Employment Discrimination Law Update

(Session: The Year in Review: Annual Discrimination and Retaliation Law Update)

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This is a supplement to Lindemann, Grossman & Weirich, *Employment Discrimination Law* (6th ed. 2020). It is organized by book chapters. The Sixth Edition includes Court of Appeals decisions through mid-2018 and Supreme Court cases issued during the 2018-2019 term. With a few exceptions, this update begins with cases decided after January 1, 2018. It focuses almost exclusively on Court of Appeals and Supreme Court decisions.

Disparate Treatment (Ch. 2)

Summary Judgment Standards

Chambers v. District of Columbia*,* 988 F.3d 497 (D.C. Cir. 2021) – Summary judgment based on request for "purely lateral" transfer to a different unit – Circuit precedent requires this result – 2 of 3 judges on panel joined in a concurrence suggesting that the D.C. Circuit reconsider circuit precedent and allow such cases even without proof of tangible injury.

***Wilson v. Textron Aviation, Inc.*¸** 820 F. App'x 688 (10th Cir. 2020) (unpublished) – Black employee put on involuntary leave because of medical restrictions – summary judgment against his claim that the leave was because of his supervisor's racial animus rather than the medical restrictions – even if the supervisor was biased, he was just one member of a five-person teamauconier that imposed the medical leave and the black employee did not show any racial animus by any other team member.

Pribyl v. County of Wright, 964 F.3d 793 (8th Cir. 2020) – Police promotion – round one was objective analysis of qualifications – plaintiff most qualified – but plaintiff did badly on round two, interviews – even if one interviewer was biased, other interviewers scored her badly – even if plaintiff was the most objectively qualified, county was permitted to consider the interview performances in making a final decision – summary judgment.

Button v. Dakota, Minnesota & Eastern R.R. Corp., 963 F.3d 824 (8th Cir. 2020) – Summary judgment affirmed in sex discrimination RIF case – train dispatching supervisor laid off – principle reliance on comment made by director of train dispatching who was female who while visiting the train dispatching desk allegedly said that the desk "wasn't a place for a woman" – but this individual was not involved in the RIF decision-making and was not plaintiff's supervisor – to be direct proof a remark must have been made by a decision-maker and specifically link the alleged discrimination to the challenged job action.

Findlator v. Allina Health Clinics, 960 F.3d 512 (8th Cir. 2020) – Summary judgment affirmed against black lab technician who had an altercation with a white co-worker – white co-worker threw lab coat at black technician but black technician engaged in physical misconduct against the white employee – white not discharged – not comparable.

Main v. Ozark Health, Inc., 959 F.3d 319 (8th Cir. 2020) – Summary judgment affirmed in age sex discharge case – employer had honest belief that employee was rude and insubordinate – plaintiff contended that honest belief rule was limited to second- or third-hand reports and is not applicable when the conduct is observed first hand – plaintiff contended that others disagreed with supervisor's assessment that the conduct in question was rude and insubordinate – court held that there was an honest belief and affirmed summary judgment – honest belief rule not limited to second- or third-hand reports but can apply first-hand reports.

Trahan v. Wayfair Maine, LLC, 957 F.3d 54 (1st Cir. 2020) – Summary judgment proper on discharge of disabled employee – discharged for repeatedly referring to two co-workers as "bitches" and reacting aggressively to them – fired employee was not similarly situated to co-workers who snapped at her and used profanity because her conduct included throwing her headset and slamming down her phone and that was therefore more egregious – moreover, she "doubled down" on her

swearing by repeatedly referring to her co-workers as bitches during an investigation.

Bharadwaj v. Mid Dakota Clinic, 954 F.3d 1130 (8th Cir. 2020) – Discharge summary judgment affirmed – doctor discharged for failing to get along with co-workers – essentially claims treated unfairly – employment discrimination laws do not authorize federal courts "to sit as super personnel departments reviewing the wisdom or fairness of the business judgment made by employers . . ." 954 F.3d at 113 (citing prior Circuit case) – Doctor contended that other doctors also had interpersonal problems – however, none of them had problems to the point where other doctors refused to work with them – therefore not comparable.

Castetter v. Dolgencorp, LLC, 953 F.3d 994 (7th Cir. Mar. 25, 2020) – Summary judgment in disability discharge lawsuit – does not matter that supervisor made mocking disability related comments – remarks were neither contemporaneous nor part of the discharge decision – one reason for discharge was failing to complete the hiring paperwork – the fact that the employer did not discharge subordinate who was ordered to do it by the plaintiff irrelevant – different standards for managers and subordinate employees.

Paul v. Murphy, 948 F.3d 42 (1st Cir. 2020) – Summary judgment affirmed in sex, age, and retaliation case – while a sharp drop in ratings from an old supervisor to a new supervisor can be evidence of pretext, "there was only a modest decline in [plaintiff's] reviews and rankings over a period of three years" during which she had a new supervisor. 948 F.3d at 51 – this is not the stark difference in assessments necessary to support an inference of discrimination – with respect to plaintiff's contention that she was improperly blamed for the mistakes of others, "there is no indication in the record that [her new supervisor] did not believe that [plaintiff] was responsible for the mistakes at issue," *Id*. – with respect to age discrimination, an isolated comment from her new supervisor that "you are 64 no 65" is simply an isolated ambiguous remark insufficient for a jury to infer discrimination.

Barnes v. Bd. of Trs. of the Univ. of Ill., 946 F.3d 384 (7th Cir. 2020) – Summary judgment affirmed in race discrimination promotion case –

choice between two candidates based on relative performance in interview process – "The best Barnes can do is point to problems with the interview process: it was unstructured, subjective, and therefore, he contends, unfair. . . . [E]ven if this unstructured and subjective method of interviewing is disfavored, Barnes merely shows that Donovan's process was not accurate, wise or well-considered; that does not make his stated reason for hiring [the other candidate] a lie." 946 F.3d at 390 (internal quotation marks omitted) – The fact that no African-American had ever been a chief engineer was insufficient to avoid summary judgment – decision-maker had previously promoted African-Americans to head positions – summary judgment affirmed.

Rinchuso v. Brookshire Grocery Co., 944 F.3d 725 (8th Cir. 2019) – Summary judgment affirmed – discharge based on inappropriate personal use of company computers and complaints of female co-workers of inappropriate touching – issue is not whether employee did it – issue is whether employer reasonably believed that the employee engaged in the inappropriate conduct – IT Department unable to conclusively establish that plaintiff viewed pornography at work – nevertheless, employer reasonably believed testimony of female co-workers.

Singh v. Cordle, 936 F.3d 1022 (10th Cir. 2019) – Professor's employment contract wasn't renewed because university felt he wasn't collegial and was disrespectful to colleagues – Dean of his department who originally recommended non-renewal had made discriminatory comments about Asians – actual decision-makers independently investigated the professor's conduct and stated that the final non-renewal decision wasn't based on the Dean's recommendation or knowledge bias – plaintiff relied on the cat's paw theory – a reasonable jury could find that the Dean in question was biased – but a subordinate's bias must be a proximate cause – the causal chain can be broken by an independent review – the grievance committee which affirmed the non-renewal reviewed over a thousand pages of evidence and unanimously concluded that plaintiff's non-renewal was justified.

Beasley v. Warren Unilube, Inc., 933 F.3d 932 (8th Cir. 2019) – Summary judgment in race discrimination case affirmed – alleged comparators not comparable – they didn't share the same supervisor, were not subject to the same standards, or did not engage in the same conduct – "Without some way to tie his termination to racial animus, Beasley's claim fails. Though Beasley's termination might have been unfair or

disproportionate, this alone is insufficient under Title VII933 F.3d at 939 – federal courts are not super personnel departments.

Luceus v. Rhode Island, 923 F.3d 255 (1st Cir. 2019) – Opinion by Retired Justice Souter sitting by designation – Summary judgment granted on both disparate impact and disparate treatment claims – On disparate treatment, proper to bypass the *prima facie* case issue – assuming a *prima facie* case, plaintiff failed to rebut the employer's justification for declining to promote plaintiff – her disruptive conduct in the workplace – no similarly-situated comparators identified – plaintiff's primary evidence on her promotion claim is that seven of the eight temporary promotions went to white employees –

> "But the central focus of a disparate treatment claim is less whether a pattern of discrimination existed and more how a particular individual is treated, and why. . . . For that reason, statistical evidence of a company's general hiring patterns, although relevant, carries less probative weight in a disparate treatment claim and in and of itself[] rarely suffices to rebut an employer's legitimate, non-discriminatory rationale for its decision. . . . Nor is there any basis in the record to treat this case as exceptional . . . ."

923 F.3d at 259 (internal quotation marks and citations omitted). Summary judgment affirmed on disparate treatment claim. Summary judgment also affirmed on disparate impact claim – no statistical significance shown.

Haynes v. Waste Connections, Inc., 922 F.3d 219 (4th Cir. 2019) – Summary judgment in discharge case overturned – employer's "reason for his termination has changed substantially over time." 922 F.3d at 226. – This constitutes sufficient evidence of pretext.

Lewis v. City of Union City, 918 F.3d 1213 (11th Cir. 2019) (*en banc*) – In opposing summary judgment on the basis of similarly-situated comparators, the proposed comparators must be "similarly situated in all material respects," 918 F.3d at 1231, 1246 – normally this requires that the employee and the proposed comparator (1) have engaged in the same basic conduct; (2) were subject to the same employment policies; (3) were in most instances under the jurisdiction of the same supervisor; and

(4) have the same employment or disciplinary history – other Circuit opinions have taken different positions on how close the comparator must be – a meaningful comparator analysis must be conducted at the *prima facie* stage of *McDonnell Douglas's* burden shifting framework – it should not be moved to the pretext stage – we decline plaintiff's suggestion that the comparator evidence analysis be at the pretext stage – at the *prima facie* stage the plaintiff must establish a presumption of discrimination – "It follows, therefore, that at the *prima facie* stage the plaintiff must show a potential 'winner' – i.e., enough to give rise to a valid inference that her employer engaged in unlawful intentional discrimination," *Id*. at 1222. The plaintiff must thus show that the employer treated like cases differently – "Absent a qualitative comparison at the *prima facie* stage . . . there's no way of knowing (or even inferring) that discrimination is afoot. Think about it: Every qualified minority employee who gets fired, for instance, necessarily satisfies the first three prongs of the traditional *prima facie* case." *Id*. at 1224. Therefore, if the qualitative assessment of comparator evidence is not at the *prima facie* stage, this would effectively shift to the defendant the burden of disproving discrimination which the Supreme Court has expressly rejected – On comparative evidence, we must choose between "nearly identical" and "same or similar" – "we hold that a plaintiff . . . must show that she and her comparators are 'similarly situated in all material respects.'" *Id*. at 1224, 1226. Similarly situated is too vague and "risks giving courts too much leeway to upset employers' business judgments." *Id*. at 1225. "An all-material-respects standard . . . leaves employers the necessary breathing space to make appropriate business judgments. . . . An employer is well within its rights to accord different treatment to employees who are differently situated in 'material respects' . . . Finally, the all-material-respects standard serves the interests of sound judicial administration by allowing for summary judgment in *appropriate* cases – namely, where the comparators are simply too dissimilar to permit a valid inference that invidious discrimination is afoot." *Id*. at 1228-29 (citations omitted, emphasis in original). "In sum, we hold that when a plaintiff relies on the . . . burden-shifting framework . . . using circumstantial evidence, she must demonstrate – as part of her *prima facie* case – that she was treated differently from other individuals with whom she was similarly situated in all material respects." *Id*. at 1231. Decision was 10-3.

Bonilla-Ramirez v. MVM, Inc., 904 F.3d 88 (1st Cir. 2018) – Summary judgment affirmed against fired security guard – alleged male

comparables were not charged with actual security violations – employer comparables who did commit security violations were also discharged.

Ranowsky v. Nat'l R.R. Passenger Corp. (Amtrak), 746 F. App'x 23 (D.C. Cir. 2018), *reh'g en banc denied* (Oct. 16, 2018) – New Amtrak inspector general fired 12-year lawyer – reason was lack of confidence in demeanor and competence – summary judgment granted – recent positive evaluations are not inconsistent with lack of confidence in lawyer's style and demeanor – different person hired young successor so no inferences from that can be drawn.

Rogers v. Henry Ford Health Sys., 897 F.3d 763 (6th Cir. 2018), *reh'g en banc denied* (Sept. 5, 2018) – Summary judgment affirmed on promotion claim – employee with high school diploma denied promotion to job that specified bachelor's and master's degree – alleged comparables had educational requirements waived, but only one level of educational requirement – no comparable had two levels of education waived based on experience – these are material distinctions, mandating summary judgment.

Khowaja v. Sessions, 893 F.3d 1010 (7th Cir. 2018) – Summary judgment against Muslim FBI trainee who was terminated affirmed – alleged comparably situated white trainee worked in close proximity, did have the same supervisor, and was involved in a similar issue – however, although the white trainee was counseled for mistakes, unlike plaintiff he did not defend his mistakes – moreover, plaintiff was involved in numerous other instances of inappropriate judgment – viewing the evidence as a whole, plaintiff presents no evidence that would lead a reasonable fact finder to conclude that he was terminated because he was a Muslim – questions by terminating supervisor about plaintiff's religious faith not demeaning.

Fassbender v. Correct Care Solutions, LLC, 890 F.3d 875 (10th Cir. 2018) – Summary judgment affirmed on retaliation claim – no reasonable jury could conclude that prison employee was terminated because she

passed on a complaint of sexual harassment – summary judgment overturned on pregnancy discrimination claim – shifting explanations for termination are circumstantial evidence from which a jury could infer pretext.

Rooney v. Rock-Tenn Converting Co., 878 F.3d 1111 (8th Cir. 2018) – Summary judgment affirmed – district court considered grounds for termination beyond the reasons provided to plaintiff at the time he was fired – *McDonnell Douglas* framework is not as narrow as plaintiff contends – employer does not have obligation to list all reasons for discharge in time of adverse action – burden of listing all reasons occurs only during litigation – "an employer is certainly not bound as a matter of law to whatever reasons might have been provided [at time of discharge]," 878 F.3d at 1116 – evidence of a substantial shift in an employer's explanation for decision may evidence pretext, but elaborating on reasons given at the time does not show pretext – no contradiction between explanation given to plaintiff at the time and the additional examples of poor performance offered in support of summary judgment – with respect to employer's assertion that one reason for discharge was poor relations with a co-worker, plaintiff asserts that the poor relations were the co-worker's fault – "it is important to remember, as we have often said, that a federal court is not a super-personnel department with authority to review the wisdom or fairness of business judgments made by employers," 878 F.3d at 1118 – plaintiff's evidence falls well short of creating a factual issue – contention that Jewish co-workers are treated more favorably than he was lacks evidentiary support – no evidence that allegedly anti-Christian employee played a role in the termination.

Grant v. Trustees of Ind. Univ., 870 F.3d 562 (7th Cir. 2017), *reh'g denied* (Sept. 28, 2017) – Black tenured professor fired after outside investigator confirmed that he had misrepresented his academic credentials – no evidence that his race or his prior internal EEO complaint against a dean affected the decision – no evidence that allegedly biased executive vice chancellor who recommended discharge had any input or influence in the case – he simply submitted it to the chancellor long before the firing – professor's misrepresentations justify discharge – cat's paw argument rejected.

Ross v. Jefferson Cty. Dep't of Health, 701 F.3d 655 (11th Cir. 2012), *reh'g en banc denied* 706 F.3d 1333 (11th Cir. 2013) – Summary judgment properly granted on black employee's race discrimination claim

since she waived her complaint of racial discrimination when she was asked whether she "felt like her termination had anything to do with her race" and she responded "no." 701 F.3d at 661 (alterations omitted).

General

Cruz v. McAleenan, 931 F.3d 1186 (D.C. Cir. 2019) – Summary judgment reversed – trial court should not have granted summary judgment without allowing plaintiff to take discovery – evidence that she might gather might show that she was treated less favorably than non-black and male co-workers – district court improperly believed that the evidence sought by plaintiff could not create a dispute of material fact with respect to motivation for the employer's actions – plaintiff had requested that summary judgment proceedings be stayed pending discovery.

Iyoha v. Architect of the Capitol, 927 F.3d 561 (D.C. Cir. 2019) – Summary judgment on promotion claim reversed – numeric scores from a panel are only as valid as the lack of bias of the panel – one member of the panel had made disparaging remarks about accents and had previously been found to discriminate against the plaintiff with respect to a reassignment out of the same department to which he was seeking a promotion.

Mawakana v. Board of Trs. of Univ. of D.C., 926 F.3d 859 (D.C. Cir. 2019), *reh'g en banc denied* (Aug. 14, 2019) – Black law professor denied tenure – summary judgment reversed – law school dean supported every white applicant for tenure during her time as dean – she raised concerns about more than half of the black applicants who applied for or were considering applying for tenure – she treated criteria differently when assessing black and white candidates – for blacks she viewed negatively, co-authored work and work published in the University's own Law Review – for white applicants she gave that full credit.

Richard v. Reg'l Sch. Unit 57, 901 F.3d 52 (1st Cir. 2018) – Court affirmed five-day bench trial decision against plaintiff – *McDonnell Douglas* analysis – Plaintiff established *prima facie* case of retaliation – employer offered legitimate non-discriminatory reason – plaintiff proved that legitimate non-discriminatory reason was false – nevertheless, the district court then turned to the ultimate question – had plaintiff

established it was more likely than not that retaliation for advocacy for students with disabilities actually motivated the adverse actions – the Court found "scant evidence" that the superintendent of schools was even aware of the plaintiff's advocacy for disabled students –

> "[Plaintiff's] argument confuses two concepts: what the evidence *permits* a fact finder to do, and what the evidence *compels* a fact finder to do." 901 F.3d at 58.
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> "[O]nce a factfinder is satisfied that an employer's reasons for taking an adverse action are pretextual, it *may* find for the plaintiff on causation without further evidence. . . . But [plaintiff] cites no authority for the proposition that once pretext is established, a factfinder *must* find in plaintiff's favor." *Id*. (emphasis in original).

2-1 decision.

Caraballo-Caraballo v. Corr. Admin.; Corr. Dep't of the Commw. of P.R., 892 F.3d 53 (1st Cir. 2018) – Plaintiff who had successfully been performing job for years transferred with no loss of pay to lesser job; error to rule as matter of law that replacement has superior qualifications because of additional education – plaintiff's experience could be found to counterbalance extra education – while transfers may not be adverse employment actions if they do not involve a real demotion, a transfer is actionable if it involves more than minor changes in working conditions – if it changes the plaintiff's conditions of employment in a manner that is more disruptive than a mere inconvenience or an alteration of job responsibilities.

Adverse Impact (Ch. 3 & Ch. 4)

Freyd v. University of Oregon, 990 F.3d 1211 (9th Cir. 2021) – Full professor allegedly paid less than comparable male full professors and thus denied equal pay – summary judgment for University reversed 2 to 1 – with respect to pay contention, the comparison should have been the overall job and not its individual components – even though individual professors might differ with respect to what courses they taught, what research they were doing, and the like, they were all full professors in the same department, they all did research, they all taught classes, and they all served on committees – that is sufficient for an equal pay comparison jury question – also claimed adverse impact based on the University's practice of paying retention bonuses to faculty who were offered an opportunity to leave and go elsewhere – when a retention bonus was paid, other professors who were comparable were not raised – statistical evidence indicated that female professors were less willing to relocate and thus seek retention bonuses – the statistics raised a jury question – summary judgment was upheld on sex discrimination claims – the retention bonus was not as a matter of law a business necessity – there was conflicting evidence – the dissent analogized the professor to a superstar athlete – individual compensation based on market conditions.

