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# Newsletters

## Employment Practices Newsletter - February 2013

**February 1, 2013**


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### NLRB Recess Appointments Are Invalid

The National Labor Relations Board (NLRB) is composed of five members appointed by the President, with the advice and consent of the Senate. Traditionally, Presidents have appointed three members from their own political party, and two members from the opposition party. The Constitution authorizes the President to make "recess" appointments when the Senate is not in session. On January 4, 2012, President Obama attempted to make three recess


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appointments to the NLRB: Democrats Sharon Block and Richard Griffin, and Republican Terrence Flynn. Since that date, the NLRB has issued numerous decisions. One of the employers who was found to have committed an unfair labor practice challenged the validity of the NLRB decision based on the recess appointments. On January 25, 2013, in Noel Canning Division of *Noel Corporation vs. NLRB,* No. 12-1115 (D.C. Cir., January 25, 2013), the D.C. Circuit Court of Appeals determined that President Obama exceeded his authority by trying to make three recess appointments because the Senate was not in recess. Therefore, the NLRB's unfair labor practice finding against that employer was denied enforcement, and the effect of other NLRB decisions in numerous other cases is now subject to question. The NLRB has stated that it "will continue to perform our statutory duties and issue decisions." It is expected that the NLRB will attempt to appeal this decision to the Supreme Court. In the meantime, employers are caught in a significant dilemma: should they comply with the many pro-union and pro-employee decisions issued by the NLRB after January 4, 2012? Although one cannot predict if or how the Supreme Court may rule, the most prudent course of action for employers may be to comply with all NLRB decisions until a final determination is made.

http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf

**Mandatory Bus Rides to Plant Deemed Not Compensable Work Time Under FLSA**

An engineering and construction services contractor offered its laborers the option of parking at a plant parking lot or participating in a park-and-ride program that would take the laborers directly to the plant. It later required all employees to participate in mandatory park-and-ride. Laborers scanned their plant badges and then boarded the buses, where they were subject to the contractor's rules regarding use of alcohol, tobacco, weapons and cell phones. Upon arrival at the plant, laborers again scanned their badges and then proceeded to begin work. At the end of the day, the laborers boarded the buses and returned to the lot. The daily total travel time varied from 40 to 60 minutes. A journeyman electrician filed a collective action claiming that the mandatory busing scheme violated the Fair Labor Standards Act (FLSA) because the laborers were not compensated during the bus rides, but should have been because the rides were mandatory and the laborers were subject to the contractor's rules during that time. The district court granted the contractor summary judgment, noting that the sole fact that the contractor had this mandatory busing scheme did not *per se* render the travel time to be compensable. The electrician appealed. The U.S. Court of Appeals for the Fifth Circuit affirmed. The court found that the Portal-to-Portal Act exempts employee compensation for ordinary commuting to and from work. The court also noted that no federal circuit has addressed whether a mandatory transportation scheme *per se* renders the travel time to be compensable under the FLSA. In finding the time to be not compensable, the court stated that the mandatory busing scheme was "simply normal traveling time that laborers would also be required to undertake by the mere fact of working" at the plant. The laborers were permitted to engage in personal activities such as sleeping and reading during their bus rides, which further confirmed that the time was not compensable. Employers must be familiar with federal, state, and even local laws concerning what constitutes "compensable time" and ensure that employees are paid accordingly.

