Littler

At the Forefront: Littler's Appellate Practice Group Shaping Employment Law

Prior results do not guarantee a similar outcome.

One mark of a great law firm is a deep well of legal talent that can not only try cases to verdict but can also take a case to the "next level"—the appellate courts. Littler attorneys throughout the United States have successfully represented clients in numerous federal and state employment and labor law appeals. Our cases have made law, changed or confirmed workplace practices or simply saved clients money. What makes our appellate practice so effective and invaluable is our ability to:

- Identify and preserve potential appellate issues while the case is still in trial;
- Efficiently assess the merits and likelihood of success of an appeal after trial;
- Handle any and all aspects of the appellate process;
- Prepare writs, achieve results when seeking extraordinary relief and analyze the cost-effectiveness of seeking such relief; and
- Consult and prepare *amicus curiae* briefs when appropriate.

While no law firm can possibly win them all or guarantee an outcome, Littler attorneys have achieved notable success in the appellate arena. See for yourself. Read the following sampling of case summaries detailing some of our recent triumphs in the appellate courts. For more information about Littler's appellate practice, please contact your Littler attorney or visit the Appellate Practice page on littler.com.

Littler Mendelson

Appellate Decision Summaries

U.S. Supreme Court

Rent-A-Center, West, Inc., v. Jackson, 130 S. Ct. 2772 (2010) Plaintiff signed an arbitration agreement as part of his employment and later filed a discrimination suit against his employer in federal court. The defendant sought to compel arbitration based on the arbitration agreement, which specifically stated that an arbitrator, not a court, had the authority to determine if the arbitration agreement was enforceable. The district court held for the employer and the Ninth Circuit reversed, stating that the court should decide the threshold question of unconscionability. On appeal to the United States Supreme Court, Littler convinced the Court that the enforceability of an arbitration agreement was to be decided by the arbitrator when the challenge was to its overall effectiveness and the explicit language of the agreement directed that issue to the arbitrator.

Granite Rock Co., v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847 (2010) In this case, the United States Supreme Court, in a 7-2 decision in favor of the employer, overruled the Ninth Circuit's holding that contract formation and the date on which it occurred is properly decided by the Court, not the arbitrator. This ruling reinstated a unanimous jury verdict that Granite Rock's collective bargaining agreement containing a no strike clause was ratified before Teamsters Union, Local 287 resumed its strike. On a second issue, the Court ruled that no federal action can be brought against a non-signatory International Union under Section 301 for tortious interference with a collective bargaining agreement. The Court remanded the case to allow Granite Rock to proceed against the Teamsters International on the theory that the Local Union was acting as the International Union's agent (or alter ego) when it disavowed the collective bargaining agreement. *Granite Rock* was Littler's second U.S. Supreme court victory in one week in 2010.

U.S. Court of Appeals, 1st Circuit

Alexander v. Brigham & Women's Physicians Org., Inc., 513 F.3d 37 (1st Cir. 2008) The plaintiff, a surgeon, sued the Women's Physicians Organization, alleging that its sponsorship and administration of two deferred compensation plans violated the vesting and fiduciary duty requirements of the Employee Retirement Income Security Act of 1974 (ERISA). Represented by Littler, the organization obtained summary judgment, which was then appealed by the plaintiff. On appeal, Littler argued that the organization's deferred compensation plans contained a legally sound ERISA top-hat provision, which applied to any plan that was not funded and maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. Littler convinced the court that the plans were valid top-hat plans and persuaded the court to reject the surgeon's claims that the plans catered to more than a select group of highly compensated employees. The judgment of the district court was affirmed.

Martino v. Forward Air, Inc., 609 F.3d 1 (1st Cir. 2010) In this case, the plaintiff was out of work for two years due to a workers' compensation injury. When he returned to the workforce, he applied for a position with Forward Air and discussed his prior injury during the interview. Forward Air conducted a background check on the plaintiff, thereby obtaining information regarding his workers' compensation history. For business reasons, the company later decided not to create the position for which the plaintiff had applied and therefore did not hire the plaintiff. The plaintiff then sued for disability discrimination under both federal and state law. On appeal, Littler convinced the court that the plaintiff could not support an illegal inquiry claim because he could not show he had suffered any injury as a result of Forward Air's actions. Littler also persuaded the court that the plaintiff's alleged emotional harm was not a specific injury and the company's failure to hire him was not a wrongful employment action because the jury had previously found that Forward Air did not discriminate against Plaintiff. The court of appeals affirmed the dismissal of the illegal inquiry claims.

U.S. Court of Appeals, 2nd Circuit

Powell v. Omnicom, 497 F.3d 124 (2d Cir. 2007) The plaintiff sued defendants for race and age discrimination and the parties entered into a verbal settlement before a federal magistrate judge. The plaintiff readily agreed to the settlement before the judge but later refused to consent to a written memorialization of the settlement terms. The district court ruled that the settlement was enforceable and denied the plaintiff's motion to reopen her case. On appeal, the court rejected the plaintiff's arguments that the oral settlement agreement was, among other things, invalid because it was not in writing or because the requirements of Older Workers Benefits Protection Act (OWBPA) were not met. The court specifically noted that the plaintiff was not entitled to the timing requirements under the OWBPA to consider her settlement agreement and was only entitled to a reasonable time for reflection under the statute. The court of appeals also found that the district court did not err in failing to restore the case at the plaintiff's request. Accordingly, Littler obtained a victory on appeal.

