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Trends in Employment Discrimination Law

by

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I. The Statistics

A. Judicial Case Filings

Twelve-Month Period	Number of Employment Discrimination Cases Filed in These 12 Months
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299
1999 (12 mos. to 12/31/99)	22,412
2000 (12 mos. to 12/31/00)	21,111
2001 (12 mos. to 12/31/01)	21,062
2002 (12 mos. to 12/33/02)	20,972
2003 (12 mos. to 12/31/03)	20,040
2004 (12 mos. to 9/30/04)	19,746
2005 (12 mos. to 9/30/05)	16,930
2006 (12 mos. to 9/30/06)	14,353
2007 (12 mos. to 12/31/07)	13,107
2009 (12 mos. to 3/31/10)	13,523
2011 (12 mos. to 9/30/11)	16,909 (including ADA employment cases)
2012 (12 mos. to 9/30/12)	16,976 (including ADA employment cases)
2013 (12 mos. to 9/30/13)	15,266

There are no comparable figures available for filings in State courts.

There was a 10.1% decrease in Federal-court employment discrimination filings from 2012 to 2013. There was also an 8.0% decline in FLSA filings in Federal court, from 8,152 cases in 2012 to 7,500 cases in 2013. There was a small increase in total civil filings in the same time period.

B. EEOC Charge Filings

The EEOC also had a 5.7% drop in charge-filing. In FY 2012, it received 99,412 charges; in FY 2013, it only received 93,727 charges.

II. Governmental Actions

A. The EEOC's Enforcement Guidance on Criminal Background Checks

The EEOC website cautions against the disparate impact of some criminal background checks. Its guidance states:

> Even if the employer treated you the same as everyone else, using background information still can be illegal discrimination. For example, employers shouldn't use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or

another protected characteristic, and doesn't accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a "disparate impact" and is not "job related and consistent with business necessity." (It doesn't matter whether or not the information was in a background report.)

B. Advisory Committee on the Civil Rules

The Advisory Committee on the Civil Rules has voted to eliminate its earlier proposals for additional restrictions in the presumptive number or length of depositions, the number of interrogatories, and the number of requests for admissions.

The Minutes of the March 4, 2014 conference call by the Duke Conference Discovery Subcommittee of the Advisory Committee on the Civil Rules explain what happened to the proposed text on the scope of discovery:

> 1081 Revisions in the published rule text for Rule 26(b)(1) were
> 1082 discussed next. The comments reflect widespread concern that
> 1083 listing "the amount in controversy" as the first factor in
> 1084 considering proportionality will obscure the need to reflect on the
> 1085 need to allow effective discovery in many cases that involve
> 1086 comparatively low dollar stakes but matters of high private and
> 1087 public importance. Although the next factor looks to the importance
> 1088 of the issues at stake in the action, this secondary position is
> 1089 not sufficient. The Subcommittee agreed that this concern can be
> 1090 addressed in part by inverting the order of these factors, listing
> 1091 first the importance of the issues at stake. The draft Committee
> 1092 Note has been expanded to emphasize that the importance of
> 1093 interests that cannot be compensated in money has been a central
> 1094 part of the calculus from the beginning in 1983.
> 1095 Another revision in the rule text was suggested. Many of the
> 1096 comments focus on the asymmetric distribution of discoverable
> 1097 information in several categories of actions. The fact that one
> 1098 party has little discoverable information, while the other party
> 1099 controls a great deal of discoverable information, means that the
> 1100 party with the information is properly subjected to greater burdens
> 1101 in responding to discovery. This concern can be reflected by adding
> 1102 a factor drawn from the Utah rule: "the parties' relative access to
> 1103 relevant information."
> 1104 This factor is subject to two reservations. One is that it
> 1105 addresses considerations that should be reflected in proper
> 1106 administration of the factors already described in Rule
> 1107 26(b)(2)(C)(iii) and transported to Rule 26(b)(1). A second is that
> 1108 adding a new factor may seem to undermine the position that little
> 1109 risk is run in simply moving the same factors from a somewhat
> 1110 obscure position in Rule 26(b)(2) to a more prominent position in
> 1111 Rule 26(b)(1).
> 1112 These reservations were met. If relative access to information

is implicit in the present factors, what harm is there in making it explicit and reducing the opportunities for ill-founded contentiousness? How can the court and parties avoid asking who has the information? This factor directly addresses asymmetry; if it is a placebo, it is a good one. And it provides a direct response to those who fear that arguments about proportionality will take on a disproportionate role as the parties discuss discovery. It gives the requesting party something to push back with, and will facilitate effective engagement of the parties. The rule will be better balanced.

The Subcommittee agreed to recommend adding as a factor "the parties' relative access to relevant information." The Committee Note can be expanded to say more about asymmetric information.

The Committee proposed amending Rule 37(e) to state:

> (e) **FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:
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> > (1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;
> >
> > (2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation:
> >
> > > (A) presume that the lost information was unfavorable to the party;
> > >
> > > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > (C) dismiss the action or enter a default judgment.

III. The Constitution and Statutes

A. The First Amendment

1. Public Prayer at Governmental Meetings

Town of Greece v. Galloway, __ **U.S.** __, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014), held that the New York town in question did not violate the First Amendment by opening its meetings with a sectarian prayer. Justice Kennedy delivered the opinion of the Court, except as to Part II–B. The Chief Justice and Justice Alito joined the opinion in full. Justice Scalia and Justice Thomas joined except as to Part II–B. Justice Alito, joined by Justice Scalia, filed a concurring

opinion. Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Scalia joined as to Part II. Justice Breyer field a dissenting opinion. Justice Kagan filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined. Part II-B of the opinion, which is not the opinion of the Court, stated that even though some persons may have felt excluded and offended by the sectarian prayers, this was not unconstitutional coercion. 134 S.Ct. at 1824-28.

2. Free Speech, and Exclusion Zones Around Abortion Clinics

McCullen v. Coakley, __ **U.S.** __, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014), struck down a Massachusetts statute establishing a 35-foot buffer zone around abortion clinics, as unconstitutionally interfering with the free speech rights of abortion protestors. The Chief Justice delivered the opinion for the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Scalia filed an opinion concurring in the judgment, in which Justices Kennedy and Thomas joined. Justice Alito filed an opinion concurring in the judgment. The first sentences of the majority opinion state the holding: "This case presents the question whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support. We hold that it does not, and we therefore reverse the judgment of the Court of Appeals." 134 S.Ct. at 2623. The Court explained that the essential employment relationship was that the customer employed the personal care assistant and the State paid their salaries. *Id.* at 2624. After the issuance of an Executive Order by former Gov. Rod Blagojecevic, currently a guest of the Federal prisons for unrelated activities, the Legislature recognized the employment relationship between customers and their personal care assistants but "declared personal assistants to be 'public employees' of the State of Illinois—but '[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act.'" *Id.* at 2626. "Following a vote, SEIU Healthcare Illinois & Indiana (SEIU–HII) was designated as the personal assistants' exclusive representative for purposes of collective bargaining," and eventually obtained CBAs with the State "that require all personal assistants who are not union members to pay a 'fair share' of the union dues." "deducted directly from the personal assistants' Medicaid payments." To the tune of "more than $3.6 million in fees" annually. *Id.* The Court strongly criticized *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), allowing the collection of "agency fees" from State employees who do not join a union, but did not overrule it. Justice Alito wrote the opinion for the Court, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justice Kagan dissented, joined by Justices Ginsberg, Breyer, and Sotomayor.

3. Associational Freedoms: Agency Fees to Public Sector Unions

Harris v. Quinn, __ **U.S.** __, 134 S.Ct. 2618, 199 L.R.R.M. (BNA) 3741, 189 L.Ed.2d 620 (2014), a 5-4 decision, held that the First Amendment right to freedom of association was violated by Illinois's requirement that personal-care providers pay an agency fee to a union to which they did not belong.

4. Retaliation: Protection for Truthful Sworn Testimony Outside of Job Duties

Lane v. Franks, __ **U.S.** __, 134 S.Ct. 2369, 2374-75, 189 L.Ed.2d 312 (2014), stated its holding succinctly: "Today, we consider whether the First Amendment similarly protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. We hold that it does." Plaintiff had significant responsibilities for the finances of the program he was hired to manage, and he discovered that an Alabama State Representative was being paid without working. He reported it internally and was told there would be problems if he fired her. He ordered her to start working for her pay, and she refused. He fired her. The FBI began an investigation, and he was subpoenaed and testified truthfully at the two resulting public corruption trials. He was then fired, and sued. The district court and Eleventh Circuit relied on The District Court relied on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in holding that Lane's compelled testimony was pursuant to his official duties and he was therefore not speaking as a citizen for First Amendment purposes. *Id.* at 2375-76. The Court continued:

> Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.
>
> In rejecting Lane's argument that his testimony was speech as a citizen, the Eleventh Circuit gave short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath. . . . Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. . . . When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.
>
> In holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. It reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment with CITY, *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen. . . It does not.
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> * * *
>
> But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects some expressions related to the speaker's job." *Id.*, at 421, 126 S.Ct. 1951. In

> other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

Id. at 2378-79. The Court held that former President Franks was entitled to qualified immunity. Justice Sotomayor wrote the opinion for a unanimous Court. Justice Thomas wrote a concurring opinion, joined by Justices Scalia and Alito.

5. Retaliation: No Automatic Protection for Sworn Testimony in Litigation

Rorrer v. City of Stow, 743 F.3d 1025, 1048, 29 A.D. Cases 447 (**6th Cir.** 2014) (Bernice Donald, J.), affirmed in part and reversed in part the grant of summary judgment to the First Amendment, ADA, and Ohio-law defendants. Plaintiff claimed that he was retaliated against because he provided testimony in a private arbitration on behalf of another firefighter. The court rejected his claim, stating:

> This Court has yet to address squarely whether sworn testimony in a judicial proceeding by a public employee elevates that speech to the level of public concern regardless of its content, but some of our sister circuits have. . . . *See, e.g., Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir.1997); *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir.1989). At least four circuits have decided that the mere act of giving sworn testimony is not enough for speech to rise to a matter of public concern. *See Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 926 n. 6 (9th Cir.2004) (citing *Maggio v. Sipple*, 211 F.3d 1346, 1352–54 (11th Cir.2000); *Padilla v. S. Harrison R–II Sch. Dist.*, 181 F.3d 992, 996–97 (8th Cir.1999); *Wright v. Illinois Dept. of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir.1994); *Arvinger v. Mayor & City Council of Balt.*, 862 F.2d 75, 77–78 (4th Cir.1988)). No circuit has adopted the rule that sworn testimony in a private arbitration is on a matter of public concern, regardless of content.

The court then held that the content of plaintiff's testimony did not touch on a matter of public concern.

B. The Fourteenth Amendment and Affirmative Action

Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), __ **U.S.** __, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014), held that Michigan did not violate the Equal Protection Clause of the Fourteenth Amendment when it adopted a State Constitutional amendment banning the consideration of race in admissions to State universities,. There was no opinion of the Court. Justice Kennedy's plurality opinion was joined by the Chief Justice and by Justice Alito. The Chief Justice also wrote a concurring opinion. Justice Scalia, joined by Justice Thomas, filed an opinion concurring in the judgment. Justice Breyer filed an opinion concurring in the judgment. Justice Sotomayor, joined by Justice Ginsburg, dissented. Justice Kagan did not participate in the case.

C. Age Discrimination in Employment Act

1. Impact Analysis

Sharp v. Aker Plant Services, Inc., 726 F.3d 789, 797-98 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger employee was being retained because he would be able to work for the defendant longer. The court held that defendant's impact analysis was not a defense:

> Aker points to the impact analysis performed by upper management, showing an increase in the average age of the Louisville site team following the layoffs. But that does not assist Aker in avoiding liability at this stage of the case. Although the substance of the impact analysis might be convincing evidence to rebut a disparate impact claim, it does nothing to rebut the fact that Hudson's recommendations served as the basis for the layoff decisions, and that Hudson stated he made his decision based on an illegal factor: age.

2. Succession Planning

Sharp v. Aker Plant Services, Inc., 726 F.3d 789, 801 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger employee was being retained because he would be able to work for the defendant longer. The court rejected the company's "succession planning" explanation for the remarks:

In contrast, Hudson's remarks in this case, taken in the light most favorable to the plaintiff, disclose no analytical step between computing an employee's potential longevity with the company and his age. Instead, Hudson stated in essence that Aker's succession plan was to hire or retain younger workers at the expense of older workers because it was more likely that the former would stay with the company longer than the latter. That reasoning suggests no analytical path that strays from an age-based rationale. It certainly cannot be said to be "analytically distinct" from age. Sharp therefore has offered evidence that Hudson used potential longevity with the company as a proxy for age.

D. The Americans with Disabilities Act and Rehabilitation Act

1. Actual Disability: Irritable Bowel Syndrome

EEOC v. Ford Motor Co.. __ F3d __, 2014 WL 1584674 (**6th Cir.** April 22, 2014) (No. 12–2484), reversed the grant of summary judgment to the ADA reasonable-accommodation and retaliation defendant. The court held that plaintiff's irritable bowel syndrome (IBS) was a covered disability. It stated at p. *2: "Throughout her entire period of employment with Ford, Harris suffered from IBS, an illness that causes fecal incontinence. . . . Over time, her symptoms worsened and, on particularly bad days, Harris would be unable even to drive to work or stand up from her desk without soiling herself. . . . Harris began to take intermittent FMLA leave when she experienced severe IBS symptoms. . . ."

2. Actual Disability: Inability to Sit for a Prolonged Period

Parada v. Banco Industrial De Venezuela, C.A., 753 F.3d 62, 22 Wage & Hour Cas.2d (BNA) 305, 29 A.D. Cases 779 (**2d Cir.** 2014), affirmed in part and reversed in part the grant of summary judgment to the ADA plaintiff. Plaintiff fell on a sidewalk and was severely injured. "After diagnosing Parada with lumbosacral and cervical sprains and several spinal disc herniations, Parada's doctors directed her to avoid sitting for prolonged periods." *Id.* at 66. She requested an ergonomic chair, but defendant failed to respond to her request. She took sick leave, exhausted it, exhausted short-term disability benefits, and was denied long-term disability benefits. After months of disputes over the adequacy of documentation, defendant fired her. The district court dismissed her ADA claim, holding that the inability to sit for long periods is not a covered disability. The Second Circuit reversed, stating "we agree with Parada's second argument and hold that impairments that limit the ability to sit for long periods of time do not categorically fail to qualify as disabilities under the ADA." *Id.* at 67.

3. Actual Disability: Adequacy of Physician's Affidavit

Mazzeo v. Color Resolutions Intern., LLC, 746 F.3d 1264, 1268-69, 29 A.D. Cases 757 (**11th Cir.** 2014), vacated the grant of summary judgment to the ADA defendant and remanded the case. The district court held, relying on a pre-ADAAA Eleventh Circuit opinion, that plaintiff's physician's affidavit was conclusory and insufficient to show that plaintiff had a covered disability. Reversing, the Court of Appeals held that the affidavit was sufficient, stating:

> Dr. Christopher Roberts, Mr. Mazzeo's treating physician, submitted an affidavit stating that degenerative disc disease and a herniated disc impacted Mr. Mazzeo's ability to walk, bend, sleep, and lift more than ten pounds, and that Mr. Mazzeo's pain would increase with prolonged sitting and standing. The district court thought this affidavit was insufficient, conclusory, and did not demonstrate that Mr. Mazzeo was disabled because it "contain[ed] no detailed discussion as to whether [the] back condition affected any of [Mr. Mazzeo's] life activities." D.E. 33 at 9. . . . The district court cited to a pre-ADAAA Eleventh Circuit opinion for the proposition that there could be "no disability based on physician's lifting restrictions where the plaintiff testified she could still work." *Id.* (citing *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir.1999)). The district court also noted that the post-surgery work restrictions Mr. Mazzeo discussed with Mr. Boyd were no more than a transitory impairment and, therefore, insufficient to establish that CRI regarded Mr. Mazzeo as disabled. For several reasons, we disagree with the district court's analysis as to the matter of disability.
>
> First, although the district court relied on one of our pre-ADAAA cases . . . to support its conclusion that Dr. Roberts' affidavit was conclusory, that case is distinguishable. In *Hilburn*, the physician opined, without articulating any specific facts, that the plaintiff was "substantially limited in performing manual tasks." *Id.* Given that the plaintiff herself testified that she could walk, run, sit, stand, sleep, eat, bathe, dress, write, work around the house, cook, and work, we held that the physician's opinion was conclusory and did not create any issue of material fact. *See id.* at 1227–28. Here, by contrast, Dr. Roberts explained that he had been treating Mr. Mazzeo for an extended period of time, that one of Mr. Mazzeo's disc herniation problems was "nerve root

> involvement caus[ing] radicular symptoms, that is pain radiating from the lumbar spine down Mr. Mazzeo's right leg," and that the limitations he noted (i.e., the impact on Mr. Mazzeo's ability to walk, bend, sleep, and lift more than ten pounds) were "substantial ... and permanent." That diagnosis was not, in our view, conclusory, as it explained Mr. Mazzeo's medical condition, what specific pain the condition caused, and the limitations on "major life activities" (as that term is broadly defined by the ADA) resulting from the condition and pain. At the summary judgment stage, there was no need for a more "detailed discussion" of the effects of Mr. Mazzeo's back condition.

(Citation and footnote omitted.)

4. Actual Disability: The Need to Pin Down the Facts

Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 431, 29 A.D. Cases 762 (**6th Cir.** 2014), reversed the grant of summary judgment to defendant on plaintiff's ADA and State-law disability claims. In addition to pointing out that the position description for plaintiff's job did not identify the physically strenuous tasks defendant's manager asserted were essential, the court relied on defendant's failure to pin down the facts on whether plaintiff was "otherwise qualified" to perform his job:

> Furthermore, although Ensign described the line operator job during his deposition as requiring several physically exerting activities that Demyanovich was no longer capable of at the time he was deposed . . . there is no evidence that Demyanovich was incapable of performing these physical tasks *at the time he was terminated.* Indeed, Ensign admitted that Demyanovich was not fired because of performance issues, and that he had been performing satisfactorily at his job.

(Emphasis in original.)

Mazzeo v. Color Resolutions Intern., LLC, 746 F.3d 1264, 1269, 29 A.D. Cases 757 (**11th Cir.** 2014), vacated the grant of summary judgment to the ADA defendant and remanded the case. The district court had held that plaintiff's deposition negated his having a covered disability. The Court of Appeals reversed, stating:

> Second, although Mr. Mazzeo testified at his deposition that his back problems only affected his ability to play golf and have sex, the district court read that testimony too broadly. The questions that were posed to Mr. Mazzeo did not contain a specific time frame, making it unclear whether his answers referred to how he felt before his operation in March of 2009, or after his operation (which took place two days after his termination). Indeed, some of the questions were specifically about Mr. Mazzeo's post-operation/post-termination status. *See, e.g.*, Mazzeo Dep. at 157 ("Q: And from the time you had your surgery to date does your back pain affect your performance activities other than golf or sex? A: No."). We therefore do not think that Mr. Mazzeo's deposition testimony warranted summary judgment in favor of CRI.

Comment on *Mazzeo v. Color Resolutions Intern., LLC*: Defense counsel clearly should have pinned down the plaintiff on the period of time about which he was asking, in order to make the argument defendant wanted to make. If the facts supported plaintiff, a trip to the court

of appeals might also have been avoided if plaintiff's counsel had spiked this defense ploy by asking on "redirect" about differences in the periods of time before and after the surgery. Too many lawyers on both sides follow the old maxim that one does not tip one's hands by engaging in redirect. The maxim made sense when almost all cases were tried, but makes no sense when most cases are resolved by summary judgment or settlement.

5. Actual Disability: Temporary Disabilities

Summers v. Altarum Institute, Corp., 740 F.3d 325, 29 A.D. Cases 1 (4th Cir. 2014), reversed the grant of summary judgment to the ADA defendant and held that temporary impairments are covered by the ADAAA. This will affect a lot of disability claims. The court stated at 331-32:

> Despite the sweeping language of the amended Act and the clear regulations adopted by the EEOC, Altarum maintains that a temporary impairment cannot constitute a disability. In doing so, Altarum principally relies on pre-ADAAA cases that, as we have explained, the amended Act abrogated. Additionally, Altarum briefly advances two other arguments why Summers's leg injuries did not "substantially limit" his ability to walk.
>
> 1.
>
> First, contends that the EEOC regulations defining a disability to include short-term impairments do not warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Altarum argues that Congress's intent "not to extend ADA coverage to those with temporary impairments expected to fully heal is evident," because such a "dramatic expansion of the ADA would have been accompanied by some pertinent statement of Congressional intent." . . .
>
> When a litigant challenges an agency's interpretation of a statute, we apply the familiar two-step *Chevron* analysis. First, we evaluate whether Congress has "directly spoken" to the precise question at issue. If traditional rules of statutory construction render the intent of Congress clear, "that is the end of the matter." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. If the statute is "silent or ambiguous" with respect to the question at issue, we proceed to the second step—determining whether the agency's interpretation of the statute is reasonable. *Id.* at 843, 104 S.Ct. 2778. An agency's reasonable interpretation will *332 control, even if better interpretations are possible. *Id.* at 843 n. 11, 104 S.Ct. 2778.
>
> Although Altarum contends that Congress's intent to withhold ADA coverage from temporarily impaired employees is "evident" . . . no such intent seems evident to us. To be sure, the amended Act does preserve, without alteration, the requirement that an impairment be "substantial" to qualify as a disability. But Congress enacted the ADAAA to correct what it perceived as the Supreme Court's overly restrictive definition of this very term. And Congress expressly directed courts to construe the amended statute as broadly as possible. Moreover, while the ADAAA imposes a six-month requirement with respect to "regarded-as" disabilities, it imposes no such durational requirement for "actual" disabilities, thus suggesting that no such requirement was intended. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) ("[A] negative

> inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). For these reasons, we must reject Altarum's contention that the amended Act clearly evinces Congress's intent to withhold ADA coverage for temporary impairments. At best, the statute is ambiguous with respect to whether temporary impairments may now qualify as disabilities.
>
> Accordingly, we turn to step two of the *Chevron* analysis—determining whether the EEOC's interpretation is reasonable. We conclude that it is. The EEOC's decision to define disability to include severe temporary impairments entirely accords with the purpose of the amended Act. The stated goal of the ADAAA is to expand the scope of protection available under the Act as broadly as the text permits. The EEOC's interpretation—that the ADAAA may encompass temporary disabilities—advances this goal. Moreover, extending coverage to temporarily impaired employees produces consequences less "dramatic" than Altarum seems to envision. Prohibiting employers from discriminating against temporarily disabled employees will burden employers only as long as the disability endures. Temporary disabilities require only temporary accommodations.

The court then rejected defendant's suggested distinction between impairments caused by injuries and those caused by conditions with a short-term effect. *Id.* at 332-33.

6. Perceived Disability

Widomski v. State University of New York (SUNY) at Orange, 748 F.3d 471 (**2d Cir.** 2014), affirmed the grant of summary judgment against the ADA Title II and New York Human Rights Law plaintiff. Plaintiff was a student in the Medical Laboratory Technology program in a clinical assignment. "On his third day at the Center, Sander told Widomski that he would not be allowed to draw blood from patients because his hands shook too much. . . . Although Widomski admits that his hands sometimes shake when he is nervous, he denies any physical impairment or disability of the hands." *Id.* at 473. He brought a "perceived as" disability claim, which the district court dismissed. The court of appeals affirmed. It held that the definition of "disability" applies to all titles of the ADA, and that plaintiff could not show he was perceived as having a disability because the defendant only perceived he could not draw blood, and there were many other tasks a laboratory technician can do.