*Griffin v. S&B Engineers & Constructors, Ltd.,* No. 12-40382 (5th Cir. Jan. 11, 2013)

**Failure to Object to EEOC Subpoena Within Five Business Days Waived Future Objection**

Six days after receiving a subpoena from the U.S. Equal Employment Opportunity Commission (EEOC), an employer refused to provide certain records, arguing that the subpoena sought irrelevant information and was overly burdensome. The EEOC moved to enforce the subpoena in federal court. The court rejected the employer's motion to dismiss on the merits, without considering the timing issue. A panel of the U.S. Court of Appeals for the Seventh Circuit held that the employer had failed to object to the EEOC subpoena within five business days and that pursuant to the plain terms of the EEOC's regulations, lost any right to object to the subpoena on relevancy or overbreadth grounds. Although this was an issue of first impression for the Seventh Circuit, the court noted that several district courts had found in similar cases that an employer is barred from objecting later when no initial petition was filed. Finding no reason to make an exception to the rule, the court concluded that "failure to file a timely petition to revoke or modify a subpoena" bars "an employer from challenging a subsequent application by the EEOC to enforce its administrative subpoena." Employers should ensure that all parties responsible for receiving and/or responding to administrative subpoenas from the EEOC are aware of the five-day response rule, particularly in light of this holding placing even more importance on a quick response. When it comes to objecting to EEOC subpoenas based on relevancy or burden, employers only get one bite at the apple—and that bite

needs to be taken quickly.

*EEOC v. Aerotek,* No. 11-1349 (7th Cir. Jan. 11, 2013)

**NLRB Finds Statutory Right to Picket on Private Walkways in California**

A grocery store became a target for union picketing after it opened a warehouse grocery store under a different name in Sacramento, California. The union picketed the store because the workers were not represented and had no collective bargaining agreement. The union agents held signs and distributed fliers in front of the store's entrance and walkways but did not impede customer access to the store. The grocery store contacted the Sacramento Police Department to remove the picketers. The police declined to remove the picketers without a court order. The grocery store sought injunctive relief, claiming that the union was trespassing by using the walkway in front of the store as a forum for expressive activity. The court declined to issue the injunction, finding that the union's activities were not unlawful. The California Court of Appeals reversed and remanded. The court determined that the store's entrance area was not designed and presented to the public as a public meeting place, and therefore did not constitute a public forum under the state Constitution's liberty of speech provision. Because these areas did not constitute a public forum, the grocery store could limit the speech and could exclude anyone desiring to engage in protected speech. The court also concluded that both California's Moscone Act and Cal. Lab. Code § 1138.1 violated the U.S. Constitution's First and Fourteenth Amendments because they gave speech about labor disputes greater protection than speech on other issues, thereby permitting content-based speech distinctions. On appeal, the California Supreme Court agreed that the entryway of the store was not a public forum and therefore not an area that enjoyed constitutionally protected free speech rights. To be a forum, the Court stated, the area in the shopping center must be "designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, and not merely to walk to or from a parking area, or to walk from one store to another." The Court then found that the picketing activities had statutory protection under the Moscone Act and the California Labor Code. Employers should be mindful that public walkways may quite possibly constitute a "public forum" for the purposes of speech, and should take caution as labor efforts may expand activities closer to employers' private properties.

*Ralph's Grocery Co. v. United Food & Commercial Workers Local 8, Cal.,* No. S185544, (Cal. App. Dec. 27, 2012)

**Denial of Severance Plan Benefits to Terminated Employee Was Within Plan Administrator's Discretion**

An employee worked for an employer for 25 years. While at work, the employee removed a set of audio speakers and some speaker wire from a wall at the employer's facility. The employee claimed that he did so in order to move the audio equipment to his office, and that he had no intention of stealing the equipment from his employer. The employer contended that the employee had violated company policy by misappropriating company property, and terminated him. The employee sought benefits under the employer's severance pay plan (plan), which provided that it would pay severance benefits upon an involuntary separation from service "due to unsatisfactory job performance for reasons other than willful misconduct." In denying the employee's claim for benefits, the plan's administrator concluded that the employee had been terminated for violating a company policy, which was deemed to constitute willful misconduct for purposes of the plan. The employee sued, challenging the denial of his severance benefits. In affirming summary judgment for the employer, the U.S. Court of Appeals for the Eighth Circuit applied an "abuse of discretion" standard to the plan administrator's denial of severance benefits. Noting that the plan's terms gave discretionary authority to the plan administrator, the plan language required the court to review the employer's interpretation of the plan for abuse of discretion. Despite the employee's various challenges to the plan administrator's review of his claim, the court held that the administrative record reasonably supported the conclusion reached by the employer. An employer's ERISA plan documents should provide broad discretion to the plan administrator in determining eligibility for benefits.