U.S. Court of Appeals, 3rd Circuit

Wilson v. MVM, Inc., 475 F.3d 166 (3d Cir. 2007) The plaintiffs, three federal courthouse security guards, were deemed medically disqualified to continue in service and were terminated from their employment. The trio sued MVM and several other federal defendants, including the United States Marshalls Service, for violations of numerous laws including the Rehabilitation Act (RA), Americans with Disabilities Act (ADA) and violations of procedural due process. The district court dismissed the RA claims against the federal defendants for lack of subject matter jurisdiction and the procedural due process claim against the federal defendants and MVM because the plaintiffs had no property interest in continued employment and could not state a claim upon which relief could be granted. MVM also prevailed on summary judgment on the ADA claim. On appeal, the court of appeals ruled in favor of the defendants. Littler successfully argued on behalf of MVM in defense against the ADA and procedure due process claims made against it. The court agreed, finding that the procedural due process claim was meritless because the guards failed to follow the grievance procedures available to them following termination. The court also found that the ADA claim against MVM should be dismissed because the guards could not show they were impaired or regarded as disabled within the meaning of the ADA. Accordingly, the plaintiffs' appeal was dismissed.

Umland v. Planco Fin. Servs., 542 F.3d 59 (3d Cir. 2008) In this class action lawsuit for breach of contract and unjust enrichment, the plaintiff alleged that Planco harmed her and improperly benefited itself when marketing managers were reclassified from independent contractors to employees. Specifically, the plaintiff alleged that Planco improperly deducted the employer's share of taxes from reclassified employees' paychecks. The district court granted the defendant's motion to dismiss and the plaintiff appealed. Arguing an issue of first impression in the Third Circuit, Littler persuaded the court that the Federal Insurance Contributions Act (FICA) does not create a private right of action. Moreover, the defendant avoided remand when Littler convinced the court that IRS regulations preempt the plaintiff's state law claims.

U.S. Court of Appeals, 5th Circuit

Songer v. Dillon Res., Inc., 618 F.3d 467 (5th Cir. 2010) In this case, a unanimous panel of the Fifth Circuit Court of Appeals issued two holdings, both favorable to employers attempting to establish the Motor Carrier Act exemption to the Fair Labor Standards Act (FLSA). The employer was a staff-leasing company that assigned its drivers to various interstate trucking companies. The plaintiffs were assigned to two different trucking companies and hauled material sometimes across state lines and sometimes only within the state of Texas. Littler argued and the Fifth Circuit agreed that the staff-leasing company was entitled to the Motor Carrier Act exemption because it provided drivers to interstate trucking companies. The Fifth Circuit also held that all of the truck drivers were subject to the Motor Carrier Act exemption, even if some of them drove primarily intrastate. The court held that each truck driver did not have to personally participate in interstate commerce but, rather, only had to have a reasonable expectation that he/she could be called upon to drive across state lines. All of the truck drivers at issue could reasonably be expected to engage in interstate commerce because the dispatcher randomly assigned trips, some of which crossed state lines; no truck driver had a dedicated route; and all of the drivers had to meet DOL requirements, such as completing DOT logs and drug tests. Accordingly, the Fifth Circuit found in favor of the employer.

U.S. Court of Appeals, 6th Circuit

Ladd v. Grand Trunk Western R.R., Inc., 552 F.3d 495 (6th Cir. 2009) The plaintiff, a welder, was the only African-American woman among her co-workers, the majority of whom were Caucasian males. During her employment with the defendant, the plaintiff claimed that she was subjected to both racial and sexual harassment in the form of offensive comments and tampering with her work equipment. The plaintiff also alleged that she was retaliated against when her employment was terminated after filing internal complaints and an EEOC charge. The plaintiff appealed the district court's order granting summary judgment to the defendant. On appeal, Littler persuaded the court that the plaintiff did not suffer from a hostile work environment because the majority of the offensive conduct she complained of was not directed at her, occurred over a number of years during which she admitted she didn't find it offensive enough to complain about and, when she overhead and complained about a single racial and sexual remark regarding her, the Company took action and the offensive behavior ceased. The court of appeals also found that the plaintiff's allegations of equipment tampering did not establish a hostile work environment. Accordingly, the court of appeals affirmed summary judgment in favor of the defendant.

Lewis v. Whirlpool Corp., 2011 U.S. App. LEXIS 593 (6th Cir. Jan. 12, 2011) The plaintiff, a former Whirlpool supervisor, filed a wrongful discharge "public policy" lawsuit. He claimed that he was terminated for refusing to fire hourly employees who were involved in union organizing activities. The plaintiff used the National Labor Relations Act (NLRA) as the source of his "public policy." Littler moved to dismiss plaintiff's lawsuit on *Garmon* preemption grounds under the NLRA. The plaintiff tried to avoid *Garmon* preemption by claiming that, as a former supervisor, he was not an employee covered by the NLRA. The Sixth Circuit upheld the dismissal of the claim. The court recognized that even though the NLRA does not protect supervisors from unfair labor practices, it does provide a supervisor with a viable claim that he was terminated for refusing to commit unfair labor practices, and such claims are therefore the exclusive jurisdiction of the National Labor Relations Board and preempted by the NLRA. This opinion constitutes the first federal appellate court to affirm NLRA preemption in this situation.

U.S. Court of Appeals, 7th Circuit

Crouch v. Whirlpool Corp., 447 F.3d 984 (7th Cir. 2006) When Whirlpool terminated the plaintiff after determining that he had falsely applied for a disability-related leave of absence in order to vacation with his fiancée, the plaintiff sued for violation of the FMLA. Represented by Littler, the employer obtained summary judgment, from the district court, which found that an employer's honest suspicion that an employee violated company policy by fraudulently obtaining disability leave defeated the employee's FMLA claim. On appeal, the plaintiff contended that the timing of the company's approval of his leave undercut the sincerity of its suspicions but was unable to contradict evidence establishing that Whirlpool had approved the plaintiff's leave before initiating an investigation. Accordingly, the court of appeals affirmed summary judgment.