7. Essential Functions of the Job

Rorrer v. City of Stow, 743 F.3d 1025, 29 A.D. Cases 447 (**6th Cir.** 2014) (Bernice Donald, J.), affirmed in part and reversed in part the grant of summary judgment to the First Amendment, ADA, and Ohio-law defendants. Plaintiff was a firefighter who permanently lost the vision in his right eye in a non-work-related accident. Defendants refused to reinstate him as a firefighter or to transfer him to a disputed fire inspector position on the ground that an essential function of the job was to drive an emergency vehicle with emergency lights, and plaintiff could not perform the job with monocular vision. Plaintiff produced evidence that a number of firefighters never drove the equipment, and found a squad whose leader said he would accept plaintiff and not require him to drive. There was a dispute whether the City had adopted a National Fire Protection Association standard requiring binocular vision, and the union backed

plaintiff and asserted the topic was a mandatory subject of bargaining that had never even been broached with the union. The partner of the Fire Department's regular physician, himself equally qualified to examine firefighters, approved plaintiff to return to duty. The regular physician reversed this judgment after the Fire Chief complained, and found plaintiff was not qualified. Reversing the lower court's grant of summary judgment on the ADA claims, the court stated at 1039: "Whether a job function is essential 'is a question of fact that is typically not suitable for resolution on a motion for summary judgment.'" (Citation omitted.) The court continued at 1039-40:

> At the summary judgment stage, the employer's judgment will not be dispositive on whether a function is essential when evidence on the issue is "mixed." . . . If an employer's judgment about what qualifies as an essential task were conclusive, "an employer that did not wish to be *inconvenienced* by making a reasonable accommodation could, simply by asserting that the function is essential, avoid the clear congressional mandate that employers mak[e] reasonable accommodations." . . .
>
> Written job descriptions are also not dispositive. *See Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir.2003) ("[A]n employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description."). Testimony from the plaintiff's supervisor that a job function is actually marginal may effectively rebut a written description that states that a job function is essential. . . . In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir.2001), the Third Circuit reasoned that "conflicting deposition testimonies" concerning a job's essential functions required reversal of a grant of summary judgment to the employer. *Id.* at 283. "Although the employer's judgment and the written job descriptions may warrant some deference, [the plaintiff] put forth considerable evidence that contradicts [the employer's] assertions," creating a "genuine issue of material fact [concerning] essential function." *Id.*

The Court of Appeals reversed the lower court's determination that there was no genuine dispute as to the City's reliance on the NFPA guidelines, and no genuine dispute as to the need to drive an emergency vehicle with emergency lights. *Id.* at 1040-43. It found that the lower court improperly held it was required to give deference to the defendants, failed to draw inferences in plaintiff's favor, and failed to consider plaintiff's evidence:

> The district court erred, however, in finding there was no genuine dispute as to whether driving a fire apparatus under emergency lights was an essential function of a Stow firefighter. The district court based this finding on its conclusion that the Department utilized the NFPA guidelines for determining a firefighter's essential functions. In the alternative, the lower court gave deference to Chief Kalbaugh's assertion that this function was essential, finding corroboration in the Department's internal list of essential functions and Rorrer's admission that he "could not refuse" to drive an apparatus if instructed to do so.
>
> The district court found "no issue of fact surrounding whether Stow utilized the NFPA guidelines" and credited the City's position that NFPA essential Job Task 10, "[o]perating fire apparatus or other vehicles in an emergency mode with emergency lights

and sirens," applied to Rorrer. The court stated that, "even if Stow has not formally adopted the NFPA guidelines, the record is replete with evidence that Stow's chief, Chief Kalbaugh, and its physician, Dr. Moten, relied upon those guidelines" in determining a firefighter's essential functions.

> The record is actually replete with evidence that the Department never adopted NFPA guidelines and did not rely on them in determining that Rorrer was unfit to serve as a Stow firefighter. Multiple witnesses testified that the Department never adopted the NFPA guidelines. The Department did not execute the NFPA's implementation plan, and did not require the annual physicals mandated by the NFPA.

Id. at 1041. The court rejected the testimony of defendants' physician:

> The record suggests that Dr. Moten was not familiar with the NFPA guidelines and did not rely on them in finding Rorrer unfit to serve as a firefighter. When asked by Rorrer what "fire regs" would prohibit Rorrer from returning to work, Dr. Moten referred vaguely to "literature on line [sic]" that he had found the night before, and he did not reference the NFPA. When deposed, Dr. Moten initially could not identify what "fire regs" mandated that a monocular firefighter was unfit to serve. When asked for specifics, he repeatedly referred vaguely to "fire regs" before finally stating, "Let me look." Only after counsel asked for a break was Dr. Moten able to identify the "NFPA," but he still could not say what those initials represented. When asked whether he had read the guidelines when Chief Kalbaugh gave them to him in 2003, Dr. Moten gave contradictory answers, initially stating that he had read the portions relating to physicals and then, after another intervention by counsel, stating that he had read the "entire stack."
>
> The district court did not reference any of this evidence when finding that "the record is replete with evidence that ... Moten relied upon those guidelines" in finding Rorrer unfit to serve as a firefighter. Drawing all reasonable inferences in favor of Rorrer, a reasonable jury could find that the Department had never adopted the NFPA guidelines, that Dr. Moten's determination was not based on the application of the NFPA's list of essential functions of a firefighter, and that the City's reference to the NFPA was an ex post pretext.

Id. The court next turned to the lower court's belief it was required to give deference to defendants' judgment:

> The district court also found that, even absent the NFPA guidelines, there was no genuine dispute about whether operating a fire apparatus during an emergency was an essential function of a Stow firefighter. The court reasoned that it was "required to give deference to Stow's judgment regarding what the essential functions of the position were." The court supported its holding by referencing the City's internal list of essential functions and Rorrer's admission that he "could not refuse" to drive an apparatus if instructed to do so.

> Contrary to the district court's opinion, however, federal courts are not "required to give deference to [the employer's] judgment regarding what the essential functions of the position [are]" when the record suggests that there is a genuine dispute of material fact on the issue. . . . The ADA states that the court should give "consideration" to the employer's determination, not "deference," with the latter incorrectly implying that the employer's position creates a strong presumption in its favor. . . . *See* 42 U.S.C. § 12111(8); . . . . The employer's determination about what functions are essential is certainly given weight, but it is one of seven factors the court should consider, including "[t]he amount of time spent on the job performing the function" and "[t]he consequences of not requiring the [employee] to perform the function." 29 C.F.R. § 1630.2(n)(3)(iii), (iv); . . . . The district court appears not only to have given deference to the City's position, but to have considered only the City's position, failing to consider all of the § 1630.2 factors while drawing all reasonable inferences in Rorrer's favor as required at the summary judgment stage.
>
> According to Rorrer, the consequences of forbidding a firefighter from driving an apparatus during an emergency would be minimal. Driving a fire apparatus during an emergency is not a "highly specialized" task or a job requirement that only "a limited number of employees are available" to do. 29 C.F.R. § 1630.2(n)(2); . . . . Rather, Rorrer brought forth direct evidence that such an accommodation would be "very easy" for the Department to implement. According to that direct evidence, some Stow firefighters never drive an apparatus "as a matter of choice." The district court was required to accept this evidence as true. . . . When read in the light most favorable to Rorrer, the record is clearly "mixed" about whether driving an apparatus during an emergency was an essential task for a Stow firefighter. . . .

Id. at 1042 (citations omitted). The Court of Appeals then turned to the job description, and similarly found it subject to substantial dispute. *Id.* at 1042-43. The job description said that firefighters "may" have to drive emergency equipment. *Id.* at 1042-43. The court stated:

> The district court dismissed any relevance to the presence of the term "may," stating that "Rorrer concedes ... he could not refuse to drive an apparatus if ordered to do so" and "the record is replete with evidence that no firefighters within Stow were able to opt out of any of the essential functions" detailed in the Department's job description. An "essential" task, however, is not any task that an employee would feel compelled to perform if ordered to perform it by his or her employer. *See Holly*, 492 F.3d at 1258 (holding that an employer cannot simply assert that a function is essential to "avoid the clear congressional mandate that employers mak[e] reasonable accommodations"). That definition—"a task is essential if the employer orders it done"—contradicts a central purpose of the ADA, which is to prohibit employers from requiring disabled employees to perform certain tasks that the law deems nonessential. *See, e.g., Davidson*, 337 F.3d at 1191 ("[A]n employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description."). Determining whether a function is essential "is a question of fact that is typically not suitable for resolution on a motion for summary judgment." . . . The district court thus erred in prematurely deciding whether driving an apparatus during an

emergency was an "essential" function of a Stow firefighter because the evidence creates a genuine dispute about that fact.

Id. at 1043 (citations omitted.)

8. Patient Safety as Essential Function of Job

Olsen v. Capital Region Medical Center, 713 F.3d 1149 (**8th Cir.** 2013), affirmed the grant of summary judgment to the ADA, ADEA, and Missouri Human Rights Act defendant. Plaintiff worked as a mammography technician, but had numerous unpredictable seizures while at work, sometimes falling and injuring herself, and sometimes in the presence of patients for whose movement, positioning and safety she was responsible. Defendant made numerous changes to the work environment and to patient assignments to minimize plaintiff's exposure to triggers, but she continued to have seizures. Plaintiff was ultimately transferred to another job not involving direct patient responsibility, continued to have seizures, was placed on unpaid leave, and declined an offer of reinstatement when her physician placed her on a new medication that she said would eliminate the seizures. Plaintiff's suggested accommodation was adequate rest after a seizure. The court held that plaintiff could not perform an essential function of her job, ensuring patient safety, while she was having a seizure. It stated at 1154: "The hospital need not subject its patients to potential physical and emotional trauma to comply with its duties under the MHRA and the ADA."

9. Truck Driving as Essential Function of Job

Samson v. Federal Exp. Corp., 746 F.3d 1196, 29 A.D. Cases 771 (**11th Cir.** 2014), reversed the grant of summary judgment to the ADA and Florida Civil Rights Act plaintiff. Samson was an insulin-dependent diabetic. The court described the factual setting at 1197-98: "In 2009, FedEx offered Samson, an experienced vehicle mechanic, a job as a Senior Global Vehicle Technician/DOT/CDL ('Technician') at its airport facility in Fort Myers, Florida. FedEx conditioned the offer on, among other things, Samson passing a Department of Transportation ('DOT') medical examination—which the Federal Motor Carrier Safety Regulations ('FMCSRs') require for commercial motor vehicle drivers who transport property or passengers in interstate commerce. When Samson failed his DOT medical examination due to his diabetes, FedEx withdrew Samson's job offer since he did not qualify for the Technician position. FedEx claimed that the FMCSRs required it to do so." The court noted that the company was aware of the possibility of an exemption and discussed internally whether it had to notify Samson about the possibility of a waiver. *Id.* at 1199. "Samson also claims that he spoke with Madoo, who told him "we don't hire diabetics." Madoo himself, however, is a Type–2 diabetic who treats his condition with insulin." *Id.* at p. 1200. The court held that plaintiff had produced enough evidence to warrant a jury trial on the issue whether test-driving trucks was an essential function of the Technician job. It stated at 1201-03:

> Applied here, some of these factors support a finding that test-driving is an essential function of the Technician position. First, FedEx's judgment—which carries substantial weight—is that test-driving is an essential function of the job. Second, according to FedEx's written job description, Technicians maintain, troubleshoot, and repair FedEx trucks—responsibilities that conceivably could involve test-driving. The job

description also requires Technicians to possess a commercial driver's license and "have light to heavy truck experience." Third, if Technicians did not conduct test-drives, it is reasonable to infer that there may be adverse consequences, such as failing to correctly diagnose a problem or assuming a problem was fixed when it was not. This could lead FedEx to operating unroadworthy trucks, thereby endangering the public. Fourth, the record suggests that test-driving may be a "highly specialized" job function, given that FedEx requires its Technicians to hold commercial driver's licenses and both federal and Florida law require commercial motor vehicle drivers to be licensed.

The remaining factors, however, weigh in favor of finding that test-driving is *not* an essential function of the Technician position. First, although FedEx employs only one Technician at its airport facility in Fort Myers, there are nine other licensed truck drivers at that facility among whom the test-driving could be distributed. In fact, Rotundo—the Technician hired instead of Samson—testified that, at least on one occasion, another employee test-drove while he sat in the passenger seat diagnosing the reported mechanical problem. Second, the amount of time that the incumbent Technician at the Fort Myers facility actually spends test-driving is miniscule. Indeed, Rotundo further testified that in the approximately three years he has been on the job, he has only test-driven FedEx trucks three times. If test-driving were such an essential function, as FedEx contends, one would expect it to be performed with regularity. Third, with respect to the current work experience of employees in similar jobs, the record shows that other FedEx Technicians throughout Florida generally test-drive an average of about 3.71 hours *per year*—an insignificant portion of their total time on the job.

In sum, viewing all the record evidence and reasonable inferences in the light most favorable to Samson, as required, we conclude that reasonable jurors could differ as to whether test-driving FedEx trucks is an essential function of the Technician position. . . . This issue, therefore, should not have been taken away from the jury and resolved as a matter of law.

(Citation and footnotes omitted.) The court also rejected the district court's view that the FMCSRs established a complete defense in the event that test-driving trucks is ultimately found to be an essential element of the Technician job. It held that it did not matter that defendant's business included the operation of trucks in interstate commerce; what mattered is whether plaintiff's operation of a truck would have been in interstate commerce. *Id.* at pp. *6-*7. Judge Hill dissented.

10. <u>Punctuality as Essential Function of Job</u>

McMillan v. City of New York, 711 F.3d 120, 126, 27 A.D. Cases 929 (**2d Cir.** 2013), vacated the grant of summary judgment to the ADA and State-law defendant. Plaintiff suffered from schizophrenia and other problems, and his medication made him groggy in the morning. His physician refused to alter his medication schedule. He requested an extended flex-time accommodation of a later starting time of 11:00 A.M. and being allowed to complete his work late at night or on the weekend. The City denied the accommodation, and plaintiff was ultimately suspended for thirty days for tardiness. The lower court held that plaintiff's physical

presence was an essential function of the job, and granted summary judgment on that basis. The Second Circuit explained its disagreement:

> Although a court will give considerable deference to an employer's determination as to what functions are essential, there are a number of relevant factors that may influence a court's ultimate conclusion as to a position's essential functions. . . . "Usually, no one listed factor will be dispositive." *Id.* A court must avoid deciding cases based on "unthinking reliance on intuition about the methods by which jobs are to be performed." . . . Instead, a court must conduct "a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." . . .
>
> The district court appears to have relied heavily on its assumption that physical presence is "an essential requirement of virtually all employment" and on the City's representation that arriving at a consistent time was an essential function of McMillan's position. While the district court's conclusion would be unremarkable in most situations, we find that several relevant factors here present a somewhat different picture: one suggesting that arriving on or before 10:15 a.m.—or at any consistent time—may not have been an *essential* requirement of McMillan's particular job. For many years prior to 2008, McMillan's late arrivals were explicitly or implicitly approved. Similarly, the fact that the City's flex-time policy permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential. Interpreting these facts in McMillan's favor, along with his long work history, whether McMillan's late and varied arrival times substantially interfered with his ability to fulfill his responsibilities is a subject of reasonable dispute.
>
> This case highlights the importance of a penetrating factual analysis. Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment. While a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry, drawing all inferences in favor of the non-moving party. Such an inquiry was not conducted here.[3]

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[3]The district court could not "discern a principled distinction between total absence from work on certain days and partial absence from work on most days," because "the fundamental problem is that the employee is not physically present at the job site, an essential requirement of virtually all employment." . . . However, there is an important distinction between complete absence and tardiness in jobs that require work to be done at the office: an absent employee does not complete his work, while a late employee who makes up time does. Similarly, while it may be essential in many workplaces that all tasks be performed by employees who are both physically present and supervised, these requirements are not invariably essential. Thus, depending on the requirements of the position, an employee might need to be physically present and supervised only for certain tasks. By way of example, and without expressing any view on the question, it might be necessary for a supervisor to be present when McMillan meets with clients in the office, but not when he fills out forms. The district court appears to have simply assumed that McMillan's job required at least seven hours of work each day and that the work could not be successfully performed by banking time on some days to cover tardiness on others, while working a total of at least 35 hours each week. A fact-specific inquiry, however,

requires consideration of this possibility on remand.

(Citations omitted.)

11. Reasonable Accommodations

Summers v. Altarum Institute, Corp., 740 F.3d 325, 331 n.4, 29 A.D. Cases 1 (**4th Cir.** 2014), reversed the grant of summary judgment to the ADA defendant, held that temporary impairments are covered by the ADAAA (see above), and discussed the employer's duty to provide a reasonable accommodation:

> The district court did not address the "qualified individual" issue in the context of Summers's wrongful-discharge claim. But in dismissing Summers's failure-to-accommodate claim, the court suggested that Summers was not a "qualified individual" because his requested accommodation—a temporary period of working remotely—was unreasonable. Summers does not challenge the dismissal of his failure-to-accommodate claim and so, as explained above, we do not revisit that holding. But because the "qualified individual" issue likely will arise on remand of the wrongful-discharge claim, we note that an employee's accommodation request, even an unreasonable one, typically triggers an employer's duty to engage in an "interactive process" to arrive at a suitable accommodation collaboratively with the employee. *See Wilson v. Dollar General Corp.*, 717 F.3d 337, 346–47 (4th Cir. 2013). "[L]iability for failure to engage in an interactive process depends upon a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions." *Id.* at 347 (quoting *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir.2012)) (quotation marks omitted).

Rorrer v. City of Stow, 743 F.3d 1025, 1043-44, 29 A.D. Cases 447 (**6th Cir.** 2014) (Bernice Donald, J.), affirmed in part and reversed in part the grant of summary judgment to the First Amendment, ADA, and Ohio-law defendants. Plaintiff was a firefighter who permanently lost the vision in his right eye in a non-work-related accident. Defendants refused to reinstate him as a firefighter or to transfer him to a disputed fire inspector position on the ground that an essential function of the job was to drive an emergency vehicle with emergency lights, and plaintiff could not perform the job with monocular vision. Plaintiff requested two accommodations: being allowed to work as a firefighter without driving emergency vehicles, and transfer to the Fire Prevention Bureau where he would work as a fire inspector—a job for which he was trained and certified. The court first disposed of the district court's erroneous findings in the face of genuine disputes of material fact, and then rejected the defendants' position that plaintiff could not perform the job of "fire inspector" because it called the job "firefighter," which it said meant that he would have to drive emergency equipment. The court stated: "The City's unwillingness to modify a job description to accommodate Rorrer, even though that modification would not have required any change in job duties, falls short of the City's obligation 'to locate a suitable position' for Rorrer after he identified a vacancy and requested a transfer." *Id.* at 1045 (citation omitted).

12. Interactive Process

Rorrer v. City of Stow, 743 F.3d 1025, 1045, 29 A.D. Cases 447 (**6th Cir.** 2014) (Bernice Donald, J.), affirmed in part and reversed in part the grant of summary judgment to the First Amendment, ADA, and Ohio-law defendants. Plaintiff was a firefighter who permanently lost the vision in his right eye in a non-work-related accident. Defendants refused to reinstate him as a firefighter or to transfer him to a disputed fire inspector position on the ground that an essential function of the job was to drive an emergency vehicle with emergency lights, and plaintiff could not perform the job with monocular vision. The court stated: "After Dr. Henderson initially cleared Rorrer to return to work, Chief Kalbaugh intervened to change the decision, at which point Dr. Moten reversed Dr. Henderson's decision without first examining Rorrer." The court held that the defendants' approach to plaintiff's two requests for reasonable accommodations suggested bad faith.

E. Family and Medical Leave Act

Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 429, 29 A.D. Cases 762 (**6th Cir.** 2014), reversed the grant of summary judgment to defendant on plaintiff's FMLA interference claim. The district court had held that plaintiff would have been unable to return to work after his leave. The court stated:

> Although there is ample evidence that Demyanovich might have had difficulty returning to work within twelve weeks of his February 23 request for FMLA leave, it is not indisputable that he would have been unable to do so. Dr. Mussani, Demyanovich's primary physician, "advised [Demyanovich] to quit work" and seek Social Security benefits, but he did not draft any documentation stating that Demyanovich was categorically unable to continue working. . . . We may not draw the inference, adverse to Demyanovich, that because Dr. Mussani had always cleared Demyanovich to return to work after past examinations, his advice to quit on this occasion demonstrates that Demyanovich was no longer capable of working. . . .

(Citation omitted.)

Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 22 Wage & Hour Cas.2d (BNA) 318 (**11th Cir.** 2014), reversed the judgment on a jury verdict of $200,000 for the FMLA retaliation and interference plaintiff. Plaintiff submitted a vacation schedule to his supervisor, listing eleven weeks of specified vacation dates over the next two years. While plaintiff suffered from unpredictable attacks of depression of varying duration, the requested leave was not based on any medical advice or input, and had no relation to any potential attack. He did not initially mention the FMLA or notify his employer of his depression. After the initial denial of the leave, he told his supervisor of the depression. The court held that defendant could rely on information developed in discovery to assert that this request did not qualify as a request for FMLA leave, and agreed with defendant that it did not. The court disagreed with "Hurley's argument that an employee only needs to 'potentially qualify' for leave to assert an interference claim." *Id.* at 1167.

F. USERRA

1. USERRA and the Veterans' Benefit and Improvement Act of 2008

Baldwin v. City of Greensboro, 714 F.3d 828 (**4th Cir.** 2013), affirmed the grant of summary judgment to the USERRA defendant. The court held that the four-year catch-all period of limitations in 28 U.S.C. § 1658 applies to USERRA claims because the statute does not have its own period of limitations. The court held that the subsequently-enacted abolition of the period of limitations in the Veterans' Benefit and Improvement Act of 2008 did not apply r753 F.3d 740etroactively.

2. The Burdens of Production and Persuasion

Dorris v. TXD Services, LP, 753 F.3d 740, 746, 198 L.R.R.M. (BNA) 2521 (**8th Cir.** 2014), reversed the grant of summary judgment to the USERRA defendant because the lower court's dismissal of plaintiff's claim, for failure to show that personnel on furlough or leave of absence for non-military reasons were treated more favorably, reversed the statutory allocations of the burdens of production and persuasion. The court stated: "In this case, USERRA's purposes, § 4311(c)(1), and the fact that relevant evidence is far more accessible to the employer warrant placing on TXD the burden of establishing compliance with § 4311(a) and § 4316(b)(1) if Jonathan Dorris was denied a benefit not determined by seniority when he was left off the employee list provided to Foxxe." (Citation omitted.)

G. Sarbanes-Oxley

Lawson v. FMR LLC, __ **U.S.** __, 134 S.Ct. 1158, 188 L.Ed.2d 158, 37 IER Cases 1193 (2014), held that the whistleblower protection in 18 U.S.C. § 1514A, enacted as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745, protects whistleblowers who are not employees of covered (public) companies, but are employees of private companies doing work for public companies. Justice Ginsberg wrote the opinion for the Court. Justice Scalia, joined by Justice Thomas, concurred in part and concurred in the judgment. Justice Sotomayor dissented, joined by Justices Kennedy and Alito.

Smith v. Psychiatric Solutions, Inc., 750 F.3d 1253 (**11th Cir.** 2014), affirmed the award of attorneys' fees to the successful employer in a retaliatory discharge case brought under Sarbanes-Oxley and the Florida Whistleblower Act. Plaintiff alleged she internally reported "instances of child abuse and evidence of Medicaid fraud, falsification of medical forms, and several reporting violations, "and was fired as a result." She sued under these statutes, lost on summary judgment, and lost on appeal. The district court "directed Smith to pay Appellees $53,925.98 in attorneys' fees under the FWA and ordered Smith's counsel to pay Appellees $5,338.20 in attorneys' fees in connection with Smith's failed motion for Rule 11 sanctions." *Id.* at 1257. On appeal, the court held that the FWA's provision allowing attorneys' fees to successful defendants was not in conflict with the Sarbane-Oxley Act. "Sarbanes–Oxley's fee provision requires courts to award fees to prevailing plaintiffs; it does not bar a defendant from recovering attorneys' fees that are authorized elsewhere." *Id.* (citation omitted). The court held at 1260 that, under the circumstances of the case, a fee award to defendant under the FWA would not deter worthy claims under that statute.

