2013-14 EMPLOYMENT LAW UPDATE: SUPREME COURT AND FOURTH CIRCUIT

Narendra K. Ghosh and Paul E. Smith
Patterson Harkavy LLP
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This paper summarizes the employment law decisions by the United States Supreme Court and Fourth Circuit Court of Appeals over the past year. This review is not meant to be exhaustive. Unpublished cases and less popular practice areas such as ERISA, labor law, and federal employee rights have been largely left out for the sake of brevity.

United States Supreme Court

The 2013-14 term has been a quite one for the Supreme Court when it comes to the core areas of employment law. There have been a few cases in peripheral areas, which are briefly discussed below. There were, however, two important decisions issued at the very end of the last term after last year's summary was written: *Nassar* and *Vance*.

Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013): *Title VII retaliation claims must be proved according to principals of but-for causation.*

Dr. Nassar, a physician at the Parkland Memorial Hospital, was offered a different position with the hospital. After receiving this offer, he publicly complained that his then-current supervisor was biased against him on account of his religion and ethnic heritage. Following this complaint, the accused supervisor protested to the hospital that Dr. Nassar was not eligible for the new position he had been offered, as he was not on the University's faculty. The University then withdrew the job offer. Dr. Nassar sued, alleging in relevant part that the University retaliated against him for complaining of alleged harassment. A jury found in Dr. Nassar's favor on this claim. The Fifth Circuit affirmed, on the theory that retaliation claims brought under Title VII require only a showing that retaliation was a motivating factor for the adverse employment action, rather than a but-for cause.

The Supreme Court – with the usual 5-4 split – reversed the Fifth Circuit. Justice Kennedy, writing for the majority, found that "but-for" causation must be established in Title VII retaliation cases under 42 U.S.C. § 2000e–3(a). The Republican majority distinguished away the Civil Rights Act of 1991, which established that race, color, religion, sex, and national origin need only be a "motivating factor" to make an employment decision unlawful, noting that the Act did not explicitly include any form of retaliation in that list.

Justice Ginsburg wrote for the dissent, noting that the court has repeatedly held that retaliation in response to a complaint about discrimination *is* discrimination. The dissent highlighted the absurdity of the proposition that Congress intended the "motivating-factor" analysis not to apply to cases of retaliation, and noted the EEOC's longstanding position that the

"motivating-fact" standard did apply to cases of retaliation. Given the majority's ruling, the dissent also stressed that trial courts will now have to delivery two different causation standards to juries in cases involving both primary discrimination and retaliation for complaining about that discrimination.

Vance v. Ball State Univ., 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013): *An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim.*

Maetta Vance, an African American woman employed by Ball State University as a substitute server, claimed she was subjected to a hostile work environment created by Saundra Davis, another University employee. Vance alleged that Davis was her supervisor, and that the University should therefore be vicariously liable for Davis's actions. The District Court entered summary judgment for the University, finding that Davis did not qualify as a "supervisor" under Title VII because she did not have the authority to hire, fire, demote, promote, transfer, or discipline Vance. The University could not, therefore, be vicariously liable for Davis's actions. The Seventh Circuit affirmed on the same grounds.

The Supreme Court affirmed the Seventh Circuit in a party-line 5-4 vote, with Justice Alito writing for the majority. The Court adopted the same approach taken by the district court and Seventh Circuit, finding that employers are vicariously liable for hostile work environment claims if the hostile environment was created by a "supervisor," which it defined as someone with the ability to hire, fire, demote, promote, transfer, or discipline the victim. In reaching this conclusion, the Court abrogated opinions from the Fourth Circuit taking a more nuanced approach. *See Whitten v. Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010) (finding an individual to be a supervisory when he "had power and authority that made [the victim] vulnerable to his conduct in ways that comparable conduct by a mere co-worker would not")

Justice Ginsburg wrote for the dissent, noting that the majority strikes from the supervisory category employees who control the day-to-day schedules and assignments of other employees.

2013-14 Cases

The Supreme Court has decided several minor employment case this term. In **Lawson v. FMR LLC**, 134 S. Ct. 1158 (2014), the court found that the anti-retaliation provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which prohibits public companies from retaliating against whistleblowing employees, also protects employees of private contractors and subcontractors serving public companies. In **Sandifer v. U.S. Steel Corp.**, 134 S. Ct. 870, 187 L. Ed. 2d 729 (2014), the Court found that time spent donning and doffing protective gear was time spent "changing clothes" under 29 U.S.C. § 203(o) of FLSA, which means that the compensability of such time is determined by a collective bargaining agreement if one is in place. In **Heimeshoff v. Hartford Life & Acc. Ins. Co.**, 134 S. Ct. 604, 610, 187 L. Ed. 2d 529 (2013), the Court found that an ERISA plan could provide a limitations period for suits arising under the plan that begins to run before the cause of action accrues, as long as the period is

reasonable. In **United States v. Quality Stores, Inc.**, 134 S. Ct. 1395, 1396 (2014), the Court held that severance payments to employees who were involuntarily terminated were taxable wages for FICA purposes.