*Carr v. Anheuser-Busch Companies, Inc.,* No. 12-1224 (8th Cir. Dec. 21, 2012)

**Eleventh Circuit Affirms Summary Judgment in ADEA Case Where Plaintiff Used "Cat's Paw" Theory**

An employer discovered that a supervisor committed more errors than any other supervisors, did not fully understand his duties, and had not improved over time. The employer was in the process of evaluating its financials and decided to

eliminate two of the supervisor positions. A senior manager decided that the subject supervisor should be selected based on his own personal observations of the employee's discomfort with computers and slow production of paperwork when compared with the other supervisors. The senior manager also sought and obtained input from the other supervisors (all of who agreed with his decision), but had already decided to include the subject supervisor in the reduction-in-force (RIF). After being terminated, the supervisor sued, claiming that his termination at age 71 was due to his age. The supervisor cited comments by his immediate supervisor that he was "too slow" doing his job, that he would recommend the supervisor's termination if there were cutbacks, while also saying "age has nothing to do with it." The employer claimed that it was a RIF that led to the discharge. The U.S. Court of Appeals for the Eleventh Circuit examined the standard under the Age Discrimination in Employment Act (ADEA) that requires plaintiffs to prove that age discrimination was the "but-for" cause of the complained-of adverse employment action. The court noted that the supervisor was trying to use circumstantial evidence to establish age discrimination, and that the employer claimed budgetary reasons were the cause. The court noted that the record showed no evidence of age bias by the decision-making senior manager or that the inference was far too weak to satisfy the "but-for" standard. The court also rejected an argument that the senior manager was a "cat's paw" or supervisor agent who expressed the alleged discriminatory age bias of his immediate supervisor. The senior manager not only had not been accused of having made age-derogatory comments, but had regularly evaluated supervisory personnel, including the employee, and their performance. The decision to place the employee in the RIF was his own decision, regardless of whether the employee's immediate supervisor shared the same opinion of his job performance. The court concluded that no reasonable juror could rule in favor of the employee given the absence of "but-for" causation evidence, and that there was no evidence that the alleged age-biased conduct of his immediate supervisor created any "determinative influence" on the senior manager's decision to place him in the RIF. This case underscores the benefits of having someone other than an immediate supervisor of personnel involve themselves and make their own evaluations of job performance and accompanying discharge decisions.

*Sims v. MVM, Inc.,* Case No. 11-11481 (11th Cir. Jan. 17, 2013)

**NLRB Gives Unions Greater Access to Witness Statements**

A certified nursing assistant (CNA) at a continuing care facility was discharged after a charging nurse reported her for sleeping on the job. The CNA and her union filed a grievance regarding the discharge and requested the witness statements the employer had obtained during its investigation. The employer denied the request, prompting the union to file an unfair labor practice charge for failure to supply information in violation of Section 8(a)(5) of the National Labor Relations Act. The National Labor Relations Board (NLRB) ruled in the union's favor, overruling a 36-year-old "bright-line rule" denying unions pre-hearing access to an employer's witness statements. The current NLRB has chosen a flexible approach that balances a union's need for requested information with an employer's interests in assuring employee participation in investigations, protecting employees from intimidating and effectively conducting investigations. Employers faced with requests for witness statements now have the burden of showing that a legitimate and substantial confidentiality interest outweighs the union's need for requested information. Accordingly, employers should be more vigilant in documenting workplace bullying and harassment.

