2015 LEGAL DEVELOPMENTS

Laws governing Arizona employers come from several places:

- Federal: Congress (statutes), White House (executive order), agencies (advice, decisions, regulations), federal courts (decisions).

- State: Legislature (statutes), agencies (administrative code), courts (decisions).

Each of these entities and organizations issues multitudes of decisions and guidance each year. For the year 2014, here are a few we think you should particularly be aware of.

FEDERAL STATUTES

S.2486. A bill entitled "Restoring Overtime Pay for Working Americans Act," was introduced last year, purportedly to "restore overtime protections for low- and mid-wage salaried workers." It has not (yet) been re-introduced this session. The legislation would help to restore the 40-hour workweek for these workers. Key provisions of the bill included:

- Gradually raising the overtime salary threshold for executive, administrative, and professional (EAP) workers from $455 a week to $1,090 a week to match the inflation-adjusted level from 1975.

- Gradually raising the threshold for "highly-compensated employees" from $100,000 to $125,000, based on inflation since the concept was introduced in the regulations in 2004, and indexing it to inflation after that.

- Creating a "commonsense" definition of the term "primary duty." This term is used in regulations to determine if a worker's duties are overtime-exempt. Prior to 2004, a primary duty was that which was performed the majority of the time. Regulations issued in 2004 removed that 50% threshold. The bill would restore a 50% threshold.

- Establishing recordkeeping penalties. Additionally, the bill would establish penalties for violations of the recordkeeping provisions of the FLSA, which would be the same as for violations of minimum wage or overtime: up to $1,100 if the violation is willful or repeated. Currently in Committee (updated 8/12/14)

H.R. 465 / S.233. Working Families Flexibility Act of 2015. Would allow private employers to provide comp time to employees in lieu of overtime. In committee.

EXECUTIVE ORDERS

Here is a very, very general description of Executive Orders entered since January 1, 2014. Companies with federal contracts are urged to investigate each of these in more detail.

Executive Order 13658. Establishes a minimum wage for federal contractors.

Executive Order 13665. Makes it unlawful to retaliate against an employee of a federal contractor for disclosing the employee's compensation information.

Executive Order 13672. On July 21, 2014, President Obama issued an Executive Order which prohibits federal contractors and subcontractors from discriminating based on an applicant's or employee's sexual orientation or gender identity. Consistent with this Order, the Office of Federal Contract Compliance Programs (OFCCP) issued Directive 2014-2 stating that its policy is to fully investigate and remedy instances of sex discrimination based on an employee's gender identity or transgender status.

Executive Order 13673 On July 31, 2014, President Obama issued Executive Order 13673 which has several parts:

- requires bidders, federal contractors, and subcontractors whose federal contracts exceed $500,000 to track and report adverse administrative merit determinations, arbitral awards or decisions, and civil judgments for three years.

- requires covered federal contractors and subcontractors to provide each employee a document every pay period containing the employee's hours worked, overtime hours, pay, and any additions to or deductions from pay.

- requires federal agencies to ensure that contracts with estimated values exceeding $1 million contain a clause forbidding contractors from requiring pre-dispute agreements to arbitrate Title VII claims or any tort arising from sexual assault or harassment.

- Effective January 1, 2015, requires federal contractors and subcontractors to pay employees who work on new federal contracts or subcontracts (and replacements for expiring federal contracts or subcontracts) a minimum wage of $10.10 per hour, plus 1.5 times the new minimum wage for all overtime worked on government contracts.

FEDERAL AGENCIES

National Labor Relations Board

The NLRB routinely rules in cases brought before it. The following is not intended to be an exhaustive list of such cases, but rather a few cases that are important in Arizona, even for non-union workforces.

In May 2014, the National Labor Relations Board ruled that an employer violated the National Labor Relations Act (NLRA) by firing five non-union employees for comments they posted on Facebook.

On December 11, 2014, the NLRB ruled that employees with access to their employer's email system must be allowed to use the system during non-working hours for communications protected by the National Labor Relations Act, including union organizing and discussions about wages and working conditions.

On December 12, 2014, the NLRB approved new rules that will allow it to speed up the scheduling of union elections and, as a result, quite possibly make it easier for unions to secure election victories. The rules will become effective on April 14, 2015. Currently, the time between the filing of the petition and the election is 38 days. Under the new rules, a Regional Director could hold elections between 10 and 20 days of the filing of the petition for election. This will seriously hamper the employer's ability to campaign against the union.

During 2014, the NLRB brought complaints against over 40 unfair labor practice proceedings based on charges by unions against McDonalds franchises. In each, the claims include allegations that the franchisor (McDonalds) is a joint employer with each of the franchisees. These cases are making their way through the system; McDonalds is fervently denying that it is a joint employer.

United States Department of Labor

FLSA - Home Care. January 2015: The new home caregiver rules were set to go into effect. Under the old rule, people who cared for others in the home of the client were exempt from minimum wage and overtime requirements – even if the worker was paid by a company that was in the business of providing such care. Congress did not change any of its language, but the Agency announced that, after 40 years, such individuals must now be paid minimum wage and overtime. The posture of the new rule is unclear, as one court has held the new regulation to be invalid. For now, the Agency has announced that it will not enforce the new regulation until June 2015; however, it is still on the books and an individual claimant may still bring an action.

FMLA. February 2015: The Department of Labor modified the language of the Family and Medical Leave Act (FMLA) to define "spouse" to include same-sex spouses, so long as the union was legal in the state where it was entered into.

In general, the DOL has increased its audit of employers for FMLA compliance, as well as for FLSA (wage and hour) compliance.

EEOC

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 2014). This Guidance explains the EEOC's position on various topics related to child birth:

- The Pregnancy Discrimination Act (PDA) prohibits discrimination on the basis of current or past pregnancy; potential or intended pregnancy; as well as infertility and medical conditions related to pregnancy or childbirth. PDA also prohibits discrimination on the basis of an employee's caregiver responsibilities;

- Lactation as a covered pregnancy-related medical condition;

- Employers must treat pregnant employees the same as non-pregnant employees regarding their ability or inability to work for purposes of leave and light duty;

- Employers cannot force a pregnant employee who is able to perform her job to take a leave of absence;

- Parental leave must be extended to men as well as women;

- Guidance reaffirms that under the ADA, the term "disability" must be broadly construed and, while pregnancy itself is not a disability under the ADA, pregnancy-related impairments may qualify as a disability;

- Employers must extend reasonable accommodations to pregnant employees;

- Best Practices – The guidance includes a series of "best practices" for employers to adopt: developing and enforcing leave; light duty and related policies that comply with the guidance; training managers and employees on their rights and responsibilities related to pregnancy, childbirth and related medical conditions; and adopting nondiscriminatory hiring practices.

In 2014, the EEOC filed suit challenging the legality of company wellness programs;

Honeywell case, filed in October, 2014 – In this company's wellness program, employees and their spouses got blood draws for cholesterol, glucose and nicotine screens as well as have their BMI and BP measured. If the employee refused, he was subject to a $500 surcharge on health insurance and could lose up to $1500 in employer contributions to his HSA.

EEOC is taking aim at the "do it or else" approach that employers who offer financial incentives for workers to take part in programs that incorporate blood pressure, cholesterol, body mass index screenings and the like.

EEOC's focus seems to be on programs that are not voluntary.

There is a lack of clarity in the standards these programs must meet to comply with both HIPAA, the ADA and GINA (no regulations or standards).

[House and Senate Republicans March 2 introduced legislation (H.R. 1189, S. 620) aimed at reaffirming that employers legally may offer financial incentives that reduce health insurance premiums for employees who participate in employer-sponsored wellness programs.]

FEDERAL COURTS

United States Supreme Court

Young v. United Parcel Service (pending). We await a decision from the Supreme Court which will determine whether the Pregnancy Discrimination Act of Title VII should be interpreted to require accommodations for pregnant workers (such as temporary light duty positions) if those same accommodations are offered to a different class of non-pregnant workers similar in their ability or inability to work. As noted above, the EEOC's guidance suggests such accommodations.

Mata v. Holder, et al. (pending). Several cases have been consolidated, and the Supreme Court has granted cert to determine whether states can ban gay marriage.

Mach Mining Co. v EEOC (pending). The question before the Court is whether and to what extent courts may preclude a lawsuit with the EEOC as plaintiff if it failed to fully conciliate the claims before filing suit (as it is obligated by statute to do).

EEOC v. Abercrombie & Fitch Stores, Inc. (pending) A 17-year-old Muslim female interviewed for a retail job, was rated highly in the interview, but was ultimately denied the position because she was wearing a hijab that the retailer said violated its "no hat" policy. Because she didn't ask for an accommodation or mention that the headscarf was for religious purposes, the Tenth Circuit said she didn't put the company on notice and the store didn't have to assume it was worn for religious reasons.

Hobby Lobby, Inc. v. Sebelius (U.S. 2014). U.S. Department of Health and Human Services regulations require group health plans to provide preventive care to women at no cost. Although there is an exception for churches and other non-profit religious institutions, there is none addressing for-profit organizations. The Court struck down the contraceptive mandate, as applied to closely-held corporations that have sincere religious objections to providing contraceptive coverage.

Integrity v. Busk (U.S. 2014). The Court found that time employees spent waiting to undergo and undergoing security screening was not compensable under the Fair Labor Standards Act (FLSA).

NLRB v. Noel Canning (U.S. 2014). On June 26, 2014, the Court ruled that President Obama lacked the authority to make the three January 9, 2012 recess appointments to the NLRB, thereby requiring the Board to reconsider many of the 800 cases decided between that date and July 30, 2013.

Ninth Circuit Court of Appeals

Alexander v. FedEx Ground Package Systems, 765 F.3d 981 (9th Cir. 2014). The Court found that FedEx was improperly designating its drivers as independent contractors rather than employees. Result? Drivers will be entitled to overtime for previous 2-3 years (doubled) and other benefits such as social security contributions, insurance and FMLA. ***Take-away: Most workers are employees, not independent contractors. Make very certain any worker you pay as an independent contractor is legitimately so.***

Ambat v. City & County of San Francisco, 757 F.3d 1017 (9th Cir. 2014). Summary judgment reversed (so matter could proceed to trial). Sheriff had policy that male deputies could not supervise female inmates. The sheriff's office argued that it was a bona fide occupational qualification (BFOQ) – court said there were arguments as to whether policy was a legitimate means of ensuring inmate safety. ***Take-away: Gender preference policies are rarely upheld – even if the preference is one expressed by clients.***

Arizona v. ASARCO LLC, 773 F.3d 1050 (9th Cir. 2014). In a Title VII sexual harassment case, the jury returned a verdict awarding plaintiff $1.00 in actual (nominal) damages and $868,750 in

punitive damages. ***Take-away: Courts and juries make decisions about who is the bad actor in a particular case. Always be sure your supervisors and your documents portray the company in the best possible light – as an employer who cares about its employees.***

Curley v. City of North Las Vegas, 772 F.3d 629 (9th Cir. 2014). Where city had documented proof that it terminated employee for nonperformance of duties and threatening behavior, employee's ADA claim that he was terminated because of his hearing impairment did not make it to trial – even though the employer put up with his behavior for a long time. ***Take-away: Document, document, document***

EEOC v Peabody Western Coal Co., 768 F.3d 962 (9th Cir. 2014). A hiring preference for Navajo Indians contained in the employer's coal leases with the Navajo Nation did not run afoul of Title VII. The preference was based on a "political classification," not a classification based on "national origin." Title VII does not reach tribal hiring preferences based on political classifications.

