PAUL HASTINGS

EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman

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By

Paul Grossman*

This is a supplement to Lindemann, Grossman & Weirich, *Employment Discrimination Law* (5th ed. 2013), and the 2017 Supplement put out by the ABA Section of Labor and Employment Law (Debra A. Millenson, Laurie E. Leader, and Scott A. Moss, Executive Editors). It is organized by book chapters. The 2017 Supplement includes Court of Appeals decisions through 2016 and some Supreme Court cases issued during the 2016-2017 term. With a few exceptions, this update begins with cases decided after January 1, 2016. It focuses almost exclusively on Court of Appeals and Supreme Court decisions.

Disparate Treatment (Ch. 2)

Summary Judgment Standards

Bonilla-Ramirez v. MVM, Inc., 904 F.3d 88, 130 FEP 1864 (1st Cir. 2018) – Summary judgment affirmed against fired security guard – alleged male comparables were not charged with actual security violations – employer comparables who did commit security violations were also discharged.

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Ranowsky v. Nat'l R.R. Passenger Corp. (Amtrak), No. 17-7062, ___ F.App'x ___, 130 FEP 1745, 2018 WL 3894287 (D.C. Cir. Aug. 14, 2018), *reh'g en banc denied* (Oct. 16, 2018) – New Amtrak inspector general fired 12-year lawyer – reason was lack of confidence in demeanor and competence – summary judgment granted – recent positive evaluations are not inconsistent with lack of confidence in lawyer's style and demeanor – different person hired young successor so no inferences from that can be drawn.

Rogers v. Henry Ford Health Sys., 897 F.3d 763, 130 FEP 1784 (6th Cir. 2018) – Summary judgment affirmed on promotion claim – employee with high school diploma denied promotion to job that specified bachelor's and master's degree – alleged comparables had educational requirements waived, but only one level of educational requirement – no comparable had two levels of education waived based on experience – these are material distinctions, mandating summary judgment.

Khowaja v. Sessions, 893 F.3d 1010, 130 FEP 1644 (7th Cir. 2018) – Summary judgment against Muslim FBI trainee who was terminated affirmed – alleged comparably situated white trainee worked in close proximity, did have the same supervisor, and was involved in a similar issue – however, although the white trainee was counseled for mistakes, unlike plaintiff he did not defend his mistakes – moreover, plaintiff was involved in numerous other instances of inappropriate judgment – viewing the evidence as a whole, plaintiff presents no evidence that would lead a reasonable fact finder to conclude that he was terminated because he was a Muslim – questions by terminating supervisor about plaintiff's religious faith not demeaning.

Fassbender v. Correct Care Solutions, LLC, 890 F.3d 875, 130 FEP 1521 (10th Cir. 2018) – Summary judgment affirmed on retaliation claim – no reasonable jury could conclude that prison employee was terminated because she passed on a complaint of sexual harassment – summary judgment overturned on pregnancy discrimination claim – shifting explanations for termination are circumstantial evidence from which a jury could infer pretext.

Rooney v. Rock-Tenn Converting Co., 878 F.3d 1111, 130 FEP 1076 (8th Cir. 2018) – Summary judgment affirmed – district court considered grounds for termination beyond the reasons provided to plaintiff at the time he was fired – *McDonnell Douglas* framework is not as narrow as plaintiff contends – employer does not have obligation to list all reasons for discharge in time of adverse action – burden of listing all reasons occurs only during litigation – "an employer is certainly not bound as a matter of law to whatever reasons might have been provided [at time of discharge]," 878 F.3d at 1116 – evidence of a substantial shift in an employer's explanation for decision may evidence pretext, but elaborating on reasons given at the time does not show pretext – no contradiction between explanation given to plaintiff at the time and the additional examples of poor performance offered in support of summary judgment – with respect to employer's assertion that one reason for discharge was poor relations with a co-worker, plaintiff asserts that the poor relations were the co-worker's fault – "it is important to remember, as we have often said, that a federal court is not a super-personnel department with authority to review the wisdom or fairness of business judgments made by employers," 878 F.3d at 1118 – plaintiff's evidence falls well short of creating a factual issue – contention that Jewish co-workers are treated more favorably than he was lacks evidentiary support – no evidence that allegedly anti-Christian employee played a role in the termination.

Golla v. Office of Chief Judge of Cook Cty., 875 F.3d 404, 130 FEP 925 (7th Cir. 2017) – White administrative assistant paid substantially less than African-American despite doing similar work – disparity caused by different pay grades awarded in prior positions – numerous black and white employees doing similar work paid less than white plaintiff – 7th Circuit no longer treats "direct" and "indirect" methods of proof as distinct legal standards – evidence must be considered as a whole – issue is whether reasonable factfinder could find causal connection with race – *McDonnell Douglas* indirect method remains a means of organizing and presenting the circumstantial evidence but is not a separate method of proof – no reasonable factfinder could conclude that white plaintiff received lower pay than black co-employee because of his race – pay grades were set in prior positions that did not change when they transferred to present position – no pattern of reverse racial discrimination – "the evidence as a whole was insufficient for a reasonable jury to conclude that . . . Golla [was paid] at a lower pay grade than Taylor on account of his race." 875 F.3d at 408.

Grant v. Trs. of Ind. Univ., 870 F.3d 562, 130 FEP 675 (7th Cir. 2017), *reh'g denied* (Sept. 28, 2017) – Black tenured professor fired after outside investigator confirmed that he had misrepresented his academic credentials – no evidence that his race or his prior internal EEO complaint against a dean affected the decision – no evidence that allegedly biased executive vice chancellor who recommended discharge had any input or influence in the case – he simply submitted it to the chancellor long before the firing – professor's misrepresentations justify discharge – cat's paw argument rejected.

Reed v. Freedom Mortg. Corp., 869 F.3d 543, 130 FEP 639 (7th Cir. 2017) – Two black employees chosen for layoff because of attendance records – claimed whites had worse attendance records – "'Similarly situated' means directly comparable in all material respects. The objective is to eliminate other possible explanatory variables such as differing roles, performance histories, or decision-making personnel, in order to isolate the critical independent variable of discriminatory animus." 869 F.3d at 549 (citations omitted) – Proposed comparator need not be identical in every conceivable way – it is a common sense evaluation – here the alleged comparators were not shown to have a similar history of violation of the attendance policy and plaintiff testified only that he had seen these other employees arrive at 8:00 a.m. an unspecified number of times – no evidence of the whites' attendance records – plaintiffs failed to produce evidence as to how often the comparators were tardy, whether management was aware of the tardiness, whether they had permission to be tardy, and whether there had been discipline – summary judgment affirmed.

Mourning v. Ternes Packaging, Ind., Inc., 868 F.3d 568, 130 FEP 603 (7th Cir. 2017) *reh'g en banc denied* (Oct. 3, 2017) – Numerous subordinates complained about plaintiff's unprofessional conduct toward them – summary judgment affirmed – comparative evidence claim rejected – plaintiff compared herself to a male former materials manager who she claimed acted more egregiously than she did but was given additional chances to improve his performance – "For [the male manager] to be an adequate comparator, however, [plaintiff] would need to show that he was treated more favorably then she was by the same decisionmaker . . .," 868 F.3d at 571 – Under new 7th Circuit test, no reasonable jury could conclude that plaintiff was discharged because of her sex.

McKinney v. Office of Sheriff of Whitley Cty., 866 F.3d 803, 130 FEP 565 (7th Cir. 2017) – Summary judgment in race discharge case reversed – plaintiff was first black sheriff – sheriff sent termination letter with three reasons – County Board of Commissioners added two more reasons several days later – defense lawyers added three more justifications – shifting reasons – "The most striking features of this lawsuit are the sheer number of rationales the defense has offered . . . and the quality and volume of evidence plaintiff has collected to undermine the accuracy and even the honesty of those rationales," 866 F.3d at 810 – one reason was discredited because plaintiff did exactly as he was instructed – other rationales overturned by comparative evidence – many of the rationales were offered after discharge – "The fact that the defendant did not offer any of these rationales at the time it fired [plaintiff] also calls into question whether any of these reasons actually motivated the firing, so these could easily be deemed pretexts, as well." *Id*. at 813. – The fact that sheriff both hired and fired was given undue weight – this "is not a conclusive presumption" – "[t]here are many statutes . . . where it is unsound to infer the absence of discrimination simply because the same person both hired and fired . . . ." *Id*. at 815. – One example of such a situation might be applicable here – "The same supervisor could hire a county's first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague, that same supervisor could fire the black officer because of his race . . . ." *Id*.

Edwards v. Hiland Roberts Dairy, Co., 860 F.3d 1121, 130 FEP 362 (8th Cir. 2017) – Summary judgment affirmed against two black maintenance employees fired for violating timecard policies – alleged comparables committed different acts which did not involve dishonesty – plaintiffs tried to deceive the company which differentiated them from the alleged comparables.

EEOC v. AutoZone, Inc., 860 F.3d 564, 130 FEP 332 (7th Cir. 2017), *reh'g en banc denied* 875 F.3d 860 (7th Cir. 2017) – Summary judgment affirmed – EEOC alleged that black sales manager was transferred away from a store in a mostly Hispanic area to create a predominantly Hispanic workplace – since transfer involved no reduction of responsibilities, and was simply one of several transfers that had occurred during the individual's career, summary judgment granted on the basis of no adverse

action – statute prohibits segregating employees in a way which tends to eliminate opportunities – assume *arguendo* material factual dispute about whether AutoZone intentionally segregated black employee because of his race – no reasonable jury could conclude that the transfer adversely affected his employment – EEOC assertion that claimant under the provision of Title VII prohibiting segregation does not require an adverse action rejected – purely lateral job transfers do not give rise to Title VII liability absent unusual facts because they do not constitute a material adverse employment action.

Alkhawaldeh v. Dow Chem. Co., 851 F.3d 422, 129 FEP 1765 (5th Cir. 2017), *reh'g denied* (Apr 27, 2017) – Summary judgment affirmed on claims of national origin and religious discrimination by a Muslim-Jordanian-Arab scientist – In October, 2009 Supervisor Hook gave plaintiff the lowest possible rating, a 1 on a 1:5 scale and placed him on a performance plan – the following month plaintiff complained to Hook about the discriminatory comment made by a co-worker – Hook refused to take the complaint seriously and commented that given the part of the world plaintiff came from, "there's a perception, and perception is reality" 851 F.3d at 429 – before deciding to terminate plaintiff, Dow transferred him to a different supervisor who also rated him a poor performer – moreover, the supervisor had helped plaintiff successfully appeal a visa denial – the sequence of events undercuts plaintiff's claim as does the lack of any comparables.

Mayes v. WinCo Holdings, Inc., 846 F.3d 1274, 129 FEP 1565 (9th Cir. 2017) – Summary judgment reversed – female freight crew supervisor fired for taking stale cake and sharing it with crew – female general manager had expressed her belief that a man "would be better" in the position after she replaced plaintiff – she also stated she didn't like that "girl" as crew leader – evidence that sharing stale cakes was common in combination with direct evidence warrants trial.

Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 129 FEP 1145 (6th Cir. 2016) – Summary judgment in race/age demotion case – Black manager who failed to meet goals in performance improvement plan demoted to a supervisor – decision-maker used the "N" word in referencing another UPS employee – district president used the word "boys" in reference to plaintiff's black co-workers – neither of the alleged comments was directed at plaintiff nor was the "N" word used in his presence – too great a jump to infer that the decision-making supervisor's use of the "N" word in relation to an unrelated employee meant that his decision to demote plaintiff was due to a similar racial animus – "boy" can be discriminatory based on context, tone, and local custom – no indication that executive's animus, if any, trickled down and influenced the decision-makers – direct evidence claim fails – circumstantial evidence fails because alleged comparators are not comparable – the alleged comparables were not demoted, were not "similarly situated in all relevant respects" – comparator one did not have similar experience and disciplinary history – comparator two did not have a comparable record of performance deficiencies – no record of performance deficiencies by comparator three – comparator four did not have comparable performance failures and in two years exceeded her performance goals – age claims dismissed on same basis as race claim.

Williams v. Office of Chief Judge of Cook Cty., 839 F.3d 617, 129 FEP 1119 (7th Cir. 2016), *reh'g denied* (Nov. 30, 2016) – Black employee injured on job was receiving temporary total disability benefits – told to let employer know when she was able to return – plaintiff received an independent medical examination from the Cook County Medical Office determining that she was returning to work in December, 2010 – no one noticed this until June, 2011 – employer sent letter directing plaintiff to return to work on August 2 – plaintiff went to medical office for evaluation on August 1 and was approved to return to work but her personal physician disagreed and provided a note that she was not able to return to work – her attorney provided the County attorney with a letter from the physician stating she would be allowed to return to work on September 3 – plaintiff did not keep the employer informed of her new return to work date and was sent a termination letter based on her failure to communicate any intent to return to work – plaintiff claimed retaliation for a race discrimination complaint and race discrimination – summary judgment affirmed – 7th Circuit has discarded direct and indirect methods of proof – "There is simply not enough evidence for a reasonable

factfinder to rule in favor of Williams," 839 F.3d at 626 – comparator not similarly situated since comparator kept employer aware of all return to work facts.

Ortiz v. Werner Enters., Inc., 834 F.3d 760, 129 FEP 803, (7th Cir. 2016) – Summary judgment reversed – plaintiff subjected to barrage of ethnic slurs – discharged for engaging in conduct tolerated by non-Hispanic brokers – trial court erred in treating "direct" and "indirect" evidence as separate methods of proof requiring their own elements and in requiring that to avoid summary judgment employee demonstrate a "convincing mosaic" of discrimination – this is not the legal test – after-acquired evidence of misuse of company internet by sending and receiving sexually explicit messages cannot retroactively justify discharge but if uniformly enforced might reduce damages – panel of Posner, Easterbrook, and Hamilton – the sole question that matters is whether a reasonable jury can conclude that plaintiff would have kept his job if he had a different ethnicity but everything else was the same – even though this court has in the past used "convincing mosaic" as a legal requirement, that was clear error and these cases are overruled – the direct and indirect framework does nothing to simplify the analysis of the basic question of causation – District Courts must stop separating "direct" from "indirect" evidence – inconsistent cases ruled – *McDonnell Douglas v. Green* is sometimes referred to as an indirect means of proving discrimination – it does not matter what the case is called as a shorthand – what is important is that evidence not be put into different piles and labeled "direct" and "indirect." Applying the correct test, a reasonable jury could infer that the decisionmakers didn't much like Hispanics and fired him for using techniques that were tolerated when practiced by other brokers – a jury could also go the other way – but given the conflict, a trial is necessary.

O'Donnell v. Cleveland, 838 F.3d 718, 129 FEP 957 (6th Cir. 2016), *reh'g, en banc denied* (6th Cir. 2016*), cert. denied* 137 S. Ct. 1206 (2017) – Twelve white and one Hispanic police officers were involved in a shooting of two black drivers – they alleged they were placed on restricted duty for much longer than comparably situated black police officers who were involved in shootings – summary judgment for Cleveland – submitting a spreadsheet of relative discipline insufficient to establish that the situations were comparable.

Cherry v. Siemens Healthcare Diagnostics, Inc., 829 F.3d 974, 129 FEP 615 (8th Cir. 2016) – Allegedly biased supervisor gave plaintiff bad performance evaluations in years 2010 and 2011. Unbiased decisionmaker chose plaintiff for layoff based on low evaluations – Plaintiff claimed that "cat's paw" theory applicable – theory not applicable – supervisor was not using unbiased decisionmaker as dupe because supervisor did not know layoff coming when gave evaluations – summary judgment for employer affirmed.

Rogers v. Pearland Indep. Sch. Dist., 827 F.3d 403, 129 FEP 429 (5th Cir. 2016) , *cert. denied* 137 S. Ct. 820 (2017) – Job applicant rejected because lied about three different criminal drug convictions – disparate treatment claim fails on summary judgment because alleged comparator not comparable – alleged comparator lied but only about one drug conviction – disparate impact claim fails because undisputed facts establish that convictions are not an automatic bar to employment and the record shows that the school district recently hired several employees with felony convictions – 2:1 decision – dissent contended that "[t]he majority's application of the 'nearly identical circumstances' test to establish a 'similarly situated comparator' . . . is so strenuous that it effectively immunizes employers from disparate treatment claims unless the plaintiff is able to show that he shares identical traits with the alleged comparator," 827 F.3d at 410.

Henry v. Hobbs, 824 F.3d 735, 129 FEP 229 (8th Cir. 2016) – Black jail employee failed voice stress test which revealed lied about denials of supplying contraband to inmate – comparative evidence fails – no evidence why comparators given voice test – white officer discharged in separate contraband incident after failing voice test.

Jones v. City of St. Louis, 825 F.3d 476, 129 FEP 313 (8th Cir. 2016) – Summary judgment affirmed – claim that paid medical leave allegedly caused by illegal racial stress was an adverse employment action because it depleted his accrued medical leave rejected – to the contrary allowing plaintiff to go on paid medical leave at his request provided him with "a favorable employment benefit" – therefore, no adverse action – claim that poor overall performance rating was racially biased rejected because alleged comparables were not similarly situated.

Johnson v. Perez, 823 F.3d 701, 129 FEP 237 (D.C. Cir. 2016) – Summary judgment affirmed despite testimony of co-workers that Black temp terminated for poor performance and argumentative demeanor performed well on his joint projects with them and behaved well – testimony did not come from supervisors – temporary employee primarily worked alone and supervisors gave consistent explanations for discharge.

Blackwell v. Alliant Techsystems, Inc., 822 F.3d 431, 129 FEP 141 (8th Cir. 2016), *reh'g en banc denied* (Aug 15, 2016) – Summary judgment affirmed – black female protected age worker discharged for elbowing co-worker in back – alleged comparators had not committed act of physical violence – delay between incident and discharge of one month explained by employer's desire to conduct full investigation – claim of retaliation fails despite contention that she was discharged the same day she sent an email to the company investigator – mere coincidence – employee had already been suspended for the event, Human Resources had completed its investigation, and had recommended discharge two weeks earlier.

Chaib v. Geo Grp., Inc., 819 F.3d 337, 128 FEP 1809 (7th Cir. 2016) – Summary judgment affirmed on sex, race and national origin discrimination claims – employer concluded plaintiff was exaggerating the extent of her work related injuries and improperly extending her paid medical leave – racist comments by supervisor and co-workers insufficient to establish pretext since they were not decision makers – failed to show lack of an honest belief since there was video evidence of her driving and running errands while claiming to be unable to perform such tasks together with opinion of examining neurologist that she was malingering.

Bagwe v. Sedgwick Claims Mgmt. Servs., Inc., 811 F.3d 866, 128 FEP 1253 (7th Cir. 2016), *cert. denied* 137 S. Ct. 82 (2016) – Summary judgment affirmed in race discrimination case – operations manager terminated because of poor interpersonal and leadership skills which allegedly lowered morale in the office – no inference of discrimination even though she met company goals – company had received numerous complaints about inability to work with others and had placed her on a performance improvement plan because of such concerns – pay allegation that she was paid less than her white colleagues rejected because of lack of evidence about whether they were subject to the same standards, had the same supervisors, or had comparable experience and qualifications.

Flowers v. Troup Cty., Ga. Sch. Dist., 803 F.3d 1327, 128 FEP 212 (11th Cir. 2015), *cert. denied* 136 S. Ct. 2510 (2016) – summary judgment affirmed against black high school football coach fired for recruiting violations – plaintiff was first black head football coach in the county since it was desegregated – multiple letters to school district from neighboring district questioned eligibility of certain students as to whether they lived in the proper school district – while investigation may have been "ham-handed," and one could reasonably conclude that the school superintendent "had it in for Flowers from the beginning," there was no evidence that the investigation of recruiting violations was a pretext for discrimination – alleged comparative evidence of two white head football coaches at other schools in the county who were disciplined for recruiting violations rejected – the facts as to the "intensity and frequency" of the violations were totally different – "The obvious differences between Flowers's circumstances and those of his purported comparators are hardly the stuff of an apples-to-apples comparison," 803 F.3d at 1341.

Burley v. National Passenger Rail Corp., 801 F.3d 290, 128 FEP 1 (D.C. Cir. 2015), *reh'g en banc denied* (C.A.D.C. Nov. 6, 2015), *cert. denied* 136 S. Ct. 1685 (2016) – African American train engineer fired when he ran his engine past the stop signal and caused a derailment – he contended that a racial motivation could be inferred because (1) the punishment was disproportionate for a first offense; and (2) he could show that the investigation was flawed – there was a hearing that concluded that the charges had been proven – an internal appeal was denied, but an external appeal concluded Burley had committed the violation but reinstated him

without back pay – the Locomotive Engineer Review Board found a lack of substantial evidence that a warning signal was properly displayed and overturned the suspension of his engineering certificate – summary judgment affirmed – Amtrak's final decision maker was not aware of Burley's race – plaintiff contended that his supervisor, who did the initial investigation, was biased, and thus it was a cat's paw case – but he had no evidence that his immediate supervisor was motivated by race – even though the Locomotive Engineer Review Board's assessment indicated that a jury might conclude that no warning notice was properly displayed, that, without more, is not a ground "on which a reasonable jury could conclude that [the supervisor] was so far off base as to suggest he acted with a racial motive," 801 F.3d at 298 – while a jury can conclude that employer's reasons are pre-textual if it concludes that an investigation was not just flawed but inexplicably unfair, which no reasonable jury could conclude that the investigation included "an error so obvious it must have been intentional," 801 F.3d at 300 – plaintiff's contention that Amtrak disciplined him significantly more harshly than white employees is rebutted by the fact that the decision maker who decided on the level of discipline did not know his race – "we find no basis in the record upon which a reasonable factfinder could conclude that whatever investigative flaws or unfairness Barley may have suffered . . . were so unexplained or otherwise striking as to suggest that Amtrak was motivated by Burley's race to discipline him," 801 F.3d at 302.

Mintz v. Caterpillar Inc., 788 F.3d 673, 127 FEP 317 (7th Cir. 2015) – Summary judgment in race disparate treatment case affirmed – no *prima facie* case since employee not meeting employer's legitimate expectations – employer expected zero errors of a particular type, and plaintiff, an engineer, had many errors – he admitted his record was "bad" – thus he did not "raise a genuine issue of fact as to whether he was meeting Caterpillar's legitimate expectations," 788 F.3d at 680 – Moreover, even if he could meet that burden, he has not identified any other employee with a similar record whom Caterpillar treated more favorably – plaintiff argument that Caterpillar's expectations were unreasonable rejected – "A federal court does not sit as a 'super personnel department,' second-guessing an employer's legitimate concerns about an employee's performance," *id*.

Washington v. American Airlines, Inc., 781 F.3d 979, 126 FEP 1057 (8th Cir. 2015) – Five whites and one black applied for a machinist position, which required satisfactory completion of an examination – four of the whites, who passed, were not comparable, because they were tested by a different examiner – the examiner who flunked the plaintiff also flunked the white applicant he tested – this negated any racial motivation.

Simpson v. Beaver Dam Cmty. Hosps., Inc., 780 F.3d 784, 126 FEP 648 (7th Cir. 2015) – Summary judgment affirmed against black physician denied staff privileges – comments by member of credentials committee about plaintiff's disruptive behavior and being a "bad actor," and that plaintiff might be a "better fit" elsewhere, are not, under the facts of this case, indicative of racial discrimination – it was undisputed that plaintiff was put on academic probation while in residency, that there were two uninsured medical malpractice claims against him, and that the credentials committee received a negative reference from a staff member at one of plaintiff's former employers – "[R]ather than refuting the facts that underlie the [hospital's] concerns, [plaintiff] simply argues that the concerns should not have mattered[,]"780 F.3d at 798-99 – "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. And the record does not raise a reasonable inference that it was[,]" *id*. at 799

Ross v. Jefferson Cty. Dep't of Health, 701 F.3d 655, 116 FEP 930, 27 A.D. Cas. 1 (11th Cir. 2012), *reh'g en banc denied* 706 F.3d 1333 (11th Cir. 2013) – Summary judgment properly granted on black employee's race discrimination claim since she waived her complaint of racial discrimination when she was asked whether she "felt like her termination had anything to do with her race" and she responded "no." 701 F.3d at 661 (alterations omitted).

General

Richard v. Reg'l Sch. Unit 57, 901 F.3d 52, 33 A.D. Cas. 1862 (1st Cir. 2018) – Court affirmed five-day bench trial decision against plaintiff – *McDonnell Douglas* analysis – Plaintiff established *prima facie* case of retaliation – employer offered legitimate non-discriminatory reason – plaintiff proved that legitimate non-discriminatory reason was false – nevertheless, the District Court then turned to the ultimate question – had plaintiff established it was more likely than not that retaliation for advocacy for students with disabilities actually motivated the adverse actions – the Court found "scant evidence" that the superintendent of schools was even aware of the plaintiff's advocacy for disabled students –

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

2-to-1 decision.

Caraballo-Caraballo v. Corr. Admin.; Corr. Dep't of the Commw. of P.R., 892 F.3d 53, 130 FEP 1581 (1st Cir. 2018) – Plaintiff who had successfully been performing job for years transferred with no loss of pay to lesser job; error to rule as matter of law that replacement has superior qualifications because of additional education – plaintiff's experience could be found to counterbalance extra education – while transfers may not be adverse employment actions if they do not involve a real demotion, a transfer is actionable if it involves more than minor changes in working conditions – if it changes the plaintiff's conditions of employment in a manner that is more disruptive than a mere inconvenience or an alteration of job responsibilities.

Turner v. Hirschbach Motor Lines, 854 F.3d 926, 130 FEP 81 (7th Cir. 2017) – Urine sample tested positive for marijuana – allegedly biased safety officer cancelled plaintiff's request to retest his split urine sample – safety officer not decision maker – catspaw theory rejected – decision maker unaware of alleged retest request – making hiring decision on basis of one positive test is not prohibited – no showing that drug test was unreliable or that second test would have been negative.

Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 128 FEP 1334 (11th Cir. 2016) – Mixed-motive burden of proof – a plaintiff asserting a mixed-motive claim need only produce evidence sufficient to show that one of plaintiff's protected characteristics was "a" motivating factor for the challenged adverse employment action – this is all that is necessary to survive summary judgment – the *McDonnell Douglas* burden-shifting framework is inapplicable since it assumes a single "true reason" – reasonable jury could conclude that sexist comments by three of the school board members who decided not to renew female school superintendent's contract established that illegal bias played a role.

Adverse Impact (Ch. 3 & Ch. 4)

Williams v. Wells Fargo Bank, N.A., 901 F.3d 1036, 130 FEP 1809 (8th Cir. 2018), *reh'g en banc denied* (Nov. 1, 2018) – Summary judgment affirmed against putative class of minority employees who sued FDIC-insured bank which prohibited employment of individuals who had recently been convicted of crimes involving dishonesty – bank was entitled to use business necessity defense because it could have faced penalties of $1 million per day for non-compliance with federal law – claim that waivers could have been accomplished with the assistance of the bank rejected – no data suggested waivers would have ameliorated racial disparity.

Jones v. City of Boston, 845 F.3d 28, 129 FEP 1420 (1st Cir. 2016) – Summary judgment in favor of City on drug hair test disparate impact claim reversed – the employer established job relatedness and business necessity – abstention from drug use is an important element of police behavior – however, a reasonable jury could find that the plaintiff's proposed alternative, follow-up urinalysis tests for officers who tested positive for drug use, and case has to be remanded to be tried on that theory.

Lopez v. City of Lawrence, 823 F.3d 102, 129 FEP 182 (1st Cir. 2016), *cert. denied* 137 S. Ct. 1088 (2017) – Police officer promotion tests developed by state agency with an instruction to create a selection took that "fairly test[s] the knowledge, skills and abilities which can be practically and reliably measured and which are actually required," 823 F.3d at 107 – test had an adverse impact – after an 18-day bench trial the trial court determined that the test had an adverse impact but that it was a valid selection tool and that Plaintiffs failed to prove there was an alternative selection tool that was as valid that would have resulted in more minority promotions – historical purpose of exams was that there was blatant segregation in public employment including the Boston Police Department and the exams were seen as a way to move away from racism and nepotism. The exams in question had two components – job knowledge multiple choice written examination scored on a 100 point scale, and an education and experience rating also scored on a 100 point scale. The written examination accounted for 80 percent and the education experience, the remaining 20 percent – a score of 70 was needed to be considered for promotion – the subject matter on the exams can be traced back to a 1991 validation study by the state agency responsible for the exam – that study surveyed police officers in 34 jurisdictions nationwide through a questionnaire that sought to ascertain the kinds of knowledge, skills, and abilities that are critical – they made a list of knowledge and traits and distributed that to high-ranking police officers who were asked to rank those traits – the municipalities were provided with a list of test takers who passed, ranked in order of their test scores – they were selected in strict rank order – this meant that all of those who were promoted scored well above the minimum being acceptable – the issue of whether the test is "job related . . . and consistent with business necessity" is whether or not it is valid – whether it materially enhances the employer's ability to pick individuals who are more likely to perform better – here, Boston sought to demonstrate content validity – the

questions are a representative sample of job behaviors – the Federal Uniform Selection Guidelines are not inflexible and binding legal standards that must be rigorously applied – in *Ricci*, the Supreme Court's most recent disparate impact decision, the court found New Haven's firefighter promotional exam job related without mentioning the guidelines – even on their own terms, the guidelines poorly serve the controlling role assigned them by plaintiffs in this case – they provide no quantitative measure for drawing the line between representative and non-representative samples of job performance – Boston relied on the expert testimony of Dr. James Outtz, an industrial organizational psychologist who had 20 years of experience – he opined that the exams identified critical skills actually used by police sergeants – Outtz opined that the written question and answer portion of the exam standing alone did not pass muster but when considered with the education and experience component it did – the plaintiffs relied on their own expert, Dr. James Wiesen – the Judge concluded that Outtz was correct – the question of whether a test has been validated is primarily a factual question which is reviewed for clear error – our affirmance of the trial court finds for support the absence of any quantitative measure of "representativeness" provided in the law – the plaintiffs and the *United States* as *amicus* relied on our analogy in our earlier *Beecher* case that knowledge of baseball vocabulary possessed by a potential recruit for the Red Sox who could not bat, pitch, or catch would be irrelevant – but here knowledge of the law on behalf of a sergeant is critical to the job – the more accurate baseball analogy would be the hiring of a coach who must have an extensive knowledge of the rules that must be followed by those being managed – plaintiffs attacked the selection based on rank order – plaintiffs contend that this requires a higher level of validity than use of an exam that is minimally valid – the guidelines are inconsistent on the point – some courts seem to require more scrutiny of the validation evidence when it is used in rank order – the district court here required a separate demonstration that there is a relationship between higher scores and better job performance – but there is no showing that an increased number of Black or Hispanic applicants likely would have been selected under an alternative approach – rank ordering furthers the city's interests in eliminating patronage and intentional racism – the record contains detailed professionally buttressed findings that persons who perform better under the test are likely to perform better on the job – that is sufficient – the plaintiffs clearly failed to come up with an alternative which would be equally valid with a lesser impact – Decision was 2 to 1 with Judge Torruella in dissent.