Dillard v. Starcon Int'l., Inc., 483 F.3d 502 (7th Cir. 2007) The plaintiff sued his former employer for race discrimination and the parties entered into an oral agreement on key terms of the settlement, including a cash payment and reinstatement. The plaintiff later refused to memorialize a written agreement which included the key terms as well as additional terms to which the plaintiff objected. The magistrate judge granted the defendant's motion to enforce the settlement agreement, finding that the parties had reached a meeting of the minds on the key terms. On appeal, the court found that the terms to which the parties had not agreed were immaterial and that agreement on the material terms constituted a valid oral agreement under Illinois law. The court found that the parties had reached a meeting of the minds and entered into a valid, enforceable settlement agreement.

EEOC. v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007)
An employee filed a charge with the EEOC alleging that he was fired for reporting a sexual affair between his supervisor and a co-worker. The EEOC brought an action against Concentra, arguing that Concentra had violated the anti-retaliation provision of Title VII. The district court dismissed the EEOC's complaint without prejudice, holding that the anti-retaliation provision did not protect the employee's report. The EEOC then filed a markedly less detailed amended complaint that did not contain the specifics of the employee's report. Noting that the amended complaint was even more vague than the original complaint, the district court dismissed the amended complaint with prejudice and this appeal followed. On appeal, the court found ample grounds to uphold the dismissal. The court found that the amended complaint alleged mere conclusory conduct, such that Concentra was not provided with sufficient notice of claims. Moreover, the EEOC did not attach the employee's charge so as to incorporate its contents. Rather, both at the district court and appellate court levels, the charge was attached solely to show that statutory prerequisites to filing had been met. Acknowledging the drastic nature of a dismissal with prejudice, the appellate court nevertheless concluded that the result was warranted under these circumstances.

Williams v. Interpublic Severance Pay Plan, 523 F.3d 819 (7th Cir. 2008) In this case, the appellant, an executive, resigned from his position and applied for benefits following the sale of his former employer's company. The plan administrator denied the claim pursuant to the plan's golden parachute provision which allowed benefits only if the purchasing company did not offer a comparable position at the same or higher salary. The appellant alleged that the defendants violated ERISA and that a *de novo* standard of review applied to the administrator's decision. Littler attorneys successfully argued that the appellant was not entitled to benefits under a deferential or *de novo* standard of review because he had been offered a comparable job at a higher salary. Accordingly, the district court judgment was affirmed.

Mobley v. Allstate Ins. Co., 531 F.3d 539 (7th Cir. 2008) The plaintiff suffered from medical conditions which caused concentration problems and a tendency to fall asleep during the day. The defendant provided several accommodations except the plaintiff's request to work from home a few days a week, to have one day off to sleep, and to work 10 hour shifts the remaining four days of the week. When the plaintiff was included in a reduction-in-force (RIF) based on employee performance and business needs, she sued her employer for failure to accommodate, discriminatory termination and retaliation. The court of appeals affirmed the district court's award of summary judgment to the employer, noting that an employee is not entitled to an accommodation of her choosing but a reasonable accommodation that meets his or her needs. Littler persuaded the court that there was no retaliation because the plaintiff only offered temporal proximity and nothing more as evidence of a connection between her alleged protected activities and adverse employment actions. As such, the court found that the defendant had not retaliated against the plaintiff.

Scruggs v. Garst Seed Co., 587 F.3d 832 (7th Cir. 2009) The plaintiff sued for retaliation and gender-based hostile work environment after her position was eliminated during a business restructuring. Littler obtained summary judgment for the defendant from the trial court. On appeal, the plaintiff claimed her employer retaliated against her after she filed an EEOC charge by eliminating her position and then failing to hire her for a position at another facility following the business restructuring. The court ruled in favor of the employer on both claims. The court of appeals noted that there was no evidence that the defendant eliminated the plaintiff's position in retaliation for her EEOC charge, and that the defendant's selection of a more qualified candidate for the position was not a pretext for retaliation. As for the hostile work environment claim, the court affirmed the trial court's finding that the plaintiff's supervisor's alleged offensive comments were too sporadic to be severe or pervasive enough to constitute a hostile work environment.

Lindsey v. Walgreen Co., 615 F.3d 873 (7th Cir. 2010) The plaintiff, a staff pharmacist, sued for discrimination under the Age Discrimination in Employment Act (ADEA) after her employment was terminated for dispensing a medication to a customer in violation of company policy. According to the plaintiff's supervisor, she ignored an electronic notation in the pharmacy's computer regarding a potentially serious drug interaction between a customer's current medication and the newly prescribed medication. Among other theories of age discrimination, the plaintiff alleged a "cat's paw" theory of discrimination—claiming that an unbiased decisionmaker (here, the district pharmacy supervisor) was being used as a tool by a biased employee (the plaintiff's immediate manager). The district court ruled in favor of the defendant. On appeal, Littler successfully argued that the decisionmaker had not been provided biased information, and that even assuming she had, the decisionmaker did not rely solely on information from the manager when making the termination decision. The court of appeals specifically ruled that the company terminated the plaintiff because she violated company policy, and not *because of* her age.

Elnashar v. Speedway SuperAmerica, L.L.C., 446 F.3d 796 (8th Cir. 2006) In this race and national origin discrimination case, the plaintiff appealed a district court order denying his motions to compel the production of FBI documents and the appearance of an FBI witness. The appellate court found that the district court order did not qualify for review as a final agency decision because the plaintiff had not sought a writ, the appeal did not involve separation of powers issues and the order did not present the same exigency as an order compelling disclosure of privileged testimony. Littler argued the limits of federal appellate jurisdiction, and the court ultimately dismissed the appeal on the grounds that the discovery order denying disclosure was not a final judgment that had been entered at the time of the interlocutory appeal.

