in the face of generally applicable federal laws—without even mentioning *Tuscarora*.<sup>49</sup>

Judge McKeague would adhere to the analysis adopted by the Tenth Circuit in *Pueblo of San Juan*—"federal statutes of general applicability do not presumptively apply 'where an Indian tribe has exercised its authority as a sovereign . . . rather than in a proprietary capacity such as that of employer or landowner.'" Judge McKeague further asserts that the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community*,<sup>50</sup> reaffirmed the traditional principles of non-interference tribal affairs in the absence of clear congressional intent to do so.<sup>51</sup>

### **Soaring Eagle Casino & Resort v. NLRB**

*Soaring Eagle Casino & Resort v. NLRB*,<sup>52</sup> involved the Board's assertion of jurisdiction over a casino owned and operated by the Saginaw Chippewa Indian Tribe of Michigan on tribal lands. After asserting jurisdiction the

<sup>47</sup> 2015 U.S. App. LEXIS 9585, at \*47.

<sup>48</sup> 2015 U.S. App. LEXIS 9585, at \*48 (emphasis in original).

<sup>49</sup> 2015 U.S. App. LEXIS 9585, at \*48.

<sup>50</sup> 34 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

<sup>51</sup> In *Bay Mills*, the State of Michigan sued an Indian tribe that purchased land outside the tribe's reservation, claiming that the tribe violated the Indian Gaming Regulatory Act and a compact the State entered with the tribe, when the tribe built a casino on the land. Although the federal district court in which the suit was brought granted the State's request for an order enjoining the tribe from operating the casino, the Sixth Circuit reversed, holding that the tribe was immune from suit because the relevant federal statute only authorized suits to enjoin gaming activity located on Indian lands—not gaming activity on non-reservation land. The U.S. Supreme Court agreed.

<sup>52</sup> 2015 U.S. App. LEXIS 11306 (6th Cir. July 1, 2015).

<sup>40</sup> *Little River Band*, 2015 U.S. App. LEXIS 9585, at \*26 (quoting *Pueblo of San Juan*, 276 F.3d at 99).

<sup>41</sup> 2015 U.S. App. LEXIS 9585, at \*27.

<sup>42</sup> 2015 U.S. App. LEXIS 9585, at \*27.

<sup>43</sup> 2015 U.S. App. LEXIS 9585, at \*29.

<sup>44</sup> 2015 U.S. App. LEXIS 9585, at \*31.

<sup>45</sup> 2015 U.S. App. LEXIS 9585, at \*44.

<sup>46</sup> 2015 U.S. App. LEXIS 9585, at \*47.

Board held that the no-solicitation policy adopted by the casino violated the National Labor Relations Act and that the Casino also violated the Act by discharging an employee who was not a tribal member for her violation of the policy. In that case, a panel majority concluded that *Little River* was wrongly decided, that *Coeur d'Alene* is inconsistent with Supreme Court precedent and premised on inapplicable dictum, and that application of the NLRA to the Tribe is inconsistent with traditional notions of tribal sovereignty. Nonetheless, in light of the prior panel decision in *Little River*, it was "bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort, and that the Board has jurisdiction[.]"<sup>53</sup>

In explaining why it felt that *Little River* was wrongly decided, the *Soaring Eagle* panel started with the Supreme Court's decision in *Montana v. United States*.<sup>54</sup> There, the issue was the authority of a tribe to regulate hunting and fishing by non-tribal members on reservation land. The Court recognized "the 'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' when such activity occurs on land not owned by a member or held in trust for the tribe."<sup>55</sup> The Court, however, also enunciated two exceptions to the general proposition:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>56</sup>

Because neither of these exceptions applied to non-member hunting and fishing on nonmember fee land, the Court held that Michigan was permitted to regulate hunting and fishing on such land. The Court stressed, however, that "the tribe's authority as to nonmember hunting or fishing activities was *not* limited on tribal lands."<sup>57</sup>

<sup>53</sup> 2015 U.S. App. LEXIS 11306, at \*68.

<sup>54</sup> 450 U.S. 544 (1981).

<sup>55</sup> *Soaring Eagle*, 2015 U.S. App. LEXIS 9585, at \*38 (quoting *Montana*, 450 U.S. at 565).

<sup>56</sup> 2015 U.S. App. LEXIS 9585, at \*38-39 (quoting *Montana*, 450 U.S. at 565-66).

<sup>57</sup> 2015 U.S. App. LEXIS 9585, at \*39 (citing *Montana*, 450 U.S. at 557).

Taking into consideration the Supreme Court's holding in *Montana* and a subsequent holding in *Nevada v. Hicks*<sup>58</sup> (dealing with the issue of the jurisdiction of tribal courts over claims asserted under 42 U.S.C. § 1983 against nonmember state wardens executing search warrants on trust land within the reservation relating to off-reservation conduct), the Sixth Circuit held that:

absent a clear statement by Congress, to determine whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana*.<sup>59</sup>

That analysis requires that a court:

first determine whether Congress has demonstrated a clear intent that a statute of general applicability will apply to the activities of Indian tribes. If so, we would effectuate Congress's intent, as Congress has the authority, as the superior sovereign, "to legislate for the Indian tribes in all matters." If Congress has not so spoken, we would then determine if the generally applicable federal regulatory statute impinges on the Tribe's control over its own members and its own activities. If it has, the general regulatory statute will not apply against the Tribe as a sovereign. If we find that the generally applicable federal statute does not impinge on the Tribe's right to govern activities of its members[,] . . . we would assume that, generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." And we would determine, then, whether the Tribe has demonstrated that one of the two Montana exceptions to the general rule—consensual commercial relationships between the Tribe and nonmembers, or conduct "that . . . threatens or has some direct effect on" aspects of tribal sovereignty—applies. When analyzing the exceptions, we would apply a totality of the circumstances analysis, considering factors such as the member/nonmember distinction, and the location of the conduct at issue (whether on trust or member fee land, or on nonmember fee land). If one of the exceptions applies, the generally applicable federal statute should not apply to tribal conduct, and Congress must amend the statute for it to apply against the Tribe if Congress so desires. If one of the exceptions does not apply, the Tribe would be subject to the provisions of the federal statute.<sup>60</sup>

<sup>58</sup> 533 U.S. 353 (2001).

<sup>59</sup> *Soaring Eagle*, 2015 U.S. App. LEXIS 9585, at \*42.

<sup>60</sup> 2015 U.S. App. LEXIS 9585, at \*44-45 (citations omitted).

In the case before it, the Sixth Circuit agreed with the Board that the Act is a statute of general applicability and that neither the Act nor its legislative history contains evidence supporting or not supporting coverage of Indian tribes. Therefore, said the court, “unless one of the *Montana* exceptions covers the application of the NLRA to a tribal-owned casino on trust property, the NLRA should apply to the Casino and would bar the no-solicitation policy.”<sup>61</sup> The court went on to find that the first *Montana* exception applied, stating that:

when a nonmember voluntarily enters into a commercial relationship with the Tribe, the Tribe as a sovereign itself may choose to place conditions on its contractual relationships with those nonmembers, and the courts will not annul the private dealings of the Tribe with nonmembers absent clear statements of Congress’s desire to abrogate those dealings.