Two additional cases have not been decided at the time of writing. In **Lane v. Franks**, the Court will address whether the First Amendment prohibits the government from retaliating against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities, and if so, whether qualified immunity would bar a claim for damages for such an action. In the opinion below, the Eleventh Circuit found that because the record did not establish that the plaintiff had testified as a citizen on a matter of public concern, he could not state a claim for retaliation under the First Amendment. *See Lane v. Cent. Alabama Cmty. Coll.*, 523 F. App'x 709, 710 (11th Cir. 2013). In **NLRB. v. Noel Canning**, the Court will address whether President Obama's 2012 appointment of three members to the NLRB occurred during a "recess of the Senate" for the purposes of the Recess Appointments Clause. In the opinion below, the D.C. Circuit found that the Recess Appointments Clause only grants the President the power to fill vacancies that first occurred during the official intersession recess of the Senate, and that the appointments to the NLRB were therefore invalid. *See Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013).

Fourth Circuit

Composition of the Court

The only change in the Fourth Circuit over the past year was Judge Davis's decision to take senior status on February 28, 2014. On May 8, 2014, President Obama nominated Pamela Harris of Maryland to fill Davis's seat. Harris clerked for Justice Stevens and has worked for the Department of Justice, various law schools, and O'Melveny & Myers. Most recently, she served as the Executive Director of the Supreme Court Institute at Georgetown. Her nomination is currently pending before the Senate Judiciary Committee.

Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013): *Public employees who "liked" a sheriff's electoral opponent on Facebook were engaging in speech protected by the first amendment, and could not be terminated on that basis.*

Six former employees of the Hampton, Virginia sheriff's office were not reappointed to their positions after taking various acts to support the sheriff's electoral opponent. In a wrongful termination suit, all six alleged that the sheriff violated their First Amendment right to free association. Four of the six also alleged that they were they were terminated for engaging in speech protected by the First Amendment. The district court granted the defendant's motion for summary judgment, finding that (1) plaintiffs who "liked" the sheriff's opponent on Facebook had not engaged in expressive speech; (2) the fourth plaintiff alleging a violation of his right to freedom of speech failed to show that his speech was on a matter of public concern; (3) that no plaintiff established a causal relationship between their association with the opposing campaign

and their non-reappointment; and (4) that individual capacity claims against the sheriff were barred by qualified immunity.

The Fourth Circuit reversed as to three plaintiffs. It first distinguished a prior Fourth Circuit opinion, finding that the sheriff could not terminate the uniformed jailer plaintiffs for political reasons because their job duties did not require them to exercise policy making discretion. Addressing the freedom of association claims, the Court determined that three plaintiffs had showed sufficient evidence to support a finding of causation, in part because the sitting sheriff allegedly warned his employees not to support his opponent and told one employee that his support for the opponent would cost him his job. It dismissed the association claims of the other plaintiffs, largely because their support for the opponent was less public.

The Court also reversed as to three of the four claims based on the plaintiffs' having engaged in protected speech. It found that (1) a plaintiff who only "liked" the sheriff's opponent on Facebook had engaged in expressive, protected speech; (2) a plaintiff who posted a supportive comment about the sheriff's opponent on Facebook had engaged in expressive, protected speech; and (3) evidence could support a finding that the sheriff was aware of a third plaintiff's bumper sticker supporting the sheriff's opponent. The Court affirmed the dismissal of the fourth speech-based claim, which related to the circulation of a petition for reasons unrelated to the sheriff's election. Over dissent, the Court affirmed the district court's determination that qualified immunity protected the sheriff from liability in his personal capacity.

McCray v. Maryland Dep't of Transp., Maryland Transit Admin., 741 F.3d 480 (4th Cir. 2014): *Legislative immunity does not shield individuals from suit for actions taken before any legislative activity occurred.*

Marie McCray worked for the Maryland Transit Authority assembling an annual rider usage report for trains and buses. McCray fainted in 2007 because of diabetes related low blood sugar. Following this incident, McCray's supervisors hectored her about her fitness and ability to work, despite the fact that her doctors all said her diabetes would not impact her ability to work. Her supervisors transferred responsibilities related to the annual rider usage report to a consultant and refused to give her new job responsibilities. In October 2008, McCray's supervisors informed her that her position had been eliminated as part of a series of statewide budget cuts.