H. Fair Labor Standards Act

1. Donning and Doffing Protective Clothing

Sandifer v. U.S. Steel Corp., __ **U.S.** __, 134 S.Ct. 870, 876-77, 187 L.Ed.2d 729 (2014), a donning-and-doffing case, construed the term "clothes" in § 203(*o*) of the Act (defining the scope of an exemption subject to collective bargaining):

> Dictionaries from the era of § 203(o)'s enactment indicate that "clothes" denotes *items that are both designed and used to cover the body and are commonly regarded as articles of dress*. See Webster's New International Dictionary of the English Language 507 (2d ed. 1950) (Webster's Second) (defining "clothes" as "[c]overing for the human body; dress; vestments; vesture"); see also, e.g., 2 Oxford English Dictionary 524 (1933) (defining "clothes" as "[c]overing for the person; wearing apparel; dress, raiment, vesture"). That is what we hold to be the meaning of the word as used in § 203(o). Although a statute may make "a departure from the natural and popular acceptation of language," *Greenleaf v. Goodrich*, 101 U.S. 278, 284–285, 25 L.Ed. 845 (1880) (citing *Maillard v. Lawrence*, 16 How. 251, 14 L.Ed. 925 (1854)), nothing in the text or context of § 203(*o*) suggests anything other than the ordinary meaning of "clothes."

(Emphasis in original.) The Court held that non-compensable time spent substituting garments, or putting garments or gear on top of other garments, is not covered by § 203(*o*), but the time spent in putting on some items is compensable:

> Petitioners have pointed to 12 particular items: a flame-retardant jacket, pair of pants, and hood; a hardhat; a snood; wristlets; work gloves; leggings; metatarsal boots; safety glasses; earplugs; and a respirator. The first nine clearly fit within the interpretation of "clothes" elaborated above: they are both designed and used to cover the body and are commonly regarded as articles of dress. That proposition is obvious with respect to the jacket, pants, hood, and gloves. The hardhat is simply a type of hat. The snood is basically a hood that also covers the neck and upper shoulder area; on the ski slopes, one might call it a "balaclava." The wristlets are essentially detached shirtsleeves. The leggings look much like traditional legwarmers, but with straps. And the metatarsal boots—more commonly known as "steel-toed" boots—are just a special kind of shoe.
>
> The remaining three items, by contrast, do not satisfy our standard. Whereas glasses and earplugs may have a covering function, we do not believe that they are commonly regarded as articles of dress. And a respirator obviously falls short on both grounds. The question is whether the time devoted to the putting on and off of these items must be deducted from the noncompensable time. If so, federal judges must be assigned the task of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities during the period in question.

Id. at 879-80. The Court held that the general *de minimis* doctrine did not apply to § 203(*o*), and that even small amounts of time may be subject to bargaining. *Id.* at 880-81. Justice Scalia wrote the decision, which was unanimous except that Justice Sotomayor did not join in footnote

7, which questioned the vitality of the doctrine that exemptions from the FLSA are to be narrowly construed.

2. Informer's Privilege

In re Perez, 749 F.3d 849 (**9th Cir.** 2014), granted the Secretary of Labor's request for a writ of mandamus to the U.S. District Court for the Western District of Washington. The court explained the case and its holding at 850:

> Thomas Perez, the Secretary of the United States Department of Labor, sued the Washington State Department of Social and Health Services ("DSHS"), alleging violations of the Fair Labor Standards Act's overtime and recordkeeping provisions. The Secretary's proof of the alleged violations comes from 400 employees' statements—350 of which he obtained after he had filed suit. Over the Secretary's objection, the district court held that these 350 employees are not informants whose identities are protected from discovery by the government's informants privilege. For this reason, and because it believed DSHS's defense depended upon knowing the identities of the informants, the district court ordered the Secretary to answer three interrogatories that would disclose their identities. To avoid that result, the Secretary petitioned this court for a writ of mandamus. Because we are convinced that the timing of the employees' statements does not affect their status as informants, and because knowledge of the informants' identities will not significantly aid DSHS, we grant the petition.

The court explained its ruling at 856-67:

> DSHS argues that the privilege is an unnecessary investigative tool once litigation has commenced because employees "can be required to come forward and testify via the subpoena process." We reject this argument because it would "take needed flexibility from those charged with the Act's enforcement." . . . One need not be a seasoned litigator to understand that a witness whose assistance is compelled is going to be less helpful than a witness whose assistance is voluntarily given. By being able to offer an employee the protection the informants privilege affords, the Secretary has a better chance at a candid dialog.
>
> Furthermore, the timing of the employee's disclosure is unlikely to temper the reaction of an employer who feels he has been betrayed by his employee. The informants privilege is a particularly effective means of preventing retaliation. *See Does I thru XXIII*, 214 F.3d at 1071 ("[C]omplaining employees are more effectively protected from retaliation by concealing their identities than by relying on the deterrent effect of *post hoc* remedies under the FLSA's anti- retaliation provision...."); *United States v. Hemphill*, 369 F.2d 539, 542 (4th Cir.1966) (describing the FLSA's anti- retaliation provision as an insufficient sanction because "retribution can be subtle and cunning and difficult to prove"); *Wirtz v. Cont'l Fin. & Loan Co. of W. End*, 326 F.2d 561, 563–64 (5th Cir.1964) ("[T]he most effective protection from retaliation is the anonymity of the informer. The pressures which an employer may bring to bear on an employee are difficult to detect and even harder to correct.").

DSHS's promise not to retaliate is similarly insufficient to dispel such fears. A common theme in the employees' statements is that they were told by their immediate supervisors not to request overtime because the funding was not available. Several employees further reported being reprimanded or threatened with discipline when they persisted in requesting or recording overtime. As a practical matter, we are not convinced that DSHS can effectively monitor all 42 supervisors' daily conduct to enforce its promise. Here too an ounce of prevention is worth a pound of cure. Nor is it feasible for an employee to engage in selfhelp, if the only way for an employee to enforce DSHS's promise would be for the employee to engage in litigation. The privilege properly invoked relieves the employees from the prospect of that burden.

(Citation omitted.)

I. National Labor Relations Act

NLRB v. Noel Canning, __ U.S. __, 134 S.Ct. 2550, 2556-57, 189 L.Ed.2d 538, 199 L.R.R.M. (BNA) 3685 (2014), held that the President's recess appointments of three members of the NLRB were unconstitutional. Justice Breyer's opinion for the Court, joined by Justices Kennedy, Ginsburg, Kagan, and Sotomayor, stated the case and its holdings succinctly:

> Ordinarily the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the United States." U.S. Const., Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause.
>
> The first concerns the scope of the words "recess of the Senate." Does that phrase refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.
>
> The second question concerns the scope of the words "vacancies that may happen." Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.
>
> The third question concerns calculation of the length of a "recess." The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "*pro forma* session[s]," with "no business ... transacted," every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923 (2011) (hereinafter 2011 S. J.). In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.
>
> Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3–day recess. Three days is too short a time

to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

Justice Scalia filed an opinion concurring in the judgment, in which the Chief Justice and Justices Thomas and Alito joined.

J. Joint Employers and Successor Liability

Thompson v. Real Estate Mortg. Network, 748 F.3d 142, 150-51 (**3d Cir.** 2014), vacated the district court's dismissal of plaintiff's FLSA and New Jersey-law action, holding that plaintiff adequately alleged that both defendant companies were joint employers under the FLSA, and that the second company was also a successor employer under Federal and State common-law standards. The Federal common-law standard is particularly interesting, and has wide scope. The court stated:

> Thompson urges that, as to her FLSA claim, we apply a federal common law standard for successor liability that has slowly gained traction in the field of labor and employment disputes over the course of almost fifty years. That standard, which presents a lower bar to relief than most state jurisprudence, was designed to "impos[e] liability upon successors beyond the confines of the common law rule when necessary to protect important employment-related policies[,]" *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 94 (3d Cir. 2011), and dictates consideration of only the following factors: "(1) continuity in operations and work force of the successor and predecessor employers; (2) notice to the successor-employer of its predecessor's legal obligation; and (3) ability of the predecessor to provide adequate relief directly." *Brzozowski v. Corr. Physician Servs., Inc.*, 360 F.3d 173, 178 (3d Cir. 2004) (quoting *Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396, 402 (3d Cir. 1999)).
>
> The Supreme Court crafted the federal common law standard in the context of a claim under the Labor Management Relations Act, *see John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548–51, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), and later applied the standard to claims under the National Labor Relations Act. *See Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 181–85, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973). In the past decade we have further extended the federal standard to claims brought under Title VII, *see Brzozowski*, 360 F.3d at 177–79, and ERISA, *see Einhorn*, 632 F.3d at 93–99.
>
> Two of our sister circuits have addressed the merits of this issue and concluded that application of the federal standard to claims under the FLSA is the logical extension of existing case law. *See, e.g., Teed v. Thomas & Betts Power Solutions*, 711 F.3d 763, 765–77 (7th Cir.2013); *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir.1995). We agree. In *Teed*, Judge Posner, writing for the Court of Appeals for the Seventh Circuit, stated the following case for the ongoing vitality of the standard itself and for its applicability to claims under the FLSA:
>
> > The idea behind having a distinct federal standard applicable to federal labor and employment statutes is that these statutes are intended either to foster labor peace, as in the National Labor Relations Act, or to protect workers' rights,

> as in Title VII, and that in either type of case the imposition of successor liability will often be necessary to achieve the statutory goals because the workers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them. This logic extends to suits to enforce the Fair Labor Standards Act. "The FLSA was passed to protect workers' standards of living through the regulation of working conditions. 29 U.S.C. § 202. That fundamental purpose is as fully deserving of protection as the labor peace, anti-discrimination, and worker security policies underlying the NLRA, Title VII, 42 U.S.C. § 1981, ERISA, and MPPAA." *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir.1995). In the absence of successor liability, a violator of the Act could escape liability, or at least make relief much more difficult to obtain, by selling its assets without an assumption of liabilities by the buyer (for such an assumption would reduce the purchase price by imposing a cost on the buyer) and then dissolving. And although it can be argued that imposing successor liability in such a case impedes the operation of the market in companies by increasing the cost to the buyer of a company that may have violated the FLSA, it's not a strong argument. The successor will have been compensated for bearing the liabilities by paying less for the assets it's buying; it will have paid less because the net value of the assets will have been diminished by the associated liabilities.

K. Religious Freedom Restoration Act

Burwell v. Hobby Lobby Stores, Inc., __ **U.S.** __, 134 S.Ct. 2751, 2759-60 (2014), is one of the most hotly-discussed—by which I do not mean intelligently-discussed—decisions of the October 2013 Term. The decision affect the enforcement of any part of what Congress wrote in the Affordable Care Act, but merely an administrative regulation the Department of Health and Human Services chose to adopt under the ACA. The decision did not involve the "contraception mandate" as it is commonly misdescribed; Hobby Lobby provided 16 of the 20 Federally-required forms of contraception and opposed only four Federally-required forms of "contraception," including the "Plan B" day-after pill, that its owners believed resulted in abortions. The case is more accurately described as involving an abortion mandate. Justice Alito's opinion for the 5-4 Court sums up the court's ruling and its limits:

> We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.
>
> In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in

this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the *2760 HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." *Post,* at 2787 (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose "disadvantages ... on others" or that require "the general public [to] pick up the tab." *Post,* at 2787. And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby." *Post,* at 2787.[1] The effect of the HHS-created accommodation on the women

> employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

The Reporter described the breakdown of opinions: "ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to all but Part III–C–1. BREYER AND KAGAN, JJ., filed a dissenting opinion."

Comment of Richard Seymour on the *Hobby Lobby* Decision: The decision is not really very surprising. Congress made the critical value judgments when it passed the Religious Freedom Restoration Act, and the result of this case should have been seen from miles away at the time HHS was developing its regulations. There are so many other ways to accomplish the desired result that it is difficult to see the regulation's choice of forcing employers to provide abortifacients themselves as anything other than officials trying to "put the boot in" to persons who disagreed with them on abortion, making them complicit in an action they abhor. This was unworthy as well as unwise.

L. Integrated Employers

Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 428, 29 A.D. Cases 762 (**6th Cir.** 2014), reversed the grant of summary judgment to defendant on plaintiff's FMLA claims, holding that there were triable issues of fact as to the defendant's coverage under the FMLA. Although defendant never had 50 permanent and temporary employees, plaintiff presented enough evidence to show that it was integrated with another company with more than 500 employees. The court stated:

> Demyanovich has presented evidence from which a reasonable jury could conclude that Cadon and MNP are integrated employers. First, MNP and Cadon share several common managers. Craig Stormer is the Executive Vice President of both . . . . In addition, Randy Allison, who is Vice President of Human Resources for MNP, also functioned as a human resources manager at Cadon: Ensign made the decision to terminate Demyanovich "with some help" from Allison . . . ; Cadon's office manager regularly consulted Allison or his subordinates at MNP regarding employee matters . . . : and Allison represented Cadon management when negotiating the collective bargaining agreement with unionized Cadon employees . . . . Second, the operations of the two entities are interrelated. Although there is no evidence that Cadon and MNP mingle accounts or keep joint financial records . . . they maintain the same registered business address and jointly obtain quality certifications. . . . Moreover, the two entities are engaged in the same business of preparing automotive parts . . . and orders from MNP comprise half of Cadon's business. . . . Third, MNP exercised at least some control over Cadon's labor relations. Cadon employees regularly consulted Allison, MNP's human resources officer, on labor and employment issues. Allison also represented Cadon in negotiating the collective bargaining agreement, suggesting that MNP retained some degree of centralized control over Cadon's employment practices. . . . Finally, the same

> group of investors has owned both MNP and Cadon since 2004. R. 38–6 (Ensign Dep. at 4–5) (Page ID # 884). Thus, Demyanovich has presented sufficient evidence to create a genuine dispute regarding whether Cadon and MNP are an "integrated employer" covered under the FMLA.

(Citations omitted.)

IV. Theories and Proof

A. Direct Evidence

Harper v. Fulton County, 748 F.3d 761, 765 (**7th Cir.** 2014), affirmed the grant of summary judgment to the § 1983 sex discrimination defendant. The court held that plaintiff had not shown "direct evidence" of sex discrimination by relying on testimony about the subjective feelings of female employees that the county management was male-dominated and hostile to women, or that women believed they had to make presentations justifying pay increases to male-dominated, unfriendly entities. The court stated: "'Direct evidence is evidence that would prove discriminatory intent without reliance on inference or presumption.'" (Citations omitted.) The court also held that plaintiff's evidence was insufficient as circumstantial evidence under the direct model, because it was speculative and conclusory and did not lead directly to an inference of sex discrimination.

B. The Inferential Model

1. Qualified Individuals

Olsen v. Capital Region Medical Center, 713 F.3d 1149, 1154-55 (**8th Cir.** 2013), affirmed the grant of summary judgment to the ADA, ADEA, and Missouri Human Rights Act defendant. This case is described in more detail in the section below on disability claims. The court held that plaintiff was not a qualified individual with a disability because of her numerous unpredictable seizures while at work, potentially endangering patients as well as herself. It also concluded that plaintiff could not meet the first element of the prima facie case for ADEA or state-law age bias claims because she was not qualified for the position in question.

2. *Prima Facie* Cases: Standard Model or RIF Model?

Pierson v. Quad/Graphics Printing Corp., 749 F.3d 530 (**6th Cir.** 2014), reversed the grant of summary judgment to the ADEA and Tennessee-law defendant. Plaintiff lost his job in what the employer described as a reduction in force. The court described the traditional prima facie case in ADEA cases at 536-37, and continued: "However, when an employee is terminated as part of a reduction in force, the employee must meet a heightened standard to prove his prima facie case: He must present 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled [him] out ... for discharge for impermissible reasons.'" (Citation omitted.) The court further explained at 537:

> An employer "replaces" a discharged employee when it reassigns an existing employee to assume the discharged employee's duties in a way that "fundamentally change[s] the nature of his employment." *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 522 (6th

> Cir.1997) (concluding that a part-time employee who was promoted to full-time employment effectively replaced a terminated employee because "[t]his type of reassignment is analogous to hiring a new employee to cover the terminated employee's duties"). However, we have consistently found that a "plaintiff's job was simply eliminated" when the plaintiff's "former duties were assumed by [a younger employee], who performed them in addition to his other functions." . . .

(Citations omitted.) The court described plaintiff's evidence that his younger replacement, David DePriest, reduced his activities in his former position and spent the bulk of his time performing the same duties plaintiff had performed. It concluded: "Although it is possible that DePriest continued to perform his former energy-procurement functions from his new Dickson location, a reasonable jury could infer that, because DePriest was physically located in the Dickson facility and traveling less frequently while maintaining the same work hours, he was not able to perform fully all of his existing job functions." *Id.* at 538. The court held that plaintiff had shown a triable issue of fact on whether he was replaced, and the less stringent, normal *prima facie* standard should be used. *Id.* at 539.

Mazzeo v. Color Resolutions Intern., LLC, 746 F.3d 1264, 1271-72, 29 A.D. Cases 757 (**11th Cir.** 2014),, vacated the grant of summary judgment to the ADEA defendant and remanded the case. The district court held that plaintiff was not replaced, and that the RIF model of the *prima facie* case applied, requiring plaintiff to show as the fourth element not that he was replaced, but that there was evidence pointing to age discrimination. The Eleventh Circuit reversed, holding that there was sufficient evidence to create a triable issue on whether plaintiff was replaced. The court stated:

> A plaintiff may demonstrate that he was replaced by showing that, after his termination, some of his former responsibilities were delegated to another employee, in addition to that other employee's own responsibilities. . . . In our view, the district court erred in applying the RIF version of the *prima facie* case to Mr. Mazzeo's claim of age-based discrimination at the summary judgment stage.
>
> The evidence here, viewed in the light most favorable to Mr. Mazzeo, indicates that his position was not eliminated. Shortly after his termination, the responsibilities and sales territory of Mr. Mazzeo were combined together with those of a retiring employee, Ms. Lumpkin. The duties of this consolidated position were no different from those of Mr. Mazzeo's original position, except inasmuch as the consolidated position necessarily encompassed a larger sales territory forged from the two constituent positions. CRI, moreover, hired Mr. Kyzer-a younger individual without any sales experience-shortly after Mr. Mazzeo's termination to assume this consolidated position. A reasonable jury, we think, could find that CRI, in giving Mr. Kyzer this consolidated position, replaced Mr. Mazzeo.
>
> CRI contends that Mr. Kyzer was hired to replace Ms. Lumpkin, not Mr. Mazzeo. That is a permissible reading of the record, but it is not the only reasonable reading of the record when the evidence is viewed in the light most favorable to Mr. Mazzeo. Although, as the district court noted, Mr. Kyzer was hired to work out of Atlanta, he never handled the key CRI client in Atlanta who required a local representative. Moreover, Mr. Boyd's

> deposition testimony suggests that, at the time Mr. Kyzer was hired, CRI informed him that he would be servicing the territory of Ms. Lumpkin as well as the territory formerly serviced by Mr. Mazzeo. Indeed, within his first month of employment at CRI, Mr. Kyzer was accompanying Mr. Boyd to client meetings in Florida, Mr. Mazzeo's former territory, and after that he was traveling to Florida every other week. And following his training period in the summer of 2009, Mr. Kyzer officially assumed responsibility over Mr. Mazzeo's territory, as well as that of Ms. Lumpkin's.

(Citation and footnote omitted.)

3. Pretext

a. Nature of Pretext Inquiry

Hnin v. TOA (USA), LLC, 751 F.3d 499, 506, 122 Fair Empl.Prac.Cas. (BNA) 989 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Title VII national-origin discrimination and State-law defendant. The court stated:

> "The focus of the pretext inquiry is whether the proffered reason is a lie." . . . "An inquiry into pretext requires that we evaluate the honesty of the employer's explanation, rather than its validity or reasonableness." . . . In other words, the "question is not whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reasons it has offered to explain the discharge." . . .

(Citations omitted.)

b. Methods of Showing Pretext

Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 431, 29 A.D. Cases 762 (**6th Cir.** 2014), reversed the grant of summary judgment to defendant on plaintiff's FMLA interference claim. The court stated: "Plaintiffs may show that an employer's proffered reasons for an adverse employment action are pretext for discrimination if the reasons '(1) have no basis in fact; (2) did not actually motivate the action; or (3) were insufficient to warrant the action.'" (Citation omitted.) The court held that defendant had no basis in fact for its explanation that any further absence would result in plaintiff's termination because he had no attendance points left, reasoning that plaintiff had 1.5 points left on February 23 and would have gotten down to zero if he had taken off work on February 24 as he requested, but plaintiff showed adequate evidence that he was fired on February 23 when he asked for February 24 off. Defendant's second explanation, that plaintiff would have been unable to work, also had no basis in fact because defendant did not yet know that plaintiff would have had difficulties.

c. Plaintiff Shows Plausibility of Pretext

Barnett v. PA Consulting Group, Inc., 715 F.3d 354, 360 (**D.C.Cir.** 2013), reversed the grant of summary judgment to the Title VII and ADEA sex and age discrimination defendant. Plaintiff was as high-performing employee laid off in a reduction-in-force when her work group lost substantial money and its employees were transferred or laid off. The court's reversal was based primarily on it analysis of comparators: a younger male employee named Gao was retained

while the older female plaintiff was laid off. The court held that a jury could reasonably find pretext in the defendant's explanations for the disparate treatment:

> PA makes three arguments why Gao's retention could not lead any reasonable jury to find pretext. First, PA points to Kelly's deposition testimony that Gao took a pay cut to stay. Kelly's testimony, however, clashes with record evidence, a document prepared by human resources staff at the firm in early 2003, that suggests Gao's salary remained constant. Whether Gao suffered adverse professional consequences from the restructuring is a classic question of fact for the jury. PA also argues that Gao's practice was marginally more profitable than Barnett's in 2003. But Kelly testified that profitability had nothing to do with Barnett's termination, and there is no evidence in the record to support PA's claim that profitability played any role in the decision to keep Gao.
>
> Finally, PA speculates that Kelly may have offered to split Gao's salary with Rubin because Gao "had transportation experience" but Barnett did not. Appellee's Br. at 57. PA cites Gao's 2002 performance appraisal, which lists several projects Gao worked on that appear to be related to airports and the airline industry. But Miller, the partner who completed Gao's 2002 performance appraisal, also testified that Gao "was very China-focused. He had capabilities in aviation but really very, very small, still in the learning phase." (Emphasis added). Besides, Barnett had similar aviation industry experience. She had worked on a project for Khalifa Airlines, an Algerian carrier. Of course, a jury could choose to credit PA's argument that its partners considered Gao's aviation industry experience to be meaningfully distinguishable from Barnett's. The issue, however, cannot be resolved at summary judgment.