EEOC v. Freeman, 778 F.3d 463, 126 FEP 323 (4th Cir. 2015) – The EEOC alleged that background checks had an unlawful disparate impact on black and male job applicants – district court granted summary judgment to employer after excluding the EEOC's expert testimony as unreliable – affirmed – background checks included criminal background checks and credit history checks – under Federal Rule of Evidence 702, expert testimony is admissible if it "rests on a reliable foundation and is relevant" – "The district court identified an alarming number of errors and analytical fallacies in Murphy's reports, making it impossible to rely on any of his conclusions" 778 F.3d at 466 – "Most troubling, the district court found a 'mind-boggling' number of errors and unexplained discrepancies in Murphy's database," *id*. at 467 – "The sheer number of mistakes and omissions in Murphy's analysis renders it outside the range where experts might reasonably differ," *id*. (citation and internal quotations omitted) – the concurring opinion notes that Murphy "undeniably 'cherry-picked,'" *id*. at 470 – it notes that this is a "pattern of suspect work from Murphy" for the EEOC, including in *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014), where Murphy's work was also excluded – "Despite Murphy's record of slipshod work, faulty analysis, and statistical sleight of hand, the EEOC continues on appeal to defend its testimony." 778 F.3d at 471 – the EEOC owes duties to employers as well as employees – "[A] duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit," *id*. at 472 (citation and internal quotations omitted) – "That the EEOC failed in the exercise of this . . . duty in the case now before us would be restating the obvious," *id*.

Race and Color (Ch. 6)

Smelter v. S. Home Care Servs. Inc., 904 F.3d 1276, 131 FEP 9 (11th Cir. 2018) – Summary judgment on hostile racial environment reversed – frequent use of the "n" word by co-workers in presence of management – not essential but plaintiff proved that the harassment unreasonably interfered with her work performance – summary judgment affirmed on discriminatory discharge and retaliation claims – plaintiff failed to establish pretext with respect to the employer's job performance explanations for the discharge.

Robinson v. Perales, 894 F.3d 818, 130 FEP 1701 (7th Cir. 2018) *reh'g denied* (July 24, 2018) – Summary judgment reversed on racial hostile environment claim – two instances of using the "N" word is enough for a hostile environment – the test is "severe *or* pervasive", not "severe *and* pervasive."

Johnson v. Advocate Health and Hosp. Corp., 892 F.3d 887, 130 FEP 1609 (7th Cir. 2018), *reh'g en banc denied* (July 10, 2018) – Summary judgment affirmed on race pay – comparables not similarly situated – comparables need not be identical – the test is commonsense – the issues include whether the comparables were supervised by the same person, were subject to the same standards, and engaged in similar conduct – summary judgment affirmed – plaintiffs did not produce sufficient evidence of non-African American employees treated better – on promotions, inadequate evidence demonstrate that the successful candidates were comparable – summary judgment also affirmed on terminations – again, no proper comparators – summary judgment reversed on hostile work environment/racial and derogatory speech – District concluded that racial harassment was not sufficiently severe or pervasive – "We expect a certain level of maturity and thick skin from employees," 892 F.3d at 900 – fact question on whether harassment was severe enough – racially derogatory speech used by both employer and contracting company hired to supervise janitors – using Negro dialect and the "N" word relied upon – evidence that one supervisor harassed African-American employees by mocking them with what he thought was stereotypical speech and using the "N" word could allow a reasonable jury to find a hostile environment – employer which outsourced supervision liable for their comments – under Title VII an employee can have more than one employer – both direct employer and outsource supervisors potentially liable – potential hostile environment not negated by the fact that some supervisors were African-American – summary judgment on hostile work environment claim with respect to racial derogatory language reversed.

Cole v. Bd. of Trust. of N. Ill. Univ., 838 F.3d 888, 129 FEP 949 (7th Cir. 2016), *cert. denied* 137 S. Ct. 1614 (2017) – Summary judgment properly granted on hostile work environment claim – black employee downplayed noose incident anonymously placed in workspace – basic allegation was that department was rife with improper practices, favoritism, unauthorized commodity orders, and the like – record does not indicate any instances of hostility beyond noose incident connected to race and no evidence supervisor involved in race incident – University reasonably reported noose incident to University police.

EEOC v. Catastrophe Mgmt. Solutions, 852 F.3d 1018, 130 FEP 228 (11th Cir. 2016), *reh'g en banc denied* 876 F.3d 1273 (11th Cir. 2017) – EEOC disparate treatment race claim based on employer's rescission of job offer to black applicant who refused to remove dreadlocks pursuant to company grooming policy properly dismissed – EEOC conflates the distinct Title VII theories of disparate treatment, the sole basis on which the case has been filed, and disparate impact, the theory it has disclaimed in this case – Title VII enacted to protect immutable inherited physical characteristics of race, not grooming – EEOC compliance manual linking grooming practices to race is not persuasive in light of overwhelming case law and EEOC's own administrative decision declaring different employer's dreadlocks ban outside scope of federal discrimination law – Section 12(b)(6) dismissal affirmed since the proposed amended complaint does not set out a plausible claim of race discrimination – EEOC contention that *Young v. United Parcel Srvc. Inc.*, 135 Sup. Ct. 1338 (2015) supports its use of disparate impact arguments in this action rejected – *Young* does not work a dramatic shift in disparate treatment jurisprudence – *Young* indicated in a pregnancy context that a plaintiff could prove that their employer's preferred reasons are pretextual but providing evidence that the policies impose a significant burden on pregnant workers and that the employer's legitimate non-discriminatory reasons are not sufficiently strong enough to justify the burden – *Young* still requires intentional discrimination – we do not read *Young* to stand for the proposition that an employer's neutral policy can engender disparate treatment liability merely because it has an unintended adverse effect on members of a protected group – as a general matter Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices – "We recognize that the distinction between immutable and mutable characteristics of race can

sometimes be a fine [line] (and difficult) one, but it is a line courts have drawn. So, for example, discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hair style (a mutable choice) is not." 852 F.3d at 1030 (citations omitted) – the EEOC's admission that the employer's grooming policy is race neutral but nevertheless contending that it constitutes disparate treatment race discrimination is logically inconsistent: "The Compliance Manual also runs headlong into a wall of contrary caselaw. In the words of a leading treatise, '[c]ourts generally have upheld facially neutral policies regarding *mutable* characteristics, such as facial hair, despite claims that the policy has an adverse impact on members of a particular race or infringes on the expression of cultural pride and identification.' BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 6-5 (5TH ED. 2012)." 852 F.3d at 1032. "As far as we can tell, every court to have considered the issue has rejected the argument that Title VII protects hair styles culturally associated with race." *Id.* "We would be remiss if we did not acknowledge that, in the last several decades, there have been some calls for courts to interpret Title VII more expansively by eliminating the biological conception of 'race' and encompassing cultural characteristics associated with race. But even those calling for such an interpretive change have different visions (however subtle) about how 'race' should be defined." 852 F.3d at 1033 – With respect to the mutable/immutable distinction, "It may not be a bad idea to try to resolve through the democratic process what 'race' means (or should mean) in Title VII." 852 F.3d at 1035.

Jordan v. Turner Indus. Grp., LLC, 642 F. App'x 420, 128 FEP 1825 (5th Cir. 2016) (unpublished) – Summary judgment on claim by "lead man" laborer who asserted that employer failed to take any action to enforce its discrimination policy after rope resembling hangman's noose was found at job site – claimed improper discharge – summary judgment since reduction in force included a total of 116 employees as job wound down was reason for discharge, and plaintiff failed to show that "lead men" were laid off last.

National Origin and Citizenship (Ch. 7)

Village of Freeport v. Barrella, 814 F.3d 594, 128 FEP 1345 (2d Cir. 2016), *appeal after new trial* 714 F. App'x 78 (2nd Cir. 2018), *pet. for cert. docketed* ___ U.S. ___ (Oct. 3, 2018) – Reverse discrimination case – white candidate for police chief alleged that Cuban-born Hispanic chosen for racial reasons – does not matter that successful candidate self-identified himself as "white" – Hispanic ethnicity constitutes race as a matter of law – defendant not entitled to judgment as a matter of law – jury verdict for plaintiff set aside for unrelated reasons and new trial ordered.

Religion (Ch. 9)

EEOC v. Abercrombie & Fitch Stores, Inc., ___ U.S. ___, 135 S. Ct. 2028, 127 FEP 157, 2015 WL 2464053 (2015) – Abercrombie has a "look" policy that prohibits "caps" – it refused to hire Elauf, a practicing Muslim who wears a headscarf for religious reasons – the assistant manager informed the district manager "that she believed Elauf wore her headscarf because of her faith." [The district manager stated] that "Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise . . . ." 135 S. Ct. at 2031. The Tenth Circuit directed summary judgment on the ground that Elauf did not inform Abercrombie of her need for a religious accommodation – the Supreme Court rejected this view, stating "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision," 135 S. Ct. at 2032 – Title VII does not impose a knowledge requirement, although some anti-discrimination statutes do – "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," 135 S. Ct. at 2033 – imposing a knowledge requirement would be to usurp the legislative function – however, "While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice – *i.e.*, he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice. That issue is not presented in this case . . . . It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do." *Id*. at n.3.

Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 130 FEP 1343 (2d Cir. 2018), *cert. denied* 139 S. Ct. 424 (2018) – Ministerial exception doctrine properly applied to bar Title VII religious discrimination and retaliation claims by a black Methodist former Chaplin who was fired from a hospital's pastoral care department for religious-based performance issues – does not matter that hospital was only historically connected to the Methodist church – hospital through its pastoral care department is itself a religious group and the first amendment prohibits courts from inquiring into an asserted religious motive for an adverse employment action.

Tabura v. Kellogg USA, 880 F.3d 544, 130 FEP 1101 (10th Cir. 2018) – Summary judgment reversed in religious accommodation case – Seventh-Day Adventist employees observe Saturday Sabbath – Company accommodations of allowing to swap shifts and use vacation and other paid time off arguably insufficient – would still have had to work some Saturdays even if they used all their paid time off – issue is not whether there was a complete or total accommodation – "we see no need to adopt a per se rule requiring that an accommodation, to be reasonable, must eliminate, or totally eliminate, or completely eliminate, any conflict between an employee's religious practice and his work requirements." 880 F.3d at *9 – whether the accommodation here is reasonable is a question of fact – subject to a reasonableness analysis, an employee may be required to use vacation or other paid time off to avoid conflicts – not clear how helpful employer was in facilitating shift swaps and how many employees were available for shift swaps – a multitude of genuinely disputed material facts about whether there was a reasonable accommodation – undue hardship not properly presented on summary judgment.

Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 130 FEP 707 (9th Cir. 2017)), *reh'g en banc denied* 880 F.3d 1097 (9th Cir. 2018), *pet. for cert. docketed* ___ U.S. ___ (July 2, 2018) – Public high school football coach suspended when he knelt and prayed at the football field's 50-yard line in view of students and parents immediately after high school games – no entitlement to preliminary injunction – no likelihood of success on the merits since he was acting as a public employee, not a private citizen, and therefore his alleged religious activity was not protected.

Davis v. Fort Bend Cty., 765 F.3d 480, 124 FEP 101 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2804 (2015) – Employer required all technical support employees to work a weekend to install computers – Plaintiff claimed she was unable to work that Sunday morning because of a previous religious commitment – at her Pastor's request she needed to attend a special church service to feed the community – the employer denied her request on the ground that it wasn't based on a religious belief or practice – summary judgment for the employer was reversed 2-1 – the two judge majority found that the District Court erred because it improperly focused on "the nature of the activity itself" (feeding the poor) instead of addressing the sincerity of religious belief – the dissenting opinion found that the majority's conclusion departed from other circuits which have held that the courts must consider both whether the belief was religious in nature and whether it is sincerely held – the dissent also found that there would be undue hardship to have a technically sophisticated supervisor absent at a crucial time.

Nobach v. Woodland Vill. Nursing Ctr., Inc., 799 F.3d 374, 127 FEP 1628 (5th Cir. 2015), *cert. denied* 136 S. Ct. 1166 (2016) – In original opinion, Fifth Circuit reversed jury award to plaintiff who was discharged for refusing to pray the Rosary with a patient – Supreme Court granted review and remanded for reconsideration in light of *EEOC v. Abercrombie & Fitch Stores,* 135 S. Ct. 2028 (2015) – Fifth Circuit reaffirms – plaintiff claimed she was discharged for exercising her religious beliefs – jury had no legally sufficient basis to find religious discrimination because claimant put forth no evidence that her employer was aware of her religious beliefs before her discharge – "We simply cannot find evidence that, before her discharge, Nobach ever advised anyone involved in her discharge that praying the Rosary was against her religion." 799 F.3d at 378 – if there was evidence that the employer knew that she was motivated by religious belief the jury would have been entitled to rule in her favor – post discharge knowledge not material.

Sex (Ch. 10)

Young v. United Parcel Service, Inc., ___ U.S. ___, 135 S. Ct. 1338, 126 FEP 765, 2015 WL 1310745 (2015) – Pregnancy Discrimination Act requires that employers 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" – UPS accommodated many but not all workers with all non-pregnancy related disabilities with light duty work – claim was only disparate treatment – not disparate impact – UPS limited light duty work to (1) workers injured on the job; (2) workers with ADA covered disabilities; and (3) workers who lost their Department of Transportation (DOT) certifications – court rejects plaintiff's claim that if the employer accommodates any subset of workers with disabling conditions, it must accommodate pregnant workers – Congress did not intend "most favored nation" status so that if the employer accommodated anybody it had to accommodate all pregnant workers – disparate treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes does harm those members, as long as the employer has a legitimate and non-discriminatory, non-pretextual reason for doing so – 2014 EEOC Guidelines adopted after *certiorari* was granted rejected – guidelines lack timing, consistency and thoroughness of consideration which is necessary to give it "power to persuade" – pregnant worker can establish a *prima facie* case by showing that employer did accommodate others "similar in their ability or inability to work" – the employer can then defend by relying on legitimate, non-discriminatory reasons for offering accommodation to some but not others – expense would not normally suffice – assuming a legitimate non-discriminatory reason, "the plaintiff may reach a jury . . . by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, non-discriminatory' reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed, give rise to an inference of intentional discrimination[,]"135 S. Ct. at 1343 – "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 non-pregnant workers while failing to accommodate a large percentage of pregnant workers[,]" 135 S. Ct. at 1355 – "This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use

circumstantial proof to rebut an employer's apparently legitimate non-discriminatory reasons . . . ." – "[T]he continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines," *id*. (emphasis in original) – "We do not determine whether Young created a genuine issue of material fact . . . . We leave a final determination of that question with the Fourth Circuit . . . ." 135 S. Ct. at 1356 – five Justices, including Chief Justice Roberts, joined in the Opinion of the Court – Justice Alito concurred in Judgment – he was bothered by the fact that employees who lost their DOT certification were accommodated, even when the loss was for misconduct such as drunk driving or off the job injuries – "It does not appear that respondent has provided any plausible justification for treating these drivers more favorably than drivers who are pregnant[,]" – 135 S. Ct. at 1360 – the three Justice dissent (Scalia, Thomas and Kennedy) contended that the majority conflated disparate impact with disparate treatment – "Where do the 'significant burden' and 'sufficiently strong justification' requirements come from? Inventiveness posing as scholarship – which gives us an interpretation which is as dubious in principle as it is senseless in practice[,]" 135 S. Ct. at 1361 – the Court "proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact," 135 S. Ct. at 1365 – but "plaintiffs in disparate-treatment cases can get compensatory and punitive damages as well as equitable relief, but plaintiffs in disparate impact cases can get equitable relief only[,]" *id*. – Court does claim that the new test is somehow limited to pregnancy discrimination – "Today's decision can thus only serve one purpose: allowing claims that belong under Title VII's disparate impact provisions to be brought under its disparate-treatment provisions instead[,]"135 S. Ct. at 1366.

Rizo v. Yovino, 887 F.3d 453, 130 FEP 1437 (9th Cir. 2018) (*en banc), pet. for cert. docketed* ___ U.S. ___ (Sept. 4, 2018) – Female math consultant paid less than males – reason was use of prior salary to determine starting pay – the employer cannot rely on prior salary alone or in combination with other factors to justify a sex-based gender pay differential – "any other factor other than sex" in the Equal Pay Act was meant to cover only job-related factors – past salary is not a legitimate measure of job-related qualities – "We do not decide . . . whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation. We prefer to reserve all questions

relating to individualized negotiations for decision in subsequent cases." 887 F.3d at 461 – *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) overruled – it is impermissible to rely on prior salary to set initial wages since prior salary is not job related and perpetuates discrimination. Concurring opinions of five judges (less than a majority) advocated a less rigorous rule – that prior salary could be considered in conjunction with other factors – opinion authored by Justice Reinhardt prior to his death and published after his death.

Milligan-Grimstad v. Morgan Stanley, 877 F.3d 705, 130 FEP 1005 (7th Cir. 2017) – Longtime sales representative terminated after being duped into authorizing a $36,900 wire transfer in an identity theft situation – claim that terminating official misunderstood firm's fraudulent transfer policies irrelevant since this court does not act as a super personnel department – the only issue is whether her sex influenced the decisionmaker even if he did misapply firm policy – male employee not terminated when he was duped not comparable since unlike plaintiff male employee had no significant disciplinary actions whereas plaintiff had two – similarly-situated male employee was fired – co-worker told client plaintiff planned to start a family – but no evidence co-worker influenced decisionmaker so no cat's paw violation – summary judgment properly granted on hostile work environment claim – no connection to time-barred actions – comments on revealing outfits of a television anchor and comment on potential pregnancy not hostile environment – conduct while pervasive is not severe – it was not physically threatening and did not interfere with her work performance – no reasonable factfinder could find a hostile work environment.

Owens v. Old Wisc. Sausage Co., Inc., 870 F.3d 662, 130 FEP 670 (7th Cir. 2017) – Female HR manager fired for refusing to answer questions about whether she had a personal relationship with a subordinate that she hired and supervised – male subordinate not discharged – employer had legitimate reason to inquire due to the potential for conflict of interest and the supervisor's power to give preferential treatment – male subordinate had no such power.

Ernst v. City of Chicago, 837 F.3d 788, 129 FEP 968 (7th Cir. 2016) – Summary judgment in favor of city reversed with respect to physical abilities test that allegedly has disparate impact on female paramedic candidates – test was neither reliable nor properly validated under federal law to ensure that it actually measured skills needed to perform the paramedic job – prior to the year 2000, there was no physical skills requirement for paramedics – Deborah Gephardt, the president of Human Performance Systems, led the test creation – she tested volunteer paramedics – 98% of male applicants passed the test, but only 60% of female applicants – plaintiffs had all worked as licensed paramedics with other public fire departments and in their daily work they moved patients and did so safely despite having failed the Chicago examination – the lawsuit had two parts – they alleged in the disparate treatment part that the strength test was designed to keep women out – on disparate impact, they argued that improper methods were used to establish the test – in the disparate treatment case, the magistrate had rejected a "but for" test, but the trial court reinstated it – this was error – the jury asked for clarification of "but for," the court refused, and the jury held for the defense – on the disparate impact case, the court concluded that the validation study satisfied the city's burden – "but for" was in error in a case of this type where the allegation was that Chicago created a new standard operating procedure – the jury should have been instructed that the only question was whether Chicago was motivated by anti-female bias – with respect to disparate impact, the purported validity study was a criterion related validity study – job performance ratings were solicited from supervisors and peers this was one set of criteria – in addition, work samples which were supposed to represent on-the-job skills were another set of criteria – there are two types of criterion based validity studies – predictive or concurrent – an example of predictive is college entrance examinations – here Gephardt chose to conduct a concurrent validity study – volunteers' physical skills in Chicago were unusually high compared to other paramedics in other cities – she therefore lowered the physical scores by using another physical test of New York City paramedics – she then obtained ratings of the job performance of the volunteers – based on supervisor and peer ratings, volunteer female paramedics performance was very close to volunteer male paramedics' performance – though women performed far less well than men on strength tests which would appear to invalidate the physical skills test – therefore the supervisor and peer ratings were set aside – Gephardt then set aside the job performance ratings against which to validate the skills test – Gephardt found three physical tests valid – stair climb, arm endurance, and leg lift – in order to

do a study with volunteers, the volunteers have to be representative of the relative rate labor market – next, the skills tested must be the primary focus of skills or knowledge required on the job – seeking volunteers presents an obvious concern – the strongest employees are the most likely to volunteer – it is admitted that they did not represent the skill set in the general population of Chicago paramedics – next, since the study was concurrent, the test had to focus on primary skills learned on the job with respect to liability, there was only a 50/50 chance the strength tests were reliable – finally there was a serious question as to whether the work samples were a valid measure of job skills – in this case at least two out of the three strength tests are not valid – "Thus, the plaintiffs should have prevailed on their Title VII disparate-impact claims," 837 F.3d at 805 – the disparate treatment claims are reversed for a new trial – the disparate impact summary judgment is reversed with instructions to enter judgment for the plaintiffs.

Legge v. Ulster Cty., 820 F.3d 67, 129 FEP 37 (2d Cir. 2016) – Employer limited light-duty jobs to persons injured on the job – plaintiff sued for pregnancy discrimination, relying on *Young v. UPS* – District Court which granted judgment as a matter of law at the close of plaintiff's case reversed – under *Young*, jury was entitled to consider whether the county's policy was motivated by discriminatory intent – employer gave legitimate non-discriminatory reason – state law requires that corrections officers injured on the job continue to receive pay – there were some statements indicating employer believed that pregnant women should not risk injury – reasonable jury could find that defendant's explanation (compliance with state law) is pre-textual – also plaintiff could proceed under the *Young v. UPS* framework – a reasonable jury could conclude that defendant imposed a significant burden on pregnant employees – during the relevant timeframe only one corrections officer became pregnant – the plaintiff – so there was a 100% denial of light duty to pregnant workers – defendant suggests that these figures show that pregnant employees were not significantly burdened since only one of its 176 correction officers were affected – "But under *Young*, the focus is on how many pregnant employees were denied accommodations in relation to the total number of pregnant employees, not how many were denied accommodations in relation to *all* employees, pregnant or not." 820 F.3d at 76. A reasonable jury could conclude that defendant's reasons were not sufficiently strong when considered in relation to the burden.

Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769, 128 FEP 1425 (6th Cir. 2016) – Summary judgment reversed in sex discrimination case despite fact that all decision-makers were female – long service mental health technician discharged for participation in releasing wrong patient – males who did the same thing were not discharged – plaintiff was only female technician – inference that hospital preferred males due to perception that they were more capable of physically handling unruly patients.

Fairchild v. All American Check Cashing, Inc., 811 F.3d 776, 128 FEP 1109 (5th Cir. 2016), *op. withdrawn and superseded on reh'g* 815 F.3d 959 (5th Cir. 2016) – Judgment for defense at close of discharged pregnant employee's case proper – evidence that manager at different location told her that pregnancy was related to her discharge properly excluded as hearsay since that manager was not decision-maker – two month gap between employer learning of pregnancy and discharge insufficient to establish pretext – performance-related issues preceded knowledge of pregnancy.

Bauer v. Lynch, 812 F.3d 340, 128 FEP 978 (4th Cir. 2016), *cert. denied* 137 S. Ct. 372 (2016) – FBI requires 30 push-ups for male trainees, but only 12 for female trainees – district court granted summary judgment for male trainee who could only do 29 push-ups – reversed – the push-ups requirement was set at one standard deviation below the mean result for each sex determined by a study. Plaintiff did exceptionally well on all aspects of the test except push-ups – the issue was whether the FBI's use of gender norm standards was facially discriminatory – the government contended that because men and women have innate physiological differences that lead to different performance outcomes, the test's gender norm standards actually require the same level of overall fitness – the government relied on the U.S. Supreme Court's case of *United States v. Virginia* ("VMI"), 518 U.S. 515 (1996), in which the Supreme Court ruled that Virginia had violated the Equal Protection Law by excluding women from its military academy but noted that women's admission would require "*physical training programs for female cadets*" – "Men and women simply are not physiologically the same for purposes of physical fitness programs. The Supreme Court recognized as much . . . in the *VMI* . . . .", 812 F.3d at 350 – "[E]qually fit men and women demonstrate their

fitness differently," 812 F.3d at 351 – "Put succinctly, an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each." *Id*. – summary judgment for plaintiff vacated, and case remanded to consider plaintiff's alternative argument that the standards do impose an undue burden of compliance on male trainees compared to female trainees.

Sexual Orientation and Gender Identity (Ch. 11)

Masterpiece Cakeshop, Ltd.. v. Colo. Civil Rights Comm'n, No. 16-111, 584 U.S. ___, 138 S. Ct. 1719, 2018 WL 2465172 (June 4, 2018) – Custom cake maker refused to create a specialized cake for same-sex married couple, citing religious reasons – Colorado Civil Rights Commission interpreted a Colorado law which prohibited businesses from discriminating on the basis of sexual orientation to apply to this conduct, rejecting the religious belief defense – Bakery owner made two primary arguments: (1) specialty cakes constitute free speech, and forcing him to prepare such a cake would constitute compelled speech rights since he communicates through his artistic cakes; and (2) forcing him to make such a cake would violate the free exercise of religion guaranteed by the First Amendment – 7-2 opinion overturning Colorado ruling – Justices Kagan and Breyer in the majority – Colorado Civil Rights Commission did not carefully consider the "delicate" questions "with the religious neutrality that the Constitution requires." 138 S. Ct. at 1724. – Commission improperly demonstrated hostility towards the cake maker's sincerely held religious belief – public statements were made that expressed hostility towards the cake maker's religious beliefs by comparing them to the defense of slavery and the Holocaust – at the time of the events in question, neither Colorado nor the United States had legalized same-sex marriage – Commission ordered to reconsider – Supreme Court decision clearly limited: Commission cautioned that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages'" – cannot "impose a serious stigma on gay persons." *Id*. at 1728-29. – Court noted that the "outcome of cases like this" will have to "await further elaboration" and

that such "disputes must be resolved with tolerance without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Id*. at 1732. – Supreme Court cautioned that "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Id*. at 1727. – "It is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and general applicable public accommodations law." *Id*. at 1727.

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 130 FEP 1317 (6th Cir. 2018), *pet. for cert. docketed* ___ U.S. ___ (July 24, 2018) – Transgender employee protected under Title VII; biologically male transgender employee fired after she announced her transition to female and intention to wear female clothing – contentions that gender-specific dress code affected both male and female employees rejected – contention that only physical characteristics and not gender identity protected by Title VII rejected – all individuals are protected from discrimination based on nonconformance with stereotypical gender norms – Title VII protects transgender and transitioning individuals because an employer cannot discriminate against such persons without considering those employees' biological sex and their inherently gender nonconforming status – contention that requiring employment of transgender employees would violate religious rights of employer rejected – District Court correctly determined that plaintiff was fired because of her failure to conform to sex stereotype – District Court erred in concluding that plaintiff could not alternatively pursue a claim that she was discriminated against on the basis on her transgender and transitioning status – "Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the [employer] violated Title VII by firing Stephens because she is transgender and transitioning from male to female," 884 F.3d at 571 – with respect to whether transgender/transitioning status is protected by Title VII, for two reasons the EEOC and Stephens have the better argument – "First, it is analytically impossible to fire an employee based on the employee's status as a transgender person without being motivated, at least in part, by the employee's sex." 884 F.3d at 575 (citation to 7th Circuit *Hively* opinion

omitted) – as in *Hively*, "Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the woman's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected [the employer's] decision to fire Stephens." *Id*. – "Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping.", *Id*. at 576 "[A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender nonconformity, and we see no reason to try." *Id*. at 576-77 – With respect to the intent of Congress, "the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provision of our laws rather than the principal concerns of our legislatures by which we are governed." *Id*. at 577 (internal quotation mark and citation from *Oncale* Supreme Court decision omitted) – The Second Circuit in *Zarda* rejected the argument that Title VII was not originally intended to protect employees against sexual orientation discrimination because the same argument could be said of multiple forms of discrimination that are now indisputably prohibited by Title VII but were initially believed to be outside the scope of Title VII such as sexual harassment – contention that later statutes such as the Violence Against Women Act expressly prohibit discrimination on the basis of gender identity while Title VII does not irrelevant – Congress can certainly choose to use both a belt and suspenders to achieve its objectives – contention that Religious Freedom Restoration Act prevents forcing the employer to employ a transgender person rejected – the employer's religious exercise would not be substantially burdened by continuing to employ Stephens – "[W]e refuse to treat discriminatory policies as essential to Rost's business – or by association, his religious exercise." *Id*. at 587 – "[S]imply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA." *Id*. at 588 – In conclusion, "[d]iscrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. . . . RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII

here is the least restrictive means of furthering its compelling interest in combatting and eradicating sex discrimination." *Id*. at 600.

Zarda v. Altitude Express, Inc., 883 F.3d 100, 130 FEP 1245 (2d Cir. 2018) (*en banc*), *pet. for cert. docketed* ___ U.S. ___ (June 1, 2018) – Second Circuit *en banc* reverses its prior position on whether or not the Title VII ban on sex discrimination prohibits sexual orientation discrimination – "legal doctrine evolves" – "sexual orientation discrimination – which is motivated by an employer's opposition to romantic association between particular sexes – is discrimination based on the employee's own sex," 883 F.3d at 112-13 – sexual orientation stereotyping falls within Title VII's prohibition against discrimination "because sex is necessarily a factor in sexual orientation," *Id*. at 112– the vote was 10-3 – dissent said it would be delighted to find that Congress had passed legislation adding sexual orientation to the employment discrimination laws, but Congress has done no such thing and the court should not do it on its own.

