EQUAL EMPLOYMENT OPPORTUNITY CASE LAW UPDATE

MARIA FRACASSA DWYER
MIKYIA S. AARON
EMORY D. MOORE, JR.
CLARK HILL PLC
500 Woodward Avenue
Suite 3500
(248) 988-5899

TABLE OF CONTENTS

I. DISABILITY DISCRIMINATION

A. IN GENERAL

Flynn v Distinctive Home Care, Inc, 812 F3d 422 (CA 5, 2016). Where a physician was a subcontractor providing medical services to an Air Force Base, the court of appeals concluded that the physician's disability discrimination lawsuit brought under the Rehabilitation Act was allowed to proceed because Section 504 of the Act allows employment discrimination suits by independent contractors.

Garity v APWU Nat'l Labor Org, 828 F3d 848 (CA 9, 2016). Where an employee brought a lawsuit against her union for breach of the duty of fair representation and a second lawsuit against the union for ADA disability discrimination, the ADA lawsuit was not precluded by the fact that the breach of duty lawsuit had been dismissed. Breach of the duty of fair representation is not a prima facie element of an ADA lawsuit against one's union.

Gentry v E W Partners Club Mgmt Co, 816 F3d 228 (CA 4, 2016). Title VII's "motivating factor" standard does not apply to ADA claims. The ADA calls for a "but-for" standard.

Rodriguez v Eli Lilly & Co, 820 F3d 759 (CA 5, 2016). A supervisor expressed concerns about supervising the plaintiff because of an arrangement the plaintiff had to call his previous supervisor whenever he became frustrated, which was a symptom of his PTSD. Four months later, the supervisor reported to human resources that she believed the plaintiff was unstable. Shortly thereafter, the plaintiff's employment was terminated. Summary judgment for the employer on the plaintiff's claim of ADA disability discrimination was upheld because the remarks were not direct evidence. The first remark was related to the disability, but was an isolated remark too distant in temporal proximity to the termination. The second remark required inference to be considered discriminatory. Further, the plaintiff could not rebut the employer's legitimate nondiscriminatory reason for his termination because he did not even attempt to argue that he did not violate certain company policies and that his termination for those violations was false.

Hale v Johnson, ___F App'x___; 2016 U.S. App. LEXIS 23369 (CA 6, Dec. 29, 2016). Where a Tennessee Valley Authority employee was discharged for failing to meet the physical fitness requirements of the jobs, the district court's

rejection of the applicability of Title VII's national-security exemption and the Egan doctrine (precluding judicial review of security-clearance decisions) to the plaintiff's Rehabilitation Act disability discrimination claim was upheld.

Davis v New York City Department of Education, 804 F3d 231 (CA 2, 2015). Partial denial of a discretionary bonus can constitute adverse employment action. Summary judgment for the employer was proper, however, because the plaintiff failed to show that prohibited discrimination factored into in the school district's decision to divide an annual bonus between the plaintiff and a substitute who filled in while the plaintiff was on an extended leave.

Giles v Transit Employees Federal Credit Union, 794 F3d 1 (CA DC, 2015). Even if discrimination based on the costs associated with providing an employee with health insurance is disability discrimination under the ADA – an issue the Court did not decide – the plaintiff lacked evidence to establish that the cost of coverage factored into the termination decision. There was no evidence that the number, nature, or cost of the plaintiff's claims had any impact on the premium the employer paid. Nor was there evidence that the decisionmakers believed the plaintiff's multiple sclerosis would increase premium costs. Moreover, because it was not self-insured, the employer had no way of knowing what the plaintiff's treatments were or how much they cost. As such, the plaintiff was unable to sustain a disability discrimination claim, even though evidence cast doubt on whether poor performance was the real reason for discharge.

Reyazuddin v Montgomery County, 789 F3d 407 (CA 4, 2015). Public employees cannot use the public accommodation section of the ADA to sue their employers for disability discrimination. Public employees wishing to sue their employer for disability discrimination must proceed under Title 1.

Walz v Ameriprise Financial, Inc, 779 F3d 842 (CA 8, 2015). Employee fired for erratic and disrespectful behavior a few months after returning from a medical leave taken after similar misconduct did not establish disability discrimination. Even if the behavior was caused by the plaintiff's bipolar disorder, the plaintiff did not show that the employer knew about the alleged mental disability. The plaintiff did not tell her employer about the condition, or the limitations it caused her, before discharge. Mental disorders are often "non-obvious," and the plaintiff's note saying her condition had stabilized with medication did not provide notice that the plaintiff had bipolar disorder, needed an accommodation, or was otherwise disabled.

Also, "because Walz failed to inform Ameriprise of her disability or request any accommodation, Ameriprise had no duty to accommodate her."

Curley v City of North Las Vegas, 772 F3d 629 (CA 9, 2015). The fact that the city allegedly tolerated the plaintiff's misconduct for years does not show pretext. "[T]he City's failure to fire Curley sooner does not constitute evidence from which a jury could find that the stated reasons for firing Curley were pretextual." Moreover, "[d]isputing only one of several well supported, independently sufficient reasons for termination is generally not enough to defeat summary judgment."

B. REGARDED AS

Ferrari v Ford Motor Co., 826 F3d 885 (CA 6, 2016). Where an employee filed a lawsuit alleging disability discrimination, the court rejected his argument that the employer regarded him as having a disability based on his opioid use. The employer had temporarily bypassed the employee for a bid into an apprentice tradesman position under the belief that his opioid use related to a neck injury prevented him from climbing ladders and working at heights. The court of appeals concluded that the employer did not regard the employee's opioid use as a substantial impairment from the major life activity of working because the employer only restricted him from one specific job and such restriction was only temporary until he weaned off of the opioids.

Morriss v BNSF Ry Co., 817 F3d 1104 (CA 8, 2016). Where a job applicant's conditional offer of employment was revoked due to his exceeding the body mass index limits for the "safety sensitive" position, dismissal of his lawsuit alleging disability discrimination based on his obesity was upheld. Obesity is not a physical impairment unless it is the result of an underlying physiological disorder or condition, regardless of whether the weight is within or outside of the normal range. Further, there was no evidence that the employer regarded the applicant as having a physical impairment, but simply believed his obesity would or could lead to the development of a physical impairment in the future.

Burton v Freescale Semiconductor, Inc, 798 F3d 222 (CA 5, 2015). Triable "regarded as" case created with evidence that the employer generated retrospective documentation to justify a termination decision, gave shifting explanations for discharge, and a decisionmaker was unaware of one of the multiple alleged bases for discharge. "[E]vidence of a sudden and

unprecedented campaign to document Burton's deficiencies and thus justify a decision that has already been made … could raise an inference of pretext."

Silk v Board of Trustees, Moraine Valley Community College, Dist No. 524, 795 F3d 698 (CA 7, 2015). Although the employer denies the comment, the plaintiff raised a triable "regarded as" claim by alleging that a dean said he reduced the plaintiff's courseload because he thought the plaintiff was physically unable to teach his normal four classes after having heart surgery.

Fischer v Minneapolis Public Schools, 792 F3d 985 (CA 8, 2015). Statement that a janitor, who was not rehired because he failed a job-related strength test, posed an increased risk of injury because he couldn't push, pull or carry heavy objects does not establish that the employer regarded him as disabled. "[I]t was not unreasonable to observe that a worker who possesses less than the required strength to perform a physically demanding job faces an increased risk of injury."

The plaintiff did not raise a material factual dispute by arguing that the test gave a flawed result. "[E]ven assuming the CRT test was flawed, MPS's honest belief that Fischer possessed medium strength does not raise a genuine dispute of material fact that MPS regarded Fischer as disabled."

Surtain v Hamlin Terrace Foundation, 789 F3d 1239 (CA 11, 2015). "Knowledge that an employee has visited a doctor and receipt of a conclusory doctor's excuse, without more, do not plausibly underpin an employer's perception that the employee suffers from a disability."

C. ESSENTIAL FUNCTION/QUALIFIED INDIVIDUAL

Lang v Wal-Mart Stores East, LP, 813 F3d 447 (CA 1, 2016). Where an employee brought an ADA discrimination claim on the basis of the employers refusal to accommodate her pregnancy, the fact that the employee's attorney admitted that lifting sixty pounds without assistance was an essential job function, dismissal was appropriate because an employer is not required to excuse an employee from performing an essential function. Further, the employee offered no evidence that other positions that did not require lifting up to sixty pounds were available.

Kilcrease v Domenico Transp Co., 828 F3d 1214 (CA 10, 2016). Where a commercial truck driver brought an ADA lawsuit, dismissal of his ADA claim

was upheld because he did not set forth evidence that he was qualified for the position. An objective requirement of the position was possession of a certain amount of mountain driving experience, which the truck driver did not possess. The fact that the experience requirement was not formally memorialized in writing did not preclude it from being considered an essential job function.

Scruggs v Pulaski Cnty, 817 F3d 1087 (CA 8, 2016). Where an juvenile detention officer's physician placed restrictions on her FMLA certification, restricting her from lifting above twenty-five pounds, dismissal of her disability discrimination lawsuit for her subsequent termination was upheld because lifting forty pounds was an essential function of the job. There was evidence that other juvenile detention officers had been required to lift juveniles in various situations to perform one of the main functions of the job, ensuring the safety of the juveniles. Further, the employee's request that she be allowed an additional week to seek her physician's removal of the restriction was not reasonable because her FMLA leave had already been exhausted, and in any event, there was no evidence that the physician would have eliminated the restriction. Finally, another of the employee's physicians had placed her on the same restrictions and the employer would not have been required to ignore that doctor in favor of Plaintiff's other physician.

Williams v JB Hunt Transp, Inc, 826 F3d 806 (CA 5, 2016). Where a commercial truck driver alleged he was unlawfully discharged because of his disability, summary disposition for the employer was upheld because revocation of his Department of Transportation medical certification due to a loss of consciousness made him unqualified for the job.

Mayo v PCC Structurials, Inc, 795 F3d 941 (CA 9, 2015). Even if the threats were caused by a major depressive disorder, a worker fired for repeatedly threatening to kill supervisors and managers was not a qualified individual with a disability. "An essential function of almost every job is the ability to appropriately handle stress and interact with others." "[A]n employee whose stress leads to violent threats is not a qualified individual."

Shell v Smith, 789 F3d 715 (CA 7, 2015). A bus mechanic who could not drive created a material factual dispute whether driving to locations in the field was an essential function. Although the written job description suggested this was a function a mechanic must "occasionally" perform, driving to fix busses in the field had not been a regular part of the plaintiff's duties for years, it was unclear

how many other employees were available during the day to drive, and the city did not show how burdensome it would be to have other employees perform that function.

The employer's judgment about the essential functions is only one factor to consider. Other relevant factors include the time the employee spent performing the function, the consequences of requiring other employees to perform the function, and whether current or former holders of the position had to perform the function.

EEOC v Ford Motor Co, 782 F3d 753 (CA 6, 2015). "Essential functions generally are those that the employer's 'judgment' and 'written [job] description' prior to litigation deem essential. And in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees (as evidenced by its words, policies, and practices)." "Our ruling does not … require blind deference to the employer's stated judgment. But it *does* require granting summary judgment where an employer's judgment as to essential job functions – evidenced by the employer's words, policies, and practices and taking in to account all relevant factors – is 'job-related, uniformly-enforced, and consistent with business necessity.'"

"An employee's unsupported testimony that she could perform her job functions from home does not preclude summary judgment, for it does not create a *genuine* dispute of fact. Neither the statute or regulations nor EEOC guidance instructs courts to credit the employee's opinion about what functions are essential. That's because we do not 'allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience. And for good reason: If we did, every failure-to-accommodate claim involving essential functions would go to trial because all employees who request their employer to exempt an essential function think they can work without that essential function."

Summary judgment was appropriately granted where: (a) the employer established that "regular and predictable attendance" was an essential function of the plaintiff's position, which required collaboration with colleagues and clients; (b) the plaintiff did not claim she could perform the majority of her tasks *as effectively* off-site; (c) the ADA "does not require employers to lower their standards by altering a job's essential functions;" and (d) the evidence of the

plaintiff's failed prior telecommuting experiences establish that she could not perform the job as effectively from home.

Jarvela v Crete Carrier Corp, 776 F3d 822 (CA 11, 2015). Truck driver diagnosed with chronic alcohol dependence seven days before the adverse decision was not a qualified individual with a disability. The employer had to follow Department of Transportation rules, which disqualify any motor vehicle driver with "a current clinical diagnosis of alcoholism." This held true even though the plaintiff claimed his condition was in remission. "We are not prepared to draw a bright line as to how much time must pass before a diagnosis of alcoholism is no longer 'current,' but we hold that a seven-day-old diagnosis is 'current' under [the applicable DOT rule]."

Myers v Knight Protective Service, 774 F3d 1246 (CA 10, 2015). The plaintiff, who represented to the Social Security Administration that he could stand for only 20 minutes at a time and walk for only 10 minutes at a time, could not perform the essential functions of a security guard position. Security guards at the facility engage in frequent, prolonged walking and must be physically capable of responding to emergencies.

Taylor-Novotny v Health Alliance Medical Plans, Inc, 772 F3d 478 (CA 7, 2015). The plaintiff, who failed to meet expectations for punctuality and accountability, was not a qualified person with a disability. The fact that an employer had a work-at-home policy does not change this analysis because the people who worked from home had to be available and working during established times, and were also required to accurately report and account for their work activities.

D. ACCOMMODATIONS/INTERACTIVE PROCESS

Dillard v City of Austin, 837 F3d 557 (CA 5, 2016). Where an employee suffered injuries preventing him from performing his job as a laborer and field supervisor, the employer gave him a reasonable accommodation by transferring him to an administrative assistant position. The fact that the employee did not successfully adjust to the new position was not evidence of the employer's failure to participate in the interactive process because the evidence showed that the employee did not make a good faith attempt to fulfill his new role. The interactive process is a two-way street.

Adair v City of Muskogee, 823 F3d 1297 (CA 10, 2016). Where a firefighter suffered a back injury and alleged that he was constructively discharged by being forced to retire because of the injury, summary judgment for the city was upheld because the firefighter could not show that he was qualified to meet the physical demands of the job or that the city could reasonably accommodate his lifting restrictions.

Frazier-White v Gee, 818 F3d 1249 (CA 11, 2016). Where an employee's proposed accommodations were (1) indefinite light-duty assignment or (2) reassignment to an unspecified position, the court of appeals held that _. The employer was not required to create a permanent light-duty position for the employee. Further, the employee did not identify any specific position she could perform or provide the employer with sufficient information regarding the type of duties she could perform. Finally, the employee's claim that the employer failed to initiate the interactive process was rejected because the employer sent multiple letters directing the employee to contact them and to apply for other positions, but the plaintiff simply responded by making the aforementioned accommodation requests.

Delaval v PTech Drilling Tubulars, LLC, 824 F3d 476 (CA 5, 2016). Where an employee claimed that the employer failed to accommodate him and failed to engage in the interactive process with respect to his request for time off, his claims were dismissed because the fact that he failed to respond to the employer's request for documentation corroborating the reason he took time off hindered the interactive process.

Murray v Warren Pumps, LLC, 821 F3d 77 (CA 1, 2016). Where an employer was aware of an employee's work restrictions at the time of hire and agreed that the employee would self-monitor his restrictions, dismissal of his failure to accommodate claim was upheld because he simply assumed the employer deliberately directed him to violate his restrictions and never actually requested an accommodation. The employer was not liable where the employee remained silent or otherwise did not police his own needs.

Kowitz v Trinity Health, 839 F3d 742 (CA 8, 2016). Where a hospital employee was placed on medical restrictions that did not permit her to perform the physical examination necessary to maintain her CPR life support certification, and was subsequently terminated for not being CPR certified, summary disposition for the employer was reversed. Ability to perform basic life support

functions was an essential duty, but there was evidence that the employee requested and was denied a reasonable accommodation. The employee notifying the employer that she could not complete the physical portion of the test until she completed four months of physical therapy constituted a request for an accommodation until completion of the physical therapy.

Wheatley v Factory Card & Party Outlet, 826 F3d 412 (CA 7, 2016). Where an employee's only evidence that wearing a medical boot would allow her to perform the job was her own affidavit, summary judgment for the employer on her ADA failure to accommodate claim was upheld. The affidavit merely contained conclusory statements that the boot would allow her to perform the job. Further, the affidavit stated that the boot allowed the employee to stand for a few hours, but she did not produce evidence that her job could be performed by someone who could only stand for a few hours.

Osborne v Baxter Healthcare, 798 F3d 1260 (CA 10, 2015). A deaf woman who was rejected from a plasma center technician job might be able to show that she was capable of performing the essential job functions with a reasonable accommodation. The plaintiff raised a fact question with evidence that the facility could install patient call buttons that would trigger a visual or vibrating alert system, which would in turn allow the plaintiff to respond to patient emergencies. "The EEOC has said the use of appropriate emergency notification systems – like strobes or vibrating pagers – is one form of reasonable accommodation for a deaf employee, including those in health care settings."

The employer did not proffer evidence that the proposed alert system would be unduly expensive, and evidence that the employer would need to work with a vendor to create the proposed alert system was insufficient to establish hardship.

The "infinitesimal risk" created by a .0004 percent chance that a patient would lose consciousness and be unable to activate the pushbutton alert system was insufficient to sustain a "direct threat" theory, or otherwise render the accommodation unreasonable.

The court did agree that the employer was not required to restructure the position in order to relieve the plaintiff of certain duties that would be difficult for her to perform.

Doak v Johnson, 798 F3d 1096 (CA DC, 2015). The plaintiff's accommodation claim failed because the proposed accommodation would not have enabled her

to regularly appear for work and be present for meetings during normal business hours, an essential job function.