Pierson v. Quad/Graphics Printing Corp., 749 F.3d 530, 540 (**6th Cir.** 2014), reversed the grant of summary judgment to the ADEA and Tennessee-law defendant. Plaintiff lost his job in what the employer described as a reduction in force. The court rejected plaintiff's argument that there was no RIF at the time of his discharge, because this was just the first of a number of terminations. The court rejected plaintiff's argument that the manager who terminated him did not know of this specific RIF at the time he made the decision, because the manager knew that lay-offs were coming. However, the court accepted his third argument based on shifting explanations. "'Shifting justifications over time calls the credibility of those justifications into question. By showing that the defendants' justification for firing him changed over time, [the plaintiff] shows a genuine issue of fact that the defendants' proffered reason was not only false, but that the falsity was a pretext for discrimination.'" (Citation omitted.)

d. <u>The "Honest Belief" Rule</u>

Hnin v. TOA (USA), LLC, 751 F.3d 499, 506, 122 Fair Empl.Prac.Cas. (BNA) 989 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Title VII national-origin discrimination and State-law defendant. Plaintiff was assertedly fired in part for violation of defendant's anti-harassment policy. The court rejected his argument that he was merely teasing a female employee. It stated:

> On appeal, Hnin first argues that there is a genuine dispute for trial whether his conduct toward Brock rose to a level of sexual harassment, thereby, raising the inference that this reason for his termination was dishonest. Hnin contends that he was merely teasing Brock and that his childish teasing was not sexual in nature. Specifically, Hnin asserts that "[t]here is a difference between harassing and objectionable misconduct," and attempts to define what he considers sexual harassment based on case law in which we discuss Title VII hostile work environment claims. These cases do not inform our analysis because TOA's harassment policy—not whether Hnin created a Title VII hostile work environment at TOA—is at issue. In fact, we have previously held that an employer can discharge an employee based on inappropriate conduct not amounting to actionable sexual harassment to avoid future liability. . . . In the same vein, Hnin's argument that Brock never considered his conduct as sexual harassment is equally unavailing. Again, the focus of our pretext determination is TOA's honest belief that Hnin violated its harassment policy. . . .

(Citations omitted.)

Harper v. Fulton County, 748 F.3d 761, 768 (**7th Cir.** 2014), affirmed the grant of summary judgment to the § 1983 sex discrimination defendant. The court held that plaintiff had not shown the defendant's reasons for denying her a pay raise were pretextual. The court stated: "Harper does contend that the testifying Board members were mistaken about a number of the accusations they level against her. But so long as these accusations were sincere, it does not matter whether they were wrong." (Citations omitted.) Plaintiff's effort to explain away some of the criticisms directed at her was also insufficient to show pretext. "Moreover, Harper concedes that many of the accusations were true, but contends that the problems were not (entirely) her fault. . . . However, the fact that some of the criticisms leveled against Harper may not be completely fair does not establish that they are pretextual."

e. No Self-Referential Corroboration

Sharp v. Aker Plant Services, Inc., 726 F.3d 789 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger employee was being retained because he would be able to work for the defendant longer. The lower court had treated this as nondiscriminatory succession planning, and had dismissed the biased statements as stray remarks. The court rejected defendant's argument that the declarant was not the decisonmaker, because he made the recommendations, he was the only person who knew the employees in question, and his recommendations were followed. *Id.* at 797. The court then held that the remarks were direct evidence of age discrimination, and ended by stating: "If there ever was a window into the mind of an employment decisionmaker, that was it." *Id.* at 799. The court held that plaintiff's markedly lower performance evaluations were not a nondiscriminatory reason that could be adopted on summary judgment:

> Aker also relies on Sharp's performance evaluations to establish his inferior capabilities. However, those performance evaluations were completed by Hudson, and the value of his opinion is undermined by his comments ascribing his decision to Sharp's age. *Grano v. Dep't of Dev. of City of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983)

("Courts have frequently noted that subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination.").

The court looked at defendant's "poor performer" explanation and found there was adequate evidence that the company knew it was untrue. It stated at 801-02:

> Aker also argues that it would have made the same decision to discharge Sharp absent an impermissible motive because Sharp was an inferior performer compared to Kirkpatrick. Perhaps, but the jury should decide that question. Although Aker has offered evidence that supports its argument, a genuine issue of material fact exists as to whether Sharp was an inferior employee. For instance, Aker argues that Sharp submitted nothing more than his subjective view of his own qualifications. That misstates the record. Sharp offered two critical pieces of evidence: Hudson's and Ash's letter of recommendation and the transcript of Hudson's conversation.
>
> Hudson's and Ash's letter of recommendation states that Sharp "performed all the tasks given him at a high level," "ha[d] shown his ability to communicate with our client and his peers," and was "aware of details and [strove] for an error free construction project." Although not a glowing recommendation, it is enough to establish that Sharp was a competent worker.

4. <u>Causation</u>

Leal v. McHugh, 731 F.3d 405, 415, 120 Fair Empl.Prac.Cas. (BNA) 44 (**5th Cir.** 2013), affirmed in part and reversed in part the grant of defendant's motion to dismiss against the ADEA and retaliation plaintiffs. The court held that the lower court erred in conflating allegations of "but-for" causation as one of defendants' motivations and the forbidden "motivating factor" approach. The court stated:

> By dismissing Appellants' complaint on the basis that they "have asserted a mixed-motive case, which is prohibited," the district court misread *Gross*, since "but-for cause" does not mean "sole cause." *See* Black's Law Dictionary 250 (9th ed.2009) (defining "but-for cause" as "[t]he cause without which the event could not have occurred—[a]lso termed *actual cause; cause in fact; factual cause* "); *id.* (defining "sole cause," in relevant part, as "[t]he only cause that, from a legal viewpoint, produces an event or injury"); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1278 (10th Cir. 2010) (holding that *Gross* does not place "a heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action"). In *Jones*, the Tenth Circuit rejected the employer's argument that, under *Gross*, "'age must have been the only factor' in the employer's decision-making process." *Id.* at 1277. The Tenth Circuit reasoned instead that "an employer may be liable under the ADEA if other factors contributed to its taking the adverse action, as long as 'age was the factor that made a difference.'" *Id.* at 1277 (citations omitted). We find the reasoning of *Jones* persuasive. Even Appellee's brief here asserts, "*Gross* and its progeny concern a plaintiff's ultimate proof burden in ADEA claims, *not the pleading burden.*" (emphasis added). Thus, Appellants need not plead that age was the *sole* cause of their injury to survive a motion to dismiss.

(Footnotes omitted.)

C. Constructive Discharge

Laster v. City of Kalamazoo, 746 F.3d 714, 727-28, 121 Fair Empl.Prac.Cas. (BNA) 1734 (**6th Cir.** 2014), affirmed in part and reversed in part the grant of summary judgment to the Title VII and Michigan Civil Rights Act defendant. The court stated the elements of a constructive-discharge claim:

> "A constructive discharge occurs when the employer, rather than acting directly, 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'" . . . To demonstrate a constructive discharge, Plaintiff must adduce evidence to show that 1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person, and 2) the employer did so with the intention of forcing the employee to quit. . . .
>
> In . . . we formally adopted the Fifth Circuit's approach to determining whether the first prong of the constructive discharge inquiry has been met, counseling that:
>
> > Whether a reasonable person would have [felt] compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.
>
> . . . (quoting *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir.2000)).

The court held that plaintiff had not shown enough evidence to show that defendant deliberately tried to get him to quit. Plaintiff actually resigned because of bad information, but an inadvertent error was responsible for the error. Nevertheless, the court agreed with the Seventh Circuit that there was an additional way to show a constructive discharge: "In other words, constructive discharge also occurs where, based on an employer's actions, 'the handwriting was on the wall and the axe was about to fall.'" *Id.* at 728 (citations omitted). The court held that plaintiff could not meet this standard either, because the employee who told him of the statements he had heard had no involvement with the decision and made clear he was guessing.

Ames v. Nationwide Mut. Ins. Co., 747 F.3d 509, 121 Fair Empl.Prac. Cas. (BNA) 1729 (**8th Cir.** 2014), affirmed the grant of summary judgment to the constructive discharge defendant. The court stated at 512-13:

> "To prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." . . . "In addition, an employee must give her employer a reasonable opportunity to resolve a problem before quitting." . . . "Evidence of the employer's intent can be proven

'through direct evidence or through evidence that the employer could have reasonably foreseen that the employee would quit as a result of its actions.'" . . .

(Citations omitted.) The court held that defendant's efforts to accommodate plaintiff negated any intention to make her quit. Moreover, the court held that plaintiff failed to give the defendant a reasonable opportunity to resolve her problems. The court stated at 514: "By not attempting to return to Hallberg's office to determine the availability of a wellness room or to contact human resources, Ames acted unreasonably and failed to provide Nationwide with the necessary opportunity to remedy the problem she was experiencing. We thus conclude that Ames has not met her burden of demonstrating constructive discharge." The court refused to adopt the alternative approach used in the Seventh Circuit.

D. Retaliation

1. Causation

Burrage v. United States, __ **U.S.** __, 134 S.Ct. 881, 888-90 (2014), a criminal case, held that but-for causation does not require that the cause in question be the sole cause. It relied on and construed recent employment discrimination cases involving the causation standard:

> Where there is no textual or contextual indication to the contrary, courts regularly read phrases like "results from" to require but-for causality. Our interpretation of statutes that prohibit adverse employment action "because of" an employee's age or complaints about unlawful workplace discrimination is instructive. Last Term, we addressed Title VII's antiretaliation provision, which states in part:
>
> "It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a) (2006 ed.) (emphasis added).
>
> Given the ordinary meaning of the word "because," we held that § 2000e–3(a) "require[s] proof that the desire to retaliate was [a] but-for cause of the challenged employment action." *Nassar*, *supra*, at ——, 133 S.Ct., at 2528. The same result obtained in an earlier case interpreting a provision in the Age Discrimination in Employment Act that makes it "unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Relying on dictionary definitions of "[t]he words 'because of' "—which resemble the definition of "results from" recited above—we held that "[t]o establish a disparate-treatment claim under the plain language of [§ 623(a)(1)] ... a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). FN4
>
> FN4. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), is not to the contrary. The three opinions of six Justices in that case did not

eliminate the but-for-cause requirement imposed by the "because of" provision of 42 U.S.C. § 2000e–2(a), but allowed a showing that discrimination was a "motivating" or "substantial" factor to shift the burden of persuasion to the employer to establish the absence of but-for cause. See *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. ——, ——, 133 S.Ct. 2517, 2525–2527, 186 L.Ed.2d 503 (2013). Congress later amended the statute to dispense with but-for causality. Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)).

Our insistence on but-for causality has not been restricted to statutes using the term "because of." We have, for instance, observed that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship," *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007), and that "the phrase, 'by reason of,' requires at least a showing of 'but for' causation," *Gross*, *supra*, at 176, 129 S.Ct. 2343 (citing *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 653–654, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008)). See also *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 265–268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (explaining that a statute permitting recovery for injuries suffered " 'by reason of' " the defendant's unlawful conduct "require[s] a showing that the defendant's violation ... was," among other things, "a 'but for' cause of his injury"). . . .

In sum, it is one of the traditional background principles "against which Congress legislate[s]," *Nassar*, 570 U.S., at ——, 133 S.Ct., at 2525, that a phrase such as "results from" imposes a requirement of but-for causation. The Government argues, however, that distinctive problems associated with drug overdoses counsel in favor of dispensing with the usual but-for causation requirement. Addicts often take drugs in combination, as Banka did in this case, and according to the National Center for Injury Prevention and Control, at least 46 percent of overdose deaths in 2010 involved more than one drug. See Brief for United States 28–29. This consideration leads the Government to urge an interpretation of "results from" under which use of a drug distributed by the defendant need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force (such as mixed-drug intoxication) that is itself a but-for cause of death.

a. Intervening Cause

Vaughn v. Vilsack, 715 F.3d 1001, 1008 (**7th Cir.** 2013), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that adverse actions against plaintiff shortly after he settled his discrimination claims were actually caused by the settlement the defendant had just reached with the female employee who had filed repeated sexual harassment claims against plaintiff, obtained a state-court injunction against him for his admitted stalking and repeated compulsive contacting her.

b. Temporal Proximity

Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 25-26 (**1st Cir.** 2014), reversed the district court's rejection of plaintiff's retaliation claim because of what it viewed as

an excessively long five-month delay between her protected activity and her termination. The Court of Appeals stated:

> The district court also erred when it found Garayalde–Rijos's pleadings inadequate due to its view that alleged causation for retaliation must be deemed implausible based solely on a five-month period between the protected conduct and adverse employment action. Specifically, the court concluded that Garayalde–Rijos could not rely on "temporal proximity" to "establish causation" because the five-month gap between the November 1, 2010 filing of the EEOC complaint and April 1, 2011, when the alleged post-hire retaliation started, was too long. However, "temporal proximity" is merely one factor relevant to causation and usually only later in the proceedings, for example at summary judgment. . . . We do not rule out that some pleadings may allege a temporal gap so attenuated as not to meet the plausibility standard for surviving motions to dismiss, but this case is a far cry from that.
>
> Beyond that, the temporal analysis here is flawed. The court's rote evaluation of the time lag failed to read Garayalde–Rijos's complaint holistically and ignored relevant context. . . . In fact, the post-hire adverse treatment occurred only weeks after the EEOC finding and the decision to hire her.
>
> A more common-sense, plausible reading of Garayalde–Rijos's complaint is that the post-hire mistreatment was in retaliation for Garayalde–Rijos's pre-hire EEOC complaint of sex discrimination. Garayalde–Rijos alleged facts that suggest: (1) Carolina reluctantly hired her only after the EEOC had determined that Garayalde–Rijos's complaint of sex discrimination was likely meritorious; and (2) as soon as Garayalde–Rijos started working, Carolina treated her unequally compared to her male counterparts and in a way that risked her safety. The district court erred in ignoring Garayalde–Rijos's allegations of pre-hire discrimination, which set the stage for the plausibility of her post-hire retaliation claim. Indeed, since the hiring date was in the control of Carolina, the district court's analysis threatens to reward defendants who continue to practice discrimination in hiring and then engage in post-hiring retaliation.

Comment on *Garayalde-Rijos v. Municipality of Carolina*: The take-aways from this case are that (a) temporal proximity must be viewed in conjunction with other evidence; (b) events after the original protected activity may establish a much shorter period of temporal proximity, (c) lack of temporal proximity is not a defense to a retaliation claim where there is other evidence of causation; and (d) lack of temporal proximity is generally a factor to be applied on summary judgment, and not on the pleadings.

Hnin v. TOA (USA), LLC, 751 F.3d 499, 508, 122 Fair Empl.Prac.Cas. (BNA) 989 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Title VII retaliation and State-law defendant. After rejecting all of plaintiff's other evidence of causation, the court stated: "Under most circumstances, suspicious timing alone does not create a triable issue on causation . . . and the twelve months between Hnin's complaints and his termination is certainly not close enough in time to establish causation without more evidence supporting an inference of a causal link between the two events. . . ." (Citations omitted.)

E. Disparate Impact

Adams v. City of Indianapolis, 742 F.3d 720, 733, 121 Fair Empl.Prac.Cas. (BNA) 948 (**7th Cir.** 2014), affirmed the dismissal of the Title VII plaintiffs' claim of disparate impact in the promotional examinations for police officers and firefighters. The court stated:

> The plaintiffs' EEOC charges were adequate to exhaust administrative remedies, but the amended complaint must satisfy the *Twombly*/*Iqbal* plausibility standard. For all its heft, the amended complaint alludes to disparate impact in wholly conclusory terms. In several places the complaint uses the words "disproportionate" and "impermissible impact" and other synonyms, but those are bare legal conclusions, not facts. We reiterate that "[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim for relief. Iqbal, 556 U.S. at 678, 129 S.Ct. 1937. Moreover, "[t]his is a complex discrimination claim, and we have observed that under Iqbal and *Twombly*, '[t]he required level of factual specificity rises with the complexity of the claim.'" *McReynolds*, 694 F.3d at 887 (quoting *McCauley v. City of Chicago*, 671 F.3d 611, 616–17 (7th Cir.2011)).

The court went on to say that plaintiffs in disparate-impact cases either had to specify the component of the process they were attacking or show that the components could not be separated for analysis. Plaintiffs had done neither. It continued:

> The far more serious problem is the complete lack of factual content directed at disparate-impact liability. There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole. There are no allegations about the racial makeup of the relevant workforce in the Indianapolis metropolitan area or the supervisory ranks in the police and fire departments. There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance in the ranks of sergeant, lieutenant, or captain in the police department or battalion chief, lieutenant, or captain in the fire department.
>
> Disparate-impact plaintiffs are permitted to rely on a variety of statistical methods and comparisons to support their claims. At the pleading stage, some basic allegations of this sort will suffice. But the amended complaint contains no allegations of the kind, nor any other factual material to move the disparate-impact claims over the plausibility threshold. Accordingly, these claims were properly dismissed on the pleadings.

V. Types of Evidence to Prove or Rebut Discrimination

A. Comparators

1. Standards for Comparators

Cung Hnin v. TOA (USA), LLC, 751 F.3d 499, 504, 122 Fair Empl.Prac.Cas. (BNA) 989 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Title VII national-origin discrimination and State-law defendant. The court stated the standard for proper comparators:

> A similarly situated employee must be directly comparable to the plaintiff in all material respects, which is a common-sense, flexible analysis of relevant factors. . . . These relevant factors often include whether the employees "had the same supervisor, were subject to the same employment standards, and engaged in similar conduct." . . . Although the similarly situated inquiry is not a mechanical comparison, it requires enough common factors to determine if intentional discrimination was at play. . . . In other words, "the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination." . . .

(Citations omitted.)

2. Refusing Discovery and Granting Motion in Limine as to Comparators

Rorrer v. City of Stow, 743 F.3d 1025, 1048-49, 29 A.D. Cases 447 (**6th Cir.** 2014) (Bernice Donald, J.), affirmed in part and reversed in part the grant of summary judgment to the First Amendment, ADA, and Ohio-law defendants. Plaintiff was a firefighter who permanently lost the vision in his right eye in a non-work-related accident. Defendants refused to reinstate him as a firefighter or to transfer him to a disputed fire inspector position on the ground that an essential function of the job was to drive an emergency vehicle with emergency lights, and plaintiff could not perform the job with monocular vision. Plaintiff sought discovery as to two other firefighters with monocular vision who had been allowed to keep their jobs. The district court held that that would result in the defendants needing to discover information about the impairments of the other firefighters, resulting in undue burden. The court affirmed.

Comment on *Rorrer v. City of Stow*: This stands out in an otherwise closely-reasoned decision. It is not clear why discovery into anyone else's impairments would have been required by either side. The question is not what the other firefighters' medical status was; it is what the defendants knew about their medical status at the time. Only the defendants' records are relevant.

3. Adequate Comparators

Barnett v. PA Consulting Group, Inc., 715 F.3d 354, 359 (**D.C.Cir.** 2013), reversed the grant of summary judgment to the Title VII and ADEA sex and age discrimination defendant. Plaintiff was a high-performing employee laid off in a reduction-in-force when her work group lost substantial money and its employees were transferred or laid off. The court's reversal was based primarily on its analysis of comparators:

> Of course, we are conscious that a court must not act as "a super-personnel department that reexamines an entity's business decisions[.]" . . . PA was entitled to restructure the Transportation Group to return it to profitability and to fire people to do so. PA was also entitled to fire Barnett if Kelly believed that her consulting practice did not "fit" within the restructured Group. But there is evidence in the record from which a reasonable jury could conclude that lack of "fit" was not why PA fired Barnett, and that

> unlawful discrimination was. Summary judgment is inappropriate where, as here, the most significant disputes between the parties are factual in nature. . . .
>
> The most important factual dispute is why PA fired the fifty-seven year-old female, Barnett, but retained the forty-one year-old male, Gao. Different outcomes for Barnett and Gao matter because in nearly all respects material to PA's explanation, Gao was similarly situated to Barnett. The most significant differences between the two are that Gao is male and younger than Barnett. Those are differences a jury should be allowed to consider.
>
> The record is replete with evidence that PA partners, including Kelly, believed that Gao's consulting practice did not "fit" in the Transportation Group. In the September 30 chart created by Miller and Kelly, both Barnett and Gao received two check marks out of a possible three in the "Skill and Capability" rating. Each also received an accompanying notation: "Trade" in Barnett's case, and "China" in Gao's. According to Miller, these ratings meant that Barnett and Gao both had strong skills in their respective areas of expertise – trade and China – but that neither was likely to make meaningful contributions to the Group's focus on the aviation industry.

(Citations omitted.) The court then focused on the fact that the defendant tilted towards the younger male employee in accommodating his retention, but failed to do the same for plaintiff:

> There is further evidence that could lead a jury to believe that Kelly thought Gao no longer "fit" within the Transportation Group. Miller testified that he had the "same discussion" with Kelly about Gao as he did about Barnett, and that Kelly was "pretty much of the mind that [Barnett and Gao] were going to move" out of his group. But Kelly worked out an accommodation with Rubin to split Gao's time and salary "50-50" between their practice groups. By contrast, no one proposed splitting Barnett's salary or making any similar arrangement to keep her at PA. And there is no evidence that China, Gao's niche, would be part of the Transportation Group's focus going forward. To the contrary, the decision to close the Beijing office is evidence that PA had decided to reduce the Group's China operations.

Id. The court also gave weight to evidence suggesting that plaintiff was targeted for layoff and her comparator was not:

> According to Miller, Kelly was "very clear that he wanted to make sure [Barnett] was out of the practice." If "fit" in the Transportation Group was the sole motivating factor in Barnett's firing, a jury could reasonably question why Kelly was not similarly adamant that Gao leave the group entirely. At the very least, the efforts Kelly took to keep Gao at PA could raise a reasonable inference that "fit" was not the sole reason Barnett lost her job, and that PA partners found a way to keep a younger male consultant at the firm whose practice did not fit neatly into its new plans.

Id. See also the discussion of this case under "Pretext" below.

Baker v. Macon Resources, Inc., 750 F.3d 674, 122 Fair Empl.Prac.Cas. (BNA) 789 (**7th Cir.** 2014) (*per curiam*), reversed the grant of summary judgment to the ADEA defendant. The

court rejected the defendant's efforts to distinguish its light treatment of a younger co-worker from its harsh treatment of plaintiff and another older employee. The court found that a jury could reasonably infer pretext from the employer's distinction, because both sets of misconduct were violations of the same policy, the policy did not distinguish among violations, and the decisionmaker admitted in his deposition that the younger employee's conduct was regarded as serious. The court stated at 676: "Whether employees engaged in misconduct of comparable seriousness is an objective question. *Coleman v. Donahoe*, 667 F.3d 835, 851–52 & n. 4 (7th Cir. 2012); *Eaton v. Ind. Dep't of Corr.*, 657 F.3d 551, 556–58 (7th Cir. 2011)." The court discussed prior cases overriding employers' attempted distinctions and finding employees comparable:

> See *Coleman*, 667 F.3d at 851 (plaintiff who had "thoughts" about killing her boss was comparable to employees who threatened other employee with knife); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 406 (7th Cir. 2007) (two employees who left safe unlocked against policy were comparable even though one did so at night and other during business hours); *Ezell v. Potter*, 400 F.3d 1041, 1049–50 (7th Cir. 2005) (mail carrier who took extended lunch break similarly situated to carrier who lost certified mail); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 580–81 (7th Cir. 2003) (plaintiff who broke confidentiality policy and employee who was insubordinate in refusing to answer questions about confidentiality violations were materially similar).

Id. at 677. The court held that "a jury may reasonably infer pretext from flagrant inaccuracies or inconsistencies in an employer's proffered reason for an employment decision." *Id.* (citations omitted). The court continued:

> Here, the director's asserted reliance on Cross not "witnessing" abuse to justify his lenient treatment of her is inconsistent with the policy that he invokes, the Inspector General's Report on which he relies, and his other testimony. The director testified that when he decided on discipline he relied on the company's reporting policy and the Inspector General's report. The company's policy requires that staff must report abuse, not only when they "witness" it, but equally when they have "reason to believe" or have been "told of" it. And from the Inspector General's report, the director knew that Cross had both reason to believe and was told that Carter sexually abused a resident: It recounts that Cross suspected Carter of abuse, that she saw the resident point to his genitals and then gesture toward Carter, and that Carter said that he "pulled it." Even if the director believed that Cross's suspicions were as weak as a mere rumor, he also testified that a failure to report "even rumors" is a "serious offense." Construing this evidence in Baker's favor, we conclude that the record allows an inference that the director viewed Cross's silence about her suspicions of Carter's sexual abuse as an offense just as serious as Baker's. . . .