Rask v. Fresenius Med. Care N. Am., 509 F.3d 466 (8th Cir. 2007) The appellant sought review of a district court order obtained by Littler granting summary judgment in favor of Fresenius Medical Care, on allegations that the employer violated the Americans with Disabilities Act (ADA), the Minnesota Human Rights Act (MHRA) and the Family and Medical Leave Act (FMLA). The plaintiff, a patient care technician at kidney dialysis clinics, was discharged following a series of attendance problems. She alleged in her complaint that she had a history of depression, that her depression was a disability and that termination of her employment constituted discrimination under the ADA, FMLA and the MHRA. Acknowledging the hotly contested nature of the dispute, the appellate court affirmed summary judgment in favor of the employer. The court held that unexcused absences on short notice would not allow the plaintiff to perform the essential functions of her job, nor could they constitute a reasonable accommodation because she cared for seriously ill patients. Dismissal of the FMLA claims was also appropriate because the plaintiff failed to give her employer any indication that she had a serious medical condition.

Elnashar v. Speedway SuperAmerica, L.L.C., 484 F.3d 1046 (8th Cir. 2007) This appeal was the culmination of four years of litigation involving an Arabic employee, his former employer and the FBI. At the center of the litigation was the plaintiff's claim that his employer discriminated against him on the basis of his Arabic race. Throughout the litigation, the plaintiff sought to prove the employer's discriminatory intent by obtaining certain confidential FBI files, which he believed showed that another employee from the company falsely informed the FBI that he was engaged in bomb making. Littler convinced the district court to deny the plaintiff's motion to compel the FBI to produce the files, deny his motion for a continuance and grant summary judgment to the employer on the discrimination claims. On review, the court of appeals affirmed in all respects, finding that the employee was unable to show any clear need for the informant's identity or a good reason for a continuance. The court also found that many of the events the employee experienced were not adverse employment actions, that the employee failed to show that the employer's legitimate nondiscriminatory reasons for its actions were pretextual and that the employee's experiences did not rise to the level of actionable harassment.

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Brenneman v. Famous Dave's of Am., Inc., 507 F.3d 1139 (8th Cir. 2007) In this hostile environment case, the plaintiff alleged that she was forced to resign from her position as an assistant restaurant manager due to intolerable working conditions. In support of her claim, the plaintiff introduced evidence of her immediate supervisor's offensive behavior, which included inappropriate touching and sexually graphic remarks. Although the court of appeals found that the plaintiff had established a hostile work environment, Littler refuted the plaintiff's constructive discharge claim by offering evidence of the employer's prompt actions, including investigating the alleged behavior, proposing solutions and continuing to invite the plaintiff back to work. The court ultimately found that the plaintiff had not been constructively discharged, and also held that the employer's steps to prevent and correct the sexual harassment avoided liability under the *Ellerth-Faragher* affirmative defense. Accordingly, the court upheld the district court judgment in favor of the employer.

Fallo v. High-Tech Inst., 559 F.3d 874 (8th Cir. 2009) In this case regarding the arbitrability of a group of students' tort claims against the defendant, the trial court ruled it had the power to determine whether or not the students' claims were subject to arbitration. The trial court found it did have such power and denied the defendant's motion to compel arbitration. Littler appealed the trial court's ruling and the court of appeals found that the district court erred in both its rulings. The court of appeals found that the language of the Defendant's arbitration agreement was clear – (1) the arbitration agreement, which incorporated the rules of the American Arbitration Association (AAA), contained clear and unmistakable evidence that the parties intended for an arbitrator (not a court) to decide the question of arbitrability. Accordingly, the court of appeals reversed the trial court's judgment and instructed it to grant the defendant's motion to compel arbitration and stay the district court proceedings in anticipation of a ruling by an arbitrator on whether the students' claims were subject to the parties' arbitration agreement.

Littleton v. Pilot Travel Ctrs, L.L.C., 568 F.3d 641 (8th Cir. 2009) An African-American fuel truck driver sued his employer for race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and Arkansas state law. The trial court granted summary judgment to the defendant on plaintiff's retaliation claims and held a bench trial on the race discrimination claims. Under difficult circumstances—including the death of the trial judge between trial and issuance of the post-trial decision)—the defendant ultimately prevailed on all counts. On appeal, the plaintiff argued that the defendant retaliated against him by issuing him a "Correction Notice" following a company investigation into allegations of harassment and mistreatment by the plaintiff against other employees. The plaintiff also argued that he had been discriminated against on the basis of his pay, despite the fact that he earned more money than any other driver in his region with the exception of his region's lead driver, who was also African-American. Littler persuaded the court of appeals to affirm summary judgment because the plaintiff could not show a causal connection between his protected activity and issuance of the "Correction Notice" and because the trial court's findings on the discrimination claim were not clearly erroneous.

Reynolds v. Rehabcare Group East, Inc., 591 F.3d 1030 (8th Cir. 2010) The plaintiff in this case, who was a physical therapist and Captain in the United States Army Reserve, sued the defendant for discrimination based on her military status and for its failure to rehire her upon her return from active military duty in violation of the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA). Upon her return from military service, the plaintiff discovered her former employer Progressive Rehabilitation Services (Progressive) was no longer a contractor at Green Hills Retirement Community (Green Hills) where she had previously been stationed. Instead, a new subcontractor, the defendant, was performing rehabilitation services at Green Hills on behalf of a new primary contractor, Deerfield Retirement Community. The defendant was prepared to make the plaintiff an employment offer but she refused to hear any offers because she felt the defendant was violating USERRA by not placing her in a position of like seniority, status and pay that she had received while employed by Progressive. Littler convinced the district court not only that the defendant could not be considered a successor-in-interest to Progressive with no duty under USERRA to re-employ the plaintiff, but also that there was no evidence of discriminatory animus whatsoever towards the plaintiff. The court of appeals sided with Littler's line of reasoning on appeal and affirmed the district court's judgment for the defendant.