Franchina v. City of Providence, 881 F.3d 32, 130 FEP 1169 (1st Cir. 2018) – Lesbian firefighter established a hostile work environment claim against the City on a sex plus theory – she contended that she was discriminated because of her sex and being a lesbian – jury relied on fact in addition to being a lesbian she was the target of gender-specific insults – argument that she had obligation to demonstrate a class of comparable gay male firefighters to show that but for her sex she would not have been discriminated against rejected.

Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 130 FEP 1 (*en banc*) (7th Cir. 2017) – Creating Circuit split, the *en banc* Seventh Circuit holds that discrimination based on sexual orientation is unlawful "sex" discrimination in violation of Title VII – this holding departs from more than 50 years of authority – intent of Congress not determinative – it was "neither here nor there that the Congress that enacted [Title VII] . . . may not have realized or understood" (853 F.3d at 345) that the language it wrote would proscribe sexual orientation discrimination – Judge Posner in his concurrence wrote "sex discrimination meant discrimination against

men or women as such and not against subsets of men or women such as effeminate men or mannish women," (*Id*. at 356) but the statute "now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted." *Id*. at 353. – Judge Posner construed the Act to protect the "significant numbers of both men and women who have a sexual orientation [which] . . . is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase [Justice Oliver Wendell] Holmes, '*[w]e must consider what this country has become in deciding what that [statute] has reserved.*'" *Id*. at 356-57. – the majority opinion written by Chief Judge Diane Wood employed three distinct approaches to show that Title VII's definition of sex includes sexual orientation – first, discrimination against a lesbian is necessarily discrimination against a woman – "Hively allege[d] that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. . . . This describes paradigmatic sex discrimination." *Id*. at 345. – Second, the court found that since *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), Title VII has protected individuals who do not adhere to societal norms – "Hively represents the ultimate case of failure to conform to the female stereotype . . . ." *Id*. at 346. – Finally, the *en banc* majority found support in *Loving v. Virginia*, where the Supreme Court held that the Constitution is violated by legislation that discriminated "on the basis of the race [of individuals] with whom a person associates . . . ." *Id*. at 343. – "[T]o the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the . . . sex of the associate." *Id*. at 349. – The dissent argued that what the majority did was "a statutory amendment courtesy of unelected judges," (*id*. at 360) and that if Title VII were to be extended to prohibit sexual orientation discrimination, it should be done by the legislature – *Hively* will not wind up in the Supreme Court because it has been remanded to the district court where the college intends to defend the case on the merits – but the issue it presents will make it to the Supreme Court – cases posing the issue are currently pending in the Eleventh and Second Circuits – While the case is a landmark, its practical impact may be somewhat limited – currently 24 states and an estimated 255 municipalities ban discrimination on the basis of sexual orientation.

Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 129 FEP 1830 (11th Cir. 2017), *reh'g en banc denied* (July 6, 2017), *cert. denied* 138 S. Ct. 557 (2017) – Lesbian security officer claimed harassment because she is a "gay female" – case dismissed below – panel decision stated that it was bound by Eleventh Circuit precedent to reject her claim that sex discrimination expressly prohibits bias based on sexual orientation, but it reversed the dismissal to allow a sexual stereotyping theory – a claim that her employer discriminated against her because she did not conform to gender norms about how a woman should speak, act, dress or otherwise behave is actionable under Title VII.

Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 129 FEP 1848 (2d Cir. 2017) – Dismissal of gay male employee's gender stereotyping claim reversed – employee was described as effeminate and there were drawings of him wearing clothes that were not typical of males – District Court improperly concluded that all allegations related only to non-actionable sexual orientation discrimination – Second Circuit declines to reconsider whether Title VII protects against sexual orientation discrimination.

Age (Ch. 12)

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

Benjamin v. Felder Servs., L.L.C., No. 17-60662, ___ F. App'x ___, 2018 WL 6119903 (5th Cir. Nov. 20, 2018) – Summary judgment against employee who was discharged despite favorable evaluations from previous evaluator – evidence that she was fired for failure to timely complete assignments not shown to be false or unworthy of credence – employer had good faith belief that she treated co-workers poorly – slight changes in average age of small department not probative, especially since one older employee retired.

Moses v. Dassault Falcon Jet – Wilmington Corp., 894 F.3d 911, 130 FEP 1684, 33 A.D. Cas. 1789 (8th Cir. 2018) – Summary judgment affirmed – employee filed hostile environment EEOC ADEA charge – the EEOC dismissed and issued a right-to-sue letter – the employee was later terminated – no new charge was filed – the lawsuit alleged age termination – the termination claim was dismissed because it was not within the original hostile environment charge – discharge is a discrete act, not part of a hostile environment – the hostile environment claim failed because the actions were not severe enough – they may have been "rude or unpleasant" but that is not enough.

Skiba v. Ill. Cent. R.R. Co., 884 F.3d 708, 130 FEP 1369 (7th Cir. 2018) – Plaintiff was hired as a management trainee at age 55, demoted to a clerical position at age 60, and turned down for 82 different management positions to which he applied – summary judgment affirmed on ADEA and retaliation claims – multiple emails claiming that his supervisor was abusive without referencing age or any protected category cannot form the basis of a retaliation claim – "Nothing in plaintiff's complaints about [his supervisor] suggests he was protesting discrimination on the basis of age or national origin." 884 F.3d at 718. – With respect to age claim, it is a "but for" test – a question about how old he was when he interviewed for a position does not support an inference of discrimination – he in fact got the position he was being interviewed for and the question was two years before he was demoted – the question actually came from a person who promoted plaintiff at the age of 58 – multiple comments about plaintiff not responding well to training and being a low-energy person are not necessarily age related – "[T]hese statements are innocuous when viewed in context." *Id*. at 720. – The comment of one hiring official that an alternate candidate would work "a little faster" again is not indicative of age discrimination – there is simply no basis to conclude that comments like this were based on age rather than a perception of plaintiff's "intelligence, skills, or simply Plaintiff's behavior during the interview," *Id*. at 721 – "low energy" is not ageist – a comment about another candidate being close to retirement is entitled to very little weight since it was not made in relation to plaintiff – indeed the comment in context has no age inference at all – with respect to a statement that plaintiff was a "later career person . . . this is not an inevitable euphemism for old age," *Id*. at 722 – moreover, the person who said it was not a decisionmaker – normally statements by a nondecisionmaker do not satisfy plaintiff's burden of proof – moreover, the individual making the statement tried to

assist plaintiff in finding positions – the contention that 37 younger employees were offered management-level positions for which plaintiff applied is irrelevant absent comparability, which has not been shown – "[P]laintiff bears the burden of showing the individuals he identifies are similarly situated." *Id*. at 724. – The issue is simply whether plaintiff would have been better treated if everything else was the same but he was younger than 40 – no reasonable decisionmaker could so conclude.

Merrick v. Hilton Worldwide, Inc., 867 F.3d 1139, 130 FEP 632 (9th Cir. 2017) – Summary judgment affirmed in RIF case – plaintiff's salary was second highest at the hotel and would allow the hotel to comply with the parent company's RIF criteria by laying off only a single employee – does not matter that performance reviews were positive since there is no claim choice of plaintiff was based on performance – wisdom of stated reasons is not subject to review in considering pretext – minor deviations from company's RIF policy not indicative of age discrimination – cited California Supreme Court decision is *Guz v. Bechtel* as follows: "[I]f nondiscriminatory, Bechtel's true reasons need not necessarily have been wise or correct." 867 F.3d at 1148 – Hotel contended it had a mandate to reduce payroll by seven percent but in fact by laying off plaintiff only reduced it by five percent – evidence undermining employer's stated reason for an adverse employment action may assist a circumstantial case of discrimination – "Yet such evidence may still be insufficient to create a triable issue for a jury, for there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." 867 F.3d at 1150 (citation and internal quotations omitted, emphasis in original), – The deviations from the RIF mandate do not create such an inference – evidence as a whole is insufficient to permit a rational inference of discrimination.

Lauth v. Covance, Inc., 863 F.3d 708, 130 FEP 455 (7th Cir. 2017) – Summary judgment in age case – Plaintiff had long time history of inappropriate, condescending, and offensive comments – alleged comparator who was a younger supervisor didn't have the same history and accepted feedback – plaintiff simply contended that the employer was wrong in objecting to his communications – that is insufficient to establish pretext.

Aulick v. SkyBridge Americas, Inc., 860 F.3d 613, 130 FEP 341 (8th Cir. 2017) – Summary judgment affirmed – reliance on CEO hiring several older persons to serve in executive roles – plaintiff encouraged by CEO to believe he would get promotion and urged to withdraw other applications which he did – plaintiff not only did not get the promotion, but his existing job was eliminated – two other executives over the age of 60 were eliminated – comment about desiring a "new face" was age neutral – successful candidate had more applicable experience – does not matter that conflicting explanations were given as to who terminated plaintiff – explanations were the same.

Santillan v. U.S.A. Waste of California, Inc., 853 F.3d 1035, 130 FEP 61 (9th Cir. 2017) – Hispanic garbage collector who worked for his employer for 32 years and was beloved by his customers discharged for alleged four accidents in a 12-month period – settlement negotiated by attorney – reinstatement conditioned upon proof of ability to work in the U.S. – employee was not legally entitled to work in the U.S. – fired again – summary judgment on age and public policy retaliation reversed – testimony of employee that five other older Hispanics were fired, two of whom he could identify, sufficient to create *prima facie* case – employer was not obliged to check immigration status under exceptions to the immigration bill – California public policy prohibits retaliation against employee for using attorney – Judge Pregerson wrote unanimous opinion.

Johnson v. Interstate Mgmt. Co., LLC, 849 F.3d 1093, 129 FEP 1736 (D.C. Cir. 2017) – Summary judgment against hotel cook who alleged age and retaliation discrimination – company records indicate that cook was cited for violating company policies on at least 13 separate occasions – culminating incident was when plaintiff left a plastic wrap under the breading on top of a piece of cooked chicken that was served for dinner – other offenses for which Johnson was cited including using the wrong ingredients when preparing meals, undercooking chicken served at a $250 person banquet, cooking vegetables without removing the product stickers, and the like –while Johnson claimed that he was not at fault with respect to the plastic chicken, he does not provide sufficient evidence to call into question whether the hotel management "honestly and reasonably believed" that the infractions occurred.

Nash v. Optomec, Inc., 849 F.3d 780, 129 FEP 1706 (8th Cir. 2017), *cert. denied* 138 S. Ct. 213 (2017) – Summary judgment against laboratory technician in age case – concerns expressed about his ability to grow into position – criticisms of physical dexterity and inability to think on feet and stubbornness are generic criticisms not related to age – hired and discharged in less than a year by the same individual who was only five years younger.

Haggenmiller v. ABM Parking Servs., Inc., 837 F.3d 879, 129 FEP 893 (8th Cir. 2016) – Outside audit firm recommended elimination of position – summary judgment affirmed – company purported to look for alternative jobs – company "under no obligation to find alternative employment for [plaintiff]," 837 F.3d at 885 – "ABM was not obligated to find an open position for her," 837 F.3d at 888 – factual issue over whether there were open jobs does not bar summary judgment.

Bordelon v. Board of Educ. of the City of Chicago, 811 F.3d 984, 128 FEP 1243 (7th Cir. 2016) – Summary judgment affirmed in ADEA claim by school principal who was terminated by school council – supervisor's comment that it was time for the principal "to give it up" is not evidence of age bias – list of older principals disciplined does not support inference of age discrimination because almost all of the district's principals were over age 40 – school's council's independent reasons for non-renewal as well as absence of showing of bias by supervisor render cat's paw theory inapplicable.

Blizzard v. Marion Tech. Coll., 698 F.3d 275, 116 FEP 392 (6th Cir. 2012), *cert. denied,* 569 U.S. 975 (2013) – Summary judgment affirmed – although alleged comparable made the same type of mistake, the consequences of the plaintiff's mistakes were much more serious – replacement was 6½ years younger which falls between age difference of six years or less which is not significant and age difference of 10 or more years which is generally considered significant – employer honestly believed that she was not capable of using new software and had made serious mistakes.

General Issues

Mount Lemon Fire Dist. v. Guido, ___ U.S. ___, 139 S. Ct. 22, 131 FEP 37, 2018 WL 5794639 (Nov. 6, 2018) – ADEA applies to state and local governments without regard to whether or not they have 20 employees – the 20 employee limit applies only to private employers – does not matter that reach of ADEA is broader than Title VII – under Title VII, governmental entities and private employers both must have 15 or more employees.

Burrage v. United States, 571 U.S. 204, 134 S. Ct. 881, 122 FEP 237 (2014) – Criminal case involving issue of "but-for" causation – the Supreme Court concluded that the Controlled Substances Act imposing mandatory 20-year sentence when the defendant's conduct was the "but-for" cause of a death – where A shoots B who dies, A caused B's death since "but-for" A's conduct B would not have died – the same conclusion follows if the predicate act combines with other factors so long as the other factors alone would not have produced the death – "[I]f, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." 571 U.S. at 211 – "Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0 . . . [all] would agree that the victory resulted from the home run. . . . It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching . . . ." *Id*. at 211-12 (emphasis in original "By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run." *Id*. at 212 – We interpreted the word "because" in two different cases to require "but-for causation" under the retaliation provisions of Title VII or the ADEA – *Price Waterhouse v. Hopkins* did not dispense with but-for – it simply allowed a showing that discrimination was a motivating factor to shift the burden of persuasion to the employer to establish the absence of but-for cause – this was later amended by the

Civil Rights Act of 1991 – "In sum, it is one of the traditional background principles 'against which Congress legislates' . . . that a phrase such as 'results from' imposes a requirement of but-for causation." – In the case at bar the decedent took lots of different drugs including the defendant's heroin but nobody was prepared to say that he would have died from the heroin use alone – the government seeking to sustain the conviction appeals to a second line of cases under which an act or admission is considered to be a cause in fact if it was a substantial or contributing factor – we decline to adopt that permissive interpretation – Justices Ginsburg and Sotomayor concurred in the judgment, but reiterated their position in *Nassar* that in a retaliation case "because of" does not mean "solely because of."

Dayton v. Oakton Cmty. Coll., 907 F.3d 460, 131 FEP 29, (7th Cir. 2018) – Community college formerly hired state university system retirees who were receiving retirement benefits – rules changed, and hiring retirees caused the college to incur penalties – college eliminated all retiree hiring – clear adverse impact – employer prevailed because the decision was economic which constituted a reasonable factor other than age – no issue of whether employer could have achieved the same goals with lesser impact – RFOA is not a business necessity defense – "unlike Title VII's business necessity test, which asks whether alternatives that do not result in disparate impact are available for the employer to achieve its goals, the ADEA's reasonableness inquiry includes 'no such requirement.'" 2018 WL 4927203, at *4 (citation omitted) – under the ADEA "employers need not defend their selection of one policy over a narrower policy." *Id*.

O'Brien v. Caterpillar Inc., 900 F.3d 923, 130 FEP 1765 (7th Cir. 2018) – For over 50 years Caterpillar had paid unemployment benefits to laid off employees – it agreed with its Union to stop the practice – in exchange, Caterpillar paid $7.8 million to employees previously covered by the unemployment benefit plan – if the employee was eligible to retire, received payments from the fund only if agreed to retire – those who were eligible to retire but did not agree to retire received nothing – those not eligible to retire received normal benefits – even though there was impact on older workers, the action was justified as reasonable factors other than age – the reasonable factors were that this eliminated the cost of unemployment benefits and established Union management harmony.

Kleber v. CareFusion Corp., 888 F.3d 868, 130 FEP 1469 (7th Cir. 2018), *reh'g en banc granted, op. vacated* (June 22, 2018) – Creating a Circuit conflict with the Eleventh Circuit's *en banc* decision in *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (*en banc)*, *cert. denied* 137 S. Ct. 2292 (2017), Seventh Circuit holds that applicants denied hire can bring an adverse action claim under the ADEA – the ADEA in its prohibition of disparate treatment expressly references "refuse to hire" and applies to "any individual" (paragraph (a)(1)); – the disparate impact provision, (a)(2), makes it unlawful "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . ." 888 F.3d at 872. Disagreeing with the Eleventh Circuit, the Seventh Circuit holds that this "broad language easily reaches employment practices that hurt older job applicants as well as current employees." *Id*. – The critical statutory language is "to limit, segregate or classify" employees – if an employer classifies a position as one that must be filled by someone with a certain minimum or maximum experience requirements, it is classifying its employees – this would tend to deprive any individual of employment opportunities – the phrase "any individual" is certainly broad enough to include applicants – the phrase "or otherwise adversely affect his status as an employee" need not be read as a limitation of disparate impact claims to existing employees – moreover, deciding whether or not someone becomes an employee has the most dramatic possible effect on status as an employee – in this case, an older, experienced attorney was rejected because the company required seven years or less of experience – interpreting (a)(2) as limiting disparate impact claims to present employees, if plaintiff and an identically situated internal employee both applied for the job, the employee could bring an adverse impact action, but an applicant could not – this makes no sense – "when courts interpret statutory language that is less than crystalline, it is worth keeping in mind the practical consequences of the argued interpretations," *Id*. at 876 – "There can be no doubt that Congress enacted the ADEA to address unfair employment practices that make it harder for older people to *find jobs*." *Id*. at 877 (emphasis in original). This was a major objective of Congress, and to accept the defense argument would be to ignore the statutory purpose – "To adopt the defendant's reading of paragraph (a)(2), we would have to find that the ADEA's protection of the employment opportunities of any individual prohibits employment practices with disparate impacts in firing, promoting, paying, or managing older workers, *but not in hiring them*." *Id*. at 878 (emphasis in original) (cleaned up) – but Congress was clearly concerned about hiring – our conclusion is

unaffected by the fact that Title VII was amended to add the words "or applicants for employment" – but *Griggs* was decided before the statutory change – decision was 2-to-1, with the dissenting Judge stating that the reversal "is an erroneous form of statutory interpretation that requires writing in words that Congress chose not to include." *Id*. at 889.

Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 129 FEP 1031 (11th Cir. 2016) (*en banc*), *cert. denied* 137 S. Ct. 2292 (2017) – Recruiters were told to target applicants who were "2-3 years out of college" and to avoid those with over eight years of prior sales experience – only 19 of 1,000 hires during a three-year period were over the age of 40 – *Smith v. City of Jackson, Mississippi,* 544 U.S. 228 (2005) authorized disparate impact claims under the ADEA but the case only involved claims of current employees and did not answer the question of whether job applicants could bring disparate impact claims – the disparate impact language of the ADEA, § 4(a)(2) makes it unlawful for an employer "to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 839 F.3d at 976. Although the EEOC for years has taken the position that job applicants can bring ADEA disparate impact claims, the clear language of the statute is to the contrary – disparate impact claims brought by unsuccessful job applicants are not allowed under the ADEA, which protects only employees from such unintentional discrimination – decision was 8-3.

Carson v. Lake Cty., 865 F.3d 526, 130 FEP 499 (7th Cir. 2017) – Group of county employees over age 65 accepted a retirement incentive package which included a supplemental Medicare insurance plan and part-time employment – later discharged when the plan proved too expensive – no age discrimination even though you had to be age 65 to be eligible – No violation in discharging over age 65 employees who signed up for lucrative plan when lucrative plan proved too expensive.

McLeod v. General Mills, Inc., 856 F.3d 1160 (8th Cir. 2017) – District Court had held that when employees challenge a release under the OWBPA, the matter cannot be arbitrated because the OWBPA requires the party asserting the validity of the waiver to prove in a court of competent jurisdiction that the waiver was knowing and voluntary –

reversed – the relevant clause in the OWBPA requires courts to resolve questions about the validity of waivers of substantive rights, just like it requires courts to resolve the primary right to be free from bias – the clause does not apply to the waiver of procedural rights, like the right to file a lawsuit as a class – since the release specified arbitration, that is all that is at issue, and arbitration is compelled – District Court ordered to grant motion to compel individual arbitration of the substantive ADEA claims. However, the Eighth Circuit said that it is not deciding whether General Mills can actually assert the validity of its waiver in arbitration – it left that question unanswered.

Vaughan v. Anderson Reg'l Med. Ctr., 849 F.3d 588, 129 FEP 1666 (5th Cir. 2017), *cert. denied* 138 S. Ct. 101 (2017) – Fifth Circuit adheres to its view that pain and suffering and punitive damages are not available under the ADEA, either in a discrimination or retaliation case – it notes a circuit split and that the EEOC view is to the contrary – the EEOC interpretation relies on *Moskowitz v. Trustees of Purdue Univ.,* 5 F.3d 279, 284 (7th Cir. 1993), an unpersuasive opinion – transfer of ADEA functions previously performed by Secretary of Labor to EEOC is not an intervening change of law.

Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 129 FEP 1461 (3d Cir. 2017) – Lawsuit alleging disparate impact against persons over 50 compared to persons in their 40s revived – Third Circuit rejects view of Second, Sixth, and Eighth Circuits that such claims are not allowed – clear from plain language of ADEA that disparate impact claims may be brought by sub-groups of workers in the protected class – statute prohibits adverse consequences based on age rather than being over 40.

DeJesus v. WP Co., LLC, 841 F.3d 527, 129 FEP 1285 (D.C. Cir. 2016) *reh'g en banc denied* (C.A.D.C. Jan. 13, 2017) – Summary judgment in age/race case reversed – factual questions about whether supervisor really believed alleged offense was dischargeable based on supervisor's initial reaction – reliance on telling black plaintiff he "spoke well" and describing a black individual as "not a good fit" for an event – on age, several former employees testified to an alleged management philosophy of forcing out older workers and replacing them with younger workers.

Rabin v. PricewaterhouseCoopers LLP, 236 F.Supp.3d 1126, 129 FEP 1715 (N.D. Cal. 2017) – Rejecting *Villarreal en banc* decision of 11th Circuit, District Judge Tigar holds that protected age job applicants can bring an ADEA disparate impact claim alleging hiring discrimination.

Richardson v. Wal-Mart Stores, Inc., 836 F.3d 698, 129 FEP 899 (6th Cir. 2016) – Employee terminated after four instances of discipline – former supervisor had stated that plaintiff was too old to be working and asked about when he was going to quit or leave – this supervisor did not make the decision, and was not even on the premises at the time – plaintiff claimed decisionmaker treated her differently from younger employees, stared at her and did not greet her in the mornings – "Although these facts demonstrate that [the decisionmaker] probably did not like [plaintiff], none of these facts evidences discrimination on the basis of *age*." 836 F.3d at 704 (emphasis in original). – Plaintiff's attempt to contest one of her coachings was unsuccessful, because she offers no evidence that the supervisor responsible for firing her did not honestly believe that her coaching history justified termination – even if the decisionmaker might have concluded upon closer examination that one or more of the coachings should have been removed from her file, an employer's pre-termination investigation doesn't have to be perfect – the issue is age – "Because [the decisionmaker] 'made a reasonably informed and considered decision,' . . . Wal-Mart is entitled to the protection of the honest belief rule." 836 F.3d at 707.

Noreen v. PharMerica Corp., 833 F.3d 988, 129 FEP 814 (8th Cir. 2016), *reh'g denied* (Sept. 26, 2016) – Summary judgment affirmed despite fact that company ignored its layoff guidelines and retained a younger employee with a lower performance rating – disregarding its layoff policies is something that it did regularly – no showing this was aimed at plaintiff – company's "sloppy management or arbitrary decisionmaking" (833 F.3d at 995) was insufficient to send age case to trial in the absence of age motivation evidence – plaintiff's unprofessional reaction to notice of layoff and wife's subsequent threats to decisionmaker relied upon in denying plaintiff's application for transfer to a different position to avoid layoff – "there is insufficient evidence to infer age discrimination from the company's repeated failure to follow the written guidelines," 833 F.3d at 994.

Tramp v. Associated Underwriters, Inc., 768 F.3d 793, 124 FEP 1285 (8th Cir. 2014) – Summary judgment in age RIF case reversed – employer wrote its healthcare carrier and stated that it expected lower premiums since it had gotten rid of its "older, sicker employees."

Walczak v. Chi. Bd. of Educ., 739 F.3d 1013, 121 FEP 506 (7th Cir. 2014), *cert. denied*, 573 U.S. 906 (2014) – Public school teacher sued for wrongful discharge, and lost in state court – her subsequent federal court ADEA suit was dismissed – claim preclusion – both suits involved the same parties and the causes of action in both cases arose from a single group of operative facts regardless of different theories.

Neely v. Good Samaritan Hosp., 345 F. App'x 39, 106 FEP 1741 (6th Cir. 2009) (unpublished) – Over-40 employee claimed race discrimination but never claimed age discrimination – district court dismissed all claims except race discrimination and referred matter to mediation – parties reached a settlement which they confirmed on the record – parties never discussed age or right to revoke in mediation – defendant prepared settlement agreement which waived rights under the ADEA and contained a clause allowing employee 21 days to consider and seven days to revoke – employee signed agreement but revoked within seven days – district court rejected revocation on ground that there was a verbal settlement – court of appeals reversed, holding that it did not matter that there was no age issue – the written agreement expressly allowed revocation – employer clearly wanted to protect itself against any theoretical age claim since plaintiff was over 40 – does not matter that right to revoke was not bargained for – once there was an ADEA release right to revoke was required by law.

Disability/Handicap (Ch. 13)

General

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

Bullington v. Bedford Cty., 905 F.3d 467, 34 A.D. Cas. 68 (6th Cir. 2018) – Plaintiff's ADA claim dismissed for failure to file a timely charge – nevertheless, plaintiff can allege disability claims under 42 U.S.C. section 1983.

EEOC v. BNSF Ry. Co., 902 F.3d 916, 34 A.D. Cas. 8 (9th Cir. 2018) *as amended* (Sept. 12, 2018) – Job applicant received conditional job offer contingent upon satisfactory completion of post-offer medical review – medical review revealed back injury from four years before – employee's primary care doctor, his chiropractor, and the employer's doctor all determined he had no current limitations – however, the Railway demanded that employee submit an MRI of his back at his own cost or it would treat him as having declined the offer – he could not afford the MRI, and to the Railway revoked its offer – while the Railway could have

required an MRI at its expense, it violated the ADA by imposing that expense on the employee – the Railway perceived the employee as possibly disabled – "An employer would not run afoul of [the ADA] if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense." 902 F.3d at 927 – in that case the employer would be imposing a cost on all applicants, but here an applicant perceived as disabled was discriminated against.

EEOC v. Dolgencorp, 899 F.3d 428, 33 A.D. Cas. 1852 (6th Cir. 2018) – Jury verdict affirmed – diabetic cashier was denied request to keep juice nearby in case of low blood sugar – terminated for violating company policy by consuming juice from store cooler before paying for it during two episodes – employer's refusal of request justifies finding a failure to accommodate – no interactive process – irrelevant that alternative solutions such as glucose tablets or candy might have worked.

Snapp v. United Transp. Union and BNSF Ry. Co., 889 F.3d 1088, 33 A.D. Cas. 1717 (9th Cir. 2018), *cert. denied* 2019 WL 113164 (Jan. 7, 2019) – Once an employee notifies an employer of a disability and a need to engage in the interactive process, employer will be liable if it does not do so and a reasonable accommodation would have been possible – at summary judgment, the burden is on the employer that did not engage in the interactive process to prove the unavailability of a reasonable accommodation – however, at trial, the plaintiff bears the burden of proving that a reasonable accommodation was possible that would have allowed the plaintiff to perform the essential functions of the job without undue hardship – trial judgment for employer based on such jury instructions affirmed.

Sepulveda-Vargas v. Caribbean Rest., LLC, 888 F.3d 549, 33 A.D. Cas. 1703 (1st Cir. 2018) – "Today's opinion is a lesson straight out of the school of hard knocks. No matter how sympathetic the plaintiff or how harrowing his plights, the law is the law and sometimes it is just not on his side." 888 F.3d at 552. – Fast food manager with depression and post-traumatic stress disorder failed to allege adverse action to support retaliation claim based on his request for accommodation – miscellaneous

complaints about schedule changes and being required to stay late and the like did not create a retaliatory hostile environment.

Rodrigo v. Carle Found. Hosp., 879 F.3d 236, 33 A.D. Cas. 1465 (7th Cir. 2018) – Hospital required medical residents to pass qualifying exams with no more than three attempts – medical resident claimed that refusing to allow him a fourth attempt was a failure to accommodate his insomnia – he was not a qualified individual – cannot attempt to bypass uniform requirements for qualification by contending accommodation required.

Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 33 A.D. Cas. 1109 (7th Cir. 2017) – Plaintiff's claim was that in terminating her, the school district unlawfully interfered with her right to advocate for disabled students – she contended that her teaching style was more effective for disabled students than the way the school district wanted the classes taught – this is not protected activity – in order to state a claim for interference with the rights of the disabled, the plaintiff must establish that she complained about or discouraged discrimination based on disability – summary judgment affirmed – standard for interference with the rights of the disabled is the same under the ADA and under the Rehabilitation Act – "[A] plaintiff alleging an ADA interference claim must demonstrate that: (1) she engaged in an activity statutorily protected by the ADA; (2) she was engaged in, or aided or encouraged others in, the exercise or enjoyment of ADA protected rights; (3) the defendants coerced, threatened, intimidated or interfered on account of her protected activity; and (4) the defendants were motivated by an intent to discriminate." 872 F.3d at 550-51 – A common example of protected activity would be formal complaints of discrimination for reporting a public school's failure to provide appropriate public education to students with disabilities – here, plaintiff simply asserted that her teaching style was better than others – that is insufficient.

Monroe v. Ind. Dep't of Transp., 871 F.3d 495, 33 A.D. Cas. 1117 (7th Cir. 2017) – Summary judgment affirmed – post-traumatic stress disorder caused individual with previously high performance ratings to be abusive to co-workers, many of whom refused to work with him – abusive conduct warrants discharge – does not matter that behavior caused by PTSD –

immaterial that employer initially misstated number of employee complaints against him – comparators are not similarly situated because there were either different decision makers, their conduct was not as offensive, or they were not at-will employees.