Am. Baptist Homes of the W. d/b/a Piedmont Gardens, 359 NLRB No. 6 (NLRB, Dec. 15, 2012)

**Employee's Discrimination Claim Not Preempted by Collective Bargaining Agreement**

An employee requested accommodation from her employer after it combined her position with another position which required heavy lifting that would aggravate the employee's previous back injury. The employee stated that she would need the assistance of another employee for heavy lifting tasks. The employer suggested moving the employee from second shift to first shift, where another employee was available to assist with her duties. The union refused to agree to allow the employee to circumvent the existing seniority system and take the place of more senior employees on the first shift. The employer then placed the employee on an unpaid medical leave of absence and invited her to apply for other available positions. The employee pursued her remedies under the parties' collective bargaining agreement (CBA), but did not submit her grievance to arbitration. Instead, she sued her employer in state court for disability discrimination and retaliation in violation of state law. The employer removed the case to federal court and argued that the state law claims involved an interpretation of her CBA. The district court dismissed the employee's claims because she had not pursued

arbitration. The U.S. Court of Appeals for the Sixth Circuit reversed and ruled that the employee's state law claims were not so "inextricably intertwined" with the CBA's terms to require preemption. The court reasoned that the employee's complaint did not stem from any disagreement about the CBA provisions and was only tangentially related to her claim. Moreover, the employee herself had not requested an accommodation that implicated the seniority of other employees. As such, simply because an employee's accommodation may involve aspects of a CBA, it does not necessarily mean the employee must exhaust the grievance procedure in the CBA before filing a discrimination claim under state law.

*Paul v. Kaiser Foundation Health Plan of Ohio,* No. 11-4217 (6th Cir. Dec. 11, 2012)

**NLRB Permits Unions to Charge Dues Objectors for Lobbying**

A former union member filed an unfair labor practice charge alleging that the union, which represented hospital employees, violated the National Labor Relations Act by its treatment of her and other employees who resigned their union memberships and objected to paying dues unrelated to collective bargaining, contract administration, or grievance adjustment. The National Labor Relations Board (NLRB) issued a complaint against the union, and an administrative law judge sustained some allegations. On review of the case, the NLRB ruled that a union with a collective bargaining agreement that includes a union-security clause may charge nonmember dues objectors for union lobbying expenses that are "germane to collective bargaining, contract administration or grievance adjustment." The NLRB found, for example, that lobbying expenses associated with minimum wage legislation, professional licensing, and state supplements to the WARN Act are chargeable to objectors, while those related to general economic stimulus or "broad social or environmental policies" are not chargeable. Although the NLRB provided such examples, it left unanswered precisely what lobbying expenses may be chargeable. The NLRB did, however, invite briefing on how it should apply its new standard going forward. The deadline to file *amicus* briefs addressing how the NLRB should define and apply a "germaneness standard" is February 19, 2013. It is anticipated that the NLRB will accept the union's arguments that every lobbying function is meant to improve its members' lives and is related to collective bargaining, thereby allowing for the vast majority of lobbying expenses to be charged to objectors, and creating a broad exception to the holding in *Communications Workers v. Beck,* 487 U.S. 735 (1988), where the U.S. Supreme Court held that those who object to paying the required dues may only be charged for the percentage of dues used for purposes of collective bargaining, contract administration, or grievance adjustment. Employers that seek to have input on the NLRB's definition of this term are encouraged to submit their proposals.

