EQUAL EMPLOYMENT OPPORTUNITY CASE LAW UPDATE

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I. DISABILITY DISCRIMINATION

A. IN GENERAL

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

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

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

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

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

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

Tramp v Associated Underwriters, 768 F3d 793 (CA 8, 2014). Summary judgment was properly granted, even though the plaintiff was fired just before going to surgery. There was no evidence that any decisionmaker knew about her surgery.

Withers v Johnson, 763 F3d 998 (CA 8, 2014). Summary judgment properly granted. Requiring the plaintiff to provide his supervisor a medical release following leave did not run afoul of the ADA.

Cody v Prairie Ethanol, LLC, 763 F3d 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) claims that the basis for termination was 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 F3d 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."

B. REGARDED AS

Burton v Freescale Semiconductor, Inc, 798 F3d 222 (CA 5, 2015). Triable "regarded as" case created with evidence that the employer generated retrospective documentation to justify a termination decision, gave shifting explanations for discharge, and a decisionmaker was unaware of one of the multiple alleged bases for discharge. "[E]vidence of a sudden and unprecedented campaign to document Burton's deficiencies and thus justify a decision that has already been made … could raise an inference of pretext."

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

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

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

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

C. ESSENTIAL FUNCTION/QUALIFIED INDIVIDUAL

EEOC v AutoZone, Inc, 809 F3d 916 (CA 7, 2016). Sufficient evidence supported a jury finding that the injured former AutoZone sales manager was not an ADA-protected qualified individual for purposes of the EEOC's action on her behalf after she was discharged because her co-workers' testimony and the company's job description established that heavy lifting was an essential job function that she was unable to perform due to her shoulder injury. Moreover, AutoZone's employment of part-time co-worker with paralyzed left arm did not show that manager was qualified given that the co-worker had a different job and no lifting restriction.

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

Shell v Smith, 789 F3d 715 (CA 7, 2015). A bus mechanic who could not drive created a material factual dispute whether driving to locations in the field was an essential function. Although the written job description suggested this was a function a mechanic must "occasionally" perform, driving to fix busses in the field had not been a regular part of the plaintiff's duties for years, it was unclear how many other employees were available during the day to drive, and the city did not show how burdensome it would be to have other employees perform that function.

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

EEOC v Ford Motor Co, 782 F3d 753 (CA 6, 2015). "Essential functions generally are those that the employer's 'judgment' and 'written [job] description' prior to litigation deem essential. And in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees (as evidenced by its words, policies, and practices)." "Our ruling does not … require blind

deference to the employer's stated judgment. But it *does* require granting summary judgment where an employer's judgment as to essential job functions – evidenced by the employer's words, policies, and practices and taking in to account all relevant factors – is 'job-related, uniformly-enforced, and consistent with business necessity.'"

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

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

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

Myers v Knight Protective Service, 774 F3d 1246 (CA 10, 2015). The plaintiff, who represented to the Social Security Administration that he could stand for

only 20 minutes at a time and walk for only 10 minutes at a time, could not perform the essential functions of a security guard position. Security guards at the facility engage in frequent, prolonged walking and must be physically capable of responding to emergencies.

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

Kauffman v Petersen Health Care VII, LLC, 769 F3d 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 material 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.

Hwang v Kansas State University, 753 F3d 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."

D. ACCOMMODATIONS/INTERACTIVE PROCESS

Hooper v Proctor Health Care, Inc, ___ F3d ___; 2015 US App LEXIS 18630 (CA 7, 2015). The district court properly dismissed the plaintiff's failure to accommodate claim because it was not included in the plaintiff's EEOC charge. The charge did not mention a need for, or the failure to provide, any accommodation(s).

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

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

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

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

Doak v Johnson, 798 F3d 1096 (CA DC, 2015). The plaintiff's accommodation claim failed because the proposed accommodation would not have enabled her to regularly appear for work and be present for meetings during normal business hours, an essential job function.

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

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

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

Noll v International Business Machines Corp, 787 F3d 89 (CA 2, 2015). Employer reasonably accommodated a deaf software engineer by providing him: (a) interpreters at meetings; (b) transcripts of meetings and videos, upon request;

and (c) the option of viewing certain videos with captioning, upon request. Although the plaintiff claims the accommodations were "not as effective" as the ones he proposed, "the law requires an effective accommodation, not one that is most effective for each employee."