Swanson v Village of Flossmoor, 794 F3d 830 (CA 7, 2015). The department reasonably accommodated the plaintiff by offering him the accommodation his doctor recommended, instead of the accommodation the plaintiff requested. "[E]ven if light duty would have been Swanson's preferred accommodation, the ADA does not entitle a disabled employee to the accommodation of his choice."

Reyazuddin v Montgomery County, 789 F3d 407 (CA 4, 2015). The district court erred in concluding at the summary judgment stage that the proposed accommodation was unreasonable because it would take the department over budget. Employers set their own budgets, so employers could make any accommodation unreasonable by refusing to factor the cost of the accommodation into the budget.

Stern v St. Anthony's Health Center, 788 F3d 276 (CA 7, 2015). An employer cannot be held liable for failing to engage in the interactive process if the employee is not a qualified individual with a disability. "Failure of the interactive process is not an independent basis of liability under the ADA."

Noll v International Business Machines Corp, 787 F3d 89 (CA 2, 2015). Employer reasonably accommodated a deaf software engineer by providing him: (a) interpreters at meetings; (b) transcripts of meetings and videos, upon request; and (c) the option of viewing certain videos with captioning, upon request. Although the plaintiff claims the accommodations were "not as effective" as the ones he proposed, "the law requires an effective accommodation, not one that is most effective for each employee."

Nigro v Sears, Roebuck & Co, 784 F3d 495 (CA 9, 2015). Summary judgment reversed. The employer claimed that it granted the plaintiff's request for a flexible work schedule. The plaintiff raised a fact question on this point by claiming that the employer required him to arrive, and that he did in fact arrive, by 6 a.m. every day.

Minnihan v Mediacomm Communications Corp, 779 F3d 803 (CA 8, 2015). Former supervisor who was restricted from driving for six months could not proceed with his failure to accommodate case. He could not show that he was qualified for the position, which required him to drive to customers' homes. The plaintiff argued the employer should have engaged in the interactive process to

see how the employer could retain the plaintiff during the period of his restriction. The court rejected this argument, because employers are not obliged to reallocate essential job functions or restructure positions. Moreover, the plaintiff failed to show that the alternative position the employer offered was inferior.

Taylor-Novotny v Health Alliance Medical Plans, Inc, 772 F3d 478 (CA 7, 2015). Summary judgment of the plaintiff's failure-to-accommodate claims was properly granted because the employer offered several reasonable accommodations, and the plaintiff failed to establish how the one accommodation she proposed, and which the employer rejected, would have alleviated her alleged symptoms. The plaintiff's physician reported that the plaintiff was suffering from fatigue relating to her multiple sclerosis, but there was no physical or mental fatigue associated with the work requirement she wanted to change.

Snowden v Trustees of Columbia University, 612 Fed Appx 7 (CA 2, 2015). Summary judgment for the employer was proper where the proposed accommodation was to relieve the plaintiff of an essential job function.

Waltherr-Willard v Mariemont City Schools, 601 Fed Appx 385 (CA 6, 2015). School teacher with a debilitating fear of young children could not proceed with a failure to accommodate claim because the requested accommodation would have required her employer to either create a new job for her or displace an existing employee.

E. MEDICAL RECORDS

Taylor v City of Shreveport, 798 F3d 276 (CA 5, 2015). Plaintiffs' medical disclosure case under the §12112(d) of the ADA was properly dismissed; however plaintiffs' claim under the Rehabilitation Act was reversed and remanded. Plaintiffs police officers complained that defendant's policy requiring that an officer on sick leave divulge medical information to the department which (1) provides the general diagnosis to explain why s/he was on a sick leave and (2) complete a form which requires, among other things, that the officer's health care provider state whether intermittent absences may be required moving forward. The Court held that while it is appropriate for the department to investigate why the officer missed work in the past, and to confirm that the officer's leave was justified, an investigation of whether the officer may miss work in the future is more likely to reveal information

regarding an officer's disability status. The officers could therefore establish a prima facie claim under the Rehabilitation Act. On remand, the City must show that the inquiry was job related and consistent with business necessity.

Tadlock v Marshall County HMA, LLC, 603 Fed Appx 693 (CA 10, 2015). Plaintiff filed her EEOC Charges claiming she was discriminated and retaliated against on the basis of her disability. The EEOC issued a Notice of Right to Sue and Plaintiff filed suit. Defendant Hospital contended that plaintiff had not properly pled disability discrimination on the basis of her disc and nerve disease and rather had based her EEOC charge on her diabetes and therefore had failed to exhaust her administrative remedies as it related to her disc and nerve disease. The district court agreed. The Court of Appeals found that plaintiff had established her *prima facie* claim and reversed and remanded and held that the definition of disability under the ADA does not require the EEOC to analyze the cause of the disability, but rather to determine whether it "substantially limits a major life activity." The Court further found the medical records had raised an issue of fact as to her disc and nerve disease.

F. SUBSTANTIAL LIMITATION/DEFINITION OF "DISABILITY"

Neely v Benchmark Family Servs, 640 Fed Appx 429 (CA 6, 2016). Summary judgment properly granted because the plaintiff was unable to establish that he suffered from a physical or mental impairment that caused his sleeping problems. Plaintiff, who had only consulted a physician regarding his difficulty sleeping but had not actually obtained any diagnosis of sleep apnea, claimed without support that he had the disorder. The court held that Plaintiff's "bare assertions of sleep apnea, without any supporting medical evidence, cannot establish a 'physical or mental impairment' within the meaning of the ADA."

Plaintiff also presented no expert medical evidence that any of his major life activities were substantially limited by his sleeping problems. Although Plaintiff acknowledged that his "sleep apnea substantially [had] affect[ed] . . . [his] sleeping and breathing" for the previous ten years, the court held that the plaintiff's "descriptions of the effects of his condition . . . [were] insufficient to establish the level of severity required to qualify as a 'substantial limitation' on major life activities."

Oehmke v Medtronic, Inc, 2016 US App LEXIS 23031 (CA 8, 2016). The plaintiff presented sufficient evidence that her cancer and its lingering effects on

her health and her suppressed immune system rendered her disabled under the ADA. The court agreed that "cancer is an impairment, [and] the functioning of one's immune system is a major life activity." The court also held that "an impairment that is . . . in remission, . . . is a disability if it would substantially limit a major life activity when active." "Therefore, . . . [the plaintiff's] cancer, even while in remission, . . . [was] clearly a covered disability under the ADA." Plaintiff's claim ultimately failed, however, because she failed to establish that her status as a cancer survivor was causally connected to her termination.

Makeda-Phillips v Ill Sec'y of State, 642 Fed Appx 616 (CA 7, 2016). Summary judgment properly granted because the plaintiff presented no expert medical evidence that any of her major life activities were substantially limited by her high blood pressure. The only evidence the plaintiff introduced regarding the effect of her condition was a form signed by her doctor, who declined to impose any work or job restrictions other than stating that the condition required her to work for a different supervisor. The court rejected the evidence on the grounds that as long as she could do the same job for another supervisor, she could do the job, and that her high blood pressure did not qualify because there was no evidence that it limited one or more major life activities as required to establish her claim under the ADA.

Alexander v Wash Metro Area Transit Auth, 826 F3d 544 (CA DC, 2016). Plaintiff was terminated for testing positive for alcohol in her position as an Automatic Train Control Mechanic Helper and told he could reapply in one year after completing treatment. He filed suit after applying three times and being rejected due to a post offer physical screening. The district court granted summary judgment to the employer. On appeal, the court held that the district court enforced too strict a definition of the "substantially limits" showing needed for the plaintiff's actual-disability and record-of-impairment claims. The court held that the plaintiff provided sufficient expert medical evidence that his prior "debilitating diagnosis of alcoholism" dramatically affect[ed] major life activities, including "the ability to care for himself, walking, concentrating, and communicating." The medical expert also reported that the plaintiff had a "stated daily history of consuming a six-pack of beer or half a pint of rum;" that "[h]e also noted periods of time during which he could not recollect events following his consumption of alcohol (consistent with blackouts), as well as a more general deterioration in his ability to sleep regularly;" that he previously continued to use alcohol "despite a clearly declared motivation to re-commit

himself to his work, and even in the face of the considerable occupational difficulties it presented." The court held that a reasonable jury considering the proffered evidence could conclude that the plaintiff had a qualifying disability.

Cannon v Jacobs Field Servs N Am, 813 F3d 586 (CA 5, 2016). District Court erred in granting summary judgment because there was ample evidence to support a finding that the plaintiff was disabled. The plaintiff suffered from a torn rotator cuff in his right shoulder, which the appellate court found that the district court ignored Congress' expansive definition of disability when it amended the ADA in 2008.

Morriss v BNSF Railway Co, 817 F3d 1104 (CA 8, 2016). Summary judgment properly granted because Plaintiff, who suffered from morbid obesity, provided no medical evidence to prove that his obesity was the result of a physical impairment or an actual disability under the ADA. Plaintiff argued that severe obesity, namely body weight more than 100% over the normal range, qualified as a physical impairment under the EEOC Compliance Manual. The court rejected Plaintiff's argument and held that weight, even morbid obesity, is merely a physical characteristic unless it is both outside the normal range and the result of an underlying physiological disorder or condition. Further, even though BNSF did not hire him because of his obesity and predisposition to develop an illness or disease in the future, it did not "regard him as" being disabled.

Dooley v Jetblue Airways Corp, 636 Fed Appx 16 (CA 2, 2015). District court erred in dismissing the plaintiff's ADA discrimination claim because she had given plausible support to a minimal inference of discriminatory motivation, and had plausibly alleged that she was disabled. The plaintiff met the definition of disabled by stating that she "suffered a fracture and also damage to the ulnar and median nerve distributions, resulting in temporary total disability . . . and, ultimately, permanent partial disability with limitations on lifting and repetitive motion," and that her "injury took her off work for medical care and treatment." The court held that because "major life activities include . . . performing manual tasks . . . lifting . . . and working," the plaintiff had successfully pled a physical or mental impairment that substantially limited one or more of her major life activities. The court reasoned that under the ADA, "the definition of disability [is to be] construed in favor of broad coverage."

Carothers v Cnty of Cook, 808 F3d 1140 (CA 7, 2015). Summary judgment properly granted because the plaintiff, a hearing officer who adjudicated juvenile

detainee grievances, was not impaired in the major life activity of working when the evidence only indicated that as a result of her anxiety disorder she could not work in a position that required that she interact with juvenile detainees. The plaintiff was involved in a physical altercation with a juvenile detainee during a riot at work, in which she injured her hands and suffered from anxiety disorder that was "exacerbated by exposure to and interactions with teenagers."

The court rejected the plaintiff's argument that she was disabled under the ADA because although she presented evidence that her anxiety disorder prevented her from interacting with juvenile detainees, there was no evidence that her anxiety disorder would prevent her from engaging in any other line of occupation. "Since the inability to interact with juvenile detainees does not restrict [the plaintiff] from performing either a class of jobs or a broad range of jobs, she has not established that she is disabled within the meaning of the ADA."

Scarborough v Cent Bucks Sch Dist, 632 Fed Appx 80 (CA 3, 2015). District court did not err in denying the plaintiff's motion for a new trial because the plaintiff could not prove that he was disabled within the meaning of the ADA. The plaintiff provided no expert medical evidence to prove that any of his major life activities were substantially limited by hearing loss or that his hearing loss was a disability. The plaintiff's only evidence consisted of his own testimony that he was exposed to loud noise while serving in the military and various examples of times when he had trouble hearing while communicating with his wife in his home. However, several fellow employees testified that, while working and communicating with the plaintiff on a daily basis, it was not apparent that his hearing interfered with his work. The court concluded that a reasonable jury could have concluded that the plaintiff failed to establish that he suffered from a disability under the ADA.

Wilson v Iron Tiger Logistics, Inc, 628 Fed Appx 832 (CA 3, 2015). Summary judgment properly granted because the plaintiff, a truck driver, failed to present sufficient evidence that any of his major life activities were substantially limited by his frostbite. The plaintiff actually admitted that his frostbite did not affect his ability to perform any major life activities besides working. The plaintiff could not prove that he had a qualified disability under the ADA.

Cunningham v Nordisk, 615 Fed Appx 97 (CA 3, 2015). Summary judgment properly granted because the plaintiff failed to show evidence that any of her major life activities were substantially limited because of her heart attack and

subsequent quadruple bypass surgery. The plaintiff's cardiologist returned her to work without restriction. In addition, the plaintiff testified that when she returned to work she was fully capable of working, performing her job duties, and caring for herself. The court held that the plaintiff did not present sufficient evidence to show that she was disabled within the meaning of the ADA.

Williams v Long Island RR, 618 Fed Appx 716 (CA 2, 2015). Summary judgment properly granted because the employee, an electrician, presented no evidence that any of his major life activities were substantially limited by a work-related back injury and ankylosing spondylitis (an inflammatory disorder that affects the back). Although the plaintiff claimed that the back injury rendered him unable to "lift [heavy objects] up to 70 [pounds] without running the high risk of re-injury," the court held that while "lifting light objects may be a major life activity, an individual is not 'disabled' merely because he cannot lift heavier objects weighing, for instance, around twenty pounds." Accordingly, the plaintiff failed to raise a genuine dispute of material fact about whether he was disabled as the ADA defined the term.

Jacobs v North Carolina Administrative Office of the Courts, 780 F3d 562 (CA 4, 2015). "Social anxiety disorder", which impaired the plaintiff's ability to "interact with others," is a "disability" under the amended ADA. The employer claimed that the disorder was not substantially limiting because the plaintiff regularly interacted with customers, and socialized with coworkers both at work and after hours. However, a person "need not live as a hermit" in order to be substantially limited in dealing with others. A plaintiff need only show that she has anxiety in those situations when she interacts with others.

Pretext could be shown with evidence that the employer's various explanations for discharge, while not internally inconsistent, were not set forth at the time of termination and lacked supporting documentation.

Coleman-Lee v Government of District of Columbia, 758 F3d 296 (CA DC, 2015). District court did not err in instructing the jury in a pre-ADAAA case that the plaintiff, who had diabetes, could not be considered disabled because he controlled his disease with a strict eating regimen and medication.

G. JUDICIAL ESTOPPEL

Kovaco v Rockbestos-Surprenant Cable Corp, 834 834 F3d 128 (CA 2, 2016). The plaintiff could not proceed with his discriminatory discharge claim where he

represented to the Social Security Administration (the "SSA") that he was unable to work in any capacity deeming him disabled and qualified for SSI benefits. However, the undisputed evidence showed that the plaintiff was able to use an electric cart as an accommodation during his shifts. Because the plaintiff's explanation on appeal that "notwithstanding . . . [his] representation to the SSA, he continued to perform his job duties without issue through the date of the termination of his employment" was insufficient to explain the apparent contradiction, the plaintiff was judicially estopped from asserting that he could perform his essential job functions—with or without reasonable accommodation—at the time that his employment was terminated by his employer to establish that he was "qualified for his position" under the ADA. The court reasoned that "[w]hen an individual's prior submission regarding his disability to an adjudicatory body contains a purely factual statement that directly contradicts a statement made in a subsequent . . . ADA . . . claim, and the two cannot be reconciled with any amount of explanation, judicial estoppel will preclude the ADA claim."

Robinson v Concentra Health Services, 781 F3d 42 (CA 2, 2015). The plaintiff could not proceed with her failure to accommodate claim where she represented to the Social Security Administration that she was completely unable to work. Judicial estoppel precludes her from maintaining the inconsistent position in a federal discrimination lawsuit. This held true even though the plaintiff kept working for the employer after making the statements to the SSA. The subsequent work history merely demonstrates that the plaintiff's statements to the SSA were false.

H. DIRECT THREAT

Lopez v Hollisco Owners'Corp, 2016 US App LEXIS 19231 (CA 2, 2016). The employer was entitled to summary judgment on a "direct threat" defense because the plaintiff, who suffered from hepatitis, failed to provide any evidence that his employer had a discriminatory motivation in requiring that he obtain medical clearance to ensure that he could perform his duties without risk of his hepatitis spreading to others.

Felix v Wis DOT, 828 F3d 560 (CA 7, 2016). Summary judgment properly granted where the plaintiff, who suffered from a variety of mental health disabilities, was terminated after she had a mental break down at work and an independent medical examination concluded that she remained at risk of

repeating such behavior. "[W]hen an employee's disability has actually resulted in conduct that is intolerable in the workplace, the direct-threat defense does not apply: the case is no longer about potential but rather actual dangers that an employee's disability poses to herself and others. "[W]hat is at issue once an employee has engaged in threatening behavior is not the employer's qualification standards and selection criteria and whether they tend to screen out people with disabilities . . .[,] but whether the employer must tolerate threatening (and unacceptable) behavior because it results from the employee's disability." The court held that the plaintiff's unacceptable behavior rendered her unqualified to remain in her position.

Michael v City of Troy Police Dep't, 808 F3d 304 (CA 6, 2015). Employers seeking to utilize the "direct threat" defense "need not rely on a medical opinion to determine that a person poses a direct threat. Rather, 'testimonial evidence' concerning the employee's behavior 'can provide sufficient support for a direct threat finding under the ADA.'"