Alamillo v. BNSF Ry. Co., 869 F.3d 916, 33 A.D. Cas. 1025 (9th Cir. 2017) – On-call railway engineer missed eleven calls for shifts while working on-call – disciplinary process began before he made claim of sleep apnea – request for leniency in disciplinary proceedings not reasonable accommodation under California law – summary judgment affirmed.

Patton v. Jacobs Eng'g Grp., Inc., 874 F.3d 437, 33 A.D. Cas. 1205 (5th Cir. 2017) – Summary judgment affirmed – systems designer claims he was openly mocked because of his stutter – plaintiff claimed he was unusually sensitive to noise – however, he did not attribute this to a physical or mental impairment – a jury must be able to infer the employer's knowledge that the limitations experienced by the employee were a result of a disability – it is not obvious that sensitive to noise is the result of the disability and therefore plaintiff did not satisfy this element of his burden of proof – although a jury could find that the harassment was severe or pervasive, plaintiff did not challenge on appeal the District Court's determination that he unreasonably failed to avail himself of the employer's anti-harassment policies – plaintiff forfeited any objection to this determination by not challenging it on appeal.

Marshall v. Rawlings Co. LLC, 854 F.3d 368, 33 A.D. Cas. 687 (6th Cir. 2017), *reh'g en banc denied* (May 30, 2017) – Summary judgment denied – cat's paw theory – several layers of management separated biased immediate supervisor from ultimate decision-maker, but there is conflicting evidence as to whether biased lower-level supervisors unfairly evaluated her performance and whether higher-level officials conducted independent investigation.

EEOC v. BNSF Ry. Co., 853 F.3d 1150, 33 A.D. Cas. 637 (10th Cir. 2017) – Locomotive electrician applicant rejected because medical examination revealed that due to hand impairment he lacked grip strength to safely climb on and off trains – summary judgment affirmed – railroad did not regard applicant as disabled – railroad's suggestion that applicant apply for other railroad jobs rebutted contention that he was viewed as substantially limited in his ability to work – perceived inability to perform a job specific task does not show a perception that the individual could not perform manual tasks central to daily life.

Williams v. FedEx Corp. Servs., 849 F.3d 889, 33 A.D. Cas. 481 (10th Cir. 2017), *pet. for cert. docketed by Chute v. Nifty-Fifties, Inc.*, ___ U.S. ___ (June 30, 2017) – Summary judgment for employer on ADA hostile work environment and regarded as disabled claim – summary judgment reversed with respect to allegation that FedEx unlawfully required a medical examination, to wit, required him to disclose his use of legally prescribed prescription drugs – an employer is liable for an improper medical examination "unless such examination or inquiry is shown to be job-related and consistent with business necessity," 849 F.3d at 902 – FedEx argues that it satisfies this test because of its drug testing program which insures that employees who seek assistance for drug abuse are no longer abusing the drug if they return to FedEx – this argument has not been resolved, and case remanded to District Court to address this claim.

Capps v. Mondelez Global, LLC, 847 F.3d 144, 33 A.D. Cas. 377 (3d Cir. 2017) – Employee was allowed intermittent Family Medical Leave Act days off because of off-again, on-again hip pain – arrested and jailed for drunk driving while on leave allegedly for leg pain – employee discharged when employer learned of the drunk driving facts – "Where an employer provides that the reason for the adverse employment action taken by the employer was an honest belief that the employee was misusing FMLA leave, that is a legitimate, nondiscriminatory justification for the discharge." 847 F.3d at 152.

EEOC v. Flambeau, Inc., 846 F.3d 941, 33 A.D. Cas. 394 (7th Cir. 2017) – Employer adopted wellness program which required employees as a condition of receiving employer-subsidized health insurance to fill out a medical questionnaire and to undergo biometric testing – employee did not meet those requirements for the 2012 benefit year, and as a result he and

his family were briefly without health insurance – EEOC lawsuit challenging program on ground that it was a prohibited involuntary medical examination dismissed as moot since employer terminated the program – no relief is available to the individual on whose behalf suit was brought – with respect to a claim for reimbursement of $82.02 of medical expenses incurred while he did not have insurance coverage, plaintiff actually never paid – the bills were either written off or paid by third parties so there is no right to be repaid – with respect to emotional distress damages, testimony was "when they took my insurance away, and my kids didn't know what's going on, and I couldn't go to the doctor . . . ." 846 F.3d at 946 – "[H]is testimony does not even reach the level of conclusory statements of emotional distress and is insufficient to show he could be entitled to such damages," *Id*. at 947 – as to punitive damages, reckless indifference is required – when the individual's insurance was terminated, the EEOC had not yet proposed regulations – legal uncertainty at the relevant time distinguishes this case from punitive damages cases for well-understood violations – moreover, the employer consulted with its attorneys about the benefit plan's compliance with state and federal law.

Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 33 A.D. Cas. 62 (6th Cir. 2016) – Black hub manager claimed demotion because of race, age, and disability – summary judgment on race claims affirmed because alleged comparators either were not on a performance improvement plan, or improved their performance while on an improvement plan, or held a dissimilar position – the age claim fails because there was no evidence other than replacement by younger employee which is insufficient – the disability claim fails because decision-makers had no knowledge of stress related disabilities before the decision on demotion.

Parker v. Crete Carrier Corp., 839 F.3d 717, 33 A.D. Cas. 6 (8th Cir. 2016), *reh' en banc denied* (Nov. 16, 2016), *cert. denied* 137 S. Ct. 1445 (2017) – Trucking company required all drivers with body mass index of 33 or above to undergo sleep study to determine their risk of sleep apnea – class of drivers required to undergo study was reasonably defined given medical evidence showing correlation between obesity and sleep apnea – study was job related and consistent with business necessity in view of safety concerns – does not matter that individual had no documented sleep related problems at work, and had a five-year record of accident free driving – company stopped giving plaintiff work until he complied.

Mendoza v. Roman Catholic Archbishop of L.A., 824 F.3d 1148 (9th Cir. 2016) – Bookkeeper went on ten month disability leave – church's pastor temporarily took over bookkeeping duties – pastor decided part-time employee could do the job – when plaintiff returned to work, pastor offered only part-time job – she declined and sued, alleging that failure to reinstate her to a full-time job was disability discrimination – summary judgment affirmed – she could not show full-time job was available.

Roberts v. City of Chicago, 817 F.3d 561, 32 A.D. Cas. 1179 (7th Cir. 2016) – Hiring for firefighters was done "first come, first serve" – the first 111 members of a class under a settlement agreement to complete the court mandated hiring process were to be hired – plaintiffs completed the process – but because they failed their initial medical screenings, they were not cleared until they underwent additional tests – this delay caused them not to be in the first 111 persons – this is not disability discrimination – "[T]o prove causation under the ADA, plaintiffs must show they were not hired because of their disabilities, not because of a delay in medical clearance, even if that delay was caused by their disabilities," 817 F.3d at 565.

Morriss v. BNSF Ry. Co., 817 F.3d 1104, 32 A.D. Cas. 1173 (8th Cir. 2016), *cert. denied* 137 S. Ct. 256 (2016) – Morbidly obese individual who was disqualified for a position because of safety was not disabled under the ADA – his obesity was not a physical impairment that resulted from an underlying physiological disorder – he could not show he was regarded as disabled even though he was considered a risk for a safety sensitive position.

Gentry v. East West Partners Club Mgmt. Co. Inc., 816 F.3d 228, 32 A.D. Cas. 1128 (4th Cir. 2016) – Jury properly instructed that injured employee required to show "but for" proof that her disability caused her discharge – contention that ADA indirectly incorporates motivating factor causation standard from Title VII rejected – in amending Title VII to add motivating factor standard, Congress did not add that standard to the ADA – ADA's prohibition on discrimination "on the basis of" disability connotes "but for" causation.

Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 32 A.D. Cas. 1117 (2d Cir. 2016) – Opinion by Guido Calabresi – Issue was association discrimination – one of plaintiff's sons had diabetes – the other broke his leg shortly after she returned from Family Medical Act Leave – summary judgment reversed on FMLA claim but sustained on ADA associational discrimination claim – ADA prohibits associational discrimination in express terms – "[W]e join our sister circuits in holding that, to sustain an 'associational discrimination' claim under the ADA, a plaintiff must first make out a prima facie case by establishing: (1) that she was qualified . . .; (2) . . . adverse employment action; (3) that she was known at the time to have a relative . . . with a disability; and (4) that the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative . . . was a determining factor . . . ." 817 F.3d at 432 – we follow the 7th Circuit in *Larimer v. IBM,* 370 F.3d 698, which outlined three types of theories that would give rise to associational discrimination: "Expense", such as insurance costs; "employer" fears that the employee may contract or is genetically predisposed to develop the disability; or "distraction" – the employer fears that the employee will be inattentive – the only possible theory is distraction based on her son's diabetes – plaintiff produced no evidence that she was fired because the employer believed she would be distracted – her only evidence was that she was terminated because her employer thought she had taken too much leave from work to care for her sons – plaintiff has not shown that her employer feared she would be inattentive *at work*, but rather that her employer feared she would not be at work at all, because of a need for accommodation to which she was not entitled under the ADA. "Accordingly, we find that [plaintiff] cannot sustain an ADA claim for associational discrimination." 817 F.3d at 433.

Qualified Individual with Disability/Essential Job Functions

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

Gunter v. Bemis Co., Inc., 906 F.3d 484, 34 A.D. Cas. 82 (6th Cir. 2018) – Employer's job description required lifting at least 45 pounds – employee because of injury had 40-pound lifting restriction – fired – jury verdict for employee affirmed – evidence showed that employer discouraged employees from lifting over 40 pounds, and lifting equipment available for loads over 20 pounds – job description not determinative with respect to essential job functions.

Hostettler v. Coll. of Wooster, 895 F.3d 844, 130 FEP 1693 (6th Cir. 2018) – Summary judgment reversed – a trial is necessary to determine the factual issue of whether the essential functions of an HR job could be accomplished on the requested 30-35 hour part-time work schedule.

Faidley v. UPS of Am. Inc., 889 F.3d 933, 33 A.D. Cas. 1709 (8th Cir. 2018) (*en banc)* – Ability to work overtime was essential job function for UPS driver.

Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 33 A.D. Cas. 1585 (6th Cir. 2018) – Jury verdict finding that city utility unlawfully denied in-house attorney's request to tele-work for ten weeks to accommodate high-risk pregnancy affirmed – physical presence in office was not essential job junction – several colleagues agreed tele-work would not pose an issue for her job – in eight years on the job she had never actually performed the tasks listed in her job description that required an office presence – outdated job description did not take into account advances in internet technology that facilitate tele-work.

Felix v. Wisconsin Dep't of Transp., 828 F.3d 560, 32 A.D. Cas. 1576 (7th Cir. 2016) – Employee had fit at work, screaming and yelling, because of anxiety disorder and related disabilities – employer had independent assessment done as to whether conduct was likely to recur – assessment was that conduct was likely to recur, and employer discharged employee – summary judgment affirmed – employee was not qualified – employer was not required to prove the affirmative defense of direct threat.

Scruggs v. Pulaski Cty., 817 F.3d 1087, 32 A.D. Cas. 1351 (8th Cir. 2016) – Summary judgment affirmed – county juvenile detention officer with 25-pound lifting restriction could not perform essential functions of job – job required lifting and restraining juveniles weighing more than that – does not matter that there was no interactive process since no accommodation possible – no showing extended leave would have made any difference – "Even if we were to find that extending Scruggs's FMLA leave was a reasonable accommodation under the ADA, Scruggs did not carry her burden to show that she could perform the essential functions of her job with that accommodation." 817 F.3d at 1093.

Stephenson v. Pfizer, Inc., 641 F. App'x 214, 32 A.D. Cas. 1063 (4th Cir. 2016) (unpublished) – Summary judgment reversed – jury trial on whether sales representative who developed an eye disorder that prevented her from driving should have been assigned a driver as a reasonable accommodation – jury question is whether her inability to drive to call on doctors at their offices meant she was no longer able to perform an essential function of her job.

EEOC v. AutoZone, Inc., 809 F.3d 916, 32 A.D. Cas. 803 (7th Cir. 2016) – 15 pound lifting restriction upheld – Appeals Court rejected EEOC's "team concept" argument – the EEOC's theory was that where employees work on a team and there is no required division of labor, one team member can perform a certain function for another, and reciprocate – but this was not the normal way work was performed – the proposed accommodation was requiring somebody else to do the lifting which is not acceptable.

Preddie v. Bartholomew Consol. Sch. Corp., 799 F.3d 806, 31 A.D. Cas. 1761 (7th Cir. 2015) – diabetic school teacher was not a qualified individual since his 23 absences during one school year prevented him from performing the essential job function of being at work.

EEOC v. Ford Motor Co., 782 F.3d 753, 31 A.D. Cas. 749 (6th Cir. 2015) (*en banc*) – By 8-to-5 vote, 6th Circuit finds no violation in rejecting telecommuting for employee with irritable bowel syndrome – "regular and predictable attendance" is an essential job function – EEOC can't show individual was a qualified individual with a disability able to perform all the job's essential functions – dissent contended fact issue as to whether her physical presence at the job was essential.

McMillan v. City of New York, 711 F.3d 120, 27 A.D. Cas. 929 (2d Cir. 2013) – Summary judgment for employer reversed in chronic tardiness case – punctuality may not be an essential job function for a schizophrenic employee whose medicine made him groggy in the morning – accommodation such as working through lunch or staying late may have

been possible – it is not a given that punctuality is essential for every job – on remand court will have to inquire into the reasonableness of such accommodations.

Reasonable Accommodation

Exby-Stolley v. Bd. of Cty. Comm'rs, Weld Cty., Co., 906 F.3d 900, 34 A.D. Cas. 49 (10th Cir. 2018), *reh'g en banc granted* 910 F.3d 1129 (10th Cir. 2018) – Jury verdict against plaintiff affirmed – plaintiff put in temporary job with no loss of pay while employer searched for possible accommodation – plaintiff resigned, contending her proposed accommodation should have been granted – since she resigned, there was no adverse employment action – proving an adverse employment action is an essential element of a failure to accommodate claim.

Hill v. Assocs. For Renewal in Educ., Inc., 897 F.3d 232, 33 A.D. Cas. 1825 (D.C. Cir. 2018), *reh'g en banc denied* (Aug. 28, 2018), *pet. for cert. docketed* ___ U.S. ___ (Dec. 19, 2018) – Single leg amputee was able to perform essential functions of job without accommodation – however, job would have been much easier for him with a teacher's aide which was provided to every other teacher – employer not entitled to judgment on the pleadings on the ground that a reasonable accommodation was unnecessary – reasonable jury could find that forcing him to endure pain that classroom aide would alleviate violates ADA – denial of classroom aide and placement on upper-level floor not enough to support hostile environment claim.

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 33 A.D. Cas. 1113 (7th Cir. 2017), *cert. denied* 138 S. Ct. 1441 (2018) – Summary judgment – employee discharged at expiration of medical leave for back surgery – request for additional two-or-three month leave of absence not request for reasonable accommodation – employee who cannot work for long-term duration is not qualified.

Punt v. Kelly Servs., 862 F.3d 1040, 33 A.D. Cas. 919 (10th Cir. 2017) – Summary judgment against temporary employee in favor of staffing agency and client company – discharged for poor attendance – not entitled to leave of absence – did not specify how long impairment would last – regular attendance is necessary for temporary employees – duty to contact staffing agency if she wanted future placements.

Credeur v. Louisiana, 860 F.3d 785, 33 A.D. Cas. 855 (5th Cir. 2017) – Working from home request by litigator in State Attorney General's Office denied – not disability discrimination – presence in office is essential job function – job by nature is "interactive and team oriented" – summary judgment affirmed.

Echevarria v. AstraZeneca Pharm. LP, 856 F.3d 119, 33 A.D. Cas. 673 (1st Cir. 2017) – Employee with depression and anxiety related to a small brain tumor granted short-term disability leave – after employee out for five months, employer inquired about return and physician said symptoms wouldn't clear up for another 12 months and she "might" be able to return to work then – employer refused to extend leave for another year and terminated her – summary judgment affirmed – ADA does not require indefinite leave as a reasonable accommodation – 12-months' extension not reasonable since she presented no evidence that this would likely enable to return – 12-month leave also does not meet the "facially reasonable accommodation" test – other courts have fund that even six-month extensions aren't reasonable.

Acker v. Gen. Motors, LLC, 853 F.3d 784, 33 A.D. Cas. 597 (5th Cir. 2017) – Summary judgment affirmed – must specifically request accommodation – request for a Family Medical Leave Act (FMLA) leave was not simultaneous request for a reasonable accommodation of plaintiff's anemia – employee seeking FMLA leave asserts he has serious health condition that prevents him from performing essential job functions – employee seeking ADA accommodation asserts he is able to perform essential job functions with accommodation.

Moss v. Harris Cty. Constable Precinct One, 851 F.3d 413, 33 A.D. Cas. 561 (5th Cir. 2017) – Deputy Constable out on Family and Medical Leave Act discharged when his FMLA leave entitlement expired – he argued he should have been put on further leave until May 31, 2013, to recover from back surgery, which was also the date he had planned to retire – disability discrimination and retaliation properly dismissed on summary judgment – plaintiff failed to show he could have performed his job with an accommodation as of the date of his termination – extended leave isn't reasonable if the employee doesn't plan to return to work – since plaintiff wasn't a "qualified individual with a disability his retaliation claim necessarily also fails" – claim that showing that being qualified was necessary for a disability retaliation claim rejected.

Stevens v. Rite Aid Corp., 851 F.3d 224, 33 A.D. Cas. 557 (2d Cir. 2017), *cert. denied* 138 S. Ct. 359 (2017) – Award of $2.6 million to terminated pharmacist who had a phobia that prevented him from giving injections reversed – giving injections was an essential function of job – plaintiff suggested that a reasonable accommodation would be de-sensitization therapy – employers aren't obliged to offer medical treatment as a reasonable accommodation – plaintiff suggested that other employees could give the injections – a reasonable accommodation "can never involve the elimination of an essential function," 851 F.3d at 230.

Whitaker v. Wis. Dep't of Health Servs., 849 F.3d 681, 33 A.D. Cas. 469 (7th Cir. 2017) – Summary judgment against discharged employee who was discharged after extended absences – onsite attendance was essential function of job – no showing if accorded further accommodation employee could return to work on specific date.

DeWitt v. Sw. Bell Tel. Co., 845 F.3d 1299, 33 A.D. Cas 305 (10th Cir. 2017) – Diabetic employee is not entitled to retroactive accommodation – prior to requesting accommodation, employee violated company policy by twice hanging up on customers while on last chance agreement – honest belief that representative intentionally hung up on customers in violation of company policy negated ADA claim – her attempt to blame her

violation of employer rules on her disability was after the fact, and thus not cognizable under the ADA – four other Circuits similarly have ruled that employers aren't required to excuse "past employee misconduct" that is a result of a disabling medical condition – she was thus not entitled to "retroactive leniency" even if she could show it was linked to her disability – even if the dropping of calls was simply poor work rather than a rule violation, the ADA allows employers to hold disabled workers to the same performance standards as workers without disabilities – EEOC contention that plaintiff's waiting until after the dropped calls to request relevant accommodation didn't relieve Southwestern Bell of further accommodation obligation rejected – the employer wasn't "obligated to stay its disciplinary hand" based on plaintiff's "eleventh hour" request that her dropped calls be excused because they were attributable to her disability. 845 F.3d at 1318.

EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 33 A.D. Cas. 179 (11th Cir. 2016) – Rejecting EEOC position, employers do not have to reassign disabled workers into open positions ahead of more qualified non-disabled employees – ADA isn't an affirmative action law – employers are not required to turn away superior job candidates in favor of disabled workers seeking reassignment as an accommodation – court also rejects argument that there is a split in the Circuits – 7th Circuit didn't actually decide the question in 2012 – the District of Columbia decision was a non-binding dictum – nurse who had to use a cane removed from psychiatric ward – she was allowed to remain if she could find another nursing position within the hospital – she failed to obtain any of the open nursing positions when other applicants were deemed more qualified – she claimed she was entitled to a reassignment as an accommodation – court cited *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) that ADA does not require an employer to ignore a seniority system – as in *Barnett* the employer was allowed to pick the best qualified applicant – "As things generally run, employers operate their business for profit, which requires efficiency and good performance. Passing over the best-qualified applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance." 842 F.3d at 1346.

Murray v. Warren Pumps, LLC, 821 F.3d 77, 32 A.D. Cas. 1233 (1st Cir. 2016) – Summary judgment affirmed, dismissing ADA failure to accommodate claim – employee had medical restrictions due to back

condition – he claimed he was deliberately requested to perform tasks that conflicted with his restrictions – his claim was insufficient to support a claim given that he remained silent when assigned those tasks and never requested accommodation.

Wells v. Winnebago Cty., 820 F.3d 864, 32 A.D. Cas. 1348 (7th Cir. 2016) – The county was employer, but alleged denial of accommodation came from state employees to whom he reported – does not matter – employer is responsible for controlling the behavior of others in the workplace so as to create non-discriminatory working conditions – employee was "computer navigator" who was assigned to help litigants who had no counsel deal with the judicial system's requirements – she claimed that because she suffered from anxiety, she was entitled to have a screen or counter between her and the public – she never made a proper connection between an ADA covered disability and her request for separation – the only time she asked for an ADA accommodation – requests for leave – they were granted – summary judgment affirmed.

Kelleher v. Wal-Mart Stores, Inc., 817 F.3d 624, 32 A.D. Cas. 1183 (8th Cir. 2016) – Employee with multiple sclerosis could not climb ladders and do stocker work – transferred as accommodation to cashier – did not like cashier because of concern that customers would make comments about her speech problems – but a transfer is an adverse action only if an employee cannot carry out the job duties – nothing in this record so indicates – new position called for a pay increase – employee does not have right to choose accommodation as long as accommodation is reasonable – "Not everything that makes an employee unhappy is an actionable adverse action," 817 F.3d at 632.

Schaffhauser v. United Parcel Service, Inc., 794 F.3d 899, 31 A.D. Cas. 1437 (8th Cir. 2015) – Employee demoted for making racist comment – claimed steroids given in connection with an injury was the cause of the misconduct – duty to accommodate rejected – notice of the disability in a request for accommodation must be made before the misconduct, not after it – "As the district court articulated, liability is not established where 'an employee engages in misconduct, learns of an impending adverse employment action, and then informs his employer of a disability that is the supposed cause of the prior misconduct and requests an

accommodation.'" 794 F.3d at 906 – multiple cases cited for the proposition and an employer is not required to ignore misconduct because the claimant subsequently asserts it was a result of the disability.

Stern v. St. Anthony's Health Ctr., 788 F.3d 276, 31 A.D. Cas. 1149 (7th Cir. 2015) — Terminated chief psychologist unfit for position – subordinates noted cognitive problems similar to Alzheimer's – independent third party concluded that plaintiff "definitely had cognitive issues" typical of early Alzheimer's – court bothered by termination without interactive process – however, plaintiff did not demonstrate how disabilities could be accommodated – not sufficient to suggest delegating essential job functions – summary judgment affirmed.

Noll v. IBM, Corp., 787 F.3d 89, 31 A.D. Cas. 1049 (2d Cir. 2015) – 2-to-1 decision finding IBM reasonably accommodated deaf employee – employee demanded captions on all files on the company internet as accommodation – IBM instead provided him with written transcripts of all files he requested, together with a sign language interpreter either onsite or remotely for any file that he requested for immediate translation – plaintiff alleged this wasn't effective since it's tiring and difficult for a deaf employee to simultaneously watch the video and a sign language interpreter – IBM entitled to summary judgment since the offered accommodation, while not the preferred accommodation, is "plainly reasonable" – "[I]n other words, the plain reasonableness of the existing accommodation ends the analysis," 787 F.3d at 94 – plaintiff acknowledged that the accommodation enabled him to perform his job's essential functions – but he argued that immediate access to files posted on the internet is a benefit of employment that is being denied to deaf employees – the dissent said it should be a jury issue.

Solomon v. Vilsack, 763 F.3d 1, 30 A.D. Cas. 649 (D.C. Cir. 2014) – Employee with depression requested that she be able to determine her own hours as long as she met agency deadlines – trial court ruled that such an accommodation is not required – without ruling on whether it would be a reasonable accommodation on these particular facts, the D.C. Circuit held that "nothing in the Rehabilitation Act establishes, as a matter of law, that a maxiflex work schedule is unreasonable," 764 F.3d at 4 – a separate

analysis is required as to whether an accommodation is reasonable and whether it would result in an undue hardship – in view of the technological advances that are being made in many instances it is less essential for employees in many jobs to be physically present during prescribed hours.

Hwang v. Kan. State Univ., 753 F.3d 1159, 29 A.D. Cas. 1509 (10th Cir. 2014) – University had an inflexible maximum leave of absence for illness of six months. It refused to extend it for the plaintiff. A question, according to the Tenth Circuit, was "must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act?" Their answer: "Unsurprisingly, the answer is almost always no." – "[I]t's difficult to conceive how an employee's absence for six months . . . could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a *reasonable* accommodation," 753 F.3d at 1162 (emphasis in original)– Contention that all inflexible sick leave policies are illegal violates the Rehabilitation Act rejected – Inflexible leave policies providing unreasonably short sick leave periods might be subject to attack but the six month leave policy herewith does not fall within that category.

Retaliation (Ch. 15)

Burrage v. United States, 571 U.S. 204, 134 S. Ct. 881, 122 FEP 237 (2014) – See the case brief under Chapter 12 (Age). The Supreme Court discusses the meaning of "but-for" causation.

Univ. of Tex., Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 133 S. Ct. 2517, 118 FEP 1504 (2013) – The mixed motive amendments to Title VII are not applicable to retaliation cases – the burden of proof in a retaliation case is "but-for" – 5 to 4 decision – status-based discrimination after 1991 amendments is governed by a motivating factor analysis – this is not applicable to retaliation, which was not covered by the amendments – "Causation in fact – *i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury – is a standard requirement of any tort claim . . . ." 133 S. Ct. at 2524-25. But-for causation is the default unless

Congress indicates a different test – Congress has not done so – case is actually governed by *Gross*, which found a "but-for" test under a statute that prohibited discrimination "because of age" – the two retaliation subsections of Title VII both use the "because of" language – the number of retaliation claims filed with the EEOC have outstripped every type of status-based discrimination except race – "Lessening the causation standard could also contribute to the filing of frivolous claims . . . .

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

Id. at 2531-32. A mixed motive causation standard "would make it far more difficult to dismiss dubious claims at the summary judgment stage," *id*. at 2532 – "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [the mixed motive amendments]. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer," *id*. at 2533 – contrary interpretation in the EEOC Guidance Manual rejected as lacking persuasive force – dissent contended that majority seizes upon the 1991 amendments, designed to strengthen Title VII, to weaken retaliation protection – dissent suggests reversing this case and *Vance* through "another Civil Rights Restoration Act."

Lewis v. Wilkie, 909 F.3d 858, 131 FEP 93 (7th Cir. 2018) – Retaliation summary judgment affirmed – employee reinstated after successful EEOC complaint – contended supervisors gave him unneeded instructions, unwarranted counseling, greater scrutiny, required him to sign 60-day performance review applicable to probationary employee, and threatened him with future discipline – summary judgment proper since Court considered evidence as a whole rather than sorting into direct and indirect evidence piles – Title VII anti-retaliation does not protect an employee against petty slights or minor annoyances – the retaliation that is protected must produce an injury or harm – unfulfilled threats do not constitute adverse actions even though they might cause stress – monitoring one's

work would not dissuade a reasonable employee from protected activity – "Lewis may have disliked the performance review, but not everything that makes an employee unhappy is an actionable adverse action." 909 F.3d at 870 (internal quotations and citation omitted).

EEOC v. N. Mem'l Health Care, 908 F.3d 1098, 131 FEP 69 (8th Cir. 2018) – Sabbatarian applicant denied employment when she said she needed Friday nights off – EEOC sued only for retaliation, not disparate treatment discrimination – asking for religious accommodation is not opposition to an illegal practice – summary judgment affirmed 2-to-1.

Netter v. Barnes, 908 F.3d 932, 131 FEP 65 (4th Cir. 2018) – Unauthorized disclosure of confidential personnel files to the EEOC to support plaintiff's racial and religious discrimination claims does not constitute protected activity – such conduct is not a reasonable method of opposition – plaintiff gave copies of all five confidential files, including files of other persons to the EEOC and her lawyer – plaintiff was discharged for her conduct with respect to the confidential personnel files – no retaliation – facts undisputed – under the opposition clause, unauthorized disclosures of confidential information to third parties are generally unreasonable – the issue is closer under participation clause – but since the plaintiff's conduct violated a valid generally applicable state privacy law, illegal actions are not protected under the participation clause either.

***Gogel v. Kia Motors Mfg. of Ga., Inc.*,** 904 F.3d 1226, 130 FEP 1869 (11th Cir. 2018) – 2-to-1 decision reversed summary judgment in favor of Kia Motors – to quote the dissent in the 2-to-1 decision (the majority included a 9th Circuit judge sitting by designation):

> "As Senior Team Relations manager for Kia, one of Tina Gogel's essential job duties was to try to protect Kia from litigation by working to resolve internally discrimination complaints made by employees. She was fired by Kia when officials received information indicating that, in contravention of this responsibility, Gogel was actually—and clandestinely—trying to drum up lawsuits against the

> company. Specifically, Kia officials concluded that Gogel had encouraged and solicited another employee . . . to pursue an EEOC charge against Kia, and had referred that employee to Gogel's own attorney to assist in filing that charge. As a result of this discovery, Kia officials understandably decided that they could no longer trust Gogel to perform the duties for which she was being paid, and they feared future and continued treachery on her part as a senior manager in a highly significant and sensitive position. Thus, they fired her."
>
> "Nonetheless, the majority holds that Kia was prevented from taking any adverse action against Gogel because her actions constituted opposition to perceived discrimination and were therefore protected under Title VII's anti-retaliation provision. I respectfully, but strongly, disagree. Under our precedent, an employee's opposition conduct is not protected when the means by which she expresses that opposition so interferes with the performance of her job duties that it renders her ineffective in the positions for which she was employed."