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

Minnihan v Mediacomm Communications Corp, 779 F3d 803 (CA 8, 2015). Former supervisor who was restricted from driving for six months could not proceed with his failure to accommodate case. He could not show that he was qualified for the position, which required him to drive to customers' homes. The plaintiff argued the employer should have engaged in the interactive process to see how the employer could retain the plaintiff during the period of his restriction. The court rejected this argument, because employers are not obliged to reallocate essential job functions or restructure positions. Moreover, the plaintiff failed to show that the alternative position the employer offered was inferior.

EEOC v Kohl's Department Stores, 774 F3d 127 (CA 1, 2014). The plaintiff, who quit after her employer failed to grant her requested accommodation, lacked a viable ADA claim because she walked away from the "interactive process." "The refusal to give Manning's specific requested accommodation does not necessarily amount to bad faith, so long as the employer makes an earnest attempt to discuss other potential accommodations. Here, Kohl's refused to provide Manning's preferred schedule, but was willing to discuss other schedules that would balance Manning's needs with those of the store. Manning refused to hear what Kohl's had to offer."

EEOC v LHC Group, Inc, 773 F3d 688 (CA 5, 2014). Home health care team leader, whose job required her to spend "a couple hours a day" driving from site to site, raised a triable question whether the employer could accommodate her disability-based inability to drive. At a minimum, the employer should have engaged in the interactive process instead of summarily terminating her upon learning that the plaintiff could not drive. The plaintiff had suggested several

possible accommodations, such as utilizing a taxi service or public accommodation.

Whitaker v Milwaukee County, 772 F3d 802 (CA 7, 2014). Although Milwaukee County was the plaintiff's official "employer," it could not be held liable for the alleged failure to accommodate when it was the State Department of Health Services, not Milwaukee County, that rejected the plaintiff's request for extended leave. Milwaukee County lacked power to override, and could not be held liable for, the State's decision.

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

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

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

Judge v Landscape Forms, Inc, 31 AD Cases 21 (CA 6, 2014). Former employee could not proceed with a failure to accommodate claim without evidence that he sought the requested accommodation – an extension of his FMLA leave – while employed. "[W]e have held that, as a part of establishing a failure-to-accommodate claim under the ADA, an employee must demonstrate that he or she requested an accommodation before being fired." The former employee's request for long-term disability benefits cannot be construed as an accommodation request.

Reeves v Jewel Food Stores, Inc, 759 F3d 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 F3d 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 F3d 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.

E. MEDICAL RECORDS

Wetherbee v The Southern Co, 754 F3d 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."

F. SUBSTANTIAL LIMITATION/DEFINITION OF "DISABILITY"

Coleman-Lee v Government of the District of Columbia, 788 F3d 296 (CA DC, 2015). District court did not err in instructing the jury in a pre-ADAAA case that the plaintiff, who had diabetes, could not be considered disabled because he controlled his disease with a strict eating regimen and medication.

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

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

Felkins v City of Lakewood, 774 F3d 647 (CA 10, 2014). Summary judgment properly granted because the plaintiff presented no expert medical evidence that any of her major life activities were substantially limited by avascular necrosis. Plaintiff, who has no medical background, claimed without support that she had the disease. "Such lay evidence, however, is inadmissible in court and thus cannot be used to oppose summary judgment."

Weaving v City of Hillsboro, 763 F3d 1106 (CA 9, 2014). "One who is able to communicate with others, though his communications may at times be offensive, inappropriate, ineffective, or unsuccessful, is not substantially limited in his ability to interact with others within the meaning of the ADA. To hold otherwise would be to expose potential ADA liability to employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues." Accordingly, a police department did not violate the ADA by terminating an officer with ADHD, who was fired for an "unapproachable, noncommunicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive style that violated the employer's harassment policy." While impairment-based difficulties in communicating with others have supported ADA liability in other cases, those cases involve situations where the difficulty communicating made the plaintiff "essentially housebound." In this case, the plaintiff's difficulties affected only his interactions with peers and subordinates. They did not affect his ability to communicate with supervisors or the public in general.

G. JUDICIAL ESTOPPEL

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

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

H. DIRECT THREAT

EEOC v Beverage Distributors Company, 780 F3d 1018 (CA 10, 2015). Employers seeking to utilize the direct threat defense must establish only that it reasonably believed that an impaired worker posed a "significant risk or substantial harm" to himself or others, not that the threat actually existed.