McCray alleged that that her position was cut because of discriminatory animus due to her race, gender, age and disability. Defendants moved to dismiss, arguing that because McCray's position was cut pursuant to a state budget decision, legislative immunity blocked the lawsuit. McCray moved for additional time to conduct discovery under Rule 56(d), as she had not had an opportunity to gather information as to how positions were chosen for elimination, or how many individuals with disabilities were employed by her employer. The district court converted the defendants' motion into a motion for summary judgment and dismissed McCray's claim, finding that any lawsuit was blocked by legislative immunity. It went on to find that any discovery would be immaterial to the immunity issue, finding that she failed to identify any factual issue pertinent to legislative immunity that remained in dispute.

The Fourth Circuit affirmed in part and reversed in part. It affirmed the dismissal of McCray's claims under the ADEA and the ADA, as neither provision abrogates state sovereign immunity. However, the Court reversed the dismissal of McCray's claim under Title VII. It found that legislative immunity would have precluded suit if McCray's position was terminated by the legislature because of discriminatory animus, or if McCray's supervisors advised the legislature to terminate her position because of discriminatory animus. However, it found that McCray alleged something different – that she was subject to discriminatory adverse employment actions that made her position vulnerable to the budget cuts that eventually came. As these actions were taken before any legislative activity, they were not shielded by legislative immunity. The Court therefore also found that the district court abused its discretion in denying her motion for discovery under Rule 56(d) as it related to her claims under Title VII.

Summers v. Altarum Inst., Corp., 740 F.3d 325 (4th Cir. 2014): *Temporary impairments can qualify as "disabilities" under the amended ADA.*

Carl Summers worked as an analyst for a government contractor in Alexandria. He fell while waiting for a train, fracturing his left leg and right ankle and tearing two tendons. His employer terminated him after his doctor told him that he could not put any weight on his left leg for six weeks, and that he would not be able to walk normally for at least seven months. He sued his employer under the ADA for failure to make reasonable accommodations and for wrongful termination. The district court dismissed his claims under the ADA after finding that a temporary condition, even up to a year, does not qualify as a disability under the Act.

The Fourth Circuit reversed. It found that Congress broadened the ADA's definition of "disability" by enacting the ADA Amendments Act of 2008. The Court emphasized that Congress intended the amended ADA to be interpreted "as broadly as its text permits." It noted that the EEOC, pursuant to its authority to construe "disability" more broadly, adopted new regulations providing that impairments providing that an impairment lasting less than six months can constitute a disability if they are sufficiently severe, and recognized that the EEOC found that "a person who cannot lift more than twenty pounds for 'several months' is sufficiently impaired to be disabled within the meaning of the amended Act[.]" The Court went on to reject the defendant's reliance on cases interpreting the ADA before it was amended. It ultimately found that "because Summers alleges a severe injury that prevented him from walking for at least seven months, he has stated a claim that this impairment 'substantially limited' his ability to walk," and thus fell "comfortably" within the amended Act's expanded definition of discovery.

Scott v. Family Dollar Stores, Inc., 733 F.3d 105 (4th Cir. 2013): *Class of female managers paid less than their male counterparts were not barred from bringing a class action by the Supreme Court's opinion in Wal-Mart v. Dukes.*

Fifty-one named plaintiffs and a putative class of current and former female managers of Family Dollar stores allege that they are paid less than male store managers who perform the same job, in violation of Title VII. Defendants eventually moved for a partial judgment on the pleadings, arguing that the plaintiffs' could not satisfy the class action requirements in Rule

23(b). Plaintiffs originally relied on the Ninth Circuit's certification of a comparable class in *Dukes v. Wal–Mart, Inc.*, 509 F.3d 1168 (9th Cir.2007), claiming that their claims were "virtually identical" to those found sufficient by the Ninth Circuit. The district court eventually denied Defendants' motion for judgment on the pleadings, finding that a fully developed evidentiary record was necessary to make findings as to class certification. In June 2011, the Supreme Court reversed the Ninth Circuit. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The district court then granted the Defendant's renewed motion to dismiss, and denied the Plaintiffs' motion for leave to amend, finding that "as a matter of law" under *Wal–Mart*, the Plaintiffs could not satisfy the Rule 23(a) commonality requirement because they allege they were discriminated against on the basis of their gender as a result of "subjective decisions made at the local store levels." The district court dismissed the Equal Pay Act class claims on the same basis, and held that their claims also failed to satisfy the predominance requirement in Rule 23(b)(3).