Yarberry v Gregg Appliances, Inc, 625 Fed Appx 729 (CA 6, 2015). The employer terminated the plaintiff after he exhibited bizarre behavior over the course of two days, including misconduct at a company store, and was subsequently involuntarily committed to a psychiatric hospital. The plaintiff argued that his employer was aware of his mental impairment when he was hired. The court found that the availability of defenses under the ADA such as "undue hardship" or a "direct threat" to health or safety of other employees "establish that there are certain levels of disability-caused misconduct that have to be tolerated or accommodated." Notwithstanding, the plaintiff's behavior of "in entering a store after hours, opening the safe, roaming around the store and using store equipment, and then leaving the store without setting the alarm, all gave . . . [the defendant] grounds for terminating him for his conduct alone, which violated company policies regarding safety and security as well as general behavior standards for management. The court reasoned that "where there has been employee misconduct—including nonviolent disruptive misconduct—the employer may terminate the employee for that behavior, even if it is related to his disability."

I. MEDICAL TESTS/INQUIRIES

Pena v City of Flushing, 651 Fed Appx 415 (CA 6, 2016). Following a medical leave of absence for "stress" and other "work-related distractions," the employer

ordered the plaintiff to undergo a medical examination as a condition for returning to work. The employee refused to undergo the fitness for duty examination on the grounds that he did not believe examination was related to his job duties. The court rejected this argument, and held that employers may "requir[e] mental and physical exams as a precondition to returning to work." The court concluded that "an examination ordered for valid reasons can neither count as an adverse job action nor prove discrimination."

Adair v City of Muskogee, 823 F3d 1297 (CA 10, 2016). The employer was entitled to summary judgment on the plaintiff's medical examination claim because the evaluation and any later medical examinations took place only because the plaintiff was seeking workers' compensation benefits. The court found that the plaintiff put his own ability to perform his job at issue he sought worker's compensation benefits for an apparent inability to perform his job. "Where . . . an employee has sought workers' compensation benefits based on a potential permanent or temporary physical impairment, an employer has a valid business interest in determining whether the employee is actually able to perform the essential functions of his job."

II. SEX DISCRIMINATION

Jackson v VHS Detroit Receiving Hosp, Inc, 814 F3d 769 (CA 6, 2016). Summary judgment reversed because the circumstances surrounding the plaintiff's termination would permit a reasonable jury to infer that the defendant's justifications for her termination were pretextual, and that she was instead terminated because of her sex. The plaintiff, a female mental health technician, was terminated for failing to check a patient's identification wristband prior to his discharge from a mental health center. However, the plaintiff demonstrated that a male employee mental health technician, was not terminated when he failed to perform a complete search of a newly admitted patient. The court held that the coworker's actions were of "comparable serious" to survive summary judgment.

Burns v Johnson, 829 F3d 1 (CA 1, 2016) "The idea that discrimination consists only of blatantly sexist acts and remarks was long ago rejected by the U.S. Supreme Court. Stereotyping, cognitive bias, and certain other more subtle cognitive phenomena which can skew perceptions and judgments also fall within the ambit of Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination."

"The ultimate question is whether the employee has been treated disparately 'because of sex,' and this is so regardless of whether the employer consciously intended to base the adverse employment action on sex, or simply did so because of unthinking stereotypes or bias."

Chavez v Credit Nation Auto Sales, LLC, 641 Fed Appx 883 (CA 11, 2016). The district court's grant of summary judgment in favor of the defendant-employer was reversed in part because the plaintiff proffered sufficient evidence to permit a rational fact finder to infer her employer's discriminatory intent. In her complaint, the plaintiff alleged that she worked as an auto mechanic for the defendant and was only subjected to an adverse employment action after she announced her gender transition. The defendant contended that the plaintiff was terminated for "[s]leeping while on the clock on company time." However, the plaintiff offered ample evidence suggesting that the defendant subjected her to heightened scrutiny after learning about her gender transition plans and was simply looking for a legitimate work-related reason to terminate her. The court held that, considering all the evidence in the light most favorable to the plaintiff, triable issues of fact existed as to whether gender bias was "a motivating factor" in the defendant's decision to terminate her.

Walsh v NY City Hous Auth, 828 F3d 70 (CA 2, 2016). Summary judgment reversed because the court concluded that the plaintiff proffered evidence that, when viewed as a whole, was sufficient to permit a rational fact finder to infer that the employer's refusal to hire the candidate was based in part on the fact that she was female. The plaintiff presented evidence that at the time of the interviews, no women were employed by the defendant as bricklayers. The plaintiff proffered evidence that during her interview for the available bricklayer's position, the defendant's interview panel did not give her the same opportunities to showcase her technical knowledge as they had provided the two successful male candidates. In addition, the plaintiff presented evidence that in a side conversation shortly after her interview, the defendant's human resource representative told her that she would not be hired because the interviewers were interested in a "stronger" candidate.

The court held that the district court erred when it set aside each piece of evidence presented by the plaintiff after deeming it insufficient to create a triable issue of fact. "A plaintiff's evidence at the third step of the McDonnell Douglas analysis must be viewed as a whole rather than in a piecemeal fashion . . . . No

one piece of evidence need be sufficient, standing alone, to permit a rational finder of fact to infer that defendant's employment decision was more likely than not motivated in part by discrimination. To use the apt metaphor coined by Vincent Gambini . . . a plaintiff may satisfy her burden by building a wall out of individual evidentiary bricks." The court concluded that the plaintiff's proffered evidence was "relevant, and when marshalled effectively, may reasonably support an inference that the interviewers did not give [the plaintiff] the opportunity to demonstrate her technical knowledge because their minds had been made up [not to offer her the available position] before she set foot inside the interview room."

Jaburek v Foxx, 813 F3d 626 (CA 7, 2016). Summary judgment on the plaintiff's failure to promote claim based on sex discrimination was properly granted in favor of the defendant-employer because the plaintiff failed to demonstrate multiple elements of the *prima facie* case. Specifically, the plaintiff could not provide sufficient evidence that she applied, and was subsequently rejected, for the desired position. In addition, the plaintiff did not provide any evidence that the employer promoted someone outside of the protected group who was not better qualified for the position that she sought. The court held that the plaintiff had not produced evidence connecting any failure to promote or to compensate her adequately to any animus towards her based on her national origin or sex.

Reynolds v Sovran Acquisitions, LP, 650 Fed Appx 178 (CA 5, 2016). Summary judgment properly granted in favor of the defendant-employer because the plaintiff failed to demonstrate that the employer's proffered reason for her termination—constant customer service complaints—was pretext for discrimination. The plaintiff argued on appeal that the nondiscriminatory reason was not supported by evidence from a witness with personal knowledge. However, the court declined to consider the objection as it had been waived when the plaintiff conceded in her response to the defendant's motion for summary judgment that her employer had "articulated a legitimate business reason for her discharge." The court concluded that "[a] party's concession of an issue means the issue is waived and may not be revived," so the plaintiff could not attack the defendant's proffered nondiscriminatory reason on the ground that it was not supported by admissible evidence on appeal.

Notwithstanding, the court held that "[e]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason." To avoid summary judgment, a plaintiff must prove that the defendant did not have a good-faith belief regarding performance that constituted the proffered reason for the adverse employment action. Because the plaintiff failed to make the required showing, the court held that there was no genuine dispute as to a material fact.

Steele v Pelmor Labs Inc, 642 Fed Appx 129 (CA 3, 2016). "Under 42 U.S.C.S. § 2000e-2(a), a company has a right to make business judgments on employee status, particularly when a decision involves subjective factors deemed essential to certain positions." "Because an employee has an ultimate burden to prove intentional sex discrimination under 42 U.S.C.S. § 2000e-2(a), his or her 'gut feeling' cannot substitute for actual evidence."

"[T]o demonstrate pretext, an employee must show that the qualifications of a person actually promoted are so much lower than those of his or her competitors that a reasonable factfinder can disbelieve a claim that the employer is honestly seeking the best qualified candidate. In the absence of such a significant degree of difference in qualifications that may arouse a suspicion of sex discrimination, a court defers to the employer's hiring decisions, as Title VII is not intended to diminish traditional management prerogatives."

Schleicher v Preferred Solutions, Inc., 831 F3d 746 (CA 6, 2016). Summary judgment in favor of defendant-employer was properly granted because the plaintiff failed to show that gender bias was a motivating factor in the defendant's decision drop the male plaintiff's compensation to match that of a female co-worker. The court held that the defendant-employer did not violate the EPA because it did not lower the male employee's compensation to cure an EPA violation. The two coworkers were paid differently because the female employee chose a different pay option than the male employee. The court held that the male employee was paid more than the female employee because of a "factor other than sex."

Bauer v Lynch, 812 F3d 340 (CA 4, 2016). A male FBI trainee argued that the FBI discriminated against him by requiring him to complete 30 push-ups in order to pass the physical fitness test, while requiring female trainees to complete only 14 push-ups to pass the test. The Fourth Circuit held that the district court applied the incorrect legal standard to its assessment of the FBI's use of gender-normed physical fitness test, noting that the U.S. Supreme Court has directly addressed and approved of gender-normed standards that distinguish between sexes on the basis of their physiological differences, but impose an equal burden on both men and women (i.e. requiring the same level of physical fitness for each).

Shervin v Partners Healthcare System, 804 F3d 23 (CA 1, 2015). The plaintiff's sex discrimination claim accrued for statute of limitations purposes on the date she was notified that she was on probation. The decision had immediate, tangible effects on the plaintiff's status in the residency program, and evidence shows the plaintiff believed at the time that the decision was discriminatory.

Bennett v Windstream Communications, Inc, 792 F3d 1261 (CA 10, 2015). Summary judgment properly granted, where the plaintiff failed to show that the employer's harsh new policies, including a daily check-in requirement that required the plaintiff to drive several hours a day to check in, were motivated by sex or age. The court refused to evaluate the fairness or wisdom of such policies. "In short, Ms. Bennett has demonstrated that Windstream's new policies led to a difficult employment situation for her, in stark contrast to the favorable conditions she had enjoyed under different supervision for the previous twelve years. Yet, she has failed to produce any evidence, either direct or circumstantial, that these policies reflect discrimination on the basis of gender or age."

Cazeau v Wells Fargo Bank, NA, 614 Fed Appx 972 (CA 11, 2015). Summary judgment properly granted in favor of the defendant-employer because the plaintiff failed to present sufficient evidence that the employer's proffered reasons for not promoting him were pretext for discrimination based on his sex and national origin.

"While an employee may feel that an employer treated him unfairly, it is not the court's role to second-guess the wisdom of an employer's business decisions—

indeed the wisdom of them is irrelevant—as long as those decisions were not made with a discriminatory motive."

Cox v First National Bank, 792 F3d 936 (CA 8, 2015). Evidence that most of the employer's executives and board members are male is insufficient, even when combined with subjective decisionmaking, to sustain a sex discrimination claim. Summary judgment affirmed where the female plaintiff failed to show that she was better qualified than the successful male candidate and could not show that the employer's stated reasons for promoting the male candidate over her were unworthy of credence.

Rebouche v Deere & Co, 786 F3d 1083 (CA 8, 2015). The district court properly granted summary judgment in a failure to promote claim because the plaintiff failed to identify a similarly situated male who received the sought after promotion. Although the plaintiff alleged a male comparator had "shared the same responsibilities," the plaintiff failed to explain what those responsibilities were, and also failed to present evidence of the proposed comparator's education, work history or other qualifications.

Conlon v InterVarsity Christian Fellowship/USA, 777 F3d 829 (CA 6, 2015). The ministerial exception precludes a court from reviewing a Christian employer's decision to fire a spiritual director for not reconciling her marriage. The plaintiff performed a spiritual function for a religious organization, and there was no evidence that the employer waived the ministerial exception. The ministerial exception, which is rooted in the First Amendment, can be asserted as a defense against state law claims.

Riser v QUP Energy, 776 F3d 1191 (CA 10, 2015). The plaintiff raised a fact question concerning whether the employer's proffered reason for paying younger, male employees more money—the pay classification system—was sex or age neutral, where her supervisors arguably knew she was performing duties outside her pay classification and was performing most of the same jobs as younger men who were classified differently.

Fatemi v White, 775 F3d 1022 (CA 8, 2015). The employer did not offer "shifting" reasons for discharging the plaintiff from a medical residency program. The initial discharge document provided the reasons for dismissal in summary form. The second expanded on the first by providing specific examples to support the conclusory statements contained in the initial memo.

Evidence that no women had ever graduated from the residency program was insufficient to prove sex discrimination. There had only been two female residents before the plaintiff. One did not graduate because she was murdered before she completed the program. The other woman left voluntarily and testified that she was treated fairly. The proposed male comparators were not similarly situated because they were evaluated by a different department chair.

Ripberger v Corizon, Inc, 773 F3d 871 (CA 7, 2015). Summary judgment affirmed, where the employer offered a legitimate reason—the desire to maintain existing client relationships—for selecting a less qualified male for the position. "[T]he fact that in hindsight Ripberger may have been a better choice than Smith does nothing to establish that he was hired over Ripberger because she is a female. If anything, it may demonstrate Corizon's short-sightedness in prioritizing continuity of care over experience and certification, but … it is not our province to assess the wisdom of Corizon's personnel decisions."

Gingras v Milwaukee County, 127 F Supp 3d 964 (ED Wis, 2015). The court dismissed the plaintiff's sex stereotyping and sex plus discrimination claims, both of which were based on allegations that the employer should have accommodated her various childcare responsibilities, including the need to take time off for pediatrician appointments. Employers can expect employees to be at work, and "Title VII is not a 'get out of work free' card for parents with young children."

III. PREGNANCY DISCRIMINATION

Varlesi v Wayne State Univ, 643 Fed Appx 507 (CA 6, 2016). The district court did not abuse its discretion when it refused to give certain requested jury instructions because the evidence did not support them in an action alleging pregnancy discrimination under Title IX.

The district court also did not abuse its discretion by withholding the formal admission into evidence of certain letters, which prevented the use of the letters during testimony at trial. The defendants argued that the letters showed that the plaintiff's performance problems predated the alleged discrimination and retaliation. The defendants did not cite any cases for the alleged error, but referenced Federal Rule of Evidence 901. The court rejected the defendants' argument on the grounds that even assuming these letters were relevant, the refusal to allow the letter to be formally introduced into evidence and submitted

at trial was merely an exercise of the district court's Federal Rule of Evidence 901 authority. The court concluded that the district court did not rely on "any clearly erroneous facts; it relied on the accurate record facts and its decision is entitled to substantial deference."

Huffman v Speedway LLC, 621 Fed Appx 792 (CA 6, 2016). Summary judgment properly granted to the defendant-employer on the plaintiff's pregnancy-discrimination claim brought under state law because the plaintiff failed to make the required showing of discriminatory motive. The plaintiff alleged that the defendant's leave policy was direct evidence of discrimination. The policy provided that an employee who is unable to perform job functions due to a serious health condition should be given a leave of absence and does not differentiate between conditions that are pregnancy-related and those that are non-pregnancy-related. The court rejected the plaintiff's argument on the grounds that "[p]regnancy-blind policies of course can be tools of discrimination. But challenging them as tools of discrimination requires evidence and inference beyond such policies' express terms."

Legg v Ulster Cnty, 820 F3d 67 (CA 2, 2016). The district court erred in dismissing the plaintiff's claim for pregnancy discrimination because the pregnant employee provided sufficient evidence for a reasonable jury to infer that the defendant's denial of her accommodation under its light duty policy was motivated by discriminatory intent. The plaintiff presented evidence that the defendant accommodated a large percentage of non-pregnant workers when light duty was requested. The court held that "[a] plaintiff can establish pretext and intentional discrimination by pointing out significant inconsistencies in the employer's justification."

The court further explained that "a jury may infer a discriminatory intent where the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage [here, 100%] of pregnant workers. But if, for example, the evidence showed that the County accommodated very few injured workers under the light duty policy and that many non-pregnant workers were among those denied accommodation, the jury might reasonably refuse to infer a discriminatory intent. And while the cost of adding pregnant workers to an otherwise expansive program of accommodation cannot justify their exclusion, a policy is not necessarily doomed by the fact that it was partially motivated by cost. After all, if cost were not a factor, employers would have little reason not to accommodate everyone, and the cost of adopting such a

policy is presumably always a factor in limiting accommodations to those injured on the job. A policy that requires nearly all workers to use sick leave when injured or ill rather than be accommodated on the job with light duty is not an unreasonable one. Whether it is appropriate to infer a discriminatory intent from the pattern of exceptions in a particular workplace will depend on the inferences that can be drawn from that pattern and the credibility of the employer's purported reasons for adopting them. We simply hold that in this case, based on the evidence presented, Legg was entitled to have these issues decided by a jury."

Neidigh v Select Specialty Hosp, 2016 US App LEXIS 21421 (CA 3, 2016). "To establish pretext in a pregnancy discrimination case, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action."

"The employee must show not merely that the employer's proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer's real reason."

Jackson v JR Simplot Co, 2016 US App LEXIS 22273 (CA 10, 2016). "It is true that a failure to follow company policy can support a finding of pretext in some circumstances."

Fairchild v All Am Check Cashing, Inc, 815 F.3d 959 (CA 5, 2016). Plaintiff's evidence of temporal proximity between her employer learning of employee's pregnancy and the challenged employment action is insufficient, without more, to prove that employer's proffered reasons for its action was pretextual. Judgement granted to the employer.

The court reasoned that "the record is 'replete' with legitimate, non-discriminatory reasons for Fairchild's termination: her contentious relationship with her manager; the problems she caused regarding store morale and customer service; and her repeated performance-related problems that resulted in warnings, including a citation issued after she informed All American of her pregnancy. Consequently, under McDonnell Douglas, the burden shifted back to Fairchild, which . . . required Fairchild to show that a reasonable trier of fact could conclude that All American's offered reasons were pretextual. In order to

meet this burden, Fairchild [was required to] 'must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates.'"