Under the totality of the circumstances, we would find that the Casino’s no-solicitation policy and its suspension and termination of Lewis fall under the first *Montana* exception.<sup>62</sup>

Therefore:

if writing on a clean slate, we would conclude that, keeping in mind “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area,” the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land. The NLRA, a statute of general applicability containing no expression of congressional intent regarding tribes, should not apply to the Casino and should not render its no-solicitation policy void.<sup>63</sup>

The majority went on to explain, in considerable detail, why it feels the Board’s *Tuscarora/ Coeur d’Alene* analytical framework is misplaced.

### **Comment**

Although these two decisions of the Sixth Circuit reach the same ultimate result, there is considerable reason for

asserting that the issue is far from resolved. Together the two decisions comprise in excess of 31,500 words. Of those, over 14,000 are devoted to explaining why that ultimate result is *incorrect*<sup>64</sup> and only 7,000 support the result.<sup>65</sup> The fact that two panels of the Sixth Circuit have such disparate opinions on the issue and that four of the six judges who participated in the decisions would have reached a contrary result if they were “writing on a clean slate” strongly suggests that the issue is ripe for consideration by the *en banc* court.

There also appears to be a split among the circuits that may support Supreme Court review. If nothing else, there is a strong argument that the decisions of the Sixth Circuit and its sister circuits that have adopted the *Tuscarora/ Coeur d’Alene* framework<sup>66</sup> are in conflict with the Tenth Circuit’s decision in *Pueblo San Juan*. Despite the expansive verbiage employed by the two Sixth Circuit panels in explaining their respective positions, the core issue probably boils down to the correct interpretation of *Tuscarora* and, more specifically, to whether the Court’s statement—“that a general statute in terms applying to all persons includes Indians and their property interests[]”—is mere dictum or goes to the heart of the decision. Where better for that issue to be resolved than at the High Court, itself?

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**Editor’s Note:** Currently pending before the Senate and the House of Representatives are S. 248 and H.R. 511, identical bills that would amend the National Labor Relations Act to provide that any enterprise or institution owned and operated by an Indian tribe and located on its lands is not considered an employer (thus excluding such enterprises or institutions from coverage by such Act).

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<sup>64</sup> The 5,000+ words of the dissent in *Little River Band* and the 8,800+ words of that portion of *Soaring Eagle* that is devoted to explaining why *Little Band* was incorrectly decided.

<sup>65</sup> Parts III and IV of the opinion in *Little Band*.

<sup>66</sup> The *Soaring Eagle* court suggests that the Second, Seventh, and Eleventh Circuit have done so. See *Soaring Eagle*, 2015 U.S. App. LEXIS 9585, at \*30.

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<sup>61</sup> 2015 U.S. App. LEXIS 9585, at \*46.

<sup>62</sup> 2015 U.S. App. LEXIS 9585, at \*47.

<sup>63</sup> 2015 U.S. App. LEXIS 9585, at \*53 (citation and footnote omitted).

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## RECENT DEVELOPMENTS

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### ADA

#### Teacher's Perceived Disability Claim Revived

*Silk v. Board of Trustees, Moraine Valley Community College, District No. 524*, 2015 U.S. App. LEXIS 13282 (7th Cir. July 30, 2015)

William Silk was an adjunct professor at Moraine Valley Community College. In April, 2010, Silk underwent heart surgery, and remained on medical leave through the remainder of the spring semester. While Silk was on leave, the College discovered several troubling issues about the quality of Silk's teaching. Not certain when Silk would be able to return to his teaching job, the College reassigned to other instructors the summer school courses he normally would teach. Prior to the start of summer courses, Silk provided the College with a medical release, and Silk said he was ready to resume teaching and would be able to take on a full four course schedule for the fall 2010 semester.

During the summer, the College administrators told Silk of his teaching deficiencies, and decided to assign Silk only two courses for the fall 2010 semester. Silk claimed that the chair of his department did so because she did not think that Silk was physically capable of handling more than two classes. During the fall semester, Silk's teaching did not improve, and the College informed him that no classes would be available for him to teach in subsequent semesters. In January, 2011, Silk filed a charge with the U.S. Equal Employment Opportunity Commission ("EEOC"), claiming that because of disability and age discrimination, his course load had been reduced and ultimately eliminated.

Although Silk had been placed on a "do not hire list" of teachers, another department of the College hired Silk to teach courses for the spring 2011 semester. After observing Silk's teaching, the president of the College decided that Silk should be fired. In February, 2011, Silk was terminated.

Silk filed a lawsuit against the College in the federal district court for the Northern District of Illinois, claiming that he had been discriminated against in violation of the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). Silk also claimed that the College retaliated against him for having filed his EEOC charge. The district court granted the

College's motion for summary judgment, dismissing Silk's lawsuit in its entirety. Silk appealed to the Seventh Circuit, which reversed, in part, and affirmed, in part.

In considering Silk's ADA claim, the appeals court first considered whether Silk was disabled as defined by the statute. Silk did not claim that he had an actual disability. Rather, Silk asserted that adverse job actions were taken against him because the College regarded him as disabled. Although the "regarded as" prong of the definition of disability does not apply "to impairments that are transitory and minor," the court found that the College had failed to show that Silk's impairment came within the transitory and minor exception to ADA coverage. The Seventh Circuit noted that the College had not provided any evidence as to how long Silk's heart condition would last. Also, the condition could not be considered "minor" because it required heart surgery. Accordingly, the circuit court concluded that Silk had successfully passed the first hurdle in establishing his ADA claim, i.e., that he came within the ADA definition of disability.

The appeals court next considered whether the College had taken any adverse job actions against Silk due to having regarded him as disabled. The court rejected Silk's contention that the College impermissibly reassigned his summer 2010 courses because Silk's normal summer courses had been reassigned before the College was informed that he could return to teaching.

The Seventh Circuit also found that Silk had failed to sufficiently show that his perceived disability was why in the fall of 2010, the College did not assign him any future courses and made the determination, in February, 2011, to terminate his employment. According to the circuit court, the evidence was clear that these actions were taken because the College had the honest belief that he was a poor teacher—not due to any perceived disability. Moreover, the College's president, who determined that Silk should be terminated in February, 2011, was unaware that Silk had a heart condition. The Seventh Circuit further concluded there was no factual support for Silk's claim that he had been terminated due to his age or that the termination was in retaliation for his having filed an EEOC charge.