U.S. Court of Appeals, 9th Circuit

Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) This highly anticipated decision clarified an issue that had been inconsistently addressed by the courts—the validity of an employer's grooming policy. The plaintiff, a female bartender at a casino, was terminated for refusing to wear facial makeup in compliance with Harrah's grooming policy. The plaintiff alleged sex discrimination under theories of disparate treatment and disparate impact. Affirming the district court's grant of summary judgment in favor of the employer, the Ninth Circuit held that Harrah's grooming policy was lawful, as it placed no greater burden on one gender than the other. Littler persuaded the court that the plaintiff failed to show that the grooming policy was part of a policy motivated by sex stereotyping or that the grooming standards would objectively inhibit a woman's ability to do the job.

Aguirre v. Los Angeles Unified Sch. Dist., 461 F.3d 1114 (9th Cir. 2006) This appeal, which challenged the attorneys fees provision under the Individuals with Disabilities Education Act (IDEA), presented an issue of first impression in the court of appeals. Here, the plaintiff sought over $42,000 in legal fees where she had only won 4 of the 27 issues she raised. Littler argued that the legislative history and policy concerns of federal fee-shifting statutes authorized awards only to a "prevailing party" in IDEA cases, a standard the plaintiff could not meet. The Ninth Circuit agreed, and remanded the case to the district court for further proceedings consistent with its ruling.

Serrano v. 180 Connect, Inc., 478 F.3d 1018 (9th Cir. 2007) This appeal addressed whether the plaintiff or the defendant bore the burden of proof under the "home state controversy" exception to the Class Action Fairness Act of 2005. The district court initially held that the party seeking removal — the employers in this case—bore the burden of establishing the exception's inapplicability. On appeal, Littler convinced the federal appeals court that the party seeking remand had to prove the applicability of exceptions, both under the general removal statute and in the context of CAFA. Accordingly, the court of appeals reversed the district court's decision, concluding that the party seeking remand bore the burden to prove an exception to CAFA's jurisdiction.

Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008) In this case, an Idaho county sued the defendants under the Racketeer Influenced and Corrupt Act (RICO) for additional monies it claimed it expended on public health care and law enforcement services for undocumented immigrants the defendants allegedly illegally hired and/or harbored. Littler persuaded the district court that the county did not have standing to sue under RICO because it could not show that it had suffered an injury to its business or property. On appeal, the court of appeals adopted Littler's reasoning and affirmed the district court's ruling. The court of appeals noted that not only did the county not have standing to sue due to its inability to show injury to its business or property, it also could not show that its alleged injuries were proximately caused by the defendants.

Mevorah v. Wells Fargo Home Mortgage, 571 F.3d 953 (9th Cir. 2009), class cert. denied, In re Wells Fargo Home Mortgage Overtime Pay Litigation, 2010 U.S. Dist. LEXIS 3132 (9th Cir. Jan. 13, 2010) The defendant employed the plaintiffs as home mortgage consultants who marketed and sold home mortgages. The defendant maintained an internal policy which treated all of the home mortgage consultants as exempt employees not eligible for state and federal overtime requirements under the Fair Labor Standards Act (FLSA) and various states' laws. The plaintiffs sought class certification for the alleged violation of overtime laws as well as unfair and unlawful business practices in violation of California's Unfair Competition Law (UCL On appeal to the Ninth Circuit, Littler persuaded the court that the district court abused its discretion in relying substantially on the exemption policy and ignoring the importance of the individual issues of the plaintiffs. The court noted that the defendant's exemption policy did not eliminate the court's need to examine, on a case-by-case basis, how each employee was spending his or her time or what duties he or she was performing – an analysis that is not appropriate for class certification. Thus, the appellate court reversed the lower court's certification of the class and remanded the case for further class certification analysis.

Bamonte v. City of Mesa, 598 F.3d 1217 (9th Cir. 2010) Several police officers sued their employer, the City of Mesa, Arizona, alleging the city violated the Fair Labor Standards Act (FLSA) by failing to compensate police officers for the donning and doffing of their uniforms and accompanying gear. The district court granted summary judgment to the City of Mesa because the officers had the option of donning and doffing their uniforms and gear at home and these actions were therefore not compensable under the FLSA or the Portal-to-Portal Act. The police officers appealed the district court's ruling. The court of appeals applied a three step analysis to the police officers' claim: (1) whether the donning and doffing constituted "work;" (2) whether the activity was an "integral and indispensable duty;" and (3) whether the activity was di minimis. Littler persuaded the court that the officers' arguments failed the second test and the court ruled the donning and doffing of uniforms and accompanying gear was not an "integral and indispensable duty" because the officers could not show any law, rule or nature of the work or other obligation which required the donning and doffing to occur on the premises of their employer.

U.S. Court of Appeals, 11th Circuit

Lambert v. Austin Indus., 544 F.3d 1192 (11th Cir. 2008) In this case, the court of appeals reversed a district court ruling denying the employer's motion to compel arbitration in a race and age discrimination and retaliation case. The employer had an "Open Door" policy which included an agreement to arbitrate as part of the Company's plan for resolving internal disputes. On appeal, the court found the Open Door policy was a valid, enforceable agreement under Georgia contract law designed exactly to resolve this type of workplace dispute. Littler successfully argued that the parties had made mutual promises to use the Open Door policy and arbitration step to resolve workplace disputes. Thus, the agreement was not void for lack of mutuality. Littler also persuaded the court that the agreement, which covered "all workplace disputes," applied to termination disputes and this reasoning was further supported by federal policy favoring arbitration. Thus, the district court's order denying the employer's motion to compel arbitration was reversed.