Mandala v. NTT Data, Inc., 975 F.3d 202 (2d Cir. 2020) – Second Circuit ruled 2 – 1 that population-based statistics showing that blacks are arrested and incarcerated at a higher rates than whites are not enough to create a *prima facie* adverse impact hiring case – the purported class would be black job seekers who were rejected after criminal record checks – the general population statistics aren't probative because the company doesn't hire from the general population – the jobs in question require specific educational and technical credentials – therefore, more precise statistics were necessary for an adverse impact case.

Davis v. D.C., 925 F.3d 1240 (D.C. Cir. 2019), *reh'g en banc denied* (Aug. 14, 2019) – District court refused to consider adverse impact challenge to selection of employees for layoff, reasoning that such selection was not a particular employment practice – on that issue, reversed – "What is at issue here is not a RIF in the abstract, however, but the means by which the Agency implemented it." 925 F.3d at 1243. – The practices an employer uses to effectuate layoffs whether or not dubbed a RIF are not exempt from disparate impact scrutiny.

Williams v. Wells Fargo Bank, N.A., 901 F.3d 1036 (8th Cir. 2018), *reh'g en banc denied* (Nov. 1, 2018) – Summary judgment affirmed against putative class of minority employees who sued FDIC-insured bank which prohibited employment of individuals who had recently been convicted of crimes involving dishonesty – bank was entitled to use business necessity defense because it could have faced penalties of $1 million per day for non-compliance with federal law – claim that waivers could have been accomplished with the assistance of the bank rejected – no data suggested waivers would have ameliorated racial disparity.

Race and Color (Ch. 6)

Joseph v. LinCare, Inc., 989 F.3d 147 (1st Cir. 2021) -- Black sales representative discharged – summary judgment reversed – conflicting reasons for decision – employer said reason was dispute between plaintiff and potential customer and that plaintiff had been directed not to contact the customer – employer representative who allegedly gave instruction repudiated that allegation – moreover, clinic owner referred to the 6'4" African-American sales representative as a "Rasta-looking sales rep" and described him as a "6'4" African-American man" – a jury could find that the employer accepted this portrayal of the representative as an intimidating black man.

Brandt v. Fitzpatrick, 957 F.3d 67 (1st Cir. 2020) – A black state department of corrections employee quit in order to apply for a job at a federal correctional facility – job fell through due to a hiring freeze – plaintiff reapplied to former employer, truthfully informing former employer that he did not get the job at the federal penitentiary because of a hiring freeze – former employer checked with federal penitentiary, and was told incorrectly that there was no hiring freeze – former employer therefore concluded that employee lied and refused to reinstate him – employee claimed "unconscious" racial bias – summary judgment affirmed – mistake is not race discrimination.

Smelter v. S. Home Care Servs. Inc., 904 F.3d 1276 (11th Cir. 2018) – Summary judgment on hostile racial environment reversed – frequent use of the "n" word by co-workers in presence of management – not essential but plaintiff proved that the harassment unreasonably interfered with her work performance – summary judgment affirmed on discriminatory discharge and retaliation claims – plaintiff failed to establish pretext with respect to the employer's job performance explanations for the discharge.

Robinson v. Perales, 894 F.3d 818 (7th Cir. 2018) *reh'g denied* (July 24, 2018) – Summary judgment reversed on racial hostile environment claim – two instances of using the "N" word is enough for a hostile environment – the test is "severe *or* pervasive", not "severe *and* pervasive."

Johnson v. Advocate Health and Hosp. Corp., 892 F.3d 887 (7th Cir. 2018), *reh'g en banc denied* (July 10, 2018) – Summary judgment affirmed on race pay – comparables not similarly situated – comparables need not be identical – the test is commonsense – the issues include whether the comparables were supervised by the same person, were subject to the same standards, and engaged in similar conduct – summary judgment affirmed – plaintiffs did not produce sufficient evidence of non-African American employees treated better – on promotions, inadequate evidence demonstrate that the successful candidates were comparable – summary judgment also affirmed on terminations – again, no proper comparators – summary judgment reversed on hostile work environment/racial and derogatory speech – District concluded that racial harassment was not sufficiently severe or pervasive – "We expect a certain level of maturity and thick skin from employees," 892 F.3d at 900 – fact question on whether harassment was severe enough – racially derogatory speech used by both employer and contracting company hired to supervise janitors – using Negro dialect and the "N" word relied upon – evidence that one supervisor harassed African-American employees by mocking them with what he thought was stereotypical speech and using the "N" word could allow a reasonable jury to find a hostile environment – employer which outsourced supervision liable for their comments – under Title VII an employee can have more than one employer – both direct employer and outsource supervisors potentially liable – potential hostile environment not negated by the fact that some supervisors were African-American – summary judgment on hostile work environment claim with respect to racial derogatory language reversed.

National Origin and Citizenship (Ch. 7)

Khalaf v. Ford Motor Co., 973 F.3d 469 (6th Cir. 2020), *reh'g en banc denied* (Sept. 30, 2020) – Jury awarded individual of Middle East origin $16.8 million in compensatory and punitive damages, finding a hostile work environment based on comments by both his subordinates and a supervisor regarding his English language skills – trial court cut it to $2.1 million – Sixth Circuit reversed and ordered no recovery. Evidence showed that problems expressed by subordinates and supervisor with respect to English language skills related to communication skills and not to a derogatory national origin harassment – frequently a "fine line" as to whether comments about language and accent are derogatory or based on difficulty in communicating – but here clear that facts did not indicate harassment.

Village of Freeport v. Barrella, 814 F.3d 594 (2d Cir. 2016), *appeal after new trial* 714 F. App'x 78 (2nd Cir. 2018), *cert. denied* 139 S. Ct. 1166 (2019) – Reverse discrimination case – white candidate for police chief alleged that Cuban-born Hispanic chosen for racial reasons – does not matter that successful candidate self-identified himself as "white" – Hispanic ethnicity constitutes race as a matter of law – defendant not entitled to judgment as a matter of law – jury verdict for plaintiff set aside for unrelated reasons and new trial ordered.

Religion (Ch. 9)

Our Lady of Guadalupe Sch. v. Morrissey-Berru, ___ U.S. ___, 140 S. Ct. 2049 (2020) – Two elementary school teachers sued alleging in one case age discrimination and in the other disability discrimination – summary judgment granted below based on the ministerial exception established by the Supreme Court's *Hosanna-Tabor* case – 9th Circuit reversed holding that the individuals did not have the title of minister and their primary function was not religious – however, both were employed under agreements that set forth the school's mission to develop and promote a Catholic school faith community and they were required to teach religious subjects even though they had no formal religious training – the 9th Circuit mistakenly treated the circumstances the court found relevant in the *Hosanna-Tabor* case as a checklist – that rigid test produced a distorted analysis – the 9th Circuit erred in suggesting that an employee can never come within the ministerial exception unless they are a practicing member of the religion – to do otherwise would

unconstitutionally involve the government in religion – 7-2 decision – Sotomayor and Ginsburg dissented.

Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021) – Public high school football coach disciplined for kneeling and praying at the football field's 50-yard line immediately after high school games – school district's allowance of this practice would have violated the establishment clause – though his prayer was brief, the facts on the record including plaintiff's "media blitz" "utterly belie his contention that the prayer was personal and private." 991 F.3d at 1017. – Coach was engaging as a public employee in a demonstration aimed at students and the attending public.

Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174 (3rd Cir. 2020) – Non-practicing Muslim of Egyptian descent who was a school teacher taught holocaust denial theories and referred students to anti-semitic articles – never apologized for actions and didn't dispute evidence showing that he encouraged Hitler apologist and other conspiracy theories – he claimed race and religious discrimination – summary judgment proper because of undisputed facts – school district has the right to determine what they want taught – plaintiff claimed that his superior approved the reading list.

Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2018), *cert. denied* 139 S. Ct. 424 (2018) – Ministerial exception doctrine properly applied to bar Title VII religious discrimination and retaliation claims by a black Methodist former Chaplin who was fired from a hospital's pastoral care department for religious-based performance issues – does not matter that hospital was only historically connected to the Methodist church – hospital through its pastoral care department is itself a religious group and the first amendment prohibits courts from inquiring into an asserted religious motive for an adverse employment action.

Tabura v. Kellogg USA, 880 F.3d 544 (10th Cir. 2018) – Summary judgment reversed in religious accommodation case – Seventh-Day Adventist employees observe Saturday Sabbath – Company accommodations of allowing to swap shifts and use vacation and other paid time off arguably insufficient – would still have had to work some Saturdays even if they used all their paid time off – issue is not whether there was a complete or total accommodation – "we see no need to adopt a per se rule requiring that an accommodation, to be reasonable, must eliminate, or totally eliminate, or completely eliminate, any conflict

between an employee's religious practice and his work requirements." 880 F.3d at *9 – whether the accommodation here is reasonable is a question of fact – subject to a reasonableness analysis, an employee may be required to use vacation or other paid time off to avoid conflicts – not clear how helpful employer was in facilitating shift swaps and how many employees were available for shift swaps – a multitude of genuinely disputed material facts about whether there was a reasonable accommodation – undue hardship not properly presented on summary judgment.

Sex (Ch. 10)

Joll v. Valparaiso Comm. Schs., 953 F.3d 923 (7th Cir. 2020) – Summary judgment overturned 2-1 based on sex stereotyping – female running coach passed ovcr for positions – reasonable jury could find sex stereotyping – Joll asked about parenting and whether she could do the job with parenting – male applicants not asked about parenting – male applicants asked about coaching experience – female applicants references contacted promptly – male applicants references not checked until after hiring decision made – decision was 2-1 to overturn summary judgment – reasonable jury could find sex sterotyping.

Rizo v Yovino, 950 F.3d 1217 (9th Cir. 2020) (e*n banc*), *cert. denied* 141 S. Ct. 189 (2020) – Prior pay can never be used to justify a sex-based pay differential – decision was *en banc* – six justices joined the majority opinion – five justices concurred in the result but declined to state that prior pay could never be used – majority asserted that Second, Fourth, and Tenth Circuits fully agree with their decision – according to the majority, only the Seventh Circuit has ruled to the contrary -- *Kouba v. Allstate* overruled – Equal Pay Act "based on any factor rather than sex"defense "not applicable to prior salary" – this defense is limited to job-related factors – prior pay is clearly unrelated to the job in question – five-Judge concurrence wrote that prior pay alone is not a defense but employers do not necessarily violate the Equal Pay Act when they consider prior salary among other factors when setting initial wages.

Lenzi v. Systemax, Inc., 944 F.3d 97 (2d Cir. 2019) – Summary judgment against plaintiff reversed – claim of pregnancy discrimination – female vice president of risk management was subjected to an internal audit into expense reports three days after she disclosed her pregnancy to the chief financial officer – never before had such an audit been conducted – summary judgment was therefore inappropriate.

Bauer v. Lynch, 812 F.3d 340 (4th Cir. 2016), *cert. denied* 137 S. Ct. 372 (2016) – FBI requires 30 push-ups for male trainees, but only 12 for female trainees – district court granted summary judgment for male trainee who could only do 29 push-ups – reversed – the push-ups requirement was set at one standard deviation below the mean result for each sex determined by a study. Plaintiff did exceptionally well on all aspects of the test except push-ups – the issue was whether the FBI's use of gender norm standards was facially discriminatory – the government contended that because men and women have innate physiological differences that lead to different performance outcomes, the test's gender norm standards actually require the same level of overall fitness – the government relied on the U.S. Supreme Court's case of *United States v. Virginia* ("VMI"), 518 U.S. 515 (1996), in which the Supreme Court ruled that Virginia had violated the Equal Protection Law by excluding women from its military academy but noted that women's admission would require "*physical training programs for female cadets*" – "Men and women simply are not physiologically the same for purposes of physical fitness programs. The Supreme Court recognized as much . . . in the *VMI* . . . .", 812 F.3d at 350 – "[E]qually fit men and women demonstrate their fitness differently," 812 F.3d at 351 – "Put succinctly, an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each." *Id.* – summary judgment for plaintiff vacated, and case remanded to consider plaintiff's alternative argument that the standards do impose an undue burden of compliance on male trainees compared to female trainees.

Sexual Orientation and Gender Identity (Ch. 11)

Bostock v. Clayton County, Georgia, ___ U.S. ___, 140 S. Ct. 1731 (2020) – The Supreme Court, in an opinion by Justice Gorsuch, ruled 6-3 that discrimination against homosexual or transgender employees is barred by the prohibition against sex discrimination in Title VII. The straightforward application of Title VII's terms interpreted in accord with this Court's precedents resolves the three cases. In each of the three cases, a longtime employee was fired for simply being homosexual or transgender. Title VII prohibits discrimination where the protected status is a but-for cause. A defendant cannot avoid liability just by citing some other factor that contributed to the challenged employment action. The statute's repeated use of the term individual means that the focus is on a particular being as opposed to a class. Thus, an employer violates Title VII when it

intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. When an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex.

Three decisions of this Court confirm what the statute's plain terms suggest. First, in *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971), a violation was found because the employer refused to hire women with young children despite the fact that the employer actually preferred hiring women over men. In *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), an employer that required women to make larger pension fund contributions than men because women as a class live longer was held to violate Title VII despite that conceded fact that the discrimination was based in part on differences in longevity. Finally, in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1978), a male plaintiff alleged a triable Title VII claim for sexual harassment by co-workers who were members of the same sex.

The lessons of these three cases are instructive. First, it is irrelevant what an employer might call its discriminatory practices, or how others might label it, or what else might motivate the employer. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against the individual in part because of sex. Second, the plaintiff's sex need not be the sole or primary cause of the discriminatory practice. It is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth might also be at work, or even play the more important role.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. The law prohibits discrimination against individuals. An employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if an employer is willing to subject all male and female homosexual transgender employees to the same rule.

The employers assert that it should make a difference that plaintiffs would likely respond in conversation that they were fired for being gay or

transgender and not because of sex. But conversational conventions do not control Title VII's legal analysis.

The employers also stress that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address these matters in Title VII it would have referenced them specifically. But when Congress chose not to include any exceptions to a broad rule, this Court applies the broad rule. The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. The legislative history has no bearing here, where no ambiguity exists in how Title VII's terms apply to the facts. Justices Alito, Kavanaugh, and Thomas dissented.

Masterpiece Cakeshop, Ltd.. v. Colo. Civil Rights Comm'n, 584 U.S. ___, 138 S. Ct. 1719 (2018) – Custom cake maker refused to create a specialized cake for same-sex married couple, citing religious reasons – Colorado Civil Rights Commission interpreted a Colorado law which prohibited businesses from discriminating on the basis of sexual orientation to apply to this conduct, rejecting the religious belief defense – Bakery owner made two primary arguments: (1) specialty cakes constitute free speech, and forcing him to prepare such a cake would constitute compelled speech rights since he communicates through his artistic cakes; and (2) forcing him to make such a cake would violate the free exercise of religion guaranteed by the First Amendment – 7-2 opinion overturning Colorado ruling – Justices Kagan and Breyer in the majority – Colorado Civil Rights Commission did not carefully consider the "delicate" questions "with the religious neutrality that the Constitution requires." 138 S. Ct. at 1724. – Commission improperly demonstrated hostility towards the cake maker's sincerely held religious belief – public statements were made that expressed hostility towards the cake maker's religious beliefs by comparing them to the defense of slavery and the Holocaust – at the time of the events in question, neither Colorado nor the United States had legalized same-sex marriage – Commission ordered to reconsider – Supreme Court decision clearly limited: Commission cautioned that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages'" – cannot "impose a serious stigma on gay persons." *Id*. at 1728-29. – Court noted that the "outcome of cases like this" will have to "await further elaboration" and that such "disputes must be resolved with tolerance without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek

goods and services in an open market." *Id*. at 1732. – Supreme Court cautioned that "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Id*. at 1727. – "It is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and general applicable public accommodations law." *Id*. at 1727.

Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (*en banc*) (7th Cir. 2017) – Creating Circuit split, the *en banc* Seventh Circuit holds that discrimination based on sexual orientation is unlawful "sex" discrimination in violation of Title VII – this holding departs from more than 50 years of authority – intent of Congress not determinative – it was "neither here nor there that the Congress that enacted [Title VII] . . . may not have realized or understood" (853 F.3d at 345) that the language it wrote would proscribe sexual orientation discrimination – Judge Posner in his concurrence wrote "sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women," (*Id*. at 356) but the statute "now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted." *Id*. at 353. – Judge Posner construed the Act to protect the "significant numbers of both men and women who have a sexual orientation [which] . . . is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase [Justice Oliver Wendell] Holmes, *'[w]e must consider what this country has become in deciding what that [statute] has reserved.*'" *Id*. at 356-57. – the majority opinion written by Chief Judge Diane Wood employed three distinct approaches to show that Title VII's definition of sex includes sexual orientation – first, discrimination against a lesbian is necessarily discrimination against a woman – "Hively allege[d] that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. . . . This describes paradigmatic sex discrimination." *Id*. at 345. – Second, the court found that since *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), Title VII has protected individuals who do not adhere to societal norms – "Hively represents the ultimate case of failure to conform to the female stereotype . . . ." *Id*. at 346. – Finally, the *en banc* majority found support in *Loving v. Virginia*, where the Supreme Court held that the Constitution is violated by legislation that discriminated "on the basis of the race [of individuals] with

whom a person associates . . . ." *Id*. at 343. – "[T]o the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the . . . sex of the associate." *Id*. at 349. – The dissent argued that what the majority did was "a statutory amendment courtesy of unelected judges," (*id*. at 360) and that if Title VII were to be extended to prohibit sexual orientation discrimination, it should be done by the legislature – *Hively* will not wind up in the Supreme Court because it has been remanded to the district court where the college intends to defend the case on the merits – but the issue it presents will make it to the Supreme Court – cases posing the issue are currently pending in the Eleventh and Second Circuits – While the case is a landmark, its practical impact may be somewhat limited – currently 24 states and an estimated 255 municipalities ban discrimination on the basis of sexual orientation.

Age (Ch. 12)

Summary Judgment, Directed Verdict, JNOV, and Reversals of Jury Verdicts

McEvoy v. Fairfield Univ., ___ F. App'x ___, No. 19-3924-cv, 2021 WL 613626 (2d Cir. Feb. 17, 2021) – Summary judgment affirmed against University director not reappointed to head pre-law advisory program – employer said reason was performance based – any shifting justifications for the non-renewal decision were minor and immaterial – the mere fact that she was replaced by someone significantly younger was insufficient – decision-maker's comments that plaintiff was "traditional" and her program was "antiquated" were not enough to show age animus.

Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc., 986 F.3d 711 (7th Cir. 2021) – Younger doctor chosen over older doctor for one open position – decision made on the basis of interviews – younger doctor "outshone [plaintiff] in her interview, positioning herself as the better candidate[.]" 986 F.3d at 721. No evidence this was a pretext.

Pelcha v. MW Bancorp, Inc.*,* 988 F.3d 318 (6th Cir. 2021) – Summary judgment in age case – supervisor created new policy requiring written request for time out of office – employee resisted and was fired – employee claimed that recent Supreme Court Title VII *Bostock* decision meant under the Age Act test was whether age was one of multiple factors – argument rejected – "but for" *Gross v. FBL Fin. Servs*., Inc., 557 U.S. 167, 177-78 (2009) governs – ageist remarks about another employee did not bar summary judgment – they were "isolated" 988 F.3d at 325) and made six months prior to plaintiff's termination – "at bottom, an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason", 988 F.3d at 329 (internal quotation and citation omitted).