I. MEDICAL TESTS/INQUIRIES

Bates v Dura Automotive Systems, Inc, 767 F3d 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 F3d 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

Bauer v Lynch, 8212 F3d 340 (CA 4, 2016). A male FBI trainee argued that the FBI discriminated against him by requiring him to complete 30 push-ups in order to pass the physical fitness test, while requiring female trainees to complete only 14 push-ups to pass the test. The Fourth Circuit held that the district court applied the incorrect legal standard to its assessment of the FBI's use of gender-normed physical fitness test, noting that the U.S. Supreme Court has directly addressed and approved of gender-normed standards that distinguish between sexes on the basis of their physiological differences, but impose an equal burden on both men and women (i.e. requiring the same level of physical fitness for each).

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

evidence shows the plaintiff believed at the time that the decision was discriminatory.

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

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

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

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

Conlon v InterVarsity Christian Fellowship/USA, 777 F3d 829 (CA 6, 2015). The ministerial exception precludes a court from reviewing a Christian employer's decision to fire a spiritual director for not reconciling her marriage. The plaintiff performed a spiritual function for a religious organization, and

there was no evidence that the employer waived the ministerial exception. The ministerial exception, which is rooted in the First Amendment, can be asserted as a defense against state law claims.

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

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

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

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

Douchette v Morrison County, 763 F3d 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 F3d 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 F3d 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. 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."

Ambat v City & County of San Francisco, 757 F3d 1017 (CA 9, 2014). Barring male deputies from supervising female inmates might violate Title VII. Courts are divided on whether sex is a valid BFOQ defense in prison settings, and fact questions existed as to whether there was a "substantial basis" for believing that it is "impossible or highly impracticable" for men to supervise female prisoners. Although courts give deference to the employer's analysis of the workplace, such deference is not automatic. It is a fact intensive, case specific inquiry. It was unclear from the summary judgment record whether excluding men was truly necessary to protect the safety of female inmates.

EEOC v Audrain Health Care, Inc, 756 F3d 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."

Gingras v Milwaukee County, 2015 US Dist LEXIS 115388 (ED Wis, 2015). The court dismissed the plaintiff's sex stereotyping and sex plus discrimination claims, both of which were based on allegations that the employer should have accommodated her various childcare responsibilities, including the need to take time off for pediatrician appointments. Employers can expect employees to be

at work, and "Title VII is not a 'get out of work free' card for parents with young children."

III. PREGNANCY DISCRIMINATION

Fairchild v All Am Check Cashing, Inc, 811 F3d 776 (CA 5, 2016). Plaintiff's evidence of temporal proximity between her employer learning of employee's pregnancy and the challenged employment action is insufficient, without more, to prove that employer's proffered reasons for its action was pretextual. Judgement granted to the employer.

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

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

IV. RACE/NATIONAL ORIGIN DISCRIMINATION

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

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

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

Flowers v Troup County, 803 F3d 1327 (CA 11, 2015). Without evidence of racial bias, evidence of deficiencies in the investigation leading to the plaintiff's discharge, and evidence that the decisionmaker did not like the plaintiff, does not

create a material factual dispute. "The School District's ham-handed investigation and actions singling out Flowers could lead a reasonable jury to conclude that Pugh had it in for Flowers from the beginning. But Flowers offers no evidence, after conducting extensive discovery and assembling a lengthy record, that the investigation was pretext of discrimination on the basis of his race. As we have repeatedly and emphatically held, employers 'may terminate an employee for a good or bad reason without violating federal law.'"

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

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

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

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

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

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

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

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

Littlejohn v City of New York, 795 F3d 297 (CA 2, 2015). "We conclude that *Iqbal's* requirement applies to Title VII complaints of employment discrimination, but does not affect the benefit to plaintiffs pronounced in the *McDonnell Douglas* quartet. To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat

a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded under *Iqbal*. … The discrimination complaint, by definition, occurs in the first stage of the litigation. Therefore, the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent. The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a non-discriminatory justification."

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

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

Abril-Rivera v Johnson, 795 F3d 245 (CA 1, 2015). Absent an allegation of intentional discrimination, the plaintiffs could not support discrimination claims solely with evidence that they were paid less or treated differently due to the location of their office. Congress expressly provided in 42 USC 2000e-2(h) that different treatment in different locations is permissible absent an intent to discriminate.