The evidence was not so clear, however, as to the College's decision to assign Silk only two courses, instead of four, during the 2010 fall semester. Although Silk claimed that the department chair reduced his course load because she thought he was physically incapable of handling additional classes, the department chair disputed that she had made such a statement. Given this factual conflict, the Seventh Circuit concluded that the district court inappropriately granted summary judgment on this aspect of Silk's claim. The appeals court, therefore, remanded the case to the district court for further proceedings.

**Editor's Note:** On appeal, Silk argued that his disability was the “but for” cause of the adverse employment actions taken against him. Although the Seventh Circuit has adopted the “but for” standard in pre-ADA Amendments Act cases, the court acknowledged that it remains an “open question” as to whether the standard also applies to post-Amendment lawsuits. The court, however, “reserve[d] resolution of this question for a case in which the issue is squarely before us and adequately briefed.” For a discussion of the appropriate causation standard for ADA claims, see J. Mook, “Sixth Circuit Adopts ‘But-For’ Causation Standard for ADA Claims,” 12 *Bender's Lab. & Empl. Bull.* 373 (Sept. 2012).

### Employee Not Regarded as Disabled

*Fischer v. Minneapolis Public Schools*, 2015 U.S. App. LEXIS 11727 (8th Cir. July 8, 2015)

Danny Fischer worked as a janitor engineer for the Minneapolis Public Schools (“MPS”). For fiscal reasons, he was laid off, with eligibility for later recall and reinstatement. Approximately a year and a half later, Fischer was notified that he would be reinstated conditioned on his successful completion of a strength test administered by Cost Reduction Technology (“CRT”). Fischer completed the test, which yielded a medium strength score. This was less than the score needed for the medium-heavy strength level required for a janitor engineer position. Fischer was told by CRT that his score was lowered due to that portion of the test measuring back strength.

Because Fischer’s test score was below that required for a janitor engineer, he was not recalled. After Fischer learned that he would not be reinstated, he spoke to multiple MPS managers and employees about the unfairness of his situation. Although Fischer requested the opportunity to retake the CRT test, MPS denied the request.

Subsequently, Fischer sued MPS in the federal district court for the District of Minnesota. Fischer claimed that MPS did not reinstate him based upon its perception that he was disabled in violation of the Americans with Disabilities Act (“ADA”) and the Minnesota Human Rights Act (“MHRA”), whose provisions are similar to those of the ADA. Fischer also asserted that MPS violated the MHRA by retaliating against him for his complaints about discrimination and his request for the accommodation of retaking the test. The district court granted MPS summary judgment, and Fischer appealed to the Eighth Circuit Court of Appeals.

On appeal, Fischer argued that MPS regarded him as disabled because MPS believed his back prevented him from performing his janitor engineer duties. Under the

ADA, an employer may regard an employee as disabled where the employer subjects the employee to an adverse job action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. In contending that MPS regarded him as having a physical impairment, Fischer pointed to statements made by MPS employees that he was not recalled because of his back, that he was “incapable of pulling, carrying, pushing, or lifting a heavy load,” and that his employment would create “a substantial risk of injury in the workplace.”

Even viewing these statements in a light most favorable to Fischer, the Eighth Circuit concluded that they did not mean that MPS regarded Fischer as having an actual or perceived impairment. Instead, according to the court, the statements indicated merely that MPS perceived Fischer as having medium strength, which was less than the medium-heavy strength level needed for a janitor engineer position. Additionally, the appeals court explained that an employer’s observation that a worker faces an increased risk of injury does not create an inference that the worker has a physical impairment. Accordingly, the court ruled that Fischer had failed to establish the first element of his *prima facie* case of disability discrimination, *i.e.*, that he was regarded as disabled.

Additionally, the Eighth Circuit found that Fischer had failed to make out a *prima facie* case that he had been subjected to retaliation because Fischer failed to show a causal connection between his complaints to MPS and his termination. As the court pointed out, Fischer began complaining to MPS about unfairness and asking for a retest only after he learned that he would not be reinstated. Accordingly, MPS’ decision not to reinstate him could not be retaliatory since the decision was made before Fischer’s complaints. Therefore, the appeals court affirmed the district court’s dismissal of Fischer’s retaliation claim.

### Employee Who Threatened to Kill Supervisor Has No Disability Claim under State Statute

*Mayo v. PCC Structural, Inc.*, 2015 U.S. App. LEXIS 13065 (9th Cir. July 28, 2015)

Despite a diagnosis of major depressive disorder, Timothy Mayo, with the assistance of medication and professional treatment, worked for his employer, PCC Structural, Inc. without incident for several years. However, in 2010, he told three co-workers that he “fe[lt] like coming down [to PCC] with a shotgun an[d] blowing off” the heads of a supervisor and another manager. The co-worker need not worry, Mayo explained, because she would not be working the shift when the

killing would occur. Mayo told another co-worker on several occasions that he planned to “com[e] down [to PCC] on day [shift] . . . to take out management.” He told a third co-worker that he “want[ed] to bring a gun down [to PCC] and start shooting people.” He explained that “all that [he] would have to do to shoot [the supervisor] is show up [at PCC] at 1:30 in the afternoon” because “that’s when all the supervisors would have their walk-through.”

Mayo’s co-workers eventually reported these threats and Mayo was called to a meeting with PCC’s Senior Human Resources Manager who asked Mayo if he planned to carry out his threats, Mayo said that “he couldn’t guarantee he wouldn’t do that.” The Manager immediately suspended Mayo’s employment and barred him from company property. PCC also notified the police.

That evening, a police officer visited Mayo at his home to discuss the threats. Mayo admitted making the threats and that he had two or three people in mind, including the supervisor. He also admitted to owning several guns, though he had not decided which gun to use. When asked if he planned to go to PCC and start shooting people, Mayo responded: “Not tonight.”

With Mayo’s consent, the officer took Mayo to the hospital, where he was placed into custody because of the danger he posed to himself and others. Mayo remained in custody for six days, and then took leave under the Oregon Family Leave Act (“OFLA”) and the Family and Medical Leave Act (“FMLA”) for two months. Toward the end of this leave period, a treating psychologist cleared Mayo to return to work, as he was not a “violent person,” but recommended a new supervisor assignment. A treating nurse practitioner sent a similar letter. Mayo also indicated that he wanted to return to PCC, though there is disagreement as to whether Mayo promised that he would not repeat his threatening behavior. On May 20, 2011, PCC terminated Mayo.

In August 2011, Mayo sued PCC in state court, alleging that his termination violated Oregon’s counterpart to the Americans with Disabilities Act (“ADA”). He argued that his “disturbing statements and comments . . . were the symptoms of and caused by his disability,” thus making his termination discriminatory. PCC removed the case to federal court in January 2012, and moved for summary judgment, which was granted. The federal district court reasoned that once Mayo made his threats, he was no longer a “qualified individual” and, therefore, was not entitled to protection under either the Oregon statute or the ADA. On appeal, the Ninth Circuit affirmed, concluding that Mayo had failed to state a *prima facie* case.