Flowers v. WestRock Servs., Inc., 979 F.3d 1127 (6th Cir. 2020) – 71-year-old job applicant rejected based on negative feedback from two employees who heard bad things about his work at a prior employer – he claimed they were biased – catspaw theory has no application to the hiring context where the issue is the qualifications of an applicant for employment – summary judgment.

Santana-Vargas v. Banco Santander P.R., 948 F.3d 57 (1st Cir. 2020) – Summary judgment affirmed – longtime employee with bad recent evaluations put on six-month performance improvement plan – terminated for failing to meet goals after two months – "the plan neither stated nor implied that Santana could not be fired until six months had run," 948 F.3d at 61 – assuming a *prima facie* case, no reasonable jury could find pretext since Santana did not meet the goals for the first two months.

McMichael v. Transocean Offshore Deepwater Drilling, Inc., 934 F.3d 447 (5th Cir. 2019) – Summary judgment affirmed in ADEA case – must show age was "but for" cause – two of three decision-makers were in same age class – a number of younger employees also laid off – alleged comment about retirement eligibility was by former manager who was not involved in layoff decision.

Heisler v. Nationwide Mut. Ins. Co., 931 F.3d 786 (8th Cir. 2019) – When there is no direct evidence of discrimination, under Title VII the indirect proof of *McDonnell Douglas* is applied – unclear whether *McDonnell Douglas* technically applies to the ADEA because the ADEA

has a “but for” causation test rather than the mixed motive standards used in other statutes – it is clear, though, that a plaintiff who fails to meet the lower standard of Title VII necessarily fails to meet the ADEA’s summary judgment test – summary judgment affirmed in layoff claim because plaintiff admitted that the selected candidate for one position was more qualified and provided insufficient evidence of her qualifications for other positions.

Moses v. Dassault Falcon Jet – Wilmington Corp., 894 F.3d 911 (8th Cir. 2018) – Summary judgment affirmed – employee filed hostile environment EEOC ADEA charge – the EEOC dismissed and issued a right-to-sue letter – the employee was later terminated – no new charge was filed – the lawsuit alleged age termination – the termination claim was dismissed because it was not within the original hostile environment charge – discharge is a discrete act, not part of a hostile environment – the hostile environment claim failed because the actions were not severe enough – they may have been “rude or unpleasant” but that is not enough.

Skiba v. Ill. Cent. R.R. Co., 884 F.3d 708 (7th Cir. 2018) – Plaintiff was hired as a management trainee at age 55, demoted to a clerical position at age 60, and turned down for 82 different management positions to which he applied – summary judgment affirmed on ADEA and retaliation claims – multiple emails claiming that his supervisor was abusive without referencing age or any protected category cannot form the basis of a retaliation claim – “Nothing in plaintiff’s complaints about [his supervisor] suggests he was protesting discrimination on the basis of age or national origin.” 884 F.3d at 718. – With respect to age claim, it is a “but for” test – a question about how old he was when he interviewed for a position does not support an inference of discrimination – he in fact got the position he was being interviewed for and the question was two years before he was demoted – the question actually came from a person who promoted plaintiff at the age of 58 – multiple comments about plaintiff not responding well to training and being a low-energy person are not necessarily age related – “[T]hese statements are innocuous when viewed in context.” *Id*. at 720. – The comment of one hiring official that an alternate candidate would work “a little faster” again is not indicative of age discrimination – there is simply no basis to conclude that comments like this were based on age rather than a perception of plaintiff’s “intelligence, skills, or simply Plaintiff’s behavior during the interview,” *Id*. at 721 – “low energy” is not ageist – a comment about another candidate being close to retirement is entitled to very little weight since it was not made in relation to plaintiff – indeed the comment in context has

no age inference at all – with respect to a statement that plaintiff was a "later career person . . . this is not an inevitable euphemism for old age," *Id*. at 722 – moreover, the person who said it was not a decision-maker – normally statements by a nondecision-maker do not satisfy plaintiff's burden of proof – moreover, the individual making the statement tried to assist plaintiff in finding positions – the contention that 37 younger employees were offered management-level positions for which plaintiff applied is irrelevant absent comparability, which has not been shown – "[P]laintiff bears the burden of showing the individuals he identifies are similarly situated." *Id*. at 724. – The issue is simply whether plaintiff would have been better treated if everything else was the same but he was younger than 40 – no reasonable decision-maker could so conclude.

Blizzard v. Marion Tech. Coll., 698 F.3d 275 (6th Cir. 2012), *reh'g en banc denied* (Dec. 19, 2012), *cert. denied*, 569 U.S. 975 (2013) – Summary judgment affirmed – although alleged comparable made the same type of mistake, the consequences of the plaintiff's mistakes were much more serious – replacement was 6½ years younger which falls between age difference of six years or less which is not significant and age difference of 10 or more years which is generally considered significant – employer honestly believed that she was not capable of using new software and had made serious mistakes.

General Issues

Babb v. Wilkie, ___ U.S. ___, 140 S. Ct. 1168 (2020) – Age statute governing federal employees states that all personnel actions must be free of age discrimination – age cannot be a factor – all personal actions must be untainted by any consideration of age -- However, to obtain reinstatement, damages or other relief related to the end result of an employment decision, must show that the personnel action would have been different if age had not been taken into account. This requires "but for" proof -- but if age discrimination played a lesser part of the decision, other remedies may be appropriate. The language of the relevant statute is markedly different from those statutes where we interpreted age discrimination as requiring "but for" proof for any form of relief. The decision was 8-1, Justice Thomas in dissent.

Mount Lemon Fire Dist. v. Guido, ___ U.S. ___, 139 S. Ct. 22 (2018) – ADEA applies to state and local governments without regard to whether or not they have 20 employees – the 20 employee limit applies only to private employers – does not matter that reach of ADEA is broader than Title VII – under Title VII, governmental entities and private employers both must have 15 or more employees.

González –Bermúdez v. Abbott Labs. P.R. Inc., 990 F.3d 37 (1st Cir. 2021) – Jury verdict in favor of age plaintiff overturned – insufficient evidence – alleged comparators not similarly situated – held lower level positions than plaintiff, performed different duties, and reported to different supervisors.

Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038 (10th Cir. 2020), – Case of first impression – claim that new employer laid off older women is actionable under Title VII – individual disparate treatment claims actionable under ADEA – sex plus actionable as disparate impact claim under Title VII – *Bostock* decision focuses on individuals and recognizes that sex plus is unlawful even if the plus is lawful.

Dayton v. Oakton Cmty. Coll., 907 F.3d 460 (7th Cir. 2018) – Community college formerly hired state university system retirees who were receiving retirement benefits – rules changed, and hiring retirees caused the college to incur penalties – college eliminated all retiree hiring – clear adverse impact – employer prevailed because the decision was economic which constituted a reasonable factor other than age – no issue of whether employer could have achieved the same goals with lesser impact – RFOA is not a business necessity defense – "unlike Title VII's business necessity test, which asks whether alternatives that do not result in a disparate impact are available for the employer to achieve its goals, the ADEA's reasonableness inquiry includes 'no such requirement.'" 907 F.3d at 466 (citation omitted) – under the ADEA "employers need not defend their selection of one policy over a narrower policy." *Id.*

O'Brien v. Caterpillar Inc., 900 F.3d 923 (7th Cir. 2018) – For over 50 years Caterpillar had paid unemployment benefits to laid off employees – it agreed with its Union to stop the practice – in exchange, Caterpillar paid $7.8 million to employees previously covered by the unemployment benefit plan – if the employee was eligible to retire, received payments from the fund only if agreed to retire – those who were eligible to retire

but did not agree to retire received nothing – those not eligible to retire received normal benefits – even though there was impact on older workers, the action was justified as reasonable factors other than age – the reasonable factors were that this eliminated the cost of unemployment benefits and established Union management harmony.

Kleber v. CareFusion Corp., 914 F.3d 480 (7th Cir. 2019) (*en banc*) – Agreeing with the 11th Circuit's *en banc* decision in *Villarreal v. R. J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (*en banc*), *cert. denied* 137 S. Ct. 2292 (2017), the 7th Circuit hold *en banc* (8-4) "that the plain language of § 4(a)(2) makes clear that Congress, while protecting employees from disparate impact age discrimination, did not extend that same protection to outside job applicants. While our conclusion is grounded in § 4(a)(2)'s plain language, it is reinforced by the ADEA's broader structure and history," 914 F.3d at 481. – Section 4(a)(2) makes it unlawful "to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." – by its terms it is limited to employees – "Put most simply, the reach of § 4(a)(2) does not extend to applicants . . . ." 914 F.3d at 482. In other sections of the age act, Congress was explicit in including "applicants" in coverage, and it is significant that Congress did not do so in Section 4(a)(2) – *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), did not involve applicants, but a year after *Griggs* Congress amended Title VII to add "applicants for employment" to the prohibition of adverse impact – but Congress did not so amend the ADEA.

Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61 (3d Cir. 2017) – Lawsuit alleging disparate impact against persons over 50 compared to persons in their 40s revived – Third Circuit rejects view of Second, Sixth, and Eighth Circuits that such claims are not allowed – clear from plain language of ADEA that disparate impact claims may be brought by sub-groups of workers in the protected class – statute prohibits adverse consequences based on age rather than being over 40.

Tramp v. Associated Underwriters, Inc., 768 F.3d 793 (8th Cir. 2014) – Summary judgment in age RIF case reversed – employer wrote its healthcare carrier and stated that it expected lower premiums since it had gotten rid of its "older, sicker employees."

Neely v. Good Samaritan Hosp., 345 F. App'x 39 (6th Cir. 2009) (unpublished) – Over-40 employee claimed race discrimination but never claimed age discrimination – district court dismissed all claims except race discrimination and referred matter to mediation – parties reached a settlement which they confirmed on the record – parties never discussed age or right to revoke in mediation – defendant prepared settlement agreement which waived rights under the ADEA and contained a clause allowing employee 21 days to consider and seven days to revoke – employee signed agreement but revoked within seven days – district court rejected revocation on ground that there was a verbal settlement – court of appeals reversed, holding that it did not matter that there was no age issue – the written agreement expressly allowed revocation – employer clearly wanted to protect itself against any theoretical age claim since plaintiff was over 40 – does not matter that right to revoke was not bargained for – once there was an ADEA release right to revoke was required by law.

Disability/Handicap (Ch. 13)

General

Laird v. Fairfax Cty., 978 F.3d 887 (4th Cir. 2020) – Employee with multiple sclerosis requested work from home accommodation which was tried but did not succeed to the employer's satisfaction – employee filed EEOC charge – employee settled by suggesting a different accommodation, a transfer – after transfer employee sued claiming transfer was a demotion – no adverse act since employee sought transfer as an accommodation – demotion can be actionable but since employee requested it as an accommodation that was not viable here.

Menoken v. Dhillon, 975 F.3d 1 (D.C. Cir. 2020) – ADA prohibits in separate subsections "retaliation" and "interference, coercion or intimidation" – these are separate concepts – long-time EEOC attorney alleged that she was denied reasonable accommodations, that releases demanded as a condition of being given an accommodation – this fairly states a cause of action for interference which is separate from retaliation – dismissal reversed.

Pierri v. Medline Indus., 970 F.3d 803 (7th Cir. 2020) – Claim of an associational bias because needed time off to care for ailing grandfather not covered – plaintiff didn't allege grandfather's care left him distracted at work.

Fauconier v. Clarke, 966 F.3d 265 (4th Cir. 2020) – Prisoner had successfully performed various jobs despite physical condition – was hospitalized from time to time because of condition – after most recent hospitalization was ruled ineligible for any jobs based on the fact that the jail classified his disability as work code "D" – summary judgment below reversed – 2-1 decision – prison officials can be sued in their official capacities even though entitled to qualified immunity – a reasonable jury could find denied job because regarded as disabled even though physically able to do the job.

Darby v. Childvine, Inc., 964 F.3d 440 (6th Cir. 2020) – Case of first impression – case dismissed below – remanded for factual development – plaintiff alleged disability discrimination – plaintiff had a genetic mutation that impaired her normal cell growth – "a genetic mutation that merely predisposes an individual to other conditions, such as cancer" (964 F.3d at 946) isn't a disability – however, plaintiff alleges that her mutation is a physical impairment that substantially limits the major life activity of growing cells.

Eshleman v. Patrick Indus., Inc., 961 F.3d. 242 (3d Cir. 2020) – District court dismissed case on ground that there was no ADA-covered disability and no regarded-as claim because the disability was transitory, lasting less than six months – regulations require a finding that the condition be not only transitory but minor in order to disprove possibility of a regarded-as claim – no finding was made that it was minor – reversed and remanded.

Ford v. Marion Cty. Sheriff's Office, 942 F.3d 839 (7th Cir. 2019) – Harassment based on disability is actionable under the ADA – there were two distinct periods of alleged harassment, each involving separate harassers, with an 18-month gap – it was proper to view them analytically as separate – viewed separately, the events in question were not egregious enough to support a finding of harassment.

Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331 (7th Cir. 2019), *reh'g denied* (Dec. 20, 2019) – Obese job applicant was not himself disabled because his obesity was not the result of a physical impairment – the railroad refused to hire him because of its fear that even though he was not now disabled, his obesity would cause him one day to develop an impairment – the district court denied summary judgement but certified for appeal the issue of "whether the ADA's regarded-as provision encompasses conduct motivated by the likelihood that an employee will develop a future disability within the scope of the ADA." 941 F.3d at 334-35. – The appellate court accepted the interlocutory appeal, and reversed, holding that fear of a future impairment is insufficient for protected "regarded-as" liability.

Kelleher v. Fred A. Cook, Inc., 939 F.3d 465 (2d Cir. 2019) – District court grant of motion to dismiss reversed – associational discrimination – plaintiff had severely disabled daughter – asked for accommodation and was fired for poor attendance – while ADA does not require accommodation of the disabilities of a relative, reference to relative when fired could support a claim of associational discrimination – cannot resolve on motion to dismiss whether alleged reason for discharge was the real reason.

EEOC v. STME, LLC, 938 F.3d 1305 (11th Cir. 2019) – Employee fired after she booked a trip to Ghana – Employer feared she might contract Ebola – ADA does not protect persons who experience discrimination because of a potential future disability that any healthy person might experience.

Freeman v. Metro. Water Reclamation Dist. of Greater Chi., 927 F.3d 961 (7th Cir. 2019) – Plaintiff suffers from alcoholism – 12(b)(6) dismissal reversed – drivers' license suspended for six months – state authorized an occupational driving permit that would permit him to drive if his employer approved, which it did not – his employer fired him for allegedly unsatisfactory performance – plaintiff does not allege actual disability – he alleges he was fired because of a perceived disability – district court dismissed because plaintiff did not allege that his alcoholism substantially limited him in a major life activity – but this is not necessary for a "regarded as" allegation.

Lattimore v. Euramax Int'l, Inc., 771 F. App'x 433 (9th Cir. 2019) (unpublished) – Disability claim in layoff case rejected on summary judgment – decision to fire her was made before the company learned of her disability and it terminated the employment of a similarly-situated non-disabled employee.

Richardson v. Chicago Transit Auth., 926 F.3d 881 (7th Cir. 2019) – Disability claim of 400 pound bus driver – summary judgment affirmed – did not show that obesity was result of an underlying physiological condition – evidence did not suggest that the employer perceived him as disabled rather than as being unfit to drive.

Natofsky v. City of New York, 921 F.3d 337 (2d Cir. 2019), *cert. denied* ___ S. Ct. ___, 2020 WL 1906572 (Apr. 20, 2020) – Standard of proof under ADA and Rehabilitation Act is "but for" – not "motivating factor" – 2-1 decision – "but for" means that bias must be a reason behind the employer's actions but not necessarily the only cause – Second Circuit has joined Fourth, Sixth, and Seventh Circuits in requiring "but for" – makes no difference that plaintiff brought his claim as a public employee under Rehabilitation Act – dissent argues that for more than two decades the standard has been motivating factor, and the Supreme Court's decisions in *Gross* (an age discrimination case) and *Nassar* (a national origin case) have not changed this.

Nunies v. HIE Holdings, Inc., 908 F.3d 428 (9th Cir. 2018) – Prior to ADA Amendments Act, plaintiff "regarded as" case had to provide evidence that the employer subjectively believed the plaintiff was substantially disabled – that requirement is no longer true. Employee with shoulder injury asked for a job transfer to a part-time less physical job – requested transfer was approved but employee was then laid off, allegedly for economic reasons – fact issue whether this was true – employer contended the shoulder injury was minor and did not qualify as a disability – ADA excludes individuals from regarded as coverage if the impairment is both transitory (expected to last six months or less) and minor – employer did not submit adequate evidence on this issue – the fact that employee continued working through the pain of his shoulder does not equate with being not substantially limited in his ability to work.

Bullington v. Bedford Cty., 905 F.3d 467 (6th Cir. 2018) – Plaintiff's ADA claim dismissed for failure to file a timely charge – nevertheless, plaintiff can allege disability claims under 42 U.S.C. section 1983.

EEOC v. BNSF Ry. Co., 902 F.3d 916 (9th Cir. 2018) *as amended* (Sept. 12, 2018), *cert. denied* 140 S. Ct. 494 (2019) – Job applicant received conditional job offer contingent upon satisfactory completion of post-offer medical review – medical review revealed back injury from four years before – employee's primary care doctor, his chiropractor, and the employer's doctor all determined he had no current limitations – however, the Railway demanded that employee submit an MRI of his back at his own cost or it would treat him as having declined the offer – he could not afford the MRI, and to the Railway revoked its offer – while the Railway could have required an MRI at its expense, it violated the ADA by imposing that expense on the employee – the Railway perceived the employee as possibly disabled – "An employer would not run afoul of [the ADA] if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense." 902 F.3d at 927 – in that case the employer would be imposing a cost on all applicants, but here an applicant perceived as disabled was discriminated against.

EEOC v. Dolgencorp, 899 F.3d 428 (6th Cir. 2018) – Jury verdict affirmed – diabetic cashier was denied request to keep juice nearby in case of low blood sugar – terminated for violating company policy by consuming juice from store cooler before paying for it during two episodes – employer's refusal of request justifies finding a failure to accommodate – no interactive process – irrelevant that alternative solutions such as glucose tablets or candy might have worked.

Snapp v. United Transp. Union and BNSF Ry. Co., 889 F.3d 1088 (9th Cir. 2018), *cert. denied* 139 S. Ct. 817 (Jan. 7, 2019) – Once an employee notifies an employer of a disability and a need to engage in the interactive process, employer will be liable if it does not do so and a reasonable accommodation would have been possible – at summary judgment, the burden is on the employer that did not engage in the interactive process to prove the unavailability of a reasonable accommodation – however, at trial, the plaintiff bears the burden of proving that a reasonable accommodation was possible that would have allowed the plaintiff to perform the essential functions of the job without undue hardship – trial judgment for employer based on such jury instructions affirmed.

Sepulveda-Vargas v. Caribbean Rest., LLC, 888 F.3d 549 (1st Cir. 2018) – "Today's opinion is a lesson straight out of the school of hard knocks. No matter how sympathetic the plaintiff or how harrowing his plights, the law is the law and sometimes it is just not on his side." 888 F.3d at 552. – Fast food manager with depression and post-traumatic stress disorder failed to allege adverse action to support retaliation claim based on his request for accommodation – miscellaneous complaints about schedule changes and being required to stay late and the like did not create a retaliatory hostile environment.