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236 (9th Cir. 2014). Because employer had no documentary evidence verifying that employee explicitly declined to have her leave count as FMLA leave, the matter went to trial. A jury found that an employer did not interfere with an employee's FMLA rights when it fired her for violating its "three day no-show, no-call rule." ***Take-away: Document, document, document.***

Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072 (9th Cir. Cal. 2014). Plaintiff filed class action to recover unpaid overtime. Employer argued that plaintiff (and others) had entered into valid agreement to arbitrate such claims which included a class action waiver. ***Takeaway: Valid arbitration agreements may be useful in the employment context, particularly to avoid class action wage and hour actions. Warning: Not all arbitration agreements are valid; they must be carefully crafted.***

Landers v. Quality Communications, Inc., 2015 U.S. App. LEXIS 1290 (9th Cir. 2015). Court announced new pleading standard for employees alleging that they are owed overtime and/or minimum wages. At a minimum, plaintiff must allege at least one workweek when he worked in excess of 40 hours and was not paid overtime (or one week in which he was paid less than minimum wage). ***Takeaway: Wage and hour lawsuits are on the rise in Arizona; be sure your compensation plans have been reviewed to ensure that you are following the law.***

Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014). Employer put employee on leave for failure to get along with coworkers. During leave, it interviewed 28 coworkers. Employee submitted doctor's note indicating he suffered from ADHC. Employer conducted an independent medical examination, which concluded that employee was fit for duty. It then terminated him for his continued failure to get along with others. The court overturned a jury verdict in favor of employee. ***Take-away: When dealing with potentially disabled employee, proceed cautiously and … document.***

United States District Court for the District of Arizona

During 2014, at least 74 cases were filed in the District of Arizona against employers alleging that employees were not paid in accordance with the Fair Labor Standards Act (mostly for overtime).

Alarco v. Arriba Mexican Grill (and other consolidated cases). (D. Ariz. 2014). There are more than 30 cases currently pending in the United States District Court for the District of Arizona alleging that restaurant servers are being underpaid. Plaintiffs allege that they must be paid full minimum wage (rather than the reduced wage for tipped employees) anytime they perform services that are non-tip-producing (such as cleaning).

Vallejo v. Azteca Elec. Constr., Inc., 2015 U.S. Dist. LEXIS 11780 (D. Ariz. 2015). If an employer is found to have underpaid an employee, it must pay back wages and, in most cases, liquidated damages in an amount equal to the back wages. This court found that workers who are not authorized to work in the United States are not precluded from recovering back wages or liquidated wages.

STATE LEGISLATURE

House Bill 2502: would regulate meal and rest periods. Currently, no Arizona law requires such breaks and strict guidelines such as these could cause substantial litigation (as you now see in California).

House Bill 2188: would expand the traits protected by discrimination and harassment laws to include "gender, gender identity or expression, or sexual orientation."

House Bill 2505: would require employers to provide paid sick leave.

House Bill 2500: would require all Arizona employers to provide 2 weeks of unpaid leave per year to employees with a family member in the military.

Senate Bill 1013: would double the statute of limitations for filing a discrimination lawsuit under Arizona law (from 1 year to 2 years) and increase the damages available to a claimant under Arizona's version of anti-discrimination laws.

Senate Bill 1110: would make it unlawful to terminate an employee for leaving work in response to a call from their child's school.

Senate Bill 1253: would limit an employer's inquiries into an applicant's criminal convictions.

Senate Bill 1061 (striker): Clarifies minimum wage as applied to employees who earn commissions or piece-rate wages in place of (or in addition to) hourly wages.

STATE COURTS

Arizona Supreme Court

None.

Arizona Court of Appeals

Harris v. GoDaddy.com, Inc., 2015 Ariz. App. Unpub. LEXIS 62 (2015). Under Arizona Employment Protection Act, it is unlawful for an employer to fire an employee in retaliation for the employee's disclosure of the employer's violation of state law. Here, complaint about treatment of discretionary bonuses (for federal overtime purposes) did not count. ***Takeaway: Retaliation claims are difficult to defend. If an employee has engaged in any protected activity, be doubly sure that you have well-documented reasons for termination.***

Harris v. GoDaddy.com, Inc., 2015 Ariz. App. Unpub. LEXIS 62 (2015). Plaintiff alleged that he was terminated for asserting a right under the Arizona Minimum Wage Act. Under that statute, if the discharge occurs within 90 days after protected activity, the Act puts the burden on employer to show by "clear and convincing evidence" that discharge was for other permissible reason(s). GoDaddy made that showing by demonstrating that employee was fired for a security breach. ***Takeaway: Document, document, …***

Larson v. United Natural Foods West Inc., 2014 Ariz. App. Unpub. LEXIS 180 (2014). To overcome the presumption of at-will employment, the Arizona Employment Protection Act requires a written agreement "expressly" restricting the right of either party to terminate the employment relationship. Court held that no such express written agreement arose out of employee handbook or handwritten notes. ***Takeaway: Review all written agreements (and other documents) to ensure that they contain at-will disclaimer***.

Manzo v. Hayman, 2015 Ariz. App. Unpub. LEXIS 86 (2015). Court found that occasional sexual remarks and one clearly inappropriate email were not sufficiently severe and pervasive to render the employer liable for sexual harassment. ***Takeaway: Monitor all employee conduct, including specifically supervisors. If they behave in an inappropriate manner, address it immediately.***

OTHER JURISDICTIONS

I. DISABILITY DISCRIMINATION

A. IN GENERAL

Kauffman v Petersen Health Care VII, LLC, 769 F.3d 958 (CA 7, 2014). Summary judgment was improperly granted because there was a factual dispute about the difficulty, of having another employee assume the wheelchair pushing duties the plaintiff was medically unable to perform. While the employer claimed wheelchair

pushing was a regular duty, such that relieving the plaintiff of that duty would require it to hire someone else, the plaintiff claimed wheelchair pushing was a minor aspect of her work. This created a factual dispute for trial.

Moreover, a manager said in deposition that the employer did not allow people with permanent restrictions to work. Such a policy would violate the act by eliminating the possibility of a reasonable accommodation.

Tramp v Associated Underwriters, 768 F.3d 793 (CA 8, 2014). Summary judgment properly granted, even though the plaintiff was fired just before going to surgery. There was no evidence that a decision maker was aware of her surgery.

Withers v Johnson, 763 F.3d 998 (CA 8, 2014). Summary judgment properly granted. Requiring the plaintiff to provide his supervisor a medical release following leave did not fun afoul of the ADA.

Cody v Prairie Ethanol, LLC, 763 F.3d 992 (CA 8, 2014). Pretext not established with (a) evidence of a close temporal proximity between termination and a supervisor's learning the plaintiff would need two additional months of light duty, and (b) combined with claims that the basis for termination is false. Timing alone cannot establish pretext, and evidence shows that the plaintiff was repeatedly counseled and disciplined for the overly aggressive behavior that got him fired. Summary judgment affirmed.

EEOC v Product Fabricators, Inc., 763 F.3d 963 (CA 8, 2014). Allegation that others had received written warnings or were written up before termination did not establish dissimilar treatment. The performance issues were dissimilar and, "[t]he fact that some employees received either written or verbal reprimands, without more, does not indicate that the company had an established policy."

Smothers v Solvay Chemicals, Inc., 740 F.3d 530 (CA 10, 2014). "Although there is no clear legal rule as to how much overlap is needed among decision maker *groups* for employees to be similarly situated, requiring absolute congruence would too easily enable employers to evade liability for violation of federal employment laws. The district court erroneously rejected Mr. Smothers' pretext argument by insisting that the composition of the decision maker groups be precisely the same in every relevant disciplinary decision." Plaintiff could validly compare himself to employees with different supervisors because those employees performed similar jobs and violated similar rules. Summary judgment was improper, where evidence showed that comparable employees without disabilities who did not take FMLA leave were treated more favorably after similar misconduct.

Spurling v C&M Fine Pack, Inc., 739 F.3d 1055 (CA 4, 2014). Summary judgment reversed because there was evidence that the employer knew before finally terminating plaintiff that performance deficiencies leading to termination were disability-related. Although the employer did not know about the disability when it suspended the plaintiff pending an investigation into whether the plaintiff should be terminated, it clearly knew of the disability before unequivocally deciding to terminate. Once it learned of the disability, the employer had a duty to engage in the interactive process in an effort to find a reasonable accommodation.

Brumfield v City of Chicago, 735 F.3d 619 (CA 7, 2014). "[W]e join the Ninth and Tenth Circuits and hold that Title II of the ADA does not cover disability-based employment discrimination. Instead, employment-discrimination claims must proceed under Title I of the ADA, which addresses itself specifically to employment discrimination and, among other things, requires the plaintiff to satisfy certain administrative preconditions to filing suit. See 42 U.S.C. §§ 12117(a), 2000e-5. Brumfield's Title II claim was properly dismissed."

The plaintiff's Rehabilitation Act claim also failed. "Brumfield argues that her conduct during the feigned-injury incident was merely a manifestation of her psychological problems and that she was therefore discharged because of her disability. This does not save her claim, however. An employer may fire an employee for engaging in unacceptable workplace behavior without violating the ADA (or the Rehabilitation Act), even if the behavior was precipitated by a mental illness."

B. ESSENTIAL FUNCTION/QUALIFIED FOR POSITION

Jarvela v Crete Carrier Corporation, 754 F.3d 1283 (CA 11, 2014). The plaintiff, who had been diagnosed with alcoholism, was not qualified for a commercial truck driver job because DOT regulations prohibit anyone with a "current clinical diagnosis of alcoholism" from driving commercial trucks. The employer did not violate the ADA in testing the plaintiff for alcoholism and disqualifying him for having the condition.

Hwang v Kansas State University, 753 F.3d 1159 (CA 10, 2014). The employer did not violate the Rehabilitation Act by failing to extend the leave of a cancer patient who had already exhausted the maximum six months of paid leave. The plaintiff cannot show she was qualified to perform the position when, by her own admission, she was unable to work during her leave. "[A]n employee who needs a brief absence from work for medical care can often still discharge the essential functions of her job. Likewise, allowing such a brief absence may sometimes amount to a (legally required) reasonable

accommodation so the employee can proceed to discharge her essential job duties. After all, few jobs require an employee to be on watch 24 hours a day, 7 days a week without the occasional sick day." "Still, it's difficult to conceive how an employee's absence for six months – an absence in which she could not work from home, part-time, or in any way in any place – could be consistent with discharging the essential functions of most any job in the national economy today." "It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions – and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation." "After all, reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work."

"Neither is there anything inherently discriminatory in the fact that the University's six-month leave policy is 'inflexible,' as Ms. Hwang would have us hold. To the contrary, in at least one way an inflexible leave policy can serve to protect rather than threaten the rights of the disabled – by ensuring disabled employees' leave requests aren't secretly singled out for discriminatory treatment, as can happen in a leave system with fewer rules, more discretion, and less transparency."

EEOC v Ford Motor Co, 752 F.3d 634 (CA 6, 2014), *en banc rev granted* 8/29/14. The district court erred in ruling that the plaintiff, who could not physically appear at work as Ford required, was not qualified for a retail buyer position. "When we first developed the principle that attendance is an essential requirement of most jobs, technology was such that the workplace and an employer's brick-and-mortar location were synonymous. However, as technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location." "Determining whether physical presence is essential to a particular job is a 'highly fact specific' question."

There was a factual question whether attendance at work was an essential function. Ford deemed physical presence essential because it utilized a team-based approach to retail buying whereby team members needed to meet in person to discuss status and strategy. But the plaintiff raised a fact question on the issue by arguing that she could attend meetings by telephone and arrange in-person client meetings when she felt physically up to it.