Id. The court continued:

> Second, selective enforcement or investigation of a disciplinary policy can also show pretext . . . and the record contains evidence of that, too. The manager who oversaw Baker's disciplinary meeting learned that she told her supervisors about the flicking. But the company has never investigated those supervisors for their inaction. Nor has it offered

> a reason why, at the same time it fired Baker for failing to report the flicking, it chose not to investigate whether her own supervisors violated the same reporting rule. Instead, the director merely notes that because he is four years older than Baker, an inference of discrimination is implausible. But the Supreme Court has held that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." . . . Any inferences about the director's motivations here are for the trier of fact.

Id. at 677-78 (citations omitted).

4. Inadequate Comparators

Hnin v. TOA (USA), LLC, 751 F.3d 499, 505, 122 Fair Empl.Prac.Cas. (BNA) 989 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Title VII national-origin discrimination and State-law defendant. The court held that the one-day difference in termination between plaintiff (fired on the date of a sexual harassment investigation) and one of his four proposed comparators (fired the day after a sexual harassment investigation) was too inconsequential for the comparison to be probative of discrimination. "This one day discrepancy, however, is a distinction without a difference and does not suggest more favorable treatment or raise a reasonable inference that unlawful discrimination was at play." The court rejected plaintiff's other comparators, who were given warnings before they were fired, because none of them involved allegations of sexual harassment. One involved angry outbursts and yelling at a female employee; one involved physically threatening another employee, and one involved striking another employee and pulling on his shirt. *Id.* at 505-06.

5. Defense Comparators

Reid v. Neighborhood Assistance Corp. of America, 749 F.3d 581, 37 IER Cases 1721, 22 Wage & Hour Cas.2d (BNA) 488 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Illinois-law retaliation defendant based in substantial part on the defendant's reliance on comparators who had engaged in the same protected conduct but were not fired. The court stated:

> Turning to the record as a whole, an inference of retaliatory intent becomes even more unreasonable. Almost everyone in the office, not just the plaintiffs, complained about the same issues—wages and commission-splitting—but the others were not fired. However, someone was fired simultaneously with Reid and Sears, Mariola Jasinska, but there is no specific evidence that she had made similar complaints (only the vague statements that "everyone complained")."

Id. at 589.

B. Discriminatory Statements

1. An Intent to "Get" the Plaintiff

Willis v. Cleco Corp., 749 F.3d 314, 318, 122 Fair Empl.Prac.Cas. (BNA) 513 (**5th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the Title

VII and § 1981 racial discrimination defendant. Plaintiff was a Senior Human Relations official and reported a racist comment about African-American students and employees made to his second-level supervisor, Melancon, and subsequently ran into problems at work culminating in his termination for what appeared to be sufficient reasons. The court held that plaintiff showed evidence of a statement establishing a reasonable dispute of material fact as to pretext:

> Willis claims that the Disciplinary Warning was issued in retaliation for his reporting of Cooper's racially hostile statements. Cleco asserts that the warning issued because Willis demonstrated a "lack of good judgment" and a "lack of respect for others" when he sent the mass email disclosing that his co-worker son overdosed on pills. But Willis has proffered summary judgment evidence sufficient to show a genuine dispute of material fact about whether these stated reasons are pretext for an underlying retaliatory motive. Specifically, Willis references an affidavit from Jerome C. Ardoin, Jr. ("Ardoin"), another Cleco employee, in which Ardoin explains that Melancon, Taylor's direct supervisor in the Human Resources department, told him that he was "very pissed" with Willis for reporting the conversation with Cooper. Moreover, Ardoin's affidavit claims that Melancon stated: "If we have to find a reason, Ed [Taylor] and I have decided; we are going to terminate that n***** Greg Willis for reporting me and trying to burn my ass."

Id. (asterisks inserted in place of full word).

2. RIF Spreadsheets Listing Age

Barnett v. PA Consulting Group, Inc., 715 F.3d 354, 360-61 (**D.C.Cir.** 2013), reversed the grant of summary judgment to the Title VII and ADEA sex and age discrimination defendant. Plaintiff was a high-performing employee laid off in a reduction-in-force when her work group lost substantial money and its employees were transferred or laid off. The court relied in part on the fact that an internal audit team created a spreadsheet for the purpose of the layoff that listed the ages of employees. The court stated:

> . . . Barnett points to a spreadsheet produced by COO Tindale's secretary in February 2003 for Tindale and CEO Moynihan in advance of the first meeting they convened about the Group. The spreadsheet includes comments from the authors of the internal audit about the productivity of each employee in the Group. The spreadsheet also reports the age of each employee, including Barnett.
>
> Neither Moynihan nor Tindale could recall why ages were part of the spreadsheet, and PA asserts that there is no evidence of a link between the spreadsheet and Barnett's firing. Kelly testified that he did not see the spreadsheet and made the decision to fire Barnett on his own, without any prodding from Moynihan or Tindale. The district court determined the spreadsheet "irrelevant" to Barnett's discrimination claims, because "Kelly, alone, made the decision to terminate Ms. Barnett," and credited Kelly's testimony that his decision to fire Barnett was not influenced by Moynihan and Tindale. . . .

> The district court was too quick to resolve this issue in PA's favor. A reasonable jury could find the spreadsheet to be probative of discrimination, because the jury might infer that PA's leadership included age as a factor in its personnel decisions. A jury could likewise refuse to credit Kelly's testimony that he did not consult with Moynihan and Tindale on firing decisions in October 2003, given evidence that PA's CEO and COO led meetings discussing which Transportation Group employees to fire only a few weeks before.
>
> Of course, a reasonable jury could draw the inference that including ages in the spreadsheet was a one-off case of mistaken initiative by the secretary. But so could it reasonably infer that Moynihan and Tindale wanted ages in the spreadsheet to help PA leadership decide whom to fire and whom to keep. Barnett was entitled to all reasonable inferences in her favor to be drawn from the record evidence. . . . By resolving these fact-bound questions in PA's favor, the district court committed error.

(Citations omitted,)

3. Statements Showing Bias

Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 432, 29 A.D. Cases 762 (**6th Cir.** 2014), reversed the grant of summary judgment to defendant on plaintiff's FMLA retaliation claim. The court held that plaintiff's direct supervisor "referred to Demyanovich as a 'liability' immediately after Demyanovich requested FMLA leave." That supervisor made the decision to fire plaintiff the same evening. The court stated that this evidence, in combination with the fact that defendant had no factual basis for its explanations, was sufficient direct evidence of retaliation to survive summary judgment.

Sharp v. Aker Plant Services, Inc., 726 F.3d 789 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger employee was being retained because he would be able to work for the defendant longer. The lower court had treated this as nondiscriminatory succession planning, and had dismissed the biased statements as stray remarks. The court rejected defendant's argument that the declarant was not the decisonmaker, because he made the recommendations, he was the only person who knew the employees in question, and his recommendations were followed. Therefore, he was the decisionmaker:

> The crux of the plaintiff's case necessarily focuses on the conduct of his supervisor, Mike Hudson. The defendant argues that Hudson was not a decision maker because others in the organization ultimately executed the terminations, Hudson was on medical leave at the time, and therefore Hudson's comments cannot be viewed as anything other than stray remarks that have no bearing on Aker's motivation.

Id. at 797. The court then held that the remarks were direct evidence of age discrimination, and ended by stating: "If there ever was a window into the mind of an employment decisionmaker, that was it."

Aker argues that even if it is saddled with Hudson's comments, those comments do not constitute direct evidence that age was the but-for factor in the decision to fire Sharp. We cannot agree. "Direct evidence of discrimination is that evidence which, if believed, requires the conclusion that unlawful discrimination was [the] motivating factor in the employer's actions." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (en banc) (internal quotation marks omitted). "It does not require the fact finder to draw any inferences to reach that conclusion." *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir. 2006) (citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

"In assessing the relevancy of a discriminatory remark, we look first at the identity of the speaker." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir. 1998). Discriminatory remarks by decision makers and those who significantly influence the decisionmaking process can constitute direct evidence of discrimination. *Bartlett v. Gates*, 421 F. App'x 485, 489 (6th Cir. 2010); *DiCarlo v. Potter*, 358 F.3d 408, 417 (6th Cir. 2004); *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 550 (6th Cir. 2004). But "'only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age,' satisfy this criteria." *Scott v. Potter*, 182 F. App'x 521, 526 (6th Cir. 2006) (quoting *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989)). "[T]o prevail on direct evidence at the summary judgment stage, it seems that plaintiffs must prove 'by a preponderance of the evidence . . . that age was the "but-for" cause of the challenged employer decision.'" *Bartlett*, 421 F.App'x at 488-89 (quoting *Geiger v. Tower Auto.*, 579 F.3d 614, 621 (6th Cir. 2009)). Aker contends that Hudson's tape-recorded remarks do not constitute direct evidence of age discrimination because they were stray remarks that were unrelated to the decisionmaking process. It is true that "general, vague, or ambiguous comments do not constitute direct evidence of discrimination because such remarks require a factfinder to draw further inferences to support a finding of discriminatory animus." *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 708 (6th Cir. 2008) (citing *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 524-25 (6th Cir. 2007) (evidence that supervisor removed employee from account because he was "too old" did not constitute direct evidence of age discrimination because it was not related to his termination), *overruled on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.4 (2009)); *Rowan*, 360 F.3d at 548-49 (employer's nebulous remarks about general need to lower average age of workforce and stray comment that "the older people should go, bring in some new blood," made years before employees' termination, were not direct evidence of unlawful age bias)). However, Hudson's comments were not so vague, general, or ambiguous as to qualify as stray comments. To the contrary, Hudson's remarks were offered to explain the very decision at the heart of this lawsuit. They specifically described Hudson's — and Aker's — rationale in choosing which employees to fire and which to retain. *See Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 755 (6th Cir. 2012) (holding that a supervisor's statement, "I did not want [plaintiff] volunteering for additional military duty when he was needed at UPS," was sufficient direct proof of anti-military animus under Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(c)(1)).

> Aker also challenges the connection between Hudson's comments and the adverse employment action, making much of the fact that the tape-recorded conversation occurred after the layoff decision and after Sharp had been notified. Aker's argument ignores the fact that Atkins and Dellinger relied solely on Hudson's input when they decided which employees to let go. Hudson's comments were a retrospective description of the decision-making process thatled to the terminations. They were both "temporally [and] topically related" to the decision to choose Sharp to lay off. *See Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 725 (6th Cir. 2012). If we are to take Hudson at his word, he kept the younger Kirkpatrick and fired the older Sharp because Sharp was "of the same age [as Hudson] and we're all going to retire and I had an opportunity to bring the next generation[] in, so that's what we decided to do." If there ever was a window into the mind of an employment decision maker, that was it.

The court held that plaintiff's markedly lower performance evaluations were not a nondiscriminatory reason that could be adopted on summary judgment:

> Aker also relies on Sharp's performance evaluations to establish his inferior capabilities. However, those performance evaluations were completed by Hudson, and the value of his opinion is undermined by his comments ascribing his decision to Sharp's age. *Grano v. Dep't of Dev. of City of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983) ("Courts have frequently noted that subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination.").

The court looked at defendant's "poor performer" explanation and found there was adequate evidence that the company knew it was untrue. (Side note: Pretext, of course, ALWAYS requires proof of untruthfulness or reckless disregard for the truth; good-faith mistakes are a defense.) The court stated:

> Aker also argues that it would have made the same decision to discharge Sharp absent an impermissible motive because Sharp was an inferior performer compared to Kirkpatrick. Perhaps, but the jury should decide that question. Although Aker has offered evidence that supports its argument, a genuine issue of material fact exists as to whether Sharp was an inferior employee. For instance, Aker argues that Sharp submitted nothing more than his subjective view of his own qualifications. That misstates the record. Sharp offered two critical pieces of evidence: Hudson's and Ash's letter of recommendation and the transcript of Hudson's conversation.
>
> Hudson's and Ash's letter of recommendation states that Sharp "performed all the tasks given him at a high level," "ha[d] shown his ability to communicate with our client and his peers," and was "aware of details and [strove] for an error free construction project." Although not a glowing recommendation, it is enough to establish that Sharp was a competent worker.

4. Backlash: Defendant's Explanation Can Itself Be Direct Evidence

Sharp v. Aker Plant Services, Inc., 726 F.3d 789 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger employee was being retained because he would be able to work for the defendant longer. The lower court had treated this as nondiscriminatory succession planning, and had dismissed the biased statements as stray remarks. The court then held that the remarks were direct evidence of age discrimination, and ended by stating: "If there ever was a window into the mind of an employment decisionmaker, that was it." *Id.* at 799. The court held that defendant' effort to avoid the effect of the biased statement was itself direct evidence of discrimination:

> Aker also argues that Sharp acknowledged, and Hudson agreed, that Hudson's comments could apply to anyone because a younger individual could leave at any time. Assuming that is true, potential longevity is no measuring stick at all. It simply becomes another way to "artfully" say: "We've chosen the younger candidate because, well, he is younger." That constitutes direct evidence that age was the reason for terminating Sharp, and summary judgment in favor of Aker should not have been granted.

Id., at 801.

C. Harassment

1. After *Vance*, Who is a Supervisor?

a. Actual Authority

Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726, 121 Fair Empl.Prac.Cas. (BNA) 1329 (**10th Cir.** 2014) (Seymour, J.), reversed the grant of summary judgment to the Title VII sexual harassment defendant County. The lower court had found that the alleged harasser and alleged rapist, Sergeant Benson, was not a supervisor because he did not have power to hire and fire plaintiff, and she could not reasonably have believed he had such power. The court of appeals reversed on this point, holding that Vance and other Supreme Court precedent recognized persons with substantial authority to make recommendations as to personnel actions to be regarded as supervisors. It stated:

> In sum, if Sergeant Benson had or appeared to have the power to take or substantially influence tangible employment actions and used the threat of taking such actions to subject Ms. Kramer to a hostile work environment, then the County is vicariously liable for his severe or pervasive sexual harassment, subject to the *Faragher/Ellerth* affirmative defense. *See Vance*, 133 S.Ct. at 2448. Viewing the record evidence in the light most favorable to Ms. Kramer, we have determined there are fact questions as to whether Sergeant Benson had the power to recommend and influence tangible employment actions against Ms. Kramer, and whether under apparent authority principles Ms. Kramer was reasonable in believing Sergeant Benson had such powers even if he in fact did not. In the following subsections, we do not consider whether Sergeant Benson actually took such actions but only whether he may have had the power to do so.

Id. at 739. The court found substantial evidence that Sergeant Benson had actual supervisory authority, and plaintiff's showing is a textbook example of how to make such a showing:

> It is undisputed that Sergeant Benson was Ms. Kramer's direct manager, that he was the sole person responsible for writing her performance evaluations, and that those evaluations could cause her to be promoted, demoted, or fired. Moreover, the County characterized Sergeant Benson as Ms. Kramer's supervisor. It is further undisputed that while the Sheriff was officially the only person who could fire employees, Sergeant Benson could recommend to the Sheriff that any of his supervisees be fired. Sergeant Benson's responsibility to "document noteworthy ... behaviors of employees" was explicitly defined by the County as potentially affecting his subordinates' "job advancement, rewards, discipline and discharge." . . . Sergeant Benson could also create a "corrective action" plan for a supervisee such as Ms. Kramer, if he determined her performance was "substandard," which might include "reassignment[,] ... transfer, ... or separation." . . . We accept *arguendo* the County's argument that the Sheriff, not Sergeant Benson, was the "department head," but it is undisputed that Sergeant Benson was considered a "supervisor" in the rank hierarchy. These designations are relevant because while the County policy manual refers to some forms of discipline as being done by the "department head" . . . ("Suspension: The department head/elected official may suspend...."), department heads or "supervisors" are referred to with regard to other types of discipline . . . ("Corrective Action: ... 1. The department head/elected official/ *supervisor* shall discuss the substandard performance with the employee in an attempt to discover the reasons for such performance and to plan an appropriate solution." (emphasis added)). In the latter category, the listed "[a]ppropriate corrective actions" include "closer supervision, training, referral for personal counseling, *reassignment or transfer*, use of appropriate level career counseling, *or separation*." . . . (emphasis added). The manual also says that "[d]uring the implementation of corrective action, the department head/elected official/ supervisor shall frequently evaluate and document the employee's progress." . . . This entry reinforces the likelihood that Sergeant Benson had the power to influence or recommend tangible employment actions—he could "plan an appropriate solution" including "reassignment or transfer" or "separation," and he could likely influence other tangible employment actions by means of "frequent[ ] evaluat[ion] and document [ation]" of an employee's compliance with a corrective plan—all this after having first decided that an employee's performance was "substandard." . . .

Id. at 739-40 (footnotes omitted). The court continued:

> In addition, bailiffs worked at the justice court instead of the Sheriff's office and the record is unclear as to when, if ever, the Sheriff personally worked with Ms. Kramer or directly supervised her work as a bailiff. Where an harasser is empowered to effect significant changes in employment status indirectly through recommendations, performance evaluations, and the like, and where the person with final decision-making power does not work directly with the plaintiff, the harasser may be a "supervisor" under Title VII. *See Vance*, 133 S.Ct. at 2452; *see also Ellerth*, 524 U.S. at 762, 118 S.Ct. 2257 (approvingly citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990), in which "supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the committee functioned as the supervisor's 'cat's-paw' "). In

> contrast to a coworker who can only cause a demotion or a pay cut through "some elaborate scheme," *Ellerth*, 524 U.S. at 762, 118 S.Ct. 2257, a supervisor who lacks the direct power to impose tangible employment consequences can accomplish the same easily, without scheming, if the employer has "effectively delegated" the power to make those decisions to him by empowering him to evaluate his supervisees and then relying on his recommendations. *Vance*, 133 S.Ct. at 2452; *see also id.* at 2434 n. 8 (explaining that the harasser in *Faragher* would be considered a supervisor because his recommendations were highly influential); *see also Lobato*, 733 F.3d at 1294–95 (employer is liable if the employer relied on facts from biased subordinate in deciding to take tangible employment action).

Id. at 740-41. The court concluded:

> On the record before us, Ms. Kramer has raised a genuine issue of fact as to whether the Wasatch County Sheriff's Department effectively delegated to Sergeant Benson the power to cause tangible employment actions regarding Ms. Kramer by providing for reliance on recommendations from sergeants such as Benson when making decisions regarding firing, promotion, demotion, and reassignment. *Vance*, 133 S.Ct. at 2452. Ms. Kramer is not required to establish that the Sheriff would follow Sergeant Benson's recommendations blindly. Even if the Sheriff undertook some independent analysis when considering employment decisions recommended by Sergeant Benson, Sergeant Benson would qualify as a supervisor so long as his recommendations were among the proximate causes of the Sheriff's decision-making. *See Lobato*, 733 F.3d at 1294–95; *Staub*, 131 S.Ct. at 1193.

Id. at 741.

b. <u>Apparent Authority</u>

Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726, 742-43, 121 Fair Empl.Prac.Cas. (BNA) 1329 (**10th Cir.** 2014) (Seymour, J.), reversed the grant of summary judgment to the Title VII sexual harassment defendant County. Quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998), the court stated: "But 'in the unusual case,' apparent authority can suffice to make the harasser a supervisor for Title VII purposes, so long as the 'the victim's mistaken conclusion [is] a reasonable one.'" The court held that plaintiff established a triable issue of material fact on the issue of apparent authority:

> The Sheriff considered Sergeant Benson to be Ms. Kramer's supervisor. The Sergeant worked at the same site with Ms. Kramer every day, where he was Ms. Kramer's only immediate manager. The County assigned to Sergeant Benson the tasks of telling Ms. Kramer what to do every day, evaluating her performance, and reporting on her performance to higher management. Because of the authority given to him by the County, Sergeant Benson could assign Ms. Kramer to distinctly different tasks in different locations: he could assign her to the magnetometer, give her road training, assign her to courtrooms, or order her to transfer prisoners. Sergeant Benson could also decide what days she worked and whether and when she got vacation or sick leave. . . . Under the circumstances here, given the County's and the Sheriff's manuals, there is a genuine issue of fact as to whether Ms. Kramer was reasonable in

believing that Sergeant Benson had additional powers—such as the power to transfer, discipline, demote, or fire her. . . .

A jury is especially likely to conclude such beliefs were reasonable because Sergeant Benson repeatedly told Ms. Kramer he did in fact possess such powers . . . .

(Citations omitted.)

2. Discrete Acts May Be Included in a Harassment Claim

Brooks v. Grundmann, 748 F.3d 1273, 1278, 122 Fair Empl.Prac.Cas. (BNA) 661 (**D.C. Cir.** 2014), affirmed the grant of summary judgment against the Title VII sexual harassment plaintiff. The court held that discrete acts can form part of a hostile work environment claim. It stated in *dictum*:

> Unlike a hostile work environment claim, which "involves repeated conduct ... [that] occurs over a series of days or perhaps years and ... [where] a single act of harassment may not be actionable on its own," *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), a discrete-acts claim involves a single act of discrimination "such as termination, failure to promote, denial of transfer, or refusal to hire." Id. at 114. "[A] plaintiff may not combine discrete acts to form a hostile work environment claim without meeting the required hostile work environment standard," *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C.Cir.2011), but a hostile work environment claim is not rendered invalid "merely because it contains discrete acts that the plaintiff claims (correctly or incorrectly) are actionable on their own." *Id.*

3. Tangible Employment Actions

Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726, 121 Fair Empl.Prac.Cas. (BNA) 1329 (**10th Cir.** 2014) (Seymour, J.), reversed the grant of summary judgment to the Title VII sexual harassment defendant County. The lower court had found that the accused harasser and rapist, Sergeant Benson, was not a supervisor because he did not have power to hire and fire plaintiff, and she could not reasonably have believed he had such power. The court of appeals reversed on this point, stating:

> One common sense test that can illuminate whether a given harm is a tangible employment action is to ask whether a co-worker could have inflicted the same harm as easily. If the answer is yes, then the harm is not a tangible employment action. *See Ellerth*, 524 U.S. at 762, 118 S.Ct. 2257 (explaining that "[a] co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct ...," but a co-worker can only cause his victim to be fired or demoted by means of an "elaborate scheme ..."); *see also Rubidoux*, 173 F.3d at 1296 (tangible employment actions are things "an harassing co-worker cannot do").

Id. at 739. The court held that the alleged rape was not a tangible employment action because it was not an official action, although it was "inarguably a severe form of sexual harassment." *Id.* at 743-44. The court also rejected plaintiff's claim that an initial poor performance evaluation was a tangible employment action, because plaintiff persuaded Sergeant Benson to improve her evaluation before he submitted it. The court stated: "This kind of behavior may have contributed to the hostile work environment, and it may be relevant to Ms. Kramer's reasonableness in not reporting Sergeant Benson. But where threats are made but unfulfilled, the claim 'should be categorized as a hostile work environment claim' not a tangible employment action claim." *Id.* at 744 (citation omitted). The court also held that Sergeant Benson's failure to relieve plaintiff on two occasions, one of which required re-scheduling surgery for her son, were not tangible employment actions because failure to honor informal agreements on reliefs could also be done by a co-worker. One denial of leave was official, but not a tangible employment action because it was not enough by itself to affect the terms and conditions of her employment. *Id.* Finally, the court held that that the denial of road training, and being assigned to work on a magnetometer all day (precluding road training) were not tangible employment actions because there was no proof of economic harm, no proof supporting plaintiff's belief that road training was important for promotions or harmed her economically, and there was evidence promotions did not depend on road training. *Id.* at 744-45.