Rodrigo v. Carle Found. Hosp., 879 F.3d 236 (7th Cir. 2018) – Hospital required medical residents to pass qualifying exams with no more than three attempts – medical resident claimed that refusing to allow him a fourth attempt was a failure to accommodate his insomnia – he was not a qualified individual – cannot attempt to bypass uniform requirements for qualification by contending accommodation required.

Marshall v. Rawlings Co. LLC, 854 F.3d 368 (6th Cir. 2017), *reh'g en banc denied* (May 30, 2017) – Summary judgment denied – cat's paw theory – several layers of management separated biased immediate supervisor from ultimate decision-maker, but there is conflicting evidence as to whether biased lower-level supervisors unfairly evaluated her performance and whether higher-level officials conducted independent investigation.

<u>Qualified Individual with Disability/Essential Job Functions</u>

Weber v. BNSF Ry. Co., 989 F.3d 320 (5th Cir. 2021) – Employee with epilepsy had frequent absences – summary judgment – regular worksite attendance was an essential job function.

Bell v. O'Reilly Auto Enters., LLC, 972 F.3d 21 (1st Cir. 2020) – New trial ordered because of erroneous jury instruction – plaintiff was store manager – suffered from Tourette Syndrome and major depression – had a breakdown because was working 100-hour weeks since short staffed -- healthcare provider directed that he work no more than 45 hours – terminated since store managers could not be limited to 45 hours – Judge instructed jury to find for plaintiff only if he needed the 45-hour cap in

order to perform the store manager's essential functions – this was reversible error because disabled workers can be entitled to a job accommodation even when they are able to meet their employer's performance demands without leave accommodation.

Kotaska v. Fed. Express Corp., 966 F.3d 624 (7th Cir. 2020) – Plaintiff had lifting restriction – FedEx required ability to lift 75 pounds – plaintiff established that 75 pounds was rarely if ever required to be lifted – District Court originally granted summary judgment on 75-pound theory – then changed theory to state that the plaintiff could lift 75 pounds to her waist, 30 pounds occasionally, 15 pounds frequently between her waist and shoulders, and 5 pounds frequently above her shoulders – since average package weighed 15 pounds, clearly she could not do the job – decision was 2-1 – dissent said that this created a conflict with the 1st, 5th, 6th, and 9th Circuits which have held that the employer has at least the initial burden of proof on the essential job function issue and that the majority "improvised" a new theory for FedEx's benefit.

Anthony v. Trax Int'l Corp., 955 F.3d 1123 (9th Cir. 2020) – After suit was filed alleging termination because of disability, the employer learned that contrary to the representation on her employment application, plaintiff did not have a bachelor's degree – bachelor's degree was required of all persons in that position – disagreeing with the 7th Circuit and agreeing with other Circuits, the 9th Circuit held that the limitation on after-acquired evidence in the *McKennon v. Nashville Banner Publishing Co*. Supreme Court case does not apply when the evidence indicates that the individual was not a qualified individual under the ADA – therefore, she could not establish a *prima facie* case and summary judgment was appropriate.

Tchankpa v. Ascena Retail Grp., Inc., 951 F.3d 805 (6th Cir. 2020) – Employee with injured shoulder asked to be able to work from home three days a week – insufficient medical evidence establishing need – "An employer may request medical records supporting the employee's requested accommodation. Thus Ascena had every right to ask [plaintiff] for medical documentation linking his injured shoulder and his work-from-home request." 951 F.3d at 809 – "The ADA is not a weapon that employees can wield to pressure employers into granting unnecessary accommodations or reconfiguring their business operations." *Id*. – summary judgment affirmed since no demonstration shoulder injury mandated work from home.

Bilinsky v. American Airlines, Inc., 928 F.3d 565 (7th Cir. 2019), *as amended, reh'g en banc denied* (Aug. 9, 2019) – Employee with multiple sclerosis successfully worked at home for years – essential functions of the job changed after a merger from independent activities to team-centered crisis management requiring frequent face-to-face meetings on short notice – company properly rescinded all remote arrangements for both disabled and non-disabled employees – summary judgment affirmed.

Nall v. BNSF Ry. Co., 917 F.3d 335 (5th Cir. 2019) – Summary judgment against employee diagnosed with Parkinson's disease reversed – factual issue as to whether railroad acted reasonably in determining that employee could not perform essential functions – plaintiff's doctors concluded he could perform listed tasks safely – plaintiff successfully completed required tasks in field test – factual issue as to claim that he made "deadly decisions" during the test – comments by company personnel that people with Parkinson's don't get better raised triable issue as to whether he actually posed a direct threat.

EEOC v. McLeod Health, Inc., 914 F.3d 876 (4th Cir. 2019), *reh'g en banc denied* 2019 U.S. App. LEXIS 10189 (Apr. 5, 2019) – Disabled individual had a lifetime condition that caused her to regularly fall – despite her condition for almost three decades she satisfactorily performed her duties as an editor of the company's employee newsletter – she fell at work numerous times before the events in question – based on three falls in 2012, the company decided that the employee needed to undergo a fitness for duty medical exam – examiner made several factual errors, and concluded that the employee was a high-fall risk – he proposed accommodations, which the employee requested – the company concluded that the accommodations would not allow the employee to perform her job of traveling to the company's various campuses and put her on unpaid medical leave – the company then terminated her employment – threshold question is whether traveling to the various campuses was an essential function of the job – that is a jury question – summary judgment reversed – a reasonable jury could conclude that actually traveling to various locations was not an essential job function – there was evidence that she was able to conduct interviews and collect other content over the phone – even if it were beyond dispute that traveling to various locations was an essential function, a reasonable jury can conclude that when the company required her to take a medical exam, the company lacked a reasonable belief that her medical condition left her unable to so travel – she had done so within the same condition for years.

Gardea v. JBS USA, LLC, 915 F.3d 537 (8th Cir. 2019) – Maintenance mechanic with 40-pound lifting restriction was not qualified because pork processing plant job required lifting up to 100 pounds as an essential job function – failure to accommodate claim dismissed because not reasonable to depend on assistance from other mechanics, use of lift assisting devices wasn't practical – employer engaged in interactive process when it offered him replacement jobs that were within his restrictions even though they were lower paying -- no showing comparable jobs within his restrictions were available.

Faulkner v. Douglas Cty. Neb., No. 8:15CV303, 2016 WL 7413469 (D. Neb. Dec. 22, 2016), *aff'd* 906 F.3d 728 (8th Cir. 2018) – Jail guard injured and could not perform essential functions of job – after one year of leave, employee terminated – with respect to sex discrimination claim, asserted that seven men were similarly situated and treated more favorably – six of them were not similarly situated, and the seventh was, but was treated the same – with respect to failure to accommodate and the necessity for interactive process, employee must show that with an interactive process she could have been accommodated – "[I]f Faulkner cannot show there was a reasonable accommodation available, DCDC is not liable for failing to engage in the good faith interactive process." 906 F.3d at 733 – collective bargaining agreement limited the number of days an employee could be assigned light-duty work – plaintiff's suggested accommodation would not allow her to perform the essential functions of her job – summary judgment affirmed.

Gunter v. Bemis Co., Inc., 906 F.3d 484 (6th Cir. 2018) – Employer's job description required lifting at least 45 pounds – employee because of injury had 40-pound lifting restriction – fired – jury verdict for employee affirmed – evidence showed that employer discouraged employees from lifting over 40 pounds, and lifting equipment available for loads over 20 pounds – job description not determinative with respect to essential job functions.

Hostettler v. Coll. of Wooster, 895 F.3d 844 (6th Cir. 2018) – Summary judgment reversed – a trial is necessary to determine the factual issue of whether the essential functions of an HR job could be accomplished on the requested 30-35 hour part-time work schedule.

Faidley v. UPS of Am. Inc., 889 F.3d 933 (8th Cir. 2018) (*en banc)* – Ability to work overtime was essential job function for UPS driver.

Reasonable Accommodation

Elledge v. Lowe's Home Ctrs., Inc., 979 F.3d 1004 (4th Cir. 2020) – Plaintiff had knee problems which prevented him from walking – he occupied a director level position – he applied for two other director level positions that did not involve walking – reassignment to a different position is "last among equals" in the range of accommodations. 979 F.3d at 1014. – Basic fairness must be considered with respect to the appropriateness of such accommodation because it may negatively impact the rights of the non-disabled – "misfortune of a colleague" could deprive co-workers of opportunities. *Id*. – Loews had a policy that openings both at hiring and succession go to the best qualified applicants – it selected two non-disabled applicants because they were better qualified than plaintiff – no violation – this ruling is consistent with EEOC guidance, the decisions of the D.C. Circuit, and U.S. Supreme Court recognition that union seniority rights do not have to be obviated in order to create an accommodation – Loews offered the plaintiff other accommodations, including a scooter to get around the stores and time off to recover.

Exby-Stolley v. Board of Cty. Comm'rs, 979 F.3d 784 (10th Cir. 2020) (*en banc*) – Tenth Circuit by vote of 7 – 6 orders new trial in disability case – trial court erroneously instructed jury that in addition to proving a denial of a reasonable accommodation the employee had to prove that after the denial the employee suffered an adverse employment action such as a termination or demotion – this was an unfair standard – the employee does not need to prove an adverse employment action following the denial of an accommodation – the dissent argued that the majority's reading ignored the ADA's "in regard to clause" – that clause says that an employer doesn't violate the ADA unless it discriminates against a qualified worker with a disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training [or] other terms, conditions and privileges of employment" 979 F.3d at 822. – Dissent acknowledged that other Circuits were all over the lot and the other Circuits were not consistent.

Aubrey v. Koppes, 975 F.3d 995 (10th Cir. 2020) – Individual with potentially fatal blood condition called in on short notice for a "pre-termination" meeting and asked to explain why she shouldn't be terminated – request for more time rejected – this is not the interactive process envisioned by the Americans with Disabilities Act.

D'Onofrio v. Costco Wholesale Corp., 964 F.3d 1014 (11th Cir. 2020) – 2-1 decision overturning $775,000 award to deaf employee – company made extensive accommodation efforts including expensive equipment and training supervisors – employee wanted more and had difficulty communicating with her direct manager, with whom she did not want to communicate – employee does not get to choose accommodation as long as accommodation is reasonable.

Waggel v. George Washington Univ., 957 F.3d 1364 (D.C. Cir. 2020) – Case dismissed because of plaintiff's failure to request accommodation – normally requests for accommodation necessary to trigger ADA violation – no unusual circumstances putting employer on notice which would excuse requesting an accommodation.

Durham v. Rural/Metro Corp., 955 F.3d 1279 (11th Cir. 2020) – In case of first impression, the 11th Circuit ruled that employee disabled because of pregnancy must be offered the same accommodations as an employee disabled because of work injuries – summary judgment reversed – case remanded to determine whether the employer provided legitimate non-discriminatory reasons for denying the pregnant employee's request for accommodation and whether treating her differently from employees who had a disability because of injury – requested accommodation was light duty.

Youngman v. Peoria County, 947 F.3d 1037 (7th Cir. 2020) – Plaintiff had a portion of his pituitary gland and the entirety of his thyroid gland removed – he became dizzy when assigned to work in the employer's control room – he asked as an accommodation not to be assigned to the control room – district court granted summary judgment on the ground that plaintiff was responsible for a breakdown in the interactive process negotiations – court of appeal affirmed on a totally different ground which

was argued but not ruled upon below – that plaintiff did not prove that there was a connection between his dizziness and his physical condition – without proof that motion sickness was caused by a condition that qualifies as a disability, the claim fails.

Hill v. Assocs. For Renewal in Educ., Inc., 897 F.3d 232 (D.C. Cir. 2018), *reh'g en banc denied* (Aug. 28, 2018), *cert. denied* 139 S. Ct. 1201 (2019) – Single leg amputee was able to perform essential functions of job without accommodation – however, job would have been much easier for him with a teacher's aide which was provided to every other teacher – employer not entitled to judgment on the pleadings on the ground that a reasonable accommodation was unnecessary – reasonable jury could find that forcing him to endure pain that classroom aide would alleviate violates ADA – denial of classroom aide and placement on upper-level floor not enough to support hostile environment claim.

Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595 (6th Cir. 2018) – Jury verdict finding that city utility unlawfully denied in-house attorney's request to tele-work for ten weeks to accommodate high-risk pregnancy affirmed – physical presence in office was not essential job junction – several colleagues agreed tele-work would not pose an issue for her job – in eight years on the job she had never actually performed the tasks listed in her job description that required an office presence – outdated job description did not take into account advances in internet technology that facilitate tele-work.

DeWitt v. Sw. Bell Tel. Co., 845 F.3d 1299 (10th Cir. 2017) – Diabetic employee is not entitled to retroactive accommodation – prior to requesting accommodation, employee violated company policy by twice hanging up on customers while on last chance agreement – honest belief that representative intentionally hung up on customers in violation of company policy negated ADA claim – her attempt to blame her violation of employer rules on her disability was after the fact, and thus not cognizable under the ADA – four other Circuits similarly have ruled that employers aren't required to excuse "past employee misconduct" that is a result of a disabling medical condition – she was thus not entitled to "retroactive leniency" even if she could show it was linked to her disability – even if the dropping of calls was simply poor work rather than a rule violation, the ADA allows employers to hold disabled workers to the same performance standards as workers without disabilities – EEOC contention that plaintiff's waiting until after the dropped calls to request

relevant accommodation didn't relieve Southwestern Bell of further accommodation obligation rejected – the employer wasn't "obligated to stay its disciplinary hand" based on plaintiff's "eleventh hour" request that her dropped calls be excused because they were attributable to her disability. 845 F.3d at 1318.

EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333 (11th Cir. 2016) – Rejecting EEOC position, employers do not have to reassign disabled workers into open positions ahead of more qualified non-disabled employees – ADA isn't an affirmative action law – employers are not required to turn away superior job candidates in favor of disabled workers seeking reassignment as an accommodation – court also rejects argument that there is a split in the Circuits – 7th Circuit didn't actually decide the question in 2012 – the District of Columbia decision was a non-binding dictum – nurse who had to use a cane removed from psychiatric ward – she was allowed to remain if she could find another nursing position within the hospital – she failed to obtain any of the open nursing positions when other applicants were deemed more qualified – she claimed she was entitled to a reassignment as an accommodation – court cited *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) that ADA does not require an employer to ignore a seniority system – as in *Barnett* the employer was allowed to pick the best qualified applicant – "As things generally run, employers operate their business for profit, which requires efficiency and good performance. Passing over the best-qualified applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance." 842 F.3d at 1346.

Schaffhauser v. United Parcel Service, Inc., 794 F.3d 899 (8th Cir. 2015) – Employee demoted for making racist comment – claimed steroids given in connection with an injury was the cause of the misconduct – duty to accommodate rejected – notice of the disability in a request for accommodation must be made before the misconduct, not after it – "As the district court articulated, liability is not established where 'an employee engages in misconduct, learns of an impending adverse employment action, and then informs his employer of a disability that is the supposed cause of the prior misconduct and requests an accommodation.'" 794 F.3d at 906 – multiple cases cited for the proposition and an employer is not required to ignore misconduct because the claimant subsequently asserts it was a result of the disability.

Retaliation (Ch. 15)

Univ. of Tex., Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) – The mixed motive amendments to Title VII are not applicable to retaliation cases – the burden of proof in a retaliation case is "but-for" – 5-4 decision – status-based discrimination after 1991 amendments is governed by a motivating factor analysis – this is not applicable to retaliation, which was not covered by the amendments – "Causation in fact – *i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury – is a standard requirement of any tort claim . . . ." 570 U.S. at 346. But-for causation is the default unless Congress indicates a different test – Congress has not done so – case is actually governed by *Gross*, which found a "but-for" test under a statute that prohibited discrimination "because of age" – the two retaliation subsections of Title VII both use the "because of" language – the number of retaliation claims filed with the EEOC have outstripped every type of status-based discrimination except race – "Lessening the causation standard could also contribute to the filing of frivolous claims . . . .

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation."

Id. at 358. A mixed motive causation standard "would make it far more difficult to dismiss dubious claims at the summary judgment stage." *Id*. – "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [the mixed motive amendments]. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id*. at 360 – contrary interpretation in the EEOC Guidance Manual rejected as lacking persuasive force – dissent contended that majority seizes upon the 1991 amendments, designed to strengthen Title VII, to weaken retaliation protection – dissent suggests reversing this case and *Vance* through "another Civil Rights Restoration Act."

Igasaki v. Ill. Dep't of Fin. & Prof'l Regulation, 988 F.3d. 948 (7th Cir. 2021) – Summary judgment – plaintiff alleged retaliation for filing EEOC charge two months before discharge, age, national origin, disability and sexual preference – even though EEOC charge filed two months before, no evidence played a role in termination – employee had received good evaluation from new supervisor first time around, but then poor evaluations and corrective action plan extended four times – sexual preference claim failed because there was no evidence employer knew he was gay – no comparator with comparable age or national origin or disability treated differently identified – plaintiff was unable to specify which of his many protected conditions caused the decision – disability failed because accommodations were provided – no need to grant request for flexible work schedule as accommodation.

Brown v. Wal-Mart Stores E., L.P., 969 F.3d 571 (5th Cir. 2020), *as revised* (Aug. 14, 2020) – Summary judgment – plaintiff was on final warning for multiple offenses – plaintiff then accused store manager of sexual harassment against other employees – plaintiff then committed one more offense – Wal-Mart verified that she had violated policy in the last instance and she was discharged – even though she had a *prima facie* case of discrimination, a reasonable jury could not conclude that her sexual harassment complaint motivated the discharge.

Wilcox v. Lyons, 970 F.3d 452 (4th Cir. 2020), petition for cert. docketed ___ U.S. ___ (Jan. 21, 2021) – Government employee cannot sue for retaliation under the Fourteenth Amendment – underlying complaint was sex discrimination – sex discrimination is covered because it is an immutable characteristic under the Fourteenth Amendment – retaliation doesn't depend on sex and therefore is not covered.

Kenney v. Aspen Techs, Inc., 965 F.3d 443 (6th Cir. 2020) – Summary judgment in retaliation case – 75 days lapsed between protesting racial hiring practices and termination standing by itself insufficient to infer discrimination – the employer's explanation for discharge was rude behavior and high attrition of employees under her supervision – not shown to be false.

Martin v. Fin. Asset Mgmt. Sys., Inc., 959 F.3d 1048 (11th Cir. 2020) – Black female settled race sex discrimination claim 16 months before blow up with CEO – she filed a new complaint just after the blow up but no evidence that CEO decision maker was aware that she was claiming sex or race discrimination as opposed to simple unfairness – therefore no retaliation – retaliation requires evidence the decision maker knew at the time of challenged employment decision that the worker was engaged in protected activity – can't infer that from 16 months' earlier charge.

Couch v. Am. Bottling Co., 955 F.3d 1106 (8th Cir. 2020) – Longtime employee with satisfactory reviews received new supervisor – the new supervisor implemented different management philosophies – company claimed plaintiff resisted these changes and became combative in several meetings – employee filed charge of discrimination – two weeks later, employee received an unsatisfactory score and soon thereafter was terminated – changes in reviews were not suspicious – no direct evidence of retaliation – difficulty adjusting to new management expectations was legitimate reason – although employee discharged within a month of his charge, not particularly suspicious since plaintiff filed the charge just before his scheduled review.

Monaghan v. Worldpay US, Inc., 955 F.3d 855 (11th Cir. 2020) – Summary judgment reversed in retaliation case – Standard is whether the alleged employment action "well might have dissuaded" reasonable persons from engaging in protected activity – white employee claimed black supervisor harbored racist and ageist bias – claim was that supervisor pounded her fists on the table and threatened employee for having made complaints – another supervisor told plaintiff at time of discharge she was being fired for complaining.