While Ford's view that physical presence is essential is a factor to consider, the court refused to defer to that view because: "we should not abdicate our responsibility as a

court to company personnel boards: While we do not allow plaintiffs to redefine the essential functions of their jobs based on their personal beliefs about job requirements, neither should we allow employers to redefine the essential functions of an employee's position to serve their own interests. Rather we should carefully consider all the relevant factors, of which the employer's business judgment is only one."

Ford could be liable for failing to accommodate the plaintiff even though it offered her at least two accommodations, including offering her positions she could work at home. "[A]lthough the employer ordinarily has the option of choosing an accommodation from among other reasonable options, Ford was not entitled to force Harris to accept an alternative position in this case because the telecommuting arrangement proposed by Harris was a reasonable means of accommodating her disability."

Samson v Federal Express Corp, 746 F.3d 1196 (CA 11, 2014). The ability to drive is not an essential function of a FedEx mechanic. FedEx withdrew its job offer to an insulin-dependent diabetic mechanic based on a new DOT regulation prohibiting insulin dependent diabetics from operating commercial vehicles in interstate commerce. FedEx argued that mechanics needed to test drive the vehicles they fix, and therefore needed to operate commercial vehicles in interstate commerce. But the evidence showed that, on average, mechanics spent only a few hours per year test driving trucks and generally do not transport commerce between states.

Rorrer v City of Stow, 743 F.3d 1025 (CA 6, 2014). The trial court erred in giving "deference" to the employer's view of the essential job functions. "The statute states that the court should give 'consideration' to the employer's determination, not 'deference'." Giving "deference" to the employer's judgment would create an improper presumption in favor of employers.

Summary judgment improperly granted, where there was a material factual dispute concerning whether driving a fire truck under emergency lights was an essential function of a Stow firefighter. Although NFPA guidelines suggest that all firefighters must be able to perform this function, the department never adopted NFPA guidelines and the decision maker was not even familiar with them. Moreover, there was some evidence that not all firefighters drove fire trucks in emergencies, and that it would be easy to accommodate one employee's inability to drive under emergency lights.

C. ACCOMMODATIONS/INTERACTIVE PROCESS

Reeves v Jewel Food Stores, Inc., 759 F.3d 698 (CA 7, 2014). "A tentative request for an accommodation to address minor theft [by an employee with Downs syndrome] does

not imply a request for an accommodation for inappropriate verbal outbursts that violate the employer's anti-harassment policies." Therefore, and particularly where the store had accommodated other issues for which the plaintiff had requested accommodation, store had no duty to accommodate the plaintiff's verbal outbursts.

Bunn v Khoury Enterprises, Inc., 753 F.3d 676 (CA 7, 2014). Summary judgment proper, despite allegations that the employer failed to engage in the interactive process or caused the process to break down, where the plaintiff was ultimately given a reasonable accommodation. There is no separate cause of action for failing to engage in the interactive process. In this area of law, courts are concerned with the ends, not the means.

Parada v Banco Industrial De Venezuela, 753 F.3d 62 (CA 2, 2014). The plaintiff, who had a spinal injury that prevented her from sitting for long periods, raised a triable failure to accommodate case with evidence that the employer ignored her two requests for an ergonomic chair.

D. MEDICAL RECORDS

Wetherbee v The Southern Co, 754 F.3d 901 (CA 11, 2014). A plaintiff cannot recover under §12112(d)(3)(C) (the provision prohibiting misuse of medical information) without establishing that the plaintiff is "disabled" under the ADA. "[W]hether or not the results of an exam under (d)(3)(C) were used in accordance with the applicable subchapter turns on whether there was discrimination on the basis of disability, and discrimination on the basis of disability cannot occur unless the claimant is disabled."

E. SUBSTANTIAL LIMITATION/DEFINITION OF "DISABILITY"

Mazzeo v Color Resolutions International, 746 F.3d 1264 (CA 11, 2014). The plaintiff's disc herniation problems, which resulted in pain, surgery and limited his ability to walk, bend, sleep and lift more than ten pounds, was a disability under the ADAAA.

Summers v Altarum Institute, Corp, 740 F.3d 325 (CA 4, 2014). A temporary impairment caused by an injury can be a "disability" under the ADAAA if it is "sufficiently severe" to substantially limit a major life activity. The ADAAA broadened the definition of disability and overrides *Toyota Motor Mfg, Kentucky, Inc. v Williams,* 534 US 184, which suggested that a temporary impairment could not constitute a disability. Moreover, the EEOC revised its regulations at Congress'

direction and clarified that the term "substantially limits" is to be construed broadly, that "substantially limits" is not a demanding standard, and that the duration of a disability is just one factor to consider. The relaxed standard favored plaintiff, who got into an accident that left him unable to walk for at least seven months.

Parada v Banco Industrial De Venezuela, 753 F.3d 62 (CA 2, 2014). The inability to sit for long periods of time because of a spinal injury qualified as a "disability" under the pre-2009 ADA. The district court erred in categorically ruling that the inability to sit non-disabling.

Brumfield v City of Chicago, 735 F.3d 619 (CA 7, 2014). The district court properly dismissed the plaintiff's disability discrimination claim, even though the plaintiff's condition allegedly made her vulnerable to workplace stress, because the plaintiff did not allege that this vulnerability prevented her from performing an essential function of the job.

F. MEDICAL TESTS/INQUIRIES

Bates v Dura Automotive Systems, Inc., 767 F.3d 566 (CA 6, 2014). Summary judgment improper for either side where the employer tested all employees for illegal and prescription drugs, directed employees taking prescriptions to tell the testing agency what drugs they were taking, and terminated all employees who continued using prescriptions packaged with machinery operation warnings. "Dura's drug-testing protocol pushes the boundaries of the EEOC's medical-examination and disability-inquiry definitions. It certainly goes further than what the ADA's drug-testing exemption specifically permits, see 42 U.S.C. § 12114(d), but does not clearly fit the EEOC's definitions and examples of prohibited conduct." "Accepting the EEOC's fact-bound definitions of 'medical examination' and 'disability-related inquiry' as reasonable, we conclude that a reasonable jury could decide these issues either way."

Kroll v White Lake Ambulance Authority, 763 F.3d 619 (CA 6, 2014). Following several emotional outbursts at work and an altercation with a co-worker, the employer ordered the plaintiff to undergo psychological counseling as a condition of continued employment. Summary judgment for the employer was improper because there is a question whether the examination was job-related. A reasonable juror could conclude that the person who ordered the examination had only limited information pertaining to the plaintiff's emotional outbursts at work, and that this limited information would not support the conclusion that Kroll was experiencing an emotional or psychological problem that interfered with her ability to perform her job functions. Similarly, the

employer was not entitled to summary judgment on a "direct threat" defense because the person who ordered the test was allegedly unaware of all the incidents that would support a contention that the plaintiff posed a direct threat.

II. SEX DISCRIMINATION

Douchette v Morrison County, 763 F.3d 978 (CA 8, 2014). Positive performance reviews did not show pretext because they preceded the billing errors that resulted in discharge. Summary judgment affirmed.

Fiero v CSG Systems, Inc., 759 F.3d 874 (CA 8, 2014). The plaintiff's claim that others were responsible for failing to get a key project done does not demonstrate that the supervisor did not honestly believe the plaintiff was at fault. A proposed comparator was not similarly situated because, unlike the plaintiff, the male comparator's performance improved after an adverse performance review. Summary judgment affirmed.

Orton-Bell v Indiana, 759 F.3d 768 (CA 7, 2014). A female prison employee who had a consensual intra-office affair with a male co-worker can proceed with sex harassment and discrimination claims because she was disciplined more severely than the male companion with whom she had the affair. The plaintiff was also subjected to a "constant barrage of sexually charged comments." Although the plaintiff and her male companion were subject to different "chains of command," they broke the same rule and had the same "ultimate supervisor."

EEOC v Audrain Health Care, Inc., 756 F.3d 1083 (CA 8, 2014). Male nurse failed to establish that the failure to transfer him to the operating room constituted sex discrimination, despite a manager's alleged statement that the doctors wanted more female nurses working there. The plaintiff never submitted a transfer request form and told a hospital supervisor that he did not want to work in the operating room. The court rejected the EEOC's contention that the lack of an application was excused as futile because the EEOC failed to present evidence sufficient to establish that there was an atmosphere of "gross or pervasive discrimination."

Ames v Nationwide Mutual Insurance Co, 747 F.3d 509 (CA 8, 2014). The plaintiff was not constructively discharged when, on the day she returned from pregnancy leave, a supervisor denied her access to a lactation room, told her she had only two weeks to catch up with her work, told her to "go home and be with your babies," mistakenly denied additional FMLA leave, and dictated what the plaintiff should say in her resignation letter. The plaintiff failed to show that these actions were designed to

compel her resignation where the plaintiff was supposed to have completed paperwork to entitle her access to a lactation room, and the offending supervisor attempted to accommodate plaintiffs concerns by directing the plaintiff to people who know more than she about the leave-related issues the plaintiff was concerned about. "Nationwide's several attempts to accommodate Ames show its intent to maintain an employment relationship, not force her to quit." "Although Nationwide incorrectly calculated Ames' FMLA leave, it made efforts to ameliorate the impact of its mistake. Neel did not discourage Ames from taking the FMLA leave to which Ames was entitled."

Garayalde-Rijos v Municipality of Caronia, 747 F.3d 15 (CA 1, 2014). The district court erred in dismissing the plaintiff's sex discrimination claim pursuant to Rule 12(b)(6). Although the plaintiff was hired for one of the eight positions she sought, "[t]he fact that Garayalde-Rijos was eventually hired does not mean there was not unlawful discrimination in the hiring decisions for the first seven firefighter positions" for which she unsuccessfully applied. This held particularly true where the plaintiff alleged that she was the only female applicant for some of the positions and had the best test scores.

Shazor v Professional Transit Management, LTD, 744 F.3d 948 (CA 6, 2014). The African-American female plaintiff presented a *prima facie* sex discrimination case, even though she failed to show that similarly situated people were treated better, because she was replaced a Hispanic woman – i.e., someone outside her specific protected class. This held true even though the female plaintiff was replaced with a female. The plaintiff's sex bias claims "cannot be untangled from her claim of race discrimination." "In the case now before us, both classifications – race and sex – are protected by Title VII. These characteristics do not exist in isolation. African American women are subjected to unique stereotypes that neither African American men nor white women must endure. And Title VII does not permit plaintiffs to fall between two stools when their claim rests on multiple protected grounds."

A prima facie sex-discrimination case was also supported with evidence that the plaintiff was referred to in emails by non-decision makers as disrespectful, disloyal, a "prima donna" and a "hellava bitch."

Rester v Stephens Media, LLC, 739 F.3d 1127 (CA 8, 2014). The female plaintiff, who quit after a male supervisor allegedly yelled and cursed at her during a meeting and physically prevented her from leaving the meeting, could not sustain a sex

discrimination claim. The plaintiff did not experience adverse employment action. The plaintiff also failed to show that the outburst occurred because she was female.

Clark v Cache Valley Electric Company, 123 FEP Cases 1460 (CA 10, 2014). The paramour preference can defeat a sex discrimination claim, even if the relationship is non-sexual. "[O]ther motives such as friendship, nepotism, or personal fondness or intimacy, rather than an actual sexual relationship, also suffice to remove the case from Title VII's anti-discrimination provisions." Summary judgment was therefore properly granted where a male supervisor favored a female employee based on a close personal, albeit non-sexual, relationship.