*United Nurses & Allied Prof'ls (Kent Hosp.),* 359 NLRB No. 42, (Dec. 14, 2012)

**Employee's Email Requesting Time/Place for Expressing Breast Milk Did Not Constitute a "Complaint" Under the FLSA**

An employee sued her employer, claiming that she was not allowed to express breast milk and that she was terminated after she asked for a time and place to do so, in violation of the Fair Labor Standards Act (FLSA). The U.S. Court of Appeals for the Eleventh Circuit found that the employee had been given the necessary breaks to express breast milk and had access to a private place to do so. Based on the employer's actions, the court held that the district court had properly concluded that the evidence was insufficient for a reasonable jury to find that the employer violated Section 207(r)(1) of the FLSA. The employee also argued that she was retaliated against because she filed a complaint within the meaning of Section 215(a)(3) of the FLSA when she emailed her supervisor and asked for a time and place to express breast milk. The court held that neither the context nor content of the employee's email put the employer on notice that the employee was lodging a grievance. The court also rejected the employee's argument that emails to friends and family in which she voiced her discontent effectively notified the employer of her grievance. This decision provides guidance to employers addressing the needs of nursing mothers in the workplace. Employers should work with their employees to develop solutions that comply with the FLSA and state law and that balance other human resources considerations. Employers should regularly review their policies and practices regarding nursing mothers to ensure compliance with applicable law.

*Miller v. Roche Surety and Casualty Co., Inc.,* No. 12-10259 (11th Cir. Dec. 26, 2012)

**Pension Plan Participants Class Certified Despite Individualized Damage Issues**

Current employee participants and former participants in an employer's cash balance pension plan sued the employer sponsoring the plan, alleging that they were not credited with benefits to which the plan entitled them over the course of a 23-year period. The more than 4,000 participants sought certification as a class, and raised claims depending upon their employment status and the nature and form of the benefits they sought, including interest credit "whipsaw," "cut-back" and "wear-away" claims. The district court certified the class, but based on the varying issues within the class, divided the participants into 10 subclasses. The employer appealed to the U.S. Court of Appeals for the Seventh Circuit, challenging the class certification under Fed. R. Civ. P. 23(b)(2). The employer argued that based on the U.S. Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011), the participants could not bring a Rule 23(b)(2) class action seeking declaratory or injunctive relief and monetary relief, because if the class were to be certified and awarded the relief sought, each participant would potentially be entitled to claim an individualized award of damages. Thus, the employer argued, the class should not have been certified because *Dukes* provided that a class could be certified only if a single injunction or declaratory judgment would provide relief to all subclasses. The court rejected both arguments, stating that a single injunction or declaratory judgment issue was not applicable where each subclass member had the same claim. It also provided that any monetary relief awarded would be incidental to the other relief sought. Employers should be aware that the class certification under Rule 23(b)(2) over issues arguably involving individualized damages is not unlikely.

*Johnson v. Meriter Health Services Employee Retirement Plan,* No. 12-2216 (7th Cir. Dec. 4, 2012)

**NLRB Holds That Employer Must Bargain Before Taking Disciplinary Action**

General counsel for the National Labor Relations Board (NLRB) filed a complaint against an employer, asserting that the employer violated its duty to bargain with the union pursuant to the National Labor Relations Act (NLRA) when it took unilateral disciplinary action against its employees. The NLRB held that "like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and . . . employers may not impose certain types of discrimination unilaterally." The NLRA provides that employers must bargain before imposing a change that alters the terms and conditions of employment for their employees if the change "has a material, substantial, and significant impact on a worker's employment." Accordingly, the NLRB found that when an employer imposes major discipline, such as suspension, demotion or discharge, an employer's duty to bargain before such action is taken is triggered. The NLRB held that for more minor discipline, such as oral and written warnings, an employer may bargain after the action has been taken. Employers that have unionized employees must be mindful of their obligations to bargain with the union before taking certain forms of disciplinary action.