Rasmy v. Marriott Int'l, Inc., 952 F.3d 379 (2d Cir. 2020) – Whistleblower reported wage theft and alleged he suffered hostile work environment and other forms of retaliation because of his race and religion – summary judgment reversed – hostile work environment does not require a plaintiff to show he or she had been physically threatened or that his or her work performance has suffered as a result of the claimed hostile work environment – remarks of discriminatory nature made in plaintiff's presence though not directly aimed at plaintiff can contribute to an actionable hostile work environment – retaliation claim presented factual issues that should be resolved by a jury.

Robertson v. Dep't of Health Servs., 949 F.3d 371 (7th Cir. 2020) – Summary judgment affirmed on retaliation claim because the facts did not establish an adverse action – claim of hostile workplace rejected – body language, cold shoulder, rude statements such as "be quiet," and the like are simply insufficient to establish an actionable adverse action – snubbing is not actionable – unfair reprimands or negative performance reviews unaccompanied by tangible job consequences do not suffice – Title VII protects against discrimination, not personal animosity or juvenile behavior – the alleged behavior is simply not materially adverse – it did not cause a significant or substantial change to her job responsibilities.

Welsh v. Fort Bend Indep. Sch. Dist., 941 F.3d 818 (5th Cir. 2019) – Placement on a performance improvement plan following an EEOC complaint was not an actionable adverse employment action allowing a retaliation claim – an associate principal's rude remark was merely an unpleasant workplace experience – summary judgment granted.

Hubbell v. FedEx SmartPost, Inc., 933 F.3d 558 (6th Cir. 2019), *reh'g en banc denied* (Sept. 11, 2019) – Jury verdict of retaliation affirmed – unblemished work history before filed first EEOC complaint – disciplinary write-up four days later and twice more within two months of EEOC filing and many times thereafter – clearly singled out for adverse treatment.

Lacey v. Norac, Inc., 932 F.3d 657 (8th Cir. 2019) – Plaintiff alleged chosen for layoff because of her race and her refusal to sign an affidavit that supported the company in a Title VII lawsuit – summary judgment affirmed because employer provided evidence that it had planned on laying off the employee before the affidavit issue.

Mahler v. First Dakota Title Ltd. P'ship, 931 F.3d 799 (8th Cir. 2019) – Summary judgment affirmed – female regional president fired a week after her final complaint of sexual harassment but she had been warned about her long history of performance in mistreating subordinates before she made any claims of sexual harassment – she did not show that the final incident that led to her termination was related in any way to her complaint – much more substantial evidence is necessary to prove pretext than is necessary to establish a *prima facie* case – plaintiff had also engaged in protected activity long before her discharge without repercussion.

Iyoha v. Architect of the Capitol, 927 F.3d 561 (D.C. Cir. 2019) – Summary judgment retaliation claim affirmed despite reversal of summary judgment claim on failure to promote – temporal proximity is relevant only when the protected activity and adverse action are very close – even when there is temporal proximity, "[m]ere temporal proximity is not sufficient to support [a finding of retaliation] because otherwise protected activity would effectively grant employees a period of immunity, during which no act, however egregious, would support summary judgment for the employer's subsequent retaliation claim. . . . As a result, positive evidence beyond mere proximity is required to defeat the presumption that the proferred explanations [where the adverse employment actions] are genuine." 927 F.3d at 574 (internal quotation marks and citations omitted).

Mollett v. City of Greenfield, 926 F.3d 894 (7th Cir. 2019) – Summary judgment affirmed in constructive discharge case – firefighter contended that protected activity led to repeated criticism of work performance – summary judgment proper because work performance was criticized before protected activity.

LaRiviere v. Board of Trs. of S. Ill. Univ., 926 F.3d 356 (7th Cir. 2019) – Plaintiff contended failure to renew her appointment was because of two prior state law discrimination lawsuits against her employer – non-appointment decision wasn't made until ten months after second state court lawsuit ended – interval between protected activity and adverse action standing alone too long to support a finding of causation.

Scheidler v. Indiana, 914 F.3d 535 (7th Cir. 2019), *reh'g en banc denied* (Mar. 1, 2019) – During investigation of plaintiff's claim of illegal conduct against her, employer discovered that some months before in relation to a co-worker's interview for a government job plaintiff said, "I'm sure she'll get it because . . . it's who you know and who you blow . . . ." 914 F.3d at 538. Retaliation summary judgment affirmed – "A retaliation claim requires statutorily protected activity, which generally involves subjective and objective factors: The plaintiff must not only have a subjective (sincere, good faith) belief that he opposed an unlawful practice; his belief must also be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by Title VII." *Id*. at 542 (internal quotation marks and citations omitted). – Plaintiff's complaint fails both the subjective and objective requirements.

Lewis v. Wilkie, 909 F.3d 858 (7th Cir. 2018) – Retaliation summary judgment affirmed – employee reinstated after successful EEOC complaint – contended supervisors gave him unneeded instructions, unwarranted counseling, greater scrutiny, required him to sign 60-day performance review applicable to probationary employee, and threatened him with future discipline – summary judgment proper since Court considered evidence as a whole rather than sorting into direct and indirect evidence piles – Title VII anti-retaliation does not protect an employee against petty slights or minor annoyances – the retaliation that is protected must produce an injury or harm – unfulfilled threats do not constitute adverse actions even though they might cause stress – monitoring one's work would not dissuade a reasonable employee from protected activity – "Lewis may have disliked the performance review, but not everything that makes an employee unhappy is an actionable adverse action." 909 F.3d at 870 (internal quotations and citation omitted).

EEOC v. N. Mem'l Health Care, 908 F.3d 1098 (8th Cir. 2018), *reh'g en banc denied* (Feb. 11, 2019) – Sabbatarian applicant denied employment when she said she needed Friday nights off – EEOC sued only for retaliation, not disparate treatment discrimination – asking for religious accommodation is not opposition to an illegal practice – summary judgment affirmed 2-to-1.

Netter v. Barnes, 908 F.3d 932 (4th Cir. 2018) – Unauthorized disclosure of confidential personnel files to the EEOC to support plaintiff's racial and religious discrimination claims does not constitute protected activity – such conduct is not a reasonable method of opposition – plaintiff gave copies of all five confidential files, including files of other persons to the EEOC and her lawyer – plaintiff was discharged for her conduct with respect to the confidential personnel files – no retaliation – facts undisputed – under the opposition clause, unauthorized disclosures of confidential information to third parties are generally unreasonable – the issue is closer under participation clause – but since the plaintiff's conduct violated a valid generally applicable state privacy law, illegal actions are not protected under the participation clause either.

Rogers v. Henry Ford Health Sys., 897 F.3d 763 (6th Cir. 2018), *reh' en banc denied* (Sept. 5, 2018) – Summary judgment affirmed on promotion claim, reversed on retaliation claim – trial judge granted summary judgment on the basis that transfer at same rate did not constitute a "significant change in employment status" (897 F.3d at 775)– but the Supreme Court has rejected the application of this requirement, which

applies to Title VII discrimination claims – the requirement for retaliation claims is simply that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination," which "showing is less burdensome than what a plaintiff must demonstrate for a Title VII discrimination claim." *Id.* at 776. Reversal on retaliation claim was 2-to-1.

Auer v. City of Minot, 896 F.3d 854 (8th Cir. 2018), *reh'g en banc denied* (Aug. 28, 2018) – Probationary city attorney fired after one month on the job alleged it was retaliation for complaining about sex-based harassment – retaliation mandates that "the employee *reasonably* believes the conduct was illegal," 896 F.3d at 859 (emphasis in original) – here the only basis for asserting sex discrimination in job criticisms was that plaintiff's work style was unfavorably compared to her male predecessor – bias cannot be inferred from this – summary judgment affirmed.

Mys v. Mich. Dep't of State Police, 886 F.3d 591 (6th Cir. 2018) – Cat's paw theory applicable when female police sergeant transferred 100 miles away from her preferred location near her mother for whom she was a caretaker after two sexual harassment complaints against a male sergeant – does not matter that transfer review board made the decision since the police captain who initiated the process blamed plaintiff for a hostile work environment and helped choose the distant transfer location – harassment complaints referenced in transfer discrimination – jury verdict affirmed – jury presumably concluded that the captain's bias influenced the board.

Winfrey v. City of Forest City, 882 F.3d 757 (8th Cir. 2018) – Former police officer could not state retaliation claim – alleged was terminated because claimed underpaid – at his deposition he stated "I believe I was retaliated against for standing up against the city and the mayor" – complaints of underpayment not protected by Title VII.

Villa v. CavaMezze Grill, LLC, 858 F.3d 896 (4th Cir. 2017) – Summary judgment in retaliation case affirmed – plaintiff reported that a former female employee told her that the general manager demanded sex in exchange for a raise in pay. Plaintiff also reported this conversation occurred in the presence of a witness, and that plaintiff believed that

another female employee had left because of a similar demand by the general manager – all three individuals denied the alleged conversations, and plaintiff was terminated for lying – in a deposition, one witness changed her story and testified that plaintiff had accurately reported their conversation about sex for a raise – plaintiff claimed even if the employer in good faith believed that she lied, she was entitled to prevail because she was opposing discrimination and thus was retaliated against – if the employer due to a genuine factual error never realized that its employee engaged in protected conduct, it cannot be guilty of retaliation – the opposition clause does not protect a knowingly false allegation – the employer reasonably concluded that those were the facts – firing employee for knowingly fabricating an allegation relating to a Title VII violation does not run afoul of the opposition clause – this is true even though the participation clause protects false statements made in EEOC charges – when it fired plaintiff, the employer did not know she had engaged in any protected activity – it simply concluded in good faith that she had lied – the EEOC's *amicus* argument that limiting retaliation liability to cases where the employer was actually motivated by a desire to retaliate is rejected.

Ray v. Ropes & Gray LLP, 799 F.3d 99 (1st Cir. 2015) –Summary judgment for defendant on denying black associate a partnership under up or out policy – after plaintiff filed EEOC charge, two Ropes' partners who had promised to support his application for a position as an assistant U.S. Attorney refused, one of them stating that he could no longer "in good conscience" write such a letter in light of the "groundless" EEOC claim – plaintiff, an alumnus of Harvard Law School, asked that the Harvard Law School bar Ropes from campus interviews – a legal media website obtained a copy of Ray's letter to Harvard and asked for comment – Ropes provided the website with an unredacted copy of the EEOC's determination which contained sensitive and confidential information about Ray's employment with the firm, which the website posted – summary judgment on the basic discrimination claim affirmed – the retaliation claim went to the jury – Ropes argued that Ray did not actually believe in his EEOC claim, but just used it to try to extort money – the jury concluded that Ray had not established a *prima facie* case of retaliation because he had not engaged in protected activity under Title VII – retaliation based on both participation (the rejection of letters of reference after he filed his EEOC complaint) and opposition (contacting Harvard) – district court instructed the jury that the EEOC complaint was protected if done in good faith – jury instructed that opposition was protected if he had shown it was both undertaken in good faith and based on a reasonable belief – the participation clause does not

require a reasonable belief – "Simply put, Ray has not set forth a coherent argument on appeal for why the district court erred as a legal matter in requiring him to show good faith for purposes of the participation clause. Thus, we deemed his argument waived for lack of development." 799 F.3d at 111 – summary judgment on denial of partnership affirmed – denial was based on negative reviews from partners – contention that associates who received more favorable reviews should not have been so favorably traded fails under comparative evidence discussed – every associate was different – Ray's reliance on a subjective review process flounders because it is supported only by speculation – plaintiff's reliance on two racially charged remarks from partners about which he protested not shown to have any connection with the policy committee's decision – fact that only one black associate had ever been promoted to partner in the history of the firm is unfortunate and troubling but it fails to imply pretext in this case.

Wright v. St. Vincent Health Sys., 730 F.3d 732 (8th Cir. 2013) – Plaintiff was discharged 45 minutes after she called the hospital's HR Department to complain of racial discrimination – the court characterized the timing as "incredibly suspicious" – nevertheless, it affirmed the trial court's dismissal following a bench trial – the hospital's evidence was that the decision to discharge her was made the day before, multiple individuals had been advised of the decision, and the protected conduct occurred after the discharge decision had been made – no error in the discharge decision not being racially motivated despite the fact that the decision-maker had discharged three other African-American employees and no Caucasians during her tenure.

Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – "The district court correctly held that there was no causal link between [plaintiff's protected conduct] and his termination, the reason being obvious: [employer] officials recommended firing [plaintiff] before he wrote the letter. Causation moves forward, not backwards, and no protected conduct after an adverse employment action can serve as the predicate for a retaliation claim." 723 F.3d at 42 – quotation from state court decision that "[w]here, as here, adverse employment actions or other problems with an employee pre-date any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation[,]" *id.* (citation omitted). Recommendation had not reached the General Manager prior to the

protected conduct, but no evidence that recommendation would have been rejected if no one had known of the protected conduct – quotation from prior First Circuit case – "'Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint[,]'" *id*. (citation omitted)

Benes v. A.B. Data, Ltd., 724 F.3d 752 (7th Cir. 2013) – Summary judgment affirmed against employee fired for outburst during mediation session – EEOC conducted mediation session – each side instructed to remain in their room with a third party relaying offers back and forth – upon receipt of employer's offer, employee barged into employer's room and shouted: "You can take your proposal and shove it up your ass and fire me and I'll see you in court" – he was promptly fired, and he sued for retaliation, alleging that he was fired for having "participated in any manner" in Title VII proceedings – held fired not for participating but for the outburst – if the employer would have fired an employee who barged into a superior's office in violation of instructions and made a similar comment, it was entitled to fire someone who did the same thing during a mediation.

Promotion, Advancement, and Reclassification (Ch. 17)

Madlock v. WEC Energy Grp., Inc., 885 F.3d 465 (7th Cir. 2018) – Lead billing clerk who made a $10,000 billing error was transferred to another position where she lost her non-managerial title of "lead" – summary judgment on Section 1981 race suit affirmed – losing lead title was not an actionable adverse employment action – dislike of location of new desk was a mere subjective presence – views of co-workers that she had been demoted is not a term of employment – adverse employment action must be "some quantitative or qualitative change in the terms or conditions of [the plaintiff's] employment that is more than a mere subjective preference, 885 F.3d at 470 – not everything that makes an employee unhappy is actionable – transfer herein occasioned no reduction in salary, loss of benefits or even a loss of title – it did diminish her responsibilities but that is not actionable – reaction of co-workers that plaintiff had been demoted insufficient to create adverse employment action – "Whether an action is adverse requires an amount of objectivity, 'otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." 885 F.3d at 471

(corrected) – contention that she lost a promotion after filing her grievance and that a list of her errors was inaccurate not relevant "[a]s long as management genuinely believed in the correctness of the [list of errors]," 885 F.3d at 473 – summary judgment affirmed.

Compensation (Ch. 19)

Freyd v. University of Oregon, 990 F.3d 1211 (9th Cir. 2021) – *See* case summary under Chapter 4 – Equal pay issue involving professor and colleagues – summary judgment reversed.

Kellogg v. Ball State Univ., 984 F.3d 525 (7th Cir.2021), *reh'g denied* (Jan 28, 2021) – A discriminatory remark made in 2006 was proper evidence with respect to pay discrimination over a decade later – at time of hire female plaintiff told she didn't need more money because her husband made a lot of money – time barred discriminatory acts such as this conversation can always be considered as evidence with respect to proving current discrimination – moreover, this case falls squarely within what is known as the Lily Ledbetter Amendment to Title VII, the so-called "paycheck accrual rule" – case remanded for trial.

Lenzi v. Systemax, Inc., 944 F.3d 97 (2d Cir. 2019) – Dismissal reversed in pay equity case – plaintiff was not able to identify a male comparator doing the same type of work – however, she had evidence that her executive pay was below market for her position, whereas male executives were above market for their positions – this is sufficient to withstand a motion to dismiss – Title VII standards are more flexible than the Equal Pay Act, which would require plaintiff to prove she did the same work as her comparators.

Terry v. Gary Cmty. Sch. Corp.**,** 910 F.3d 1000 (7th Cir. 2018) – Plaintiff, an elementary school principal, had a lower salary than two male principals who were conceded to be appropriate comparators – for economic reasons, plaintiff's salary was frozen for several years – salary freeze resulted in plaintiff and her two male comparators being frozen – the differences in salary were the result of the salary freeze and not a decision by the school district to pay the men more than the women – this constitutes a reasonable factor other than sex – summary judgment affirmed.

EEOC v. Md. Ins. Admin., 879 F.3d 114 (4th Cir. 2018) – Summary judgment for employer in Equal Pay Act case reversed – three female fraud investigators hired at lower rate than four male counterparts with all performing equal work – no need to establish intent under EPA – employer must prove affirmative defense – employer alleged that under neutral salary scale males were entitled to higher pay because of greater experience – although the state standard salary schedule is facially neutral, the employer exercises discretion each time it assigns a new hire to a specific step in salary range based on its review of the hire's qualifications and experience – fact finder could find that in exercising this discretion the employer in part based its assignment of step levels on gender – showing that two of the males produced certificates that were preferred that the females did not possess could explain a disparity, but the burden of proof is that the employer must establish "that a factor other than sex *in fact* explains the salary disparity," 879 F.3d at 123 (emphasis in original) – trial is necessary – 2-1 decision with lengthy dissent.

Smith v. URS Corp., 803 F.3d 964 (8th Cir. 2015), *reh'g en banc denied* (Jan. 12, 2016) – Summary judgment reversed by 2:1 vote – black employee hired at salary $11,000 higher than requested – some months later white employee hired for same job at pay rate $7,000 above black employee – black employee requested pay raise which was denied – district court erred in treating case as hiring discrimination case other than one asserting racially disparate treatment in pay – jobs were identical and no material difference in qualifications – even if being hired at a salary at $11,000 higher than requested is material with respect to the initial hire, "URS provides no argument as to the continuing pay disparity after [the black employee] did, in fact, ask for a raise," 803 F.3d at 972.

<u>Sexual and Other Forms of Harassment (Ch. 20)</u>

<u>Cases Interpreting *Faragher/Ellerth*</u>

Vance v. Ball State Univ., 570 U.S. 421 (2013) – Under *Faragher* and *Ellerth*, if the harasser is a co-worker, the employer is judged by a negligence standard – however, if a "supervisor," and the harassment culminates in a tangible employment action, the employer is strictly liable – but if there is no tangible employment action, the employer may escape liability with an affirmative defense that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or

corrective opportunities provided – it therefore matters whether the harasser is a supervisor or a co-worker – "We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . ." 570 U.S. at 424.

– Under the Restatement, masters are generally not liable for the torts of their servants if the torts are outside the scope of employment – there is however an exception where the servant was "aided in accomplishing the tort by the existence of the agency relation" – we adapted this to Title VII in *Ellerth* and *Faragher* – neither party challenges the application of *Faragher/Ellerth* to race-based hostile environment claims and we assume that it does apply – lower courts have divided on the test for supervisor – some have followed the EEOC's Guidance which ties the supervisor's status to the ability to exercise significant direction over daily work –

"[w]e hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e*., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" 570 U.S. at 431 (quoting *Ellerth*, 524 U.S. at 761). "We reject the nebulous definition of 'supervisor' advocated in the EEOC Guidance . . . ." *Id*. – Under test set forth herein "supervisory status can usually be readily determined, generally by written documentation." *Id*. at 432. – the test we adopt "is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial." *Id*.