In a split opinion, the Fourth Circuit found that *Wal-Mart* did not set out a per se rule against class certification where subjective decision-making or discretion is alleged. Instead, it read the Supreme Court as focusing on whether "all managers exercise discretion in a common way with some common direction[.]" Plaintiffs therefore satisfy the commonality requirement when they allege that "the subjective practice at issue affected the class in a uniform manner." The Fourth Circuit further noted that such claims can be saved when a complaint alleges both discretion and "a company-wide policy of discrimination[.]" Finally, it stated that "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel."

In applying these standards to the proposed amended complaint, the Court found that it alleged uniform corporate policies and high-level corporate decision-making that were substantively different than those addressed in *Wal-Mart*, and also alleged that the discretionary decisions were made by high-level corporate decision-makers as opposed to the store level managers at issue in *Wal-Mart*. As such, the Court found that *Wal-Mart* did not preclude, as a matter of law, class certification based on the allegations of the proposed amended complaint, and held that the district court erred in concluding that amendment would be futile. The Court rejected the Defendant's argument that amendment would be prejudicial. It found that because the original complaint included a conclusory allegation of centralized control of compensation, the amended complaint would not pursue a new theory of liability.

Judge Wilkinson penned a strident defense, arguing that the majority "hollowed out" *Wal-Mart*, which it characterized as an opinion "written precisely for a dispute such as this one."

EEOC v. Baltimore Cnty., 747 F.3d 267 (4th Cir. 2014): *Employee retirement benefit plan that required older employees to pay a greater percentage of their salaries based on their age at the time of enrollment violated the ADA.*

Baltimore County employees contributed a fixed percentage of their annual salaries to fund a pension plan. Employees were generally eligible to retire and receive pension benefits after 30 years of service, regardless of their age. Employees were also generally eligible to retire

and receive pension benefits at age 60, regardless of the length of their employment. Given that the contributions of older employees would earn interest for fewer years than younger employees' contributions, the county determined that the older an employee was at the time of enrollment, the higher the rate that the employee would be required to contribute. In 1999 and 2000, two county employees filed charges of age discrimination with the EEOC. The EEOC ultimately filed charges against the county. In 2009, the district court granted summary judgment to the county, finding that the plan's employee contribution rates were not motivated by age, but by the number of years remaining until an employee reached retirement age. In 2010, the Fourth Circuit vacated the district court's order for failing to consider the plan's separate provision for service-based eligibility irrespective of age. On remand, the district court granted partial summary judgment for the EEOC, holding that the "but-for" cause of the disparate treatment was age.

The Fourth Circuit affirmed the partial grant of summary judgment. Defendant argued that the plan was motivated not by age, but instead by the "time value of money." The Court rejected this argument because the plan permitted employees to retire based solely on years of service. The court noted that a 20–year–old correctional officer and a 40–year–old correctional officer enrolled in the plan at the same time, and elected to retire after completing the required years of service, the older employee would have contributed a larger percentage of his annual salary to the plan, despite receiving the same level of pension benefits as the younger employee. The Court also easily rejected the defendant's argument that the plan fell within the safe-harbor provision at 29 U.S.C. § 623(l)(1)(A)(ii)(I).

Crockett v. Mission Hosp., Inc., 717 F.3d 348 (4th Cir. 2013): *Employee failed to forecast evidence sufficient to survive summary judgment as to her hostile work environment claims.*

Stephanie Crockett worked as a radiologic technologist for Mission Hospital. On February 16, 2010, Crockett received a final warning as to her use of cell phones on the job, which indicated that any further misconduct would result in her termination. Two days later, Crockett's supervisor, Harry Kemp, met with Crockett in an otherwise empty office to discuss the final warning. Kemp closed and locked the door. He then convinced Crockett to lift her shirt and expose the underside of her breasts, claiming that he wanted to ensure that she was not bugged. Crockett was in tears by the time she lifted her shirt. At the end of their thirty-minute conversation, Kemp stated that they should "seal it with a kiss." When Crockett refused, Kemp embraced her and twice kissed her on the cheek.

On February 25, Crockett met with her department's director, Teresa McCarthy. McCarthy stated that Kemp reported that Crockett continued to misuse her cell phone, and that she flashed him in an attempt to persuade him not to report the misuse. Crockett said that Kemp was trying to cover up something "horrific," but refused to elaborate. McCarthy said she would investigate, and placed Crockett on suspension pending the conclusion of the investigation.