904 F.3d at 1239-40 (internal quotations omitted).

The 2-to-1 majority concluded that Gogel in her position heard many complaints about how women and Americans were treated at the Korean-owned company, and that she experienced similar discriminatory treatment herself. Ms. Gogel had filed her own EEOC charge against Kia. Another employee, Ms. Ledbetter, learned of this, met with Ms. Gogel and Gogel passed along her attorney's name to Ledbetter.
Kia asked Gogel to sign a document stating that she would not discuss her EEOC charge or similar claims with team members and not use her position to solicit team members to make claims against Kia – Gogel initially refused to sign it, was asked to go home, but changed her mind and signed it – Gogel and two employees filed charges using the same attorney – Gogel was fired by an executive who testified he was totally convinced that she had solicited and encouraged other team members to file a lawsuit against the company. He had lost total confidence and trust in her to perform her job duties – "The District Court concluded Kia fired her for failing to perform her job duties because she allegedly helped or solicited Ms. Ledbetter in filing her EEOC charge against Kia." 904 F.3d

1233 – Kia acknowledges that in most circumstances assisting a co-worker in filing an EEOC charge is protected activity, but this does not apply, says Kia, when a human resource employee helps another employee file a discrimination charge. The majority acknowledged cases holding that human resources officials must follow company policy, but distinguished them – "[O]ur precedent does not look to the *fact* that a human resource employee opposes a policy, but rather looks to the *manner* in which she does it." 904 F.3d. at 1235 – the test is a balancing test to determine whether the opposition was reasonable – a human resources employee who tries to resolve complaints internally but fails due to the inadequacy of her employer's procedures furthers the purpose of the statute by going outside the employer's internal procedures – sometimes the balancing test "will require accepting an employee's opposition to discrimination as protected activity where the employee has stepped outside the bounds of work rules to do so." 904 F.3d at 1236 – providing Ms. Ledbetter with the name of an attorney was reasonable conduct – the Court relies heavily on Gogel's failure to get satisfaction with her own complaints of sexism – when Gogel tried to investigate Ledbetter's claim of an inappropriate supervisor relationship, and Gogel was prevented by higher officials from continuing the investigation, Kia's internal framework was exhausted – thus, Gogel had tried to use Kia's internal reporting relationships, but failed – "[H]er deviation from [internal procedures] furthered the purposes of Title VII." 904 F.3d at 1237 – thus "[W]e conclude that the manner of her opposition was reasonable, and her conduct was protected activity." 904 F.3d at 1237-38 – "The dissent fails to explain how its per se rule could be consistent with the opposition clause of Title VII, which contains no exception for human resource employees." 904 F.3d at 1238. – Grant of summary judgment on retaliation claims reversed – summary judgment affirmed on plaintiff's claims of sex and national origin discrimination – she was not fired because of her sex or national origin but because of her assistance to Ms. Ledbetter.

Rogers v. Henry Ford Health Sys., 897 F.3d 763, 130 FEP 1784 (6th Cir. 2018), *reh' en banc denied* (Sept. 5, 2018) – Summary judgment affirmed on promotion claim, reversed on retaliation claim – trial judge granted summary judgment on the basis that transfer at same rate did not constitute a "significant change in employment status" (897 F.3d at 775)– but the Supreme Court has rejected the application of this requirement, which applies to Title VII discrimination claims – the requirement for

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

Auer v. City of Minot, 896 F.3d 854, 131 FEP 48 (8th Cir. 2018*),reh'g en banc denied* (Aug. 28, 2018) – Probationary city attorney fired after one month on the job alleged it was retaliation for complaining about sex-based harassment – retaliation mandates that "the employee *reasonably* believes the conduct was illegal," 896 F.3d at 859 (emphasis in original) – here the only basis for asserting sex discrimination in job criticisms was that plaintiff's work style was unfavorably compared to her male predecessor – bias cannot be inferred from this – summary judgment affirmed.

Mys v. Mich. Dep't of State Police, 886 F.3d 591, 130 FEP 1429 (6th Cir. 2018) – Cat's paw theory applicable when female police sergeant transferred 100 miles away from her preferred location near her mother for whom she was a caretaker after two sexual harassment complaints against a male sergeant – does not matter that transfer review board made the decision since the police captain who initiated the process blamed plaintiff for a hostile work environment and helped choose the distant transfer location – harassment complaints referenced in transfer discrimination – jury verdict affirmed – jury presumably concluded that the captain's bias influenced the board.

Winfrey v. City of Forest City, 882 F.3d 757, 130 FEP 1229 (8th Cir. 2018) – Former police officer could not state retaliation claim – alleged was terminated because claimed underpaid – at his deposition he stated "I believe I was retaliated against for standing up against the city and the mayor" – complaints of underpayment protected by Title VII.

Watford v. Jefferson Cty. Pub. Sch., 870 F.3d 448, 130 FEP 655 (6th Cir. 2017), *reh'g denied* (Oct. 20, 2017), *reh'g en banc denied* (Nov. 9, 2017) – Plaintiff's union grievance put on hold after she filed an EEOC charge – this is an adverse action allowing a retaliation claim – summary judgment reversed.

Donathan v. Oakley Grain, Inc., 861 F.3d 735, 130 FEP 353 (8th Cir. 2017), *reh'g en banc denied* (Aug. 10, 2017) – Summary judgment in retaliation case reversed – plaintiff fired eight days after her unequal pay complaint – long discussion about the relevance of temporal proximity – plaintiff terminated even though she never received negative performance reviews, was never previously laid off.

Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 130 FEP 247 (4th Cir. 2017) – Summary judgment in retaliation case affirmed – plaintiff reported that a former female employee told her that the general manager demanded sex in exchange for a raise in pay. Plaintiff also reported this conversation occurred in the presence of a witness, and that plaintiff believed that another female employee had left because of a similar demand by the general manager – all three individuals denied the alleged conversations, and plaintiff was terminated for lying – in a deposition, one witness changed her story and testified that plaintiff had accurately reported their conversation about sex for a raise – plaintiff claimed even if the employer in good faith believed that she lied, she was entitled to prevail because she was opposing discrimination and thus was retaliated against – if the employer due to a genuine factual error never realized that its employee engaged in protected conduct, it cannot be guilty of retaliation – the opposition clause does not protect a knowingly false allegation – the employer reasonably concluded that those were the facts – firing employee for knowingly fabricating an allegation relating to a Title VII violation does not run afoul of the opposition clause – this is true even though the participation clause protects false statements made in EEOC charges – when it fired plaintiff, the employer did not know she had engaged in any protected activity – it simply concluded in good faith that she had lied – the EEOC's *amicus* argument that limiting retaliation liability to cases where the employer was actually motivated by a desire to retaliate is rejected.

Cabral v. Brennan, 853 F.3d 763, 130 FEP 27 (5th Cir. 2017) – Summary judgment affirmed – two-day suspension not "a material adverse action" so no *prima facie* case – *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) did not establish a per se rule that all suspensions are materially adverse – there the suspension was 37 days – under *White* case, plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination – plaintiff failed to do this, offering only conclusory statements attesting to his emotional and psychological harm because of the two-day suspension – no documentation provided.

Burton v. Bd. of Regents of the Univ. of Wisc. Sys., 851 F.3d 690, 129 FEP 1818 (7th Cir. 2017) – Summary judgment affirmed – Professor filed EEO charge and lawsuit – six months later Dean of University issued plaintiff a letter with directions to remediate purported inappropriate behavior – when Professor rejected the directions, Dean requested formal reprimand – the letter of direction identified seven events that the Dean considered examples of inappropriate behavior – summary judgment affirmed because six months elapsed between the protected conduct and the letter of direction – the issue is whether under the "but for" test a reasonable jury could find causation – the last protected activity was six months before the letter of direction – while this does not preclude the claims as a matter of law, the Dean had a factual basis for each of the directions in the letter – "these are exactly the type of personnel management decisions that federal courts do not second-guess," 851 F.3d at 698 – there is simply not enough evidence to establish "but for" causation.

Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 129 FEP 1801 (3d Cir. 2017) – In *Nassar* decision, Supreme Court held that retaliation cases require "but for" proof – "but for" does not apply at the initial *prima facie* stage of the summary judgment phase of a case – "but for" only needs to be shown at the pretext stage of summary judgment – Circuit split on the issue – some Circuits require the "but for" test to be applied at the *prima facie* state – three stage "McDonnell Douglas" test not rendered obsolete by *Nassar* – some of claims survived summary judgment since she met the *prima facie* case test of "*McDonnell Douglas*" to show that there was an inference that her protected activity was a likely reason for being given

a "terminal" contract, rather than a "renewable" contract – she failed to meet the *prima facie* test on her claim that she was voted out as department chair in retaliation for her protected activity – Fourth Circuit earlier reached the same conclusion as the Third Circuit.

Fisher v. Lufkin Indus., Inc., 847 F.3d 752, 129 FEP 1629 (5th Cir. 2017), *as revised* (Mar. 30, 2017) – Plaintiff alleged racial discrimination when his supervisor called him "boy" – multiple co-workers were offended at the charge, and conducted a "sting" operation – they purchased pornographic videos from plaintiff – others in the plant had pornographic videos, and sold things without complaint – this triggered an investigation – plaintiff lied during the investigation – Magistrate Judge found that investigation was motivated by retaliatory motives, but that lying during the investigation was an intervening cause, and ruled for the defendant – reversed – cat's paw theory applicable – investigation into the sale of DVDs motivated by desire to retaliate – subsequent discipline was motivated by a desire to retaliate – but the District Court clearly erred in finding that the chain of proximate cause was broken when plaintiff lied during the investigation – the individuals who triggered the investigation for retaliatory motives were a proximate cause of the termination – plaintiff's refusal to acquiesce in the retaliatory investigation was not a superseding cause – a superseding cause must be unforeseeable – "While we do not endorse [plaintiff's] response, we view his mild resistance to a retaliatory investigation as entirely foreseeable[,]" 847 F.3d at 759 – Fisher's lack of cooperation with the employer's retaliatory-motivated investigation which itself was "based on a dubious work rule violation" (*id*. at 759-60) did not sever the causal chain.

Sieden v. Chipotle Mexican Grill, Inc., 846 F.3d 1013, 129 FEP 1537 (8th Cir. 2017) – Summary judgment against former restaurant general manager on retaliation claim – discharge for poor performance not pretextual – although plaintiff had received four promotions between 2001 and 2011, his more recent record showed he had been relieved of management duties based on concerns about performance a year prior to the alleged protected activity.

Lord v. High Voltage Software, Inc., 839 F.3d 556, 129 FEP 1021 (7th Cir. 2016), *cert. denied* 137 S. Ct. 1115 (2017) – Summary judgment on sexual harassment and retaliation claims by a male – hostile environment claim based on oft-repeated joke about plaintiff's alleged sexual interest in a female co-worker, and for unwanted touchings by a male co-worker – hostile environment "is a nonstarter because Lord has not established that his coworkers harassed him because of his sex," 839 F.3d at 561 – no harasser was homosexual – in same-sex harassment cases the central question is whether the harassment occurred because of the sex of the plaintiff– sexual connotations in a joke are not enough – with respect to retaliation, plaintiff contends he was fired because he complained about the alleged harassment – first, the complaints were not protected activity because they did not concern the type of conduct that Title VII prohibits – while it is not necessary that the complained-of conduct in fact be an unlawful employment practice, the plaintiff must have a sincere and reasonable belief that he is opposing an unlawful practice – plaintiff's belief that he was complaining about sexual harassment "though perhaps sincere, was objectively unreasonable," 839 F.3d at 563 – but even assuming it was protected, there is no showing of causation with respect to retaliation – Lord was fired two days after one complaint and one day after indicating that he might file a charge with the EEOC – the timing constitutes circumstantial evidence of a retaliative motive here, but the employer's legitimate reasons, including failure to follow instructions to immediately report anything believed to be harassment and an obsessive fixation with his co-worker's performance, timeliness, and conduct had not been called into question – summary judgment affirmed unanimously on discrimination claim and 2-1 on retaliation claim.

Maggi v. Creative Health Care Servs., Inc., 608 F. App'x. 472, 127 FEP 713 (9th Cir. 2015) (unpublished) – Supervisor, whom plaintiff alleged sexually harassed her, sued her in state court for defamation – her retaliation claim against employer dismissed – no evidence employer was the but-for cause of the lawsuit – the suit was filed in the supervisor's personal capacity.

Foster v. Mountain Coal Co., LLC, 830 F.3d 1178, 32 A.D. Cas. 1629 (10th Cir. 2016) – Supervisor requested company's cooperation with respect to his coming surgery – this was an accommodation request – no magic language is required – fired days later – Supreme Court in *University of Texas v. Nassar*, 570 U.S. 338 (2013) held that an employee alleging retaliation must show more than temporal proximity – however a 10th Circuit decision issued after *Nassar* seemed to leave open temporal proximity when the adverse action follows closely upon the protected activity – summary judgment reversed.

Cooper v. N.Y. State Dep't of Labor, 819 F.3d 678, 129 FEP 44 (2d Cir. 2016) – Rule 12(b)(6) dismissal affirmed on retaliation claim – Director of Equal Opportunity Development removed from her position after she opposed plan by the Governor's office to alter the means by which EEO complaints were to be handled – plaintiff believed that the proposed changes would increase the likelihood that workplace discrimination would go unredressed – her position was successful, but thereafter she was fired, allegedly in retaliation for having lobbied against the plan of the Governor's office – dismissal proper since plaintiff could not reasonably believe that in lobbying against the Governor's proposal she was opposing conduct that qualified as an unlawful employment practice under Title VII.

Boston v. U.S. Steel Corp., 816 F.3d 455, 128 FEP 1471 (7th Cir. 2016) – Summary judgment in retaliation case affirmed – 15-month gap between EEOC charge and disqualification too long to support bias inference – decisionmaker not aware of protected activity – poor performance explanation not pretextual.

Ya-Chen Chen v. City Univ. of New York, 805 F.3d 59, 128 FEP 349 (2d Cir. 2015) – Summary judgment on retaliation claim – assertion of temporal proximity between filing of affirmative action complaint and non-renewal of contract rejected because members of her department had concerns about claimant's "overaggressiveness and lack of tact" both before and after she filed her complaint – decision not to renew her contract was made before she filed her complaint – reasonable jury could not conclude that failure to renew her contract was motivated by

discrimination – with respect to conceded fact that plaintiff received outstanding evaluations on her scholarship and teaching ability, there are no comparators – "[w]ithout such comparators . . . no reasonable jury could decide that CUNY's decision to prioritize the complaints against Chen over her professional achievements evinces such motives." 805 F.3d at 73 – Title VII is not an invitation for courts to act as a super personnel department that reexamines employer's judgments – decision on retaliation was 2 – 1.

Ray v. Ropes & Gray LLP, 799 F.3d 99, 127 FEP 1606 (1st Cir. 2015) – Summary judgment for defendant on denying black associate a partnership under up or out policy – after plaintiff filed EEOC charge, two Ropes' partners who had promised to support his application for a position as an assistant U.S. Attorney refused, one of them stating that he could no longer "in good conscience" write such a letter in light of the "groundless" EEOC claim – plaintiff, an alumnus of Harvard Law School, asked that the Harvard Law School bar Ropes from campus interviews – a legal media website obtained a copy of Ray's letter to Harvard and asked for comment – Ropes provided the website with an unredacted copy of the EEOC's determination which contained sensitive and confidential information about Ray's employment with the firm, which the website posted – summary judgment on the basic discrimination claim affirmed – the retaliation claim went to the jury – Ropes argued that Ray did not actually believe in his EEOC claim, but just used it to try to extort money – the jury concluded that Ray had not established a *prima facie* case of retaliation because he had not engaged in protected activity under Title VII – retaliation based on both participation (the rejection of letters of reference after he filed his EEOC complaint) and opposition (contacting Harvard) – District Court instructed the jury that the EEOC complaint was protected if done in good faith – jury instructed that opposition was protected if he had shown it was both undertaken in good faith and based on a reasonable belief – the participation clause does not require a reasonable belief – "Simply put, Ray has not set forth a coherent argument on appeal for why the district court erred as a legal matter in requiring him to show good faith for purposes of the participation clause. Thus, we deemed his argument waived for lack of development." 799 F.3d at 111 – summary judgment on denial of partnership affirmed – denial was based on negative reviews from partners – contention that associates who received more favorable reviews should not have been so favorably traded fails under comparative evidence discussed – every

associate was different – Ray's reliance on a subjective review process flounders because it is supported only by speculation – plaintiff's reliance on two racially charged remarks from partners about which he protested not shown to have any connection with the policy committee's decision – fact that only one black associate had ever been promoted to partner in the history of the firm is unfortunate and troubling but it fails to imply pretext in this case.

Foster v. Univ. of Maryland, E. Shore, 787 F.3d 243, 127 FEP 167 (4th Cir. 2015) – Supreme Court's decision in *Nassar*, which required but-for causation and rejected mixed motive theory in retaliation cases, did not alter the plaintiff's "less onerous" burden of showing causation under the *McDonnell Douglas* framework at the *prima facie* case stage – the *Nassar* Court was silent as to the application of but-for causation in *McDonnell Douglas* pretext cases – "*Nassar* did not alter the *McDonnell Douglas* analysis for retaliation claims, ..." 787 F.3d at 246 – the District Court had denied summary judgment on retaliation claim under *McDonnell Douglas* prior to *Nassar* – after *Nassar* District Court reconsidered, holding that under the causation standard of but-for articulated in *Nassar* summary judgment was warranted – the Court of Appeal reversed – "We conclude that the *McDonnell Douglas* framework, which already incorporates a but-for causation analysis, provides the appropriate standard for reviewing Foster's claim," 787 F.3d at 249 – *Nassar* significantly altered the causation standard for claims based on direct evidence of retaliatory animus by rejecting the mixed motive theory – however, this case did not involve direct evidence but the indirect *McDonnell Douglas* order and allocation of proof – that is unaffected by *Nassar* – at the third stage of *McDonnell Douglas* "[i]f a plaintiff can show that she was fired under suspicious circumstances and that her employer lied about its reasons for firing her, the factfinder may infer that the employer's undisclosed retaliatory animus was the actual cause of her termination," 787 F.3d at 250 – thus a plaintiff must establish causation at two different stages under *McDonnell Douglass* – first, in the *prima facie* case, and second, in satisfying her ultimate burden – other circuits disagree as to whether *Nassar* has applicability to the causation prong of the *prima facie* case – we conclude it does not – "Had the *Nassar* Court intended to retire *McDonnell Douglas* and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect," 787 F.3d at 251 – the next question is whether *Nassar* alters the pretext stage – "Because the pretext framework already requires plaintiffs to prove that retaliation was

the actual reason for the challenged employment action, we conclude that it does not," 787 F.3d at 252 – *Nassar*'s "but-for" standard is no different from *McDonnell Douglas*' "real reason" standard – "We conclude, therefore, that 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," *id*. – this requires reinstatement of the District Court's original decision denying summary judgment on the retaliation claim under the *McDonnell Douglas* test.

EEOC v. Allstate Ins. Co., 778 F.3d 444, 126 FEP 77 (3d Cir. 2015) – Allstate switched all of its employee agents to independent contractor status in the year 2000. As a condition of offering an independent contractor relationship selling Allstate products, Allstate required that each former employee waive any pending discrimination claims. The EEOC sued, alleging that this constituted retaliation under the federal anti-bias laws – the Court of Appeal ruled for Allstate – the general rule was that employers may require signed releases of claims in exchange for severance pay of other enhanced benefits not normally available – "Allstate followed the well-established rule that employers can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits." 778 F.3d at 453.

Sklyarsky v. Means-Knaus Partners, LP, 777 F.3d 892, 125 FEP 1677 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2861 (2015) – Discrimination claims fail because numerous reprimands show that the employee was not meeting the employer's legitimate expectations even though the reprimands went to attitude and not actual work performance – retaliation claims fail – first suspended six months after filing bias charges and then fired about seven months after submitting another round of charges – suspicious timing between a protected act and an adverse employment action "alone rarely establishes causation," 777 F.3d at 898.

Wright v. St. Vincent Health Sys., 730 F.3d 732, 119 FEP 1717 (8th Cir. 2013) – Plaintiff was discharged 45 minutes after she called the hospital's HR Department to complain of racial discrimination – the court characterized the timing as "incredibly suspicious" – nevertheless, it affirmed the trial court's dismissal following a bench trial – the hospital's evidence was that the decision to discharge her was made the day before, multiple individuals had been advised of the decision, and the protected

conduct occurred after the discharge decision had been made – no error in the discharge decision not being racially motivated despite the fact that the decisionmaker had discharged three other African-American employees and no Caucasians during her tenure.

Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 119 FEP 1 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – "The district court correctly held that there was no causal link between [plaintiff's protected conduct] and his termination, the reason being obvious: [employer] officials recommended firing [plaintiff] before he wrote the letter. Causation moves forward, not backwards, and no protected conduct after an adverse employment action can serve as the predicate for a retaliation claim." 723 F.3d at 42 – quotation from state court decision that "[w]here, as here, adverse employment actions or other problems with an employee pre-date any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation[,]" *id*. (citation omitted). Recommendation had not reached the General Manager prior to the protected conduct, but no evidence that recommendation would have been rejected if no one had known of the protected conduct – quotation from prior First Circuit case – "'Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint[,]'" *id*. (citation omitted)

Benes v. A.B. Data, Ltd., 724 F.3d 752, 119 FEP 509 (7th Cir. 2013) – Summary judgment affirmed against employee fired for outburst during mediation session – EEOC conducted mediation session – each side instructed to remain in their room with a third party relaying offers back and forth – upon receipt of employer's offer, employee barged into employer's room and shouted: "You can take your proposal and shove it up your ass and fire me and I'll see you in court" – he was promptly fired, and he sued for retaliation, alleging that he was fired for having "participated in any manner" in Title VII proceedings – held fired not for participating but for the outburst – if the employer would have fired an employee who barged into a superior's office in violation of instructions and made a similar comment, it was entitled to fire someone who did the same thing during a mediation.

Promotion, Advancement, and Reclassification (Ch. 17)

Hales v. Casey's Mktg. Co., 886 F.3d 730, 130 FEP 1425 (8th Cir. 2018), *reh'g en banc denied* (May 21, 2018) – Employee did not file state lawsuit within 90 days of state administrative release letter – time limits for state lawsuit not tolled during pendency of EEOC consideration of EEOC charge based on same operative facts – Supreme Court decision in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 465 (1975) holding that the filing of a Title VII claim with the EEOC does not toll the statute of limitations for Section 1981 indicates no tolling here – Federal retaliation claim time barred since suit not filed within 90 days of right to sue letter – unsupported claim that right to sue letter late rejected – presumption that it is received three days after mailing.

Madlock v. WEC Energy Grp., Inc., 885 F.3d 465, 130 FEP 1394 (7th Cir. 2018) – Lead billing clerk who made a $10,000 billing error was transferred to another position where she lost her non-managerial title of "lead" – summary judgment on Section 1981 race suit affirmed – losing lead title was not an actionable adverse employment action – dislike of location of new desk was a mere subjective presence – views of co-workers that she had been demoted is not a term of employment – adverse employment action must be "some quantitative or qualitative change in the terms or conditions of [the plaintiff's] employment that is more than a mere subjective preference, 885 F.3d at 470 – not everything that makes an employee unhappy is actionable – transfer herein occasioned no reduction in salary, loss of benefits or even a loss of title – it did diminish her responsibilities but that is not actionable – reaction of co-workers that plaintiff had been demoted insufficient to create adverse employment action – "Whether an action is adverse requires an amount of objectivity, 'otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." 885 F.3d at 471 (corrected) – contention that she lost a promotion after filing her grievance and that a list of her errors was inaccurate not relevant "[a]s long as management genuinely believed in the correctness of the [list of errors]," 885 F.3d at 473 – summary judgment affirmed.

Compensation (Ch. 19)

***Terry v. Gary Cmty. Sch. Corp.*,** No. 18-1270, ___ F.3d ___, 2018 US App. LEXIS 35178 (7th Cir. Dec. 14, 2018) – Plaintiff, an elementary school principal, had a lower salary than two male principals who were conceded to be appropriate comparators – for economic reasons, plaintiff's salary was frozen for several years – salary freeze resulted in plaintiff and her two male comparators being frozen – the differences in salary were the result of the salary freeze and not a decision by the school district to pay the men more than the women – this constitutes a reasonable factor other than sex – summary judgment affirmed.

EEOC v. Md. Ins. Admin., 879 F.3d 114, 130 FEP 1082 (4th Cir. 2018) – Summary judgment for employer in Equal Pay Act case reversed – three female fraud investigators hired at lower rate than four male counterparts with all performing equal work – no need to establish intent under EPA – employer must prove affirmative defense – employer alleged that under neutral salary scale males were entitled to higher pay because of greater experience – although the state standard salary schedule is facially neutral, the employer exercises discretion each time it assigns a new hire to a specific step in salary range based on its review of the hire's qualifications and experience – fact finder could find that in exercising this discretion the employer in part based its assignment of step levels on gender – showing that two of the males produced certificates that were preferred that the females did not possess could explain a disparity, but the burden of proof is that the employer must establish "that a factor other than sex *in fact* explains the salary disparity," 879 F.3d at 123 (emphasis in original) – trial is necessary – 2:1 decision with lengthy dissent.

***Lauderdale v. Ill. Dep't of Human Servs.*,** 876 F.3d 904, 130 FEP 992 (7th Cir. 2017) – Female plaintiff was superintendent at one school district and was paid $88,000 a year – male superintendent supervised a different school district and was paid $121,000 per year – he resigned, and female plaintiff was chosen to head both districts – she received a 21% increase to $106,500, which was substantially less than her male predecessor, despite the fact that she was now heading a much larger district – summary judgment to the employer – discrepancy resulted from budget concerns and the Illinois pay plan – neither shown to be pre-textual – pay increases are based primarily on the employee's prior salary – special salary request

was necessary to give her the 21% increase rather than the 5% normal limit – clear reliance on prior salary – 7th Circuit has repeatedly held that a difference in pay based on a difference in what employees were previously paid is a legitimate factor other than sex – basing pay on prior wages could be discriminatory if sex discrimination led to the lower wages but that issue is not the case – also clear that extreme cost concerns were present and employees were required to take furlough days and there was a risk that the schools might have to close entirely – legitimate budget concerns are not pre-textual – employer genuinely concerned about budget problems – reasons for pay disparity are legitimate under both Equal Pay Act and Title VII.

David v. Bd. of Trust. Of Cmty. Coll. Dist. No. 508, 846 F.3d 216, 129 FEP 1505 (7th Cir. 2017) – Summary judgment proper on unequal pay claims under Title VII and Equal Pay Act – Plaintiff unsuccessfully sought change in title and compensation due to her increased responsibilities after she announced she would retire in ten months – proffered comparators who received higher pay had superior qualifications and performed different, additional, and more complex duties – moreover creation of new position would have taken months and her retirement was pending.

Smith v. URS Corp., 803 F.3d 964, 128 FEP 134 (8th Cir. 2015), *reh'g en banc denied* (Jan. 12, 2016) – Summary judgment reversed by 2:1 vote – black employee hired at salary $11,000 higher than requested – some months later white employee hired for same job at pay rate $7,000 above black employee – black employee requested pay raise which was denied – district court erred in treating case as hiring discrimination case other than one asserting racially disparate treatment in pay – jobs were identical and no material difference in qualifications – even if being hired at a salary at $11,000 higher than requested is material with respect to the initial hire, "URS provides no argument as to the continuing pay disparity after [the black employee] did, in fact, ask for a raise," 803 F.3d at 972.

EEOC v. Port Auth. of N.Y. & N.J., 768 F.3d 247, 124 FEP 1071 (2d Cir. 2014) – EEOC equal pay suit on behalf of female attorneys dismissed – judgment on the pleadings affirmed – EEOC failed to compare the attorneys actual job duties to support its claim that the male and female non-supervisory attorneys were performing equal work – EEOC argument that the attorneys had the same job codes dismissed as insufficient –

EEOC's broad allegations ignored legitimate factors other than sex such as "varying workplace demands" – allegations about the same job code were "plainly insufficient to support a claim under the EPA," 768 F.3d at 256.

Sexual and Other Forms of Harassment (Ch. 20)

Cases Interpreting *Faragher/Ellerth*

Vance v. Ball State Univ., 570 U.S. 421, 133 S. Ct. 2434, 118 FEP 1481 (2013) – Under *Faragher* and *Ellerth*, if the harasser is a co-worker, the employer is judged by a negligence standard – however, if a "supervisor," and the harassment culminates in a tangible employment action, the employer is strictly liable – but if there is no tangible employment action, the employer may escape liability with an affirmative defense that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided – it therefore matters whether the harasser is a supervisor or a co-worker – "We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . ." 133 S. Ct. at 2439.

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

"[w]e hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"

133 S. Ct. at 2443 (quoting *Ellerth,* 524 U.S. at 761). "We reject the nebulous definition of 'supervisor' advocated in the EEOC Guidance . . . ." 133 S. Ct. at 2443 – Under test set forth herein "supervisory status can usually be readily determined, generally by written documentation," *id*. – the test we adopt "is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial," *id*. at 2444.

– In responding to the dissent's contention that one of the supervisors in *Faragher* would not have qualified under this test, even though the harasser could impose discipline, the Court responded "If that discipline had economic consequences (such as suspension without pay) then [the harasser in *Faragher*] might qualify as a supervisor under the definition we adopt today," 133 S. Ct. at 2447 n.9 – In *Faragher*, the harassing lifeguard threatened the plaintiff to "[d]ate me or clean the toilets for a year" – "That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher's eligibility for promotion, then it might constitute a tangible employment action," 133 S. Ct. at 2447 n.9 – In determining supervisory status, "[t]he ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework . . . ." *Id*. at 2448.

– "The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser's status will become clear to both sides after discovery. . . . [S]upervisor status will generally be capable of resolution at summary judgment," *id*. at 2449 – "[E]ven where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions), this preliminary question is relatively straightforward," *id*. at 2450 – "Contrary to the dissent's suggestions . . . this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or altering the work environment in objectionable ways. In such cases the victims will be able to prevail simply by showing that the employer was negligent . . . and the jury should be instructed that the nature and degree of authority wielded by the

harasser is an important factor to be considered in determining whether the employer was negligent," *id*. at 2451.