– In responding to the dissent's contention that one of the supervisors in *Faragher* would not have qualified under this test, even though the harasser could impose discipline, the Court responded, "If that discipline had economic consequences (such as suspension without pay) then [the harasser in *Faragher*] might qualify as a supervisor under the definition we adopt today," 570 U.S. at 437 n.9. – In *Faragher*, the harassing lifeguard threatened the plaintiff to "[d]ate me or clean the toilets for a year" – "That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher's eligibility for promotion, then it might constitute a tangible employment action." *Id*. – In

determining supervisory status, "[t]he ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework . . . ." *Id.* at 439.

– "The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. . . . [S]upervisor status will generally be capable of resolution at summary judgment," *id.* at 441. – "[E]ven where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions), this preliminary question is relatively straightforward." *Id.* at 444. – "Contrary to the dissent's suggestions . . . this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or altering the work environment in objectionable ways. In such cases the victims will be able to prevail simply by showing that the employer was negligent . . . and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." *Id.* at 445-46.

– If an employer has a very small number of individuals who can make decisions involving tangible job actions, they "will likely rely on other workers who actually interact with the affected employee," and "[u]nder those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies." *Id.* at 445-47. – Even under the negligence standard "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant." *Id.* at 449. – "We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Id.* at 450. – 5-4 decision – Justice Ginsburg's dissent included "[t]he ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today." *Id.* at 470-71.

Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624 (7th Cir. 2019) – Summary judgment affirmed – female employee claimed that male supervisor repeatedly asked to see her breasts – Wal-Mart showed that it acted reasonably to prevent and correct promptly the supervisor's alleged behavior – female employee unreasonably failed to take advantage of preventative or corrective opportunities – waited months to report the alleged conduct even though she could have used an anonymous phone line – Wal-Mart retrained the supervisor even though investigation did not substantiate the allegations – Wal-Mart established the *Faragher-Ellerth* affirmative defense because it reasonably prevented and corrected sexual harassment and had unreasonably delayed the harassment – claim of constructive discharge rejected – "[w]hile comments like these have no place in the workplace, our precedent makes clear that a plaintiff must provide evidence of an environment of significantly greater severity before an actionable claim of construction discharge materializes," 931 F.3d at 628-29 – "no reasonable jury could find that Wal-Mart acted unreasonably. Wal-Mart had a comprehensive policy that explicitly prohibited sexual harassment," *Id*. at 630 – "additionally, the options for reporting retaliation were robust. . . ." *Id*. –investigation was prompt and thorough – there were no witnesses – Wal-Mart was unable to substantiate the claims but nevertheless required him to retake the company's ethics course which included anti-harassment training – the second element of the *Faragher-Ellerth* defense requires that the defendant show the plaintiff had unreasonably failed to take advantage of preventative measures – plaintiff did no reporting for four months.

Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2d Cir. 2010) – Harassee complained only to manager who was harassing her – employer's policy allowed harassment complaints to be brought to the attention of the employee's supervisor, human resources, or any member of management – trial court found it unreasonable for employee not to go to other managers or HR – Second Circuit reversed: "We do not believe that the Supreme Court . . . intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints." 596 F.3d at 104-05 – some evidence that pursuing other avenues of complaint would have been futile.

General

Agosto v. New York City Dept. of Educ., 982 F.3d 86 (2d Cir. 2020) – Summary judgment properly granted in male on male sexual harassment hostile environment claim – contentions that principal would stare, sneer, catcall and clap at him and on a few occasions sing or talk to him in an unusual manner are insufficient to support a finding of objectively hostile workplace – the principal's alleged act of suggestively licking a lollypop while looking at the teacher isn't in the category of "extraordinarily severe" single actions that create a hostile work environment.

Sanderson v. Wyoming Highway Patrol, 976 F.3d 1164 (10th Cir. 2020) – Trial court reversed – trial court found that facts were not severe enough for hostile environment – plaintiff was officer with highway patrol – obtained promotion to Division O which is the prestigious division that protects the governor. She faced persistent rumors that she was promoted to Division O only because she traded sex for a promotion and that she regularly flirted – multiple troopers commented that Division O "does not accept females" – the court also considered for severity non-sex based ostracization – co-workers pointedly ignored her – one co-worker bought burritos for everyone in a group and pointedly excluded her – these facts would permit a reasonable jury to find hostile environment sexual harassment.

Fernandez v. Trees, Inc., 961 F.3d 1148 (11th Cir. 2020) – Summary judgment reversed in harassment case – supervisor frequently uttered anti-Cuban slurs – four factors determine whether objectively conduct might constitute actionable hostile environment – all four met – four factors are (1) frequency; (2) severity in which she was present since the language was vulgar; (3) humiliating since the slurs were in front of coworkers; and (4) although weaker, did it interfere with job.

Gibson v. Concrete Equip. Co., Inc., 960 F.3d 1057 (8th Cir. 2020), *reh'g en banc denied* (July 27, 2020) – Claims of sex bias, harassment, and retaliation properly dismissed – the letter alleging discrimination attached a document that contained profane and inappropriate language – plaintiff had been reprimanded for violating the company's workplace harassment policy – to prove sex discrimination without direct evidence, a worker must show she was meeting her employer's legitimate expectations, but the undisputed violations of the anti-harassment policy meant that she was not – she could not identify a male co-worker with the same supervisor

who was not fired under similar circumstances – moreover a letter from plaintiff indicating that she loved her job and viewed her co-workers as her friends was inconsistent with her current allegations.

Bazemore v. Best Buy, 957 F.3d 195 (4th Cir. 2020) – Plaintiff complained about a racist and sexually-charged joke – employer did not discharge individual who told the joke – plaintiff contended person who told the joke should have been discharged – Title VII does not require specific actions when employers find there has been harassment – the employer need only take steps reasonably calculated to end harassment, which Best Buy did – it issued a final written warning to the alleged harasser – there was no recurrence.

Bentley v. AutoZoners, LLC, 935 F.3d 76 (2d Cir. 2019) – Plaintiff alleged sexual harassment by a co-employee who oversaw day-to-day operations – Court found that harasser was not a supervisor because he lacked authority to hire, fire, demote or promote or set work schedules even though plaintiff alleged that the harasser threatened to cut her hours and fire her – since no harassment following notice to top management, summary judgment – both plaintiff and harasser terminated for inappropriate conduct after an internal investigation concluded that she had used crude language in an altercation with the harasser – no strict liability since harasser was not a supervisor – not a supervisor because he lacked authority to "take tangible employment action" which could inflict economic injury. 935 F.3d at 91-92. Harasser could informally discipline her if circumstances warrant factual issue created by deposition testimony that she reported the sexist comments well before the harassment stopped because it was contradicted by other parts of her deposition and her prior written but unsworn statement – summary judgment on plaintiff's discrimination and retaliation claims also affirmed because her conduct – using crude language – was not so minor as to be a pretext – even though plaintiff was terminated month after reporting the sexist behavior, proximity can only establish a *prima facie* case and cannot demonstrate pretext by itself.

Menaker v. Hofstra Univ., 935 F.3d 20 (2d Cir. 2019) – Male coach of men's and women's varsity tennis rejected a freshman woman's request to increase her athletic scholarship, and her father threatened the coach – the woman engaged an attorney who alleged that the coach subjected her to sexual harassment – based on an allegedly inadequate investigation, the coach was fired – the case was dismissed under 12(b)(6) – reversed – universities may over react to claims of sexual harassment – "the very

same pressures that may drive a university to discriminate against male *students* accused of sexual misconduct may drive a university to discriminate against male *employees* accused of the same." 935 F.3d at 32 – precedent stands for the general principle that when a university takes adverse action against the student or employee in response to allegations of sexual misconduct, and there is a clearly irregular or inadequate investigation, and the university is reacting to criticisms of reacting inadequately to allegations of sexual misconduct, these circumstances provide the requisite support for a *prima facie* case of sex discrimination – here there are clear allegations of an irregular investigation –contended that the complaint is insufficient because there is no allegation that the decision-maker was biased – on remand a "cat's paw" theory is appropriate – the allegations of the female student and her parents may well have been motivated at least in part by the coach's sex – this intent may be imputed to Hofstra.

Parker v. Reema Consulting Servs., Inc., 915 F.3d 297 (4th Cir. 2019), *cert. denied* 140 S. Ct. 115 (2019) – Male subordinate circulated false rumor that plaintiff slept with higher ranking male manager to get promotion – this is sufficient for hostile work environment – dismissal of lawsuit reversed.

Roy v. Correct Care Sols., LLC, 914 F.3d 52 (1st Cir. 2019) – Plaintiff, a nurse, worked for a third party who assigned her to defendant prison – hostile work environment found – non-employers can be liable for sexual harassment against contractor – liability found.

Swyear v. Fare Foods Corp., 911 F.3d 874 (7th Cir. 2018) – Summary judgment affirmed against female sales representative who claimed a hostile work environment – her co-workers used crude and offensive nicknames, discussed male co-workers sexual activities, and the same male co-worker made improper advances towards her on a business trip – none of the nicknames or comments were directed towards her – discussions were infrequent – she admitted she felt in control of the business trip situation.

EEOC v. Costco Wholesale Corp., 903 F.3d 618 (7th Cir. 2018) – A male customer repeatedly stalked a female employee – Costco claimed that the alleged conduct was mild in comparison with other cases, and not overtly sexual – but the conduct does not have to be overtly sexual to be actionable as long as it is because of the plaintiff's sex – "A reasonable juror could conclude that being hounded for over a year by a customer despite intervention by management, involvement of the police, and knowledge that he was scaring her would be pervasively intimidating or frightening to a person of average steadfastness." 903 F.3d at 626 (internal quotation marks and citation omitted). – Employee went off on medical leave of absence – never returned – terminated after one-year limit for such absences expired – Costco did attempt to respond to complaints about the customer but its response "was unreasonably weak" (*id*. at 628) – employee was unable to work due to emotional distress – she is entitled to back pay only for the period of her medical leave – she cannot claim constructive discharge "because she did not quit: Costco fired her because she had exhausted the 12-month leave of absence available under her Employee Agreement . . . ." *Id*. – It is a clear principle of law that an employee cannot claim constructive discharge unless she quits – she was fired because she did not return to work and that is the equivalent of walking off the job – On remand, EEOC can recover back pay for employee if it can show that her work environment was so hostile that she was forced to take an unpaid leave – if a reasonable person in the employee's shoes would have felt forced by unbearable working conditions to take an unpaid leave she is entitled to recover for some period of time following the involuntary leave but that cannot extend beyond the date when Costco terminated her employment.

Smith v. Rosebud Farm, Inc., 898 F.3d 747 (7th Cir. 2018) – Jury verdict of same-sex harassment affirmed – male co-workers at grocery store regularly grabbed genitals/buttocks of plaintiff and mimed oral and anal sex – only male employees harassed.

Minarsky v. Susquehanna Cty., 895 F.3d 303 (3d Cir. 2018) – Summary judgment in sexual harassment case reversed despite the fact that harassee did not report her direct supervisor's conduct under the anti-harassment policy and despite the fact that the harasser was discharged after his behavior became known through an overheard conversation – reasonable jury could find that employer did not act reasonably to stop the harassment given that it continued after the harasser was twice verbally reprimanded over his hugging of other females and that he had attempted to hug or kiss two high-level female officials – her failure was reasonable in light of the

fact that prior reprimands were ineffective and that she feared discharge, especially since her daughter had cancer.

Gardner v. CLC of Pascagoula. LLC, 915 F.3d 320 (5th Cir. 2019), *as revised* (Feb. 7, 2019) – Nurse in care facility harassed by patient – summary judgment for employer reversed – triable issue on severe or pervasive – employer knew of harassment and failed to take appropriate action – mentally ill patient had reputation for groping female employees – district court granted summary judgment because it was not clear that the harassing comments and attempt to grope are beyond what a nurse should expect of patients in a nursing home. While patients with reduced mental capacity will be expected to make inappropriate comments, which would normally not be sufficient, the facility must take steps to protect an employee from inappropriate physical contact.

Berryman v. SuperValu Holdings, Inc., 669 F.3d 714 (6th Cir. 2012), *reh'g en banc denied* (Apr. 11, 2012) – Eleven African-American employees alleged a racially hostile work environment spread over 25 years – district court properly considered each of the claims separately – summary judgment properly awarded on each of the claims on the ground that the conduct was not sufficiently severe or pervasive – district court properly considered only conduct directed at the plaintiff or of which the plaintiff was aware – cannot aggregate experiences of which a particular individual was not aware.

<u>Discharge and Reduction in Force (Ch. 21)</u>

Newbury v. City of Windcrest, 991 F.3d 672 (5th Cir. 2021) – Summary judgment affirmed – no constructive discharge – allegations supervisor was rude and dismissive of plaintiff, questioned her education level, and screamed at her in front of co-workers were not enough to show that the purported harassment was sex-based or that their working conditions were so intolerable that she had no choice but to resign.

Green v. Town of East Haven, 952 F.3d 394 (2d Cir. 2020) – Plaintiff quit rather than face a disciplinary hearing that could lead to his termination – summary judgment reversed – two lines of cases – if there was a reasonable opportunity plaintiff could prevail in the scheduled disciplinary hearing there was no constructive discharge and no adverse action – but if plaintiff reasonably believed that it was a foregone

conclusion that he would be discharged, then there was a constructive discharge – summary judgment inappropriate because a reasonable factfinder could conclude the plaintiff reasonably believed that discharge was inevitable.

Fields v. Board of Educ. of City of Chicago, 928 F.3d 622 (7th Cir. 2019) – No constructive discharge when black teacher resigned after being placed on performance improvement plan and was required to attend a disciplinary mediation – there was no actual discipline – these facts cannot show that her working conditions were so intolerable she was forced to resign.

Cosby v. Steak-N-Shake, 804 F.3d 1242 (8th Cir. 2015) – No constructive discharge – first, employee failed to show an intolerable work environment. Next, "[i]f an employee quits without giving the employer a reasonable chance to resolve his claim, there has been no constructive discharge." 804 F.3d at 1246. With respect to state law disability claim, decision to demote was made before employee requested leave of absence for depression – employer had no knowledge of disability at time decision made.

Employers (Ch. 22)

Prince v. Appleton Auto, LLC, 978 F.3d 530 (7th Cir. 2020) – Defendant was a member of a network of corporately distinct used car dealerships – summary judgment properly granted – defendant did not meet the 15 employees threshold required for Title VII coverage – no basis for aggregating the employees of the affiliated but distinct used car dealerships.

EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019) – Labor contractor imported workers from Thailand to work in defendant's orchards – orchard held to be joint employer with labor contractor – Ninth Circuit adopted common law test for joint employer, rejecting the FLSA economic realities test – in order to import workers under H2A visas, employers have to agree to provide housing and transportation – orchard employer held jointly liable with labor contractor for both discrimination on-the-job and the housing and transportation requirements – allegations included claims that labor contractor charged workers exorbitant fees for

the opportunity to work in the United States – allegations included over-crowded and nearly uninhabitable housing infested with mice, flies, and cockroaches – district court denied summary judgment with respect to workplace allegations, but granted it with respect to the off-the-job allegations – Ninth Circuit reverses denial – does not matter that contract with labor contractor delegated to labor contractor responsibility for housing and food and transportation – even if a joint employment relationship exists, one joint employer is not automatically liable for the actions of the other – co-employer must be shown to have known or should have known about the other employer's conduct – the EEOC plausibly alleged that orchard employer was aware of the abysmal living conditions.

Frey v. Hotel Coleman, 903 F.3d 671 (7th Cir. 2018) – Owner of Holiday Inn franchise, Hotel Coleman, hired Vaughn Hospitality, Inc. to run the daily operations of the hotel. Vaughn Hospitality was responsible for hiring, supervising, directing and discharging employees and determining their compensation. On summary judgment the district court determined that Vaughn Hospitality was not a joint employer with Hotel Coleman – "two otherwise unrelated business entities – one owns a hotel and the other manages the employees of that hotel—and we must determine whether one, the other, or both qualify as [plaintiff's] employer for purposes of Title VII." 903 F.3d at 677 – district court believed Vaughn Hospitality was just a hired manager, an agent of the actual employer – the proper test is an economic realities test which looks to whether each putative employer exercised sufficient control – case must be remanded for the district court to apply the proper economic realities test which considers multiple factors but the most important is "the employer's right to control . . . ." 903 F.3d at 676 – additional factors include the kind of occupation and nature of skill required, responsibility for costs of operation, method and form of payment of benefits, and length of job commitment and/or expectations.

Knight v. State Univ. of N.Y. at Stony Brook, 880 F.3d 636 (2d Cir. 2018) – Jury properly determined that black union electrician referred to university for a job was not an employee of university – multifactor test for distinguishing employees from independent contractors properly used – contention that a judge and not a jury should decide whether an individual is an employee rejected – contention that multifactor test was limited to determining whether an individual was an independent contractor was rejected – it can also be used to determine whether the person is an employee – multifactor test included hiring party's right to

control the manner and means by which the product is accomplished, skill required, source of instrumentalities and tools, location of work, duration of the relationship, whether the hiring party has the right to assign additional projects, the extent of the hired party's discretion over when and how long to work, the method of payment, the hiring party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision for employee benefits, and tax treatment.

Charging Parties and Plaintiffs (Ch. 25)

Simmons v. UBS Fin. Servs., Inc., 972 F.3d 664 (5th Cir. 2020), *cert. denied* ___ S. Ct. ___, 2021 WL 666439 (Feb. 22, 2021) – Plaintiff's daughter, an employee, filed a discrimination claim against the defendant and later settled it. After the settlement, UBS discriminated against her father by barring him from doing business with it – "Title VII claims require an employment relationship between plaintiff and defendant. James Simmons essentially asked this court to adopt an exception where a nonemployee (Simmons) is the intentional target of an employer's retaliatory animus against one of its employees (Simmons's daughter). That we cannot do. As a nonemployee, Simmons asserts interests that are not within the zone that Title VII protects. We therefore affirm the dismissal of the complaint for lack of statutory standing." 972 F.3d at 665.

Henry v. Adventist Health Castle Med. Ctr., 970 F.3d 1126 (9th Cir. 2020), *petition for cert. docketed* (Dec. 30, 2020)– Summary judgment affirmed – surgeon who provided on-call service in a hospital emergency department was independent contractor and not employee – relevant factors included the surgeon's payment arrangement, his limited obligations to the defendant, and his description as an independent contractor in the parties' contracts – other factors including the surgeon's high skill level, Castle's provision of assistance and medical equipment and its mandatory professional standards did not weigh heavily in the plaintiff's favor.

Von Kaenel v. Armstrong Teasdale, LLP, 943 F.3d 1139 (8th Cir. 2019) – Judgment on the pleadings against 70-year-old law firm partner forced to retire under mandatory retirement policy affirmed. Matter of first impression under the ADEA for 8th Circuit – as equity partner, plaintiff shared in firm's profits and losses, voted on policies and admission of new

partners, was not supervised with respect to his substantive work, had the ability to seek lower hourly rates for clients, and had substantial protection against discharge – he did not bear a reasonable relationship to a normal employee and therefore was not covered by the ADEA.

Levitin v. Northwest Comty. Hosp., 923 F.3d 499 (7th Cir. 2019) – Surgeon who claimed discrimination when hospital privileges were revoked was not an employee but an independent practitioner – summary judgment affirmed – owned own medical practice, billed patients directly, tax returns stated "self-employed," did not receive any benefits from the hospital, and could set her own hours.