Allmond v. Akal Sec., Inc., 558 F.3d 1312 (11th Cir. 2009), cert. denied, 130 S. Ct. 1139 (2010) This appeal addressed whether the United States Marshalls Service (Marshalls Service—and the private security contractors they employ at federal courthouse—could assert the affirmative "business-necessity" defense to support their ban on the use of hearing aids by security officers. The plaintiff in this case, a security officer employed by Akal Security, Inc. (Akal) was unable to pass a hearing test under the hearing aid ban. The Marshalls Service informed Akal of the plaintiff's situation, and Akal terminated plaintiff's employment as it was required to do under its contract with the Marshalls Service. Littler obtained summary judgment on plaintiff's disability discrimination claims at the trial court level. On appeal, the Eleventh Circuit affirmed the district court's ruling in favor of the defendants, holding that the hearing aid ban was both job-related and a business necessity due to the duties and responsibilities of federal courthouse security guards.

Howard v. Walgreen Co., 605 F.3d 1239 (11th Cir. 2010) In this retaliation case, Plaintiff claimed he was retaliated against when his employment was terminated after he complained about a message his supervisor left him stating his job was in jeopardy. The trial court denied the Defendant judgment as a matter of law and a jury awarded the Plaintiff staff pharmacist $300,000 in damages. On appeal, the plaintiff argued that he was entitled to the trial court judgment because defendant's motions for judgment as a matter of law were inadequate. The court disagreed, noting that the plaintiff had failed to raise this argument at trial and was now precluded from doing so on appeal. As to plaintiff's substantive claim, the court found that the plaintiff could not meet all the elements of a *prima facie* retaliation claim because his supervisor's message regarding his job was not an adverse employment action. Therefore, the plaintiff's complaint about the message was not protected activity because his belief that the message was discriminatory was not reasonably held. Accordingly, the court reversed the judgment of the trial court.

California

San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist. 209 P.3d 73 (Cal. 2009) The teachers in the San Leandro Unified School District are represented by the San Leandro Teachers Association (SLTA), affiliated with the California Teachers Association (CTA). The SLTA placed two notices in school mail boxes concerning their endorsement of political candidates. The District objected, claiming this violated District policy as well as the California Educational Code Section 7054. SLTA and CTA challenged this decision and the trial court granted SLTA/CTA full relief; the court of appeals disagreed, holding that school mail boxes were "non-public forums" subject to reasonable regulation. Littler argued for the District before the California Supreme Court, which held that the Education Code applied, having the purpose of preventing the use of public resources to selectively support political candidates. It also held that under the federal "forum" analysis, the mail boxes were "non-public forums" subject to reasonable regulation, and under all alternative standards for interpreting the State Constitution, the conduct would not be protected. This decision helped to end a quarter century of debate over the meaning of Education Code Section 7054. The application of the federal forum analysis regarding free speech under the California Constitution was a 25-year-first for the California Supreme Court and will influence subsequent free speech cases involving public property and resources in California.

Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court of Los Angeles County, 209 P.3d 937 (Cal. 2009) In this case, seventeen individual plaintiffs and two labor unions brought suit against the defendants under California's unfair competition law. The suit also claimed that the defendants failed to provide meal and rest periods as mandated by California's Labor Code Private Attorneys General Act of 2004. The trial court held that the plaintiff unions lacked standing to sue under both the unfair competition law and as "aggrieved employees" under the Labor Code. The trial court also ruled that the unfair competition claims brought on behalf of others must be brought as a class action. The plaintiff unions sought a writ of mandate and stay of the trial court's ruling from the court of Appeal. The stay was granted but, upon review, the writ of mandate was denied. On further appeal, the California Supreme Court affirmed the court of appeal's ruling. Littler helped persuade the Supreme Court that the history and plain text of both the unfair competition law and Labor Code Private Attorneys General Act did not confer standing to the labor unions to sue individually or on behalf of their employee members. Littler represented Laidlaw Transit, one of the defendants. [California]

Cristler v. Express Messenger Sys., Inc., 89 Cal. Rptr. 3d 34 (Cal. Ct. App. 2009), cert. denied, 2009 Cal. LEXIS 5283 (May 20, 2009). This class action against a parcel delivery company by a group of drivers was resolved at the trial level in favor of the employer. On appeal, the drivers argued a number of claims, including that they had been wrongfully classified as independent contractors and the legal principles regarding this issue that were applied at the trial level were erroneous. Littler argued that the question of whether an individual is deemed an employee or an independent contractor is one of fact and the appellate court agreed, unwilling to reverse a jury's finding of facts supported by substantial evidence. The California Court of Appeal affirmed the trial court's findings and jury verdict in favor of the employer, including an award of costs to the company, and found that all plaintiffs were independent contractors. Subsequently, Littler's victory at the trial court level was designated one of the top 10 verdicts in California in 2007 and is still one of the leading decisions in this area. [California]

North Carolina

Shaw v. U.S. Airways, Inc., 665 S.E.2d 449 (N.C. 2008) In a case of statutory interpretation, the court considered whether the employer's contributions to the plaintiff's retirement accounts should be included in determining an employee's average weekly rate under the state Workers' Compensation Act. Noting the prevalence of fringe benefits in the workplace, the court remarked upon the significance of this issue and the potentially widespread impact of its ruling. Even though the statute was given liberal construction, Littler convinced the court that the Act, as written, does not "clearly express" the inclusion of fringe benefits as earnings under the statute, and that clarification of the statute is more appropriately left to the legislature.

Ohio

Cont'l Airlines, Inc. v. Ohio Dept. of Job & Family Servs., 2007-Ohio-5434, 173 Ohio App. 3d 311, 878 N.E.2d 647 (2007) The plaintiff, a former flight attendant, was 27 weeks pregnant when she applied for and was granted unemployment compensation benefits. The employer contested the award on the grounds that the controlling collective bargaining agreement authorized placing the plaintiff on unpaid maternity leave starting at 27 weeks pregnancy. On appeal, Littler argued that the collective bargaining agreement was a valid contract, negotiated at arm's length. The appellate court agreed with Littler, and denied benefits on the grounds that the plaintiff's collective bargaining agreement superseded the Unemployment Compensation Act.