– If an employer has a very small number of individuals who can make decisions involving tangible job actions, they "will likely rely on other workers who actually interact with the affected employee," and "[u]nder those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies," *id*. at 2452 – Even under the negligence standard "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant," *id*. at 2453 – "We hold that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim," *id*. at 2454 – 5 to 4 decision – Justice Ginsburg's dissent included "[t]he ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today." *Id*. at 2466.

Pullen v. Caddo Parish Sch. Bd., 830 F.3d 205, 129 FEP 628 (5th Cir. 2016) – Policy against harassment posted on bulletin board in personnel office – summary judgment reversed based on failure to utilize policy – several employees testified that they were not trained with respect to the policy and did not know that it existed – this creates factual issue as to applicability of *Ellerth/Faragher* defense.

Stewart v. Rise, Inc., 791 F.3d 849, 127 FEP 809 (8th Cir. 2015), *reh'g en banc denied* (Aug. 5, 2015) – reversing the trial court summary judgment, Circuit Court holds that supervisor may proceed to trial on claims that she was the victim of harassment by her subordinates, that higher management and HR knew about it, and did not protect her – a jury must decide whether the harassment was sufficiently severe and whether employer officials knew or should have known about it – contention that plaintiff should have filed written complaints instead of simply oral complaints rejected – although reversing the Court of Appeals noted that "[w]hen the plaintiff is a supervisor, and the objected-to conduct originates among her subordinates, a jury may look with great suspicion upon claims that the plaintiff adequately presented her concerns up the chain of command."

791 F.3d at 862 – the summary judgment had been based on *Faragher/Ellerth* and failure to take advantage of corporate procedures for correcting harassment – the Eighth Circuit viewed failure to follow the harassment procedures as possibly "determinative in the minds of jurors," but not determinative as a matter of law.

Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 108 FEP 769 (2d Cir. 2010) – Harassee complained only to manager who was harassing her – employer's policy allowed harassment complaints to be brought to the attention of the employee's supervisor, human resources, or any member of management – trial court found it unreasonable for employee not to go to other managers or HR – Second Circuit reversed: "We do not believe that the Supreme Court . . . intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints." 596 F.3d at 104-05 – some evidence that pursuing other avenues of complaint would have been futile.

General

EEOC v. Costco Wholesale Corp., 903 F.3d 618, 130 FEP 1841 (7th Cir. 2018) – A male customer repeatedly stalked a female employee – Costco claimed that the alleged conduct was mild in comparison with other cases, and not overtly sexual – but the conduct does not have to be overtly sexual to be actionable as long as it is because of the plaintiff's sex – "A reasonable juror could conclude that being hounded for over a year by a customer despite intervention by management, involvement of the police, and knowledge that he was scaring her would be pervasively intimidating or frightening to a person of average steadfastness." 903 F.3d at 626 (internal quotation marks and citation omitted). – Employee went off on medical leave of absence – never returned – terminated after one-year limit for such absences expired – Costco did attempt to respond to complaints about the customer but its response "was unreasonably weak" (*id*. at 628) – employee was unable to work due to emotional distress – she is entitled to back pay only for the period of her medical leave – she cannot claim constructive discharge "because she did not quit: Costco fired her because she had exhausted the 12-month leave of absence available under her Employee Agreement . . . ." *Id.* – It is a clear principle of law that an employee cannot claim constructive discharge unless she

quits – she was fired because she did not return to work and that is the equivalent of walking off the job – On remand, EEOC can recover back pay for employee if it can show that her work environment was so hostile that she was forced to take an unpaid leave – if a reasonable person in the employee's shoes would have felt forced by unbearable working conditions to take an unpaid leave she is entitled to recover for some period of time following the involuntary leave but that cannot extend beyond the date when Costco terminated her employment.

Smith v. Rosebud Farm, Inc., 898 F.3d 747, 130 FEP 1733 (7th Cir. 2018) – Jury verdict of same-sex harassment affirmed – male co-workers at grocery store regularly grabbed genitals/buttocks of plaintiff and mimed oral and anal sex – only male employees harassed.

Minarsky v. Susquehanna Cty., 895 F.3d 303, 130 FEP 1653 (3d Cir. 2018) – Summary judgment in sexual harassment case reversed despite the fact that harassee did not report her direct supervisor's conduct under the anti-harassment policy and despite the fact that the harasser was discharged after his behavior became known through an overheard conversation – reasonable jury could find that employer did not act reasonably to stop the harassment given that it continued after the harasser was twice verbally reprimanded over his hugging of other females and that he had attempted to hug or kiss two high-level female officials – her failure was reasonable in light of the fact that prior reprimands were ineffective and that she feared discharge, especially since her daughter had cancer.

Gardner v. CLC of Pascagoula. LLC, 894 F.3d 654, 130 FEP 1637 (5th Cir. 2018) – Nurse in care facility harassed by patient – summary judgment for employer reversed – triable issue on severe or pervasive – employer knew of harassment and failed to take appropriate action – mentally ill patient had reputation for groping female employees – District Court granted summary judgment because it was not clear that the harassing comments and attempt to grope are beyond what a nurse should expect of patients in a nursing home. While patients with reduced mental capacity will be expected to make inappropriate comments, which would normally not be sufficient, the facility must take steps to protect an employee from inappropriate physical contact.

Blake v. MJ Optical, Inc., 870 F.3d 820, 130 FEP 663 (8th Cir. 2017), *reh'g en banc denied* (Oct. 18, 2017), *cert. denied* 138 S. Ct. 1442 (2018) – Female employee of family-owned business continued to work at the company for almost 15 years after alleged harassment began without once complaining – she knew she could report incidents and she and the alleged harasser had a mostly positive 40-year relationship – lack of company sexual harassment policy does not excuse failure to tell anyone the conduct was unwelcome – summary judgment affirmed.

Moody v. Atl. City Bd. of Educ., 870 F.3d 206, 130 FEP 689 (3d Cir. 2017) – Summary judgment reversed since harasser found to be supervisor – 2-to-1 decision – plaintiff was part-time custodian who obtained job assignments from harasser – did not matter that there were multiple custodial foreman at various schools, any one of which could have been plaintiff's supervisor when she was assigned to that school – majority held that under *Vance v. Ball State Univ.* Supreme Court decision, harasser was supervisor – dissenting judge said that Supreme Court in *Vance* set a new "readily applied" test which asks only one question – whether the proposed supervisor had authority from the employer to alter the employee's "status" – the harasser could not have hired or fired Moody, promoted her, demoted her, given her a new assignment, or affected her job benefits – he could only assign work, which in the view of the dissent was insufficient.

Nischan v. Stratosphere Quality, LLC, 865 F.3d 922, 130 FEP 530 (7th Cir. 2017) – Outside employee harassed plaintiff – plaintiff did not file a complaint – harassment witnessed by low-level supervisor – employer's policy manual required all supervisors to report all suspected harassment – claim dismissed for a lack of reporting – reversed – plaintiff may be able to establish company on notice because of the requirement in the employee handbook that all supervisors report all suspected harassment – 2-to-1 decision on constructive notice issue.

Liles v. C.S. McCrossan, Inc., 851 F.3d 810, 129 FEP 1810 (8th Cir. 2017) – Summary judgment to construction company on female assistant project manager's hostile work environment claim – claims subjected to lewd comments by co-worker and co-worker's father – although comments rude and unpleasant they were not so objectively and subjectively offensive that they alter the terms and conditions of

employment – co-worker's lewd comments stopped after she reported him and he was reprimanded – the unpleasant name calling occurred between two and five times in a two-year period which was not sufficient to alter the terms and conditions of employment.

Zetwick v. Cty. of Yolo, 850 F.3d 436, 129 FEP 1657 (9th Cir. 2017) – Summary judgment reversed – County sheriff greeted female correction officer with more than 100 hugs over a 12-year period and at least one unwelcome kiss – this conduct as well as sheriff's hugging other female employees and infrequency of hugs to male employees could permit a finding of a hostile work environment – District Court erred in applying mathematical test to determine that officer's environment was not hostile and by holding that hugs and kisses on cheek in workplace are common behavior; opinion by District Judge Mark Bennett sitting by designation.

Reynaga v. Roseburg Forest Prods., 847 F.3d 678, 129 FEP 1571 (9th Cir. 2017) – 2-to-1 decision – co-employee harassment – employer brought in outside agency to investigate and issued verbal warning to harasser to have no unnecessary contact with harassees – harassees refused to continue work if scheduled for same shift with harasser – summary judgment reversed – reasonable trier-of-fact could conclude that refusing to work was not the real reason for the termination but was pre-textual – case seems erroneous in suggesting that harassees have a right to refuse to work on the same shift with harasser even though there has been no repetition of the harassing conduct after an investigation and warning.

Hansen v. SkyWest Airlines, 844 F.3d 914, 129 FEP 1494 (10th Cir. 2016) – Grant of summary judgment to employer reversed – same-sex gay harassment – district court misapplied continuing violation doctrine and improperly excluded from consideration incidents that occurred over 300 days before the EEOC filing – acts occurring outside 300-day period involved the same type of harassment.

Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 129 FEP 1385 (11th Cir. 2016) – Alleged harasser was disabled individual suffering from Asperger Syndrome – he stared at plaintiff with an erect penis and would deliberately bump and rub his erection against her – a second employee witnessed these actions – plaintiff did not originally complain because she recognized that his disability may have affected his behavior – ultimately, plaintiff complained to her supervisor – the supervisor refused to take action – shortly thereafter plaintiff took a picture of the harasser from the neck down to prove that he exhibited an erection in the workplace – she showed the photographs to several co-workers – management did not take her seriously and laughed at her – plaintiff was suspended and then fired for taking an inappropriate photograph and showing it around the workplace – she sued for sexual harassment and retaliatory discharge – summary judgment granted to company on retaliation issue – plaintiff disobeyed instructions with respect to showing the photograph – summary judgment reversed with respect to plaintiff's sexual harassment complaints that the company did not take adequate action when she complained.

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 128 FEP 1233 (6th Cir. 2016) – Male-on-male harassment jury verdict upheld – same-sex hostile environment – harasser only harassed fellow males – conduct went on for substantial length of time – employer's response unreasonable since it delayed investigation ten days and did not suspend harasser pending investigation – harasser had previously been threatened with discharge after similar behavior.

EEOC v. New Breed Logistics, 783 F.3d 1057, 126 FEP 1403 (6th Cir. 2015), *rehr'g en banc denied*, (6th Cir. July 8, 2015) – $1.5 million dollar jury verdict affirmed on behalf of three complainants – the three harassees complained only to the harasser – "[W]e conclude that a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII[,]" 783 F.3d at 1067 – Sixth Circuit acknowledged that Fifth Circuit is to the contrary – employer liable because it knew about the protected activities because of the complaints directed to the harasser – all three complainants terminated – two were fired by a different supervisor, but "cat's paw" liability affirmed – reasonable to conclude that the harasser influenced the terminating supervisor – *Faragher/Ellerth* defense irrelevant since there were tangible employment actions.

Muhammad v. Caterpillar, Inc., 767 F.3d 694, 124 FEP 524 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16. 2014) – Company reasonably responded to complaints of co-worker harassment which included offensive comments and graffiti and perceptions of sexual orientation – Title VII prohibits the co-workers derogatory comments about race and sexual orientation, but the claims must fail because Caterpillar took prompt action that was reasonably calculated to end the harassment, such as immediately painting over the graffiti and threatening the offending co-workers with termination – prompt response ended the harassment except for one remark that was never reported.

Adams v. Austal USA, LLC, 754 F.3d 1240, 123 FEP 485 (11th Cir. 2014) – Only incidents of harassment of which the plaintiff was aware of at the relevant time frame can be considered – reason is that courts must conduct objective assessment from perspective of reasonable person in plaintiff's position, knowing what the plaintiff knew – this does not allow consideration of what one learns about harassment only after employment ends or through discovery – 24 African-American employees sued together alleging racial harassment, racial graffiti, nooses, Confederate flags, and racial slurs – summary judgment granted against the claims of 13 of the employees on the ground that their work environment was not objectively hostile – this appeal concerns those 13 orders as well as jury verdicts against two of the plaintiffs who went to trial – "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[,]" – 754 F.3d at 1245 – nevertheless several of the employees submitted sufficient evidence and summary judgment must be vacated against them – summary judgment affirmed against the remaining six employees and the two jury verdicts against plaintiffs – the District Court correctly applied a reasonable person standard but erred in judging the severity of the conduct for summary judgment purposes with respect to seven of the thirteen cases decided on summary judgment.

Debord v. Mercy Health Sys. of Kan., Inc., 737 F.3d 642, 120 FEP 1429 (10th Cir. 2013), *cert. denied,* 134 S. Ct. 2664 (2014) – Summary judgment against female employee who complained of sexual harassment – no retaliation – she posted inflammatory material about her supervisor on the internet, saying that he was a "snake" who "needs to keep his

creepy hands to himself" – she also sent text messages to her co-workers containing such allegations – her contention that she was merely trying to gather evidence rejected – properly terminated for improper postings and lying about them – company policy dictates that investigation should be confidential.

Williams-Boldware v. Denton Cty., 741 F.3d 635, 121 FEP 755 (5th Cir.), *cert. denied,* 135 S. Ct. 106 (2014) – Racial harassment judgment reversed – employer took prompt action – reprimand and requirement to attend diversity training sufficient – "Employers are not required to impose draconian penalties upon the offending employee in order to satisfy this court's prompt remedial action standard," 741 F.3d at 640.

Bertsch v. Overstock.com, 684 F.3d 1023, 115 FEP 745 (10th Cir. 2012) – Summary judgment properly granted on hostile environment claim – employer took proper remedial action by conducting investigation and issuing written warning to alleged harasser – plaintiff contended that employer did not "follow up" to ensure that the harassment had ended – that is not the employer's burden – it is the claimant's burden to seek relief if the harassing conduct continues after the discipline.

Berryman v. SuperValu Holdings, Inc., 669 F.3d 714, 114 FEP 808 (6th Cir. 2012), *reh'g en banc denied* (Apr. 11, 2012) – Eleven African-American employees alleged a racially hostile work environment spread over 25 years – district court properly considered each of the claims separately – summary judgment properly awarded on each of the claims on the ground that the conduct was not sufficiently severe or pervasive – district court properly considered only conduct directed at the plaintiff or of which the plaintiff was aware – cannot aggregate experiences of which a particular individual was not aware.

Discharge and Reduction in Force (Ch. 21)

Shultz v. Congregation Shearith Israel of N.Y.C., 867 F.3d 298, 130 FEP 584 (2d Cir. 2017) – Employer notified pregnant female employee that she would be terminated in three weeks – motivation was pregnancy – after her lawyer called, employer, prior to effective date of termination,

rescinded termination – dismissal reversed – Supreme Court has ruled that statute of limitations for termination starts with notice of termination – therefore, notice of termination was an actionable employment action – however, rescission, if in good faith would cutoff ongoing accrual of back pay liability – opinion limited to these facts – "We need not decide . . . whether in some circumstances the period of time between a notice of firing and its rescission may be so short as to render the termination *de minimus*," 867 F.3d at 306 – holding specifically ruled to apply only to terminations and not to other potential adverse employment actions – "[a] notice of termination is unlike other types of actions that an employer may take . . . ." *Id*. at 307 – Dismissal of constructive discharge claim affirmed since plaintiff has not pled sufficient facts arising after the notice of termination to establish that a reasonable person would have been compelled to resign.

Cosby v. Steak-N-Shake, 804 F.3d 1242, 32 A.D. Cas. 405 (8th Cir. 2015) – No constructive discharge – first, employee failed to show an intolerable work environment. Next, "[i]f an employee quits without giving the employer a reasonable chance to resolve his claim, there has been no constructive discharge." 804 F.3d at 1246. With respect to state law disability claim, decision to demote was made before employee requested leave of absence for depression – employer had no knowledge of disability at time decision made.

Employers (Ch. 22)

Frey v. Hotel Coleman, 903 F.3d 671, 130 FEP 1886 (7th Cir. 2018) – Owner of Holiday Inn franchise, Hotel Coleman, hired Vaughn Hospitality, Inc. to run the daily operations of the hotel. Vaughn Hospitality was responsible for hiring, supervising, directing and discharging employees and determining their compensation. On summary judgment the district court determined that Vaughn Hospitality was not a joint employer with Hotel Coleman – "two otherwise unrelated business entities – one owns a hotel and the other manages the employees of that hotel—and we must determine whether one, the other, or both qualify as [plaintiff's] employer for purposes of Title VII." 903 F.3d at 677 – District Court believed Vaughn Hospitality was just a hired manager, an agent of the actual employer – the proper test is an economic realities test which looks to whether each putative employer exercised sufficient

control – case must be remanded for the district court to apply the proper economic realities test which considers multiple factors but the most important is "the employer's right to control . . . ." 903 F.3d at 676 – additional factors include the kind of occupation and nature of skill required, responsibility for costs of operation, method and form of payment of benefits, and length of job commitment and/or expectations.

Knight v. State Univ. of N.Y. at Stony Brook, 880 F.3d 636, 130 FEP 1137 (2d Cir. 2018) – Jury properly determined that black union electrician referred to university for a job was not an employee of university – multifactor test for distinguishing employees from independent contractors properly used – contention that a judge and not a jury should decide whether an individual is an employee rejected – contention that multifactor test was limited to determining whether an individual was an independent contractor was rejected – it can also be used to determine whether the person is an employee – multifactor test included hiring party's right to control the manner and means by which the product is accomplished, skill required, source of instrumentalities and tools, location of work, duration of the relationship, whether the hiring party has the right to assign additional projects, the extent of the hired party's discretion over when and how long to work, the method of payment, the hiring party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision for employee benefits, and tax treatment.

Love v. JP Cullen & Sons, Inc., 779 F.3d 697, 126 FEP 659 (7th Cir. 2015) – African American plaintiff dismissed from construction job site after physical altercation with another worker – general contractor employed a sub-contractor who in turn employed a second sub-contractor which in turn employed plaintiff – the job superintendent for the second tier sub-contractor received work instructions from the general contractor, and passed those instructions on to plaintiff – the general contractor only gave specific directions if it reviewed a finished product and found it unsatisfactory – in the event of "serious incidents," the general contractor retained the right to investigate alleged misconduct by its subcontractors' employees and to permanently remove them from the job site – the general ordered both combatants permanently removed from the job site – plaintiff's employer attempted to persuade the general to reinstate plaintiff

but unsuccessfully – plaintiff's employer terminated him, since it had no other pending projects – court below granted summary judgment on the ground that the general contractor was not the de facto or direct employer – a plaintiff may have multiple employers for the purpose of Title VII liability – precedents have looked to five factors: (1) the extent of the employer's control and supervision over the employees; (2) the kind of occupation and nature of skill required; (3) the employers responsibility for the cost of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment. Of all the factors, the employer's right to control is the most important in determining whether an individual is an employee or independent contractor – here the control was only as to the result to be achieved – if the general reviewed a finished product and found it to be unsatisfactory, it would communicate further instructions – "This minimal supervision is essentially limited to 'the result to be achieved,' which militates against a finding of control." 779 F.3d at 703 – when control is examined, the key powers are hiring and firing – here the general retained the final decision regarding the continued presence of any worker on the project site – but the record lacks any evidence that the general attempted to jeopardize plaintiff's continued employment with the sub-contractor – the fact that the sub-contractor had no other projects is unrelated – here none of the five factors support an employment relationship – our prior cases have indicated that an entity other than the direct employer may be considered a Title VII employer if it directed the discriminatory act – but the general didn't fire him, it just directed that he be removed from its project – in any case, "evidence that a de facto employer 'directed the discriminatory act' is not – without more – enough to establish a de facto employer-employee relationship under Title VII[,]" 779 F.3d at 706 (internal quotation marks omitted) – the general's decision to remove plaintiff from the project is relevant but not determinative on the control issue – summary judgment affirmed.

Employment Agencies (Ch. 24)

Nicholson v. Securitas Security Servs. USA, Inc., 830 F.3d 186, 129 FEP 617 (5th Cir. 2016) – Staffing agency placed plaintiff with client – client requested plaintiff be removed for age discriminatory reasons – staffing agency complied – staffing agency liable only if it knew or should have known that client's motive for requesting removal was discriminatory – remanded for factual determination.

Charging Parties and Plaintiffs (Ch. 25)

Bluestein v. Cent. Wis. Anesthesiology, S.C., 769 F.3d 944, 124 FEP 1459 (7th Cir. 2014) – Issue was whether anesthesiologist who was partner and shareholder of medical practice was employee or employer – plaintiff worked as an employee for 2½ years and then became a full partner – she had a vote in all matters – physician shareholders shared profits and losses equally – most issues were resolved by a majority vote – plaintiff participated in many votes – summary judgment affirmed – extensive analysis of non-exclusive list of 6 factors under *Clackamas* – no one factor is determinative – there were approximately 16 shareholders at the time of her termination – hire and fire decisions were by vote – indeed plaintiff voted on her own termination – "the right to cast a vote equal to that of any other board member unequivocally indicates that Bluestein was an employer rather than an employee," 769 F.3d at 953 – the second part of the first factor, whether the organization set the rules and regulations of the individual's work, does not assist plaintiff – it was not the organization but the physician shareholders who collectively voted on rules and regulations – the second factor, whether the organization supervises the individual's work, undisputed that plaintiff was not supervised – third factor, whether she reports to someone higher in the organization, is essentially coextensive with the second factor on supervision – the fourth factor is to what extent the individual is able to influence the organization – she had a full vote – Bluestein's situation was markedly different from *EEOC v. Sidley Austin* where a large law firm consisting of more than 500 partners was controlled by a small self-perpetuating executive committee – we held some shareholders may be considered employees and remanded for discovery – the fifth factor, whether the parties intended the individual to be an employee, we note that she did have an employment agreement – the language in plaintiff's contract cannot overcome the reality of her position – as to the sixth factor, she clearly shared in profits – "Our conclusion that she was an employer is fatal to all her discrimination claims," 769 F.3d at 956 – summary judgment affirmed – award of attorneys' fees against plaintiff and her lawyer also affirmed since case was frivolous – trial court found that "a reasonable amount of legal research should have alerted counsel to the implausibility of success on the merits of any of her claims," 769 F.3d at 957. – "A reasonable jurist could conclude that [plaintiff's] suit was frivolous, unreasonable and without foundation, and we therefore affirm the award of attorneys' fees." *id*.

EEOC Administrative Process (Ch. 26)

EEOC v. BDO USA, LLP, 876 F.3d 690, 130 FEP 945 (5th Cir. 2017) – In administrative subpoena enforcement proceeding, employer, not EEOC, bears the burden of proof that documents need not be produced because of the attorney-client privilege.

EEOC v. United Parcel Serv., Inc., 859 F.3d 375, 33 A.D. Cas. 801 (6th Cir. 2017) – Broad reading of EEOC's right to information in investigation – issue was how UPS disclosed medical information – company position that EEOC requests for information should be denied since it went beyond information relevant to the charging party or those similarly situated rejected – charge alleges a "pattern" – employer failed to show that the information was irrelevant or would be unduly burdensome.

EEOC v. TriCore Reference Labs, 849 F.3d 929, 129 FEP 1741 (10th Cir. 2017) – Employer does not have to submit broad personnel information to EEOC in the agency's investigation of a single discrimination charge – EEOC contended, in relation to a charge dealing with a requested pregnancy accommodation, names of all employees who became pregnant to allow the agency to determine if there was a pattern or practice – the broad data request simply wasn't relevant to the individual charge – the scope of EEOC subpoenas is before the Supreme Court in *McLane Co. v. EEOC* – nothing in the individual charge suggested a pattern or practice – requiring the employer to provide the names of pregnant workers who never sought accommodations has no apparent connection to the pending disability or sex bias charge.

McLane Co., Inc. v. EEOC, ___ U.S. ___, 137 S. Ct. 1159, 129 FEP 1825, 2017 WL 1199454 (2017) – Charging party worked for eight years in physically demanding job – when she wanted to return from maternity leave, she failed a strength test three times and was fired – the EEOC began an investigation – Employer refused to provide "pedigree information" – names, social security numbers, addresses, and telephone numbers of employees asked to take the evaluation – EEOC expanded its investigation both geographically (nationally) and substantively (age

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

EEOC v. McLane Co., Inc., 857 F.3d 813, 130 FEP 176 (9th Cir. 2017) – On remand from the Supreme Court, the Ninth Circuit held that even under an abuse of discretion standard, the EEOC had the right to obtain "pedigree information" – name, social security number, addresses, and phone numbers – case returned to the district court to determine whether the EEOC subpoena is unduly burdensome.

EEOC v. Aerotek, Inc., 498 F. App'x 645, 117 FEP 26 (7th Cir. 2013) (unpublished), *reh'g denied* (Mar. 12, 2013) (non-precedential) – The EEOC regulations state that any recipient of an EEOC subpoena who does not intend to fully comply must petition for revocation or modification and that such petitions must be mailed "within five business days . . . after service of the subpoena." 29 C.F.R. § 1601.16(b). – Here the petition to revoke or modify was submitted six business days later, one business day late. "The EEOC argues that Aerotek has waived its right to challenge the enforcement of the subpoena. We agree. . . . Aerotek has provided no excuse for this procedural failing . . . ." 498 F. App'x at 647-48 – No other Circuit Court has ruled on the question of whether an employer's failure to timely challenge before the EEOC precludes a later challenge to the enforcement of the subpoena in the Title VII context – two District

Courts allowing such challenges are not particularly instructive – other District Courts have found that an employer waives its objections by simply failing to file a timely petition – "EEOC may enforce its subpoena because Aerotek has waived its right to object." *Id*. at 649.

EEOC v. Aerotek, Inc., 815 F.3d 328, 128 FEP 1478 (7th Cir. 2016) – EEOC investigation subpoena against staffing company enforced – staffing company required to submit information related to its clients and their requests for staffing – EEOC's initial review of information revealed hundreds of age-based discriminatory job requests made by clients at 62 of the staffing firm's facilities – EEOC entitled to identifying information about the staffing agency's clients.

Timeliness (Ch. 27)

Continuing Violation

Stamper v. Duval Cty. Sch. Bd., 863 F.3d 1336, 130 FEP 484 (11th Cir. 2017) – Plaintiff let time limits expire after receiving her original EEOC right to sue letter – EEOC reconsidered and dismissed its earlier decision and issued a second right to sue letter from which she finally filed a lawsuit – EEOC's failure to timely revoke original notice of her right to sue prevented it from issuing a second one so lawsuit untimely.

General Issues

Hamer v. Neighborhood Hous. Servs. of Chicago, 583 U.S. ___, 138 S. Ct. 13, 130 FEP 879, 2017 WL 5160782 (2017) – Issue is time to appeal from Federal District Court dismissal of discrimination claims – District Court granted 60-day extension of deadline set by rule of court – 7th Circuit decided it lacked jurisdiction to decide the appeal because under the Federal Rules of Appellate Procedure, the District Court could not grant extensions of more than 30 days – Supreme Court unanimously reverses – a rule of court is not jurisdictional – it is not a statute – case remanded to decide whether equitable considerations warrant hearing the appeal.

Artis v. D.C., ___ U.S. ___, 138 S. Ct. 594, ___ FEP ___ (Jan. 22, 2018) – Time limit to refile in state court when federal/state case is dismissed is 30 days plus whatever time was left on the state statute of limitations at the time of the federal filing.

Green v. Brennan, 136 S. Ct. 1769, 129 FEP 117 (2016) – Statute of limitations on constructive discharge claims runs from date of resignation, not date of last discriminatory act, not last day of work.

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

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

Rodriguez v. Wal-Mart Stores, Inc., 891 F.3d 1127, 33 A.D. Cas. 1741 (8th Cir. 2018) – Case dismissed since charge not filed within 180 days – equitable tolling or equitable estoppel not applicable even though employee claimed he delayed because of settlement negotiations.

Carlson v. Christian Bros. Servs., 840 F.3d 466, 33 A.D. Cas. 61 (7th Cir. 2016) – Discharged employee's ADA claim properly dismissed because there was no timely EEOC charge – "Complainant Information Sheet" filled out with state agency was not the equivalent of a charge even though it identified the parties and described the alleged discrimination since the form did not request remedial action or relief, which is required information for a charge under Supreme Court precedent.

Rembisz v. Lew, 830 F.3d 681, 129 FEP 673 (6th Cir. 2016) – Charging party received right to sue notice more than 90 days before suit was filed; notice was separately sent to attorney for charging party, who received it less than 90 days before suit was filed – time limit runs from earliest delivery of notice to either charging party or counsel, not from latest – summary judgment affirmed.

Jurisprudential Bars to Action (Ch. 28)

Slater v. U.S. Steel Corp., 871 F.3d 1174, 130 FEP 727 (11th Cir. 2017) (*en banc*) – *En banc* 11th Circuit revisited prior precedent and overruled it – prior precedent was that plaintiff's non-disclosure of a civil claim as an asset in bankruptcy would allow a federal trial court to dismiss the claim under the doctrine of judicial estoppel – the new rule in the 11th Circuit is that federal courts must consider "all the facts and circumstances" of a plaintiff's bankruptcy non-disclosure before dismissing claims – the court should look to factors such as the plaintiff's level of sophistication, the explanation for the omission, whether the plaintiff subsequently corrected the disclosures, and any action taken by the Bankruptcy Court concerning the non-disclosure – using this broader standard, the Appeals Court revived race and sex claims by the plaintiff, and directed that a three-judge Appeals Court determine under the new standard whether the trial judge improperly dismissed the claims.

Matson v. United Parcel Serv., Inc., 840 F.3d 1126, 129 FEP 1205 (9th Cir. 2016) – Trial court dismissal on LMRA preemption reversed – claim that company favored men over her in the assignment of lucrative extra work was only part of her gender-based claim – her right to be free from workplace discrimination is independent of any rights under the collective bargaining agreement – normally employers will not be successful in arguing LMRA preemption to try to get hostile work environment claims dismissed – hostile work environment cases are different from claims brought under or requiring interpretation of a collective bargaining agreement – while LMRA preemption can be present if the claim requires interpretation of the collective bargaining agreement, the term "interpret" is defined narrowly.