"Yet, as noted, Fairchild's only evidence is temporal proximity. This Circuit has not yet addressed whether the temporal proximity between an employer learning of the plaintiff's pregnancy and the challenged employment action can be sufficient to prove pretext. In the context of other employment discrimination claims, we have held that while suspicious timing may be evidence of pretext under *McDonnell Douglas*, such '[t]iming standing alone is not sufficient absent other evidence.'"

Young v United Parcel Service, 135 S Ct 1338 (2015). A plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act, which requires employers to treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work," may make out a *prima facie* case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work.

"The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination."

IV. RACE/NATIONAL ORIGIN DISCRIMINATION

Jackson v Trinity Health-Mich, 2016 US App LEXIS 15143 (CA 6, 2016). Summary judgment properly granted to the defendant-hospital on the plaintiff's racial-discrimination claims. The plaintiff, an African-American former

manager, claimed that she was terminated as a result of racial animus. However, the hospital provided evidence establishing that the plaintiff was discharged due to her poor communication skills and dictatorial management style. Despite the fact that the plaintiff had been replaced by a white woman, she could not establish, with direct or circumstantial evidence, that the stated reasons for her discharge were a pretext for discriminatory animus.

Tennial v UPS, 840 F3d 292 (CA 6, 2016). Summary judgment properly granted in favor of the defendant-employer because the African-American employee failed to make the required showing that the employer's stated reason for his demotion, that he consistently failed to meet performance goals, was pretext for unlawful discriminatory animus.

Woods v FacilitySource, LLC, 640 Fed Appx 478 (CA 6, 2016). Absent an allegation of intentional discrimination, the plaintiffs, a long-tenured African-American account manager and his white domestic partner and coworker, could not support discrimination claims with evidence that they were paid less than white account managers who were hired after them. The employer presented sufficient evidence that the later-hired white managers were paid more because they were subject to new hiring guidelines requiring higher qualifications. The plaintiffs argued that they had greater seniority and should have received salary increases. The court, however, affirmed summary judgment on the grounds that employers are entitled to emphasize criteria other than seniority to make salary and increase determinations.

Henry v Abbott Labs, 651 Fed Appx 494 (CA 6, 2016). Plaintiff, an African-American customer relations employee, has a triable race discrimination claim because he presented sufficient evidence that every other employee with performance scores similar to his during the past 10 years had been promoted except the plaintiff. In addition, a similarly-situated Caucasian comparator had been promoted instead of the plaintiff. The employer argued that the plaintiff was not qualified for the promotion because she failed the required assessment test. However, the court held that failing to promote the plaintiff despite her record of above-average performance, coupled with the evidence that a similarly-situated comparator had been promoted instead of the plaintiff, created a genuine issue of material fact regarding whether the employer's proffered reason was pretext for discrimination.

Nelson v Ball Corp, 656 Fed Appx 131 (CA 6, 2016). Summary judgment properly granted in favor of the defendant-employer on the plaintiff's reverse discrimination claim under state law because the white plaintiff failed to present sufficient background circumstances to establish that the employer was the unusual employer that discriminated against the majority.

"When a plaintiff alleges reverse race discrimination, . . . he bears the heightened burden of demonstrating that he was intentionally discriminated against despite his majority status." "Unless the plaintiff is able to satisfy . . . [the heightened burden requirement] of the McDonnell Douglas test, the court does not even reach questions of whether the employer had a legitimate reason for terminating the plaintiff or whether the proffered reason was pretextual."

Coffman v US Steel Corp, 2016 US Dist LEXIS 59701 (ED MI, 2016). A triable race case was raised with allegations applying the cat's paw analysis. Plaintiff a Caucasian woman asserted claims against an African-American woman, an intermediate supervisor accused of acting on discriminatory animus to cause the direct supervisor to take action against the plaintiff. The court held that a reasonable jury could find that the proffered reason for the plaintiff's discharge, that she made certain mistakes multiple times, was pretext for discrimination because there was evidence that Caucasian employees were not disciplined for making the same mistakes and the plaintiff was the only employee disciplined for common mistakes.

O'Brien v City of Benton Harbor, 2016 US Dist LEXIS 35878 (WD MI, 2016). A triable reverse discrimination case under Title VII and state law was raised by Caucasian police officers against an African-American city manager who allegedly terminated them to promote an African-American police chief. The court found testimony that the city manager told officers they were "the wrong color" to be chief because they were "not black" to be direct evidence of discriminatory animus. "The comments testified to are clear, and viewed in favor of Plaintiffs, require no inference to discern a discriminatory intent or motive." Because the court was fully persuaded that the plaintiffs had established sufficient direct evidence of unlawful discrimination, there was no need to consider the evidence under the McDonnell Douglas burden-shifting framework.

O'Donnell v City of Cleveland, 838 F3d 718 (CA 6, 2016). In a reverse discrimination case by twelve white and one Hispanic officer, who were placed

on restrictive duty after using deadly force and killing African American suspects, summary judgment was properly granted in favor of the defendant-city where the officers failed to show that African-American police officers involved in similar incidents were treated more favorably. The employer argued that the plaintiffs' leave had been extended because they had disobeyed command while on restrictive duty, and the plaintiffs were unable to establish that the employer's proffered reason was pretext for discrimination.

Smith v City of Inkster, 644 Fed Appx 602 (CA 6, 2016). A white police officer's claim that the defendant-city unlawfully delayed and denied his psychiatric disability retirement benefits due to his race was not precluded based on the doctrine of collateral estoppel because his cardiac condition, not his mental status, was adjudicated in a prior worker's compensation case. The court held that only "when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, [are] federal courts . . . [required to] give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts."

Moran v City of Kalamazoo, 2016 Mich App LEXIS 101 (CA 6, 2016). Summary judgment properly granted because the plaintiff, a Caucasian public safety officer, did not present evidence that his failure to be promoted to sergeant "occurred under circumstances giving rise to an inference of unlawful discrimination," the fourth element of his *prima facie* claim. The plaintiff argued that the fourth element was satisfied because he was more qualified than the minority candidates who were eligible for promotion. Plaintiff also presented evidence that the decisionmaker was under pressure to promote minorities. Specifically, plaintiff presented evidence that the decision-maker's performance was evaluated according to his efforts to diversify the Kalamazoo Department of Public Safety, and that the decisionmaker received quarterly reports and an annual affirmative action plan showing the demographics of the employees of the KDPS. In holding that the plaintiff had not satisfied the fourth element, the court reasoned that "[a]t bottom, any conclusion based on the annual affirmative action plan, the quarterly reports, or . . . [the decisionmaker's] performance assessments that . . . [he] was pressured to discriminate according to race is pure conjecture, which cannot defeat summary disposition."

Dunn v Genesee County Rd Comm'n, 2016 Mich App LEXIS 207 (CA 6, 2016). In these consolidated appeals, the court held that summary judgment in

favor of the defendant Genesee County Road Commission ("GCRC") was appropriate as to Plaintiff Beck and inappropriate as to Plaintiffs Dunn and Ross. The case involved a claim that the defendant discriminated against the three African American plaintiffs in its hiring and interview practices relating to an available foreman position. At the time the GCRC posted the foreman position, plaintiffs Dunn, Ross and Beck all worked within the maintenance department for the GCRC as equipment operators, and it was not disputed that all three men applied for the promotion.

The court ruled that summary judgment in favor of the defendant was proper as to Beck's claim because there was no evidence that he actually "suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination." Beck alleged that his adverse employment action was the denial of the opportunity to interview for the foreman position after he applied; however, there was no record evidence that his application was ever referred to the decisionmaker for consideration.

Conversely, the court ruled that summary judgment against the other two plaintiffs Dunn and Ross was not appropriate because there was sufficient evidence to establish that their applications were, in fact, forwarded to the decisionmaker for consideration. The decisionmaker testified that both plaintiffs were "well-qualified for the foreman position and that [the] defendant traditionally promoted equipment operators to foreman positions." The court held that a reasonable trier of fact could conclude that the interviews and the decision to give the foreman position to another person "occurred under circumstances giving rise to an inference of unlawful discrimination."

Cole v Bd of Trs, 838 F3d 888 (CA 7, 2016). Summary judgment properly granted to the employer because the African-American plaintiff failed to present sufficient evidence to establish a racially hostile work environment. Although the plaintiff presented chilling evidence that a coworker left a hangman's noose near his workstation establishing unwelcome race harassment, the district court found that plaintiff had not produced evidence that the noose was intentionally left for him to find. Further, the employer was not liable for the coworker's conduct because it promptly investigated the act and took reasonable measures to prevent additional coworker harassment. "Employers are strictly liable for supervisor harassment, but when a plaintiff claims that coworkers are responsible for the harassment, he must show that his employer has been negligent either in discovering or remedying the harassment."

EEOC v Catastrophe Mgmt Solutions, 837 F3d 1156 (CA 11, 2016). District court properly dismissed the plaintiff's disparate-treatment claim where the employer rescinded the plaintiff's job offer after she refused to cut off her dreadlocks pursuant to the employer's grooming policy. The court found that a grooming policy which prohibited dreadlocks and cornrows was outside the scope of federal employment discrimination statutes because it did not discriminate on the basis of immutable characteristics.

As a general matter, "Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices." "[E]very court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race."

Garceau v City of Flint, 2016 U.S. Dist. LEXIS 117599 (ED MI, 2016). In a reverse discrimination case by fourteen white officers, who believed they were passed over for promotion in favor of other African-American officers, the district court properly granted summary judgment in favor of the defendant-city because the plaintiffs failed to show direct evidence that the defendant was the unusual employer that discriminated against the majority. The plaintiffs' circumstantial evidence that their supervisor allowed African-American police officers to call the white plaintiffs the "N***** Beating Crew," despite a Department of Justice investigation that cleared the plaintiffs from any alleged wrongdoing, was also insufficient to establish racial bias. The plaintiffs also offered a single stray remark allegedly made by the decisionmaker a year earlier that he needed to hire "a black female" in regards to a different position. The stray remark was also insufficient to provide evidence of circumstantial racial animus.

Hall v Nat'l Forensic Sci Tech Ctr, 2016 Mich App LEXIS 1479 (MIC APP, 2016). The trial court's denial of the defendants' motion for directed verdict and JNOV was proper where the African-American plaintiffs provided sufficient circumstantial evidence that race was a motivating factor in their failure to be promoted in the forensic science division. The plaintiffs provided evidence that despite completing the required firearm training, they were not selected for a promotion, but other less-qualified white troopers were selected for promotion. The plaintiffs also provided sufficient evidence that they were awarded a certificate stating that they had completed the required firearms module, but did not receive the required promotion. At least one of the plaintiffs also scored higher than two of the white trainee-comparators on the final cumulative score

for the firearm module. The court concluded that a reasonable jury could find that the stated reasons for failing to promote the plaintiffs were pretext for discrimination.

Vill of Freeport v Barrella, 814 F3d 594 (CA 2, 2016). "The meaning of the word 'race' in Title VII . . . is, like any other question of statutory interpretation, a question of law for the court." "Despite societal confusion regarding Hispanic identity, the existence of a Hispanic 'race' has long been settled with respect to § 1981. . . . As a matter of law, 'Hispanic' is a race for purposes of § 1981 and Title VII." "Because § 1981 also forbids so-called reverse discrimination, § 1981 also protects against discrimination based on lack of Hispanic ethnicity."

Lavigne v Cajun Deep Founds, LLC, 654 Fed Appx 640 (CA 5, 2016). The district court did not err in finding, on reconsideration of its ruling, that the plaintiff had not presented evidence that he was paid less than similarly-situated employees. The district court properly considered a multitude of relevant evidence, including the job responsibilities, experience, and qualifications of a number of the defendant's employees in order to determine that that there was no evidence of race discrimination and that it had been mistaken in comparing him to other Superintendent employees when the plaintiff had only occasionally performed Superintendent-like duties. While "[t]here is no precise formula to determine whether an individual is similarly situated to comparators," "an employee who proffers a fellow employee as a comparator [must] demonstrate that the employment actions at issue were taken 'under nearly identical circumstances.'"

Instead, the plaintiff was most closely comparable to those employees who also only periodically performed Superintendent-like duties on certain jobs. Because these comparators, both of whom are white, were paid similarly to Plaintiff, the district court properly found that Plaintiff had not shown he was paid less than other similarly situated employees outside his protected class.

Deets v Massman Const Co, 811 F3d 978 (CA 7, 2016). In a reverse discrimination case by a white construction crane oiler, who was laid off and replaced by a member of a racial minority, the district court erred when it determined that the alleged statement by the project superintendent – "my minority numbers aren't right. I'm supposed to have 13.9 percent minorities on this job and I only got 8 percent" – did not constitute direct evidence of reverse discrimination. It does not take any inference to conclude that the white oiler

was laid off because he was not a member of minority. The white oiler's testimony was also supported by another employee's affidavit, which the district court erroneously did not address.

Bagwe v Sedgwick Claims Mgmt Servs, 811 F3d 866 (CA 7, 2016). The employer did not wrongfully terminate the former employee, born in India and of Indian descent, based on her race or national origin in violation of Title VII, despite the employer's admission that the employee's termination had nothing to do with her job performance. The court found that there was sufficient evidence to support the legitimate reason for her termination – i.e. that the employee's attitude contributed to low office morale. "A company can certainly insist on a management style that ensures a smooth operating atmosphere." Here, Plaintiff was on a PIP which talked about poor leadership, poor behavior and her refusal to listen to criticism. The employee failed to rebut the employer's reason and also failed to show any similarly situated colleagues were treated more favorably.

Crane v Mary Free Bed Rehab Hosp, 634 Fed Appx 518 (CA 6, 2015). Summary judgment properly granted because the plaintiff, an African-American part-time nursing supervisor, failed to present evidence that she was subjected to an adverse employment action.

"Not every action taken by an employer that potentially affects an employee rises to the level of an adverse employment action. Instead, a plaintiff must point to a materially adverse change in the terms or conditions of her employment. Examples of a materially adverse change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or other indices that might be unique to a particular situation. At a minimum, the change in employment conditions must be more than an inconvenience or an alteration of job responsibilities."

Smith v Chi Transit Auth, 806 F3d 900 (CA 7, 2015). Summary judgment to the city transit authority on the African-American manager's race-based disparate treatment claim was affirmed. Claimant, who was discharged for violation of employer's sexual harassment policy, argued that a white co-worker, who had also been accused of sexual harassment, was treated more favorably. The court found that the claimant did not establish his *prima facie* case because the record did not contain sufficient information regarding the proposed comparator. There was no evidence to determine whether the white co-worker was similarly

situated, what he was accused of doing, and what, if any discipline he received for the allegedly sexually harassing conduct.

Flowers v Troup County, 803 F3d 1327 (CA 11, 2015). Without evidence of racial bias, evidence of deficiencies in the investigation leading to the plaintiff's discharge, and evidence that the decisionmaker did not like the plaintiff, does not create a material factual dispute. "The School District's ham-handed investigation and actions singling out Flowers could lead a reasonable jury to conclude that Pugh had it in for Flowers from the beginning. But Flowers offers no evidence, after conducting extensive discovery and assembling a lengthy record, that the investigation was pretext of discrimination on the basis of his race. As we have repeatedly and emphatically held, employers 'may terminate an employee for a good or bad reason without violating federal law.'"

Smith v URS Corp, 803 F3d 964 (CA 8, 2015). African-American employee has a triable pay discrimination claim even though he was hired in at $11,000 more than he requested. Evidence that a Caucasian employee performing the same job was paid more than the plaintiff and another African-American employee raised a triable claim. Evidence that the plaintiff was paid more than he requested at hire lacked consequence because the plaintiff had subsequently requested, but did not receive, a raise. Evidence that the higher-paid white employee had different work experiences did not warrant summary judgment because the employer failed to explain how those different experiences were relevant to the specific job in question.

Rahn v Board of Trustees of Northern Illinois University, 803 F3d 285 (CA 7, 2015). The plaintiff had evidence that a board member said the university would not hire a white professor if there were minority applicants. The evidence was insufficient to sustain a race discrimination claim because the board member was not involved in the decision to remove the plaintiff's name from the list of candidates. Nor could the plaintiff show that the successful candidate was more qualified. Summary judgment affirmed.

Burley v National Passenger Rail Corp, 801 F3d 290 (CA DC, 2015). Plaintiff, the engineer of a train that derailed, was not similarly situated to the conductor and other employees on the train. The other employees were not responsible for driving the train safely.

Vega v Hempstead Union Free School Dist, 801 F3d 72 (CA 2, 2015). Reassignment to classes with more Spanish-speaking students was an "adverse employment action" because the plaintiff had to spend more time preparing for classes. He thus sustained a material increase in his responsibilities without additional compensation.

Ray v Ropes & Gray LLP, 799 F3d 99 (CA 1, 2015). Summary judgment affirmed. Evidence that the firm had historically promoted few African-American associates to partner did not establish that the decision in question was discriminatory. The white associates who were promoted instead of the plaintiff were not comparable because the plaintiff had far more negative comments about his job performance. Allegedly racist comments from partners who were not on the decision making committee were incapable of proving that the partnership decision was discriminatory.

Walker v Johnson, 798 F3d 1085 (CA DC, 2015). Summary judgment properly granted, where (a) evidence revealed that the supervisor treated other African-American employees well, and (b) the plaintiff had nothing but her own opinion to contest her supervisors' unfavorable opinion of her work. Moreover, a few "fine descriptive differences between materially consistent accounts [of the events that ultimately got the plaintiff fired], without more, do not tend to make the accounts unworthy of belief, let alone support an inference of discrimination or retaliation."