III. RACE/NATIONAL ORIGIN DISCRIMINATION

Buisson v Louisiana Community and Technical College System, ___ F.3d ___; 2014 US App LEXIS 21356 (CA 5, 2014). The Caucasian plaintiff could sustain her failure to promote claim with evidence that a key decision maker, who positioned himself to be an interviewer and solicited student complaints against the plaintiff, harbored and expressed strong pro-African-American sentiment. The plaintiff's termination claim was supported by evidence that said decision maker provided shifting and inconsistent reasons for discharging plaintiff.

Johnson v City of Memphis, 770 F.3d 464 (CA 6, 2014). Disparate impact claim failed where the plaintiffs failed to point to equally valid, less-discriminatory alternative testing methods.

Loyd v St Joseph Mercy Oakland, 766 F.3d 580 (CA 6, 2014). The plaintiff lacked a *prima facie* case of race or sex discrimination because she failed to show that she was replaced by a black female and could not show she was treated differently than similarly-situated people outside either protected class. Summary judgment affirmed.

Abrams v Department of Public Safety, 764 F.3d 244 (CA 2, 2014). Comments that a black state trooper "did not fit in" to an elite unit comprised of only white employees, and that others "fit in better," created a material question of fact for trial. In deposition, the two troopers to whom the remarks were made had different opinions about the underlying meaning of the comments: one thought the comments had nothing to do with race, while the other said it "crossed his mind" that the remarks referenced race. These differing opinions should have signaled to the trial court that a question of fact existed for trial.

Kirkland v Cablevision Systems, 760 F.3d 223 (CA 2, 2014). The following evidence supported a triable race discrimination claim: the plaintiff testified that a white manager falsified and backdated documents to support a negative performance review; a supervisor criticized plaintiff for using a "colored background" for a business presentation, stating that "there is no room for color in a business presentation" and how "white was better than color," a colleague said she thought a manager was racist and referred to him as "KKK without the hood," and management refused to investigate the plaintiff's complaint alleging race discrimination.

Mulrain v Castro, 760 F.3d 77 (CA DC, 2014). "The dispositive fact is that Cruciani ultimately decided to transfer Malone to the new DAGC position without knowing that Mulrain had applied for it. Whether Mulrain was more qualified or not, Cruciani could not have intended to discriminate against someone she did not even know wanted the job."

Matthews v Wauikesha County, 759 F.3d 821 (CA 7, 2014). The decision maker's testimony that she was unaware of the job applicants' race was not undermined by testimony (a) that certain names "possibly" were African-American, or (b) that the successful candidate's name Pricilla "sounded southern." The plaintiff's contention that believing that a name "sounded southern" translated into a belief that the candidate "fit the stereotype of the overly-accommodating African –American from the American South" is a flight of fancy and insufficient to support a discrimination case.

Tank v T-Mobile USA, Inc., 758 F.3d 800 (CA 7, 2014). A supervisor's mockery of the plaintiff's Indian accent was not sufficient to establish bias where the "isolated" conduct occurred more than three years before discharge. Regardless, the comments were made by a non-decison maker.

Brown v Daikin America Inc., 756 F.3d 219 (CA 2, 2014). The white plaintiff raised a plausible race discrimination claim with allegations that Japanese employees were treated better, and that only Americans were terminated in a reduction in force. The Japanese comparators were similarly situated, even though they worked for the Japanese parent company, because they had a common employer, mostly reported to the same supervisor and were subjected to the "same performance evaluation and disciplinary standards."

Hicks v JEH Charles Johnson, 755 F.3d 738 (CA 1, 2014). Summary judgment properly granted in a failure to promote case, despite allegations that the successful candidate lacked specific experience in the particular type of housing department, and

in the specific governmental department at issue. The successful candidate had experience on other relevant functions and more years of overall governmental experience. If the interviewers erred in judging the candidates' relative qualifications, there was nothing to suggest the error was anything but a permissible "garden-variety mistake in corporate judgment."

Young v Builders Steel Company, 754 F.3d 573 (CA 8, 2014). Summary judgment was properly granted. Although the plaintiff was the only African-American employee and had the most seniority, he failed to identify similarly-situated whites who were treated better. The plaintiff's efforts to compare himself to other bargaining unit workers in the same pay grade was unpersuasive because (a) pay grades were not necessarily linked to job similarity, and (b) the employees in the plaintiff's grade had different job classifications that required different certification and skills.

Barthelus v G4s Gov't Solutions, Inc., 752 F.3d 1309 (CA 11, 2014). The district court improperly granted summary disposition for the employer, even though the plaintiff had an "extensive history of negative performance reviews." The court wrongfully discounted the fact that the plaintiff had positive evaluations and salary increases until he complained about unfair treatment. Moreover, an independent auditor had reviewed the IT department where the plaintiff worked and concluded it was "above par and secure." Given that the plaintiff was part of the team that received such a rating, it can be inferred that the plaintiff's performance was not "uniformly negative."

Ahmed v Johnson, 752 F.3d 490 (CA 1, 2014). The Algerian Muslim plaintiff raised a triable race and religious discrimination case with vague evidence that: (a) minorities were subjected to poor working conditions; (b) minorities were not usually recruited to apply for jobs: (c) only a few minorities were promoted under a certain director's tenure; and (d) a minority co-worker testified that he felt discouraged about applying for promotions. "Given the historical evidence about a complete absence of black and Arab Deportation Officers in the Boston office throughout Chadbourne's tenure, and an environment in which Hispanics, according to [a co-worker], also felt discouraged about applying for promotions, this is not a case in which 'allowing the failure-to-promote claim to go forward would be an invitation to the jury to engage in unbridled speculation'."

Hnin v TOA (USA), LLC, 751 F.3d 299 (CA 7, 2014). Summary judgment properly granted against a foreign born plaintiff who was fired for sexually harassing a female employee, intimidating co-workers, and instructing people to work slowly to force

overtime. The plaintiff failed to show that American-born employees received more favorable treatment after engaging in similar conduct. The prospective comparators' alleged misconduct was not sex-based, and the employer showed that it discharged others accused of similar sex-based misconduct. A similarly-situated comparator must be similar "in all material respects."

Gosey v Aurora Medical Center, 749 F.3d 603 (CA 7, 2014). Evidence that the plaintiff was, in fact, in compliance with the employer's attendance policies supported her race discrimination claim by arguably showing that she was treated differently from other employees who arrived on time.

EEOC v Kaplan Higher Education Corp, 748 F.3d 749 (CA 6, 2014). Because the EEOC failed to show a racially disparate impact, the district court properly dismissed the EEOC's claim that the employer discriminated by considering the applicants' credit histories. The court scrutinized the EEOC's expert report, and found that the EEOC's "race rating" process – a process where analysts identified the race of affected individuals by looking at their drivers' license photos –failed to satisfy the *Daubert* factors. "The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." The court also mentioned that "the EEOC sued the defendants for using the same type of background check that the EEOC itself uses."

Andrews v CBOCS West, Inc., 743 F.3d 230 (CA 7, 2014). Evidence that a black manager made disparaging comments about the plaintiff's white race, said she wanted to make the Cracker Barrel she managed the "first all-black" Cracker Barrel restaurant, and tried to persuade the plaintiff to quit did not support a race discrimination claim because there was no adverse employment action. The plaintiff "assumed she was fired," but did not contact management to confirm her assumptions. The evidence thus supports the conclusion that she quit by failing to return to work. The plaintiff's constructive discharge argument was not considered because the complaint did not specifically allege it.

Adams v City of Indianapolis, 742 F.3d 720 (CA 7, 2014). "Disparatet-impact claims may be based on any employment policy, not just a facially neutral policy." The district court thus erred in dismissing a disparate impact claim on the basis that the complaint claimed that the allegedly discriminatory test was intentionally biased instead of facially neutral. Dismissal remained proper, however, because the complaint did not allege a "relevant and statistically significant disparity between black and white

applicants." The complaint lacked allegations about the racial makeup of the applicant pool versus the people who passed. The complaint also lacked allegations about the racial makeup of the relevant area workforce.

Zayas v Rockford Memorial Hospital, 740 F.3d 1154 (CA 7, 2014). The plaintiff, fired for sending her supervisor "negative, unprofessional and disrespectful" emails, could not show illegal discrimination. The plaintiff could not show that she was meeting her employer's legitimate expectations when she defied her employer's directive to stop sending the emails. "The question is not whether she *ever* satisfied the Hospital's expectations, but whether she met the Hospital's expectations at the time she was fired."

Alexander v Casino Queen, Inc., 739 F.3d 972 (CA 7, 2014). Adverse employment action occurred when two black waitresses were reassigned away from areas with greater potential for tips. "It is true that patrons pay these tips, not the employer; thus, the causal connection is not immediate. Nonetheless, Casino Queen's alleged decision caused a significant change in benefits through a clear causal relationship. At the summary disposition stage, we credit plaintiffs' allegation that Casino Queen supervisors knew that some areas average higher tips than others."

Deleon v Kalamazoo County Road Commission, 739 F.3d 914 (CA 6, 2014). Even though he had previously applied for the transfer, the plaintiff could establish the adverse action element of his *prima facie* case with evidence that he was transferred to a position that exposed him to diesel fumes. "We emphasize that the key focus of the inquiry should not be whether the lateral transfer was requested or not requested, or whether the aggrieved plaintiff must *ex tempore* voice dissatisfaction, but whether the 'conditions of the transfer' would have been 'objectively intolerable to a reasonable person.' Indeed, an employee's opinion of the transfer, whether positive or negative, has no dispositive bearing on an employment actions' classification as 'adverse.'"

Lobato v State of New Mexico Environment Department, 733 F.3d 1283 (CA 10, 2014). The lack of temporal proximity between an alleged act of misconduct and discharge did not prove pretext where the misconduct was not the sole basis for discharge.

Townsend-Johnson v Rio Rancho Public Schools, 586 Fed Appx 542 (CA 10, 2014). The plaintiff's allegation that the district failed to meet with the plaintiff to discuss her progress toward her growth plans, as it was allegedly supposed to do, does not show

that the decision makers lied when they claimed they fired the plaintiff for failing to achieve those plans. Summary judgment properly granted.

IV. AGE DISCRIMINATION

Johnson v Securitas Security Services USA, Inc., 769 F.3d 605 (CA 8, 2014). Summary judgment properly granted, despite evidence that the 76-year-old plaintiff's supervisor told him to "hang up his Superman cape and retire." There was no evidence that the reason for terminating the plaintiff – leaving work early and failing to report a vehicular accident – was pretextual. The decision makers' "mere awareness" of the plaintiff's age does not show pretext. Nor is it sufficient to prove that the plaintiff did not, in fact, leave early, because the employer relied upon internal documents that were not altered. The plaintiff also failed to show that a younger, similarly-situated employee was treated better.

Tramp v Associated Underwriters, 768 F.3d 793 (CA 8, 2014). An age-protected plaintiff discharged in a RIF raised a triable case with evidence that the employer believed that shedding older workers would reduce health care premiums. The evidence, in part, came in a letter the employer sent to its health insurance carrier which, in an effort to negotiate reduced premiums, said "We have lost several of the older, sicker employees and should have some consideration on this." Although the statement could simply be a comment about the composition of the current workforce designed to help lower premiums, "there remains a possibility that these statements could also be a manifestation of discriminatory intent in the process used by Associated Underwriters to be rid of its older (and/or oldest) employees in general." "Certain consideration, such as health care costs, *could* be a proxy for age in the sense that if the employer supposes a correlation between the two factors and acts accordingly, it engages in age discrimination."