EEOC Administrative Process (Ch. 26)

***Texas v. EEOC*, **933 F.3d 433 (5th Cir. 2019) – EEOC guidance condemns any policy or practice of requiring an automatic across-the-board exclusion from all employment opportunities for convicted felons because they do not focus on the dangers of particular crimes – Texas had a policy that long-excluded persons with felony convictions from many public jobs – some Texas agencies categorically exclude all convicted felons from employment – Texas sued seeking an injunction against enforcement of the guidance – injunction granted – EEOC can issue only procedural regulations – it cannot issue binding, substantive guidance – "We agree that the Guidance is a substantive rule subject to the APA's notice-and-comment requirement and that EEOC thus overstepped its statutory authority in issuing the Guidance." 933 F.3d at 451. – EEOC and Attorney General of the United States are enjoined from enforcing the EEOC's interpretation of the guidance against the state of Texas.

Cervantes v. Ardagh Grp., 914 F.3d 560 (7th Cir. 2019) – Claim of retaliation cannot support lawsuit alleging race and national origin discrimination – not like or related – summary judgment affirmed.

McLane Co., Inc. v. EEOC, ___ U.S. ___, 137 S. Ct. 1159 (2017), *as revised* (Apr. 3, 2017) – Charging party worked for eight years in physically demanding job – when she wanted to return from maternity leave, she failed a strength test three times and was fired – the EEOC

began an investigation – Employer refused to provide "pedigree information" – names, social security numbers, addresses, and telephone numbers of employees asked to take the evaluation – EEOC expanded its investigation both geographically (nationally) and substantively (age discrimination), and issued subpoenas – the district judge declined to enforce the subpoenas, finding the pedigree information was not relevant to the charges – the Ninth Circuit, applying a *de novo* review standard, reversed – the Supreme Court reversed the Ninth Circuit, holding that a district court's decision whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion and not *de novo* – of great importance, the Supreme Court noted the Courts of Appeal had historically required district courts to defer to the EEOC's determination that the evidence is relevant – the Supreme Court clarified those cases, holding "We think the better reading of those cases is that they rest on the established rule that the term 'relevant' be understood 'generously' to permit the EEOC 'access to virtually any material that might cast light on the allegations against the employer.'" 137 S. Ct. at 1169, quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). "A district court deciding whether evidence is 'relevant' under Title VII need not defer to the EEOC's decision on that score; it must simply answer the question cognizant of the agency's broad authority to seek and obtain evidence." *Id*.

EEOC v. McLane Co., Inc., 857 F.3d 813 (9th Cir. 2017) – On remand from the Supreme Court, the Ninth Circuit held that even under an abuse of discretion standard, the EEOC had the right to obtain "pedigree information" – name, social security number, addresses, and phone numbers – case returned to the district court to determine whether the EEOC subpoena is unduly burdensome.

EEOC v. Aerotek, Inc., 498 F. App'x 645 (7th Cir. 2013) (unpublished), *reh'g denied* (Mar. 12, 2013) (non-precedential) – The EEOC regulations state that any recipient of an EEOC subpoena who does not intend to fully comply must petition for revocation or modification and that such petitions must be mailed "within five business days . . . after service of the subpoena." 29 C.F.R. § 1601.16(b). – Here the petition to revoke or modify was submitted six business days later, one business day late. "The EEOC argues that Aerotek has waived its right to challenge the enforcement of the subpoena. We agree. . . . Aerotek has provided no excuse for this procedural failing . . . ." 498 F. App'x at 647-48 – No other Circuit Court has ruled on the question of whether an employer's failure to timely challenge before the EEOC precludes a later challenge to

the enforcement of the subpoena in the Title VII context – two district courts allowing such challenges are not particularly instructive – other district courts have found that an employer waives its objections by simply failing to file a timely petition – "EEOC may enforce its subpoena because Aerotek has waived its right to object." *Id*. at 649.

EEOC v. Aerotek, Inc., 815 F.3d 328 (7th Cir. 2016) – EEOC investigation subpoena against staffing company enforced – staffing company required to submit information related to its clients and their requests for staffing – EEOC's initial review of information revealed hundreds of age-based discriminatory job requests made by clients at 62 of the staffing firm's facilities – EEOC entitled to identifying information about the staffing agency's clients.

Timeliness (Ch. 27)

General Issues

Hamer v. Neighborhood Hous. Servs. of Chicago, ___ U.S. ___, 138 S. Ct. 13 (2017) – Issue is time to appeal from Federal district court dismissal of discrimination claims – district court granted 60-day extension of deadline set by rule of court – 7th Circuit decided it lacked jurisdiction to decide the appeal because under the Federal Rules of Appellate Procedure, the district court could not grant extensions of more than 30 days – Supreme Court unanimously reverses – a rule of court is not jurisdictional – it is not a statute – case remanded to decide whether equitable considerations warrant hearing the appeal.

Artis v. D.C., ___ U.S. ___, 138 S. Ct. 594 (2018) – Time limit to refile in state court when federal/state case is dismissed is 30 days plus whatever time was left on the state statute of limitations at the time of the federal filing.

Green v. Brennan, 136 S. Ct. 1769 (2016) – Statute of limitations on constructive discharge claims runs from date of resignation, not date of last discriminatory act, not last day of work.

Simko v. U.S. Steel Corp., ___ F.3d. ___, No. 20-1091, 2021 WL 1166407 (3d Cir. March 29, 2021) – Plaintiff's discharge claim untimely – plaintiff filed a charge two years before alleging a denial of an accommodation – a job transfer – after discharge, claimed discharge was in retaliation for earlier charge – these are too dissimilar even though the EEOC actually investigated retaliatory discharge claim – decision was 2 to 1.

Logan v. MGM Grand Detroit Casino, 939 F.3d 824 (6th Cir. 2019) – Contractual agreement by employee and employer to shorten Title VII time limit for filing charges void as against public policy – employee signed a contract agreeing to six-months – statutory time limit of 300 days governs.

Nestorovic v. Metro. Water Reclamation Dist. of Greater Chi., 926 F.3d 427 (7th Cir. 2019) – District court dismissed case but granted plaintiff extension of 30-day time limit to file appeal – appeal dismissed – district court abused its discretion in extending time for appeal because there was no adequate showing of excusable neglect or good cause.

Kirklin v. Joshen Paper & Packaging of Ark. Co., 911 F.3d 530 (8th Cir. 2018) – Laid off employee did not file charge within 180 days of layoff – employee contended he delayed because he had been led to believe he might be rehired – summary judgment affirmed – possibility of rehire is not sufficient to create equitable tolling.

Wrolstad v. Cuna Mut. Ins. Soc'y, 911 F.3d 450 (7th Cir. 2018) – Laid off employee released age claims in exchange for substantial severance pay – nevertheless sued – employer sent letter saying that if he did not drop his appeal, employer would sue for breach of the severance agreement – employee filed retaliation charge more than 300 days after the letter but less than 300 days after the lawsuit was actually filed – summary judgment – untimely – retaliation claim accrued when employee received the letter stating employer would enforce the waiver in his severance agreement by means of the lawsuit.

Rodriguez v. Wal-Mart Stores, Inc., 891 F.3d 1127 (8th Cir. 2018) – Case dismissed since charge not filed within 180 days – equitable tolling or equitable estoppel not applicable even though employee claimed he delayed because of settlement negotiations.

Hales v. Casey's Mktg. Co., 886 F.3d 730 (8th Cir. 2018), *reh'g en banc denied* (May 21, 2018) – Employee did not file state lawsuit within 90 days of state administrative release letter – time limits for state lawsuit not tolled during pendency of EEOC consideration of EEOC charge based on same operative facts – Supreme Court decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975) holding that the filing of a Title VII claim with the EEOC does not toll the statute of limitations for Section 1981 indicates no tolling here – Federal retaliation claim time barred since suit not filed within 90 days of right to sue letter – unsupported claim that right to sue letter late rejected – presumption that it is received three days after mailing.

Jurisprudential Bars to Action (Ch. 28)

In re GM, LLC, No. 19-0107, ___ F.3d ___, 2019 WL 8403402 (6th Cir. Sept. 25, 2019) – GM terminated an American citizen at its Chinese facility allegedly because of China's mandatory 60-year old retirement age for males. GM petitioned for the right to appeal the district court's denial of its motion to dismiss – the motion to dismiss was based on the foreign law exception to Title VII and the Age Discrimination Act which exempts an employer from liability for violations involving an employee working in a foreign country if compliance with the statute would cause the employer to violate the law of the foreign country – since resolution of the applicability of the foreign law exception would not resolve all issues in the case, including other questions under Chinese law, the Court of Appeal rejected the request for an interlocutory appeal.

Slater v. U.S. Steel Corp., 871 F.3d 1174 (11th Cir. 2017) (*en banc*) – *En banc* 11th Circuit revisited prior precedent and overruled it – prior precedent was that plaintiff's non-disclosure of a civil claim as an asset in bankruptcy would allow a federal trial court to dismiss the claim under the doctrine of judicial estoppel – the new rule in the 11th Circuit is that federal courts must consider "all the facts and circumstances" of a plaintiff's bankruptcy non-disclosure before dismissing claims – the court should look to factors such as the plaintiff's level of sophistication, the explanation for the omission, whether the plaintiff subsequently corrected the disclosures, and any action taken by the Bankruptcy Court concerning the non-disclosure – using this broader standard, the Appeals Court revived race and sex claims by the plaintiff, and directed that a three-judge Appeals Court determine under the new standard whether the trial judge improperly dismissed the claims.

Kovaco v. Rockbestos-Surprenant Cable Corp., 834 F.3d 128 (2d Cir. 2016) – Social Security disability application which stated plaintiff "unable to work" inconsistent with ADA unlawful discharge claim – Plaintiff judicially estopped from showing qualified at time of discharge.

Title VII Litigation Procedure (Ch. 29)

Urquhart-Bradley v. Mobley, 964 F.3d 36 (D.C. Cir. 2020) – Race sex claim filed in Washington, D.C. court against plaintiff's superior who fired her– superior based in Chicago – superior terminated employee over the telephone – case dismissed below based on fiduciary shield doctrine which protects individuals from being sued in jurisdictions where they do not operate – remanded for factual development – fiduciary shield argument rejected.

Lincoln v. BNSF Ry. Co.**,** 900 F.3d 1166 (10th Cir. 2018) – district court concluded that plaintiff failed to exhaust administrative remedies for all instances of discrimination that occurred more than 300 days before his lone EEOC charge and after his lone EEOC charge – this correctly applied 40 years of 10th Circuit authority – "For nearly forty years, this Court has steadfastly held that exhaustion of administrative remedies is a jurisdictional prerequisite to suit." 900 F.3d at 1181 (internal quotation marks and citation omitted) – appellants argue that this position is inconsistent with *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (statutory time limits for filing charges is not a jurisdictional prerequisite – a plaintiff's failure to file a timely EEOC charge permits a defendant an affirmative defense subject to waiver, estoppel and equitable tolling) – this panel, after checking with all active judges on the court, now overrules prior precedent – "[T]he full court now holds that a plaintiff's failure to file an EEOC charge regarding a discrete employment incident merely permits the employer to raise an affirmative defense" and is not jurisdictional. 900 F.3d at 1185. – Case remanded.

Ashbourne v. Hansberry, 894 F.3d 298 (D.C. Cir. 2018), *reh'g en banc denied* (Sept. 5, 2018), *cert. denied* 140 S. Ct. 305 (2019) – *Res judicata* bars Title VII discrimination action by female former federal employee – she unsuccessfully pursued her claims in earlier lawsuit challenging her firing under other statutes and lost – even though at the time she filed her lawsuit she had not received an EEOC right-to-sue letter, her Title VII action involved the same parties and the same nucleus of operative facts, and she could have sought to stay the other matters until she had a right to file the Title VII case.

Peeples v. City of Detroit, 891 F.3d 622 (6th Cir. 2018), *reh'g denied* (July 6, 2018) – Laid off Hispanic fire fighter filed timely charge and received right-to-sue letter – laid off Black fire fighters did not receive right-to-sue letters – Black fire fighters could not piggyback – a charge to be adequate to support piggybacking under the single filing rule must contain sufficient information to notify prospective defendants of their potential liability – no need to satisfy Title VII's filing requirement if there is a substantially related timely charge – single filing rule applies to claims that arose from the same discriminatory conduct – national origin and race discrimination are not substantially related – piggybacking not allowed.

Dindinger v. Allsteel, Inc., 853 F.3d 414 (8th Cir. 2017) – Results of OFCCP pay audit favorable to employer properly excluded in jury trial on alleged pay discrimination based on sex – trial court did not abuse its discretion in allowing "me too" evidence – claims of female employees who were not part of the case that they also were paid less than their male counterparts – temporal proximity between alleged based sex discrimination claims against by female non-party employees and the claims of plaintiffs – "me too's" do not have to be similarly situated in all relevant respects.

EEOC Litigation (Ch. 30)

Mach Mining, LLC v. EEOC, 575 U.S. 480 (2015) – Courts may review EEOC conciliation efforts prior to filing a lawsuit but the scope of review is narrow – 7th Circuit holding that Title VII shields EEOC's pre-suit conciliation efforts from any review rejected – nothing in Title VII "withdraws the courts' authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims," 135 S. Ct. at 1656 – but the EEOC has considerable discretion over the conciliation process and judicial review is limited – if a court finds for the employer regarding a conciliation shortfall, the remedy is not dismissal but further conciliation.

EEOC v. Union Pac. R.R. Co., 867 F.3d 843 (7th Cir. 2017), *reh'g en banc denied* (Nov. 21, 2017), *cert. denied* 138 S. Ct. 2677 (2018) – Two black employees alleged race discrimination, received right to sue letters from the EEOC, sued, and lost on their discrimination claims – the EEOC nevertheless contended that it had the right to continue its investigation – the 7th Circuit agreed – Congress granted the EEOC broad authority to pursue bias investigations and the agency's power isn't limited by any

individual worker's allegations – Circuit split on whether issuance of a right to sue notice terminates the EEOC's right to proceed – 5th Circuit has held that the issuance of a right to sue letter must terminate the EEOC's bias probe – the 9th Circuit has held to the contrary – here there was not only a right to sue letter, but the charging party sued and lost – the EEOC does not have to proceed solely on the basis of a commissioner's charge in such circumstances.

EEOC v. Sterling Jewelers Inc., 801 F.3d 96 (2d Cir. 2015), *cert. denied* 137 S. Ct. 47 (2016) – Title VII requires the EEOC to "investigate the charge" before filing a lawsuit – a district court granted summary judgment to the employer on the grounds of inadequate investigation – reversed – the inquiry should simply have been whether the Commission conducted an investigation, not whether it was sufficient – Supreme Court in *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645 (2015) did authorized some inquiry into whether the EEOC fulfilled its duty to conciliate, however, Title VI grants the EEOC considerable discretion over the process – while *Mach Mining* did not deal directly with the investigation requirement, "we conclude that judicial review of an EEOC investigation is similarly limited, 801 F.3d at 101 – an affidavit from the EEOC stating that it performed its investigative obligations in outlining the steps taken to investigate will usually suffice – a court should not second guess how the EEOC conducted its investigation.

Federal Employees (Ch. 32)

Babb v. Wilkie, ___ U.S. ___, 140 S. Ct. 1168 (2020) – This case is discussed in Chapter 12 (Age, under General).

Class Actions (Ch. 33)

Frank v. Gaos, ___ U.S. ___, 139 S. Ct. 1041 (2019) – Three named plaintiffs sued Google for violations of the Stored Communications Act – resulting settlement paid $5 million to Cy Pres recipients, $2 million in attorneys' fees, and nothing to the Class. Certiorari granted to decide if settlement was fair and reasonable – Solicitor General on appeal urged remand of the lower court to address standing under *Spokeo* – case remanded to determine "whether any of the named plaintiffs has standing

to sue in light of . . . *Spokeo* . . . ." 139 S. Ct. at 1043-44. – "Nothing in our opinion should be interpreted as expressing a view on any particular resolution of the standing question," *Id.* at 1046.

Microsoft Corp. v. Baker, ___ U.S. ___, 137 S. Ct. 1702 (2017) – Orders granting or denying class certification are interlocutory and not immediately reviewable on appeal, unless permitted by the Court of Appeal under Federal Rule of Civil Procedure 23(f) – absent permission to appeal, a plaintiff may pursue an individual claim to final judgment, and then appeal – plaintiffs herein, after class certification was denied, and after denial of Rule 23(f) (permission to appeal), voluntarily dismissed their individual claims "with prejudice," but reserved the right to revive their claims should the Court of Appeal reverse the certification denial – this voluntary dismissal does not qualify as a final decision which would allow appeal – this tactic would undermine finality principles which are required for appeal, which is designed to guard against piecemeal appeal, and subvert the balance of Rule 23(f) by allowing only plaintiffs to obtain immediate review of adverse class action orders – allowing plaintiffs to do this is one-sided – it operates only in favor of plaintiffs – the so called death-knell doctrine is adverse to plaintiffs, but "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense," 137 S. Ct. at 1708 (quoting *Coopers & Lybrand*) – while a plaintiff who dismisses runs the risk of losing their individual case, "plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement," 137 S. Ct. at 1713 – allowing only plaintiffs to appeal class certification decisions is inherently unfair since "[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability . . ." 137 S. Ct. at 1715 (quoting *Coopers & Lybrand*).

Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016) – The Fair Credit Reporting Act (FCRA) requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of consumer reports – Spokeo, a "people search engine," got some facts wrong with respect to plaintiff Robins – he filed a class action alleging that the company willfully failed to comply with the above requirements, and sought the liquidated damages provided in the statute for violations – between $100 and $1,000 per person – there was a serious question as to whether his complaint alleged injury in fact – the Ninth Circuit held that this was not required, since Congress could dispense with injury in fact simply by creating a federal right – the

Supreme Court reversed, holding that under Article III of the Constitution Congress could not authorize monetary damages simply because a statute had been violated in relation to a particular person – injury in fact was required:

> "Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'"

136 S. Ct. at 1547-48.

> "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical."

Ibid. (internal quotations and citation omitted).

> "A concrete injury must be de facto; that is, it must actually exist. . . . When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term – 'real,' and not 'abstract.'"

Id. at 1548 (internal quotations, emphasis, and dictionary citations omitted).

> "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."

Id. at 1549.

> "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm."

Id. at 1550.

The case was remanded to the Ninth Circuit with the following instruction:

> "[The Ninth Circuit] did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement [which the Court just held existed in the FCRA]."

Id.

Tyson Foods, Inc., v. Bouaphakeo, 577 U.S. 442 (2016) – This was an FLSA and state wage hour Rule 23 representative/class action – at issue was the compensability of "donning and doffing" time with respect to protective gear worn before killing and cutting chickens – Tyson did not keep any records of the time – plaintiffs' expert did videotaped observations and then analyzed on average how long each contested activity took – there was no *Daubert* challenge to the expert – plaintiffs' other expert then estimated from the first expert the amount of uncompensated time – the jury did not award the entire amount claimed and it was not clear which types of donning and doffing the jury found compensable and which they did not – the jury awarded the class $2.9 million – the parties did not dispute that the standard for certification under Rule 23 and 29 USC § 216 was the same – the central question was whether representative evidence could be used by the plaintiffs to show that each employee worked more than 40 hours a week when average time for donning and doffing was added to regular hours – the court concluded that in this case the representative evidence was admissible –

> "In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.' . . . One way for respondents to show, then, that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." 577 U.S. at 445.

The Court explained that this is not a trial by formula of the sort condemned by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) – there the employees were not similarly situated and none of them could have prevailed in an individual suit by relying on evidence from other stores and other managers –

> "In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them." 577 U.S. at 459.