Miller v Polaris Labs, LLC, 797 F3d 486 (CA 7, 2015). Evidence that two non-decisionmakers who had made racist comments deliberately manipulated materials to make it more difficult for the plaintiff to meet her production numbers created a triable discrimination case under the cat's paw theory. There was evidence that the decisionmakers accepted the plaintiff's performance numbers "unquestionably," even though they knew people had sabotaged the plaintiff's ability to make her numbers.

Shea v Kerry, 796 F3d 42 (CA DC, 2015). The Caucasian plaintiff could not sustain a "reverse" race claim, where the employer was acting pursuant to a lawful affirmative action plan designed to increase minority representation. There was evidence capable of supporting the conclusion that there had been past discrimination with continuing effects, and that the plan did not act as an "absolute bar" to the hire or promotion of Caucasian candidates.

Littlejohn v City of New York, 795 F3d 297 (CA 2, 2015). "We conclude that *Iqbal's* requirement applies to Title VII complaints of employment discrimination, but does not affect the benefit to plaintiffs pronounced in the *McDonnell Douglas* quartet. To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded under *Iqbal*. … The discrimination complaint, by definition, occurs in the first stage of the litigation. Therefore, the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent. The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a non-discriminatory justification."

"In other words, absent direct evidence of discrimination, what must be plausibly supported by facts alleged in the complaint is that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by discriminatory intent. The facts alleged must give plausible support to the reduced requirements that arise under *McDonnell Douglas* in the initial phase of a Title VII litigation. The facts required by *Iqbal* to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation."

The plaintiff raised a plausible discrimination case by alleging that she was demoted to a lower-paying, non-managerial position and replaced by a less qualified white employee.

Huynh v United States Department of Transportation, 794 F3d 952 (CA 8, 2015). Denial of a positive recommendation letter, which apparently limited the plaintiff's training opportunities, did not constitute material adverse employment action where the denial did not cost the plaintiff any pay or promotion, and the plaintiff was offered other opportunities to obtain training.

Schaffhauser v United Parcel Service, Inc, 794 F3d 899 (CA 8, 2015). The employer's failure to follow internal investigation procedures, alleged

deficiencies in the investigation, and the plaintiff's speculative belief that the employer agreed to demote the plaintiff as a *quid pro quo* for resolving an unrelated grievance did not establish direct evidence of discrimination. This holds particularly true where the plaintiff admitted that he never heard anyone in upper management make a racist remark. Moreover, the proposed comparators were not similar in "all relevant respects" because none of them were accused of making racial remarks like the ones plaintiff was accused of making.

Tolbert v Smith, 790 F3d 427 (CA 2, 2015). A triable race case was raised with allegations that the decisionmaker had made racist comments.

Surtain v Hamlin Terrace Foundation, 789 F3d 1239 (CA 11, 2015). A plaintiff need not plead the elements of a prima facie case in the complaint.

Miller v St Joseph County, 788 F3d 714 (CA 7, 2015). The plaintiff could not show that a temporary assignment to a position the he did not want occurred because he is African-American. Someone had to do the job, and there was no proof of racial slurs or hostility. The plaintiff was not prohibited from applying for other posts, and the one position the plaintiff sought but did not get was given to a much more qualified individual.

Mintz v Caterpillar Inc, 788 F3d 673 (CA 7, 2015). The plaintiff failed to show he was meeting his employer's legitimate expectations, and therefore couldn't present a prima facie case, where he consistently failed to meet production requirements. The plaintiff's claim that the requirements were unrealistic was dismissed because courts do not sit as a "super-personnel department" and cannot "second-guess[] an employer's legitimate concerns about an employee's performance." Summary judgment affirmed.

Thomas v Johnson, 788 F3d 177 (CA 5, 2015). Regular status employees were not comparable to the plaintiff, who was a probationary employee. The employer showed that probationary employees receive less procedural protection than regular status employees, and that unlike regular status employees, probationary employees are fired for almost any infraction. Moreover, quibbling with the accuracy of the employer's good faith belief does not establish that the employer acted in bad faith.

Brown v Nucor Corp, 785 F3d 895 (CA 4, 2015). The district court erred in refusing to certify a class of 100 African-American employees who claimed discrimination in promotion decisions at a single plant. The employees

presented statistical evidence of a 2.4 percent standard deviation from what would be expected if race was not a factor. There was also anecdotal evidence of discriminatory treatment in the plant. The fact that the plaintiffs all came from a single facility distinguished the case from *Wal-Mart*, which involved multiple facilities across the country. Also, the anecdotal evidence from over 16 of the 100 – or one in 6 – workers in the class suggested that the workers labored in a discriminatory work culture.

Wheat v Fifth Third Bank, 785 F3d 230 (CA 6, 2015). The plaintiff and the comparator had different versions of the altercation that allegedly led to discharge, each claiming the other was the aggressor. The plaintiff was fired shortly after the incident, while the comparator was not immediately fired. These issues created a factual dispute for trial.

A jury could also question whether the plaintiff's refusal to respond to questions about the incident provided a sufficient basis for termination. The plaintiff apparently felt that most of the inquiries were not relevant, and did not get an opportunity to tell his side of the story.

McMullin v Mississippi Department of Public Safety, 782 F3d 251 (CA 5, 2015). "Sharp disagreement" over whether the white plaintiff actually applied for the position, combined with evidence that the plaintiff was much better qualified for the lieutenant position, was sufficient to establish a prima facie case and pretext.

Washington v American Airlines, Inc, 781 F3d 979 (CA 8, 2015). The plaintiff, who sustained adverse action for not passing a test, alleged that the person who administered the test was not qualified to do so, and that the test was too subjective. These allegations could not sustain a race discrimination claim because the tester also failed white applicants and the plaintiff could not prove the test was administered in a racially biased way.

Hutchens v Chicago Bd of Education, 781 F3d 366 (CA 7, 2015). The African-American plaintiff raised a triable race discrimination claim with evidence that the plaintiff had slightly more work experience than the successful Caucasian candidate, received her certification more quickly, and received an award the Caucasian candidate did not receive. The plaintiff also showed that testimony concerning the plaintiff's poor performance was "riddled with unreliable hearsay" and was completely undocumented. The plaintiff could proceed to trial

even though the ultimate decision was made by an African-American because the African-American decisionmaker received information from Caucasian subordinates.

Simpson v Beaver Dam Community Hospitals, Inc, 780 F3d 784 (CA 7, 2015). Direct evidence of race discrimination was not shown through comments from credentials committee members which: (a) expressed concern about the plaintiff's "disruptive behavior"; (b) suggested that an applicant such as Plaintiff should be on his "best behavior"; (c) expressed concern about hiring a "bad actor"; and (d) opined the plaintiff would be a "better fit" elsewhere. "Comments such as 'better fit' or 'fitting in' elsewhere are not necessarily about race or discriminatory." Such comments could describe legitimate, nondiscriminatory bases for decision.

The plaintiff did not overcome the honest belief rule by arguing that the employer's concerns should not have mattered in the contested employment decision. "That is his view, but the Credentials Committee is entitled to its own view, provided it is not based on an impermissible animus such as race."

McCleary-Evans v Maryland Department of Transportation, 780 F3d 582 (CA 4, 2015). Dismissal pursuant to Rule 12(b)(6) was appropriate. Unsupported complaint allegations that the decisionmakers were "predetermined to select [white candidates] for both positions" were "naked," conclusory allegations. The complaint lacked factual allegations capable of establishing, without resort to pure speculation, that the white candidates were chosen based on race. "While the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is consistent with discrimination, it does not alone support a reasonable inference that the decisionmakers were motivated by bias."

Austin v Long, 779 F3d 522 (CA 8, 2015). The "similarly situated coworker inquiry is a search for a substantially similar employee, not for a clone."

Etienne v Spanish Lake Truck & Casino Plaza, LLC, 778 F3d 473 (CA 5, 2015). Affidavit alleging that a manager said "on several occasions" that he "thought . . . Etienne was too black to do various tasks at the casino" constitutes direct evidence of discrimination. If the allegations are true, no inference is required to prove discrimination was a factor in the adverse employment decision.

Ledbetter v Good Samaritan Ministries, 777 F3d 955 (CA 7, 2015). Summary judgment reversed. The employer failed to proffer admissible evidence that the events leading to discharge actually happened. Moreover, the employer's interrogatory answers about the date of the termination decision were inconsistent with representations made in briefs.

Sklyarsky v Means-Knaus US Partners, 777 F3d 892 (CA 7, 2015). "Sklyarsky's own opinion about his work performance is irrelevant." Summary judgment affirmed, where the decisionmaker honestly believed the plaintiff was performing poorly.

Estate of Carlos Bassatt v School District No 1 in the City and County of Denver, 775 F3d 1233 (CA 10, 2015). The plaintiff did not create a factual question on pretext by showing that the investigation into his misconduct was inadequate, that there was no direct evidence of his guilt, or that some of the witnesses' stories had holes. The decisionmaker had to weigh the evidence he had available, and there was no evidence the decisionmaker did not honestly believe that the plaintiff had committed the alleged misconduct. Summary judgment affirmed.

Martinez v Texas Workforce Commission, 775 F3d 685 (CA 5, 2015). A subjective interview score can serve as a legitimate, non-discriminatory reason where, as here, the employer provides evidence demonstrating how it scored the applicants in the interview process. Summary judgment affirmed.

Nassar v Jackson, 779 F3d 547 (CA 8, 2015). The employer waived their request for a JNOV by failing to specify why they believed they were entitled to JNOV. Counsel for the employer merely said: "the defendants would move for a directed verdict based on the plaintiffs' failure to carry their burden on all but the due process claim. And I – I could go through all the evidence, but the Court – I won't go any further."

Moody v Vozel, 771 F3d 1093 (CA 8, 2015). Pretext was not shown with evidence that the plaintiff did not commit the sexual harassment he was fired for committing. The plaintiff presented no evidence that the employer believed or should have known the claims were untrue. The plaintiff also failed to proffer evidence of discriminatory animus.

V. AGE DISCRIMINATION

Vaughan v Anderson Reg'l Med. Ctr., No. 16-60104, 2016 U.S. App. LEXIS 22412 (5th Cir. Dec. 16, 2016). Pain and suffering and punitive damages are not awardable for private actions brought under the ADEA.

Loffredo v Daimler AG, ___F App'x___; 2016 U.S. App. LEXIS 20333 (CA 6, Nov. 8, 2016). The plaintiff's ELCRA age discrimination claim was pre-empted by ERISA where the plaintiff's complaint complied with ELCRA's administrative procedures and was filed within Michigan's limitations period, but was filed outside of the ADEA's limitations period and without following the ADEA's administrative procedure. The exception to ERISA's pre-emption of state-law claims applicable to claims that mirror the ADEA is only applicable to the extent the state law mirrors the ADEA. ELCRA's longer period of limitations does not mirror the ADEA. Thus, since the plaintiff's complaint was filed outside of the ADEA's limitations period, the court found the state-law age discrimination claim was pre-empted by ERISA.

Villarreal v. R.J. Reynolds Tobacco Co., 839 F3d 958 (CA 11, 2016). Where an employer targeted job applicants "2-3 years out of college," a 49 year old applicant's claim of disparate impact was dismissed because the ADEA only provides for disparate impact claims by employees. It does not cover mere job applicants. Disparate treatment claims are brought under Section 4(a)(1) of the ADEA, which makes it unlawful "to fail or refuse to hire or to discharge" an individual because of the individual's age. Disparate Impact claims are brought under Section 4(a)(2) of the ADEA, which makes it "unlawful for an employer . . . 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." Section (4)(a)(2) does not contain "refuse to hire" language like Section 4(a)(1). Likewise, Section 4(a)(1) does not include any "status as an employee" language like Section 4(a)(2). Thus, since job applicants do not have "status as an employee," they are not covered by Section 4(a)(2) and cannot bring disparate impact claims under the ADEA.

Additionally, equitable tolling did not apply to the plaintiff's untimely complaint because the plaintiff waited for more than two years after applying for the job to investigate the status of his application.

Richardson v Wal-Mart Stores, Inc, 836 F3d 698, 703 (CA 6, 2016). Where a manager made statements that the plaintiff was too old to work and questioning when the plaintiff was going to quit or leave, those statements were not direct evidence of age discrimination because the manager was not involved in the decision to terminate the employee. The manager had been transferred to a different store four months before the termination decision.

Further, the plaintiff did not present any evidence that the decision maker did not honestly believe that the plaintiff's discipline history justified the termination decision. Upon a closer review of the disciplines, the decision maker might not have found them to be appropriate, but there is no requirement that an employer's pre-termination investigation be perfect. The decision maker reasonably relied on the disciplines in deciding to discharge the plaintiff.

Williams v. Poarch Band of Creek Indians, 839 F.3d 1312 (11th Cir. 2016). A fifty-five-year-old employee who was the laboratory manager at a hospital operated by a federally-recognized tribe of Native Americans on reservation lands, filed an ADEA lawsuit when she was terminated and replaced by a twenty-eight-year-old. The trial court did not err when it dismissed her lawsuit because the hospital was immune from suit by tribal sovereign immunity.

Dunaway v. MPCC Corp., No. 15-2587, 2016 U.S. App. LEXIS 17510 (2d Cir. Sep. 27, 2016). A company president made several references to age when interviewing a candidate, including asking the candidate his age and stating that he was looking for someone to be with the company 10 to 15 years. Plaintiff filed an ADEA lawsuit when he was not hired. The district court did not err by dismissing the complaint because the president's questions and statements related to the expected tenure of the candidate and the candidate's fitness for the job, which were permissible inquiries and considerations.

Moore v AMPAC, 645 F App'x 495 (CA 6, 2016). The trial court erred in concluding that the plaintiff and a younger co-worker were not similarly situated. The plaintiff and the co-worker both occupied the same sales position, both reported to the same supervisor, and both were placed on the same performance plan requiring them to sign two new accounts per week. Further, both failed to satisfy the requirements set forth in the performance plan. The fact that the co-worker, unlike the plaintiff, signed an account large enough to satisfy his dollar volume for the year did not make them dissimilarly situated. Nonetheless, the plaintiff's argument that the fact that he was discharged for

failing to meet the performance plan requirements whereas the younger employee was not was unpersuasive. The court found that the employer's decision not to discharge the younger employee was not evidence of pretext given that the younger employee had generated a substantial amount of business despite his technical failure to meet the performance plan requirements.

Bordelon v Bd of Educ of City of Chi, 811 F3d 984 (CA 7, 2016). A long-tenured Chicago school principal whose contract wasn't renewed when he reached age 63 failed to establish his age discrimination claim under the ADEA. The court affirmed that the principal didn't show that his supervisor manipulated the local school council's nonrenewal decision. The supervisor's comment suggesting it was time for the principal "to give it up" wasn't an express remark about age since it didn't reference the principal's age. Further, a council member testified that he thought the remark referred to the poor academic performance of the principal's school. The evidence that the supervisor maintained a list of "five or six older black principals" to discipline didn't support the inference of age bias because, among other things, only two of 16 principals in the supervisor's area were under 40. Lastly, the principal failed to establish his cat's paw theory because the council had independent reasons for not renewing principal's contract.

Thomas v Heartland Employment Services, 797 F3d 527 (CA 8, 2015). Evidence that Hagen, a supervisor who made ageist comments, played a role in the discharge decision created a triable age discrimination claim. Although the employer claimed that Hagen played no role in the decision, a regional human resources manager testified that Hagen was an "indirect supervisor" with authority to contribute to a discharge decision, and a decisionmaker said that "they" – i.e., a group that might have included Hagen – made the decision and that it was "their" decision to terminate the plaintiff. A jury could construe these statements as evidence that Hagen was involved.

The following comments by Hagen, all of which occurred within a two month time span but did not directly reference the adverse decision, could be "direct evidence" of discrimination: referencing the plaintiff as an "old short blond girl," saying older people didn't work as fast and were not as productive as younger employees, commenting about having "fresh blood, younger employees," and telling a client that he "likes to keep himself surrounded with young people."

France v Johnson, 795 F3d 1170 (CA9, 2015). The plaintiff created a triable age claim with evidence that a supervisor with a "significant and influential" role in the decision not to promote the plaintiff made ageist remarks shortly before the adverse decision. The remarks included stating a preference for "young, dynamic agents" and repeatedly asking the plaintiff about his retirement plans.

Goudeau v National Oilwell Varco, LP, 793 F3d 470 (CA 5, 2015). Decisionmaker's ageist comments, combined with allegations that the employer never showed the plaintiff the numerous written disciplinary warnings in his file, created a triable age discrimination claim. "We have recognized … that when an employer opts to have a disciplinary system that involves warnings, failure to follow that system may give rise to inferences of pretext." The ageist comments included calling older workers "old farts," telling the plaintiff he wore "old people's clothes," saying the smoking area was "where the old people meet," and threatening to fire two age-protected employees after asking about their age.

Wagner v Gallup, 788 F3d 877 (CA 8, 2015). Allegation that the age-protected plaintiff's 35-year-old supervisor used the words "historically" and "old school" in a conversation with the plaintiff shortly before termination was not "direct evidence" of discrimination. The word "historically" was used as a temporal reference as the supervisor was discussing ways to get the plaintiff to think differently about certain concepts. The phrase "old school" was used when asking whether clients might think it too "old school" for the plaintiff to reference books he authored several years prior. "There is simply too great a leap from the context of these word usages to the establishment of a specific link between an alleged age animus and Wagner's termination using the direct evidence method."

The plaintiff could not sustain a claim by the circumstantial method because he failed to produce evidence capable of establishing that the employer's non-discriminatory explanation – that he was difficult to work with and too "self-oriented" – was a pretext for age discrimination. Summary judgment affirmed.