Scheick v Tecumseh Public Schools, 766 F.3d 523 (CA 6, 2014). Superintendent's statement, made shortly before the district decided not to renew his contact as principal, that "they just want somebody younger" constituted direct evidence of age discrimination. "Any suggestion that 'they' could have referred to parents or staff [and not the decision makers on the Board] is not credible."

However, telling the plaintiff during a performance review that "the Board wants you to retire" is not direct evidence that the subsequent non-renewal of his contract was age-based. One must infer that the retirement reference was a proxy for age discrimination.

Delaney v Bank of America Corp, Merrill Lynch, Pierce, Fenner & Smith, Inc., 766 F.3d 163 (CA 2, 2014). Summary judgment for the employer affirmed, even though (a) the plaintiff was the oldest employee in his group, (b) the only one in the group let go, and (c) a decision maker made age-related comments about another employee. Evidence supported the fact that the plaintiff was performing poorly, and "[c]omments about another employee's age, removed from any context suggesting that they influenced decisions regarding Delaney's own employment, do not suffice to create a genuine issue of fact as to whether age was the but-for cause of Delaney's termination."

McCarthy v Ameritech Publishing, Inc., 763 F.3d 469 (CA 6, 2014). The plaintiff could not establish pretext by arguing that the employer violated the collective bargaining agreement in the termination process. The employer thought it was complying with the CBA, and disputes about the construction of the CBA, without more, cannot establish a discrimination claim. This is particularly true where there was undisputed evidence that the employer used the same layoff procedures in other offices, without regard to age, sex or race.

Hutt v Abbvie Products LLC, 757 F.3d 687 (CA 7, 2014). The plaintiff failed to raise a triable age discrimination case with evidence that supervisors were mean to her, asked employees to submit their birth dates, and constantly criticized the plaintiff's performance. The plaintiff did not allege that anyone made discriminatory comments, and her "amorphous litany of complaints about a myriad of workplace decisions" was insufficient, without more, to establish discrimination under the direct or circumstantial method. "[G]uesswork and speculation are not enough to avoid summary judgment."

Hildebrand v Allegheny County, 757 F.3d 99 (CA 3, 2014). State and local government workers may only pursue federal age discrimination claims under the ADEA. They cannot pursue age discrimination claims under the Civil Rights Act of 1871.

Wilson v Cox, 753 F.3d 244 (DC Cir, 2014). Age protected veteran who was fired from his position with an armed forces retirement home because he was also a resident of the home has a triable age discrimination claim. The employer had a program of allowing residents of the retirement home to work certain positions at the home, such as security. An administrator discontinued the program and prohibited the employment of residents, explaining that older security guards were not "doing their jobs properly, as from time to time they would be found asleep…" and that he "allowed residents to work to make them feel productive, not because they were entitled to the positions." The administrator also told residents, "you didn't come here to work, you came here to

retire." The comments constitute direct evidence of age discrimination because they can be viewed as reinforcing "the stereotype that older workers fall short in productivity and thus should have no entitlement to employment." "Even if Cox knew one instance in which a guard fell asleep on the job, a statement indicating a generalized concern about older guards as a group, based on one incident alone, is suggestive of impermissible, inaccurate stereotyping."

Baker v Macon Resources, Inc., 750 F.3d 674 (CA 7, 2014). Summary judgment improper, where the age-protected plaintiff, who was discharged for failing to report patient abuse, proffered evidence that a 39-year-old employee received only a three-day suspension for similar misconduct. Although the Plaintiff witnessed the alleged abuse and the comparator only suspected it was occurring, the employer did not make that distinction when imposing discipline originally, and the rules require employees to report abuse even if they only suspect it is occurring.

Adamson v Walgreens Co, 750 F.3d 73 (CA 1, 2014). The plaintiff's claim that he was treated differently than other employees who committed a single policy violation lacked consequence because, unlike the comparators, the plaintiff was terminated for committing a second policy violation. Moreover, the district court did not err or make an improper factual conclusion by overlooking an alleged inconsistency about a fact that played no material role in the discharge. Summary judgment affirmed.

Pierson v Quad/Graphics Printing Corp, 749 F.3d 530 (CA 6, 2014). "An employer 'replaces' a discharged employee when it reassigns an existing employee to assume the employee's duties in a way that 'fundamentally change[s] the nature of his employment." The plaintiff raised a fact question under this standard with evidence that the existing employee who assumed his duties moved to the location where the plaintiff had worked, did not increase his hours despite adding the plaintiff's former duties to his own, and might have been relieved of some of the duties he was performing previously. Accordingly, the district court erred in applying the heightened RIF standard.

The plaintiff had managed a plant in Dixon, Tennessee. Following an acquisition, the acquiring company determined that the Dixon plant would reduce operations, did not need a full-time manager, and that management of the Dixon plant could be assumed by DePriest, an Energy Manager working out of Franklin, Tennessee. The acquiring company then decided to close down the Franklin offices, so DePriest relocated to Dixon where he then spent most of his time. The plaintiff alleged that, after DePriest relocated to Dixon, DePriest spent the majority of his time doing what the plaintiff had

done and did not increase his overall hours. A jury could conclude from these facts that DePriest's position had fundamentally changed to focus on the plaintiff's former duties, with significantly less time on the energy-related functions he had previously performed.

Pretext was shown with evidence of "shifting" justifications for discharge. "Although Lentz claims that he immediately selected Pierson for termination based on his assessment that the Facilities Manager position could be eliminated without hardship to the company, he later justified the decision by preparing performance evaluations that reflect that Pierson was not a 'team player.'" Then, after discharging the plaintiff without mentioning his alleged performance deficiencies, a company representative responded to news of an age discrimination charge by claiming the decision was based on "performance not age."

Mazzeo v Color Resolutions International, 746 F.3d 1264 (CA 11, 2014). The district court erred in ruling that the plaintiff was terminated in a RIF, and thus imposing a heightened *prima facie* standard. Evidence showed that the plaintiff's job responsibilities and sales territory were immediately taken over by a retiring employee. When that employee retired, the consolidated position, which included both the plaintiff's duties and the retiring employees' duties, was then given to a younger employee. A reasonable jury could conclude from this evidence that the employer hired a younger person to replace the plaintiff.

V. RELIGIOUS DISCRIMINATION/ACCOMMODATION

Davis v Fort Bend County, 765 F.3d 480 (CA 5, 2014). The plaintiff presented a triable question whether her employer unlawfully discharged her for refusing to work one Sunday morning. The plaintiff told her employer she could not come in because she had to attend a special church service, and the employer failed to show it would suffer undue hardship by allowing the plaintiff to miss work that day. Although the service conflicted with a critical work event where all technical employees were supposed to come in to install new computer systems, the plaintiff had identified a suitable substitute who was willing to fill in for her at no additional cost to the employer. "That Davis lacked authority to schedule her own substitute does not take away from the fact that there was at least one volunteer to work Davis's shift."

Nobach v Woodland Village Nursing Center, 762 F.3d 442 (CA 5, 2014). Firing an employee for refusing to pray the Rosary with a patient could not sustain a religious discrimination claim because there was no evidence that the employer knew the

plaintiff's refusal was based on a conflicting religious belief. Although the plaintiff informed the employer after discharge that her refusal had been based on her conflicting religious belief, "other circuits have held that an employer has no obligation to withdraw its termination decision under Title VII based on information supplied after the termination decision has been made."

VI. RETALIATION

A. IN GENERAL

Muhammad v Caterpillar, Inc., 767 F.3d 694 (CA 7, 2014). Retaliatory animus was not shown with evidence that, when the plaintiff complained about alleged harassment, a supervisor "mentioned" that he had registered his complaint with the wrong person and that, in the future, he should follow the proper chain of command submitting complaints. The comment was not made in anger, and was nothing but a reminder as to proper procedure to follow. Summary judgment affirmed.

Collazo-Rosado v University of Puerto Rico, 765 F.3d 86 (CA 1, 2014). Summary judgment affirmed because the plaintiff's evidence failed to establish that the employer's duel rationales for discharge were so inconsistent that they are unworthy of credence.

EEOC v Product Fabricators, Inc., 763 F.3d 963 (CA 8, 2014). "Given that Breauz engaged in the protected activity a year prior to his termination, the temporal connection here does not support a finding of causation." This holds true even though an EEOC lawsuit, which was based in part on the plaintiff's prior protected activity, was filed the day before the plaintiff was terminated. There was no evidence that the employer knew about the EEOC filing when it made the decision to terminate.

Malin v Hospira, Inc., 762 F.3d 552 (CA 7, 2014). The district court erred in ruling that the three year temporal gap between the plaintiff's harassment complaint and her demotion was too great to establish causation. The plaintiff alleged that, during the three year period, she was repeatedly denied promotional opportunities despite "excellent" reviews and requests for promotions, not even considered for a position she sought, and given promotions without commensurate pay increases. The person with reason to be upset about the harassment complaint was arguably involved in each decision, and may have affirmatively blocked efforts to raise the plaintiff's pay.

Cox v Onondaga County Sheriff's Department, 760 F.3d 139 (CA 2, 2014). Summary judgment properly granted, where evidence supported the employer's view that the

plaintiffs made false race discrimination allegations, both internally and to the EEOC. "[E]mployees who complain about racial discrimination, whether internally and/or through an EEOC complaint, may not claim retaliation simply because the employer undertakes a fact-finding investigation." "Employers are under and independent duty to investigate and curb racial harassment by lower level employees of which they are aware. It would therefore be anomalous to conclude that an employer is not allowed to investigate, with a view to discipline, false complaints of harassment that themselves might be viewed as intended as racial harassment." "The plaintiffs have presented no evidence that the warning about disciplinary actions was intended to retaliate for any reason other than the apparent falsity of their EEOC charges and the complex circumstances those false charges created."

Tank v T-Mobile USA, Inc., 758 F.3d 800 (CA 7, 2014). Commencing an investigation into the plaintiff's misconduct just two days after he complained about alleged discrimination was not suspicious because the investigation was motivated by two complaints against the plaintiff – one from an in-house attorney who questioned the billing practices of a law firm the plaintiff had retained, and an anonymous complaint about his leadership practices.

Plaintiff's claim that another manager ignored his complaint alleging discrimination does not suggest that the manager harbored unlawful discriminatory animus.

Booth v Pasco County, 757 F.3d 1198 (CA 11, 2014). Evidence supported a retaliation verdict where the plaintiffs' union disseminated and posted a memorandum that: (a) claimed that the plaintiffs' EEOC charge was frivolous; (b) named and publicly identified the plaintiffs; and (c) suggested that the union might have to assess members additional dues because the charge might cost the local over $10,000 in legal bills.

Montell v Diversified Clinical Services, 757 F.3d 497 (CA 6, 2014). The plaintiff could have believed that she was subjected to illegal harassment based on sex when she complained to management that, while she was wearing a red dress and heels, a supervisor said he was turned on by women in red dresses and heels. The comment was sexual in nature, and the supervisor who made the comment admitted that the plaintiff could get him in trouble by reporting it.

The court cast doubt on the doctrine that temporal proximity alone cannot establish causation, noting that "it is nearly impossible to come up with other evidence that the adverse employment action was retaliatory where the adverse action comes directly on the heels of the protected activity." While the court suggested that there was evidence

beyond mere temporal proximity, the evidence consisted only of allegations that, shortly after the plaintiff complained, the target of the plaintiff's complaint told the plaintiff to resign and undermined her authority.