On February 26, McCarthy met with Kemp, who denied that anything unusual had occurred. On March 1, an HR representative asked Crockett if Kemp had made sexual advances. Crockett nodded her head but refused to provide details. The HR representative provided

Crockett with a copy of the employer's sexual harassment policy, and advised her of the process for reporting a harassment claim. HR then interviewed five of Crockett's co-workers, but none said they had seen or heard anything unusual. Sometime before March 6, Crockett filed an EEOC charge. On March 8, Crockett returned to work after the employer failed to substantiate Kemp's allegations. The employer denied Crockett's requests to be placed under a different supervisor. On March 9, Crockett completed the employer's form complaint to report Kemp's harassment, but gave no information beyond the summary contained in her EEOC charge. Crockett first told HR the details of the incident on March 17. On March 18, the HR representative met with Kemp, who denied the allegations. Following the meeting, Kemp went home and committed suicide. On March 24, Crockett was terminated for tape-recording patients, co-workers, and HR investigators in violation of HIPPA and hospital policy.

The District Court granted the defendant's motion for summary judgment, finding that Crockett's harassment had not resulted in a tangible employment action, and that the *Faragher-Ellerth* defense shielded the employer from liability. The Fourth Circuit affirmed. It found that the only relevant tangible employment action was Crockett's temporary suspension, and that no evidence indicated that Kemp's harassment caused that action. It identified three separate grounds for this causation determination. First, at the time of her suspension, Crockett had only reported that Kemp had done something "horrific," not that he had engaged in sexual harassment. Second, it was not Kemp who decided to suspend her based on the allegation of unauthorized phone usage. Third, Crockett failed to produce evidence indicating that she suffered any pecuniary loss, as she had only cited a statement from her director that the suspension "would be unpaid *if* she did not have paid time off … available to cover it," and as there was no evidence that plaintiff did or did not have paid time off available, or that she was forced to use any paid time off during her suspension.

The Court also found the employer shielded by the *Faragher-Ellerth* defense, as it had conducted an investigation despite Crockett's vague complaint of "horrific" behavior. The Court also noted that the Crockett had repeatedly failed to provide her employer with additional details, and that she had provided no information that would have substantiated her supposed need to be transferred to a different supervisor.

Freeman v. Dal-Tile Corp., __ F.3d __, 2014 WL 1678422 (4th Cir. April 29 2014): *An employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment.*

Lori Freeman was an African-American woman working as a customer service representative for defendant. One of defendant's customers employed a sales representative, Timothy Koester, who interacted with Freeman more than once a day. Koester regularly made racially and sexually offensive comments over a period of three years, which included referring to "black bitches" and his sexual experience. In 2009, Koester called Freeman and asked that she cover a customer appointment for him, saying he was "as fucked up as a nigger's checkbook." Freeman reported this comment to her assistant manager, Sara Wrenn, who did nothing in response. Freeman subsequently told Wrenn that Koester called her a "black bitch."

Wrenn again did nothing. Freeman reported Koester's conduct to human resources, who stated that Koester would be permanently banned from the facility. The defendant subsequently lifted the ban, causing Freeman to take a medical leave of absence for depression and anxiety. When she returned to work, defendant informed her that Koester was still doing business with defendant, but would call Wrenn's cell phone for all work related calls. Freeman was constantly worried she would encounter Koester at work, and ultimately resigned.

Freeman alleged that she was subjected to a sexually and racially hostile work environment and that she was the victim of a discriminatory discharge. The district court granted defendant's motion for summary judgment. It found that Freeman failed to present create a genuine dispute on the issue of whether the harassment was objectively severe or pervasive, and that even if it were, Freeman would be unable to establish that liability should be imputed to defendant. The district court also found that plaintiff was not constructively discharged, but instead voluntarily resigned.

In a split opinion, the Fourth Circuit reversed in part. The majority first found the harassment could be found subjectively severe, noting that the plaintiff cried in front of co-workers, complained to her supervisors and human resources, and sought medical leave to seek treatment for depression and harassment. The Court also found that evidence supported a finding that the harassment was objectively severe and pervasive, noting the Koester's regular use of "bitch" and "black bitch," and emphasizing the how the use of the word "nigger" is "pure anathema" to African Americans. As a matter of first impression, the Court held that an employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment.

