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The Plaintiffs

Terry Madden	Rebecca O'Bar	Doug Wortman
<ul style="list-style-type: none"><li>Pre-opening:<ul style="list-style-type: none"><li>Assembled shelves</li><li>Received merchandise</li></ul></li><li>Post-opening:<ul style="list-style-type: none"><li>Completed data entry tasks</li><li>Assisted customers in the lumber yard</li><li>Unloaded trucks</li><li>Collected trash</li></ul></li></ul>	<ul style="list-style-type: none"><li>Pre-opening:<ul style="list-style-type: none"><li>Assembled shelves</li><li>Stocked merchandise</li></ul></li><li>Post-opening:<ul style="list-style-type: none"><li>Worked in the lumber yard</li><li>Worked in shipping/receiving</li></ul></li></ul>	<ul style="list-style-type: none"><li>Pre- and Post-opening:<ul style="list-style-type: none"><li>Waited on customers</li><li>Helped load trucks</li><li><u>On occasion, would direct truck drivers on where to make deliveries</u></li></ul></li></ul>

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Hiring Process



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## Lessons from *Madden*

### Not an unreasonably high burden – BUT IT EXISTS

- "[M]any different employee duties and levels of involvement can work to satisfy this fourth element"
- Immaterial that employee has "no control over the ultimate hiring and personnel decisions"
- Need only show "involvement in **at least one** personnel decision"

### Intended duties are not enough; must show *actual* performance

- No proof that Madden and O'Bar ever gave recommendations
- Size of an enterprise matters when considering the frequency

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## Cases From the Supremes

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## Sarbanes–Oxley Act of 2002

- Section 1514A provides civil action to protect against retaliation.
  - "No [public] company . . . , or any . . . contractor [or] subcontractor . . . of such company, may [take adverse action] against an employee . . . because of [whistleblowing activity]."

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**Lawson v. FMR LLC**

- **Allegation:** Fidelity statement filed with SEC misrepresented how portfolio managers were compensated.
- **Issue:** Does SOX allow retaliation lawsuits only by the employees of the public company, or by those of its contractors as well?

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**United States Supreme Court**

- **Held:** Whistleblower protection includes employees of a public company's private contractors and subcontractors.
- **Impact:** Closed loophole but gives plaintiffs' attorneys additional incentives to pursue aggressive litigation against privately held companies.

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**Templemire v. W&M Welding, Inc.**

- **Facts:** Employee discharged for failing to perform work tasks and brought workers' compensation retaliation claim against employer.
  - Employee appealed jury verdict for employer.
- **Issue:** Should the standard for workers' compensation retaliation be exclusive causation, for which 30 years of precedent exists, or contributing factor?

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## Supreme Court of Missouri

- **Held:** Employee must demonstrate that his or her filing of a workers' compensation claim was a **contributing factor** to the employer's discrimination or the employee's discharge.
- **Impact:** Expands potential liability for Missouri employers. Be even more cautious before taking adverse action against employees who have exercised WC rights.

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## The Latest & Greatest of Social Media

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### HOT Issue With The NLRB

- National Labor Relations Board (NLRB) administers the National Labor Relations Act (NLRA).
- Applies to unionized and nonunionized workforces.
- Does not apply to state or federal government.
- **Employees have a right to engage in "concerted activities" for "mutual aid or protection."**

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### A New Helpful Case

- Gatto v. United Airlines
  - Individual plaintiff deactivated social media (Facebook account) evidence that contradicted damage request after defendant company subpoenaed records
  - Sanctions against plaintiff (draw negative inference against plaintiff) "spoliation instruction"

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### NLRB Approved Policy Language

"Employees are prohibited from posting or displaying comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic."

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### *Gulliver Schools v. Snay*

- Court voids \$150,000 settlement in an age discrimination case for breach of confidentiality agreement.
- "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

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**Putting Pen to Paper – Arbitration & Restrictive Covenant Agreements**  
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**Types of Restrictive Covenants**

- Employee non-solicitation agreement
- Customer/client non-solicitation agreement
- Non-competition agreement
  - Based on industry, geography, time and/or specific clients/customers

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**David Darr v. Roberts Marketing Group, LLC**  
*2014 WL 1595846 (Mo. Ct. App. April 22, 2014)*

- Unemployment compensation awarded to individual who quit due to refusal to sign non-competition agreement.

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**C.L.E.A.N., LLC v. Division of  
Employment Security**

405 S.W.3d 613 (Mo. Ct. App. 2013)

- Non-competition agreement undermined employer's claim individuals were independent contractors, not employees.

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**Central Trust and Investment  
Company v. SignalPoint Asset  
Management, LLC**

422 S.W.3d 312 (Mo. 2014)

- Court rejected trade secret theft claim where electronic and hard copy client lists were put in safe deposit box.

"Although SignalPoint performed services for and bills people who were once Central Trust or STC clients and who eventually became clients of Kennedy and SignalPoint, there is no support in the record that SignalPoint had any way of knowing which of Kennedy's clients are new clients and which are former clients of STC or Central Trust."

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**Baier v. Darden Restaurants**

420 S.W.3d 733 (Mo. Ct. App. 2014)

- Arbitration agreement not enforceable where company did not sign it (where agreement provided a company signature line).

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**Your Trusty Favorite:  
Recent FMLA Cases**  
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***James v. Hyatt Regency Chicago*  
Seventh Circuit, February 13, 2013**

- Facts: Employee on FMLA leave submitted conflicting documents regarding his ability to return to work. As a result, employer failed to return employee to work at employee's first request.
- Issue: Does an employer violate the FMLA by failing to return an employee to work who is unable to perform the essential functions?

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***James v. Hyatt Regency Chicago*  
Seventh Circuit, February 13, 2013**

- Holding: An employer is not required to return an employee to work if the employee cannot perform the essential functions of his/her position with or without a reasonable accommodation.
- Impact: If an employee provides conflicting information, an employer can delay the return to work without violating the FMLA. Employers should make a good-faith effort to resolve the dispute.

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***Walker v. Trinity Marine Products***  
**Eighth Circuit, July 19, 2013**

- Facts: Employer was concerned about employee's ability to perform the job and required employee to use FMLA leave until being released to work by her physician.
- Issue: Does an employer interfere with an employee's FMLA rights by forcing the employee to take FMLA leave?

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***Walker v. Trinity Marine Products***  
**Eighth Circuit, July 19, 2013**

- Holding: An employee has no cause of action for FMLA interference related to forced FMLA leave unless the employee attempts to take FMLA leave in the future and is denied.
- Impact: Improperly designating leave under the FMLA will only result in an interference claim if an employee is denied leave later for a serious health condition. But be aware of the ADA.

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***Escriba v. Foster Poultry Farms, Inc.***  
**Ninth Circuit, February 25, 2014**

- Facts: Employee requested vacation to care for a sick parent. Employee declined leave other than vacation leave. Employee failed to return to work and did not call the company after her approved vacation.
- Issue: Is an employer required to designate leave as FMLA when an employee affirmatively declines FMLA leave?

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***Escriba v. Foster Poultry Farms, Inc.***  
**Ninth Circuit, February 25, 2014**

- Holding: An employer will not violate the FMLA by failing to designate leave as FMLA if an employee affirmatively declines FMLA leave.
- Impact: Makes it unclear whether an employer can designate leave as FMLA against an employee's wishes.

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**Thank you**

Seminar materials can be found on the firm's website...

[www.huschblackwell.com](http://www.huschblackwell.com)

under "Business Insights"

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