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

Schaffhauser v United Parcel Service, Inc, 794 F3d 899 (CA 8, 2015). The employer's failure to follow internal investigation procedures, alleged deficiencies in the investigation, and the plaintiff's speculative belief that the employer agreed to demote the plaintiff as a *quid pro quo* for resolving an unrelated grievance did not establish direct evidence of discrimination. This holds particularly true where the plaintiff admitted that he never heard anyone in upper management make a racist remark. Moreover, the proposed comparators were not similar in "all relevant respects" because none of them were accused of making racial remarks like the ones plaintiff was accused of making.

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

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

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

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

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

Brown v Nucor Corp, 785 F3d 895 (CA 4, 2015). The district court erred in refusing to certify a class of 100 African-American employees who claimed discrimination in promotion decisions at a single plant. The employees presented statistical evidence of a 2.4 percent standard deviation from what would be expected if race was not a factor. There was also anecdotal evidence of discriminatory treatment in the plant. The fact that the plaintiffs all came from a single facility distinguished the case from *Wal-Mart*, which involved multiple facilities across the country. Also, the anecdotal evidence from over 16 of the 100 – or one in 6 – workers in the class suggested that the workers labored in a discriminatory work culture.

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

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

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

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

Huthens v Chicago Bd of Education, 781 F3d 366 (CA 7, 2015). The African-American plaintiff raised a triable race discrimination claim with evidence that the plaintiff had slightly more work experience than the successful Caucasian candidate, received her certification more quickly, and received an award the

Caucasian candidate did not receive. The plaintiff also showed that testimony concerning the plaintiff's poor performance was "riddled with unreliable hearsay" and was completely undocumented. The plaintiff could proceed to trial even though the ultimate decision was made by an African-American because the African-American decisionmaker received information from Caucasian subordinates.

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

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

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

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

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

inference is required to prove discrimination was a factor in the adverse employment decision.

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

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

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

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

Brown v Sessoms, 774 F3d 1016 (CA DC, 2014). Allegation that that a law school denied the black professor tenure while granting tenure to an equally qualified white person raised a triable §1983 claim. Both applicants failed to satisfy the publication criterial generally required by tenured professors.

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

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

Johnson v City of Memphis, 770 F3d 464 (CA 6, 2014). Disparate impact claim failed where the plaintiffs failed to point to equally valid, less-discriminatory alternative testing methods.

EEOC v Peabody Western Coal Co, 768 F3d 962 (CA 9, 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.

Loyd v St Joseph Mercy Oakland, 766 F3d 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 F3d 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 F3d 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 F3d 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 F3d 821 (CA 7, 2014). The decisionmaker'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 F3d 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-decisonmaker.

Brown v Daikin America Inc, 756 F3d 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 F3d 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 in 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 F3d 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 F3d 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 F3d 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 F3d 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."

Buisson v Louisiana Community and Technical College System, 592 Fed Appx 237 (CA 5, 2014). The Caucasian plaintiff could sustain her failure to promote claim with evidence that a key decisionmaker, 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 this decisionmaker provided shifting and inconsistent reasons for discharging the plaintiff.

Nonpayment for teaching a particular course did not establish a Title VII race discrimination claim because there was no evidence that people outside the protected class were paid for teaching the course. However, inconsistent and conflicting reasons for the decision not to promote the plaintiff created a triable claim on her failure to promote case.

V. AGE DISCRIMINATION

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

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

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

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

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

Wagner v Gallup, 788 F3d 877 (CA 8, 2015). Allegation that the age-protected plaintiff's 35-year-old supervisor used the words "historically" and "old school" in a conversation with the plaintiff shortly before termination was not "direct evidence" of discrimination. The word "historically" was used as a temporal reference as the supervisor was discussing ways to get the plaintiff to think

differently about certain concepts. The phrase "old school" was used when asking whether clients might think it too "old school" for the plaintiff to reference books he authored several years prior. "There is simply too great a leap from the context of these word usages to the establishment of a specific link between an alleged age animus and Wagner's termination using the direct evidence method."

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

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

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

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

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

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

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

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

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

Rickard v Swedish Match North America, 773 F3d 181 (CA 8, 2014). Calling the age-protected plaintiff an "old man," and suggesting he had "a lot of age on [him]" did not affect a term or condition of employment, and the comments were not severe and pervasive enough to sustain an age-based harassment claim. The plaintiff's inability to sustain a harassment claim meant that he was also unable to sustain a constructive discharge claim.