Evidence that the employer had contemplated the plaintiff's discharge before she engaged in protected activity did not warrant summary judgment because the adverse action that actually occurred does not "square" with the action previously contemplated. The plaintiff's PIP stated that she had until June 2 to improve. But it was on May 20, the day after she complained, that management told her to resign or face termination. Moreover, although there was evidence that the plaintiff had failed to improve and was on the road to termination, there was at least some evidence that management had not firmed up that decision when, the day after she complained, a manager told the plaintiff to resign or face discharge.

Kmak v American Century Companies, Inc., 754 F.3d 513 (CA 8, 2014). Dismissal on the pleadings was improper because the plaintiff alleged that (a) almost immediately after giving testimony adverse to his employer in an arbitration, his employer reminded him that it could recall his stock options at any time, and (b) the employer did, in fact, recall the plaintiff's stock options, and nobody else's, one to three days after it received the adverse arbitration award. The stock options were a form of employment compensation, and the timing of both the threat and the removal could create a material factual question on causation.

Robinson v American Red Cross, 753 F.3d 749 (CA 8, 2014). Issue whether 12 or 6 months elapsed between the protected activity and the termination was irrelevant because "a lapse of even just two months may itself be too long to support of inference of retaliation." The plaintiff's claim that the employer retaliated by soliciting adverse comments about her from other employees was unhelpful because (a) she did not raise the argument in her administrative charge, and (b) "solicitation of coworker comments or required performance meetings have not been seen as adverse employment actions." Moreover, there was no evidence that the decision makers even knew the plaintiff had filed an EEOC charge.

Willis v Cleco Corp, 749 F.3d 314 (CA 5, 2014). Allegations that a human resource manager who supervised the decision maker (a) was "very pissed" about the plaintiff's race discrimination claim, (b) said he was going to fire "that nigger" for reporting him, and (c) was out to get the plaintiff are sufficient to support a retaliation claim.

Garayalde-Rijos v Municipality of Caronia, 747 F.3d 15 (CA 1, 2014). The district court erroneously dismissed a retaliation claim on the pleadings simply because there was a five month temporal gap between the protected activity and the adverse action. Although some pleadings might allege a temporal gap so attenuated as to not meet the plausibility standard, temporal proximity is merely one factor in judging causation and factual development might permit causation despite the temporal gap.

Lors v Jim Dean, 746 F.3d 857 (CA 8, 2014). The plaintiff's termination letter was not direct evidence of discrimination, even though it repeatedly mentioned the fact that the plaintiff had inappropriately challenged authority and debated decisions made by others. The letter went on to explain that the decision to terminate had nothing to do with the ADA claim he had filed years before, or his alleged disability, and that the decision was based instead on his "disruptive and insubordinate behavior…" Further, there was evidence that the employer's discontent with the plaintiff's behavior preexisted his ADA complaint.

Laster v City of Kalamazoo, 746 F.3d 714 (CA 6, 2014). The district court erred in ruling that the plaintiff sustained no adverse employment action. The department's decision to investigate the plaintiff for allegedly being drunk and disorderly at a graduation ceremony where Barack Obama was speaking, combined with allegations that the plaintiff was wrongfully evaluated, suspended, scrutinized, and denied the opportunity to attend a conference could sustain a retaliation claim. "Facing heightened scrutiny, receiving frequent reprimands for breaking selectively enforced policies, being disciplined more harshly than similarly situated peers, and forced to attend a pre-determination hearing based on unfounded allegations of wrongdoing might well have dissuaded a reasonable worker form making or supporting a charge of discrimination."

AuBuchon v Geithner, 743 F.3d 638 (CA 7, 2014). Retaliatory failure to promote claim properly dismissed on summary judgment because there were no open positions for the plaintiff to be promoted into.

Rodriguez-Vives v Puerto Rico Fire-Fighters Corps of the Commonwealth of Puerto Rico, 743 F.3d 278 (CA 1, 2014). Filing a lawsuit alleging sex discrimination under the Equal Protection Clause constitutes protected activity under Title VII. "[N]othing in the language of the statute or common sense suggests that she was nevertheless required to mention Title VII in order to be protected from opposing the practices that Title VII renders unlawful."

Hernandez v Penny Sue Pritzker, 741 F.3d 129 (CA DC, 2014). The plaintiff could not sustain a retaliation case based on the allegation that she was transferred to a disfavored position. The plaintiff had requested a transfer, did not identify the unit she wanted to be transferred into, and did not complain about the transfer until filing suit.

Pina v The Children's Place, 740 F.3d 785 (CA 1, 2014). Summary judgment properly granted in a failure to re-hire case where (a) the plaintiff failed to establish that the hiring manager knew about her previous complaint, and (b) the plaintiff failed to point to a vacant position she was qualified to perform. The employer is not obliged to prove the non-existence of a vacancy.

Howard R.L. Cook & Tommy Shaw Foundation for Black Employees of the Library of Congress, Inc. v Billington, 737 F.3d 767 (CA DC, 2014). The plaintiffs' retaliation complaint was properly dismissed. Even if the non-profit *organization* for which the plaintiff's worked was, as an entity, retaliated against for *the organization's* protected activities, and even if the alleged retaliation cost the individual members of that organization employment or employment benefits, the complaint does not allege that a particular employee engaged in protected activity.

Lewis v City of Norwalk, 122 FEP Cases 703 (CA 2, 2014). Summary judgment properly granted, where the plaintiff engaged in protected activity in response to being informed that he was in danger of being terminated, and there was ample evidence to support the discharge decision.

B. PROTECTED ACTIVITY

Boyer-Liberto v Fontainebleau Corporation, 752 F.3d 350 (CA 4, 2014). The African-American plaintiff did not engage in protected activity when she complained to management that a co-worker twice called her a "porch monkey." Two racially offensive comments, both of which stemmed from a single incident, "doesn't come close to a hostile work environment," and a reasonable person would not regard such comments as creating a hostile work environment. Although a plaintiff can engage in protected activity by complaining about conduct likely to ripen into a hostile environment, there is no indication of this potentially occurring when the two comments stemmed from a single incident, and the person who made the offensive comments was warned to have no further contact with the plaintiff.

Clark v Cache Valley Electric Company, 123 FEP Cases 1460 (CA 10, 2014). The plaintiff did not engage in protected activity by making complaints to management that included conclusory statements about "discrimination" and "hostile work environment"

stemming from a male supervisor's alleged favoritism of a woman with whom he had a close personal relationship. Although employees are not expected to know that a "paramour preference" does not violate the law, the plaintiff's complaint in this case contained no facts to support the view that the subject of his complaint was engaged in actionable sex discrimination. "Rather, Mr. Clark complained about Mr. Perschon's inappropriate conduct with Ms. Silver, and the resulting favoritism shown to her."

VII. HARASSMENT

A. SEX HARASSMENT

Moll v Telestor Resources Group, Inc., 760 F.3d 198 (CA 2, 2014). The district court erred in dismissing the plaintiff's harassment claim on the pleadings simply because she failed to allege any "sexually offensive acts" within the limitations period. "The district court should have considered all incidents in their totality – including sex-neutral incidents – before it dismissed Moll's hostile work environment claims for failure to allege an actionable incident within the applicable statute of limitations."

Orton-Bell v Indiana, 759 F.3d 768 (CA 7, 2014). A female prison officer raised a triable harassment claim with allegations that (a) a male employee watched as she underwent her daily pat-downs and said he needed a cigarette afterword because it was as good as sex, and (b) she was told not to wear jeans to work because her "ass" looked so good it might cause a riot. Although the plaintiff engaged in vulgar banter with some co-workers, there was sufficient evidence to believe she was subjectively offended by the comments.

The plaintiff could not support her claim with evidence that night shift employees frequently had sex on her desk when the plaintiff was not working and then joked about it. The conduct was not based on the plaintiff's sex. "The conduct was certainly sexual *intercourse* on her desk, but that does not mean that night-shift staff had sexual intercourse on Orton-Bell's desk because she was of the *female* sex."

Brooks v Grundmann, 748 F.3d 1273 (CA DC, 2014). Unprofessional, uncivil and boorish actions by supervisors could not sustain a harassment claim. Most of the alleged conduct were inactionable critiques of the plaintiff's performance. For example, a supervisor angrily yelled and threw a notebook at the plaintiff to express his disappointment with the quality of a report the plaintiff had written. Another supervisor critiqued the plaintiff's management abilities, accused her of fudging numbers, gave her a low performance rating and enforced attendance policies against her that were not

enforced against others. Selective enforcement of attendance policies does not necessarily establish sexual animus.

Gilster v Primebank, 747 F.3d 1007 (CA 8, 2014). The court set aside a $900,000 plaintiff's verdict because the plaintiff's lawyer improperly cited her personal experience with sexual harassment in closing argument. The comments were not "minor aberrations made in passing." "Counsel made a deliberate strategic choice to make emotionally-charged comments at the end of rebuttal closing argument, when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond." The prejudice of these comments were shown, in part, by the fact that the jury's damages award went outside the bounds of rationality.

Wilson v Cook County, 742 F.3d 775 (CA 7, 2014). A female massage therapist who was duped into to providing sex to a Cook County employee in exchange for a nonexistent job he promised her has no triable sex discrimination or harassment claim. To establish a Title VII claim, there must be some kind of employment relationship, actual or potential. "A plaintiff must be passed over for a job that actually existed…. When no job exists, the plaintiff cannot be said to have suffered any adverse employment action." "In short, the county did not refuse to hire plaintiff because of her sex; it refused to hire her because there was no position for a massage therapist at the hospital. It was not hiring *anyone.*"

Ponte v Steelcase Inc., 741 F.3d 310 (CA 1, 2014). A female sales manager lacked a triable sex harassment claim, despite allegations that her male supervisor, while driving her back to the hotel during a business trip, placed his hand on her shoulder twice and said she "owed" him for hiring her. The two occurrences did not adversely affect the plaintiff's performance and were not sufficiently severe or pervasive to sustain a claim. While the alleged touching would certainly make a female employee uncomfortable, "discomfort is not the test."

Rester v Stephens Media, LLC, 739 F.3d 1130 (CA 8, 2014). A single incident, where a male supervisor allegedly yelled and swore at the plaintiff during a workplace disagreement, and also touched her three times while physically preventing her from leaving a meeting, was insufficient to sustain a harassment claim. "This demanding standard requires 'extreme' conduct rather than merely rude or unpleasant conduct." Moreover, "[t]he incident is related to a workplace disagreement and the conduct does not denote a sexist connotation."

Lewis v City of Norwalk, 122 FEP Cases 703 (CA 2, 2014). The plaintiff's claim that his gay supervisor leered at him, licked his lips provocatively while staring at the plaintiff's crotch, asked the plaintiff to work out with him at a gym and join him for drinks was not sufficiently severe or pervasive to sustain a harassment claim.

B. RACE/NATIONAL ORIGIN HARASSMENT

Buisson v Louisiana Community and Technical College System, ___ F.3d ___; 2014 US App LEXIS 21356 (CA 5, 2014). A single use of the bigoted term "chink," combined with other "annoying acts," were isolated and incapable of sustaining the severe and pervasive requirement.

Nichols v Michigan City Plant Planning Department, 755 F.3d 594 (CA 7, 2014). A single use of the "n-word" is not severe enough to support a racial harassment claim. While there is no "magic number of slurs" that indicates a hostile work environment, and an unambiguously racial epithet falls on the "more severe end of the spectrum," "one utterance of the n-word has not generally been held to be severe enough to rise to the level of establishing liability." Five other incidents of alleged harassment were insufficient because (a) the comments were not directed at the plaintiff, and (b) the plaintiff failed to establish that they were racially motivated.

Adams v Austal, USA, LLC, 754 F.3d 1240 (CA 11, 2014). "We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile."