The appellate court reasoned:

Even if Mayo were disabled (which we assume for this appeal), he cannot show that he was qualified at the time of his discharge. An essential function of almost every job is the ability to appropriately handle stress and interact with others. And while an employee can be qualified despite adverse reactions to stress, he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions (here, at least five times). This vastly disproportionate reaction demonstrated that Mayo could not perform an “essential function” of his job, and was not a “qualified individual.” This is true regardless of whether Mayo’s threats stemmed from his major depressive disorder.

(Citations omitted).

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## Affordable Care Act

### Individual Employee Has Standing to Challenge ACA’s Contraceptive Rules

*Wieland v HHS*, 2015 U.S. App. LEXIS 12463 (8th Cir. July 20, 2015)

Paul Wieland, a member of the Missouri House of Representatives, obtains healthcare coverage for himself and his family through the Missouri Consolidated Health Care Plan (MCHCP), a group healthcare plan made available to him by his employer, the State of Missouri. Prior to August 1, 2013, MCHCP offered Wieland an opportunity to opt out of coverage for contraceptives under state law. But the State and MCHCP discontinued offering the opportunity to opt out of such coverage following a decision by the United States District Court for the Eastern District holding that the ACA preempted the provision of Missouri state law that required the opt-out. The State of Missouri did not appeal that decision, and on August 1, 2013, MCHCP placed the Wielands in a healthcare plan that included coverage for contraceptives.

The Wielands, parents of three daughters and devout Roman Catholics, believe that they cannot pay for or participate in a healthcare plan that includes coverage for contraceptives or provide such coverage to their daughters without violating their sincerely held religious beliefs. They filed a complaint against HHS, generally contending that HHS’s enforcement or threatened enforcement of the ACA caused MCHCP to place them in a healthcare plan that includes coverage for contraceptives, thereby forcing them to provide that coverage to their dependent

daughters. They sought a declaration “that the Mandate [requiring contraceptive coverage] and [HHS’s] enforcement of the Mandate . . .” violates their rights and “an order prohibiting [HHS] from enforcing the Mandate . . .” They also sought a temporary restraining order (TRO) and a preliminary injunction “prohibiting [HHS] from requiring that the Plaintiffs’ health benefit plan contain coverage for contraceptives.”

HHS moved to dismiss the complaint for lack of standing, asserting that the Wielands lacked standing because they were challenging provisions of the ACA that did not apply to them and were seeking an injunction prohibiting HHS from enforcing the Mandate against MCHCP and, ultimately, the State of Missouri, neither of which was a party to the case. The district court agreed and granted the motion.

On appeal, the Eighth Circuit reversed. It agreed with the Wielands that they had established causal connection between their injury and the Mandate sufficient to satisfy the causation element of standing. Further, said the court, the Wielands had adequately alleged a chain of causation that runs directly from the Mandate to their placement in a healthcare plan that includes coverage for contraceptives. Contrary to the holding of the lower court, the appellate court concluded that there was no “independent discretionary action” by Missouri or the MCHCP that intervened and broke the chain of causation:

MCHCP placed them in a healthcare plan that included coverage for contraceptives, thereby causing their injury, as a direct result of HHS’s threatened enforcement of the Mandate against the State and MCHCP.

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## ERISA

### Employer/Debtor to Benefit Plans Not Fiduciary under ERISA or Bankruptcy Code

*Bos v. Board of Trustees*, 2015 U.S. App. LEXIS 13272 (9th Cir. July 30, 2015)

Gregory Bos was owner and president of Bos Enterprises, Inc. (“BEI”), which, in turn, was party to a collective bargaining agreement with the Carpenters Union (“CBA”) obligating BEI to contribute to several trust funds that provided benefits to BEI’s employees. Contributions under the CBA were based on hours of work and each of the trust agreements defined its respective fund as including “all contributions required by the [CBA] . . . to be made for the establishment and maintenance of the [respective plan], and all interest, income and

other returns of any kind.” With the exception of the Health and Welfare Fund Agreement, the trust agreements defined each fund to include, as well, any other money received or held because of or pursuant to the trust.

It was undisputed that Bos, personally, had full control over BEI’s finances, as well as authority to make payments on behalf of BEI, and, therefore, was personally responsible for making the required contributions to the funds on behalf of BEI. In March 2009, Bos signed a promissory note personally guaranteeing payment to the funds of \$359,592.09—the amount he had failed to pay from August 2008 through January 2009. Although he made one payment in April 2009, he otherwise failed to meet the payment obligations required by the CBA and the promissory note.

The Board of Trustees (“the Board”) charged with administering the funds filed a grievance against Bos and BEI to recover the amounts owed and an arbitrator entered an award in excess of \$500,000 in favor of the Board and against BEI and Bos, individually and doing business as BEI. Thereafter, Bos filed a petition for Chapter 7 bankruptcy. The Board intervened contesting the dischargeability of Bos’ debt to it.

The bankruptcy court entered judgment, concluding that Bos had committed defalcation while acting as a fiduciary of the Funds and that the debt was therefore nondischargeable. The district court affirmed.

Section 523(a)(4) of the Bankruptcy Code provides that Chapter 7 debtors may not discharge debts incurred due to the debtor’s “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4). For a debt to be held nondischargeable under § 523(a)(4)’s defalcation provision, the debtor must have been a fiduciary *prior to* his commission of the fraud or defalcation. The courts below had concluded that Bos’s debt was nondischargeable under § 523(a)(4) because he controlled money which was contractually required to be paid to benefit funds subject to ERISA, and therefore was a fiduciary for purposes of both ERISA and § 523(a)(4). Specifically, each concluded that because the trust agreements defined the funds as including contributions “required . . . to be made” to the funds, the unpaid contributions were plan assets. They then concluded that because Bos, as president of BEI, personally had control over BEI’s finances and the authority to make contributions to the funds, he personally exercised the requisite control over the unpaid contributions to be deemed a fiduciary under ERISA, and therefore under § 523(a)(4).

Ninth Circuit precedent clearly establishes that unpaid contributions by employers to employee benefit funds are not plan assets. Nonetheless, several of the district courts

in that circuit have recognized an exception to that general rule when the plan document expressly defines the fund to include future payments. Although the Ninth Circuit had not previously considered the validity of the exception, those circuits that have reviewed the issue are split. The Second and Eleventh Circuits have recognized the exception, while the Sixth and Tenth Circuits have rejected it. In *Bos v Board of Trustees*, the Ninth Circuit joined the two circuits that had rejected the exception.

It reasoned that even if the unpaid contribution was converted to some type of plan asset under the trust documents, that asset could be legally classified in only three ways. First, it could be deemed a contractual right to collect the payment when due. Classifying the “asset” as such a contractual right would not make Bos or BEI an ERISA fiduciary because neither had authority over the right—only the funds could enforce the right. If, instead, the asset was classified as an unpaid past-due contribution, neither Bos nor BEI could be a fiduciary under § 523(a)(4) because the event that created the debt—the nonpayment of the funds—would be the same event that created the fiduciary status.