4. Severity or Pervasiveness

Brooks v. Grundmann, 748 F.3d 1273, 1276-78, 122 Fair Empl.Prac.Cas. (BNA) 661 (**D.C. Cir.** 2014), affirmed the grant of summary judgment against the Title VII sexual harassment plaintiff because plaintiff had not shown the necessary level of severity or pervasiveness. The court stated at 1276: "Severity and pervasiveness are complementary factors and often go hand-in-hand, but a hostile work environment claim could be satisfied with one or the other." (Citations omitted.) Plaintiff's claim was based on some poor performance reviews, angry remarks by her supervisor in front of others, and her supervisor's slamming a book down on a table then talking to her. The court distinguished an Eleventh Circuit case involving more severe conduct, at 1277-78:

> While Brooks heavily relies on *Gowski v. Peake*, 682 F.3d 1299 (11th Cir.2012) (per curiam), to make her case as to severity, that decision does little to help her cause. *Gowski* involved supervisors of a hospital facility who engaged in retaliatory acts that cumulatively amounted to a hostile work environment. These actions included but were not limited to: (1) the revocation of privileges necessary for working in critical-care units; (2) a two-week suspension based on a dubiously substantiated allegation of unprofessional behavior with a nurse; (3) the rescinding of the employees' medical committee membership; and (4) a two-year suspension from participating in research programs. *See id.* at 1305–08. To the Eleventh Circuit, these actions evinced "a workplace filled with intimidation and ridicule that was sufficiently severe and pervasive to alter [the two plaintiff-doctors'] working conditions." *Id.* at 1313.
>
> In contrast, nothing resembling that level of malevolence is present here. Of course, the record shows the supervisors engaged in unprofessional conduct. But unlike the plaintiffs in *Gowski,* Brooks has not been shut out from her work because her privileges have been revoked and her duties eliminated; rather, she is continually assigned discrete tasks and

performs them with mixed degrees of success. The facts underlying Brooks' claims seem more like the "ordinary tribulations of the workplace" . . . a series of "petty insults, vindictive behavior, and angry recriminations" that are not actionable under Title VII . . . .

5. Adequacy of Employer's Response

Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726, 747-50, 121 Fair Empl.Prac.Cas. (BNA) 1329 (**10th Cir.** 2014) (Seymour, J.), reversed the grant of summary judgment to the Title VII sexual harassment defendant County. The court held that plaintiff had shown a triable issue of material fact as to the adequacy of defendant's efforts to investigate plaintiff's sexual harassment complaint. Plaintiff alleged that Sgt. Benson's sexual harassment of her included rape. The Sheriff did not consult Human Relations for guidance. The court described his actions:

> When the Sheriff first learned of the allegations, he initiated an investigation into what he referred to as "some sex" or "sexual misconduct" between Ms. Kramer and Sergeant Benson which, he explained, is "a violation of our policy and procedure, ... especially if it's on-duty." . . . It is unclear if he perceived the putative policy violation as sexual harassment or simply as a prohibited intra-office relationship between a supervisor and his subordinate.FN12 . . . (the Sheriff explained that because Sergeant Benson was Ms. Kramer's "supervisor ... POST does not condone that kind of relationship"). The Sheriff did not consult the County's human resources professional about the allegations or ask him for advice as to what to do. Instead, the Sheriff assigned the investigation to Detective Brian Gardner, not because Detective Gardner had any specific qualifications for this task but because he "was the unfortunate guy that was on-duty on that particular day." . . .
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> FN12. The Sheriff's testimony suggests his view was that sex with "no consent" by a supervisor might only violate Department policy if it occurred while the employees were on the clock, and that sex while on the clock was his real concern. The Sheriff explained: "consent" or "no consent," "the fact that ... some of these happened on lunch hours that I am paying for on my time. That's a direct violation...." . . .

Id. at 147-48 (footnote omitted). "Moreover, Detective Gardner had been friends with Sergeant Benson for over ten years and considered him a mentor. In addition, the fact that Detective Gardner was never trained to investigate a complaint of sexual harassment is relevant to whether the County's efforts were deficient. . . ." *Id.* at 148 (citations omitted). The problems seen by the court continued:

> Nor did the Sheriff give Detective Gardner any "policy or procedures on how to conduct the investigation." . . . The Sheriff explained that he gave Detective Gardner no such instructions because "[w]e don't have any real hard-set investigative standards policy ... other than what the state has and the federal government has put out, as far as sexual harassment." . . . That statement is contrary to the evidence the County argues proves its reasonable efforts to prevent harassment: the Wasatch County Personnel Policy, which does in fact contain an "Investigation Procedure" for sexual harassment. . . . The investigative procedure provides that the investigator should "obtain[ ] a written

> statement from complainant ... [,] discuss[ ] the matter with the alleged offender ... [,] [and] obtain[ ] statements from possible witness(es) from both sides of the issue. Upon completion, an investigation report shall be submitted to the personnel officer or Board of County Commissioners as appropriate." *Id.* Perhaps unsurprisingly, given the Sheriff's ignorance of the County's policy, Detective Gardner's "investigation" did not follow these steps. He did not obtain a written statement from Ms. Kramer, nor did he submit a report to the personnel officer or to anyone other than the Sheriff. The record does not contain any evidence that he "obtained statements from possible witnesses from both sides of the issue."
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> Instead of seeking to discover whether Title VII had been violated—in other words, whether Ms. Kramer had been sexually harassed in a way that affected her ability to do her job—which he admits he did not do, Detective Gardner focused on finding out who was the father of Ms. Kramer's baby and then on uncovering the extent of Ms. Kramer's consensual affair with that man. Ms. Kramer testified that Detective Gardner repeatedly told her no one would believe her allegations about Sergeant Benson unless she confessed to having a consensual affair with her baby's father. Upon learning that Ms. Kramer's paramour was a County firefighter, Detective Gardner reported this information to the Sheriff. Detective Gardner then returned to Ms. Kramer's house for a second interview, during which he repeatedly suggested that, due to her relationship with a firefighter, she should resign.
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> The Sheriff told POST about Ms. Kramer's affair with the firefighter, and POST suspended Ms. Kramer's certification. The Sheriff admitted he told Detective Gardner that he wanted Ms. Kramer to resign in order to protect the reputation of the fireman and of the Sheriff's Department. Ms. Kramer never returned to work for the County. In her view, the County's response just confirmed her suspicion that complaining was a bad idea. Responses to complaints that encourage the plaintiff to drop the complaint or otherwise penalize the plaintiff certainly do not prove an employer's reasonableness as a matter of law. *See Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1209 (10th Cir. 2000); EEOC Compl. Man. (CCH) § 615.4(a)(9)(iii), 3103, 3213 (1988) ("appropriate corrective action ... fully remedie[s] the conduct without adversely affecting the terms or conditions of the charging party's employment in some manner....").

Id. at 748-49 (footnotes omitted). The court continued:

> More specifically, investigations targeting the victim for unrelated misconduct are especially contraindicative of reasonably calculated efforts to promptly correct sexual harassment. *See McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1135 (10th Cir. 2006) (finding employer unreasonable when in response to plaintiff's complaints, employer focused on plaintiff's past misconduct); *see also Williams*, 497 F.3d at 1090 n. 7 ("[T]he 'prospect' of an investigation [into the plaintiff] ... could dissuade a reasonable employee from making or supporting a charge of discrimination." (internal citation omitted)). Using a sexual harassment complaint as an opportunity to investigate the complainant herself for unrelated misconduct does not communicate to other employees that complaining about sexual harassment can be done "without undue risk or expense." *Faragher*, 524 U.S. at 806, 118 S.Ct. 2275.

> Not only did the investigation here fail to demonstrate that the County employed reasonable means to discharge its Title VII obligations, the Sheriff's response to Ms. Kramer's allegations suggests that he did not understand he had a Title VII compliance matter on his hands. Under Title VII, "[e]mployers have a duty to express strong disapproval of sexual harassment, and to develop appropriate sanctions." . . . In response to learning that Sergeant Benson was not the father of Ms. Kramer's baby and that "it was possibly a rape," the Sheriff decided instead that the Department need not continue to investigate. He reported Ms. Kramer to POST for having relations with the County firefighter and he asked Todd Hull, the person investigating Ms. Kramer for the missing money, to "please handle" the rape investigation. . . . The Sheriff said: "basically my end of [the investigation] was completed within a couple of days." . . .
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> The evidence shows that Todd Hull handled the investigation as a purely criminal matter. There is no evidence the Department sought to improve its sexual harassment prevention program or otherwise reduce the "risk of future harassment." . . . "An employer's failure to fully investigate a complaint supports a finding that its response was inadequate.... Moreover, an employer's decision to do nothing on the basis of an inadequate investigation likewise supports a finding that the employer did not take prompt and effective remedial action." . . . Sergeant Benson did ultimately resign, but that alone is not sufficient to avoid vicarious liability. . . . (the fact that the harassment ends is not "sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee").

Id. at 749-50 (footnotes and citations omitted).

6. Failure to Complain, and Adequacy of Complaints

Kramer v. Wasatch County Sheriff's Office, 743 F.3d 726, 750-53, 121 Fair Empl.Prac.Cas. (BNA) 1329 (**10th Cir.** 2014) (Seymour, J.), reversed the grant of summary judgment to the Title VII sexual harassment defendant County. The court held that it was not enough for the defendant to show that plaintiff did not complain; it must show that she unreasonably failed to complain. The court stated: "A failure to use internal grievance procedures can be unreasonable where the record reveals no reason for it other than a "generalized" fear of retaliation. . . . But where the fear of complaining is not "general" or "nebulous" but is based on "concrete reason[s] to apprehend that complaint would be useless or result in affirmative harm to the complainant," whether the plaintiff was reasonable and whether her fears are credible are questions of fact. . . ." *Id.* at 751. The court continued:

> As previously detailed, Ms. Kramer testified that on numerous occasions Sergeant Benson sexually assaulted her and subsequently told her to "be quiet" and "not say anything" or it would be "a career ender." *See, e.g.*, Aplt.App. at 105; *id.* at 121 ("[I]f I go down, you go down. I'm not going down alone.... You better keep your mouth shut ... not one word to anyone."). Sergeant Benson also threatened Ms. Kramer with a poor evaluation unless she would "keep [her] mouth shut and not say anything." *Id.* at 112. These are not unlike the facts in *Wilson*, where the harasser "instructed [the plaintiff] not to file a complaint with either [the college] or the police and to keep her mouth shut,

threatening [her] with, among other things, *a poor recommendation* to prevent her from getting a job in the future." 164 F.3d at 539 (emphasis added).

Sergeant Benson's threats were arguably made more intimidating by his actions. In addition to the constant harassment at work, he called and texted Ms. Kramer six times after her lie detector test and followed her home from work regularly. During the same time period, he allegedly threatened to break the taillights of court clerk Collette Ryan's car and court clerk Mindy Probst suspected him of having vandalized her car.

The district court characterized Ms. Kramer's fears as unreasonably based upon "speculation and a patchwork of unrelated and exaggerated events." . . . Crediting Ms. Kramer's version of events, as we must, the events are neither a "patchwork" nor "unrelated." They instead demonstrate a persistent theme: Sergeant Benson was an intimidating person with job-related power over Ms. Kramer who would sexually harass her and then threaten that she would lose her job if she complained.

Ms. Kramer's fear that Sergeant Benson would make good on his threats was not per se unreasonable given that he did in fact take adverse job actions against her at work—denying her leave time, threatening her with a bad performance evaluation, and giving her long shifts on the magnetometer. Even if these actions did not rise to the level of a tangible employment action, "a reasonable employee could well find ... a combination of threats and actions taken with the design of imposing both economic and psychological harm sufficient to dissuade him or her from making or supporting a charge of discrimination." . . . This evidence raises a genuine issue of fact as to whether Ms. Kramer's fears of Sergeant Benson were credible and reasonable because they were grounded in "concrete reason[s] to apprehend that complaint would ... result in affirmative harm to the complainant." . . .

Id. at 751-52 (citations omitted.) The court also held: "Fear that an employer's sexual harassment remediation program is inadequate, if credible, can rebut an employer's argument that the plaintiff was unreasonable." *Id.* at 752 (citations omitted). The court finally held: "Taken together, this evidence is sufficient to raise a genuine issue of fact as to whether Ms. Kramer was reasonable in believing it would be futile and potentially detrimental to herself to complain." *Id.* at 752.

D. Independent Investigations

Sharp v. Aker Plant Services, Inc., 726 F.3d 789, 797 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger employee was being retained because he would be able to work for the defendant longer. The lower court had treated this as nondiscriminatory succession planning, and had dismissed the biased statements as stray remarks. The court rejected defendant's argument that the declarant was not the decisonmaker, because he made the recommendations, he was the only person who knew the employees in question, and his recommendations were followed. Therefore, he was the decisionmaker.

The crux of the plaintiff's case necessarily focuses on the conduct of his supervisor, Mike Hudson. The defendant argues that Hudson was not a decision maker because others in the organization ultimately executed the terminations, Hudson was on medical leave at the time, and therefore Hudson's comments cannot be viewed as anything other than stray remarks that have no bearing on Aker's motivation.

* * *

The facts in this case, when examined in the light most favorable to Sharp, justify the conclusion that Aker is accountable for whatever age bias Hudson harbored, because Aker terminated Sharp's employment based on Hudson's recommendation. Although Hudson was not the ultimate decision maker, Dellinger and Atkins relied solely on Hudson's forced rankings and recommendation of who Aker could fire without disrupting current projects. That "discriminatory information flow" began with Hudson and influenced the decisions made downstream. *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 350 (6th Cir. 2012) (quoting *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 678 (6th Cir. 2008)). Aker contends that it conducted a multi-step, independent review of the layoff decisions; but that review consisted simply of comparing information submitted by Hudson to other information submitted by Hudson. Aker offers no evidence that it conducted any independent fact gathering. Without considering information from an independent source, Aker's review could not have scrubbed Hudson's alleged age bias from the forced rankings and recommendation.

VI. Litigation

A. Exhaustion

Koch v. White, 744 F.3d 162, 165, 29 A.D. Cases 445 (**D.C.Cir.** 2014), affirmed the grant of summary judgment to the Rehabilitation Act defendant because of the plaintiff's failure to provide medical records and testimony to the EEO investigator in support of his claims. Plaintiff refused because the investigator was a contractor and plaintiff did not like the idea of a private firm having his investigation. The court held that the failure to cooperate could not be excused as a good-faith effort to cooperate, because this was actually a failure to cooperate. The court stated: "But here, it was an effort *not* to cooperate that Koch says was in good faith. Because Koch failed to explain both how his concern over the disclosure of his medical records justified his failure to provide his testimony to Jewell and how the extensive privacy protections for his medical records included in the contract between Jewell and the Commission were insufficient, Koch's refusal to cooperate was clearly unjustified." (Emphasis in original.)

B. Timeliness

1. 180 Days or 300 Days to File with EEOC?

Rivera-Diaz v. Humana Insurance of Puerto Rico, Inc., 748 F.3d 387, 390, 29 A.D. Cases 975 (**1st Cir.** 2014), affirmed the dismissal of plaintiff's ADA and retaliation claims. The court held that the Puerto Rico Department of Labor was a deferral agency with respect to a disability claim, so the 300-day charge-filing period applies. The Department had no authority to provide relief for any claim of retaliation except opposition to sexual harassment, was not a deferral

agency on most retaliation claims, and plaintiff's retaliation claim therefore had to be filed within 180 days.

2. Claims of Mental Problems Justifying Equitable Tolling

Bartlett v. Department of the Treasury (I.R.S.), 749 F.3d 1, 12, 29 A.D. Cases 983 (**1st Cir.** 2014), rejected the § 504 Rehabilitation Act plaintiff's claim that mental problems justified the equitable tolling of her 45-day period to contact an EEO counselor. The court stated the standard at p. *8: "We have recognized that mental illness may toll the time to file an administrative claim of discrimination, but only if the plaintiff has "show[n] that the mental disability was so severe that the plaintiff was '[un]able to engage in rational thought and deliberate decision making sufficient to pursue [her] claim alone or through counsel.'"" Plaintiff did not allege this degree of difficulty and instead alleged that she performed all her duties capably.

3. EEOC Charge Does Not Toll State-Law Tort Claims

Castagna v. Luceno, 744 F.3d 254, 255, 121 Fair Empl.Prac.Cas. (BNA) 1533 (**2d Cir.** 2014), affirmed the dismissal of plaintiff's New York tort claims. The court stated: "We now join the U.S. Courts of Appeals for the Seventh and Ninth Circuits in holding as a matter of federal law that filing an EEOC charge does not toll the limitations period for state-law tort claims, even if those claims arise out of the same factual circumstances as the discrimination alleged in the EEOC charge."

C. Bars to Suit

1. Preemption

Ventress v. Japan Airlines, 747 F.3d 716, 37 IER Cases 1717 (**9th Cir.** 2014), affirmed the dismissal of the *pro se* plaintiff's California-law whistleblower claims of retaliation and constructive termination, holding that his claims were preempted by the Federal Aviation Act and FAA regulations. Plaintiff had complained about the fitness of a fellow pilot: "Ventress claims JAL retaliated against him for raising safety concerns regarding fellow pilot Captain Jeff Bicknell's medical fitness to operate an aircraft during a June 2001 flight. Specifically, Ventress alleges JAL subjected him to unnecessary psychiatric evaluations and prevented him from working because he raised those safety concerns and submitted two safety reports to several federal agencies." The court described the preemption history of the case at 719:

> In the first round of proceedings in this court, we held that his state law claims are not preempted by the Friendship, Commerce, and Navigation ("FCN") Treaty. . . . In the second round, we held that the claims are not preempted by the Airline Deregulation Act of 1978 ("ADA"). . . . In *Ventress II*, we noted that the parties had not addressed whether Ventress's claims are preempted by the FAA, *id.* at 681, 683, which is now the issue before us in this third appeal. Mindful that the FAA does not preempt all state law tort actions touching air travel . . . we conclude that Ventress's state law claims are preempted because they require the factfinder to intrude upon the federally occupied field of aviation safety by deciding questions of pilot medical standards and qualifications. We affirm the judgment of the district court.

(Citations omitted.) The court explained the two types of preemption at 720-21:

> Because the FAA does not expressly preempt state regulation of air safety or prohibit states from imposing tort liability for unlawful retaliation or constructive termination, FAA "preemption, if any, must be implied." . . . Implied preemption comes in two forms: conflict preemption and field preemption. . . . Conflict preemption applies "where compliance with both federal and state regulations is a physical impossibility," and in "those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . Field preemption "can be inferred either where there is a regulatory framework 'so pervasive ... that Congress left no room for the States to supplement it' or where the 'federal interest [is] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" . . . "[W]hen an agency administrator promulgates pervasive regulations pursuant to his [or her] Congressional authority, we may infer a preemptive intent unless it appears from the underlying statute or its legislative history that Congress would not have sanctioned the preemption." . . .

(Citations omitted.) The court stated at 721: "Our review of the applicable FARs confirms that pilot qualifications and medical standards for airmen, unlike aircraft stairs, are pervasively regulated." (Citation and footnote omitted.) The court emphasized at 722-23 that not all State-law employment claims are preempted.

2. Limitations

Heimeshoff v. Hartford Life & Acc. Ins. Co., __ **U.S.** __, 134 S.Ct. 604, 611, 187 L.Ed.2d 529 (2013), an ERISA denial-of-benefits case, held that the parties can contractually agree to shorten the period of limitations, and can contractually agree that it will commence before the cause of action accrues, as long as there is still a reasonable amount of time in which to bring suit and as long as there is no controlling statute expressly forbidding such a result.

Comment: This decision requires plaintiff's attorneys to get and look at every document an employee received from the employer, to see if there is a shortening. It heightens the risk of waiting until the last minute to file an EEOC charge, or a lawsuit.

Gabelli v. Securities Exchange Commission, __ **U.S.** __, 133 S.Ct. 1216, 1221-22 (2013), held that the "discovery rule" in fraud cases could only be invoked to extend the period of limitations by victims of a self-concealing fraud, and not by the government in its role as enforcer of a civil penalty. The Court discussed the importance of finality and of clarity in the operations of statutes of limitations, and explained:

> Notwithstanding these considerations, the Government argues that the discovery rule should apply instead. Under this rule, accrual is delayed "until the plaintiff has 'discovered'" his cause of action. . . . The doctrine arose in 18th-century fraud cases as an "exception" to the standard rule, based on the recognition that "something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." . . . This Court has held that "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the

> fraud is discovered.'" . . . And we have explained that "fraud is deemed to be discovered when, in the exercise of reasonable diligence, it could have been discovered." . . .
>
> But we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties. . . .

(Citations omitted.) The Court continued at 1222:

> There are good reasons why the fraud discovery rule has not been extended to Government enforcement actions for civil penalties. The discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed. Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so. Instead, courts have developed the discovery rule, providing that the statute of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered.

The Court went on to discuss the many investigative tools available to the SEC, including the provision of monetary awards to whistleblowers, and the fact that the SEC is empowered to seek relief other than compensatory relief to victims.

Comment of Richard Seymour on *Gabelli v. SEC*: The Federal courts have increasingly departed from the discovery rule in assessing the timeliness of EEOC charges and discrimination suits. Plaintiffs should now rely on *Gabelli* to re-invigorate this doctrine and rescue cases in which the plaintiff had no reasonable basis within the charge-filing period or suit-filing period to suspect a discriminatory or retaliatory motive. The question whether plaintiff has a reasonable basis to suspect an unlawful motive is not readily amenable to resolution on summary judgment, and one of defendants' major tools in obtaining summary judgment has thus now been taken from them. *Gabelli* also raises a question whether EEOC or Justice Department enforcement actions will or will not have the benefit of the discovery rule, based on the breadth of the relief sought. In some cases where the government seeks broad relief, the charging party may have a timely challenge to conduct the EEOC or Justice Department cannot timely challenge.

3. Claim Preclusion or *Res Judicata*

Dookeran v. County of Cook, 719 F.3d 570, 578 (**7th Cir.** 2013), affirmed the grant of summary judgment to the Title VII and State-law defendant because of *res judicata*. Plaintiff was a physician working at one of defendant's hospitals. Four years after he was hired, he disclosed for the first time, during a biennial reappointment proceeding, that a previous employer had fired him for creating a hostile work environment. The hospital revoked his staff privileges. He obtained judicial review in State court and lost. Later, he received a Notice of Right to Sue and filed suit. The court held that plaintiff's discrimination and retaliation claims could have

been raised in his judicial-review proceedings, and he thus had a full and fair opportunity to litigate them. This was sufficient for claim preclusion under Illinois law. Judge Hamilton dissented. *Id.* at 578-82.

Adams v. City of Indianapolis, 742 F.3d 720, 736, 121 Fair Empl.Prac.Cas. (BNA) 948 (**7th Cir.** 2014), affirmed the dismissal of the Title VII plaintiffs' claim of disparate impact in the promotional examinations for police officers and firefighters. The court affirmed the lower court's dismissal, on *res judicata* grounds, of a second lawsuit directed at later promotions made from the same tests:

> In federal court, res judicata—or claim preclusion—has three elements: (1) an identity of the parties or their privies in the first and second lawsuits; (2) an identity of the cause of action; and (3) a final judgment on the merits in the first suit. . . . Whether there is an identity of the cause of action depends on "whether the claims comprise the same core of operative facts that give rise to a remedy." . . .

(Citations omitted.)

Comment on *Adams v. City of Indianapolis*: It is critical to focus on the doctrine that an identical cause of action depends on the "core of operative facts," not the legal theory. Many cases are brought to no good effect because the plaintiff did not make this distinction.