Santangelo v New York Life Insurance Co, 785 F3d 65 (CA 1, 2015). Evidence that the violations for which the plaintiff was fired do not, in fact, violate the employer's policy cannot sustain a discrimination claim. The plaintiff must proffer evidence that age was the real reason for discharge. The fact that younger people were hired after the plaintiff was fired means nothing

because the plaintiff did not show the younger people were hired to perform his former duties. Summary judgment affirmed.

Jenkins v City of San Antonio Fire Dep't, 784 F3d 263 (CA 5, 2015). A District Chief's nonselection as District Chief of a different district was not adverse employment action. The plaintiff did not show that the position would have benefitted him financially, given him more prestige, or required greater skill, education or experience.

Squyres v Heico Companies, 782 F3d 224 (CA 5, 2015). A 70-year-old former business owner, who sold his business and was retained by the purchaser pursuant to a three year employment agreement, did not show that the purchaser's decision not to renew the contract or hire him as an at-will employee was discriminatory. The fact that the plaintiff's employment ended differently than other at-will employees was not evidence of pretext because those other employees did not have three-year employment contracts.

Discriminatory comments by two co-workers could not establish pretext because the co-workers who made the comments were actually lobbying for the plaintiff to stay on with the company.

Soto-Feliciano v Villa Cofresi Hotels, Inc, 779 F3d 19 (CA 1, 2015). Given the "gaps and inconsistencies" in the employer's explanations for discharge, a chef raised triable age discrimination and retaliation claims by alleging that he was told he was "too old" and "too slow." The alleged misconduct for which the plaintiff was terminated was not documented in his personnel file, despite a policy of documenting such misconduct. The alleged misconduct was not mentioned in prior meetings. The employer also strayed from its "progressive discipline" policy.

Hilde v City of Eleventh, 777 F3d 998 (CA 8, 2015). The plaintiff raised a triable age discrimination case with evidence that he was "obviously superior" to the successful candidate, who was eight years younger. The plaintiff was the only candidate whose interview scores were lowered, and the employer failed to explain the plaintiff's unusually low training and employment scores. Moreover, the employer's explanation for the decision – that the plaintiff might not be as motivated because he was already retirement eligible – wasn't a nondiscriminatory explanation under the ADEA. "To assume that Hilde was

uncommitted to a position because his age made him retirement-eligible is age-stereotyping that the ADEA prohibits."

Tilley v Kalamazoo County Road Commission, 777 F3d 303 (CA 6, 2015). Evidence of an alleged "pattern of discrimination" against older workers lacked consequence because the plaintiff could not show that the alleged mistreatment of older workers was based on age. The plaintiff also failed to show that he was replaced by a younger worker or treated differently than a younger employee who engaged in similar misconduct. Summary judgment affirmed.

Valle-Santana v Servicios Legales De Puerto Rico, Inc, 2015 US App LEXIS 18150 (CA 1, 2015). No prima facie case where the plaintiff failed to show that her position was given to a significantly younger employee. Nor was there evidence of ageist comments or animus. Summary judgment affirmed.

Widmar v Sun Chemical Corp, 772 F3d 457 (CA 7, 2015). Evidence that the plaintiff, a plant manager, was blamed for things outside his control does not establish age discrimination. "Sun Chemical takes a 'buck stops here' approach in which it required its plant managers to accept responsibility not just where he has direct control, but rather over all aspects of the plant." "[I]f Sun Chemical's legitimate expectation was that a plant manager not pass the buck, then Widmar's brief in which he repeatedly denies responsibility gives further weight to the conclusion that Widmar was not meeting his employer's legitimate expectations."

VI. RELIGIOUS DISCRIMINATION/ACCOMMODATION

Summers v Whitis, 2016 U.S. Dist. LEXIS 173222 (SD Ind, Dec. 15, 2016). A deputy county clerk refused to process a same-sex couple's paperwork seeking a marriage license. The deputy clerk requested a religious accommodation, but was terminated for insubordination. The former deputy clerk's subsequent religious discrimination lawsuit was dismissed. The court held that the former deputy clerk's religious convictions did not excuse her from performing the ministerial duties of her job, including processing marriage licenses.

Equal Opportunity Empl Comm'n v United Health Programs of Am, Inc, ___F Supp 3d___; 2016 U.S. Dist. LEXIS 136625 (EDNY, Sep. 30, 2016). Where an employer implemented a conflict resolution program (known as "Onionhead") that was religious in nature and which the employers had sincerely held beliefs

regarding, the court found that the employer violated Title VII by imposing the program on employees.

Guessous v Fairview Prop Invs, LLC, 828 F3d 208 (CA 4, 2016). Where a muslim employee was subjected to numerous disparaging remarks regarding her religion, race and national origin, the district court's grant of summary disposition to the employer on the employee's discrimination and hostile work environment claims was reversed. The employer stated that it had been engaged in a year-long evaluation of the need for the employee, and had finally decided to terminate her because it did not have enough work to justify keeping her. There was, however, no evidence of such an evaluation, and the termination decision appears to have been made shortly after the employee's conversation with her supervisor about the supervisor's disparaging remarks. Further, despite the fact that all of the alleged disparaging remarks were outside of the Title VII statute of limitations period, the decision to take work away from her and to terminate her were a part of the harassment such that the claim survived based on the continuing-violation doctrine.

Marrero-Méndez v Calixto-Rodríguez, 830 F3d 38 (CA 1, 2016). A police commander asked for a volunteer to lead the team in prayer during a work meeting. An openly-atheist police officer pulled the captain aside and objected to participation. The commander angrily ordered the officer to leave the formation and stand still while the others prayed, and shouted in front of everyone "he doesn't believe in what we believe in." After making an administrative complaint, the officer was transferred to a lesser position. The officer filed a §1983 claim alleging violation of the Establishment Clause. The Court of Appeals affirmed the denial of the defendants' motion to dismiss. The defendants were not entitled to qualified immunity because the defendants' violated the Establishment Clause, and the clearly-established law placed defendants' on notice that such conduct was illegal.

EEOC v Abercrombie & Fitch Stores, Inc, 135 S Ct 2028 (2015). "The rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the

prospective accommodation is a motivating factor in his decision, the employer violates Title VII."

"Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has 'actual knowledge' of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." Title VII does not impose a knowledge requirement. "[T]he intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

"Abercrombie's argument that a neutral policy cannot constitute 'intentional discrimination' may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.' An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

Nobach v Woodland Village Nursing Center, Inc, 799 F3d 127 (CA 5, 2015). The court reaffirmed its prior ruling that the plaintiff could not sustain a religious bias claim, even though she was fired for refusing to pray the Rosary with a patient. The plaintiff failed to show that the employer knew before it terminated her that her refusal to pray the Rosary was based a religious belief. "If Nobach had presented any evidence that Woodland knew, suspected, or reasonably should have known the cause for her refusing this task was her conflicting religious belief – and that Woodland was motivated by this knowledge or suspicion – the jury would certainly have been entitled to reject

Woodland's explanation for Nobach's termination. But, no such evidence was ever provided to the jury."

Shirrell v St. Francis Medical Center, 793 F3d 881 (CA 8, 2015). Summary judgment properly granted, even though the plaintiff was terminated shortly after complaining about an alleged anti-Semitic remark. The plaintiff accrued 12 disciplinary points in a 12-month period, which mandated termination according to hospital policy. She failed to show that any similarly situated person was treated differently. The plaintiff also failed to show that the decisionmaker harbored any prohibited bias or made any anti-Semitic statements.

Wiercinski v Mangia 57, Inc, 787 F3d 106 (CA 2, 2015). A manager's severe anti-Sematic slurs toward the plaintiff were capable of sustaining religious and national origin discrimination claims. Punitive damages were inappropriate, however, because evidence showed that the person to whom the plaintiff complained about the remarks tried to address the problem by granting the plaintiff's transfer and shift change requests.

Yeager v FirstEnergy Generation Corporation, 777 F3d 362 (CA 6, 2015). Employers are not liable for refusing to accommodate a religious belief that would require them to violate or ignore a federal statute. Summary judgment was therefore proper for an employer who claimed his religion prohibited him from producing a Social Security number.

VII. RETALIATION

A. IN GENERAL

Hutton v Maynard, 812 F3d 679 (CA 8, 2016). The district court found that the police chief engaged in protected activity for affiliating with a black staff member and recommending that he be promoted, but that plaintiff had failed to establish any causal connection between his termination and protected activity. Plaintiff did not dispute that the city offered a legitimate non retaliatory reason for his discharge. The city was consistent in its reason for discharge and those reasons – i.e. that he failed to ensure his officers' firearms certifications were up-to-date and mishandling dashboard video camera purchases – were legitimate bases for discharge. The court found that even though the discharge occurred one day after he made his recommendation to the mayor, temporal proximity alone is insufficient to establish pretext. Lastly, the employee failed to explain how his proposed comparators were similarly situated.

Wheat v Fla Parish Juvenile Justice Comm'n, 811 F3d 702 (CA 5, 2016). A juvenile detention facility was improperly granted summary judgment on a Title VII claim by a staff officer who alleged that she was discharged for complaining about female detainee's sexual advances. On appeal, the court found that factual issues existed as to whether the employee's discharge for using excessive force against a detainee was pretextual given (1) she had been charged with the same offense before her complaint without being discharged and (2) evidence showed that the Commission only discharged some employees, but not others, for excessive force. The mixed record on this issue created a genuine issue of material fact enabling the plaintiff to survive summary judgment.

Brandon v Sage Corp, 808 F3d 266 (CA 5, 2015). The employer truck driving school was properly granted summary judgment on a Title VII retaliation claim by a former school director who resigned after being threatened by the regional director with a 50 percent pay cut for hiring a transgender individual as a driving instructor. The trial court properly found that threat was not an adverse employment action because the regional director was outside the director's chain of command and lacked final decision-making authority. For those same reasons, the court was persuaded the court that no reasonable employee would be deterred from engaging in protected activity based on that threat. A reasonable employee in her position would have waited to receive confirmation on whether the threat was official or would have followed school's grievance process.

Kazolias v IBEW Local Union 363, 806 F3d 45 (CA 2, 2015). The district court erred in dismissing the age discrimination claims of union members who alleged that they were denied job referrals by the union after they filed their EEOC charges alleging age discrimination. The court held that the retaliatory remarks made by the union's business manager at the union meeting could reasonably support an inference that the manager harbored retaliatory animus against members for their protected activity at the time he made the remarks and beforehand. The lower court's dismissal of the age discrimination claims was vacated and remanded.

Thomas v Berry Plastics Corp, 803 F3d 510 (CA 10, 2015). "We conclude that Berry's independent termination review process broke the causal chain between Morton's purported retaliatory animus and Thomas's termination."

Vega v Hempstead Union Free School Dist, 801 F3d 72 (CA 2, 2015). Retaliation claims are actionable under 42 USC § 1983.

Harden v Marion County Sheriff's Department, 799 F3d 857 (CA 7, 2015). The plaintiff, who was fired for stealing money from a suspect he arrested, did not establish that his termination was pretext for illegal retaliation. "At most, Harden has raised some doubts about his guilt. That is not enough to suggest that the Internal Affairs investigation was a sham or that the relevant decisionmakers at the Sheriff's Department did not legitimately rely on" the Internal Affairs investigation.
Evidence that a supervisor "had it in for him" was irrelevant because there was no evidence linking the supervisor to the adverse employment decision.

Ray v Ropes & Gray LLP, 799 F3d 99 (CA 1, 2015). Unlike opposition activity, which requires a reasonable belief that the employer acted unlawfully, a plaintiff who engages in participation activity need not hold a reasonable belief that the employer's actions actually violated Title VII.

Zamora v City of Houston, 798 F3d 326 (CA 5, 2015). The court affirmed a jury verdict in favor of the plaintiff where the plaintiff offered evidence capable of showing that he was suspended and removed from a prestigious position in retaliation for his father's discrimination suit against the city. Retaliatory animus could be inferred with evidence that the plaintiff was harshly accused of misconduct shortly after his father engaged in protected conduct, that the accusers would have known about the protected activities, and that there was a "code of silence" in which officers tended to retaliate against anyone who complains about coworkers.

Although the plaintiff proffered no evidence that the ultimate decisionmaker was biased, and that there were multiple levels of unbiased review, the verdict for plaintiff was affirmed because the decisionmakers completely relied on the biased supervisor's statements and conducted no independent investigation.

DeMasters v Carillion Clinic, 796 F3d 409 (CA 4, 2015). The court rejected the so-called "manager's rule," which requires an employee responsible for reporting bias claims to "step outside his or her role of representing the

company" in order to engage in protected opposition or participation activity. "Nothing in the language of Title VII indicates that the statutory protection accorded an employee's oppositional conduct turns on the employee's job description or that Congress intended to excise a large category of workers from its anti-retaliation protections."

Allen v Johnson, 795 F3d 34 (CA DC, 2015). The plaintiff's disagreement with the performance ratings she received from a new supervisor was, by itself, insufficient to establish that the lower than expected ratings were retaliation for prior discrimination complaints. "Nothing in the record suggests that Hill did not genuinely and reasonably believe she made the right decision in the performance ratings she assigned to Allen…."

Jones v Union Pacific Railroad Co, 793 F3d 694 (CA 7, 2015). Summary judgment was properly granted, where the plaintiffs failed to show that management intentionally kept them from taking a required eligibility test. Even assuming a manager mishandled or lost some applications to take the exam, there was no evidence this was done pursuant to retaliatory motives.

Yazdin v Conmet Endoscopic Technologies, Inc, 793 F3d 634 (CA 6, 2015). The following two allegations constituted "direct evidence" of retaliation: (a) management referenced the following statement by plaintiff as an example of the plaintiff's unwillingness to accept and apply constructive coaching: "you don't like the way I write. You don't like the way I talk. I guess you don't like my race, either"; and (b) that a manager decided to fire the plaintiff immediately after a phone call during which the plaintiff said that he was going to file a lawsuit, file charges, and was experiencing a "hostile work environment."

The plaintiff also created a circumstantial case with evidence that the employer's explanation for discharge—insubordination—was pretextual. At the summary judgment stage, courts cannot accept a conclusory claim that the plaintiff was "insubordinate" where the insubordination might have consisted of overt or subtle resistance to perceived discrimination. "Indeed, there may be some instances when the allegedly insubordinate act may be a response to a sort of unspoken, subliminal discrimination in the workplace." While some examples of the plaintiff's alleged insubordination were probably unprotected—such as when the plaintiff called his manager a "bad individual" who makes

"inappropriate business decisions,"—the plaintiff made other comments in the same exchange—such as threatening to sue or file a complaint—that arguably constitute protected opposition activity. Moreover, although the employer had critiqued the plaintiff's communication style before he engaged in protected activity, it was unclear whether the alleged communications issues would have resulted in termination from employment. Summary judgment reversed.

Planadeball v Wyndham Vacation Resorts, Inc, 793 F3d 169 (CA 1, 2015). A short, two-month proximity between the plaintiff's complaint and a threat to terminate created a prima facie case of retaliation. Summary judgment was proper, however, because the evidence clearly showed that the plaintiff's performance was suffering.

Baird v Gotbaum, 792 F3d 166 (CA DC, 2015). The long list of alleged slights, rudeness, name calling, and other unprofessional behavior the plaintiff allegedly experienced in the eight years following his discrimination charge did not create a hostile environment, and were not "material" enough to dissuade a reasonable person from complaining. "The sheer volume of Baird's allegations does not change our conclusion: a long list of trivial incidents is no more a hostile work environment than a pile of feathers is a crushing weight."

Allegation that human resources failed to investigate or take action regarding these "intermittent spats" does not make the otherwise unactionable events actionable. "A trivial incident does not become nontrivial because an employer declines to look into it. Title VII is aimed at preventing discrimination, not auditing the responsiveness of human resources departments."

Harris v DC Water and Sewer Authority, 791 F3d 65 (CA DC, 2015). Dismissal on the pleadings was improper, where the plaintiff alleged that: (a) he was "regularly commended for his work" before he complained; (b) the employer did not actually eliminate his position, as it had claimed; and (c) the plaintiff was not given the opportunity to apply for internal vacancies.

Culbertson v Lykos, 790 F3d 608 (CA 5, 2015). The plaintiffs, who resigned from the employer and went to work for a college, could sustain a retaliation claim with evidence that the former employer retaliated against them by terminating its contract with the college they went to work for.

Mintz v Caterpillar Inc, 788 F3d 673 (CA 7, 2015). Speculation based on suspicious timing alone is insufficient to sustain a retaliation case. There must be some corroborating evidence to support an inference of causation.

Foster v University of Maryland-Eastern Shore, 787 F3d 243(CA 4, 2015). The Supreme Court's holding in *University of Texas Southwestern Medical Center v Nasser* did not displace the *McDonnell Douglas* framework in retaliation cases. To the contrary, "the *McDonnell Douglas* framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action."

Castro v DeVry University, Inc, 786 F3d 559 (CA 7, 2015). Worker terminated for poor performance and "volatile behavior" 10 months after complaining about a supervisor's racial comments raised a triable retaliation claim. An internal document pointed out that the plaintiff had challenged "every decision his supervisor makes as racially motivated" and mentioned that the plaintiff was one of the people who had complained about his supervisor's alleged remarks. Moreover, contrary to the employer's explanation for discharge, records suggested that the plaintiff was performing well. There was also testimony that a supervisor, and not the plaintiff, was the one who engaged in the volatile behavior.

Summary judgment was properly granted against two other employees who were discharged 15 and 30 months after complaining. The employer had strong evidence that these employees performed poorly over a long period.

Keefe v City of Minneapolis, 785 F3d 1216 (CA 8, 2015). Summary judgment properly granted where the plaintiff proffered no specific facts to discredit the employers' proffered explanation for discharge. Simply denying the alleged misconduct is not enough.