Third, in order to avoid the problem encountered by classifying the asset as an unpaid past-due contribution, the Board argued that the asset should be classified as amounts which the employer must eventually contribute to the plan, but which are not yet due. That classification fails, says the Ninth Circuit, because “until the time payment is due, the plan does not actually possess the money, and in fact has no present right to it.” It, therefore, is akin to a contractual right to enforce payment, which, like the first classification, belongs to the funds and not to the employer, Bos or BEI.

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## FLSA

### Will Independent Contractor Status Survive New DOL Guidance?

DOL Administrator's Interpretation No. 2015-1 (July 15, 2015)

On July 15, 2015, the Department of Labor (DOL), through its Wage and Hour Division, issued its first Administrator's Interpretation of the year (“AI 2015-1”). It focuses on the always complex issue of independent contractor versus employee classification under the Fair Labor Standards Act (“FLSA”) and makes clear the DOL has little tolerance for the concept of independent contractors, stating unequivocally that most workers “are employees under the FLSA's broad definitions.” Although

an administrative interpretation does not have the same legal impact and effect as agency regulations, this AI will no doubt become the hot topic of FLSA process and litigation.

In recent years, the DOL has focused its efforts on investigating misclassification as a priority item. Addressing this point, Administrator Weil writes that misclassification can deprive individuals of “important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation[.]” “Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers.”

The DOL, observing that the FLSA broadly defines “employ” as “to suffer or permit to work,” adopts the court-developed economic realities test as the standard for resolving the independent contractor/employees status issue. The Administrative Interpretation provides guidance on each of the six factors in the economic realities test. Noting that economic dependence is the key, the test “focuses on whether the worker is economically dependent on the employer or in business for him or herself.” “A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of ‘employ’ under the Act, most workers are employees under the FLSA.” AI 2015-1 lists the six factors as follows:

- Is the work an integral part of the employer's business?
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
- How does the worker's relative investment compare to the employer's investment?
- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the employer permanent or indefinite?
- What is the nature and degree of the employer's control?

AI 2015-1 emphasizes that all factors are to be considered and there is no one factor, including the control factor, that is determinative of whether a worker is an employee. These factors are not to be mechanically applied, “but with an understanding that the factors are indicators of the broader concept of economic dependence.”

While not a new concept in this area of law, AI 2015-1 reminds that a “label” given to a worker is not determinative. “Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities



of the working relationship and is not relevant to the analysis of the worker's status."

AI 2015-1 should be a wake-up call to all businesses currently using workers classified as independent contractors. The time to consult labor counsel is now before one or more of those independent contractors contacts the DOL or plaintiff's counsel. An ounce of prevention is worth a pound of cure.

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### **Contract Lawyer May Be Subject to FLSA's Overtime Provisions**

*Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 2015 U.S. App. LEXIS 12755 (2d Cir. July 23, 2015)

Beginning in April 2012 and continuing for 15 months thereafter, David Lola, an attorney licensed to practice law in California, worked (through Tower Legal Staffing Inc., a company that provides attorneys and paralegals on a contract basis to various law firms and corporate law departments) for Skadden, Arps, Slate, Meagher & Flom LLP in North Carolina. His job was to conduct document review for Skadden in connection with a multi-district federal law suit. He subsequently brought a putative collective action against Skadden and Tower in the United States District Court for the Southern District of New York alleging that they had violated the overtime provisions of the Fair Labor Standards Act by failing to pay him overtime premium for hours worked in excess of forty in a workweek.

As the Second Circuit recited the facts, Lola alleged:

that his work was closely supervised by the Defendants, and his "entire responsibility . . . consisted of (a) looking at documents to see what search terms, if any, appeared in the documents, (b) marking those documents into the categories predetermined by Defendants, and (c) at times drawing black boxes to redact portions of certain documents based on specific protocols that Defendants provided." Lola further allege[d] that Defendants provided him with the documents he reviewed, the search terms he was to use in connection with those documents, and the procedures he was to follow if the search terms appeared. Lola was paid \$25 an hour for his work, and worked roughly forty-five to fifty-five hours a week. He was paid at the same rate for any hours he worked in excess of forty hours per week. Lola was told that he was an employee of Tower, but he was also told that he needed to follow any procedures set by Skadden attorneys, and he worked under the supervision of Skadden attorneys. Other attorneys employed to work on the same project performed similar work and were likewise paid

hourly rates that remained the same for any hours worked in excess of forty hours per week.

Defendants moved to dismiss the complaint, arguing that Lola was exempt from the FLSA's overtime rules because he was a licensed attorney engaged in the practice of law. The district court granted the motion, finding. Among other things that Lola was engaged in the practice of law as defined by North Carolina law, and was therefore an exempt employee under FLSA. On appeal the Second Circuit vacated the lower court's judgment and remanded for consideration consistent with its opinion.

Observing that North Carolina's General Statutes do not make clear whether the review of documents constitutes the practice of law, the Second Circuit points to an ethics opinion issued by the North Carolina State Bar, which partially concerns the question of document review as the practice of law and "strongly suggests that inherent in the definition of 'practice of law' in North Carolina is the exercise of at least a modicum of independent legal judgment." Turning to Lola's allegations, the court stated:

The gravamen of Lola's complaint is that he performed document review under such tight constraints that he exercised no legal judgment whatsoever—he alleges that he used criteria developed by others to simply sort documents into different categories. Accepting those allegations as true, as we must on a motion to dismiss, we find that Lola adequately alleged in his complaint that he failed to exercise any legal judgment in performing his duties for Defendants. A fair reading of the complaint in the light most favorable to Lola is that he provided services that a machine could have provided. The parties themselves agreed at oral argument that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law.

Accordingly, the appellate court returned the case for further development of the facts regarding the independent judgment issue.

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### **Expert Witness Fees Not Recoverable in FLSA Action**

*Gortat v. Capala Bros.*, 2015 U.S. App. LEXIS 13179 (2d Cir. July 29, 2015)

After prevailing in a collective action under the Fair Labor Standards Act ("FLSA") plaintiffs were awarded attorneys' fees and costs that included reimbursement for expert witness fees. The defendants appealed, arguing,

among other things, that expert witness fees are not recoverable under 29 U.S.C. § 216(b) of the FLSA. The Second Circuit agreed.

29 U.S.C. § 216(b) provides that, where a defendant has violated the provisions of sections 206, 207, or 215(a)(3) of the FLSA, “[t]he court . . . shall, in addition to any judgment awarded to the . . . plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” The appellate court observed that, under clear Supreme Court precedent, “a district court may not award reimbursement for expert fees beyond the allowances authorized by 28 U.S.C. § 1920, as limited by 28 U.S.C. § 1821 [\$40 per diem and travel expenses].” The court then held that “§ 216(b)’s reference to ‘costs’ does not constitute explicit statutory authorization to award expert fees.”