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

Johnson v Securitas Security Services USA, Inc, 769 F3d 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 pretexutal. The decisionmakers' "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 F3d 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 F3d 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 decisionmakers 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 F3d 163 (CA 2, 2014). Summary judgment for the employer affirmed, even though (a) the plaintiff was the oldest employee in his group, (b) was the only one in the group let go, and (c) a decisionmaker 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 F3d 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 F3d 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 F3d 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 F3d 244 (CA DC, 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 F3d 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 F3d 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.

VI. RELIGIOUS DISCRIMINATION/ACCOMMODATION

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

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

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

Nobach v Woodland Village Nursing Center, Inc, 799 F3d 127 (CA 5, 2015). The court reaffirmed its prior ruling that the plaintiff could not sustain a religious bias claim, even though she was fired for refusing to pray the Rosary with a patient. The plaintiff failed to show that the employer knew before it terminated her that her refusal to pray the Rosary was based a religious belief. "If Nobach had presented any evidence that Woodland knew, suspected, or reasonably should have known the cause for her refusing this task was her conflicting religious belief – and that Woodland was motivated by this knowledge or suspicion – the jury would certainly have been entitled to reject Woodland's explanation for Nobach's termination. But, no such evidence was ever provided to the jury."

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

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

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

Marie v American Red Cross, 771 F3d 344 (CA 6, 2014). Two Catholic nuns who served as unpaid disaster relief volunteers for the American Red Cross during a local emergency could not proceed with their religious bias claims because they were not "employees" within the meaning of Title VII. Although the nuns received some benefits, such as workers' compensation eligibility,

liability insurance, expense reimbursement and training, those benefits were "contingent or were simply incidental to their work with the organization rather than valuable financial consideration exchanged in return for services."

Davis v Fort Bend County, 765 F3d 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."

VII. RETALIATION

A. IN GENERAL

Hutton v Maynard¸ 812 F3d 679 (CA 8, 2016). The city was entitled to summary judgment dismissing the action by a former city police chief who alleged that he was discharged in retaliation for recommending to the mayor that a black staff member be promoted. The court found that his discharge was not pretext for retaliation, even though the discharge occurred one day after chief recommended promotion. The city was consistent in its reason for discharge and those reasons – i.e. that he failed to ensure his officers' firearms certifications were up-to-date and mishandling dashboard video camera purchases – were legitimate bases for discharge. The court found that even though the discharge occurred one day after he made his recommendation to the mayor, temporal proximity alone is insufficient to establish pretext. Lastly, the employee failed to explain how his proposed comparators were similarly situated.

Wheat v Fla Parish Juvenile Justice Comm'n, 811 F3d 702 (CA 5, 2016). A juvenile detention facility was improperly granted summary judgment on a Title VII claim by a staff officer who alleged that she was discharged for complaining about female detainee's sexual advances. On appeal, the court found that factual

issues existed as to whether the employee's discharge for using excessive force against a detainee was pretextual given (1) she had been charged with the same offense before her complaint without being discharged and (2) evidence showed that the Commission only discharged some employees, but not others, for excessive force. The mixed record on this issue created a genuine issue of material fact enabling the plaintiff to survive summary judgment.

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

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

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

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

Harden v Marion County Sheriff's Department, 799 F3d 857 (CA 7, 2015). The plaintiff, who was fired for stealing money from a suspect he arrested, did

not establish that his termination was pretext for illegal retaliation. "At most, Harden has raised some doubts about his guilt. That is not enough to suggest that the Internal Affairs investigation was a sham or that the relevant decisionmakers at the Sheriff's Department did not legitimately rely on" the Internal Affairs investigation.

Evidence that a supervisor "had it in for him" was irrelevant because there was no evidence linking the supervisor to the adverse employment decision.

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

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

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

DeMasters v Carillion Clinic, 796 F3d 409 (CA4, 2015). The court rejected the so-called "manager's rule," which requires an employee responsible for reporting bias claims to "step outside his or her role of representing the company" in order to engage in protected opposition or participation activity. "Nothing in the language of Title VII indicates that the statutory protection accorded an employee's oppositional conduct turns on the employee's job description or that Congress intended to excise a large category of workers from its anti-retaliation protections."