Kovaco v. Rockbestos-Surprenant Cable Corp., 834 F.3d 128, 32 A.D. Cas. 1721, (2d Cir. 2016) – Social Security disability application which stated plaintiff "unable to work" inconsistent with ADA unlawful discharge claim – Plaintiff judicially estopped from showing qualified at time of discharge.

Marshall v. Honeywell Tech. Sys., Inc., 828 F.3d 923. 129 FEP 584 (D.C. Cir. 2016), *cert. denied* 137 S. Ct. 830 (2017) – Summary judgment granted based on judicial estoppel for failure to list discrimination claims on bankruptcy petition.

Van Horn v. Martin, 812 F.3d 1180, 128 FEP 1293 (8th Cir. 2016) – Employee is judicially estopped from bringing Title VII case – case arose while employee had pending Chapter 13 Bankruptcy suit – employee failed to disclose employment claims to Bankruptcy court – failure to disclose not good faith mistake given that employee had received right to sue letter due during pendency of Bankruptcy proceedings – Bankruptcy court discharged employee's debts based on representation she had no such claims.

Jones v. Bob Evans Farms, Inc., 811 F.3d 1030, 128 FEP 1181 (8th Cir. 2016) – Federal and State race discrimination claims dismissed because not disclosed in Chapter 13 bankruptcy proceeding. Judicial estoppel found – asserting the claims was inconsistent with his Bankruptcy position that they didn't exist – Bankruptcy plan was confirmed that ordered him to report lawsuits that are received or receivable during the plan term – he received a right to sue letter from the EEOC and filed suit but didn't report it – after summary judgment was granted on judicial estoppel grounds he reopened his Bankruptcy estate to amend his schedules to include the discrimination lawsuit – Too late.

Title VII Litigation Procedure (Ch. 29)

Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 33 A.D. Cas. 1870 (10th Cir. 2018) – District Court concluded that plaintiff failed to exhaust administrative remedies for all instances of discrimination that occurred more than 300 days before his lone EEOC charge and after his lone EEOC charge – this correctly applied 40 years of 10th Circuit authority – "For nearly forty years, this Court has steadfastly held that exhaustion of administrative remedies is a jurisdictional prerequisite to suit." 900 F.3d at 1181 (internal quotation marks and citation omitted) – appellants argue that this position is inconsistent with *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (statutory time limits for filing charges is not a jurisdictional prerequisite – a plaintiff's failure to file a timely EEOC charge permits a defendant an affirmative defense subject to waiver, estoppel and equitable tolling) – this panel, after checking with all active judges on the court, now overrules prior precedent – "[T]he full court now holds that a plaintiff's failure to file an EEOC charge regarding a discrete employment incident merely permits the employer to raise an affirmative defense" and is not jurisdictional. 900 F.3d at 1185. – Case remanded.

Ashbourne v. Hansberry, 894 F.3d 298, 130 FEP 1663 (D.C. Cir. 2018), *reh'g en banc denied* (Sept. 5, 2018) – *Res judicata* bars Title VII discrimination action by female former federal employee – she unsuccessfully pursued her claims in earlier lawsuit challenging her firing under other statutes and lost – even though at the time she filed her lawsuit she had not received an EEOC right-to-sue letter, her Title VII action involved the same parties and the same nucleus of operative facts, and she could have sought to stay the other matters until she had a right to file the Title VII case.

Peeples v. City of Detroit, 891 F.3d 622, 130 FEP 1556 (6th Cir. 2018), *reh'g denied* (July 6, 2018) – Laid off Hispanic fire fighter filed timely charge and received right-to-sue letter – laid off Black fire fighters did not receive right-to-sue letters – Black fire fighters could not piggyback – a charge to be adequate to support piggybacking under the single filing rule must contain sufficient information to notify prospective defendants of their potential liability – no need to satisfy Title VII's filing requirement if there is a substantially related timely charge – single filing rule applies to

claims that arose from the same discriminatory conduct – national origin and race discrimination are not substantially related – piggybacking not allowed.

Anwar v. Dow Chem. Co., 876 F.3d 841, 130 FEP 1012 (6th Cir. 2017) – Plaintiff worked for and was terminated by MEG International in Dubai – she sued in Michigan alleging sex discrimination naming as defendant an American subsidiary of MEG International and Dow Chemical – alter ego test not satisfied – must demonstrate unity of interest in ownership that goes beyond mere ownership and shared management personnel – no showing that MEG International controlled the American subsidiary – plaintiff argues that Dow was a joint employer -- claim that terminating official employed by a wholly-owned subsidiary of DOW – no showing of special circumstances for finding that the parent DOW should be liable for any wrongdoing of the subsidiary – DOW was not plaintiff's employer – case properly dismissed.

Dindinger v. Allsteel, Inc., 853 F.3d 414, 129 FEP 1869 (8th Cir. 2017) – Results of OFCCP pay audit favorable to employer properly excluded in jury trial on alleged pay discrimination based on sex – trial court did not abuse its discretion in allowing "me too" evidence – claims of female employees who were not part of the case that they also were paid less than their male counterparts – temporal proximity between alleged based sex discrimination claims against by female non-party employees and the claims of plaintiffs – "me too's" do not have to be similarly situated in all relevant respects.

Cazorla v. Koch Foods of Miss., LLC, 838 F.3d 540, 129 FEP 1783 (5th Cir. 2016) – District Court ordered Hispanic workers and EEOC to provide in discovery information as to whether the plaintiffs had applied for so-called U Visas, which are available to abused victims who assist in government investigations that are supposed to be confidential – employer contended that employees fabricated abuse claims to obtain visas – District Court is to reconsider its order directing the production of such information – District Court failed to consider the possible chilling effect of allowing discovery of confidential "U Visas" on the broader public and the EEOC's interests when it did its balancing test – U Visa discovery is not forbidden outright but it must not reveal the identities of visa applicants during the liability phase of the trial.

Ramirez v. T&H Lemont, Inc., 845 F.3d 772, 129 FEP 1413 (7th Cir. 2016), *cert. denied* 138 S. Ct. 116 (2017) – Plaintiff paid co-worker money to lie about having witnessed discrimination – witness tampering is a grave abuse of judicial process – dismissal with prejudice as sanction is proper – facts underlying District Court's decision to dismiss as sanction only need to be established by preponderance of the evidence.

Walker v. FedEx Office & Print Servs., Inc., 123 A.3d 160, 127 FEP 1571 (D.C. Ct. App. 2015) – Trial court properly dismissed on collateral estoppel grounds discrimination claims of African-American female employee, who lost arbitration alleging discrimination against employer – claim that individual managers named as defendants not in arbitration rejected – collateral estoppel may be invoked by defendant not of party to the original proceedings.

McCleary-Evans v. Maryland Dep't of Transp., 780 F.3d 582, 126 FEP 640 (4th Cir. 2015), *cert. denied* 136 S. Ct. 1162 (2016) – 12(b)(6) dismissal affirmed since complaint did not contain sufficient factual matter to state a plausible claim of discrimination because plaintiff was African American or female under *Iqbal* and *Twombly* – the complaint simply alleged in conclusory fashion that the decision-makers were biased with respect to her not being selected for promotion – plaintiff relies on *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (*prima facie* case not necessary to survive motion to dismiss) – but under *Iqbal* and *Twombly* a complaint must contain factual allegations sufficient to create a non-speculative right to relief– a complaint must contain sufficient factual matter which if accepted as true states a claim to relief that is "plausible on its face" – this complaint stopped short of a line between the possibility of discrimination and the plausibility of discrimination – "the Supreme Court in *Swierkiewicz* applied a different pleading standard than that which it now requires under *Iqbal* and *Twombly*[,]" 780 F.3d at 586 – while *Swierkiewicz* remains good law, *Twombly* and *Iqbal* did alter the criteria in at least two respects – (1) it rejected the holding that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts sufficient for relief, and (2) "*Iqbal* and *Twombly* articulated a new requirement that a complaint must allege a *plausible* claim for relief, thus rejecting a standard that would allow a complaint to 'survive a motion to dismiss whenever the pleading left open the *possibility* that a plaintiff might later establish some 'set of

[undisclosed] facts' to support recovery[,]'" 780 F.3d at 587 (internal quotation marks omitted; emphasis in original).

Climent-Garcia v. Autoridad de Transporte Maritimo, 754 F.3d 17, 122 FEP 1543 (1st Cir. 2014) – Employer waived right to challenge jury loss on basis of sufficiency of evidence when, although it moved for directed verdicts at the close of the employee's case and at the close of all the evidence, it failed to file a JNOV motion after the jury returned a verdict or to move for a new trial.

Gilster v. Primebank, 747 F.3d 1007, 122 FEP 527 (8th Cir. 2014) – Rebuttal closing argument by plaintiff's counsel where she recounted her own experience of being sexually harassed basis for new trial – this was plainly calculated to arouse jury sympathy – not sufficient that court instructed the jury that statements, arguments, questions, and comments by lawyers are not evidence – "[T]he timing and emotional nature of counsel's improper and repeated personal vouching for her client, using direct references to facts not in evidence, combined with the critical importance of [plaintiff's] credibility to issues of both liability and damages, made the improper comments unfairly prejudicial and require that we remand for a new trial," 747 F.3d at 1013 – where a lawyer departs from the path of legitimate argument she does so at her own peril and that of her client.

Caudle v. District of Columbia, 707 F.3d 354, 117 FEP 525 (D.C. Cir. 2013) – $1 million award set aside and new trial ordered because of "golden rule" and "send a message" statements by plaintiff's counsel during closing argument – golden rule arguments are impermissible regardless of whether they address liability or damages – "put yourselves in the plaintiff's shoes" is also impermissible – "send a message" might not have warranted reversal by itself, but when coupled with the other comments which followed three sustained objections a new trial is necessary – a jury has a duty to decide the case based on facts and law instead of emotion – even though District Court sustained the employer's objections and gave the jury a curative instruction and gave it a general instruction to decide the case without prejudice these measures failed to mitigate the prejudice caused by four impermissible statements.

Conroy v. Vilsack, 707 F.3d 1163, 117 FEP 385 (10th Cir. 2013) – Two of plaintiff's experts properly excluded – female claimed Forest Service refused to promote her because she is a woman and that re-advertising the position with a college degree requirement was discriminatory – first expert proposed to testify on "sex stereotyping" and how it affected the decision to select a male employee over the plaintiff – the second wanted to testify that the decision to re-advertise the position to include the requirement of a college degree was "purposefully designed to deny [her] the position," 707 F.3d at 1170 - District Court properly found stereotyping expert to be unqualified even though she had previously testified as an expert in discrimination cases – she had never researched or written about sex stereotyping, and became familiar with the topic only after being retained for this case – she could not recall articles or relevant cases supporting the application of sex stereotyping research to disparate treatment cases – the second witness was excluded as unreliable because he "'demonstrated a lack of knowledge'" and "'failed to provide a meaningful analysis of how he came to conclude what he did while showing that his testimony reliably applied to the facts of this case[,]'" *id*. (citation and alteration omitted) - the expert was "oblivious to . . . key facts," including the fact that the job as re-advertised required either a college degree or equivalent professional experience.

EEOC Litigation (Ch. 30)

Mach Mining, LLC v. EEOC, ___ U.S. ___, 135 S. Ct. 1645, 126 FEP 1521, 2015 WL 1913911 (2015) – Courts may review EEOC conciliation efforts prior to filing a lawsuit but the scope of review is narrow – 7th Circuit holding that Title VII shields EEOC's pre-suit conciliation efforts from any review rejected – nothing in Title VII "withdraws the courts' authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims," 135 S. Ct. at 1656 – but the EEOC has considerable discretion over the conciliation process and judicial review is limited – if a court finds for the employer regarding a conciliation shortfall, the remedy is not dismissal but further conciliation.

EEOC v. CollegeAmerica Denver, Inc., 869 F.3d 1171, 130 FEP 703 (10th Cir. 2017) – EEOC sued seeking injunction against college that sued former employee for violating settlement agreement – college repudiated the legal position which was the basis of the suit, and the District Court

dismissed – reversed because college then asserted a new theory against the former employee which was that the settlement agreement was breached by reporting adverse action to the EEOC without notifying the former employer – the EEOC seeks an injunction against this claim, which means that the litigation is not moot and must continue.

EEOC v. Union Pac. R.R. Co., 867 F.3d 843, 130 FEP 606 (7th Cir. 2017), *reh'g en banc denied* (Nov. 21, 2017), *cert. denied* 138 S, Ct, 2677 (2018) – Two black employees alleged race discrimination, received right to sue letters from the EEOC, sued, and lost on their discrimination claims – the EEOC nevertheless contended that it had the right to continue its investigation – the 7th Circuit agreed – Congress granted the EEOC broad authority to pursue bias investigations and the agency's power isn't limited by any individual worker's allegations – Circuit split on whether issuance of a right to sue notice terminates the EEOC's right to proceed – 5th Circuit has held that the issuance of a right to sue letter must terminate the EEOC's bias probe – the 9th Circuit has held to the contrary – here there was not only a right to sue letter, but the charging party sued and lost – the EEOC does not have to proceed solely on the basis of a commissioner's charge in such circumstances.

EEOC v. Bass Pro Outdoor World, LLC, 826 F.3d 791 (5th Cir. 2016) *reh'g en banc denied* 865 F.3d 216 (5th Cir. 2017) – EEOC can pursue pattern or practice discrimination claims under Section 706 – this will potentially allow the shifting of the burden to employers to disprove bias at individual hearings at the remedial stage – the EEOC can employ the bifurcated trial framework set forth in *Teamsters v. U.S.* even if it sues under Section 706, which permits compensatory and punitive damages – employer position that EEOC can pursue pattern or practice claims only under Section 707 which limits relief to back pay and injunctive relief rejected.

EEOC v. PJ Utah, LLC, 822 F.3d 536, 32 A.D. Cas. 1427 (10th Cir. 2016) – Unconditional right of employee to intervene in EEOC enforcement action trumps individual's arbitration agreement – "Once it is established that a party enjoys an unconditional statutory right to intervene, the language of Rule 24(a)(1) does not allow the district court any discretion to deny intervention even if the party would ultimately need

to go to arbitration," 822 F.3d at 540 – nevertheless, Circuit Court refused to disturb district court's order compelling individual plaintiff to arbitrate – order compelling arbitration is not a final decision – the bottom line is that plaintiff is allowed to intervene, but ordered to proceed to arbitration – not clear what affect the arbitration award would have on the EEOC litigation.

EEOC v. CVS Pharmacy, Inc., 809 F.3d 335, 128 FEP 797 (7th Cir. 2015) – CVS entered into a severance agreement with a terminated employee that included a broad release of waivable claims including claims under Title VII – it carved out the employee's right to participate in a proceeding with any appropriate governmental agency enforcing discrimination laws – the EEOC sued without engaging in conciliation – summary judgment affirmed – "[T]he EEOC argues that Section 707(a) of Title VII gives it broad powers to sue without engaging in conciliation or even alleging that the employer engaged in discrimination . . . . [W]e disagree with the EEOC and affirm the judgment of the district court." 809 F.3d at 336 – prior to suit CVS asked the EEOC to comply with the pre-suit procedures of Section 706, and to reconsider its position that merely offering a severance agreement to a terminated employee without any allegation of discrimination or retaliation was actionable – the EEOC stated it would resolve the claims only by a consent decree and it was not required to engage in conciliation – the EEOC contends that since Section 707(a) authorizes it to bring actions challenging a "pattern or practice of resistance," this lets it proceed without following any of the pre-suit procedures in Section 706 – the EEOC further contended that a reasonable jury could conclude that the severance agreement deterred signatories from filing charges because of the length of the agreement, the small font, and the fact that it was drafted in "legalese" – in 1972 Congress gave the EEOC the right to sue under Section 706, and transferred the Attorney General's authority to initiate pattern or practice suits to the EEOC under Section 707 – but Section 707(e) provided that the EEOC's authority on pattern or practice cases "shall be conducted in accordance with the procedures set forth in [Section 706]" – the legislative history indicated that the EEOC would have the same power the Attorney General formerly had under Section 707 – the problem is that it reads Section 707(e) out of the statute – "We reject the EEOC's expansive interpretation of its powers under Section 707(a)," 809 F.3d at 341 – suits under Section 707(a) must challenge practices that threaten the employee's right to be free from

workplace discrimination and retaliation for opposing discriminatory employment practices – the only right secured by Title VII.
Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – offering a terminated employee new benefits for a release is not retaliation – there is no difference between a suit challenging a "pattern or practice of resistance" under Section 707(a) and a "pattern or practice of discrimination" under Section 707(e) – the EEOC was required to comply with all pre-suit procedures contained in Section 706, including conciliation – "If we were to adopt the EEOC's interpretation of Section 707(a), the EEOC would never be required to engage in conciliation before filing a suit because it could always contend that it was acting pursuant to its broader power under Section 707(a)." 809 F.3d at 342 – "The 1972 amendments gave the EEOC the power to file 'pattern or practice' suits on its own, but Congress intended for the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge," 809 F.3d at 343.

EEOC v. Sterling Jewelers Inc., 801 F.3d 96, 128 FEP 8 (2d Cir. 2015), *cert. denied* 137 S. Ct. 47 (2016) – Title VII requires the EEOC to "investigate the charge" before filing a lawsuit – a district court granted summary judgment to the employer on the grounds of inadequate investigation – reversed – the inquiry should simply have been whether the Commission conducted an investigation, not whether it was sufficient – Supreme Court in *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645 (2015) did authorized some inquiry into whether the EEOC fulfilled its duty to conciliate, however, Title VI grants the EEOC considerable discretion over the process – while *Mach Mining* did not deal directly with the investigation requirement, "we conclude that judicial review of an EEOC investigation is similarly limited, 801 F.3d at 101 – an affidavit from the EEOC stating that it performed its investigative obligations in outlining the steps taken to investigate will usually suffice – a court should not second guess how the EEOC conducted its investigation.

Class Actions (Ch. 33)

Microsoft Corp. v. Baker, 582 U.S. __, 137 S. Ct. 1702 (2017) – Orders granting or denying class certification are interlocutory and not immediately reviewable on appeal, unless permitted by the Court of Appeal under Federal Rule of Civil Procedure 23(f) – absent permission to appeal, a plaintiff may pursue an individual claim to final judgment, and then appeal – plaintiffs herein, after class certification was denied, and after denial of Rule 23(f) (permission to appeal), voluntarily dismissed their individual claims "with prejudice," but reserved the right to revive their claims should the Court of Appeal reverse the certification denial – this voluntary dismissal does not qualify as a final decision which would allow appeal – this tactic would undermine finality principles which are required for appeal, which is designed to guard against piecemeal appeal, and subvert the balance of Rule 23(f) by allowing only plaintiffs to obtain immediate review of adverse class action orders – allowing plaintiffs to do this is one-sided – it operates only in favor of plaintiffs – the so called death-knell doctrine is adverse to plaintiffs, but "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense," 137 S. Ct. at 1708 (quoting *Coopers & Lybrand*) – while a plaintiff who dismisses runs the risk of losing their individual case, "plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement," 137 S. Ct. at 1713 – allowing only plaintiffs to appeal class certification decisions is inherently unfair since "[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability . . ." 137 S. Ct. at 1715 (quoting *Coopers & Lybrand*).

Spokeo, Inc. v. Robins, 578 U.S. ___, 136 S. Ct. 1540, 2016 WL 2842447 (2016) – The Fair Credit Reporting Act (FCRA) requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of consumer reports – Spokeo, a "people search engine," got some facts wrong with respect to plaintiff Robins – he filed a class action alleging that the company willfully failed to comply with the above requirements, and sought the liquidated damages provided in the statute for violations – between $100 and $1,000 per person – there was a serious question as to whether his complaint alleged injury in fact – the Ninth Circuit held that this was not required, since Congress could dispense with injury in fact simply by creating a federal right – the

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

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

136 S. Ct. at 1547-48.

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

Ibid. (internal quotations and citation omitted).

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

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

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

Id. at 1549.

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

Id. at 1550.

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

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

Id.

Tyson Foods, Inc., v. Bouaphakeo, 577 U.S. ___, 136 S. Ct. 1036, 2016 WL 1092414 (2016) – This was an FLSA and state wage hour Rule 23 representative/class action – at issue was the compensability of "donning and doffing" time with respect to protective gear worn before killing and cutting chickens – Tyson did not keep any records of the time – plaintiffs' expert did videotaped observations and then analyzed on average how long each contested activity took – there was no *Daubert* challenge to the expert – plaintiffs' other expert then estimated from the first expert the amount of uncompensated time – the jury did not award the entire amount claimed and it was not clear which types of donning and doffing the jury found compensable and which they did not – the jury awarded the class 2.9 million dollars – the parties did not dispute that the standard for certification under Rule 23 and 29 USC § 216 was the same – the central question was whether representative evidence could be used by the plaintiffs to show that each employee worked more than 40 hours a week when average time for donning and doffing was added to regular hours – the court concluded that in this case the representative evidence was admissible –

> "In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.' . . . One way for respondents to show, then, that the sample relied upon here is a permissible method of proving class-wide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." 577 U.S. at ___, 136 S. Ct. at 1046.

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

> "In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them." 577 U.S. at ___, 136 S. Ct. at 1048.

The Court continued "Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondent's experts methodology under *Daubert*. . . ." *Id*. at 1048-49 – Tyson argued that there has to be some mechanism to identify uninjured class members – class members who even with donning and doffing would not exceed 40 hours in a week – the Court remanded so that this question could be considered since it was not fairly presented – the court invited Tyson to challenge any method of allocation. The vote was 6 to 2, with Thomas and Alito in dissent.

Brown v. Nucor Corp., 785 F.3d 895, 126 FEP 1793 (4th Cir. 2015) – Class of black employees alleging promotion discrimination meets commonality requirement even after *Dukes* – statistical evidence is sound and yields results that satisfy *Dukes'* requirements – statistical disparity in promotions is significant at 2.54 standard deviations.

Stockwell v. City and Cty. of San Francisco, 749 F.3d 1107, 122 FEP 795 (9th Cir. 2014) – San Francisco moved from a 1998 qualifying exam for promotion to a new Sergeant's Exam – individuals who had passed the 1998 exam but either refused to take the new exam or did not pass it sued alleging disparate impact age discrimination under California's FEHA – District Court denied certification because of inadequacies in the

plaintiffs' statistical showing – the regression analysis did not account for numerous alternative explanations other than age for the alleged statistical disparity – Ninth Circuit reversed – District Court engaged in an improper merits analysis – "[C]ourts must consider merits issues only as necessary to determine a pertinent Rule 23 factor, and not otherwise[.]" 749 F.3d at 1113 – It may be that the defects in the statistics will bar 23(b)(3) certification and this is remanded – Disparate impact under FEHA is parallel to under the ADEA – the officers produced a statistical study purportedly showing a disparate impact – whatever its failings the class's statistical analysis affects each class members' claims uniformly and thus is similar to the Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 133 S. Ct. 1184 (2013), where the court held that merits questions need be considered only to the extent that they are relevant to determining Rule 23 prerequisites – "The district court . . . critiqued that study as inadequate for–among other reasons–failing to conduct a regression analysis to take account of alternative explanations, unrelated to age, for any statistical imbalance. But whatever the failings of the class's statistical analysis, they affect every class member's claims uniformly, just as the materiality issue in *Amgen* affected every class member uniformly[,]" 749 F.3d at 1115 – "To so recognize is in no way to approve of the statistical showing the officers have made as adequate to make out their merits case," 749 F.3d 1116 – "The defects the City has identified may well exist, but they go to the merits of this case, or to the predominance question[,]" *id*.

Bolden v. Walsh Constr. Co., 688 F.3d 893, 115 FEP 1153 (7th Cir. 2012) – Black employees claim that by granting discretion to job site supervisor company allowed discrimination against them with respect to assigning overtime and in working conditions – no commonality – class members worked on at least 262 different construction sites having different superintendents and foremen – the sites had materially different working conditions – the only policy being protested was the policy of affording discretion to each job site superintendent – commonality is the basis of the *Wal-Mart v. Dukes* case – "when multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question," 688 F.3d at 896 – "[t]he sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in *Wal-Mart*: it begs the question," *id*. - "[i]f [the company] had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers – but

that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality," *id*. - "[a]ccording to plaintiffs – in *Wal-Mart* and this case alike – local discretion had a disparate impact that justified class treatment," *id*. at 897 – but *Wal-Mart* rejected that proposition – in *Wal-Mart* the court recognized that discretion might facilitate discrimination (*Watson v. Fort Worth Bank & Trust*) but it also observed that some managers will take advantage of the opportunity to discriminate while others won't – "One class per store may be possible; one class per company is not," *id*. – the District Court relied on *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) – in that case we remarked that the class in *Wal-Mart* would not have been manageable – in *McReynolds* we held that a national class could be certified to contest the policy allowing brokers to form and distribute commissions within teams and to determine who would be on a team – this single national policy was the missing ingredient in *Wal-Mart* – plaintiffs contend McReynolds supports their position – "it doesn't." While plaintiff's brief on appeal contends Walsh has 14 policies that present common questions, they all boil down to affording discretion – "Wal-Mart tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity," 688 F.3d at 898 – this is applicable to both the overtime class and the hostile work environment class – "[t]he order certifying two multi-site classes is reversed." *Id*. at 899.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 112 FEP 769 (2011):

Overview

Unanimous – case improperly certified under Rule 23(b)(2) – claims for monetary relief may not be so certified at least where the monetary relief is not incidental – individualized monetary claims must be certified if at all under 23(b)(3).

Unanimous – Wal-Mart is entitled to individualized determinations of each employee's eligibility for back pay – this is required by § 706(g) of Title VII and by the *Teamsters* line of cases – this right cannot be replaced by "trial by formula."

5-4 – commonality requirement of 23(a)(2) not established – common question means determination of its truth or falsity will resolve a central issue.

5-4 – plaintiffs must factually prove all requirements of Rule 23 – *Eisen* does not prohibit considering merits evidence when relevant to Rule 23 issues.

Detail of Majority Opinion

Wal-Mart store managers have great discretion with respect to pay and promotions utilizing their own subjective criteria – plaintiffs say because Wal-Mart is aware of statistics indicating men were favored that this amounts to disparate treatment – plaintiffs contend strong and uniform corporate culture permits bias against women to infect these discretionary decisions making every woman the victim of a common practice – Ninth Circuit *en banc* approved nationwide class certification based on three forms of proof: statistical evidence, anecdotal reports, and a sociologist's testimony – Ninth Circuit would allow formula relief by randomly selecting claims that would be litigated and then extrapolating the value of those claims to the entire class – crux of the case is commonality –

whether the named plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence – commonality requires the plaintiffs to have suffered the same injury as the class members – "Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor" (131 S. Ct. at 2550) – commonality "means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke" (*id.*) – quoted a commentator that commonality requires "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" (*id.* at 2551) (citation omitted; emphasis in original) – analysis is rigorous – plaintiff must prove with evidence that frequently will overlap the merits of each of the Rule 23 requirements – *Eisen* case has been mistakenly believed to preclude consideration of merits evidence even if relevant to Rule 23 issues – not so – it merely precludes deciding the merits – "Proof of commonality necessarily overlaps with [plaintiffs'] merits contention [of] a *pattern or practice* of discrimination" (*id.* at 2552) (emphasis in original) – crux of the inquiry is the reason for a particular employment decision – here plaintiffs wish to sue about literally millions of employment decisions at once – "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to . . . produce a common answer to the crucial question *why was I disfavored*." (*id.*) (emphasis in original) – *Falcon* describes how commonality must be proven: "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." (*id.* at 2553) (quoting *Falcon*) – significant proof is absent – the only evidence of a general policy of discrimination was the testimony of Dr. William Bielby, plaintiffs' sociological expert, who testified that Wal-Mart has a strong corporate culture which makes it vulnerable to bias – but "[a]t his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." (*id.*) – the parties dispute whether Bielby's testimony should even be admissible under *Daubert* – the district court concluded that *Daubert* did not apply to experts at the certification stage – "We doubt that is so" but even if properly considered, Bielby's testimony adds nothing in light of his concession that he cannot even estimate what percent of employment decisions were infected by stereotypes – the only corporate

policy attacked is allowing discretion by local supervisors – this "is a policy *against having* uniform employment practices" (*id.* at 2554) (emphasis in original) – subjective decisionmaking is common and presumptively reasonable – when different store managers can operate differently, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions." (*id.*) – the statistical studies are insufficient – "As Judge Ikuta observed in her dissent, '[i]nformation about disparities at the regional and national level does not establish the existence of disparities in individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.' [citation omitted] A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends." (*id.* at 2555) – moreover, despite the requirements of *Wards Cove* plaintiffs have identified no specific employment practice that ties together their 1.5 million claims – the anecdotal evidence is too weak – in *Teamsters* it was one anecdote for every 40 class members – here it is one for every 12,500 – next, certification under 23(b)(2) was improper – whether or not monetary relief can ever be certified under (b)(2) "we now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief" (*id.* at 2557) – "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class" (*id.*) – these claims could be certified if at all under 23(b)(3), which "allows class certification in a much wider set of circumstances but with greater procedural protections" (*id.* at 2558) – moreover, the test of whether injunctive relief predominates, which plaintiffs urge, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief, including, in the *Wal-Mart* case, dropping compensatory damages – "Contrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme." (*id.* at 2560) - § 2000e-5(g)(1) flatly bars backpay to any non-victim – "[I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order backpay under §2000e-5(g)(2)(A)" (*id.* at 2560-61) – *Teamsters* sets forth the procedure – a district court must usually conduct additional proceedings to determine individual relief – the

burden of proof will shift to the company but it will have the right to raise any individual affirmative defenses – "The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula" (*id.* at 2561) – "We disapprove that novel project." (*id.*) – the Rules Enabling Act forbids interpreting Rule 23 to abridge any substantive right and therefore "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (*id.*).