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## NLRA

### Challenge to New Election Rule Rejected by District Court for the District of Columbia

*Chamber of Commerce of the United States v. NLRB*, 2015 U.S. Dist. LEXIS 98789 (D.D.C. July 29, 2015)

On December 12, 2014, the National Labor Relations Board adopted a Final Rule that drastically alters the procedures utilized by the Board in representation cases—the proceedings by which the Board determines whether employees wish to be represented by a union. See N.P. Lareau “NLRB Finalizes Election Rule Changes First Issued in 2011” 15 *Bender’s Lab. & Empl. Bull.* 58 (February 2015). The new Rule became effective on April 14, 2015, and applies to all representation petitions filed on or after that date.

The Chamber of Commerce of the United States of America, joined by other management representatives filed suit in the United States District Court for the District of Columbia, seeking to overturn the Rule on numerous bases. On July 29, 2015, that court rejected the challenge. It summarized its reasoning in the second and third paragraphs of its opinion:

Plaintiffs mount a broad attack on the rule as a whole, claiming that it “makes sweeping changes to the election process” and that it “sharply curtails” employers’ statutory, due process, and constitutional rights. But these dramatic pronouncements are predicated on mischaracterizations of what the Final Rule actually provides and the disregard of provisions that contradict plaintiffs’ narrative. And the claims that the regulation contravenes the NLRA

are largely based upon statutory language or legislative history that has been excerpted or paraphrased in a misleading fashion. Ultimately, the statutory and constitutional challenges do not withstand close inspection, and what is left is a significant policy disagreement with the outcome of a lengthy rule-making process. This is apparent from the Chamber plaintiffs’ heavy reliance upon the dissent to the Final Rule published by two members of the Board.

Plaintiffs’ policy objections may very well be sincere and legitimately based, but in the end, this case comes down to a disagreement with choices made by the agency entrusted by Congress with broad discretion to implement the provisions of the NLRA and to craft appropriate procedures. Given the level of deference that applies in an APA case, particularly in the labor context, and for the additional reasons set forth in more detail below, the Court does not find grounds to overturn the Final Rule. The Board’s motion for summary judgment will be granted.

(Footnote and citation omitted).

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### Request for Police to Arrest Demonstrators May Be Protected by First Amendment

*Venetian Casino Resort v. NLRB*, 2015 U.S. App. LEXIS 11899 (D.C. Cir. July 10, 2015)

During a union demonstration in front of the Venetian Casino Resort in Las Vegas, the Venetian requested that police officers at the scene issue criminal citations to the demonstrators and block them from the walkway because they were allegedly trespassing upon private property belonging to the Venetian. The National Labor Relations Board later determined that that request violated the National Labor Relations Act (“Act”) even though the police department had not acted upon the request.

On appeal to the D.C. Circuit, the Venetian argued that the Board’s decision was in error because the request was protected by the First Amendment under the *Noerr-Pennington* doctrine. Under that doctrine, conduct that constitutes a direct petition to government, but would otherwise violate the Act, is shielded from liability by the First Amendment. The appellate court agreed that Venetian’s request to the police constituted a government petition within the meaning of the *Noerr-Pennington* doctrine, to the extent that the petition was not a sham. It therefore granted the Venetian’s petition for review, denied the Board’s cross-application to enforce its order, and vacated the Board’s order. However, because the Board had not addressed whether the Venetian’s petition

was a sham, the court remanded the case to the Board for further consideration.

In determining that the request of the police constituted a direct petition to government, the court observed:

As a starting point, a petition “conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns.” In modern usage, “to petition” means to “make a request or supplication to,” and the term has had that meaning since before the Founding. The Supreme Court has specified that, for purposes of the *Noerr-Pennington* doctrine, parties exercise their right to petition when they “advocate their causes and points of view respecting resolution of their business and economic interests,” or attempt to “influence the passage or enforcement of laws.” Whether conduct constitutes protected petitioning activity “depends not only on its impact, but also on the context and nature of the activity.

Applying those principles, we conclude that the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection under the *Noerr-Pennington* doctrine.

Requesting police enforcement of state trespass law is an attempt to persuade the local government to take particular action with respect to a law. As we see it, that fits squarely within the traditional mold of a petition to government protected by the *Noerr-Pennington* doctrine.

(Citations omitted).

The court then turned to the “sham” exception to the *Noerr-Pennington* doctrine, noting that it “does not cover activity that was not genuinely intended to influence government action.” A petition is a sham if it is “objectively baseless” and is “brought with the specific intent to further wrongful conduct through the use of governmental process.” The Board will be required to consider that issue when it receives the case back from the court.

### **D.C. Circuit Reverses Board’s Failure to Use “Common Sense”**

*Southern New England Telephone Company v. NLRB*, No. 11-1099 (D.C. Cir. July 10, 2015)

AT&T Connecticut banned employees who interact with customers or work in public—including employees who enter customers’ homes—from wearing union shirts that said “Inmate” on the front and “Prisoner of AT&T” on the back. Section 7 of the National Labor Relations Act generally protects the right of employees to wear union apparel at work. However, under a recognized “special

circumstances” exception, an employer may lawfully prohibit its employees from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image.

The Board, Member Hayes dissenting, held that shirts in question did not fall within the “special circumstances” exception. It therefore held that AT&T had violated the Act when it instituted the ban and when it suspended employees who refused to remove the shirts after being instructed to do so.

AT&T appealed to the D.C. Circuit, which reversed. The appellate court opened its opinion by stating “Common sense sometimes matters in resolving legal disputes. This case is a good example.” The Board had found that the shirts worn by the employees “would not have been reasonably mistaken for prison garb” and that it was not “reasonably likely, under the circumstances, to cause fear or alarm” among AT&T’s customers. In concluding that it was not required to extend judicial deference to this conclusion, the court noted that the Board’s “expertise is surely not at its peak in the realm of employer-customer relations.” It stated:

[T]he appropriate test for “special circumstances” is not whether AT&T’s customers would confuse the “Inmate/Prisoner” shirt with actual prison garb, but whether AT&T could reasonably believe that the message may harm its relationship with its customers or its public image. To resolve this case, it is enough to ask the question, as Member Hayes did in dissent: “What would you think about a company that permitted its technicians to wear such shirts when making home service calls?”

### **Filing Suit under FLSA Constitutes Protected Activity**

*Arsovski*, 362 N.L.R.B. No. 152, 2015 NLRB LEXIS 562 (July 29, 2015)

Beyoglu, a restaurant in New York City, discharged Marjan (Mario) Arsovski after it received notice that Arsovski had filed a lawsuit in the United States District Court for the Southern District of New York, on behalf of himself and other similarly situated employees, which alleged certain violations of the Fair Labor Standards Act (“FLSA”). An administrative law judge determined that, notwithstanding the wording of the complaint, Arsovski filed the lawsuit without the consent of any other employees. By the time the case reached the Board, it was clear that Beyoglu had discharged Arsovski for filing the lawsuit, presenting the Board with the issue of “whether a single employee who files a lawsuit ostensibly

on behalf of himself and other employees is engaged in protected concerted activity.”