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

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

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

The plaintiff also created a circumstantial case with evidence that the employer's explanation for discharge – insubordination – was pretextual. At the summary judgment stage, courts cannot accept a conclusory claim that the plaintiff was "insubordinate" where the insubordination might have consisted of overt or subtle resistance to perceived discrimination. "Indeed, there may be some instances when the allegedly insubordinate act may be a response to a sort of unspoken, subliminal discrimination in the workplace." While some examples of the plaintiff's alleged insubordination were probably unprotected - - such as when the plaintiff called his manager a "bad individual" who makes "inappropriate business decisions," – the plaintiff made other comments in the same exchange – such as threatening to sue or file a complaint - - that arguably constitute protected opposition activity. Moreover, although the employer had critiqued the plaintiff's communication style before he engaged in protected activity, it was unclear whether the alleged communications issues would have resulted in termination from employment. Summary judgment reversed.

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

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

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

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

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

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

Foster v University of Maryland-Eastern Shore, 787 F3d 243(CA 4, 2015). The Supreme Court's holding in *University of Texas Southwestern Medical Center v Nasser* did not displace the *McDonnell Douglas* framework in retaliation cases. To the contrary, "the *McDonnell Douglas* framework has long

demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action."

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

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

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

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

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

propositions 'unsupported in fact'" is a "far cry from knowingly reporting false statements."

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

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

Greengrass v International Monetary Systems, Ltd, 776 F3d 481 (CA 7, 2015). Identifying the plaintiff by name in an SEC filing as having filed an EEOC charge against the employer, and then referring to the charge as "meritless," could support the adverse employment action element of a retaliation claim. Publicly identifying a charging party might reduce the charging party's chances of finding another job, and people would be less likely to file charges if they knew they would be publicly identified in this way.

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

Walker v Mod-U-Kraf Homes, LLC, 775 F3d 202 (CA 4, 2014). Proof that the plaintiff raised harassment complaints during the company's investigation into her alleged altercation with one of the alleged harassers does not establish that the employer's explanation for discharge – the altercation – was pretextual or retaliatory.

Musolf v J.C. Penney Co, 773 F3d 916 (CA 8, 2014). The plaintiff could not establish a causal connection between her harassment complaint and her termination six months later, where she received favorable treatment (a raise and an a honorary award) after her complaint and was not fired until after co-workers reported that she impermissibly accessed confidential documents and asked another employee to help her break into a manager's office.

Ward v Jewell, 772 F3d 1199 (CA 10, 2014). Supervisor's vague reference to "things that had happened in the past" was insufficient to link the adverse employment action to protected activity the plaintiff engaged in three years before the adverse action.

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

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

Muhammad v Caterpillar, Inc, 767 F3d 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 F3d 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 F3d 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 F3d 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 F3d 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 an 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 F3d 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 or retaliatory animus.

Booth v Pasco County, 757 F3d 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 plaintiff's charge might cost the local over $10,000 in legal bills.

Montell v Diversified Clinical Services, 757 F3d 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. Reporting the incident thus constituted protected activity.

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 F3d 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 recall could create a material factual question on causation.

Robinson v American Red Cross, 753 F3d 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 decisionmakers even knew the plaintiff had filed an EEOC charge.

B. PROTECTED ACTIVITY

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

Yazdin v Conmet Endoscopic Technologies, Inc, 793 F3d 634 (CA 6, 2015). The following statements constituted protected activity, even though they were not clearly linked to claims of alleged national origin discrimination: "I'm going to respond to counsel"; "I will have my attorney respond"; "I'm going to bring you up on charges…."; "I will be responding with charges"; threatening to "bring a lawsuit"; claiming the boss was subjecting him to a "hostile work environment," and once saying to his manager "you don't like the way I write. You don't like the way I talk. I guess you don't like my race, either." "These statements – particularly the hostile-work-environment charge – put ConMed on notice that Yazdian believed that [his manager's] conduct was illegal" and "[a]

reasonable jury could conclude that Yazdian used and intended the phrase 'hostile work environment' to reference discriminatory treatment because he was aware of the legal significance of the term and meant it to be a complaint about national-origin or religious discrimination." "In addition, the record shows that ConMed understood Yazdian's complaints as opposition to [his manager's] conduct because the legal department told Hutto to investigate Yazdian's claim after learning that Yazdian had accused [his manager] of creating a hostile work environment and not liking his 'race.'"

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

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

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

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

Boyer-Liberto v Fontainebleau Corporation, 752 F3d 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.