Discovery (Ch. 34)

Brown v. Oil States Skagit Smatco, 664 F.3d 71, 113 FEP 1537 (5th Cir. 2011) (*per curiam*) – Title VII case properly dismissed for perjured deposition testimony – at deposition plaintiff testified that he quit for only one reason – racial harassment, in his accident personal injury lawsuit, he testified under oath that he left his job "solely" because of the back pain caused by the accident – lawsuit dismissed with prejudice – "[D]ismissal with prejudice [is] a more appropriate sanction when the objectionable conduct is that of the client, not the attorney," 664 F.3d at 77 – contention lesser sanction should have been imposed rejected – "Brown deceitfully provided conflicting testimony in order to further his own pecuniary interests . . . and, in doing so, undermined the integrity of the judicial process. Through his perjured testimony, Brown committed fraud upon the court, and this blatant misconduct constitutes contumacious conduct[,]" *id.* at 78 – the lesser sanction of a monetary sanction would not work because Brown could not pay it – not everyone like Brown will be caught and when perjury is discovered the penalty needs to be severe – "Brown plainly committed perjury, a serious offense that constitutes a severe affront to the courts and thwarts the administration of justice. . . . Brown, and not his attorney, committed the sanctionable conduct, which makes the harsh sanction of dismissal with prejudice all the more appropriate." *Id.* at 80.

Statistical and Other Expert Proof (Ch. 35)

Burgis v. NYC Dep't of Sanitation, 798 F.3d 63, 127 FEP 1341 (2d Cir. 2015), *cert. denied* 136 S. Ct. 1202 (2016) – Statistical proof alone can be used to prove intent under Section 1981 and/or the equal protection clause if statistically significant and makes other plausible non-discriminatory explanations very unlikely – dismissal affirmed because statistical proof was inadequate, basically showing simply declining percentages of minorities as one went up the job scale – in order to show discriminatory intent "the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely[,]" 798 F.3d at 69.

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

Haynes v. Ind. Univ., 902 F.3d 724, 130 FEP 1820 (7th Cir. 2018) – Black assistant professor denied tenure – summary judgment affirmed – Section 1981 claim applies only to intentional discrimination – that negates fact that school never offered tenure to black men – does not matter that department chair and dean exhibited hostility towards him since there is no indication that was because of race – court's role is not to second guess opinions of 70% of faculty who voted against tenure – hiring of plaintiff through minority recruitment initiative weakens his case.

Williams v. Pa. Human Relations Comm'n, 870 F.3d 294, 130 FEP 627 (3d Cir. 2017) – Black HR representative for Pennsylvania Human Relations Commission cannot sue under Section 1983 – Congressional intent was that individual racial discrimination claims can only be filed under Title VII.

Bonenberger v. St. Louis Met. Police Dep't, 810 F.3d 1103, 128 FEP 1045 (8th Cir. 2016) – $620,000 jury award against three police department officials who discriminated against the white plaintiff because of a desire to hire a black sergeant affirmed – the job in question did not have any increase in pay, benefits, or rank but offered a more favorable work schedule and greater prestige and increased opportunities for promotion – that was deemed sufficient for an adverse employment action – a reasonable jury could conclude that there was an understanding of the decision-makers to discriminate on the basis of race – case brought under Section 1983.

Reverse Discrimination and Affirmative Action (Ch. 38)

Formella v. Brennan, 817 F.3d 503, 128 FEP 1525 (7th Cir. 2016) – white decision maker chose black applicant over white plaintiff for promotion – since decision-maker and alleged discriminatee are both white, reverse discrimination proof standards govern – to survive summary judgment, white plaintiff must show, in addition to meeting employer's legitimate expectations in suffering an adverse action, the following: (1) "[B]ackground circumstances exist to show an inference that the employer has reason or inclination to discriminate invidiously against whites or evidence that there is something 'fishy' about the facts at hand"; and (2) "[Plaintiff] was treated less favorably than similarly situated individuals who are not members of his protected class," 817 F.3d at 511 (internal quotations and citations omitted) – there is no evidence of an inclination of the white decision maker to favor non-whites – alleged comparators are not similarly situated – this is especially true because the successful candidate did a much better job in answering questions in the competitive oral interviews – "Officer Fields performed better in the interview than Formella. Better performance in an interview is unquestionably a legitimate, non-discriminatory basis to hire one candidate over another," 817 F.3d at 514.

Deets v. Massman Const. Co., 811 F.3d 978, 128 FEP 1248 (7th Cir. 2016) – Reverse discrimination – summary judgment reversed – plaintiff alleged employer told him he was being laid off because "[m]y minority numbers aren't right. I'm supposed to have 13.9 percent minorities on this job, but I've only got 8 percent." 811 F.3d at 980. – This factual

assertion makes the case appropriate for resolution by a jury – the labor contract required proper minority staffing – lower court's conclusion that the alleged statement didn't "point directly at discrimination" was puzzling – plaintiff was in fact replaced the next day by a black worker.

Shea v. Kerry, 796 F.3d 42, 127 FEP 1507 (D.C. Cir. 2015), *cert. denied* 136 S. Ct. 1656 (2016) – White foreign service officer challenged state department affirmative action plan – proper analytical framework is set forth in the Supreme Court's *Johnson* and *Weber* cases despite contention that *Ricci* "strong basis in evidence" standard should apply – *Johnson* and *Weber* are directly applicable to this situation, and *Ricci* via implication did not overrule these decisions – burden was thus to establish that affirmative action plan was based on a "manifest racial imbalances in traditionally segregated job categories" – state department met this test – summary judgment affirmed.

Injunctive and Affirmative Relief (Ch. 40)

Olivares v. Brentwood Indus., 822 F.3d 426, 129 FEP 199 (8th Cir. 2016) – Jury awarded $1.00 in nominal damages and no reinstatement or front pay to discriminatorily discharged plaintiff – denial of reinstatement affirmed since it was neither possible nor practical because all supervisory positions were already filled and there were unrepairable trust issues between the employee and the company. Denial of front pay award was proper since the supervisor's testimony about his post-verdict salary was unsupported by any admissible documentation.

Monetary Relief (Ch. 41)

Pittington v. Great Smoky Mountain Lumberjack Feud, LLC, 880 F.3d 791, 130 FEP 1141 (6th Cir. 2018) – Retrial on damages – $10,000 in back pay awarded by jury too low – must consider periods of unemployment, several weeks at a job that paid less, and that the amount of pre-judgment interest must take into account inflation.

Clemens v. Centurylink, Inc., 874 F.3d 1113, 130 FEP 908 (9th Cir. 2017) – On remand District Court should consider whether to grant a "gross-up" to the lost wages and benefits awarded to compensate the employee for being pushed into a higher tax bracket – "[A] lump sum award will sometimes push a plaintiff into a higher tax bracket than he would have occupied had he received his pay incrementally over several years." 874 F.3d at 1116. Third, Seventh, and Tenth Circuits have all held that District Courts have discretion to award a gross-up for income tax consequences. The D.C. Circuit does not permit gross-ups – that was a one paragraph *per curium* decision that did not indicate awareness of relevant cases – the party seeking gross-up relief bears the burden of showing an income tax disparity and justifying any adjustment.

Stragepede v. City of Evanston, 865 F.3d 861, 33 A.D. Cas. 986 (7th Cir. 2017), *as amended* (Aug. 8, 2017) – Direct threat defense rejected by jury with respect to terminated employee who acted in an aberrational manner after a home accident in which he lodged a 4-inch nail in his head – $934,540.00 verdict affirmed – failure to mitigate defense rejected – under 7th Circuit test, employer must establish (1) worker didn't exercise reasonable diligence; (2) there was a reasonable likelihood the worker would have found comparable employment if he had been diligent – 7th Circuit refused to apply 2d Circuit test which does not require an employer to show other comparable employment was available.

Guenther v. Griffin Constr. Co., Inc., 846 F.3d 979, 33 A.D. Cas. 400 (8th Cir. 2017) – Death of plaintiff does not moot compensatory damages claim for mental pain and suffering under the Americans With Disabilities Act – no view on whether a claim for punitive damages would survive.

Johnson v. Nextel Commc'ns, Inc., 780 F.3d 128, 126 FEP 473 (2d Cir. 2015) – Company and law firm representing over 500 employees entered into agreement to set up a dispute resolution process and drop lawsuits – total payout to employees was $3.9 million – approximately double that amount went to the law firm – class action suit versus company and class malpractice suit versus law firm – class certification reversed – claims were under state law, and laws of different states differed on relevant issues – punitive damages trial plan unacceptable – in *Simon II Litigation v. Philip Morris U.S.A., Inc.*, 407 F.3d 125 (2d Cir. 2005), the court rejected a trial plan that called for the jury to determine a lump sum of punitive damages for the entire class, prior to any determination of actual injury to individual plaintiffs – such a trial plan might conflict with *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which held that punitive damage awards must be tethered to compensatory damages in order to comply with due process – plaintiffs attempted to avoid this problem by proposing that the phase two jury determine only a punitive damages ratio that would then be applied to each class member's compensatory damages – under the specific facts of this case, determining a punitive damages ratio without any grounding in a compensatory damages award is impracticable and fails to give the jury an adequate basis for determining what measure of punitive damages is appropriate – as *State Farm* explained, while there is no rigid upper limit on a ratio of punitive damages to compensatory damages, the propriety of the ratio can be meaningfully assessed only when comparing the ratio to the actual award of compensatories – a larger punitive to compensatory ratio might be appropriate where there were particularly egregious acts but little damages – similarly, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee[,]" 780 F.3d at 149 (quoting *State Farm*, 538 U.S. at 425) – under plaintiff's trial plan the phase two jury would determine a ratio based on an amalgam of the actual damages to only the named plaintiffs yet based on the defendants' conduct toward the entire class – "This one-size-fits-all punitive damages ratio would therefore be no more tethered to compensatory damages than the lump sum we disapproved of in *Simon II*[,]" *id*. – "Plaintiffs' trial plan

therefore suggests that . . . the punitive damages inquiry in this case fails to meet the predominance and superiority requirements of Rule 23(b)(3)[,]" *id*. at 150.

Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 125 FEP 895 (2d Cir. 2014) – Punitive damage award of $5 million in racial harassment case required further reduction despite extremely egregious conduct – compensatory award of $1.32 million is particularly high, so 4-to-1 ratio serves neither predictability nor proportionality – 2-to-1 ratio is maximum allowable under these circumstances.

Arizona v. ASARCO LLC, 773 F.3d 1050, 125 FEP 753 (9th Cir. 2014) (*en banc*) – A $300,000 punitive damage award under Title VII is constitutionally permissible even though the prevailing plaintiff recovered only $1 in nominal damages on her sexual harassment claim – the due process analysis set forth by the U.S. Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), must be modified in the Title VII context – Gore's ratio analysis has little applicability in the Title VII context – Title VII places a consolidated cap on both compensatory and punitive damages – Under Title VII when compensatory damages are awarded that decreases the punitive damages.

Attorney's Fees (Ch. 42)

CRST Van Expedited, Inc. v. EEOC, ___ U.S. ___, 136 S. Ct. 1642, 129 FEP 134, 2016 WL 2903425 (2016) – The issue was whether a favorable judgment on the merits was necessary in order for a defendant employer to recover attorneys' fees against the EEOC – the underlying case was dismissed because the EEOC failed to properly conciliate – in order to recover attorneys' fees the party must be the "prevailing party" – there had been no judgment that CRST was not guilty of hostile environment sexual harassment – the suit was dismissed because of the failure to conciliate and/or comply with other Section 706 requirements – the trial court awarded over $4 million in attorneys' fees – the court of appeal affirmed the dismissal of almost all the Commission's claims, reversing only the claims of two employees – the Commission withdrew one of the claims and settled the other – the Court of Appeal had vacated the award of

attorneys' fees, CRST moved again for attorneys' fees, which were again awarded – the trial court noted that under *Fox v. Vice,* 563 U.S. 826 (2011), fees could be awarded with respect to the claims on which CRST prevailed – the Court of Appeal again reversed, holding there had to be a favorable judicial determination on the merits before a defendant could recover fees – the Supreme Court reversed, holding "that a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party.'" 136 S. Ct. at 1651 – "The defendant has . . . fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The defendant may prevail even if the court's final judgment rejects the plaintiff's claims for a non-merits reason." *Id.* – The purpose of attorneys' fee awards to defendants is to spare defendants from the cost of frivolous litigation – it makes no sense to distinguish "between merits-based and non-merits-based frivolity," *Id.* at 1652 – case remanded to consider ancillary arguments.

Fox v. Vice, 563 U.S. 826, 131 S. Ct. 2205 (2011) – Must apportion attorney's fees between those caused by frivolous cause of action and fees that would have been incurred without frivolous cause of action – "but for" test – just as plaintiffs may receive fees even if they are not victorious on every claim, so too may a defendant even if the plaintiff's suit is not wholly frivolous – but defendant is not entitled to fees caused by the non-frivolous claims – the issue is whether the attorney's fees and costs would have been incurred in the absence of the frivolous allegation – this should not result in a second major litigation since the essential goal is rough justice, not auditing perfection – case filed in state court with § 1983 claim – removed by defendant to federal court - § 1983 claim dismissed and state claims remanded to state court – award of totality of attorney's fees vacated and remanded.

Sommerfield v. City of Chicago, 863 F.3d 645, 130 FEP 469 (7th Cir. 2017) – Attorneys' fees request of $1.5 million reduced to $430,000 – plaintiff awarded $30,000 – plaintiff lost most claims – over 800 of the hours were unnecessary or frivolous.

McKelvey v. Sec'y of U.S. Army, 768 F.3d 491, 30 A.D. Cas. 1142 (6th Cir. 2014) – Lodestar cut in half for successful plaintiff – rejected settlement offer that was more favorable than final result – most of attorney's fees were accrued after offer was rejected.

Muniz v. United Parcel Service, Inc., 738 F.3d 214, 120 FEP 1549 (9th Cir. 2013) – Ninth Circuit 2 to 1 in opinion written by District Court judge sitting by designation approved $697,971.80 in attorneys' fees in a case where the plaintiff recovered only $27,280 – District Court judge reduced lodestar by 10% to account for lack of success – did not explain reasoning why the number was 10% – plaintiff originally sought $2 million in fees – unreasonably inflated – under state law would qualify as a special circumstance that would have justified a substantial reduction in total denial of fees – but majority holds that this is discretionary.

Alternative Dispute Resolution (Arbitration) (Ch. 43)

Epic Sys. Corp. v. Lewis, ___ U.S. ___, 138 S. Ct. 1612, 2018 WL 2292444 (May 21, 2018) – 5-to-4 decision – Arbitration agreements that preclude class or collective actions are fully enforceable – contention of Obama NLRB that class action waivers and arbitration agreements violated employee's rights to engage in concerted activities under the National Labor Relations Act rejected – class action waivers in arbitration agreements are fully enforceable – plaintiff had sought to maintain collective action under FLSA – arbitration agreement precluded this – until recently courts and the NLRB general counsel agreed that such arbitration agreements were enforceable, but in 2012 the NLRB ruled to the contrary – arbitration agreements providing for only individualized proceedings must be enforced – FAA saving clause which allows courts to refuse to enforce arbitration agreements upon such grounds as exist in equity for the revocation of any contract are not applicable – employee's claim seeks to interfere with fundamental attributes of the FAA – contention that NLRA overrides FAA rejected – employees must show a "clear and manifest" intent to displace the FAA – Section 7 of the NLRA focuses on the right to organize unions and bargain collectively – it does not mention class or collective action procedures or even hint at a wish to displace the Federal Arbitration Act.

DirecTV, Inc. v. Imburgia, 577 U.S. ___, 136 S. Ct. 463, 2015 WL 8546242 (2015) – By 6 – 3 vote, consumer arbitration agreement that precludes class actions upheld – California Court of Appeal decision reversed – California courts bound by *AT&T Mobility LLC v. Concepcion* and its holding that no court, state or other body may avoid *Concepcion*'s mandate – FAA preemption found.

Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 133 S. Ct. 2304 (2013) – American Express arbitration agreement with the restaurant barred class actions, barred joinder or consolidation of claims for parties, required confidentiality, and precluded any shifting of costs to American Express even if Italian Colors prevailed, 133 S. Ct. at 2316 (dissent); maximum recovery for anti-trust violation when trebled was $38,549 – in order to establish the anti-trust violation, use of economic experts would cost hundreds of thousands and perhaps more than a million dollars – plaintiff opposed arbitration on the ground that as a practical matter precluding class actions in the arbitration agreement absolutely prevented vindication of statutory rights under the anti-trust laws – District Court ordered arbitration – Court of Appeals reversed, Supreme Court remanded for reconsideration in light of *Stolt-Nielsen* – also reconsidered in light of *Concepcion* – 2d Circuit stood by its reversal – *en banc* review was denied with five judges dissenting – "[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes, and the rules under which that arbitration will be conducted . . . ." 133 S. Ct. at 2309 (citations and internal quotation marks omitted; emphasis and second alteration in original). "[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim[,]" *id*. – "Nor does congressional approval of [FRCP] 23 establish an entitlement to class proceedings for the vindication of statutory rights[,]" *id*. – "The Rule [23] imposes stringent requirements for certification that in practice exclude most claims[,]" *id*. at 2310. Plaintiff's major reliance was on a line of cases that hold that an arbitration agreement cannot be enforced if it bars "effective vindication" of statutory rights – this is dicta – the dicta would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights – it might cover excessive filing or administrative fees that make arbitration impracticable – "[B]ut the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy[,]"

id. at 2311 (emphasis in original) – "The class-action waiver merely limits arbitration to the two contracting parties[,]" *id*. This result is all but mandated by *AT&T Mobility* – "'[T]he switch from bilateral to class arbitration', we said, 'sacrifices the principle advantage of arbitration' – its informality[,]" *id*. at 2312 (citation omitted; first alteration in original) –

"We specifically rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system[,]" *id*. (citation and internal quotation marks omitted) – Court of Appeals theory would require federal courts to litigate the cost of proving a case, and then decide whether that precluded effective enforcement of rights – "Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution[,]" *id*. at 2312 – Decision was 5 to 3 (Justice Sotomayor took no part) – Kagan dissent for three dissenting Justices stated "AmEx has insulated itself from antitrust liability – even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse," *id*. at 2313.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740 (2011) – California's judicially created *Discover Bank* rule finds arbitration agreements unconscionable if they do not allow classwide arbitration – the *Discover Bank* rule is preempted by the FAA – the issue is "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" (131 S. Ct. at 1744) – the answer is yes – the FAA was enacted in response to widespread judicial hostility to arbitration agreements – federal policy favors arbitration – Section 2 of the FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" (*id.*) – this allows arbitration agreements to be invalidated by generally applicable defenses such as fraud, duress or unconscionability "but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*id.* at 1746) – plaintiffs argue that unconscionability is included within FAA Section 2 – when state law prohibits outright the arbitration of a particular claim the analysis is straightforward – FAA preemption – inquiry is more complex when a normally applicable doctrine such as duress or unconscionability is alleged to have been applied in a manner that disfavors arbitration – an obvious illustration would be a state policy finding unconscionable arbitration agreements that fail to provide for judicially monitored discovery, or

finding unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence – although Section 2's savings clause preserves generally applicable contract defenses it is not intended to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objective – "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*id.* at 1748) – arbitration is a creature of contract – parties may agree to limit the issues – parties may agree to limit with whom they will arbitrate – parties can agree that the proceedings will be kept confidential to protect trade secrets – the parties can agree on streamlined procedures – "California's *Discover Bank* rule . . . interferes with arbitration. . . . [Its] rule is limited to adhesion contracts . . . but the times in which consumer contracts were anything other than adhesive are long past." (*id.* at 1750) – "States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action waiver provisions in adhesive agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." (*id.* at 1750 n.6) – *Gilmer* case cited as allowing ADEA claims "despite allegations of unequal bargaining power between employers and employees" (*id.* at 1749 n.5) – as held in *Stolt-Nielsen* cannot interpret silent arbitration agreement to allow class arbitration – huge differences between individual and class arbitration – arbitrators not generally knowledgeable about procedural aspects of certification – "The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*id.* at 1750-51) – switch from bilateral to class arbitration sacrifices the principal advantage of arbitration, its informality – as of September 2009, AAA had opened 283 class arbitrations, 121 remained active, and "[n]ot a single one, however, had resulted in a final award on the merits" (*id.* at 1751) – class arbitration was not envisioned by Congress when it passed the FAA – "[I]t is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied" (*id.* at 1751-52) – class arbitration greatly increases the risks to defendants – "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail . . . . (*id.* at 1752) – "Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a

certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well." (*id.*) – "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." (*id.*) – "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . California's *Discover Bank* rule is preempted by the FAA." (*id.*) (citation and internal quotation marks omitted) – 5-4 decision – Justice Thomas concurred based on his interpretation of the wording of the FAA, which allowed a failure to enforce only based on grounds applicable to all contracts "for the revocation of any contract" (*id.* at 1753).

Britto v. Prospect Chartercare SJHSRI, LLC, 909 F.3d 506, 131 FEP 81 (1st Cir. 2018) – Arbitration agreement upheld – to overturn must be both substantively and procedurally unconscionable – required as condition of employment – claimed agreement illusory because company reserved right to modify, procedurally unconscionable because he was required to immediately sign it without opportunity to seek counsel and no one explained agreement's significance or checked to see if he understood his terms – under state law, employee's continued employment is adequate independent consideration – no showing substantively unconscionable.

Scheurer v. Fromm Family Foods LLC, 863 F.3d 748, 130 FEP 489 (7th Cir. 2017) – Female employee signed arbitration agreement with temporary help staffing agency, Remedy, which assigned her to a pet food company, where she was sexually harassed – she need not arbitrate her complaint against the pet food company – there is no equitable estoppel because the pet food company didn't even know about the arbitration agreement until the law suit – issue is governed by Wisconsin state law – Second Circuit case ordering arbitration under similar circumstances distinguishable since plaintiff sued both the temporary help agency and its client.

Burch v. P.J. Cheese, Inc., 861 F.3d 1338, 130 FEP 373 (11th Cir. 2017) – Federal District Court properly held bench trial on whether employee's signature on arbitration agreement was authentic and properly ordered case to arbitration even though earlier motion to compel arbitration was denied and employer was obliged to litigate the case in court; arbitration compelled four years into the lawsuit.

Bayer v. Nieman Marcus Grp., Inc., 861 F.3d 853, 33 A.D. Cas. 901 (9th Cir. 2017) – Nieman Marcus informed existing employee plaintiff that if he continued to work he would be bound by an arbitration agreement, which by its terms purported to apply to an existing charge he had on file with the EEOC – in prior lawsuit arbitration held not binding since plaintiff never agreed to be bound – this lawsuit sought nominal damages, alleging that by attempting to impose the arbitration agreement on plaintiff while he had a pending EEOC disability charge, defendant violated plaintiff's ADA rights which prohibited interference with such rights – lower court dismissed case as moot – 9th Circuit reversed – nominal damages available – plaintiff can proceed to try to prove that Nieman Marcus interfered with his ADA rights by imposing an arbitration agreement that would apply to existing claims.

Salas v. GE Oil & Gas, 857 F.3d 278, 130 FEP 153 (5th Cir. 2017) – GE advised plaintiff that if he continued to work he would be bound by the arbitration program and he did – he sued GE later in district court and the district court judge ordered arbitration and dismissed the case without prejudice – a year passed, with no arbitration – "each side blames the other for the delay" – plaintiff filed a motion in the district court to compel arbitration – district court issued order reopening the case and withdrawing its earlier order compelling arbitration since there had been a failure to arbitrate – GE appealed – appellate jurisdiction exists under the Federal Arbitration Act – district court reversed – FAA limits jurisdiction by the courts to intervene into the arbitral process prior to the issuance of an award – courts may not intervene beyond the determination as to whether there is an agreement to arbitrate – if there is an agreement and a default, the court can order the parties to arbitrate – nothing allows the

judge to reassert jurisdiction over the underlying dispute – strong policy arguments against finding waivers of right to arbitrate – GE has not invoked judicial process so it has not waived its rights.

Lawrence v. Sol G. Atlas Realty Co., Inc., 841 F.3d 81, 129 FEP 1229 (2d Cir. 2016) – Union contract did not clearly refer statutory claims to arbitration – Union contract contained a non-discrimination clause that expressly stated that "[a]ny disputes under this provision shall be subject to . . . arbitration . . . ." 841 F.3d at 83 – However, there is a difference between a contractual prohibition on discrimination and statutory claims – if the parties to a collective bargaining agreement want all statutory claims to go to arbitration, the contract must expressly so state.

Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320, 126 FEP 1789 (9th Cir. 2015) – Arbitration agreement binding – plaintiff waived rights to go to court when he signed a form acknowledging receipt of the company's policy manual, which mandated arbitration – irrelevant that acknowledgment form did not lay out the terms, since the "full text of the Policy was at [plaintiff's] fingertips," 785 F.3d at 1325 – "[T[he Acknowledgment here explicitly notified [plaintiff] the Manual contained a Dispute Resolution Policy . . . ." *Id*.

Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 22 W.H. Cas. 2d 1428 (9th Cir. 2014) – Class overtime claim barred by arbitration agreement – Bloomingdales announced the arbitration pact and gave employees thirty days to opt out – plaintiff did not opt out – plaintiff is bound by arbitration agreement – "Bloomingdale's merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis." 755 F.3d at 1076.

Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 122 FEP 1208 (4th Cir. 2014) – Dodd-Frank Act holds that agreements to arbitrate whistleblower claims are not "valid or enforceable" – this does not invalidate an arbitration agreement between an employer and employee who is claiming age discrimination – invalidation is limited to Dodd-Frank claims – nothing suggests that Congress sought to bar arbitration of every claim if the agreement in question did not exempt whistleblower claims.

Kilgore v. KeyBank, N.A., 718 F.3d 1052 (9th Cir. 2013) (*en banc*) – Non-employment case – arbitration agreement prohibited class actions – District Court refused to order arbitration – *en banc* 9th Circuit reversed – California law governed – "Plaintiffs claimed below that the [arbitration agreement's] ban on class arbitration is unconscionable under California law, but that argument is now expressly foreclosed by *Concepcion* . . . . Plaintiff's assertion that students may not be able to afford the arbitration fees fairs no better. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 . . . (2000) ('The "risk" that [a plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.')." 718 F.3d at 1058 – Confidentiality Agreement not a reason to find an arbitration clause unconscionable – "[T]he enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable," *id*. at 1059 n.9.

Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 117 FEP 1055 (2d Cir. 2013) – District Court which refused to honor arbitration agreement's prohibition of class claims reversed – plaintiff claimed that since "pattern or practice" cases could proceed only on a class basis and that she had a statutory right to bring such a case, this rendered the arbitration agreement's prohibition on class actions unenforceable – the 2nd Circuit reversed – "[T]here is no substantive statutory right to pursue a pattern-or-practice claim," 710 F.3d at 486 – that term simply refers to a method of proof and does not create a separate cause of action.

Sandquist v. Lebo Automotive, Inc., 1 Cal. 5th 233, 129 FEP 744 (2016) – California Supreme Court 4 to 3 holds arbitrator not court determines whether arbitration agreement silent on the subject allows class actions – question of whether agreement allows class actions held to be procedural rather than "gateway" inquiry – dissent by Justice Krugar notes that every Federal Court of Appeal to consider the issue has held to the contrary, and that language in recent Supreme Court decisions indicates that issue of whether agreement allows class actions is qualitatively different from other procedural issues.

Settlement (Ch. 44)

McClellan v. Midwest Machining, Inc., 900 F.3d 297, 130 FEP 1827 (6th Cir. 2018), *reh'g en banc denied* (Oct. 12, 2018) – Settlement agreement required employee to tender back consideration before suing – employee sued without returning release consideration – District Court decision dismissing case reversed – requiring recently discharged employees to return consideration received under severance agreement contrary to remedial nature of civil rights laws and denigrates employees' statutory rights when those employees are most financially vulnerable – even if tender-back doctrine was applicable it would not require that severance be returned before suit was filed – female employee actually attempted to return money but was rebuffed.

Beverly v. Abbott Labs, 817 F.3d 328, 128 FEP 1680 (7th Cir. 2016) – Federal District Court properly granted enforcement of handwritten settlement agreement reached during mediation – does not matter that parties intended to execute binding agreement in the future and that handwritten agreement omits certain terms – mediation lasted 14 hours – both parties represented by counsel – near the end both parties and counsel signed a handwritten agreement that indicated that the employer's offer of $200,000 and the Plaintiff's demand of $210,000 to resolve the matter would remain open for a specified period of time – the following day the employer's counsel emailed acceptance – the employer's counsel sent a formal draft settlement agreement which was largely identical to a template settlement agreement sent before the mediation which gave the employee 21 days to review and 7 days to revoke – plaintiff ultimately declined to sign the agreement, arguing that the handwritten agreement was merely a preliminary document and it only evidenced an intention to execute a binding settlement agreement in the future – plaintiff also contended that numerous material items were omitted from the handwritten agreement – the material terms were undisputed – payment of a set sum and dismissal of all claims – the anticipation of a more formal future writing does not nullify an otherwise binding agreement – the fact that some terms were missing does not affect enforceability as long as the terms are not material – the material terms were the amount paid and the dismissal of the case – plaintiff offers no explanation as to why the missing terms "are so vital that the parties would not have settled the dispute without them," 817 F.3d at 335.

Roman-Oliveras v. Puerto Rico Elec. Power Auth., 797 F.3d 83, 31 A.D. Cas. 1784 (1st Cir. 2015) – Oral settlement reached before federal judge held binding despite inability to agree on written agreement – following oral settlement agreement, the parties over a period of months circulated several draft agreements – plaintiffs demanded several changes – the parties could not agree – the court nevertheless dismissed the case as settled – District Court found that the unsigned instrument "captured the terms and conditions" of the oral settlement agreement – plaintiffs "bare assertion" that there was no settlement is insufficient to overcome the finding of the settlement judge that an oral agreement had been reached.

Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 117 FEP 966 (7th Cir. 2013) – Accepted Rule 68 covered "all . . . claims for relief" but did not specify that it covered attorney's fees – plaintiff was entitled to attorney's fees in addition to Rule 68 judgment amount – "[T]he offering defendant bears the burden of any silence or ambiguity concerning attorney fees [and] '*must make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party*[,]'" 709 F.3d at 692 (citation omitted; emphasis in original).

* * *