The majority also found that a reasonable jury could find that defendant knew or should have known of the harassment, as evidence demonstrated that Freeman's supervisor knew of all three of the most major incidents, and as the supervisor admitted to knowing that Koester regularly used vulgar language, made sexual comments, and that he showed pictures of naked women on his phone in the office. Finding the defendant's response to that notice inadequate, the Court emphasized that the conduct had been ongoing for three years. It found "particularly shocking" that defendant "took absolutely no action when Koester passed gas on Freeman's phone and made Freeman cry in Wrenn's presence, nor when Freeman promptly complained to Wrenn that Koester had used the word 'n* * * *r' on the phone with her." It recognized that while a communication ban may have been an adequate response had it been put in place sooner, defendant was not responding promptly to the harassment after three years of misconduct. The Court, however, affirmed the order of summary judgment as to the claims for constructive discharge, finding no intolerable conditions after Freeman's return to work.

Dissenting in part, Judge Niemeyer expressed "grave concerns" over permitting hostile work environment claims based on the conduct of third parties. He likewise argued that while the harasser had engaged in offensive behavior for three years, it could not have been so severe as to have created a hostile work environment until the summer of 2009, when the defendant took prompt remedial measures to address it.

EEOC v. v. Propak Logistics, Inc., 746 F.3d 145 (4th Cir. 2014): *District Court's order requiring the EEOC to pay Defendant attorneys' fees upheld where EEOC delayed in bringing suit nearly 7 years and pursued litigation despite knowing no relief would be available.*

A charge of discrimination was filed in 2003 alleging that the defendant refused to hire non-Hispanic applicants and employees for non-management positions at a Wal-Mart distribution center. The EEOC sporadically investigated the charge for several years, issuing a right to sue letter in February 2008 at the request of the charging party. The letter was issued before the EEOC concluded its own investigation. The charging party filed suit in March 2008, and had his claims dismissed four months later. In September 2008, the EEOC concluded its investigation, having found reason to conclude Defendant violated Title VII. In conciliation, the EEOC proposed remedial measures for the facilities at issue; however, in the years since the charge was filed, the Defendant had closed all the relevant facilities, making remedial measures impossible to implement. The EEOC then initiated a lawsuit in August 2009, more than six and a half years after the charge of discrimination had been filed.

The district court granted the defendant's motion for summary judgment based on the defense of laches. It found that the EEOC unreasonably delayed in initiated the lawsuit, and that the defendant was prejudiced by that delay because several important witnesses were no longer employed by defendant and likely could not be located, because even if they could be located they would likely have "faded memories," and because the defendant destroyed personnel records three years after employees left the company.

The district court also awarded defendant $192,602.95 in attorneys' fees, finding that the EEOC had acted unreasonably in filing the complaint, and alternatively had acted unreasonably in continuing the litigation in view of the developing record. Each of these findings were based on the fact that by the time the EEOC determined to bring the action, injunctive relief was not available because the defendant had closed the facilities at issue, and monetary damages were unlikely because the EEOC knew it could not identify the class of alleged victims.

The Fourth Circuit affirmed. It refused to consider whether laches is available as an affirmative defense to actions filed by a United States agency because the government abandoned its appeal of the summary judgment order. It then found that the district court did not abuse its discretion in awarding attorneys' fees, focusing primarily on the district court's conclusion that the EEOC was unable to identify the class of alleged victims when it brought suit. It recognized that this was an appropriate factor to consider because attorneys' fees can be justified when a plaintiffs seeks relief that it knew or should have known was unavailable. It noted that records only demonstrated that the EEOC had interviewed or contacted "potential" class members without indicating if they actually applied for or worked at the relevant facility, and without indicating if any actually had valid claims of discrimination.

Feldman v. Law Enforcement Associates Corp., __F.3d __, 2014 WL 1876546 (4th Cir. May 12, 2014): *Plaintiff failed to proffer evidence that his allegedly protected activity under the Sarbanes-Oxley Act was a contributing factor to his termination*

Paul Feldman, a former officer of the defendant, was terminated after a protracted period of tension between himself and defendant. He alleged that his termination amounted to retaliation for his having providing information about the defendant's potentially illegal conduct, in violation of the Sarbanes-Oxley Act ("SOX"). The district court granted the defendant's summary judgment motion, finding that the plaintiff failed to produce evidence demonstrating that the allegedly protected activities were a contributing factor to his termination.

The Fourth Circuit affirmed. It first addressed a procedural issue. To obtain relief under SOX, a plaintiff must first file a complaint with the Secretary of Labor through his designee, OSHA. If the secretary has not issued a final decision within 180 days of that filing, the plaintiff may file suit in federal district court. Here, Feldman originally brought non-SOX claims before the expiration of the 180 day waiting period, and subsequently filed an amended complaint with SOX charges after the 180 day period passed. The Court found that Feldman should have filed a supplemental complaint under Rule 15(d), not an amended complaint, as the amended complaint technically related back to the date of the filing of the first complaint. However, it found that it was not required to apply the doctrine of relation back so strictly as to bar the action, and construed the amended complaint as a supplemental pleading under Rule 15(d).