C. WHISTLEBLOWERS' PROTECTION ACT

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

VIII. HARASSMENT

A. SEX HARASSMENT

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

Perez v Horizon Lines, Inc, 804 F3d 1 (CA 1, 2015). Supervisor's request that the plaintiff bring cornbread and pastries to her office cannot reasonably be construed as a request for sex, and is not severe enough to sustain a hostile environment claim. The supervisor asked other employees to run personal

errands for her, and there is no evidence to show that the alleged requests interfered with his work.

Walker v Mod-U-Kraf Homes, LLC, 775 F3d 202 (CA 4, 2014). The plaintiff raised a triable harassment claim, despite the lack of sexual propositions or physical touching, with evidence that two co-workers repeatedly harassed her by talking about her performing oral sex, and by repeatedly grabbing their crotches while saying "these nuts are looking for you." A reasonable jury could find that the offending co-workers' "consistent and repeated" comments "painted women in a sexually subservient and demeaning light [that is] sufficiently severe or pervasive to alter the conditions of [Walker's] employment and to create an abusive work environment."

Rickard v Swedish Match North America, 773 F3d 181 (CA 8, 2014). Male employee who claimed his male supervisor squeezed his nipple, and also rubbed his crotch on a towel before handing it to the plaintiff, cannot proceed with a sexual harassment claim. The comments and conduct were "manifestly inappropriate and obnoxious," but plaintiff failed to show that it was motivated by sex, sexual desire, or a general hostility toward men in the workplace.

Moll v Telestor Resources Group, Inc, 760 F3d 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 F3d 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."

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

B. RACE/NATIONAL ORIGIN HARASSMENT

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

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

Tolbert v Smith, 790 F3d 427 (CA 2, 2015). The plaintiff's hostile environment claim was properly dismissed where only two allegedly racist comments were made in his presence, one of which was ambiguous and did not necessarily reference race. There was no evidence that the allegedly unpleasant conditions

the plaintiff complained about, such as putting too many pupils in the plaintiff's class and denying his request for a lump sum budget, had anything to do with race.

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

Buisson v Louisiana Community and Technical College System, 592 Fed Appx 237 (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 F3d 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 F3d 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 F3d 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 F3d 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.

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

C. RELIGIOUS HARASSMENT

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

D. AGE-BASED HARASSMENT

Rickard v Swedish Match North America, 773 F3d 181 (CA 8, 2014). Calling the age-protected plaintiff an "old man," and suggesting he had "a lot of age on [him]" did not affect a term or condition of employment, and the comments were not severe and pervasive enough to sustain an age-based harassment claim. The

plaintiff's inability to sustain a harassment claim meant that he could not sustain a constructive discharge claim.

E. EMPLOYER LIABILITY

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

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

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

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

Muhammad v Caterpillar, Inc, 767 F3d 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 F3d 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 F3d 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.

"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.

IX. ADVERSE EMPLOYMENT ACTION

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

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

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

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

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

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

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

Buisson v Louisiana Community and Technical College System, 592 Fed Appx 237 (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 F3d 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.'"

X. STATUTORY PRECONDITIONS AND LIMITATIONS PERIODS

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

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

Hooper v Proctor Health Care, Inc, ___ F3d ___; 2015 US App LEXIS 18630 (CA 7, 2015). The district court properly dismissed the plaintiff's failure to accommodate claim because it was not included in the plaintiff's EEOC charge. The charge did not mention the suggested accommodations, or a need for accommodations.

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

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

that the compensation itself was set in a discriminatory manner. A plaintiff must plead and prove the elements of a pay-discrimination claim to benefit from the Ledbetter Act's accrual provisions."

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

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

EEOC v Simbaki, Ltd, 767 F3d 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."

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

XI. PLEADING REQUIREMENTS

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

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

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

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

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

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

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

XII. MISCELLANEOUS

A. HONEST BELIEF RULE

Yazdin v Conmet Endoscopic Technologies, Inc, 793 F3d 634 (CA 6, 2015). The honest belief rule was inapplicable because the employer "failed to make a reasonably informed and considered decision before taking its adverse employment action." The decision to discharge was based solely on one

manager's account of the events; upper management did not interview the plaintiff, his co-workers or his prior managers about the events in question or the plaintiff's behavior overall; the plaintiff was not afforded the opportunity to present his side of the story; and management did not review the rebuttal letter the plaintiff submitted.