Jones v. Wilson, 2007-Ohio-6484 (Ohio Ct. App. Dec. 6, 2007) This case required the court to determine whether it had subject matter jurisdiction over a pastor's suit for termination from his position. At an evidentiary hearing, the court examined evidence related to whether the dispute required interpretation of secular work or patently religious work. Littler argued that the dispute was improperly before the court, as it required the court to delve into church doctrine contained in an overtly religious work known as the Hiscox Directory. The appellate court agreed and dismissed for lack of subject matter jurisdiction. [Ohio]

DeMell v. Cleveland Clinic Found., 2007-Ohio-2924 (Ohio Ct. App. June 14, 2007) The plaintiff in this case had been employed by the Cleveland Clinic Foundation for over thirty years. At the time of her discharge, she was paid on an hourly basis as a non-exempt employee in the radiology department. After her discharge, the plaintiff filed suit, alleging that she was underpaid and wrongfully terminated in violation of public policy. The trial court granted summary judgment in favor of the employer and the plaintiff appealed, alleging eight assignments of procedural and substantive error. Littler convinced the appellate court to overrule each of the eight alleged errors. Littler also obtained an award for the employer's costs on appeal. [Ohio]

Sharp v. Cleveland Clinic, 2008-Ohio-1777 (Ohio Ct. App. Apr. 11, 2008) Following a drug test for suspicious narcotics activity, the plaintiff, a registered nurse at the Cleveland Clinic, was terminated for performance-related reasons. The plaintiff filed suit alleging five causes of action, including false imprisonment on the day of her drug test. The trial court granted the Cleveland Clinic's motions for summary judgment on all of the plaintiff's causes of action, and the plaintiff appealed the ruling only as to her false imprisonment claim. Facing close scrutiny of the facts, Littler recounted the events of the day and satisfied the court that the plaintiff was free to leave whenever she wanted. Accordingly, the court affirmed the judgment of the trial court. [Ohio]

Dabney-Hall v. Cleveland Clinic Found., 2008-Ohio-1080 (Ohio Ct. App. Mar. 13, 2008) In this age discrimination claim, the plaintiff contended that she was denied a customer service position in favor of a younger applicant. Littler established the company's non-discriminatory reasons for their choice, including the plaintiff's lack of interest in a long-term position and lack of recent business experience, both of which the younger applicant possessed. The plaintiff was unable to show that the company's reasons were a pretext for discrimination, as evidenced by the plaintiff's failure to list relevant experience on her resume. Littler persuaded the court to affirm the lower court judgment, and also obtained an order for recovery of costs and a special mandate to carry the judgment into execution. [Ohio]

Texas

Green v. Lowe's Home Ctrs, Inc., 199 S.W.3d 514 (Tex. App. 2006) In this case for retaliatory discharge, the employee claimed that he was fired for filing a workers' compensation claim, and that the stated reason for his discharge was a pretext for retaliation. The trial court ruled in favor of the employer and the plaintiff appealed. On appeal, Littler demonstrated that there was no causal link between the plaintiff's workers' compensation claim and his termination. Littler argued that the company did not have a negative attitude toward the plaintiff's injury, adhered to its sexual harassment policy, did not treat the plaintiff less favorably than similarly situated employees, and did not state a false reason for the plaintiff's discharge. Accordingly, the court affirmed summary judgment in favor of the employer.

Virginia

Fairfax County Sch. Bd. v. Martin-Elberhi, 687 S.E.2d 91 (Va. Ct. App. 2010) The plaintiff fractured her left patella in a work-related accident. The year prior to the accident , she had undergone a successful total knee replacement on the same knee. The knee replacement was not work-related. After her work injury had healed, the plaintiff's physician gave her a 37% permanent partial disability rating but neglected to indicate what portion of the rating was attributable to the accident and what portion to the non-compensable cause. Under the *AMA Guides to the Evaluation of Permanent Impairment*, a knee replacement with a good result generally merits a 37% rating. The Workers' Compensation Commission awarded the plaintiff a 37% rating despite the lack of evidence regarding the causal relationship between the rating and the compensable injury. Littler appealed the Commission's findings and the Virginia Court of Appeals reversed. The court rejected the plaintiff's argument that the Commission had "impliedly" found that the 37% impairment rating was due to her work-related injury, and held that proof of causation was part of the plaintiff's burden of proof. The Court remanded the case to the Commission for further proceedings. Ultimately, Littler defeated the claim in its entirety.

Influential Cases that Were Ahead of Their Time

U.S. Court of Appeals, 3rd Circuit

An Influential Case

Spinetti v. Serv. Corp. Int'l, 324 F.3d 212 (3d Cir. 2003) The plaintiff filed a court action for age and gender discrimination under the ADEA and Title VII despite having signed an employment arbitration agreement. The district court granted the employer's motion to dismiss and ordered the parties to proceed with arbitration. The plaintiff appealed, and the EEOC joined in the plaintiff's appeal as *amicus curiae*, asking the Third Circuit Court of Appeals to refuse to enforce the arbitration agreement. The court rejected the EEOC's arguments and held that the arbitration agreement was enforceable. Littler further persuaded the court that two unenforceable provisions of the agreement could be severed, even though the agreement did not contain a severability clause.

U.S. Court of Appeals, 7th Circuit

An Influential Case

Bragg v. Navistar Int'l Transp. Corp., 164 F.3d 373 (7th Cir. 1998) The plaintiff had brought constructive discharge, failure to promote and equal pay claims based on race and gender. After obtaining a summary judgment award on all counts, Littler persuaded the court to reject the plaintiff employee's arguments on appeal, and instead agree with the corporate defendant that no prima facie case of discrimination was established.