Clay v Credit Bureau Enterprises, Inc., 754 F.3d 535 (CA 8, 2014). The following comments, combined with allegedly favorable treatment toward Caucasians, were not severe or pervasive enough to establish that the African-American plaintiff was racially harassed: a co-worker called the plaintiff a "black bitch;" another co-worker said "congratulations" and told the plaintiff she "should be happy" on "the day Abraham Lincoln freed the slaves;" a co-worker once told the plaintiff not to steal anything; a supervisor said the plaintiff had "nappy" hair; and two managers said black people "live in the hood" and "get food stamps." "These incidents were infrequent and involved low levels of severity." Moreover, the plaintiff did not claim the conduct was humiliating or interfered with her work.

Boyer-Liberto v Fontainebleau Corporation, 752 F.3d 350 (CA 4, 2014). The African-American plaintiff did not engage in protected activity when she complained to management that a co-worker twice called her a "porch monkey." Two racially

offensive comments, both of which stemmed from a single incident, "doesn't come close to a hostile work environment," and a reasonable person would not regard such comments as creating a hostile work environment. Although a plaintiff can engage in protected activity by complaining about conduct likely to ripen into a hostile environment, there is no indication of this potentially occurring when the two comments stemmed from a single incident, and the person who made the offensive comments was warned to have no further contact with the plaintiff.

Gosey v Aurora Medical Center, 749 F.3d 603 (CA 7, 2014). Allegations that the plaintiff was forced to work off the clock, given tasks outside her job description, and disparaged by a supervisor were insufficient to sustain a harassment claim. There was no evidence that the actions occurred because of her race.

Alexander v Casino Queen, Inc., 739 F.3d 972 (CA 7, 2014). Allegations that the employer subjected the African-American plaintiffs to unfair suspensions, harmful casino floor assignments, and unjustified write-ups failed to create a triable hostile work environment. The treatment was not objectively severe or pervasive enough to sustain a claim.

C. EMPLOYER LIABILITY

Muhammad v Caterpillar, Inc., 767 F.3d 694 (CA 7, 2014). The employer properly responded to racist graffiti that suggested the plaintiff was gay by hiring contractors to cover the graffiti, discussing the problem at a staff meeting, and individually warning the plaintiff's co-workers that they would be immediately fired if caught spraying graffiti. Moreover, the offensive conduct stopped after the plaintiff complained.

Perez v Developers Diversified Realty Corp, 753 F.3d 265 (CA 1, 2014). The *Faragher/Ellerth* standard established for hostile environment cases also applies to *quid pro quo* cases. Also, employers should not be relieved of liability just because the *quid pro quo* harasser was not a supervisor.

In this case, the plaintiff raised a triable *quid pro quo* case with evidence that a female co-worker, who was not a supervisor. (a) threatened to "undercut" the plaintiff and get him fired if he resisted her sexual advances, and (b) engaged in "persistent and forceful lobbying" against the plaintiff that resulted in his discharge.

"Our conclusion that Martínez was not a supervisor does not necessarily absolve DDR of potential liability for Velázquez's discharge. The Supreme Court has not yet ruled on the precise question of whether employer liability premised on a finding of

negligence can be limited to cases of 'hostile workplace' discrimination, as opposed to discriminatory termination. See *Staub v. Proctor Hosp*., 131 S. Ct. 1186, 1194 n.4, 179 L. Ed. 2d 144 (2011) ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."). The Court has cautioned, though, that the distinction between hostile workplace claims and quid pro quo claims is 'of limited utility.' *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). And we see no basis for applying that distinction to permit a negligent employer to escape (or incur) liability on one type of claim but not the other. The same considerations of simplicity touted in *Vance* that counsel against heightening the potential for liability on quid pro quo claims counsel as well against lessening the potential for liability…. In short, an employer can be held liable under Title VII if: the plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation."

Freeman v Dal-Title Corp, 750 F.3d 413 (CA 4, 2014). The court used a negligence standard to conclude that the plaintiff presented a triable question whether the employer adequately responded to persistent offensive remarks by a customer.

"The district court adopted a negligence standard for analyzing an employer's liability for third-party harassment under Title VII. This Court has not yet adopted this standard in a published opinion, but we do so today. Similar to the reasoning we set forth for employer liability for co-worker harassment, 'an employer cannot avoid Title VII liability for [third-party] harassment by adopting a see no evil, hear no evil strategy.' Therefore, an employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take remedial action reasonably calculated to end the harassment." A triable question was raised through this standard with evidence that that the offending customer repeatedly made racist/sexist remarks that bothered the plaintiff, and that a supervisor knew of the three most serious incidents.

Chaib v Indiana, 744 F.3d 974 (CA 7, 2014). The plaintiff cannot sustain a harassment claim where she experienced no harassment after complaining to management about co-worker harassment.

Kramer v Wasatch County Sheriff's Office, 743 F.3d 726 (CA 10, 2014). The employer was not automatically liable for the harasser's actions because the following actions did not constitute "tangible employment actions": raping the plaintiff, denying her vacation time, preparing a bad performance evaluation that was never submitted, and denying her certain training. However, "if [the harasser] had or appeared to have the power to take or substantially influence tangible employment actions and used the threat of taking such actions to subject Ms. Kramer to a hostile work environment, then the County is vicariously liable for his severe or pervasive sexual harassment, subject to the *Faragher/Ellerth* affirmative defense."

The harasser could be considered a supervisor because, although the harasser lacked ultimate authority to hire, fire, promote or discipline, he solely prepared the plaintiff's performance evaluations and had power to recommend and influence discipline or discharge. He also threatened to harm the plaintiff's career if she complained. The district court thus erred in ruling that the harasser was not a supervisor and granting summary judgment for the employer due to lack of notice.

In evaluating the affirmative defense, the district court erred in effectively requiring the plaintiff to prove that the employer's response was unreasonable. It is the employer's burden to show reasonableness. The employer failed to meet this burden, even though it responded promptly to the rape allegation, because it assigned the investigation to a person with no experience or training in investigating harassment claims, and gave the investigator no training, instructions or protocols on the investigation. Moreover, the investigator seemed to focus more on who actually fathered the plaintiff's expected child than whether the plaintiff was raped or sexually harassed.

Williams-Boldware v Denton County, 741 F.3d 635 (CA 5, 2014). Summary judgment affirmed, where the employer's remedial action of reprimanding the harasser, requiring diversity training, and transferring the plaintiff away from the alleged harasser effectively ended the alleged harassment. "Employers are not required to impose draconian penalties upon the offending employee in order to satisfy this court's prompt remedial action standard."

Debord v Mercy Health System of Kansas, Inc., 737 F.3d 642 (CA 10, 2014). Constructive notice could not be established with evidence that a different employee complained about the harasser three years before the plaintiff was harassed. The prior complaint was temporally disparate and provided no details about the incidents the plaintiff allegedly experienced. Similarly, evidence that three women complained that the harasser had touched their cheek or neck to show them how cold his hands were

does not establish constructive notice, given that the alleged incidents were not severe or sexual. Accordingly, where the employer had a viable anti-harassment policy and the plaintiff had no basis for her view that reporting the harassment would be futile, the district court correctly granted summary judgment to the employer.

VIII. ADVERSE EMPLOYMENT ACTION

Buisson v Louisiana Community and Technical College System, ___ F.3d ___; 2014 US App LEXIS 21356 (CA 5, 2014). A poor performance evaluation was not adverse employment action because it did not affect job duties or compensation.

Davis v Fort Bend County, 765 F.3d 480 (CA 5, 2014). The plaintiff listed several actions she claimed were materially adverse, including subjecting her to daily thirty-minute meetings others were not required to attend, superseding her authority, removing her administrative rights from the computer system, and reducing her staff from fifteen to four employees. Summary judgment was proper, however, because the plaintiff failed to provide context, or otherwise explain the gravity of these actions. "Simply listing the employment actions that Davis believes were adverse does not meet her burden on summary judgment because she makes no effort to evidence the circumstances that make those actions 'materially adverse.'"

Chaib v Indiana, 744 F.3d 974 (CA 7, 2014). A prison guard's subjective view that working in a less-secure prison area would be advantageous over the high-security area does not prove that a refusal to transfer her to the low-security area was materially adverse. It is possible that the less-secure area would have been advantageous because inmates posed less danger. But it is equally possible that the fewer institutional restraints in the less-secure prison would be more dangerous and cause more stress.

A poor performance evaluation, standing alone, was incapable of sustaining the adverse action requirement.

Wilson v Cook County, 742 F.3d 775 (CA 7, 2014). A female massage therapist who was duped into to providing sex to a Cook County employee who offered her a nonexistent job has no triable sex discrimination or harassment claim. To establish a Title VII claim, there must be some kind of employment relationship, actual or potential. "A plaintiff must be passed over for a job that actually existed…. When no job exists, the plaintiff cannot be said to have suffered any adverse employment action." "In short, the county did not refuse to hire plaintiff because of her sex; it refused to hire her because there was no position for a massage therapist at the hospital. It was not hiring *anyone.*"

Hernandez v Penny Sue Pritzker, 741 F.3d 129 (CA DC, 2014). Changing the plaintiff's status to probationary was not materially adverse because the change was made to correct a clerical error and put her back into the status she was supposed to have given the amount of time served.

Rester v Stephens Media, LLC, 739 F.3d 1127 (CA 8, 2014). The female plaintiff, who quit after a male supervisor allegedly yelled and cursed at her during a meeting and physically prevented her from leaving the meeting, could not sustain a sex discrimination claim. The plaintiff did not experience adverse employment action. The plaintiff also failed to show that the outburst occurred because she was female.

Thompson v City of Waco, 730 F.3d 500 (CA 5, 2014). Restricting a plaintiff's authority to the point where he effectively became an assistant to others in his job classification is adverse action sufficient to support a race discrimination claim. While mere loss of some job responsibilities is not materially adverse, a significant change in job responsibilities can constitute an adverse job transfer The police detective could thus pursue a case based on allegations that he was prevented from working undercover or searching for evidence without supervision. The restrictions reduced the plaintiff to the level of an assistant, which is akin to an adverse job transfer.

IX. STATUTORY PRECONDITIONS AND LIMITATIONS PERIODS

EEOC v Simbaki, Ltd, 767 F.3d 475 (CA 5, 2014). The plaintiffs may pursue Title VII claims against the corporate parent of the restaurant franchise they worked for, even though they did not name the corporate parent in their EEOC charge. This holds true even though the plaintiffs were represented by counsel when they filed the EEOC charge. Courts should not be harsher on represented parties than on pro se litigants, given that pro se litigants are expected to follow the rules just like represented parties. Moreover, "[w]hether a party is represented by counsel, for example, tells us very little about whether the underlying purposes of Title VII's named-party requirement – which largely concerns whether the allegedly discriminating party has received sufficient notice either through actual notice or a proxy have been met."

Rivera-Diaz v Humana Insurance of Puerto Rico, Inc., 748 F.3d 387 (CA 1, 2014). The filing of an EEOC charge alleging retaliation did not toll the 90-day period for filing suit commenced by a right-to-sue letter on the plaintiff's original ADA charge. "[T]here is no indication in this case that the EEOC ever reconsidered, vacated, or otherwise impugned its first right-to-sue letter. By the same token, the agency never indicated to the plaintiff that it would do so."

Eisenhour v Weber County, 744 F.3d 1220 (CA 10, 2014). The plaintiff could proceed with her First Amendment claim, but not her Title VII claim, based on allegations that the County terminated her in retaliation for publicly complaining about sexual harassment. Her EEOC charge alleged harassment, not retaliation. "[F]ederal courts lack jurisdiction over incidents occurring after the filing of an EEOC claim unless the plaintiff files a new EEOC claim or otherwise amends her original EEOC claim to add the new incidents."