*Alan Ritchey Inc.,* 359 N.L.R.B. No. 40 (NLRB Dec. 14, 2012)

**Is "Hearing" an Essential Function of a Lifeguard Position?**

A deaf individual who could detect noises through the use of a cochlear implant and who used American Sign Language (ASL) to communicate successfully completed two lifeguard training programs. Although the applicant had an ASL interpreter to assist with verbal instructions, the interpreter did not help with lifesaving tasks. The applicant applied for and was conditionally offered a lifeguard position with a county subject to passing a pre-employment physical. The doctor determined that because the applicant was deaf, he could not be a lifeguard, unless he was constantly accommodated. The county then undertook a job task analysis to determine whether the applicant could perform the job with or without accommodation, and because it was uncertain whether the applicant could safely work as a lifeguard by himself, the offer of employment was revoked. He then applied for another lifeguard opening but was not hired. The applicant sued the county, alleging that he had been discriminated against on the basis of disability in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act when it failed to hire him as a lifeguard. The U.S. Court of Appeals for the Sixth Circuit reversed summary judgment for the county. Various expert witnesses had offered testimony and opinions regarding the ability of a deaf lifeguard to serve safely and testified that the ability to hear is not necessary for one to perform the essential functions of the job. Further, it was discovered that the county's doctor failed to make an individualized inquiry regarding the disability because he simply opened the applicant's file, and concluded "He's deaf; he can't be a lifeguard" without considering whether he could perform the essential functions of the position. The court also

noted that it was unclear whether there was ever an individualized inquiry made in that no one ever spoke to the applicant or inquired of his abilities. The court then considered whether the ability to hear is an essential function of a lifeguard position, an issue not then yet addressed by any federal circuit. The court found that the ability to communicate is an essential function of the position and that the evidence presented demonstrated that the applicant could communicate effectively despite being deaf. Indeed, the court noted that the world record for most lives saved is held by a deaf man and that the American Red Cross regularly certifies deaf lifeguards. The court further concluded that the provision of an interpreter during staff meetings could be reasonable, and that the employer failed to advance any evidence to demonstrate that having an interpreter for this limited purpose would pose an undue hardship. Knowing how to properly engage in the interactive process to determine whether and/or how an individual can be accommodated is key for any employer.

**CORRECTION: An earlier version of this article incorrectly stated that the U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment for defendant county. The article has been corrected to reflect that the appellate court reversed summary judgment for the county.**

*Keith v. County of Oakland,* No. 11-2276 (6th Cir. Jan. 10, 2013)

**Arbitration Agreement With Class Waiver Deemed Enforceable in FLSA Case**

A residential care facility administrator entered into an arbitration agreement when she was hired. The agreement provided that she would submit all claims relating to her employment to arbitration, and it contained a class waiver. The administrator later filed a class action against the employer, claiming that she and others were misclassified as "exempt" employees, but were entitled to overtime pay under the Fair Labor Standards Act (FLSA) because they regularly worked more than 40 hours per week. The employer contended that a class action waiver is not rendered impermissible by the language or the legislative history of the FLSA. The U.S. Court of Appeals for the Eighth Circuit noted that the administrator identified no authorities demonstrating a congressional intent to preclude employees from agreeing to arbitrate FLSA claims individually. It also rejected the administrator's attempt to establish an inherent conflict between the FLSA and the Federal Arbitration Act by relying upon recent decisions from the National Labor Relations Board, because such decisions are merely advisory and not controlling. The Eighth Circuit reached a conclusion consistent with the other courts of appeals that have considered this very issue and have similarly concluded that arbitration agreements containing class waivers are enforceable in FLSA cases. Arbitration agreements, particularly those containing class action waivers, are at the forefront of employment litigation. Employers are cautioned to work closely with counsel to ensure that their agreements are up-to-date and compliant with applicable federal and state laws so that they will withstand any potential challenge.