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

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

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

Hairston v Vance-Cooks, 773 F3d 266 (CA DC, 2014). Pretext was not shown by the fact that the hiring decisonmakers consulted the plaintiff's colleagues, instead of his supervisors, to understand certain facts deemed relevant to the promotion decision. "This argument suggests that, because there were better ways to determine if Hairston was qualified, Bernazolli must not have been seeking that information at all." But "Hairston proffers nothing that calls into question the genuineness of Bernazzoli's belief that Hairston was not qualified for the job he was seeking." Similarly, the plaintiff could not sustain a retaliation claim by raising questions about the reliability of relied-upon survey results. "Although Hairston raises questions about the reliability of [the] survey results, he offers no reason [the decisionmaker] would have doubted them at the time."

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

Loyd v St Joseph Mercy Oakland, 766 F3d 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 F3d 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.

B. CAT'S PAW

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

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

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

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

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

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

C. CONSTRUCTIVE DISCHARGE

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

Rickard v Swedish Match North America, 773 F3d 181 (CA 8, 2014). The plaintiff's inability to sustain a harassment claim meant that he was also unable to sustain a constructive discharge claim.

Perret v Nationwide Mutual Ins Co, 770 F3d 336 (CA 5, 2014). Jury verdict for the plaintiff reversed. The plaintiff failed to establish constructive discharge, despite allegations that the employer: (a) 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 F2d 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-decisionmakers.

D. SUMMARY JUDGMENT

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

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

E. ARBITRATION

Savant v APM Terminals, 776 F3d 285 (CA 5, 2015). Memorandum of Understanding between the employer and the plaintiff's union submitting ADEA claims to the contractual grievance/arbitration process was enforceable. The district court correctly dismissed the plaintiff's claim in lieu of arbitration.

F. MINISTERIAL EXCEPTION

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

G. EVIDENTIARY ISSUES

Delaney v Bank of America Corp, Merrill Lynch, Pierce, Fenner & Smith, Inc, 766 F3d 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 decisionmaker 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 F3d 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.

H. DAMAGES

Wiercinski v Mangia 57, Inc, 787 Fed 106 (CA 2, 2015). A manager's rather severe anti-Sematic slurs toward the plaintiff were capable of sustaining his religious and national origin discrimination claims. Punitive damages were

inappropriate, however, because evidence showed that the person to whom the plaintiff complained tried to address the problem by granting the plaintiff's transfer and shift requests.

Turley v ISG Lackawanna, Inc, 774 F3d 140 (CA 2, 2014). A $5 million punitive damages award is excessive where the underlying $1.32 million compensatory damages award was largely for "immeasurable" emotional damages. "[W]e conclude that a roughly 2:1 ratio is both permissible under the Constitution and consistent with the established policies adopted and adhered to by this court."

I. AFFIRMATIVE ACTION

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

J. ESTOPPEL/CLAIM PRECLUSION

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

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

Huon v Johnson & Bell, LTD, 757 F3d 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.

K. AFFIRMATIVE DEFENSES

Garofalo v Hazel Crest, 754 F2d 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.

L. ATTORNEYS' FEES

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

Barrett v Salt Lake County, 754 F3d 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."

M. EXPERT WITNESSES

EEOC v Freeman, 778 F3d 463 (CA 4, 2015). The district court did not abuse its discretion in excluding the EEOC's expert reports as unreliable under Fed. R.

Evid. 702 because there were an alarming number of errors and analytical fallacies in the expert's reports. The sheer number of mistakes and omissions in the expert's analysis rendered it outside the range where experts might have reasonably differed.

N. EMPLOYEE/EMPLOYER STATUS

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

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

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

Whitaker v Milwaukee County, 772 F3d 802 (CA 7, 2014). Although Milwaukee County was the plaintiff's official "employer," it could not be held liable for the alleged failure to accommodate when it was the State Department of Health Services, not Milwaukee County, that denied the plaintiff's request for

extended leave. Milwaukee County lacked power to override, and could not be held liable for, the State's decision.

Marie v American Red Cross, 771 F3d 344 (CA 6, 2014). Two Catholic nuns who served as unpaid disaster relief volunteers for the American Red Cross during a local emergency could not proceed with their religious bias claims because they were not "employees" within the meaning of Title VII. Although the nuns received some benefits, such as workers' compensation eligibility, liability insurance, expense reimbursement and training, those benefits were "contingent or were simply incidental to their work with the organization rather than valuable financial consideration exchanged in return for services."

Bluestein v Central Wisconsin Anesthesiology, SC, 769 F3d 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 F3d 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 F3d 1214 (CA 10, 2014). A property management 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."