In *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 NLRB LEXIS 11 (Jan. 3, 2012), the Board held that the filing of a lawsuit by a *group* of employees is protected activity. Reaffirming *D.R. Horton* in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 NLRB LEXIS 820 (Oct. 28, 2014), the Board rejected the argument that the filing of a class action lawsuit is not protected concerted activity if only one employee is immediately involved:

By definition, such an action is predicated on a statute that grants rights to the employee's coworkers, and it seeks to make the employee the representative of his colleagues for the purpose of asserting their claims, in addition to his own. Plainly, the filing of the action contemplates—and may well lead to—active or effective *group* participation by employees in the suit, whether by opting in, by not opting out, or by otherwise permitting the individual employee to serve as a representative of his coworkers. It is this potential “to initiate or to induce or to prepare for group action,” in the phrase of *Meyers II*—collectively seeking legal redress—that satisfies the concert requirement of Section 7.

Applying the reasoning of *Murphy Oil*, the Board held that the filing of the FLSA claim by Arsovski constituted protected activity and that Beyoglu had violated the Act by discharging him on that account.

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## Title VII

### EEOC Decides that Discrimination Based on Sexual Orientation Violates Title VII

*Complainant v. Foxx*, EEOC Appeal No. 2012-24738-FAA-03 (July 16, 2015)

When a temporary Front Line Manager (“FLM”) employed by the Department of Transportation (“DOT”) at Miami International Airport was not selected for a permanent FLM position, he filed a complaint with the Equal Employment Opportunity Commission (“Commission”) alleging that the DOT did not select him because he is gay. Acknowledging that, as recently as 1994, it was of the position that “Title VII’s prohibition of discrimination based on sex does not include sexual preference or sexual orientation,” the Commission, nonetheless, held that:

sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of

sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

In doing so, the Commission recognizes that discrimination based on sexual orientation is not expressly prohibited by Title VII: “When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. *It is not.*” (Emphasis supplied). But, said the Commission, the appropriate question “for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—“whether the agency has ‘relied on sex-based considerations’ or ‘take[n] gender into account’ when taking the challenged employment action.”

In reaching its conclusion, the Commission proffers a number of rationales which may be summarized as:

- “Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”
- “Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex.”
- “Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.”

Acknowledging that prohibiting discrimination based on sexual orientation may not have been specifically intended by Congress when it enacted Title VII, the Commission, quoting from the Supreme Court’s unanimous decision in *Oncale v. Sundowner Offshore Services, Inc.*, states: “statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” Addressing the argument that Congress has frequently debated the advisability of amending Title VII to expressly preclude discrimination on the basis of sexual orientation and failed to do so, the Commission, quoting the Supreme Court’s opinion in *Pension Benefit Guarantee Corp. v. LTV*, counters that the Court “has ruled that ‘[c]ongressional inaction lacks persuasive significance because several

equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.’”

The Commission’s decision, of course, is not binding on the federal courts but they may defer to it if it represents a reasonable interpretation of the statute. In deciding whether to extend deference the courts, almost certainly, will take into account the fact that, since the EEOC was created in 1965, the Commission has consistently taken the position sexual orientation discrimination does not constitute discrimination prohibited by Title VII. Such changes in administrative statutory interpretation are frequently discounted by the courts as representing political rather than legal determinations.

Whether the lower courts decide to extend deference or not, it may reasonably be anticipated that the issue will remain at the forefront for the next decade or so.

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### **Fourth Circuit Holds Hiring through Temp Agency Does Not Avoid Title VII Liability**

*Butler v. Drive Automotive Industries of America*, 2015 U.S. App. LEXIS 12188 (4th Cir. July 15, 2015)

Brenda Butler was hired by ResourceMFG, a temporary employment agency, to work at Drive Automotive Industries in Piedmont, South Carolina. Drive and ResourceMFG each exercised control over various aspects of Butler’s employment. Butler wore ResourceMFG’s uniform, was paid by ResourceMFG, and parked in a special ResourceMFG lot. ResourceMFG also had ultimate responsibility for issues related to discipline and termination. Drive, however, determined Butler’s work schedule and arranged portions of Butler’s training. Drive employees supervised Butler while she worked on the factory floor.

After ResourceMFG, in response to a request by Drive, terminated Butler’s employment, she filed suit against both companies in South Carolina state court. Drive removed the case to federal court and the parties agreed to dismiss the case against ResourceMFG, leaving Drive as the sole remaining defendant. In April 2013, the district court granted Drive’s motion for summary judgment, finding that Drive did not exercise sufficient control over Butler’s employment such that it could be liable as her employer under Title VII. Butler appealed to the Fourth Circuit, which reversed. Joining seven other circuits that have considered the issue (the Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh), the Fourth Circuit held that multiple companies can each be the “employer” of the same employee under Title VII. In *Butler*, the appellate court concluded that Drive Automotive and Resource

MFG were joint employers and that both could be liable for her claims of Title VII sexual harassment.

The court articulated a nine-part “hybrid” test, which considers both the common law of agency and the economic realities of employment, to determine an entity’s joint employer status. The three primary factors are (1) which entity has the power to hire and fire the worker; (2) which entity supervises the employee’s work; and (3) where and how the work takes place. The first factor determines ultimate control. The second factor assesses day-to-day practical control. The third determines how similar the work functions are compared to those of a regular employee at the workplace. The remaining factors look to responsibility for payroll, tax and other employment records, along with job training. None of the nine factors alone is dispositive. The Fourth Circuit recognized the factors may be modified depending on the industry involved. The Fourth Circuit adopted this majority view because it seeks to prevent those businesses that effectively “employ” a worker from evading liability by hiding behind another, such as a staffing agency.

As to the case before it, Drive was a joint employer because the temporary and regular staff worked side by side using the same equipment; the work Butler performed was part of Drive’s core business; and Drive exhibited significant control over Butler’s employment (she was fired by the staffing agency at Drive’s request). Merely because Butler wore a staffing agency uniform, received her pay from the staffing agency and parked in a lot used only by staffing agency workers did not shield Drive from Title VII liability.

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### **Plaintiff Bears Burden of Maintaining Correct Address with EEOC**

*Maggio v. Wisconsin Ave. Psychiatric Center, Inc.*, 2015 U.S. App. LEXIS 12787 (D.C. Cir. July 24, 2015)

An individual who files a charge of discrimination with the EEOC or similar state agency is required to provide the agency with his or her contact information, including a mailing address and phone number, so that the agency can notify him or her of any developments, including the outcome of the charge. Current regulations require the individual to notify the agency “of any change in address and . . . any prolonged absence from that current address so that he or she can be located when necessary during the Commission’s consideration of the charge.” 29 C.F.R. § 1601.7(b).