U.S. Court of Appeals, 8th Circuit

An Influential Case

Chambers v. Metro. Prop. & Cas. Ins. Co., 351 F.3d 848 (8th Cir. 2003) The plaintiff sued for age discrimination, breach of contract (denial of benefits), and unjust enrichment after being terminated following the sale of his employer's operation to the Metropolitan Property & Casualty Insurance Company. Littler convinced the court of appeals to affirm summary judgment on all claims. Notably, the court emphasized the power of the employer to modify or revoke a unilateral contract (including handbooks) so long as the employee has not begun performance. The court also ruled that the plaintiff's evidence did not support an inference of age discrimination.

An Influential Case

Linville v. Sears, Roebuck & Co., 335 F.3d 822 (8th Cir. 2003) The lower court granted summary judgment against a male plaintiff who sued for same-sex harassment after a coworker, in an act of horseplay, hit the plaintiff in the crotch several times. On appeal, Littler successfully argued that the judgment was proper because the plaintiff had failed to present evidence that the coworker's actions were based on sex or gender.

U.S. Court of Appeals, 9th Circuit

An Influential Case

Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000)

After being fondled by a coworker, a female dispatcher sued the City of San Mateo for sexual harassment and retaliation under state and federal law. The district court granted summary judgment for the City, holding that a single episode of harassment – albeit distasteful – did not rise to the level of severity and pervasiveness required to constitute a hostile work environment under Title VII or the FEHA. Littler's appellate team faced a considerable challenge, as the Ninth Circuit described the behavior as "highly reprehensible" and "unsavory." However, Littler convinced the court that the plaintiff's case was not actionable as a matter of law.

An Influential Case

U.S. ex rel. Local 342 Plumbers & Steamfitters v. Dan Caputo Co., 321 F.3d 926 (9th Cir. 2003) In this case, the union brought separate actions against two contractors under the federal False Claims Act, alleging failure to pay the prevailing wage rate. The district court found in favor of Caputo, based on the Department of Labor's final ruling that the company had not misclassified its employees. Representing Caputo on appeal, Littler persuaded the court of appeals to affirm summary judgment because the union could not show that a prevailing wage or classification had been established.

California

An Influential Case

Cotran v. Rollins Hudig Hall Int'l, Inc., 17 Cal. 4th 93, 948 P.2d 412 (1998) Littler achieved a significant victory for employers in this landmark case in which the Supreme Court of California set the governing standard for adjudication of wrongful discharge claims where the employee alleges breach of an implied agreement not to be terminated except for "good cause." The California Supreme Court, settling nearly two decades of inconsistent court of appeal opinions, held that the role of the jury was to determine whether the employer acted reasonably and in good faith in deciding to terminate an employee, not whether the terminated employee actually engaged in the misconduct leading to his or her discharge.

An Influential Case

Laird v. Capital Cities/ABC, Inc., 68 Cal. App. 4th 727, 80 Cal. Rptr. 2d 454 (1998) The plaintiff sued her employer's parent corporation, alleging wrongful termination and discrimination under California law. The parent company obtained summary judgment on the ground that it was not the plaintiff's employer. On appeal, Littler convinced the appellate court that the plaintiff's evidence did not meet the "integrated enterprise" test (based on analogous federal law analysis), and the court affirmed judgment in the parent company's favor. [California]

An Influential Case

Etter v. Veriflo Corp., 67 Cal. App. 4th 457, 79 Cal. Rptr. 2d 33 (1998) The defendant received a unanimous jury verdict on the plaintiff's claims of racial discrimination and harassment under the Fair Employment and Housing Act. The plaintiff appealed, challenging the court's instruction to the jury that "occasional, isolated, sporadic or trivial" acts of racial harassment are not legally actionable. Littler successfully argued that the instruction was properly based on legal standards established by state and federal precedent, and the court of appeal affirmed the judgment. [California]

An Influential Case

24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 (1998) In a triumph for companies that use employment arbitration clauses, this case presented an issue of first impression: Whether a defendant as to whom all claims are arbitrable, could be precluded from seeking summary judgment because the plaintiff had also raised nonarbitrable claims against other defendants. Agreeing with Littler's analysis, the appellate court answered "no" to the question, concluding that because all of the claims against the employer were arbitrable, and because the plaintiff had expressly repudiated the arbitration agreement, the employer was entitled to summary judgment on all claims. [California]

An Influential Case

White v. Ultramar, Inc., 21 Cal. 4th 563, 981 P.2d 944 (1999) Littler, representing client Beverly Enterprises, filed an *amicus curiae* brief on behalf of the employer, Ultramar, in this important case involving a corporation's liability for punitive damages for acts of employees who are "managing agents" under California law. The court of appeal had broadly defined "managing agent" as anyone with supervisory authority who has the ability to hire and fire employees. The California Supreme Court disagreed. Citing directly from Littler's brief, the court acknowledged such a definition "effectively allows punitive damage liability without proof of anything more than simple tort liability which [the court has] long recognized is insufficient." As a result of this and other strong defense arguments, the court narrowed the definition of "managing agent" to include only those who "exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy." [California]

Texas

An Influential Case

Columbia Valley Reg'l Med. Ctr. v. Bannert, 112 S.W.3d 193 (Tex. App. 2003) In this case, the plaintiff was terminated for dishonesty, and subsequently sued her employer for libel, alleging that a memorandum on the employer's "shared" computer drive injured her reputation. The jury awarded her over $1.5 million in actual and punitive damages. The employer challenged the judgment on numerous grounds and Littler persuaded the appellate court to reverse the judgment. The court held, among other findings, that the memorandum was not defamatory as a matter of law, and issued a judgment ordering that no damages be awarded to the plaintiff.


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