X. MISCELLANEOUS

A. HONEST BELIEF RULE

Loyd v St Joseph Mercy Oakland, 766 F.3d 580 (CA 6, 2014). Summary judgment affirmed, based on the employer's honest belief that the plaintiff committed a major work rule infraction while on final warning for prior misconduct. "[T]he hospital took witness statements and made a reasonable assessment of the available evidence before terminating Loyd. The law does not require the hospital to do anything more. To require otherwise would unduly frustrate an employer's ability to terminate insubordinate employees for legitimate, nondiscriminatory reasons." The plaintiff failed to proffer evidence capable of establishing that the employer's alleged error was "too obvious to be unintentional."

Fiero v CSG Systems, Inc., 759 F.3d 874 (CA 8, 2014). The plaintiff's claim that others were responsible for failing to get a key project done does not demonstrate that the supervisor did not honestly believe the plaintiff was at fault. A proposed comparator was not similarly situated because, unlike the plaintiff, the male comparator's performance improved after an adverse performance review. Summary judgment affirmed.

Shazor v Professional Transit Management, LTD, 744 F.3d 948 (CA 6, 2014). The honest belief rule does not apply to protect management when their investigation into whether the plaintiff had lied consisted of a single interview with one person. "Perhaps this single interview could satisfy the requirement that the investigation turn up particularized facts if Hock had fired Plaintiff for overt misconduct. But Hock fired Plaintiff for lying – not just uttering a falsehood, but doing so 'with intent to deceive.' Webster's Third New Int'l Dictionary 1305 (1993). One conversation does not establish sufficient particularized facts about the truth behind Plaintiff's statements, let alone her motive. Defendants have therefore failed to establish a foundation for the honest belief doctrine to apply."

B. CAT'S PAW

Willis v Cleco Corp, 749 F.3d 314 (CA 5, 2014). Allegation that a human resource manager who supervised the decision maker (a) was "very pissed" about the plaintiff's race discrimination claim, (b) said he was going to fire "that nigger" for reporting him, and (c) was out to get the plaintiff is sufficient to support a retaliation claim.

Lobato v State of New Mexico Environment Department, 733 F.3d 1283 (CA 10, 2014). "[A]n employer is not liable under a subordinate bias theory if the employer did not rely on any facts from the biased subordinate in ultimately deciding to take an adverse employment action – even if the biased subordinate first alerted the employer to the plaintiff's misconduct." Summary judgment was proper because there was no evidence that the decision maker relied on the biased subordinate's account. Instead, the decision maker independently determined that the plaintiff had committed misconduct.

C. CONSTRUCTIVE DISCHARGE

Perret v Nationwide Mutual Ins Co, 770 F.3d 336 (CA 5, 2014). Jury verdict for the plaintiff reversed. The plaintiff failed to establish constructive discharge, despite allegations that (a) the employer placed him on a PIP with the intention of discharging him and other older workers, (b) would inevitably have discharged him and other older workers, and (c) withheld his bonus because he was on a PIP. There is no evidence that the plaintiff was demoted, reassigned, given fewer responsibilities, humiliated or told to resign.

Garofalo v Hazel Crest, 754 F.3d 428 (CA 7, 2014). The plaintiffs' constructive discharge claim failed, where many of the comments that supported the theory preceded the plaintiffs' promotion and were made by non-decision makers.

Ames v Nationwide Mutual Insurance Co, 747 F.3d 509 (CA 8, 2014). The plaintiff was not constructively discharged when, on the day she returned from pregnancy leave, a supervisor denied her access to a lactation room, told her she had only two weeks to catch up with her work, told her to "go home and be with your babies," mistakenly denied additional FMLA leave, and dictated what the plaintiff should say in her resignation letter. The plaintiff failed to show that these actions were designed to compel her resignation where the plaintiff was supposed to have completed paperwork to entitle her access to a lactation room, and the offending supervisor attempted to accommodate plaintiffs concerns by directing the plaintiff to people who know more than she about the leave-related issues the plaintiff was concerned about.

"Nationwide's several attempts to accommodate Ames show its intent to maintain an employment relationship, not force her to quit." "Although Nationwide incorrectly calculated Ames' FMLA leave, it made efforts to ameliorate the impact of its mistake. Neel did not discourage Ames from taking the FMLA leave to which Ames was entitled."

Laster v City of Kalamazoo, 746 F.3d 714 (CA 6, 2014). The district court properly ruled that the plaintiff was not constructively discharged. "Although Plaintiff has presented some evidence that he was subjected to heightened scrutiny and treated differently than his non-minority peers, he has not presented any evidence that this behavior was undertaken with the specific intention of forcing Plaintiff to quit. Indeed, Plaintiff ultimately resigned not because of the 'intolerable' working conditions, but because he received bad information. Upon review of the evidence, it appears that this informational error was inadvertent and was not intended to force Plaintiff to quit. Simply put, Plaintiff has not adduced sufficient evidence to show that Defendants *deliberately* created intolerable working conditions with the *intention* of forcing Plaintiff to quit."

AuBuchon v Geithner, 743 F.3d 638 (CA 7, 2014). Allegations that the plaintiff received the "cold shoulder," an increased workload, "insufficient" performance reviews, and accelerated deadlines constitute "petty slights and annoyances" that cannot sustain a retaliation or constructive discharge claim.

Andrews v CBOCS West, Inc., 743 F.3d 230 (CA 7, 2014). Evidence that a black manager made disparaging comments about the plaintiff's white race, said she wanted to make the Cracker Barrel she managed the "first all-black" Cracker Barrel restaurant, and tried to persuade the plaintiff to quit did not support a race discrimination claim because there was no adverse employment action. The plaintiff "assumed she was fired," but did not contact management to confirm her assumptions. The evidence thus supports that conclusion that she quit by failing to return to work. The plaintiff's constructive discharge argument was not considered because the complaint did not specifically allege it.

D. EVIDENTIARY ISSUES

Delaney v Bank of America Corp, Merrill Lynch, Pierce, Fenner & Smith, Inc., 766 F.3d 163 (CA 2, 2014). Summary judgment for the employer affirmed, even though (a) the plaintiff was the oldest employee in his group, (b) the only one in the group let go, and (c) a decision maker made age-related comments about another employee.

Evidence supported the fact that the plaintiff was performing poorly, and "[c]omments about another employee's age, removed from any context suggesting that they influenced decisions regarding Delaney's own employment, do not suffice to create a genuine issue of fact as to whether age was the but-for cause of Delaney's termination."

Adams v Austal, USA, LLC, 754 F.3d 1240 (CA 11, 2014). "We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile." The district court properly excluded "me too" evidence in a multiple plaintiff harassment case where the alleged conduct came from supervisors who had no control over the plaintiffs, and the plaintiffs were unaware of the allegedly inappropriate conduct. Although the evidence might have come in to rebut the employer's claim that it had effective anti-harassment procedures, the evidence was not offered for this purpose.

E. ESTOPPEL/CLAIM PRECLUSION

Huon v Johnson & Bell, LTD, 757 F.3d 556 (CA 7, 2014). Claim preclusion prevented the plaintiff from pursuing a Title VII claim in federal court, where the plaintiff had previously sued his employer for defamation and intentional infliction of emotional distress. Both claims arose out of his employment, and were based on identical allegations.

F. AFFIRMATIVE DEFENSES

Garofalo v Hazel Crest, 754 F.3d 428 (CA 7, 2014). The district court did not abuse its discretion in allowing the defendant to proceed with its mixed-motive affirmative defense, even though it was not affirmatively raised in the defendant's answer. While the mixed motive theory is an affirmative defense that must generally be raised in a responsive pleading, the defendants gave the plaintiff notice of the defense by relying on it throughout the case, and raising it in its summary judgment motion.

EEOC v Propak Logistics, Inc., 746 F.3d 145 (CA 4, 2014). The district court did not err in applying the equitable defense of latches to a lawsuit brought by the federal government. The latches theory was proper because the defendant closed its facility during the government's delay, which made it impossible to reinstate the employees, as requested.

EEOC v Mach Mining, LLC, 738 F.3d 171 (CA 7, 2014). Employers have no affirmative defense based on the EEOC's alleged failure to engage in good-faith

conciliation. "The language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." Moreover, allowing employers to evade Title VII suits because the EEOC did not conciliate "adds to that statute an unwarranted mechanism by which employers can avoid liability for unlawful discrimination" and "tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes of whether the EEOC did enough before going to court."

G. ATTORNEYS' FEES

Barrett v Salt Lake County, 754 F.3d 864 (CA 10, 2014) [June 13]. A successful plaintiff in a Title VII retaliation case cannot recover attorneys' fees generated during a voluntary grievance process. "A successful Title VII plaintiff who *must* exhaust administrative grievance procedures as a precondition to bringing suit in court is entitled to the fees he incurs along the way. But a successful Title VII plaintiff who *chooses* to participate in an employer's optional grievance process – one that is not prerequisite to suit – isn't."

H. CLOSING ARGUMENT

Gilster v Primebank, 747 F.3d 1007 (CA 8, 2014). The court set aside a $900,000 plaintiff's verdict because the plaintiff's lawyer improperly cited her personal experience with sexual harassment in closing argument. The comments were not "minor aberrations made in passing." "Counsel made a deliberate strategic choice to make emotionally-charged comments at the end of rebuttal closing argument, when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond." The prejudice of these comments were shown, in part, by the fact that the jury's damages award went outside the bounds of rationality.

I. EMPLOYEE/EMPLOYER STATUS

Bluestein v Central Wisconsin Anesthesiology, SC, 769 F.3d 944 (CA 7, 2014). The district court properly ruled that the plaintiff was not an employee. The plaintiff was a shareholder of the firm with an equal right to vote on all matters, shared equally in the firm's profits and liabilities, and participated in all hiring and firing decisions, including her own. Although she was subject to general workplace policies regarding hours, vacation, scheduling and patient assignments, all physician-members were subject to the same rules. The fact that the plaintiff was often in the minority on votes, including

the vote on the issue whether to terminate her employment, does not discount the fact that that she had an equal opportunity to vote.

Alexander v Avera St. Luke's Hospital, 768 F.3d 756 (CA 8, 2014). A pathologist with privileges at defendant hospital was an independent contractor, not an employee. The hospital had no control over the pathologist's schedule, or how he performed services. The plaintiff was free to employ, and did employ, other pathologists at his own expense and signed several agreements expressly acknowledging he was an independent contractor. Moreover, the hospital did not withhold taxes from his compensation, did not impose a weekly hours worked requirement, and the plaintiff could choose where, and at what hospital, he spent most of his professional time.

Knitter v Corvias Military Living, LLC, 758 F.3d 1214 (CA 10, 2014). A property firm was not a "joint employer" of the plaintiff, who worked as a "handyman" for a general contractor maintenance company the property management firm retained. The property management firm is therefore not liable to the plaintiff under Title VII. The property firm did not pay the plaintiff directly, lacked authority to supervise or discipline the plaintiff "beyond the confines of a vendor-client relationship," and could not fire her. The power to ask the general contractor not to assign the plaintiff to the property management firm's location any longer does not establish that the firm had authority to fire her. The power to give instruction about how to perform certain tasks to its satisfaction, which did not extend to formal training or performance evaluation, was not unlike "an individual hiring a moving company to move his or her belongings into an apartment might direct the movers on where to place items or how to protect items that are particularly fragile."