4. Issue Preclusion or Collateral Estoppel

Cunningham v. United States, 748 F.3d 1172, 1180 (**Fed. Cir.** 2014), held that an action in the Court of Claims for damages for breach of the confidentiality provisions of a settlement agreement was not barred by *res judicata* because of plaintiff's unsuccessful pursuit of a claim before the Merit Systems Protection Board, because the MSPB had no authority to award damages. Plaintiff had been fired by a subsequent employer because of the breach by the Office of Personnel Management. He sought relief before the MSPB, which found a breach but it held that it could only allow him to rescind the settlement agreement, in which event he would have to refund the $50,000 he had been paid, so he withdrew his MSPB petition and sued in the Court of Claims. It dismissed his claim, holding that the MSPB dismissal was *res judicata*. The Federal Circuit reversed:

> "For purposes of res judicata," the Claims Court stated, "the remedy sought by the plaintiff is irrelevant in determining whether two actions are based upon the same transactional facts." . . . While that may be true, it is the remedies *available* to the plaintiff in a forum of limited jurisdiction, not the remedies *sought* by the plaintiff, that determine whether res judicata bars a subsequent claim in a different forum. *See* Restatement (Second) of Judgments § 26(1)(c); *cf. United States v. Tohono O'Odham Nation*, __ U.S. __, __, 131 S.Ct. 1723, 1734, 179 L.Ed.2d 723 (2011) (Sotomayor, J., concurring) ("The jurisdictional scheme governing actions against the United States often requires ... plaintiffs to file two actions in different courts to obtain complete relief in connection with one set of facts."). Here, the remedy available in the Claims Court—damages for OPM's breach of the settlement agreement—was not available in the MSPB due to the agency's limited jurisdiction.

> Under the authority granted to the MSPB under the CSRA, the MSPB could only enforce compliance with the terms of the settlement agreement between Mr. Cunningham and OPM. *See* 5 U.S.C. § 1204(a)(2) (granting the MSPB the power to compel a federal agency to comply with orders of the Board). The MSPB does not possess authority to award monetary damages for the breach of a settlement agreement. , , , This jurisdictional barrier prevented Mr. Cunningham from seeking complete relief for OPM's breach of contract. He is therefore not barred from pursuing a second claim, against the same party based on the same set of transactional facts, in a court that has the authority to grant the relief that was unavailable to him in the first action. *See* Restatement (Second) of Judgments § 26(1)(c); *see also Gurley v. Hunt*, 287 F.3d 728, 731 (8th Cir.2002) (holding that res judicata did not bar an unfair-labor-practice claim in federal district court that had previously been litigated to a final judgment before the National Labor Relations Board because the Board was "not authorized to award full compensatory or punitive damages to individuals affected by the unfair labor practice").

(Citations omitted; emphases in original.) The Federal Circuit also held that the Court of Claims had jurisdiction over his action because it fairly contemplated monetary damages for breach. There were directives the agency was required to fulfill, and there was no statement that it involved only non-monetary relief.

Adams v. City of Indianapolis, 742 F.3d 720, 736, 121 Fair Empl.Prac.Cas. (BNA) 948 (**7th Cir.** 2014), affirmed the dismissal of the Title VII plaintiffs' claim of disparate impact in the promotional examinations for police officers and firefighters. The court affirmed the lower court's dismissal, on *res judicata* grounds, of a second lawsuit directed at later promotions made from the same tests. The court explained the narrower doctrine of issue preclusion and held that, even if the core of operative facts between the first and second cases was too different to permit claim preclusion, issue preclusion would still apply:

> A narrower preclusion doctrine—"collateral estoppel" or "issue preclusion"—applies to prevent relitigation of issues resolved in an earlier suit. . . . Issue preclusion has the following elements: (1) the issue sought to be precluded is the same as an issue in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must have been fully represented in the prior action. . .
>
> * * *.
>
> Even if claim preclusion does not apply, *issue preclusion* certainly does, and that's enough to sustain the dismissal of the second suit. The 2007 and 2008 testing protocols were the central subject matter of the earlier suit. Whether the tests were intentionally discriminatory or had a disparate impact was actually litigated and essential to the final judgment. The plaintiffs in the second suit were fully represented in the first-and by the same attorney who appears for them in the second round of litigation. They cannot now relitigate issues that were decided against them in the earlier litigation. The second suit was properly dismissed on preclusion grounds.

(Footnote omitted.)

5. Judicial Estoppel

Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 29 A.D. Cases 762 (**6th Cir.** 2014), reversed the grant of summary judgment to defendant on plaintiff's FMLA interference claim. The court held that plaintiff's successful application for Social Security disability benefits did not bar his claim. The court held that neither plaintiff nor the psychologist who examined him made indisputable admissions precluding his ability to work, and plaintiff sought jobs he thought he could do even after applying for benefits.

6. Standing

Gilbert v. Donahoe, 751 F.3d 303, 199 L.R.R.M. (BNA) 3201 (**5th Cir.** 2014), affirmed in part and reversed in part the district court's grant of summary judgment to the defendant USPS. The court held that plaintiff's retirement destroyed her standing to seek an injunction under the FMLA requiring her reinstatement.

D. Pleading

Brooks v. Grundmann, 748 F.3d 1273, 122 Fair Empl.Prac.Cas. (BNA) 661 (**D.C. Cir.** 2014), affirmed the grant of summary judgment against the Title VII sexual harassment plaintiff. The court held that, although plaintiff alleged both harassment and retaliation, she never alleged or showed in opposition to summary judgment the prima facie elements of a retaliation claim, and never alleged or put the defendant and the lower court on notice that she was making a retaliatory harassment claim that included discrete acts. The court stated at 1279: "Both the defendant and the district court should have had fair notice of the legal theories behind a claim, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and neither the complaint nor the opposition sufficiently conveyed the discrete-acts claim in this instance. Therefore, we decline to conclude the district court erred by disregarding the inchoate claim." The court rejected plaintiff's explanation that another judge in the district court had held that discrete acts could not be included in a retaliation claim, and it was not until later that the Circuit ruled otherwise. It stated at 1279:

> Here, however, there was some room to maneuver. At the time Brooks filed her complaint, nothing in *our* caselaw addressed the question of whether a plaintiff may assert *both* discrete-acts and hostile work environment claims. She was therefore free to question the wisdom of the district court decision in *Baird. See Johnson v. Dist. of Columbia*, 850 F.Supp.2d 74, 79 (D.D.C.2012) ("A District Court is comprised of individual judges who reach decisions that are not binding on any one else."); *see also Owens–Ill., Inc. v. Aetna Cas. & Sur. Co.*, 597 F.Supp. 1515, 1520 (D.D.C.1984) ("The doctrine of *stare decisis* compels district courts to adhere to a decision of the Court of Appeals of their Circuit until such time as the Court of Appeals or the Supreme Court of the United States sees fit to overrule the decision."). Indeed, the *Baird* plaintiff successfully did so on appeal. *See Baird*, 662 F.3d at 1252.

(Emphasis in original.) The court also held that, since plaintiff did not seek leave below to amend her Complaint, it could not remand and give her the opportunity to cure her defect. *Id.* at 1279-80.

Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15 (**1st Cir.** 2014), reversed the district court's sua sponte dismissal of plaintiff's entire Complaint, despite defendant's failure to request such relief and despite the lack of notice to plaintiff. The court stated at 22-23:

> "Sua sponte dismissals are strong medicine, and should be dispensed sparingly." . . . The general rule is that sua sponte dismissals of complaints under Rule 12(b)(6) are "erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond." . . . Only where "it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile" can a sua sponte Rule 12(b)(6) dismissal stand. . . . "The party defending the dismissal must show that 'the allegations contained in the complaint, taken in the light most favorable to the plaintiff, are patently meritless and beyond all hope of redemption.'"

(Citations omitted.) The court also held that plaintiff's allegations of retaliation met the plausibility standard, and rejected defendant's argument they were not. It stated at 24:

> The district court made at least three errors.
>
> First, the district court faulted Garayalde–Rijos for not stating specific facts that "connect" the alleged mistreatment after she was hired to the filing of her EEOC complaint. In so doing, the district court treated the prima facie case, "a flexible evidentiary standard," as a "rigid pleading standard," *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), requiring Garayalde–Rijos to establish each prong of the prima facie case to survive a motion to dismiss. This was an error of law.
>
> We have explicitly held that plaintiffs need not plead facts in the complaint that establish a prima facie case under Title VII nor must they "allege every fact necessary to win at trial." . . . The plausibility standard governs on a motion to dismiss. So, "[n]o single allegation need [establish] ... some necessary element [of the cause of action], provided that, in sum, the allegations of the complaint make the claim as a whole at least plausible." . . .

The court also rejected the lower court's reasoning on temporal proximity. See the discussion of this case in the section above on Temporal Proximity.

See the discussion of *Adams v. City of Indianapolis*, 742 F.3d 720, 733, 121 Fair Empl.Prac.Cas. (BNA) 948 (**7th Cir.** 2014), in the section on "Disparate Impact" above.

E. Discovery Limitations

Rorrer v. City of Stow, 743 F.3d 1025, 29 A.D. Cases 447 (**6th Cir.** 2014) (Bernice Donald, J.), affirmed in part and reversed in part the grant of summary judgment to the First Amendment, ADA, and Ohio-law defendants. The court disapproved of the lower court's one-

sided discovery limitations, and its subsequent misconstruing of its own order in holding that plaintiff was not allowed to present declarations in opposition to summary judgment from witnesses that were not on his initial list of five witnesses.

> Rorrer requests reassignment to a different judge based on his contention that the district court's handling of discovery in this case suggests that the district judge may be biased against him. First, the district court ordered Rorrer to identify, within fourteen days of the January 4, 2012 status conference, "five witnesses from his list most likely to be utilized at trial in this matter to facilitate any future depositions...." The order emphasized: "Any witness that has not been identified by the end of this 14 day period will not be permitted to be utilized at trial absent extraordinary circumstances." The district court did not provide any explanation or basis for the imposition of this discovery limitation, and it did not impose the same numerical limit on Defendants. A one-sided order so severely limiting the number of witnesses that a plaintiff may call without any explanation or apparent rationale would appear to raise the possibility of bias or the appearance of lack of impartiality.
>
> * * *
>
> In the instant case, the district judge reprimanded Rorrer—scolding him for "clearly contraven[ing]" the discovery order by submitting sworn witness declarations in response to a summary judgment motion—and accused Rorrer of attempting to "sandbag" Defendants. The district court actually misconstrued its own discovery order, and it scolded Rorrer for behavior permissible under the order. The district court's discovery order required only that Rorrer submit the names of witnesses Rorrer believed, prior to the close of discovery, that he would most likely use at trial; it did not prohibit Rorrer from submitting witness declarations in opposition to a motion for summary judgment. In conjunction with the district court's imposition of one-sided discovery restrictions, the judge's remarks "compromise the appearance of justice." . . .

(Citation omitted.)

F. Summary Judgment

1. Supreme Court's Disapproval of Drawing Inferences for the Movant

Tolan v. Cotton, __ **U.S.** __, 134 S.Ct. 1861188 L.Ed.2d 895 (2014), granted certiorari and, without oral argument or even briefing, summarily reversed the Fifth Circuit's grant of summary judgment to a police officer defendant based upon qualified immunity for the shooting in question. The Court held that the Fifth Circuit did not give weight to plaintiff's evidence, accepted defendant's evidence as dispositive, and drew inferences on behalf of defendant. The Court stated at pp. *5-*7:

> In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U.S., at 249.

First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." . . . The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was "'fairly dark,'" and lit by a gas lamp that was "'decorative.'" . . . In his own deposition, however, Tolan's father was asked whether the gas lamp was in fact "more decorative than illuminating." . . . He said that it was not. . . . Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident . . . and Cotton acknowledged that there were two motion-activated lights in front of the house. . . . And Tolan confirmed that at the time of the shooting, he was "not in darkness." . . .

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." . . . But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that Tolan's mother was "very agitated" when she spoke to the officers. . . . By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated." . . .

Third, the Court concluded that Tolan was "shouting" . . . and "verbally threatening" the officer . . . in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." . . . But Tolan testified that he "was not screaming." . . . And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. . . . Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. . . . A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. 713 F.3d, at 305; see also *id.*, at 308 (characterizing Tolan's behavior as "abruptly attempting to approach Sergeant Cotton," thereby "inflam[ing] an already tense situation"). The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. . . . Tolan testified at trial, however, that he was on his knees when Cotton shot him . . . a fact corroborated by his mother . . . . Tolan also testified in his deposition that he "wasn't going anywhere" . . . and emphasized that he did not "jump up" . . . .

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal

courts" . . . we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. . . .

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might con-tribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

Id. at 1866-68 (citations omitted).

2. Responding to a Summary-Judgment Motion

Willis v. Cleco Corp., 749 F.3d 314, 317, 122 Fair Empl.Prac.Cas. (BNA) 513 (**5th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The court described at p. *3 the obligation of a party responding to a summary-judgment motion:

To satisfy its burden, the party opposing summary judgment is "required to identify specific evidence in the record, and to articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.1994). This court has regularly reminded litigants that "Rule 56 does not impose upon the district court [or the court of appeals] a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998). We have further observed that the "premise of the adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Coggin v. Longview Independent School Dist.*, 337 F.3d 459 (5th Cir.2003) (en banc).

3. No "Do-Overs" for Employer Personnel Records

Gosey v. Aurora Medical Center, 749 F.3d 603, 122 Fair Empl.Prac.Cas. (BNA) 665 (**7th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment against the Title VII racial-discrimination plaintiff. Defendant relied in its summary-judgment motion on the entry in its personnel records that plaintiff had been tardy on four specific dates, and on its tardiness policy showing that that was a ground for discharge. Defendant also said that, even if

plaintiff showed problems with those dates, there were also other dates on which she was tardy. Plaintiff showed evidence that defendant's punch system showed she was early on two of the four days (although she had mistakenly stipulated to being tardy on a day she was actually early), and showed from a supervisor that there was an informal grace period, and defendant's records as to a third day showed she was within the grace period. Defendant and the lower court relied on additional days not relied upon in plaintiff's personnel records as a basis for termination, and the Court of Appeals reversed. It was enough that plaintiff had shown a triable issue as to three of the four days the company had specified in firing her.

4. Drawing Inferences

Collins v. American Red Cross, 715 F.3d 994, 998-99 (**7th Cir.** 2013), affirmed the grant of summary judgment to the Title VII racial discrimination and retaliation defendant. Plaintiff alleged that her termination was caused by retaliation for her having filed an EEOC charge of racial discrimination. She relied on the internal investigation report, which found that the internal complaints against plaintiff were "substantiated"; one of those complaints was that plaintiff had told others the Red Cross was "out to get" minorities. The investigative report and notes of interviews did not contain any direct support for this finding, so plaintiff argued that the finding must have been based on her prior EEOC charge. The court stated:

> Collins responds that the report did not do a particularly good job of supporting this conclusion. And Collins is not wrong. For instance, the report indicates that Stice asked if Collins told "Adrianna" that "we have to stick together because they are all racist?" . . . Stice's summary of her interview with "Adriana," however, does not specifically mention this allegation. . . . Doubtless, then, Stice could have documented her findings more clearly. Nevertheless, at least *something* in the report suggests that it was concerned with Collins sowing racial tension in the office. Indeed, several parts of the report do. But *nothing* in the report suggests that it was concerned with Collins's EEOC complaint. And we see no reason why a reasonable jury would reject a proposition supported by some, albeit imperfect, evidence in favor of a proposition supported by no evidence at all.
>
> Thus, we do not think that a reasonable jury could find that the report's conclusions referred to Collins's EEOC complaint. Of course, that does not mean that the report's conclusions were *correct.* Collins denies making the statements that the report attributes to her, and we must assume, at this stage, that Collins is telling the truth. Stice's report was sloppy, and perhaps it was also mistaken or even unfair. But Title VII does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations. . . . Collins has provided evidence showing, at most, that the report's conclusions were wrong. But she has not provided anything—apart from mere speculation—that the report's conclusions were wrong *because of Collins's EEOC complaint.* As a result, the Red Cross was entitled to summary judgment.

(Citations omitted; emphasis in original.)

5. Affidavits Contradicting Deposition Testimony

Only Direct Contradictions Are to be Disregarded: *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 n. 4, 27 A.D. Cases 1324 (**7th Cir.** 2013), affirmed in part and reversed in part the grant of summary judgment to the ADEA defendant. The court held that plaintiff could supply a detail in her affidavit that was not covered in her deposition testimony: "While there is some tension in the record, we do not think that Cloe's deposition testimony directly contradicted her later affidavit that mentioned the September 25 date. Viewed in the light most favorable to Cloe, the record supports the inference that Cloe submitted the note on September 25, 2008."

The Shoe Pinches Both Sides' Feet: *A.C. ex rel. J.C. v. Shelby County Bd. of Educ.*, 711 F.3d 687, 702-03, 27 A.D. Cases 1339 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADA and Rehabilitation Act student-accommodation defendant. The court held that the deposition testimony of Amy Carver, the second-grade teacher, created a dispute of material fact by contradicting the testimony of the principal, and that the defendant could not rescue its summary-judgment motion by presenting Carver's affidavit directly contradicting the critical part of her own deposition testimony for the defense:

> For the October 30 incident, though, where the fluctuations allegedly caused the Carver-hyperventilation incident that—according to SCBE—triggered the DCS Reports, Plaintiffs have a more specific counter-argument: the incident never happened. They point to Carver's inability at her deposition to recall anything unusual that happened on the 30th, and her testimony that she was at school for a Halloween party that afternoon in her classroom. This testimony casts doubt on Principal Williams's account that Carver had hyperventilated on the morning of the 30th, created a scene in the hallway that distracted other teachers from their classrooms, had to be comforted in Williams's office, and then was sent home. Carver tried to supplement her testimony with a substantive addition on the errata sheet and an affidavit explaining that she had not recalled at her deposition that her hyperventilation incident had in fact occurred on the morning of October 30. But this does not eliminate, at the summary judgment stage, the factual issue that has been raised by Carver's original deposition testimony. Just as " 'a party who has been examined at length on deposition [cannot] raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony,'" *Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir.1984) (quoting *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir.1969)), so also we think it clear that a party moving for summary judgment cannot extinguish a genuine issue of material fact simply by filing an errata sheet and affidavit to counteract the effect of previous deposition testimony. Of course, SCBE will have an opportunity at trial to present Carver's live testimony, subject to cross-examination, and the jury will be able to evaluate any explanations that may be elicited or offered for the asserted incompleteness of Carver's deposition testimony.

G. Failure to Object to a Magistrate Judge's Recommendation

Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 25-26 (**1st Cir.** 2014), affirmed the Rule 12(b)(6) dismissal of plaintiff's pre-hire and post-hire sex discrimination claims because she failed to object to the Magistrate Judge's recommendation that summary judgment be granted.

H. Class Actions and Collective Actions

1. District Courts Insisting on Particular Racial and Sexual Composition of the Class Plaintiffs' Legal Team

Martin v. Blessing, __ **U.S.** __, 134 S.Ct. 402, 187 L.Ed.2d 446 (2013), consists of Justice Alito's statement in regard to the denial of certiorari, expressing strong disagreement with Judge Baer's practice in the Southern District of New York requiring that class counsel's legal team reflect the racial and sexual composition of the class.

Comment on *Martin v. Blessing*: Judge Baer's practice is flagrantly unconstitutional, and it is well past time for judges in higher courts to express disapproval.

2. Tolling of Limitations Periods

Odle v. Wal-Mart Stores, Inc., 747 F.3d 315, 122 Fair Empl.Prac.Cas. (BNA) 532 (**5th Cir.** 2014), reversed the district court's holding that the individual sex discrimination claim of the plaintiff former employee—who had been one of the named plaintiffs in *Dukes*—was time-barred when she did not file her own suit within ninety days after the Ninth Circuit's mandate in *Dukes* rejecting the inclusion of former employees in a Rule 23(b)(2) class on the ground that former employees had no standing to seek injunctive relief. The court noted at 320 that "'the filing of a class action tolls the running of a statute of limitations for all asserted members of the class,'" and continued:

> Tolling, however, does not continue indefinitely. If the district court denies certification, or if it certifies the class but later decertifies it, tolling ceases. This is because "the putative class members ha[ve] no reason to assume that their rights [a]re being protected." Furthermore, "[a]lthough the denial of class certification or the decertification of the class might potentially be reversed on appeal, such a ruling nonetheless serves as notice to the once-putative class members that they are 'no longer parties to the suit and ... [a]re obliged to file individual suits or intervene.'"

Id. (footnotes omitted). After discussing the parties' arguments and Circuit precedent, the court stated at 322-23:

> By contrast, the Ninth Circuit's en banc opinion in *Dukes* is not akin to a denial. By instructing the California district court to consider Rule 23(b)(3) certification on remand, the Ninth Circuit continued proceedings on the certification issue for those *former* employees of Wal–Mart. Thus, the appeals court's ruling in *Dukes* was not a final, adverse resolution of class certification for former employees. Until the California district court determined on remand whether the class of former employees could and should be certified under Rule 23(b)(3), no court had expressly or impliedly ruled that the former Wal–Mart employees had "officially lost their status as a class." . . .

(Footnotes omitted.)

3. Commonality

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, __ **U.S.** __, 133 S.Ct. 1184, 1191 (2013), affirmed the grant of class certification in a securities fraud case, holding that the materiality of the statements and omissions in question is an issue common to the class, and the need to prove materiality as a condition of individual recovery meant that the common questions predominated over individual questions:

> While Connecticut Retirement certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification. Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. Because materiality is judged according to an objective standard, the materiality of Amgen's alleged misrepresentations and omissions is a question common to all members of the class Connecticut Retirement would represent. The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class. As vital, the plaintiff class's inability to prove materiality would not result in individual questions predominating. Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims. As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry.

Stockwell v. City and County of San Francisco, 749 F.3d 1107, 122 Fair Empl.Prac.Cas. (BNA) 795 (**9th Cir.** 2014), on a Rule 26(f) appeal, reversed the district court's denial of class certification under California's Fair Housing and Employment Act based on commonality. The court held that the lower court impermissibly relied on the merits in rejecting plaintiffs' statistical showing as inadequate because it did not include regression analyses ruling out alternative, non-age factors. It held that under *Amgen* the question whether the replacement of one promotional test and scoring system by another had disparate impact against police officer test-takers over 40 years old was for the finder of fact at trial. Plaintiffs did not have the burden to show a winning statistical analysis, and the City's objections merely showed that there was a common question as to the merits of the statistical analysis.

4. Class Action Fairness Act (CAFA)

Standard Fire Ins. Co. v. Knowles, __ **U.S.** __, 133 S.Ct. 1345 (2013), unanimously held that a plaintiff in a State-court putative class action cannot defeat removal to Federal court under the Class Action Fairness Act by certifying that the class would not seek more than $5 million in damages. The class had not yet been certified. The Court held that the precertification stipulation bound the named plaintiff, but did not bind absent class members because he did not yet have authority to speak for them. It was thus ineffective to defeat Federal-court jurisdiction under CAFA. The Court held that the stipulation might not survive the certification process, and stated at 1350: "We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process."

5. Making Offers of Settlement to the Representative Party

Genesis Healthcare Corp. v. Symczyk, __ **U.S.** __, 133 S.Ct. 1523, 20 Wage & Hour Cas.2d (BNA) 801 (2013), held that an FLSA collective action is mooted by the mooting of the sole representative plaintiff's claim. Genesis Healthcare made a Rule 68 offer of judgment of full damages, attorneys' fees and costs. Symczyk conceded that the Rule 68 offer mooted her individual claim, and she did not file a cross-petition on this point. Symczyk could not seek injunctive relief, because under the FLSA such relief can only be sought by the Secretary of Labor. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). The Court distinguished the anti-mootness holdings in class actions like *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400-01 (1980), in part because class actions are "fundamentally different" from FLSA collective actions. *Id.* at 1529. The Court stated that a putative class has an independent legal status once it is certified, and that this never becomes true for collective actions. *Id.* at 1530.