The Court continued "Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts methodology under *Daubert*. . . ." *Id*. – Tyson argued that there has to be some mechanism to identify uninjured class members – class members who even with donning and doffing would not exceed 40 hours in a week – the Court remanded so that this question could be considered since it was not fairly presented – the court invited Tyson to challenge any method of allocation. The vote was 6-2, with Thomas and Alito in dissent.

Harris v. Union Pac. R.R. Co., 953 F.3d 1030 (8th Cir. 2020) – Class certification reversed – Union Pacific required workers to disclose health conditions and medical histories – that led to an evaluation of fitness for duty – class was improperly certified because ADA generally requires individualized proof – 650 jobs at issue – issue is whether policy was job-related or consistent with business necessity – that has to be done job by job – analysis would be totally different for accountant with heart condition compared to engineer with the same condition -- trial court certified the class under the Teamsters two-phase procedure – phase #1 would determine whether there was a blanket violation – phase #2 would be individualized with respect to damages – court assumed without deciding that the Teamsters framework under Title VII could be applied to the ADA in appropriate circumstances – claim could resolve if policy on its face discriminatory rejected – business necessity can only be evaluated in relation to the particular job – plaintiffs have widely varying medical conditions and there are 650 different jobs – employees with the same disability do not automatically receive the same outcome – it depends on the job – the district court would be required to consider the unique circumstances of each position to determine whether the policy is unlawfully discriminatory – "This is inherently an individualized question, defeating both predominance and cohesiveness." 953 F.3d at 1037–

common questions do not predominate – although district courts have great discretion in certifying class actions, the district court here did not conduct the necessary rigorous analysis – abuse of discretion in certifying the class under Rule 23(b)(2) and (b)(3) – Teamsters framework cannot overcome the individualized question flaws in this certification – concurring judge agreed that the class was improperly certified but felt that a proper class could be certified if limited to individuals seeking the same or similar positions.

Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012) – Black employees claim that by granting discretion to job site supervisor company allowed discrimination against them with respect to assigning overtime and in working conditions – no commonality – class members worked on at least 262 different construction sites having different superintendents and foremen – the sites had materially different working conditions – the only policy being protested was the policy of affording discretion to each job site superintendent – commonality is the basis of the *Wal-Mart v. Dukes* case – "when multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question," 688 F.3d at 896 – "[t]he sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in *Wal-Mart*: it begs the question," *id*. - "[i]f [the company] had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers – but that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality," *id*. - "[a]ccording to plaintiffs – in *Wal-Mart* and this case alike – local discretion had a disparate impact that justified class treatment," *id*. at 897 – but *Wal-Mart* rejected that proposition – in *Wal-Mart* the court recognized that discretion might facilitate discrimination (*Watson v. Fort Worth Bank & Trust*) but it also observed that some managers will take advantage of the opportunity to discriminate while others won't – "One class per store may be possible; one class per company is not," *id*. – the district court relied on *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) – in that case we remarked that the class in *Wal-Mart* would not have been manageable – in *McReynolds* we held that a national class could be certified to contest the policy allowing brokers to form and distribute commissions within teams and to determine who would be on a team – this single national policy was the missing ingredient in *Wal-Mart* – plaintiffs contend McReynolds supports their position – "it doesn't." While plaintiff's brief on appeal contends Walsh has 14 policies that present common questions, they all boil down to affording discretion – "Wal-Mart tells us that local discretion cannot support a company-wide

class no matter how cleverly lawyers may try to repackage local variability as uniformity," 688 F.3d at 898 – this is applicable to both the overtime class and the hostile work environment class – "[t]he order certifying two multi-site classes is reversed." *Id*. at 899.

Discovery (Ch. 34)

Brown v. Oil States Skagit Smatco, 664 F.3d 71 (5th Cir. 2011) (*per curiam*) – Title VII case properly dismissed for perjured deposition testimony – at deposition plaintiff testified that he quit for only one reason – racial harassment, in his accident personal injury lawsuit, he testified under oath that he left his job "solely" because of the back pain caused by the accident – lawsuit dismissed with prejudice – "[D]ismissal with prejudice [is] a more appropriate sanction when the objectionable conduct is that of the client, not the attorney," 664 F.3d at 77 – contention lesser sanction should have been imposed rejected – "Brown deceitfully provided conflicting testimony in order to further his own pecuniary interests . . . and, in doing so, undermined the integrity of the judicial process. Through his perjured testimony, Brown committed fraud upon the court, and this blatant misconduct constitutes contumacious conduct[,]" *id.* at 78 – the lesser sanction of a monetary sanction would not work because Brown could not pay it – not everyone like Brown will be caught and when perjury is discovered the penalty needs to be severe – "Brown plainly committed perjury, a serious offense that constitutes a severe affront to the courts and thwarts the administration of justice. . . . Brown, and not his attorney, committed the sanctionable conduct, which makes the harsh sanction of dismissal with prejudice all the more appropriate." *Id.* at 80.

The Civil Rights Acts of 1866 and 1871 (Ch. 36)

Comcast Corp. v. Nat'l Ass'n of African American Owned Media, ___ U.S. ___, 140 S. Ct. 1009 (2020) – Plaintiff, an African-American owned television network, sued Comcast for racial discrimination for refusing to carry its programs. The district court dismissed the complaint for failing to show that but for racial animus Comcast would have contracted with the plaintiff. The Ninth Circuit reversed, holding that plaintiff need only prove facts showing that race played "some role" in the decision-making process – the Supreme Court unanimously reversed – to prevail under Section 1981, but-for causation must be proven at every stage of the lawsuit – the court expressly rejected the "motivating factor" test.

Haynes v. Ind. Univ., 902 F.3d 724 (7th Cir. 2018) – Black assistant professor denied tenure – summary judgment affirmed – Section 1981 claim applies only to intentional discrimination – that negates fact that school never offered tenure to black men – does not matter that department chair and dean exhibited hostility towards him since there is no indication that was because of race – court's role is not to second guess opinions of 70% of faculty who voted against tenure – hiring of plaintiff through minority recruitment initiative weakens his case.

Injunctive and Affirmative Relief (Ch. 40)

Bogan v. MTD Consumer Grp., Inc., 919 F.3d 332 (5th Cir. 2019) – Jury found discrimination but awarded plaintiff just $1.00 – district court denied reinstatement and front pay, leaving her with no remedy – district court decision that plaintiff did not mitigate her damages justified the denial of front pay – reinstatement is a preferred remedy under Title VII, and is normally granted if there is no retrospective relief – two of the four reasons why the court denied reinstatement are legitimate: (1) the position no longer exists; and (2) plaintiff was clearly trying to change careers. However, the third and fourth reasons cited are erroneous. The jury rejected the argument that plaintiff would have been terminated in any event in the absence of discrimination. The final reason was discord between the parties. Hostility in litigation is almost always present. To deny reinstatement the acrimony must rise to the level at which the relationship was irreparably damaged – the district court did not find that – therefore we remand for reconsideration.

Monetary Relief (Ch. 41)

Emamian v. Rockefeller Univ., 971 F.3d 380 (2d Cir. 2020) – Jury trial discrimination verdict upheld -- $250,000 in back pay and $200,000 in emotional distress – plaintiff failed to object to court's unwillingness to instruct on punitive damages – therefore needs clear and convincing evidence punitive damages warranted – "[P]roof of the magnitude of her emotional distress, [the employer's] alleged failure to appropriately respond to her discrimination claim, and [her supervisor's] criticism of her work . . . constitutes but a paltry basis for the imposition of punitive damages . . . ." 971 F.3d at 389.

Sommerfield v. Knasiak, 967 F.3d 617 (7th Cir. 2020) -- $540,000 punitive damage award upheld against police sergeant for years of anti-Semitic abuse against plaintiff and racial comments about plaintiff's girlfriend; when plaintiff complained he retaliated by disqualifying him for promotion – does not matter that defendant was of limited means – bankruptcy is his remedy.

Ward v. AutoZoners, LLC, 958 F.3d 254 (4th Cir. 2020) – $260,000 punitive damage award thrown out – male worker repeatedly complained of sexual harassment but the sales manager to whom both the male and female reported didn't have adequate responsibilities to meet managerial capacity criteria needed to support punitive damages – with respect to the store manager and the district manager to whom the alleged harassment was reported, they were at best "negligent, not recklessly indifferent" to the harassee's concern. 958 F.3d at 268.

Pittington v. Great Smoky Mountain Lumberjack Feud, LLC, 880 F.3d 791 (6th Cir. 2018) – Retrial on damages – $10,000 in back pay awarded by jury too low – must consider periods of unemployment, several weeks at a job that paid less, and that the amount of pre-judgment interest must take into account inflation.

Clemens v. Centurylink, Inc., 874 F.3d 1113 (9th Cir. 2017) – On remand district court should consider whether to grant a "gross-up" to the lost wages and benefits awarded to compensate the employee for being pushed into a higher tax bracket – "[A] lump sum award will sometimes push a plaintiff into a higher tax bracket than he would have occupied had he received his pay incrementally over several years." 874 F.3d at 1116. Third, Seventh, and Tenth Circuits have all held that district courts have discretion to award a gross-up for income tax consequences. The D.C. Circuit does not permit gross-ups – that was a one paragraph *per curium* decision that did not indicate awareness of relevant cases – the party seeking gross-up relief bears the burden of showing an income tax disparity and justifying any adjustment.

Stragepede v. City of Evanston, 865 F.3d 861 (7th Cir. 2017), *as amended* (Aug. 8, 2017) – Direct threat defense rejected by jury with respect to terminated employee who acted in an aberrational manner after a home accident in which he lodged a 4-inch nail in his head – $934,540.00 verdict affirmed – failure to mitigate defense rejected – under 7th Circuit test, employer must establish (1) worker didn't exercise reasonable diligence; (2) there was a reasonable likelihood the worker would have found comparable employment if he had been diligent – 7th Circuit refused to apply 2d Circuit test which does not require an employer to show other comparable employment was available.

<u>Attorney's Fees (Ch. 42)</u>

CRST Van Expedited, Inc. v. EEOC, ___ U.S. ___, 136 S. Ct. 1642 (2016) – The issue was whether a favorable judgment on the merits was necessary in order for a defendant employer to recover attorneys' fees against the EEOC – the underlying case was dismissed because the EEOC failed to properly conciliate – in order to recover attorneys' fees the party must be the "prevailing party" – there had been no judgment that CRST was not guilty of hostile environment sexual harassment – the suit was dismissed because of the failure to conciliate and/or comply with other Section 706 requirements – the trial court awarded over $4 million in attorneys' fees – the court of appeal affirmed the dismissal of almost all the Commission's claims, reversing only the claims of two employees – the Commission withdrew one of the claims and settled the other – the Court of Appeal had vacated the award of attorneys' fees, CRST moved again for attorneys' fees, which were again awarded – the trial court noted that under *Fox v. Vice*, 563 U.S. 826 (2011), fees could be awarded with respect to the claims on which CRST prevailed – the Court of Appeal again reversed, holding there had to be a favorable judicial determination on the merits before a defendant could recover fees – the Supreme Court reversed, holding "that a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party.'" 136 S. Ct. at 1651 – "The defendant has . . . fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The defendant may prevail even if the court's final judgment rejects the plaintiff's claims for a non-merits reason." *Id.* – The purpose of attorneys' fee awards to defendants is to spare defendants from the cost of frivolous litigation – it makes no sense to distinguish "between merits-based and non-merits-based frivolity," *Id.* at 1652 – case remanded to consider ancillary arguments.

EEOC v. CRST Van Expedited, Inc., 944 F.3d 750 (8th Cir. 2019) – Fee award of $3.3 million against EEOC affirmed – EEOC failed to properly conciliate and investigate a number of the claims brought by female employees – the district court carefully separated those claims which were "frivolous, unreasonable and/or groundless" from claims which were arguable – under the *Fox* decision, the district court properly allocated attorney time between the frivolous and the not frivolous.

Guillory v. Hill, 36 Cal. App. 5th 802 (2019), *as modified* (June 26, 2019), *review denied* (Oct. 16, 2019) – Attorneys' fee motion under 42 U.S.C. § 1988 denied in its entirety – all fees denied because the attorneys' fee request was so unreasonable in comparison to the actual damages award that the proper award was no fees at all – attorneys' fee request was $3.7 million, later reduced to $2.4 million – the nine plaintiffs each recovered $5,335.00 – there was an offer of judgment under CCP § 1988 [the California equivalent of a Rule 68 offer] prior to trial – the statute allows "a reasonable attorneys' fee" – but a fee request is unreasonable on its face if it is unjust – fee awards under Section 1988 were never intended to produce windfalls to attorneys – the fee award must be reasonable in relation to the results obtained – in determining a fees' reasonableness the court may consider whether the motion itself is reasonable in terms of the amount requested and the credibility of supporting evidence – a fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny a reward entirely – denial of a fee is proper because of the limited success and also because of the lack of reasonableness of the attorneys' fee motion.

McKelvey v. Sec'y of U.S. Army, 768 F.3d 491 (6th Cir. 2014) – Lodestar cut in half for successful plaintiff – rejected settlement offer that was more favorable than final result – most of attorney's fees were accrued after offer was rejected.

Muniz v. United Parcel Service, Inc., 738 F.3d 214 (9th Cir. 2013) – Ninth Circuit 2-1 in opinion written by district court judge sitting by designation approved $697,971.80 in attorneys' fees in a case where the plaintiff recovered only $27,280 – district court judge reduced lodestar by 10% to account for lack of success – did not explain reasoning why the number was 10% – plaintiff originally sought $2 million in fees – unreasonably inflated – under state law would qualify as a special circumstance that would have justified a substantial reduction in total denial of fees – but majority holds that this is discretionary.

Alternative Dispute Resolution (Arbitration) (Ch. 43)

Lamps Plus, Inc. v. Varela, 587 U.S. __, 139 S. Ct. 1407 (2019) – Arbitration agreement was silent on class actions – district court rejected motion for individual arbitration, and left class arbitration up to arbitrator – this was appealable – Ninth Circuit approved class arbitration on the ground that the arbitration agreement was ambiguous – under the FAA, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration – class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower and more costly and more likely to generate a procedural morase – like silence, ambiguity does not provide a sufficient basis to conclude that the parties agreed to arbitration – the Ninth Circuit relied on the principal that one construes a document against the drafter – this approach is <u>flatly inconsistent</u> with the foundational FAA principal that arbitration is a matter of consent – 5-4 decision – nothing short of clear express to class arbitration will suffice for a federal court to order such arbitration.

Epic Sys. Corp. v. Lewis, ___ U.S. ___, 138 S. Ct. 1612 (2018) – 5-4 decision – Arbitration agreements that preclude class or collective actions are fully enforceable – contention of Obama NLRB that class action waivers and arbitration agreements violated employee's rights to engage in concerted activities under the National Labor Relations Act rejected – class action waivers in arbitration agreements are fully enforceable – plaintiff had sought to maintain collective action under FLSA – arbitration agreement precluded this – until recently courts and the NLRB general counsel agreed that such arbitration agreements were enforceable, but in 2012 the NLRB ruled to the contrary – arbitration agreements providing for only individualized proceedings must be enforced – FAA saving clause which allows courts to refuse to enforce arbitration agreements upon such grounds as exist in equity for the revocation of any contract are not applicable – employee's claim seeks to interfere with fundamental attributes of the FAA – contention that NLRA overrides FAA rejected – employees must show a "clear and manifest" intent to displace the FAA – Section 7 of the NLRA focuses on the right to organize unions and bargain collectively – it does not mention class or collective action procedures or even hint at a wish to displace the Federal Arbitration Act.

Ashford v. PricewaterhouseCoopers, 954 F.3d 678 (4th Cir. 2020) – Arbitration ordered under arbitration agreement that stated that the arbitration agreement would not apply "unless and until federal law no longer prohibits the firm from mandating arbitration of such claims." 954 F.3d at 683 – at the time the arbitration agreement was signed the Franken Amendment to the Defense Appropriations Act for fiscal year 2010 prohibited certain defense contractors with certain types of contracts from mandating arbitration – at the time of the events in question, PricewaterhouseCoopers no longer was such a defense contractor – therefore, the arbitration agreement could be enforced.

Jock v. Sterling Jewelers, Inc., 942 F.3d 617 (2d Cir. 2019) – Arbitrator's certification of a class of 44,000 women affirmed despite Supreme Court decision in *Lamps Plus* – *Lamps Plus* held that an ambiguous agreement cannot provide the necessary contractual basis for compelling class certification – that is not applicable because the parties in *Lamps Plus* agreed that a court and not an arbitrator would resolve class arbitration issues – therefore the class arbitrability decision in *Lamps Plus* was subject to *de novo* scrutiny rather than the deferential standard of review that applies to arbitrators' decisions – furthermore, *Lamps Plus* left undisturbed the proposition that an arbitration agreement may be interpreted to include implicit consent to class procedures – the arbitrator therefore acted within her authority in certifying a class and in purporting to bind absent class members to class proceedings – an open issue is whether the arbitrator exceeded her authority in certifying an opt out as opposed to a mandatory class for injunctive and declaratory relief, which will be decided on remand.

Lambert v. Tesla, Inc., 923 F.3d 1246 (9th Cir. 2019) – The issue was whether 42 U.S.C. section 1981 racial discrimination claims are subject to arbitration – arbitration ordered – "We have become an arbitration nation", 923 F.3d at 1248 (internal quotation marks and citations omitted) – Court decided that Section 1981 "should be added to the ever-expanding list of statutory causes of action already subject to arbitration." *Id*. – Court held issue was foreclosed by 9th Circuit decision in *EEOC v.Luce, Forward, Hamilton &Scripps*, 345 F.3d 742 (9th Cir. 2003) (*en banc)*, which held that Title VII claims were arbitrable – concurring opinion cited *Luce, Forward* dissenters and expressed the view that *Luce, Forward* was wrongly decided, but "bound by *Luce Forward*, we are left with no option" but to compel arbitration. *Id*. at 1253.

Rivera-Colon v. AT&T Mobility P.R., Inc., 913 F.3d 200 (1st Cir. 2019) – Arbitration program offered on opt-out basis – plaintiff did not opt out – therefore must arbitrate.

Britto v. Prospect Chartercare SJHSRI, LLC, 909 F.3d 506 (1st Cir. 2018) – Arbitration agreement upheld – to overturn must be both substantively and procedurally unconscionable – required as condition of employment – claimed agreement illusory because company reserved right to modify, procedurally unconscionable because he was required to immediately sign it without opportunity to seek counsel and no one explained agreement's significance or checked to see if he understood his terms – under state law, employee's continued employment is adequate independent consideration – no showing substantively unconscionable.

Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072 (9th Cir. 2014) – Class overtime claim barred by arbitration agreement – Bloomingdales announced the arbitration pact and gave employees thirty days to opt out – plaintiff did not opt out – plaintiff is bound by arbitration agreement – "Bloomingdale's merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis." 755 F.3d at 1076.

Settlement (Ch. 44)

McClellan v. Midwest Machining, Inc., 900 F.3d 297 (6th Cir. 2018), *reh'g en banc denied* (Oct. 12, 2018), *cert. denied* 139 S. Ct. 2691 (2019) – Settlement agreement required employee to tender back consideration before suing – employee sued without returning release consideration – district court decision dismissing case reversed – requiring recently discharged employees to return consideration received under severance agreement contrary to remedial nature of civil rights laws and denigrates employees' statutory rights when those employees are most financially vulnerable – even if tender-back doctrine was applicable it would not require that severance be returned before suit was filed – female employee actually attempted to return money but was rebuffed.

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