Jacobs v North Carolina Office of the Courts, 780 F3d 562 (CA 4, 2015). A fact question existed concerning the decisionmaker's claim that she did not know of the plaintiff's accommodation request (the protected activity). The plaintiff had previously sent the decisionmaker an email requesting accommodation, and one could presume that the plaintiff's supervisors, who did know of the request,

have discussed the issue with the decisionmaker during various pre-termination meetings.

Rattigan v Holder, 780 F3d 413 (CA DC, 2015). The plaintiff claimed that the person who spearheaded the investigation leading to discharge knew the allegations were untrue. Yet, this person had not been accused of discrimination and had "no apparent reason" to retaliate against the plaintiff. Summary judgment was proper in this context. "Motive and knowing falsity must unite in the same person." Moreover, allegations that that a supervisor made "inadequate efforts to get the [memo about the plaintiff's alleged improprieties] cleansed of propositions 'unsupported in fact'" is a "far cry from knowingly reporting false statements."

Carter v Chicago State University, 778 F3d 651 (CA 7, 2015). The fact that the adverse employment action occurred approximately seven months after the protected activity is not, by itself, "suspicious" enough to support a retaliation claim.

Gibson v Geithner, 776 F3d 536 (2015). The employer's decision to list in the termination letter only one of the two performance-based concerns it had is not enough to find pretext based on a shifting explanation. The employer's explanation for discharge did not shift. It just became more complete. Moreover, because the plaintiff failed to show that actual harassment or discrimination ever occurred, the plaintiff cannot establish pretext based on the employer's failure to discipline the alleged harassers.

Greengrass v International Monetary Systems, Ltd, 776 F3d 481 (CA 7, 2015). employment action element of a retaliation claim. Publicly identifying a charging party might reduce the charging party's chances of finding another job, and people would be less likely to file charges if they knew they would be publicly identified in this way.

Daniels v School District of Philadelphia, 776 F3d 125 (CA 3, 2015). "Unexplained hostility" toward the plaintiff after she raised a discrimination complaint cannot, by itself, sustain a retaliation claim. "The plaintiff . . . cannot establish that there was a causal connection without some evidence that the individuals responsible for the adverse action[s] knew of the plaintiff's protected

complaints of discrimination." Speculation that the decisionmakers were aware of the complaint is insufficient. Summary judgment affirmed.

Skalsky v Independent School District No. 743, 772 F3d 1126 (CA 8, 2015). Temporal proximity between the plaintiff's transfer and his wife's protected activity is not enough to sustain a discrimination claim. Nor can plaintiff take a case to trial by "simply questioning" the decisionmaker's opinion about the plaintiff's performance.

Taylor-Novotny v Health Alliance Medical Plans, Inc, 772 F3d 478 (CA 7, 2015). Summary judgment properly granted where the employer expressed concern about the plaintiff's attendance and work performance before she sought an accommodation for her multiple sclerosis.

B. PROTECTED ACTIVITY

Littlejohn v City of New York, 795 F3d 297 (CA 2, 2015). Verbal complaints of race discrimination constituted protected activity even though the complaints were made in her capacity as EEO officer.

Yazdin v Conmet Endoscopic Technologies, Inc, 793 F3d 634 (CA 6, 2015). The following statements constituted protected activity, even though they were not clearly linked to claims of alleged national origin discrimination: "I'm going to respond to counsel"; "I will have my attorney respond"; "I'm going to bring you up on charges…."; "I will be responding with charges"; threatening to "bring a lawsuit"; claiming the boss was subjecting him to a "hostile work environment," and once saying to his manager "you don't like the way I write. You don't like the way I talk. I guess you don't like my race, either." "These statements – particularly the hostile-work-environment charge – put ConMed on notice that Yazdian believed that [his manager's] conduct was illegal" and "[a] reasonable jury could conclude that Yazdian used and intended the phrase 'hostile work environment' to reference discriminatory treatment because he was aware of the legal significance of the term and meant it to be a complaint about national-origin or religious discrimination." "In addition, the record shows that ConMed understood Yazdian's complaints as opposition to [his manager's] conduct because the legal department told Hutto to investigate Yazdian's claim after learning that Yazdian had accused [his manager] of creating a hostile work environment and not liking his 'race.'"

Boyer-Liberto v Fontainebleau Corp, 786 F3d 264 (CA 4, 2015), *en banc*. Complaining about two offensive statements which, taken separately or together, might be insufficient to sustain a harassment claim, constituted protected activity capable of sustaining a retaliation claim. "[A]n employee is protected from retaliation for opposing an isolated incident of harassment when she reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur."

Greathouse v JHS Security Inc, 784 F3d 105 (CA 2, 2015). The plaintiff's oral complaint to her employer alleging underpayment for services rendered is protected activity capable of supporting a retaliation claim under the FLSA.

EEOC v New Breed Logistics, 783 F3d 1057 (CA 6, 2015). Asking the harassing supervisor to stop the harassing conduct constitutes protected activity sufficient to support a retaliation claim. "Importantly, the language of the opposition clause does not specify to whom protected activity must be directed."

EEOC v All-State Insurance Company, 778 F3d 444 (CA 3, 2015). Refusing to sign a release does not constitute protected activity. Accordingly, the employer did not illegally retaliate against 6,200 employees who were laid off in a RIF, but who were offered the right to act as independent contractors if they signed releases waiving discrimination and retaliation claims.

C. WHISTLEBLOWERS' PROTECTION ACT

Pace v Edel-Harrelson, 309 Mich App 256 (2015). The WPA protects employees who report violations of law that are planned, but not yet perpetrated. "[W]e reject defendant's suggestion that, where an employee has a good faith and reasonable belief that a violation of the law has either already occurred or is being actively planned, the report of that belief is insufficient to trigger the protections of the WPA. . . . Requiring that a reporter wait until she is certain that the violation is complete is also inconsistent with the intent of the WPA, *i.e.*, the protection of the public."

VIII. HARASSMENT

A. SEX HARASSMENT

Lord v High Voltage Software, Inc, 839 F3d 556 (CA 7, 2016). Where a male employee was teased by male co-workers about his rumored romantic interest in a female audio engineer co-worker, stating that he had the "audio bug" whenever the female co-worker was around, and where a male co-worker repeatedly slapped and touched the employee's backside, such conduct did not create an actionable hostile work environment because such conduct was not done because of his sex. Sexual horseplay is different from sex discrimination. Plaintiff's claim for retaliation also fails as Plaintiff failed to establish that the multiple reasons for the termination constitute "shifting rationale" rather the employment decisions rested on multiple grounds.

Smith v Rock-Tenn Servs, 813 F3d 298 (CA 6, 2016). Where a male co-worker pinched and/or slapped a male employee's buttocks and grinded his pelvis into the employee's backside, the jury's conclusion that such conduct was not mere horseplay was not so unreasonable as to entitle the defendant employer to judgment as a matter of law. Further, the fact that the co-worker only engaged in such conduct with male employees was direct comparative evidence sufficient to establish an inference of discrimination based on sex. Finally, defendant did not take prompt and remedial action where defendant's total inaction for ten days, where defendant knew that the male-employee had touched plaintiff, and had told the male-employee that further complaints would result in termination, was unreasonable.

Burns v Johnson, 829 F3d 1 (CA 1, 2016). Summary judgment in favor of the defendant employer was reversed where it was error for the district court to expect that under the mixed-motives theory the plaintiff had to present direct evidence of discrimination. There was sufficient circumstantial evidence from which a jury could find discrimination.

Nichols v Tri-Nat'l Logistics, Inc, 809 F3d 981 (CA 8, 2016). Where a female truck driver was subjected to a male co-driver's sexual advances while on the road and during a mandatory 34-hour rest period at the co-driver's home, the district court erred by not considering the conduct that occurred during the rest period. The rest period was mandatory and the law did not require the plaintiff to choose between performing her job and removing herself from the harassment. Further, because the employer waited seven days to arrange for a

different co-driver for the plaintiff, there was a genuine issue of material fact as to whether the employer took appropriate remedial action.

Blomker v Jewell, 831 F3d 1051 (CA 8, 2016). The plaintiff did not allege conduct so severe or pervasive to satisfy the high threshold for a sexual harassment hostile work environment claim where the seven alleged incidents spanned nearly a three-year period by two different men. Further, none of the alleged incidents involved actual touching.

Xiaoyan Tang v Citizens Bank, NA, 821 F3d 206 (CA 1, 2016). Where the female plaintiff's male supervisor had made numerous boorish comments to her that were not overtly sexual, the district court's grant of summary judgment for the employer was overturned because the context of the statements gave them a sexual tone.ee

Nichols v Tri-National Logistics, Inc, 809 F3d 981 (CA 8, 2016). The district court erred in granting summary judgment to a trucking company on a sexual harassment claim by a female former truck driver who alleged that her male co-driver propositioned her and exposed himself to her during a multi-day trip. On appeal, the court ruled that a factual issue existed as to whether the company took appropriate remedial action in response to her complaints given its alleged failure to promptly remove her from the truck, help her find another driver, or to reprimand the alleged harasser.

Perez v Horizon Lines, Inc, 804 F3d 1 (CA 1, 2015). Supervisor's request that the plaintiff bring cornbread and pastries to her office cannot reasonably be construed as a request for sex, and is not severe enough to sustain a hostile environment claim. The supervisor asked other employees to run personal errands for her, and there is no evidence to show that the alleged requests interfered with his work.

Huri v Office of the Chief Judge of the Circuit Court of Cook County, 2015 US App LEXIS 18296 (CA 7, 2015). The plaintiff's hostile work environment claim was within the scope of her EEOC charge, which alleged "harassment" but did not use the phrase "hostile work environment."

B. RACE/NATIONAL ORIGIN HARASSMENT

Cole v Bd of Trs, 838 F3d 888 (CA 7, 2016). Where an African-American employee at a university found a hangman's noose in his newly-assigned workspace, the dismissal of his claim for hostile work environment harassment

was upheld because no reasonable inference could be drawn that any complained-of incidents were connected to his race besides the noose. One incident could be sufficient, but there was no evidence that the noose was left specifically for him to find.

The Court of Appeals ultimately found that the employee provided no evidence to support liability on the part of the employer because there was no indication that a supervisor was involved or the university failed to take appropriate corrective action. When the employee reported the noose, he also said he thought it was a joke. Therefore, the university leaving the investigation to the police was appropriate.

Banks v John Deere & Co, 829 F3d 661 (CA 8, 2016). Summary judgment for the employer on the plaintiff's race harassment claim was upheld where the plaintiff's sole evidence of harassment were unsworn affidavits by co-workers that another co-worker referred to the plaintiff by using a derogatory term. The unsworn affidavits were inadmissible hearsay.f

Mensah v Michigan Department of Corrections, ___ F3d ___; 2015 US App LEXIS 13903 (CA 6, 2015). The following actions, taken separately or together, were not severe or pervasive enough to sustain a hostile environment claim: denying the plaintiff's request for annual leave; a rule requiring the plaintiff to notify his supervisor when he appeared for work each day; forcing the plaintiff to carry an ID badge; a manager telling other employees to watch the plaintiff's whereabouts; denying the plaintiff's request for flex time; forcing the plaintiff to participate in a drill that required him to go outside in the winter; and a lower than expected annual performance review.

Littlejohn v City of New York, 795 F3d 297 (CA 2, 2015). The district court properly dismissed the plaintiff's racial harassment claim on the pleadings because the following allegations, if true, are incapable of sustaining a racial harassment claim: "Baker made negative statements about Littlejohn to Mattingly; Baker was impatient and used harsh tones with Littlejohn; Baker distanced herself from Littlejohn when she was nearby; Baker declined to meet with Littlejohn; Baker required Littlejohn to recreate reasonable accommodation logs; Baker replaced Littlejohn at meetings; Baker wrongfully reprimanded Littlejohn; and Baker increased Littlejohn's reporting schedule. Baker also sarcastically told Littlejohn 'you feel like you are being left out,' and that Littlejohn did not 'understand the culture' at ACS."

Tolbert v Smith, 790 F3d 427 (CA 2, 2015). The plaintiff's hostile environment claim was properly dismissed where only two allegedly racist comments were made in his presence, one of which was ambiguous and did not necessarily reference race. There was no evidence that the allegedly unpleasant conditions the plaintiff complained about, such as putting too many pupils in the plaintiff's class and denying his request for a lump sum budget, had anything to do with race.

Boyer-Liberto v Fontainebleau Corp, 786 F3d 264 (CA 4, 2015), *en banc*. A black cocktail server who was fired after complaining that a white supervisor called her a "porch monkey" two times in one day has triable racial harassment and retaliation claims. A single workplace usage of an "odious epithet" can be "severe" enough to trigger Title VII protection, particularly where the comments were made by a person who arguably had the power to get the plaintiff fired.

Al-Kazaz v Unitherm Food Systems, Inc, 594 Fed Appx 460 (CA 10, 2015). Three isolated comments –calling the plaintiff "sand nigger," "camel jockey" and suggesting that "ragheads" should be killed – made by different co-workers were highly inappropriate but were not severe or pervasive enough to sustain a racial harassment claim. Title VII is not a general civility code.

C. RELIGIOUS HARASSMENT

Huri v Office of the Chief Judge of the Circuit Court of Cook County, ___ F3d ___; 2015 US App LEXIS 18296 (CA 7, 2015). The plaintiff stated a plausible religious-based hostile work environment claim by alleging that her employer screamed at her, shunned and implicitly criticized non-Christians, and conducted prayer circles at work.

D. EMPLOYER LIABILITY

Pullen v Caddo Parish Sch Bd, 830 F3d 205 (CA 5, 2016). Where an employee alleged sexual harassment by a supervisor, the employer was not entitled to immunity under the *Ellerth*/*Faragher* defense because the anti-harassment policy was not sufficiently publicized and employees were not trained regarding the policy. The employer was not held liable for the supervisor's alleged harassment during the time period in which he was not the plaintiff's supervisor, but was simply a co-worker and there was no evidence that the employer knew or should have known of the harassment.

Jones v Southeastern Pennsylvania Transportation Authority, 796 F3d 323 (CA 3, 2015). The plaintiff failed to take advantage of reasonable safeguards designed to prevent sexual harassment by failing to complain to management, despite 10 years of alleged harassment, until after she was accused of timesheet fraud. Summary judgment affirmed.

Stewart v Rise, Inc, 791 F3d 849 (CA 8, 2015). The plaintiff raised a triable question whether her employer knew of the alleged harassment, even though she did not complain in writing or specifically tell her employer that she thought the averse conduct was based on sex. Complaints need not come in writing or reference a prohibited animus to be protected. That is particularly true where some of the alleged conduct was clearly sex-based.

Pryor v United Air Lines, 791 F3d 488 (CA 4, 2015). A black employee who received an anonymous, racist death threat in her mailbox has a triable racial harassment claim. Employers are not strictly liable for harassing conduct and are only required to respond appropriately. However, the employer in this case failed to contact police, install security cameras as requested, take fingerprints, provide additional security, or follow the employer's own policies for responding to harassment allegations. The employer did not even get back with the plaintiff to explain what it was doing in response to her complaint. The employer's failure to properly respond the first time arguably led to a second round of racist death threats, which were toward all black employees at the same location.

Foster v University of Maryland-Eastern Shore, 787 F3d 243 (CA 4, 2015). "[E]mployers have an affirmative duty to prevent sexual harassment, and will be liable if they 'anticipated or reasonably should have anticipated' that a particular employee would sexually harass a particular coworker and yet 'failed to take action reasonably calculated to prevent such harassment.'" The employer could be liable under this standard because other employees had complained about the harasser's harassment.

IX. ADVERSE EMPLOYMENT ACTION

Mensah v Michigan Department of Corrections, 2015 US App LEXIS 13903 (CA 6, 2015). The following actions, taken separately or together, were not adverse employment actions under Title VII: denying the plaintiff's request for annual leave; a rule requiring the plaintiff to notify his supervisor when he

appeared for work each day; forcing the plaintiff to carry an ID badge; a manager telling other employees to watch the plaintiff's whereabouts; denying the plaintiff's request for flex time; forcing the plaintiff to participate in a drill that required him to go outside in the winter; and a lower than expected annual performance review.

Vega v Hempstead Union Free School Dist, 801 F3d 72 (CA 2, 2015). The plaintiff's claim that he was reassigned to classes with more Spanish-speaking students was an "adverse employment action" because the plaintiff had to spend more time preparing for classes and, hence, sustained a material increase in his responsibilities without additional compensation.

Jones v Southeastern Pennsylvania Transportation Authority, 796 F3d 323 (CA 3, 2015). A suspension with pay pending an investigation does not constitute adverse action in the discrimination context.

Huynh v United States Department of Transportation, 794 F3d 952 (CA 8, 2015). Denial of a positive recommendation letter, which apparently limited the plaintiff's training opportunities, did not constitute material adverse employment action where the denial did not cost the plaintiff any pay or promotion, and the plaintiff was offered other opportunities to obtain training.

Sellers v Deere & Co, 791 F3d 938 (CA 8, 2015). Increasing the plaintiff's work responsibilities was not a materially adverse employment action where the plaintiff admitted that he had a fluid, dynamic position where responsibilities were added, or changed, from week to week.

Tolbert v Smith, 790 F3d 427 (CA 2, 2015). Postponing for a year the decision whether to grant tenure constitutes adverse employment action because tenure would have protected the plaintiff from being fired without cause.

Jenkins v City of San Antonio Fire Dep't, 784 F3d 263 (CA 5, 2015). A District Chief's nonselection as District Chief of a different district was not adverse employment action. The plaintiff did not show that the position would have benefitted him financially, given him more prestige, or required greater skill, education or experience.