The Fourth Circuit then affirmed the District Court's grant of summary judgment. Although SOX requires only that the protected activity be a "contributing factor" in the employment decision, the Court found that the Feldman failed to meet this "rather light" burden. It found that there was a complete absence of temporal proximity, as the most significant protected activity occurred roughly twenty months before his termination. Most significantly, the Court found that the Feldman's termination occurred less than a month after an incident which Feldman concededly caused the defendant's directors to feel that Feldman had "thrown them under the bus." Further, another employee who engaged in similarly protected conduct was not terminated. The Court discounted Feldman's assertion that his strong work performance was proof that his termination was retaliatory, as he failed to offer evidence that the defendant considered him to have a strong performance record, and as the defendant cited insubordination, not substandard performance, as the reason for the termination.

Smith v. Gilchrist, __ F.3d __, 2014 WL 1910833 (4th Cir. May 14, 2014): *Defendant District Attorney who terminated the plaintiff after he made public statements criticizing a government program unrelated to the District Attorney's office was not entitled to qualified immunity in a § 1983 suit for first amendment retaliation.*

Sean Smith was an assistant district attorney running for district court judge. In the course of his campaign, in he gave a television interview criticizing a defensive-driving course taken by some individuals given traffic citations. Smith was not involved with traffic violations in his role as assistant district attorney, and did not criticize the district attorney's office in the interview. In a subsequent meeting with the District Attorney, Smith stated that he had problems

with the DA's office recommending that some individuals attend the course. Smith declined to identify any additional policies at the DA's office to which he objected. He was then terminated, with the DA claiming that this refusal amounted to insubordination.

Smith brought a § 1983 action alleging that he was terminated for engaging in speech protected by the First Amendment. The District Court granted defendant's motion for summary judgment, assuming that Smith had created a jury issue regarding whether his constitutional rights had been violated, but concluding that defendant was entitled to qualified immunity.

The Fourth Circuit reversed. The case turned on the question of whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public. The Court found that defendant had failed to meet its burden justifying the discharge on legitimate grounds, given that Smith had not criticized the DA's office in the interview, and that there was no evidence that his comments would cause problems with harmony, discipline, efficiency, or effectiveness in the DA's office.

Defendant argued that, despite these facts, it would not have been clear to a reasonable official in the DA's position if Smith's interests outweighed the government's. He argued that since the traffic course reduced the DA's caseload, a reasonable DA could have concluded that any public criticism of the course undermined the operation of the DA's office. The court easily rejected this argument, finding that programs that reduce a government agency's workload are not simply off limits from criticism from government employees. It noted that while the balancing test at issue can be complicated, it was not complicated in this case because "there is nothing on the employer's side of the ledger to weigh."

Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217 (4th Cir. 2014): *Dodd–Frank Wall Street Reform and Consumer Protection Act does not prohibit the arbitration of employees' non-whistleblower claims.*

Dr. Armand Santoro was terminated by defendant, having worked under an employment contract that compelled arbitration of all employment claims. Santoro filed suit in the Eastern District of Virginia, alleging claims under the ADEA, the FMLA, and ERISA. Defendant moved to compel arbitration. Santoro contended that the Dodd-Frank Act, which prohibits pre-dispute agreements to arbitrate whistleblower claims, invalidated in *toto* all arbitration agreements by publically-traded companies that lack a carve-out for Dodd-Frank whistleblower claims, even if the plaintiff is not a whistleblower. The District Court rejected Santoro's argument, and granted defendant's motion to compel arbitration.

The Fourth Circuit affirmed. It found that where a plaintiff is not pursuing Dodd-Frank whistleblower claims, the Act does not override the Federal Arbitration Act's mandate that arbitration agreements are enforceable.