*Owen v. Bristol Care, Inc.,* No. 12-1719 (8th Cir. Jan. 7, 2013)

**D.C. Circuit Upholds Disclosure of Sensitive Information to Union Following Employer's Competitive Disadvantage Claim**

During contract negotiations, an employer claimed that wage concessions were needed due to competitive pressures. The union requested sensitive customer and pricing information to support the employer's claim. The employer refused to turn over the information, citing a desire to remain competitive. It then locked out the bargaining unit employees. The matter was brought before the National Labor Relations Board (NLRB), which found that the union's information request was relevant to its duties as the employee's bargaining representative, and thus, the employer was not entitled to withhold the information or lock out the employees. The U.S. Court of Appeals for the D.C. Circuit concluded that because the union had tailored its information request to the employer's competitive pressures claim, a denial of that request constituted an unfair labor practice. In doing so, the D.C. Circuit affirmed the NLRB's application of a "liberal discovery-type standard" when reviewing a union request for proof of an employer's assertion of competitive pressure. This case highlights the importance of carefully considering requests for access to information and having sufficient backup to support a denial or lockout.

*KLB Industries, Inc. v. National Labor Relations Board,* No. 11-1280 (D.C. Cir. Dec. 4, 2012)

**Employee's Utter Lack of Evidence Leads to Dismissal of All Claims**

A former purchasing officer suffered from hypertension, mental illness, spinal arthritis, and osteoarthritis. By way of accommodation, she sought an adjusted work schedule, an office to accommodate her wheelchair, a closer parking space, and the ability to wear sneakers. She alleged that she was denied these accommodations, was referred to as a "cripple" and "hopalong," received a 5 percent salary reduction, and was terminated from her position. She further alleged that her salary reduction and termination were the result of taking leave, requesting accommodations, and filing a charge with the U.S. Equal Employment Opportunity Commission, and that she was deprived of three days of FMLA leave. The former purchasing officer sued her employer and various individuals. The employer argued that the individual claims were barred by Eleventh Amendment immunity and that her claims for reinstatement and/or front pay were barred because she had applied for Social Security Disability, attesting that she was totally disabled and thus unable to work. The U.S. Court of Appeals for the First Circuit found that the employee had failed to present sufficient evidence to meet her burden of demonstrating that her leave was reduced, that she was denied an accommodation, or that the reasons for the salary reduction and/or termination were merely pretexts for retaliation or discrimination. The employee lacked evidence to establish that her physical or mental conditions were severe, long-term or permanent, or that her difficulties walking, sitting, standing, or concentrating were any more difficult than similar afflictions suffered by most adults. Thus, the court concluded that she could not prove she was disabled. Defending discrimination suits is a fact-specific endeavor, and varies state-by-state. Here, the employer prevailed due to the employee's failure to produce sufficient evidence. Having the right policies in place and documenting key events can go a long way toward preventing and defending against such claims.

*Gilliard v. Georgia Dept. of Corrections,* No. 12-11751 (11th Cir. Dec. 7, 2012)

**Trier of Fact Must Decide if Harassing Conduct Occurred Before or After Insurance Policy Took Effect**

An insurance coverage dispute arose from charges of sexual harassment brought by a former employee against a one-time president of a company. The president requested that the insurer defend and indemnify him against the employee's sexual harassment claim. The insurer denied coverage less than two weeks after receiving notice, on the ground that it was "apparent" that the alleged harassment "did not happen in its entirety subsequent to the retroactive date, which is April 28, 1999," as required for coverage. The employee's complaint alleged that the president harassed her throughout her employment with the company, from 1997 to 2006. The president sued the insurer for denial of coverage, and the insurer sued the company arguing it had no duty to defend or indemnify against the harassment claim. The issue on appeal was whether a trier of fact (i.e., the jury or judge) must conclude that the conduct underlying the sexual harassment charge did or did not begin before the company's insurance policy took effect. The U.S. Court of Appeals for the First Circuit set aside a district court judgment in favor of the company and remanded the case for the district court to address the issue of when the harassing conduct that gave rise to the employee's claim began. Timing can be very important in dealing with employment claims, given the various statutes of limitations as well as the requirements of insurers. Employers should be mindful of such issues when defending against claims.

*Manganella v. Evanston Insurance Co. v. Jasmine Co.,* 702 F.3d 68 (1st Cir. Nov. 27, 2012)