X. STATUTORY PRECONDITIONS AND LIMITATIONS PERIODS

Helm v Eells, 642 Fed Appx 558 (CA 6, 2016). Summary judgment in favor of the defendants was properly granted because the plaintiff's claim stemming from

the failure to follow the school's academic misconduct policy was untimely. The plaintiff, a medical school professor, filed the action five years after being discharged by the defendants based on wrongful accusations of plagiarism in September 2009. However, the evidence showed that the plaintiff became aware that the defendants failed to follow their Office of Research Integrity policy in the summer of 2013. The plaintiff's complaint was time barred because he did not file the action until more than a year after he knew or should have known that the defendants violated the research integrity policy.

Equitable tolling also did not save the plaintiff's otherwise untimely complaint. Even accepting that . . . [the defendants'] conduct warrants tolling, equitable tolling ends once plaintiff discovers his injury, at which point the statute of limitation resumes."

Heilman v City of Beaumont, 638 Fed Appx 363 (CA 5, 2016). The district court properly dismissed the plaintiff's retaliation claims because the plaintiff failed to plead sufficient facts to allege that the defendant-city adversely acted against him in response to his protected speech, which occurred after March 4, 2012.

The district court properly held that the plaintiff's facts were conclusory, and even if such facts did establish that the City adversely acted against the plaintiff, the action would have occurred in 2011 prior to the protected activity.

Barnett v DynCorp Int'l, LLC, 831 F3d 296 (CA 5, 2016). The district court properly ruled that a Texas statute prohibiting contractual limitations periods shorter than two years did not invalidate a forum selection clause specifying Kuwait as the appropriate forum, which requires a one year statute of repose.

"[U]nder either federal law or Texas's choice-of-law rules, Barnett can prevail only if enforcing the parties' choice of Kuwaiti law and a Kuwaiti forum would contravene a 'strong' or 'fundamental' public policy of Texas. We conclude that it would not."

Abram v Fulton County Gov't, 598 Fed Appx 672 (CA 11, 2015). "[E]quitable tolling is an 'extraordinary remedy' that should be applied 'sparingly. . . . The plaintiff must establish that equitable tolling is warranted. . . . Equitable tolling may be warranted where the defendant misled the plaintiff into allowing the statutory limitations period to lapse or where the plaintiff had no reasonable way of discovering the wrong perpetrated against her. . . . Equitable tolling is not

warranted where the plaintiff failed to exercise due diligence or where she failed to file her action in a timely fashion, despite knowing (or being in a position to know) that the limitations period was running.

Mach Mining, LLC v EEOC, 135 S Ct 1645 (2015). "We hold that a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit. But we find that the scope of that review is narrow, thus recognizing the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case." "A sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice to show that it has met the conciliation requirement."

Stembridge v N.Y. City Dep't of Educ, 622 Fed Appx 6 (CA 2, 2015). The district court correctly dismissed racial-discrimination claims based on the teacher's demotion, a second demotion three years later, and the education department's subsequent failure to hire him for a principal position. The teacher failed to exhaust his administrative remedies as to his Title VII claims. Also, his complaint based on his first demotion was barred by three- and four-year statutes of limitations applicable to his claims under 42 U.S.C. sections 1981 and 1983. Lastly, he could not demonstrate retaliation for his filing of a grievance because he did not raise a claim of race discrimination within the grievance.

Hooper v Proctor Health Care, Inc, 804 F3d 846 (CA 7, 2015). The district court properly dismissed the plaintiff's failure to accommodate claim because it was not included in the plaintiff's EEOC charge. The charge did not mention the suggested accommodations, or a need for accommodations.

Shervin v Partners Healthcare System, 804 F3d 23 (CA 1, 2015). The plaintiff's sex discrimination claim accrued for statute of limitations purposes on the date she was notified that she was on probation. The decision had immediate, tangible effects on the plaintiff's status in the residency program, and evidence shows the plaintiff believed at the time that the decision was discriminatory.

Davis v Bombardier Transportation, 794 F3d 266 (CA 2, 2015). "We conclude that the Ledbetter Act does not encompass a claim of a discriminatory demotion that results in lower wages where, as here, the plaintiff has not offered any proof that the compensation itself was set in a discriminatory manner. A plaintiff must

plead and prove the elements of a pay-discrimination claim to benefit from the Ledbetter Act's accrual provisions."

Gad v Kansas State University, 787 F3d 1032 (CA 10, 2015). The requirement that a charging party verify his or her EEOC charge is non-jurisdictional, meaning a charging party's failure to verify does not divest federal courts of jurisdiction. Failure to verify can be raised as a defense to suit, which can be waived if not raised.

Ayala v Shinseki, 780 F3d 52 (CA 1, 2015). The plaintiff should have known that being transferred to a small, windowless room and being stripped of all duties constituted an adverse employment action. This was a discrete act that triggered the statute of limitation.

Huri v Office of the Chief Judge of the Circuit Court of Cook County, 804 F3d 826 (CA 7, 2015). The plaintiff's hostile work environment claim was within the scope of her EEOC charge, which alleged "harassment" but did not use the phrase "hostile work environment."

XI. PLEADING REQUIREMENTS

Connelly v Lane Constr Corp, 809 F3d 780 (CA 3, 2016). The Third Circuit held that the district court improperly dismissed the female truck driver's sex discrimination claim for failure to state a plausible claim. The court ruled that she sufficiently alleged her Title VII disparate treatment claim, given her assertions that (1) she was the only female truck driver at that particular location, (2) the employer failed to recall her after layoff—even though it recalled male drivers with less seniority than her—and (3) the employer hadn't hired any female truck drivers since it failed to recall her. The Court reiterated that for purposes of pleading sufficiency, a complaint need not establish a *prima facie* case in order to survive a motion to dismiss.

Vega v Hempstead Union Free School Dist, 801 F3d 72 (CA 2, 2015). "[A] plaintiff is not required to plead a prima facie case under *McDonnell Douglas*, at least as the test was originally formulated, to defeat a motion to dismiss. Rather, because a temporary presumption of discriminatory motivation is created under the first prong of the *McDonnell Douglas* analysis, a plaintiff need only give plausible support to a minimal inference of discriminatory motivation."

Littlejohn v City of New York, 795 F3d 297 (CA 2, 2015). "We conclude that *Iqbal's* requirement applies to Title VII complaints of employment discrimination, but does not affect the benefit to plaintiffs pronounced in the *McDonnell Douglas* quartet. To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded under *Iqbal*. … The discrimination complaint, by definition, occurs in the first stage of the litigation. Therefore, the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent. The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a non-discriminatory justification."

"In other words, absent direct evidence of discrimination, what must be plausibly supported by facts alleged in the complaint is that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by discriminatory intent. The facts alleged must give plausible support to the reduced requirements that arise under *McDonnell Douglas* in the initial phase of a Title VII litigation. The facts required by Iqbal to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation."

The plaintiff raised a plausible discrimination case by alleging that she was demoted to a lower-paying, non-managerial position and replaced by a less qualified white employee.

Surtain v Hamlin Terrace Foundation, 789 F3d 1239 (CA 11, 2015). A plaintiff need not plead the elements of a prima facie case in the complaint.

McCleary-Evans v Maryland Department of Transportation, 780 F3d 582 (CA 4, 2015). Dismissal pursuant to Rule 12(b)(6) was appropriate. Unsupported complaint allegations that the decisionmakers were "predetermined to select [white candidates] for both positions" were "naked," conclusory allegations. The complaint lacked factual allegations capable of establishing, without resort

to pure speculation, that the white candidates were chosen based on race. "While the allegation that non-Black decisionmakers hired non-Black applicants instead of the plaintiff is consistent with discrimination, it does not alone support a reasonable inference that the decisionmakers were motivated by bias."

XII. MISCELLANEOUS

A. HONEST BELIEF RULE

Yazdin v Conmet Endoscopic Technologies, Inc, 793 F3d 634 (CA 6, 2015). The honest belief rule was inapplicable because the employer "failed to make a reasonably informed and considered decision before taking its adverse employment action." The decision to discharge was based solely on one manager's account of the events; upper management did not interview the plaintiff, his co-workers or his prior managers about the events in question or the plaintiff's behavior overall; the plaintiff was not afforded the opportunity to present his side of the story; and management did not review the rebuttal letter the plaintiff submitted.

Simpson v Beaver Dam Community Hospitals, Inc, 780 F3d 784 (CA 7, 2015). The plaintiff did not overcome the honest belief rule by arguing that the employer's concerns should not have mattered. "That is his view, but the Credentials Committee is entitled to its own view, provided it is not based on an impermissible animus such as race."

Sklyarsky v Means-Knaus US Partners, 777 F3d 892 (CA 7, 2015). "Sklyarsky's own opinion about his work performance is irrelevant." Summary judgment affirmed, where the decisionmaker honestly believed the plaintiff was performing poorly.

Estate of Carlos Bassatt v School District No 1 in the City and County of Denver, 775 F3d 1233 (CA 10, 2015). The plaintiff did not create a factual question on pretext by showing that the investigation into his misconduct was inadequate, that there was no direct evidence of his guilt, or that some of the witnesses' stories had holes. The decisionmaker had to weigh the evidence he had available, and there was no evidence the decisionmaker did not honestly believe that the plaintiff had committed the alleged misconduct. Summary judgment affirmed.

B. CAT'S PAW

Coffman v US Steel Corp, 2016 US Dist LEXIS 59701 (ED MI, 2016). A triable race case was raised with allegations applying the cat's paw analysis. Plaintiff a Caucasian woman asserted claims against an African-American woman, an intermediate supervisor accused of acting on discriminatory animus to cause the direct supervisor to take action against the plaintiff. The Court held that plaintiff raised a genuine issue of material fact concerning whether the intermediate supervisor acted with intent to cause adverse employment actions and thereby proximately caused such actions. The intermediate supervisor chose to write the incident reports underlying all of plaintiff's discipline. The only purpose of such reports is to recommend disciplinary action. The Court held that there was little evidence that plaintiff's immediate supervisor or the decisionmaker exercised independent judgment in deciding whether to forward the reports to or in deciding whether to impose discipline.

EEOC v New Breed Logistics, 783 F3d 1057 (CA 6, 2015). There was sufficient evidence to support the jury's conclusion that a biased former supervisor influenced the decision to terminate the plaintiffs. The former supervisor took credit for getting two employees fired and criticized the employees' work ethic to the new supervisor, who admitted that she usually trained new employees and gave them at least a month to adjust.

Thomas v Berry Plastics Corp, 803 F3d 510 (CA 10, 2015). "We conclude that Berry's independent termination review process broke the causal chain between Morton's purported retaliatory animus and Thomas's termination."

Zamora v City of Houston, 798 F3d 326 (CA 5, 2015). Although the plaintiff proffered no evidence that the ultimate decisionmaker was biased, and that there were multiple levels of unbiased review, the verdict for plaintiff was affirmed because the decisionamkers completely relied on a biased supervisor's statements and conducted no independent investigation.

Miller v Polaris Labs, LLC, 797 F3d 486 (CA 7, 2015). Evidence that two non-decisionmakers who had made racist comments deliberately manipulated materials to make it more difficult for the plaintiff to meet her production numbers created a triable discrimination case under the cat's paw theory. There was evidence that the decisionmakers accepted the plaintiff's performance numbers "unquestionably," even though they knew the plaintiff's ability to make her numbers had been sabotaged.

France v Johnson, 795 F3d 1170 (CA 9, 2015). The plaintiff created a triable age claim with evidence that a supervisor with a "significant and influential" role in the decision not to promote the plaintiff made ageist remarks shortly before the adverse decision. The remarks included stating a preference for "young, dynamic agents" and repeatedly asking the plaintiff about his retirement plans.

Huthens v Chicago Bd of Education, 781 F3d 366 (CA 7, 2015). The plaintiff could proceed to trial true even though the ultimate decision was made by an African-American because the decisionmaker received information from Caucasian subordinates.

C. CONSTRUCTIVE DISCHARGE

Wright v Illinois Department of Children & Family Services, 798 F3d 513 (CA 7, 2015). District court correctly rejected a proposed jury instruction, which said that constructive discharge occurred if "at the time the employee resigns or retires, the employee reasonably believes that, had he not resigned or retired, he would have been immediately fired." The proposed instruction improperly emphasized the employee's subjective belief. The instruction should instead emphasize the actions of the employer, such as by saying that the employer's actions caused the employee to reasonably believe termination was eminent, or that the employer somehow communicated that termination would necessarily follow certain conduct. The error was not harmless, because there was no evidence that the employer had decided to terminate the plaintiff for failing to follow a certain directive.

D. SUMMARY JUDGMENT

Packer v Trustees of Indiana University School of Medicine, 127 FEP Cases 1748 (CA 7, 2015). Summary judgment appropriately granted because the plaintiff failed to support her factual assertions with appropriate citations to the record. Her response brief referred generally to affidavits or depositions, without pointing to specific pages or paragraphs.

Martinez v Southwest Cheese Company, 2015 US App LEXIS 10249 (CA 10, 2015). District court was within its discretion in striking sections of the plaintiff's affidavit, which alleged and described discriminatory comments she could not recall at her deposition.

E. ARBITRATION

Savant v APM Terminals, 776 F3d 285 (CA 5, 2015). Memorandum of Understanding between the employer and the plaintiff's union submitting ADEA

claims to the contractual grievance/arbitration process was enforceable. The district court correctly dismissed the plaintiff's claim in lieu of arbitration.

F. MINISTERIAL EXCEPTION

Conlon v InterVarsity Christian Fellowship/USA, 777 F3d 829 (CA 6, 2015). The ministerial exception precludes a court from reviewing a Christian employer's decision to fire a spiritual director for not reconciling her marriage. The plaintiff performed a spiritual function for a religious organization, and there was no evidence that the ministerial exception was waived. The ministerial exception, which is rooted in the First Amendment, can be asserted as a defense against state law claims.

G. DAMAGES

Wiercinski v Mangia 57, Inc, 787 Fed 106 (CA 2, 2015). A manager's rather severe anti-Sematic slurs toward the plaintiff were capable of sustaining his religious and national origin discrimination claims. Punitive damages were inappropriate, however, because evidence showed that the person to whom the plaintiff complained tried to address the problem by granting the plaintiff's transfer and shift requests.

H. AFFIRMATIVE ACTION

Shea v Kerry, 796 F3d 42 (CA DC, 2015). The Caucasian plaintiff could not sustain a "reverse" race claim, where the employer was acting pursuant to a lawful affirmative action plan designed to increase minority representation. There was evidence capable of supporting the conclusion that there had been past discrimination with continuing effects, and that the plan did not act as an "absolute bar" to the hire or promotion of Caucasian candidates.

I. ESTOPPEL/CLAIM PRECLUSION

Barr v Bd of Trustees of Western Illinois University, 796 F3d 837 (CA 7, 2015). Former employee is barred from bringing a retaliation suit against the board of trustees when his prior lawsuit against the university was dismissed for failure to serve. Although the plaintiff's new theories are slightly different, the cases arose from the same operative facts and, under Rule 41, a dismissal for failure to prosecute operates as a dismissal on the merits.

Magee v Hamline University, 775 F3d 1057 (CA 8, 2015). The plaintiff's race discrimination claim is barred by the First Amendment retaliation claim she unsuccessfully pursued in federal court. The claims arose from the same

operative facts, and the plaintiff could have raised the race claim in the prior case.

J. ATTORNEYS' FEES

EEOC v CRST Van Expedited, Inc, 774 F3d 1169 (CA 8, 2015). The Circuit Court remanded the District Court's decision to award the employer over $4 million in attorneys' fees and costs, where the EEOC succeeded on one of 154 individual claims. The district court failed to make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim. The district court also failed to determine what fees, in any, were expended solely because of the frivolous allegations.

K. EXPERT WITNESSES

EEOC v Freeman, 778 F3d 463 (CA 4, 2015). The district court did not abuse its discretion in excluding the EEOC's expert reports as unreliable under Fed. R. Evid. 702 because there were an alarming number of errors and analytical fallacies in the expert's reports. The sheer number of mistakes and omissions in the expert's analysis rendered it outside the range where experts might have reasonably differed.

L. EMPLOYEE/EMPLOYER STATUS

Casey v HHS, 807 F3d 395 (CA 1, 2015). Summary judgment to U.S. Department of Health and Human Services on Title VII retaliation claim brought by contract nurse coordinator assigned to Air Force base was affirmed. Plaintiff claimed the department persuaded her employer, a contractor, to terminate her because she reported to the military police that a federal government employee sexually assaulted her when she confronted him about a negative performance report he submitted about her to her employer. On appeal, the court found that a retaliation claim may only be brought by a defendant's employee. Contrary to the nurse coordinator's joint employment argument, the court analyzed several factors found in the EEOC Manual and determined that plaintiff was an employee of a contractor, not HHS.

Loce v JP Cullen & Sons, 779 F3d 697 (CA 7, 2015). The court applied a five-factor test that evaluated both control and "economic realities" to hold that a general contractor could not be liable to a subcontractor's foreman. The general contractor did not hire, directly control, supervise or pay the plaintiff. Nor did

the plaintiff have any expectation of working for the general contractor after the specific project ended.

EEOC v Northern Star Hospitality, Inc, 777 F3d 898 (CA 7, 2015). District court did not abuse its discretion in holding a successor company liable for the discrimination of a dissolved business where: (a) the new entity had notice of the lawsuit; (b) the same shareholder owned both companies; (c) the old and new businesses served food to the public at the same location; and (d) the evidence suggested the new entity was capable of providing the requested relief.