Boyer-Liberto v. Fontainebleau Corp., __ F.3d __, 2014 WL 1891209 (4th Cir. May 13, 2014): *Employee could not have had an objectively reasonable belief that a hostile work environment existed when she complained of a co-worker twice calling her a "porch monkey"; she therefore could not maintain an action for unlawful retaliation under Title VII and § 1981.*

Reya Boyer–Liberto, an African American, was hired by defendant on August 4, 2010. Over the following weeks she had several documented job performance problems. On September 14, another employee, Trudy Clubb, angrily confronted Liberto over a job-related issue and referred to Liberto as a "porch monkey." Clubb described herself as the restaurant's "manager," but at the time Liberto did not believe her to be a manager. The next day, Liberto went to Clubb's office to complain about the incident, and Clubb again referred to her as a "porch monkey." Liberto spoke with an HR director on September 17, and Clubb was issued a written warning the next day. Also on September 17, Liberto's supervisor met with the defendant's owner, discussing Liberto's conflict with Clubb and her performance problems. They determined that Liberto should be fired, and on September 21, 2010, terminated her. Liberto sued for race discrimination and retaliation. The district court granted the defendant's motion for summary judgment, finding the conduct too isolated to support either claim. The Fourth Circuit affirmed, with Judges Shedd and Niemeyer issuing the majority opinion over Judge Traxler's partial dissent.

The Court unanimously affirmed the grant of summary judgment on the hostile work environment claims. It emphasized that hostile work environments "generally result after an accumulation of discrete instances of harassment," and that Liberto had alleged "only two conversations, on consecutive days… both of which arose from a single incident[.]" The Court distinguished *Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013), a case denying summary judgment where there had only been two offensive conversations, noting that in that case "the hostile work environment was not precipitated by a single event, but rather by two independent statements having ongoing applicability, made by two different supervisors of the plaintiff… made during conversations directly about the plaintiff's pay and work assignments—clear situations in which the statements 'alter[ed] the conditions of the victim's employment.'"

The majority also affirmed the grant of summary judgment on the retaliation claims. It found that Liberto could not have had an objectively reasonable belief that she was complaining of an unlawful hostile work environment, relying largely on *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 339 (4th Cir. 2006). The court emphasized that Liberto had "emphatically" testified that she did not know Clubb was the restaurant's manager, and that she had been explicitly told that Clubb lacked the authority to make decisions. Disturbingly, the Court stated that: "[i]n the circumstances of this case, if no objectively reasonable *juror* could have found the presence of a hostile work environment, as we today hold, it stands to reason that *Liberto* also could not have had an objectively reasonable belief that a hostile work environment existed." Finally, the Court found that nothing in the facts would have supported a reasonable belief that the environment was likely to ripen into a hostile work environment.

Dissenting as to the retaliation claim, Judge Traxler emphasized that a single, sufficiently severe incident may create a hostile work environment. He stated that he "share[d] in the sentiment" expressed in Judge King's dissent from *Jordan*, recognizing that the decision placed victims into a "Catch-22 situation" in which "they can either report the offending conduct to

their employer at their peril, as the Supreme Court has essentially required them to do in order to preserve their rights, or they can remain quiet and work in a racially hostile and degrading work environment, with no legal recourse beyond resignation."

Barton v. House of Raeford Farms, Inc., 745 F.3d 95 (4th Cir. 2014): *Plaintiffs' South Carolina Payment of Wages Act claims were preempted by a collective bargaining agreement.*

Plaintiffs were employed by the defendant under a collective bargaining agreement ("CBA"). They alleged that the defendant violated the South Carolina Payment of Wages Act by providing written notice to employees that they would be paid based on "clock time," while actually compensating them for only "line time." Plaintiffs' CBA did not address this issue. Plaintiff also brought FLSA claims and alleged that defendant retaliated against them for instituting workers' compensation proceedings. The district court granted defendant's motion for summary judgment as to the plaintiff's claims under FLSA, but denied as to all additional claims. A jury then awarded 16 employees damages for their South Carolina Wage Act claims, and following a bench trial on the retaliation claim, the court found in favor of 8 employees.

On appeal, a divided panel of the Fourth Circuit reversed in part. In the majority, Judge Niemeyer and Agee found that under the Labor Management Relations Act, the employees' collective bargaining agreement preempted their claims under the South Carolina Wage Act. The Court found that any wages owed were necessarily those agreed to in the CBA, and that the plaintiffs' claims under the South Carolina Wage Act therefore turned on a disagreement with defendant's interpretation of how to calculate their "hours worked" under the CBA. The Court also reversed six employees' retaliation judgments, finding that they failed to present evidence satisfying South Carolina's requirements for recovery.

Judge King dissented, except as to the majority's affirmance of two of the retaliation judgments. He argued that the resolution of the plaintiff's claims did not require interpretation of their CBA, which was silent as to the "line time"-"clock time" issue. He also noted that the LMRA does otherwise preempt nonnegotiable rights conferred on employees as a matter of state law, which he argued included the right to written notice of their normal hours and wages. Judge King also disagreed with the majority's conclusion that the six of the plaintiffs failed to establish retaliation claims under South Carolina law.