Significantly, once the agency issues a right-to-sue notice, the individual has 90 days to file a lawsuit when bringing claims under Title VII, the ADA, ADEA, or GINA. Failure to bring a claim in that time period

ordinarily means that the suit is barred by limitations. There is an exception to this hard 90-day rule, however, under the doctrine of equitable tolling. In order for equitable tolling to apply, the individual must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010).

What happens when an individual provides both his own and his attorney's contact information when filing an EEOC charge, relocates to another state to care for a sick relative without notifying the agency of his new address, only to later learn that the EEOC had mailed a notice of right to sue to the address on file more than 90 days beforehand? As the D.C. Circuit recently affirmed, the individual's claim is barred.

Matthew Maggio filed a charge of gender discrimination on May 11, 2012 with the EEOC. He provided his current mailing address in Washington, D.C., while also providing his attorney's mailing address, phone number and e-mail address. A month prior to filing the charge, Maggio had moved to South Carolina to care for his ailing mother. He had not, however, provided a forwarding address either to the agency or to the post office.

On November 26, 2012, the EEOC mailed a right-to-sue notice to Maggio's D.C. address (but did not provide a copy to his attorney), which Maggio claimed he never received. Neither Maggio nor his attorney contacted the agency to ask about the status of his charge until June 2013, over a year after Maggio first filed the charge. Finally, on June 21, 2013, nearly seven months after the right-to-sue notice was issued, Maggio filed his complaint.

The district court dismissed Maggio's case since he failed to file suit within 90 days of the mailing of the right-to-sue notice. Maggio appealed, explaining that even though he did not update the EEOC as to his own change of address, he thought the EEOC would send the notice to his attorney, whose information he had provided.

In a 2-1 split, the D.C. Circuit affirmed the dismissal of Maggio's claim. In a brief opinion, the majority sided with numerous other circuits that have held that “when a complainant fails to receive a right-to-sue notice because he gave the EEOC an incorrect address or because he neglected to inform the EEOC when he moved, the complainant is at fault and he is not entitled to equitable tolling.” In a passionate dissent, Judge Rogers argued that “the fault [should] lie[] with the EEOC, not Maggio[,]” given that the EEOC's own manual states that right-to-sue notices should be sent both to the charging party and his attorney.

## Ledbetter Act Does Not Extend Time to Bring Demotion Claims

*Davis v. Bombardier Transp. Holdings (USA), Inc.*, 2015 U.S. App. LEXIS 12624 (2d Cir. July 22, 2015)

In litigation, as in many other parts of life, timing is everything. In “Plaintiff Bears Burden of Maintaining Correct Address with EEOC”, *supra*, we discussed the issues surrounding lawsuits filed after the resolution of EEOC and state agency charges. A similar issue came before a New York federal court recently and was met with a similar outcome: a plaintiff who files a claim too late has nobody but himself or herself to blame.

The Lilly Ledbetter Fair Pay Act of 2009 (“Ledbetter Act”) was passed to overrule the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). The *Ledbetter* Court had ruled that an employee is barred from bringing wage discrimination claims that the employee received less than similarly situated employees because of his or her protected status (gender, age, race, etc.) when the decisions regarding pay are made outside of the limitations period.

In response, Congress passed the Ledbetter Act to amend Title VII, the ADA, and the ADEA to extend the time for an employee to file suit, primarily by treating each paycheck as a discrete act of discrimination. The Act states:

[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e-5(e)(3)(A).

In other words, the time period to bring a wage discrimination claim restarts every time the employee is paid, and an employee who later learns of discriminatory pay practices may proceed as long as any of their paychecks were received within 300 days or less of the date he or she files suit.

But what about the situation where an employee claims that he or she was demoted for discriminatory reasons, rather than being paid less than his or her similarly situated co-workers? In *Davis v. Bombardier Transp. Holdings (USA) Inc.*, the Second Circuit concluded that the

Ledbetter Act does not extend the time for filing demotion-related wage claims. There, Natasha Davis was hired as a Customer Service Agent at JFK Airport in 2002. Her title was changed in 2004 to Air Train Agent II, as she was responsible both for monitoring the computer-driven train that transports passengers between airport terminals, and, unlike Air Train Agent I's, manually operating the train in case of emergency. Five years later, in January 2007, Davis took disability leave, ultimately having at least six eye surgeries before attempting to return to work in August 2007. At that time, Bombardier asked Davis to submit to a physical. The parties dispute whether she passed the physical, but in any event, Bombardier determined that Davis was not safe to operate the train in an emergency. Consequently, on September 1, 2007, Davis returned to work as an Air Train Agent I and, correspondingly, was paid 75 cents less an hour going forward. Davis then sued her Bombardier for disability discrimination and retaliation on the ground that she was demoted for illegal reasons. Notably, she did not bring a wage discrimination claim.

Bombardier argued that her complaint was time-barred, because she had waited more than 300 days (indeed, nearly three and a half years) to file suit after the September 2007 "demotion" decision was made. Davis claimed that the Ledbetter Act rendered her claim timely. The district court agreed with Bombardier and dismissed the suit.

On appeal, a unanimous three-judge panel of the Second Circuit affirmed. Agreeing with the Third Circuit, the only other circuit to have considered the issue, the court concluded that "the plain language of the [Ledbetter Act] covers [only] compensation decisions and not other discrete employment decisions, such as hirings, firings, promotions, and demotions." Unlike wage discrimination, the court explained, an employee who has been demoted is immediately aware of the decision and its corresponding loss in pay, and the employee can therefore seek out an explanation from his or her employer. Consequently, because the decision that Davis was challenging was her "demotion," rather than the decision to pay her less, her claims were time-barred.

As in the situation where an employee fails to update his or her address with the EEOC and misses the 90-day deadline for filing suit after an administrative charge is resolved, employees are also under a duty to bring suit promptly when they have notice of any potentially illegal decrease in wages. Employers, in particular, benefit from being able to efficiently determine the limits of the time-frame for which they may face potential exposure in litigation.

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Sept. 17	NELI ADA Workshop	Chicago, IL
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Oct. 7	NELI Affirmative Action Workshop	San Francisco, CA
Oct. 8-9	NELI Affirmative Action Briefing	San Francisco, CA
Oct. 14	NELI Affirmative Action Workshop	Austin, TX
Oct. 15-16	NELI Affirmative Action Briefing	Austin, TX
Oct. 21	NELI Affirmative Action Workshop	Washington, D.C.
Oct. 22-23	NELI Affirmative Action Briefing	Washington, D.C.
Oct. 28	NELI Affirmative Action Workshop	Chicago, IL
Oct. 29-30	NELI Affirmative Action Briefing	Chicago, IL
Nov. 12-13	NELI Employment Law Conference	Chicago, IL
Nov. 19-20	NELI Employment Law Conference	Washington, D.C.
Dec. 3-4	NELI Employment Law Conference	San Francisco, CA
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