F. Arbitration

1. Effect of Dodd-Frank Arbitration Bar in a Multi-Claim Case

Santoro v. Accenture Federal Services, LLC, 748 F.3d 217, 223-24, 122 Fair Empl.Prac.Cas. (BNA) 1208, 22 Wage & Hour Cas.2d (BNA) 781 (**4th Cir.** 2014), affirmed defendant's motion to compel arbitration of plaintiff's FMLA, ADEA and ERISA claims. The court rejected plaintiff's argument that these claims could not be subjected to arbitration because the arbitration agreement failed to carve out claims covered by Dodd-Frank, even where the plaintiff did not bring a claim under that statute. The court stated:

> Dodd–Frank created causes of action for whistleblowers and then protected those causes of action by barring their *waiver* in "predispute arbitration agreements." Nothing in Dodd–Frank suggests that Congress sought to bar arbitration of every claim if the arbitration agreement in question did not exempt DoddFrank claims. Nothing in Dodd–Frank even refers to arbitration apart from this limited reference in these statutory provisions that are otherwise concerned solely with the creation of a cause of action for whistleblowing employees. To conclude otherwise would be to forget that "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not one might say, hide elephants in mouseholes." . . . But that is exactly what Santoro requests—concluding that in this mousehole, Congress essentially grafted a new section onto the FAA by requiring every employer's arbitration agreement to carve out an exception for whistleblowers. Given the statute's language and context, Santoro cannot meet his burden of showing that Dodd–Frank represents a contrary congressional command overriding the validity of arbitration clauses as to non-whistleblower claims.

(Footnote and citation omitted.)

2. Does the CBA Require Arbitration?

Gilbert v. Donahoe, 751 F.3d 303, 310, 199 L.R.R.M. (BNA) 3201 (**5th Cir.** 2014), affirmed in part and reversed in part the district court's grant of summary judgment to the

defendant USPS. The court held that the arbitration provision of the CBA did not explicitly cover statutory claims, but the agreement as a whole made clear that Rehabilitation Act claims were covered, but did not make clear that FMLA claims were covered:

> Nonetheless, the ways in which the agreement identifies the respective statutes are distinct, and this difference guides our resolution of this case. Section 2.01(B) of the CBA specifically provides that it is incorporating into the agreement the prohibition of discrimination against handicapped employees contained in the Rehabilitation Act. It thus complies with the dicta of both *Ibarra* and *Wright* that the CBA "identify the specific statutes the agreement purports to incorporate." Combined with Article 15, this provision makes it clear and unmistakable that the Rehabilitation Act is part of the CBA and subject to the same grievance procedures. By contrast, the ELM only provides policies to comply with the FMLA. It does not purport to make the FMLA a part of the agreement. As our sister circuits have recognized, references to statutes that fall short of incorporation are insufficiently "clear and unmistakable" to bar access to federal court. There is no reason to treat this reference any differently. Accordingly, we hold that, while the CBA requires Gilbert to pursue her Rehabilitation Act claims through the specified grievance and arbitration procedures, its references to the FMLA are not sufficiently clear and unmistakable to deprive the district court of subject matter jurisdiction over claims arising under that statute.

(Footnotes omitted.)

3. Is the Agreement to Arbitrate Valid or Illusory?

Lizalde v. Vista Quality Markets, 746 F.3d 222, 58 Employee Benefits Cas. 1062 (**5th Cir.** 2014), reversed the district court's denial of the ERISA defendant's motion to compel arbitration. The arbitration agreement said that the defendant could terminate the agreement prospectively, as to disputes arising after the termination, after ten days' notice to plaintiff. The court held that this was not illusory under Texas law. The court stated at 226, referring to Texas law: "Instead, retaining termination power does not make an agreement illusory so long as that power 1) extends only to prospective claims, 2) applies equally to both the employer's and employee's claims, and 3) so long as advance notice to the employee is required before termination is effective." Plaintiff was an injured worker, with a claim under defendant's Benefit Plan, a substitute for workers' compensation. The Benefit Plan contained an unconstrained termination provision. The Court of Appeals held that, viewing both plans as a single contract, the unconstrained right of termination in the Benefit Plan did not apply to the Arbitration Agreement. The court stated at 227:

> To summarize, the parties included a termination provision in the Arbitration Agreement that constrained Vista's power to terminate the agreement; the termination provisions found in the Arbitration Agreement and the Benefit Plan expressly state that they apply only to the agreement or plan in which they are found; and applying the Benefit Plan to the Arbitration Agreement would render the termination provision in the Arbitration Agreement superfluous. These considerations are completely convincing to us that the parties did not intend for the termination provision in the Benefit Plan to apply to the Arbitration Agreement. Because Vista's power to terminate the Arbitration

Agreement is properly constrained, the Arbitration Agreement is not illusory and is enforceable under Texas law.

4. Availability of Class Certification

Oxford Health Plans LLC v. Sutter, __ **U.S.** __, 133 S.Ct. 2064, 2066 (2013), unanimously held that the arbitrator did not exceed his authority in deciding that the parties' arbitration agreement allowed for class arbitration. The first paragraph of the Court's decision summarized the case:

> Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 et seq. We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.

The Court explained the limited review of arbitral decisions for the sake of promptness and finality, noted that Oxford Health Plans had not challenged the arbitrability of class treatment in court, and held that it chose arbitration and must now live with that choice.

> Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.*

Id. at 2068. The court concluded at 2071:

> In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

5. Class-Action Waivers

American Express Co. v. Italian Colors Restaurant, __ **U.S.** __, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), upheld a class-action waiver in a commercial case, notwithstanding

evidence that the plaintiff merchants did not individually have enough at stake to warrant proceeding with their challenge to petitioner's fees, and that class treatment was the only effective means for the enforcement of their rights. The Court summarized its holding:

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

Id. at 2312. Justice Kagan's dissent, joined by Justices Ginsburg and Breyer, is remarkable. It begins:

> Here is the nutshell version of this case, unfortunately obscured in the Court's decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, 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.
>
> And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

Id. at 2313.

Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336, 22 Wage & Hour Cas.2d (BNA) 310 (**11th Cir.** 2014), affirmed the district court's order compelling the arbitration of plaintiffs' FLSA claims, enforcing a class-action waiver to prevent collective treatment, and dismissing the Complaint. The court stated: "Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right. Rather than expand a plaintiff's substantive rights, Congress's decision to enact the collective action provision actually limited a plaintiff's existing procedural rights set forth in Rule 23. Were it not for § 16(b), a plaintiff could bring a representative FLSA action even without the prior consent of similarly situated employees."

6. Noncompetition Agreements

Nitro-Lift Technologies, L.L.C. v. Howard, __ **U.S.** __, 133 S.Ct. 500, 503, 184 L.Ed.2d 328, 34 IER Cases 961 (2012), reversed the Oklahoma Supreme Court and held that courts may not review the validity of noncompetition agreements subject to a valid arbitration clause. The

Court held that the determination of validity is for the arbitrator to determine. The Court discussed the Federal Arbitration Act, and continued:

> And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court." . . . For these purposes, an "arbitration provision is severable from the remainder of the contract" . . . and its validity is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.

(Citations omitted.)

7. Post-Suit Arbitration Agreements

Russell v. Citigroup, Inc., 748 F.3d 677, 22 Wage & Hour Cas.2d (BNA) 483 (**6th Cir.** 2014), affirmed the district court's refusal to compel plaintiff to arbitrate a class action pending at the time he signed the arbitration agreement, because the court construed the agreement as contemplating only prospective disputes. The court suggested there would be problems under Ethics Rule 4.2 if either outside counsel or in-house counsel intended the pending dispute, in which plaintiff was represented by counsel to be included and arranged for an employee to give the agreement to plaintiff.

8. Effect of Arbitral Finding in Subsequent Litigation

Grimes v. BNSF Ry. Co., 746 F.3d 184 (**5th Cir.** March 18, 2014) (No. 13-60382), reversed the lower court's grant of summary judgment to the Federal Railway Safety Act defendant. Plaintiff was fired after the defendant railway's investigation of an accident concluded that the accident occurred because an uncertified crew member was operating the train, and that plaintiff and the other two crew members it fired had dishonestly tried to cover up for each other. The court rejected the arguments of both sides, as to the effect of arbitral findings under the Railway Labor Act, as too extreme. It stated at 187-88:

> . . . The RLA makes the arbitral findings conclusive on the parties *in the dispute governed by the RLA.* Grimes does not disagree that the arbitral findings of fact are conclusive on his CBA claim that he pursued with the PLB. Those findings are not, however, necessarily conclusive in a suit brought under a different statute." (Emphasis in original.)

III

> The answer lies somewhere in the middle. As a general matter, arbitral proceedings *can* have preclusive effect even in litigation involving federal statutory and constitutional rights, and the decision to apply it is within the discretion of the district court. . . . As acknowledged in . . . the Court held in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), that collateral estoppel may apply in federal-court litigation to facts found in arbitral proceedings as long as the court considers the "federal interests warranting protection." In *Greenblatt v. Drexel Burnham*

Lambert, Inc., 763 F.2d 1352, 1358–62 (11th Cir.1985), the court discussed *Byrd* and concluded that the determination of fact issues in the arbitration of state-law claims should have preclusive effect in a subsequent federal RICO suit where those fact issues determined the existence of predicate acts for purposes of RICO.

A district court has "broad discretion" to decide whether to apply the doctrine, "at least when the arbitral pleadings state issues clearly, and the arbitrators set out and explain their findings in a detailed written opinion." . . . Additionally, "[a] district court in exercising its discretion must carefully consider whether procedural differences between arbitration and the district court proceeding might prejudice the party challenging the use of offensive collateral estoppel." . . . If the procedural differences "might be likely to cause a different result," then collateral estoppel is inappropriate. . . . The arbitrators also ought to be "experienced and disinterested individuals." . . .

(Citations omitted; emphases in original.) The court held that the arbitration in question did not meet this standard. It stated at 188-89:

Here, on the other hand, the investigation and hearings were conducted by the railroad. The actual arbitrators—the PLB—only reviewed the record from that investigation. Collateral estoppel was inappropriate because the procedures of the PLB did not afford Grimes the basic procedural protections of a judicial forum. The fact that a subsequent panel of neutral arbitrators reviewed the record of the internal investigation and hearing and concluded that the railroad had reached the correct result is not enough to insulate the underlying, employer-conducted proceedings from scrutiny.

G. Evidence

1. Lying to the EEOC

Miller v. Raytheon Co., 716 F.3d 138 (**5th Cir.** 2013, affirmed the jury's finding of ADEA and Texas-law liability against the defendant. The court stated at 143 n.1: "In October 2008, Raytheon's response to Miller's EEOC charge incorrectly stated that he had not applied for any other jobs at the company." The court held that the falsity of the representation was circumstantial evidence of discrimination:

At trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement. Miller was told not to apply for jobs in supply chain management and was not selected for a new job at Raytheon, despite Raytheon's policy of searching "every corner of the earth" and "exhausting all opportunities to place the individual" before releasing an employee pursuant to a RIF. Although Raytheon emphasizes that these actions occurred after Miller's termination, the jury was entitled to view them as circumstantial evidence of discrimination. . . .

Id. at 144 (citations omitted). The court also held that Raytheon's attempt to obscure the reasons for its actions supported the finding of willfulness and justified liquidated damages. *Id.* at 146.

2. "Self-Serving" Testimony

Antoine v. First Student, Inc., 713 F.3d 824, 837, 117 Fair Empl.Prac.Cas. (BNA) 1710 (**5th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant and recognized that the testimony of plaintiff's *supervisor* was "self-serving."

Hill v. Tangherlini, 724 F.3d 965, 967 (**7th Cir.** 2013), affirmed the grant of summary judgment to the defendant, but stated:

> We begin by noting that the district court discredited Hill's testimony about his interactions with coworkers because of its "self-serving" nature. . . . This was error. Deposition testimony, affidavits, responses to interrogatories, and other written statements by their nature are self-serving. . . . As we have repeatedly emphasized over the past decade, the term "selfserving" must not be used to denigrate perfectly admissible evidence through which a party tries to present its side of the story at summary judgment.

(Citations and footnote omitted.)

Feliciano v. City of Miami Beach, 707 F.3d 1244, 1253 (**11th Cir.** 2013), a § 1983 improper-search case, stated:

> To be sure, Feliciano's sworn statements are self-serving, but that alone does not permit us to disregard them at the summary judgment stage. As we stated in *Price v. Time, Inc.*, 416 F.3d 1327, 1345 (11th Cir.2005), "[c]ourts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving." Or as Justice Bleckley put it, the law allows that "[i]nterest and truth may go together." *Davis*, 60 Ga. at 333. Besides, Feliciano's sworn statements are no more conclusory, self-serving, or unsubstantiated by objective evidence than the officers' assertions that they smelled marijuana coming from her apartment and saw Gonzaga smoking or holding a joint. While it is undisputed that Gonzaga was arrested and charged with possession of marijuana, those charges were dismissed after none of the officers appeared in court, and there is no physical evidence, at least none that survives, to show that marijuana was present in Feliciano's apartment. The substance that the officers purportedly seized was never tested and has long since been destroyed. And Feliciano's interest in obtaining a judgment against the officers is not different in kind from their interest in preventing her from doing that.

3. Cumulation of Circumstantial Evidence

Miller v. Raytheon Co., 716 F.3d 138, 145 (**5th Cir.** 2013), affirmed the jury's finding of ADEA and Texas-law liability against the defendant. The court stated:

> Considered in isolation, we agree with Raytheon that each category of evidence presented at trial might be insufficient to support the jury's verdict. But based upon the accumulation of circumstantial evidence and the credibility determinations that were required, we conclude that "reasonable men could differ" about the presence of age discrimination. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc), *overruled in part on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331

(5th Cir .1997) (en banc). Whether or not this court would have reached the same result, the Boeing standard requires affirmance of the jury verdict. *Smith v. Santander*, 703 F.3d 316, 318 (5th Cir.2012).

H. Argument to the Jury

Caudle v. District of Columbia, 707 F.3d 354, 359-61, 117 Fair Empl.Prac.Cas. (BNA) 525 (**D.C. Cir.** 2013), reversed the denial of a new trial in this Title VII retaliation case because plaintiff's counsel made improper "golden rule" arguments on liability and asked the jurors to "send a message" to defendant. The court surveyed the conflict in the Circuits and explained why it considered such an argument impermissible as to both liability and damages:

> The appellees' counsel made four inappropriate statements during her closing argument. The first three are "golden rule" arguments. A golden rule argument—which asks "jurors to place themselves in the position of a party" . . .—is "universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence." . . . For example, it is impermissible (1) to ask jurors how much the loss of the use of their legs would mean to them . . . (2) to tell jurors "do unto others as you would have them do unto you" . . . ; or (3) to tell jurors, in a reverse golden rule argument, "I don't want to ask you to place yourself in [the plaintiff's] position" . . . .
>
> While all circuits that have considered the issue have held a golden rule argument improper if made with respect to damages, there appears to be, as the district court noted, a circuit split regarding whether such argument is improper if made with respect to liability. At least four circuits have found such a golden rule argument permissible. . . . On the other hand, the Third Circuit has rejected the liability-damages distinction. . . .
>
> We join our sister circuits and hold that a golden rule argument is improper and may thus serve as the basis for a new trial. Further, we do not recognize a *per se* distinction between a golden rule argument relating to damages and the same argument regarding liability. Courts forbid golden rule arguments to prevent the jury from deciding a case based on inappropriate considerations such as emotion. . . . It is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to determine damages. Accordingly, we agree with the Third Circuit that a golden rule argument made with respect to liability as well as damages is impermissible.
>
> We conclude that the appellees' counsel's first three above-quoted statements are golden rule arguments. The third statement, addressed to damages, is plainly improper; she asked the jury to "put yourselves in the plaintiffs' shoes" in "determin[ing] how to make plaintiffs whole." . . . This is a quintessential invocation of the golden rule and the district court was correct to sustain the objection and instruct the jury to disregard it. While the propriety of the first two statements is a closer question, we nonetheless conclude that they also constitute golden rule arguments addressing liability. The appellees' counsel stated, *inter alia*, "would *you* hesitate to speak up if *you* knew that speaking up would mean that your boss would call a meeting," . . . (emphases added), and "[w]ouldn't *you* think twice

about complaining about workplace discrimination." . . . (emphasis added). The appellees argue that the statements are permissible because they explain the legal standard for retaliation under *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). But the *Burlington Northern* standard—which forbids "employer actions that would have been materially adverse to a *reasonable* employee"—is an objective standard. 548 U.S. at 57, 126 S.Ct. 2405 (emphasis added). Because it is objective, "[i]t avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* at 68–69, 126 S.Ct. 2405. As the district court necessarily found in sustaining the objections, however, the appellees' counsel's statements did not describe an objective standard. Rather, they asked the jurors to decide how each of them—not a reasonable person—would feel if he were in the appellees' situation.

The fourth statement, while not a golden rule argument, is also inappropriate. The appellees' counsel stated:

> By protecting plaintiffs' right to complain about unlawful conduct without reprisal, you preserve the rights not just of plaintiffs but of everyone. By ensuring that plaintiffs are made whole for what they have endured, you ensure that others will be free to exercise their rights without fear. Yours is an important job and we trust that you will [do what] is right and ensure that justice is done.

. . . This is a so-called "send a message" argument that, alone, might not be grounds for reversal . . . . Here, given the fact that the appellees' counsel made this argument after the district court had sustained *three* objections to golden rule arguments—her send a message argument was also inappropriate because, like the golden rule arguments, it diverted the jury's attention from its duty to decide the case based on the facts and the law instead of emotion, personal interest or bias.

(Footnote and citations omitted.) The court held for three reasons that the improper arguments were not harmless, despite the trial court's curative instructions. First, the size of the damage award indicated prejudice. The court stated at p. *6: "Furthermore, despite the fact that the appellees' damages evidence was tenuous at best, the jury awarded almost one million dollars." (Citation omitted.) Second, the improper arguments went to the core issues in the case. Third, the improper arguments were made four times.

Gilster v. Primebank, 747 F.3d 1007, 1013, 122 Fair Empl.Prac.Cas. (BNA) 527 (**8th Cir.** 2014), reversed a judgment based on a $900,000 jury verdict for the Title VII and Iowa Civil rights Act sexual harassment and retaliation plaintiff, and remanded the case for a new trial based on improper rebuttal argument. The court explained:

> Having carefully reviewed the entire trial record, we are left with the firm conviction that the 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 Gilster's credibility to issues of both liability and damages, made the improper comments unfairly prejudicial and require that we remand for a new trial. This is not an action we take lightly, for it means that Gilster is

> deprived of a favorable jury verdict, and that all the witnesses may need to endure again what was surely a stressful, unpleasant trial. However, as we said many years ago in an opinion that has been frequently cited by other courts, "when a lawyer departs from the path of legitimate argument, [s]he does so at [her] own peril and that of [her] client." *Kelly*, 84 F.2d at 573.

The case cited was *Chicago & N.W. Ry. Co. v. Kelly*, 84 F.2d 569 (**8th Cir.** 1936).

I. Back Pay

Taylor v. Republic Services, Inc., 968 F.Supp.2d 768, 801 (E.D.Va. 2013) (Lee, J.), awarded $377,734 in back pay and $804,791 in front pay, as well as $50,000 in compensatory damages, to the Title VII retaliatory discharge plaintiff in a bench trial. The court held that defendant's noncompete agreement enhanced the damages:

> The Court finds that Ms. Taylor is entitled to be made whole due to Republic Inc.'s unlawful retaliatory discharge. The evidence at trial demonstrates that Ms. Taylor made reasonable efforts to mitigate her damages. Due to Ms. Taylor's non-compete agreement, she was precluded from applying for positions in the field in which she had gained a great deal of experience. Ms. Taylor testified that applied for more than one-hundred (100) positions, but she only received one job offer.

The earnings difference is illustrated by plaintiff's expert's calculation—adopted by the court—that she would have made $272,248 in calendar year 2012 if she had remained employed with defendant, compared to the $46,347 she actually made in her replacement job outside the field for which was trained and experienced.

J. Taxation and Withholding for Back Pay and Front Pay

United States v. Quality Stores, Inc., __ **U.S.** __, 134 S.Ct. 1395 (2014), held that severance payments "made to employees terminated against their will" were "wages" under the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 *et seq*. Justice Kennedy wrote the opinion for the Court, joined by all Justices except Justice Kagan, who did not participate.

Suggestion: This decision can be useful in arguing that failure to pay an agreed severance payment can be challenged under state wage payment laws.

K. Compensatory Damages

Miller v. Raytheon Co., 716 F.3d 138, 147 (**5th Cir.** 2013, affirmed the jury's finding of ADEA and Texas-law liability against the defendant, but reversed the award of compensatory damages. The court held that the unsupported testimony of plaintiff and his wife was "self-serving" and would not support damages where plaintiff did nothing to seek a remedy for his mental distress:

> Raytheon challenges the district court's reduced award of damages for mental anguish. Compensatory damages for emotional harm, including mental anguish, will not be presumed simply because the complaining party is a victim of discrimination. *DeCorte*

v. Jordan, 497 F.3d 433, 442 (5th Cir. 2007). The award of damages must be supported by specific evidence of the nature and extent of the harm. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). Such evidence may include medical or psychological evidence in support of the damage award. *Id.* at 940. A plaintiff's conclusory statements that he suffered emotional harm are insufficient. *See Brady v. Fort Bend Cnty.*, 145 F.3d 691, 719 (5th Cir. 1998).

The district court remitted the jury award for mental anguish from $1 million to $100,000. This claim is premised solely on the testimony of Miller and his wife. Miller presented no expert medical or psychological testimony of the extent of his mental anguish. While Miller testified that he suffered chest pain, back pain, sleep disturbances, he also admitted that he did not take any over-the-counter pain or sleep medications. Nor did Miller seek the assistance of any health care professional or counselor. *DeCorte* is distinguishable because testimony from a psychologist supported the plaintiffs' claims. *DeCorte*, 497 F.3d at 443. Because the Millers' self-serving testimony is legally insufficient, we vacate the mental anguish award.

L. Attorneys' Fees

1. "Prevailing Party" Status

Lefemine v. Wideman, __ **U.S.** __, 133 S.Ct. 9, 184 L.Ed.2d 313 (2012), reversed the denial of attorneys' fees to an abortion protestor who succeeded in obtaining a permanent injunction but was denied nominal damages because of qualified immunity. The Fourth Circuit held that the injunction did not make plaintiff a prevailing party because it did not enjoin any legitimate conduct, and merely required defendants to obey the law. The Court rejected this reasoning:

> The District Court held that the defendants had violated Lefemine's rights and enjoined them from engaging in similar conduct in the future. Contrary to the Fourth Circuit's view, that ruling worked the requisite material alteration in the parties' relationship. Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner. So when the District Court "ordered [d]efendants to comply with the law," 672 F.3d, at 303, the relief given—as in the usual case involving such an injunction—supported the award of attorney's fees.

2. Hourly Rates

Miller v. Raytheon Co., 716 F.3d 138, 149 (**5th Cir.** 2013, affirmed the jury's finding of ADEA and Texas-law liability against the defendant. The court rejected plaintiff's proposed hourly rates of $825, $775, and $400 for his three primary attorneys, and held that "the reduced hourly rates of $577.50, $542.50, and $280 were reasonable, customary rates." (Citation omitted.)

M. Post-Judgment Motions

Banks v. Chicago Bd. of Educ., 750 F.3d 663, 122 Fair Empl.Prac.Cas. (BNA) 792 (**7th Cir.** 2014), affirmed the lower court's denial of relief from summary judgment and held that it did not jurisdiction over the grant of summary judgment because plaintiff did not meet the 28-day deadline for filing a motion to alter or amend the judgment. The court stated at 665:

> A Rule 59(e) motion must be filed no later than 28 days after the entry of the judgment. Because Banks missed that deadline by one day, her motion was not effective as a Rule 59(e) motion that could have tolled the time to file a notice of appeal from the judgment. Accordingly, we must treat her post-judgment motion as a Rule 60(b) motion that did not toll the time to appeal the summary judgment. Banks's notice of appeal was timely only as to the district court's denial of her post-judgment motion. The district court did not abuse its discretion by denying that motion, so we affirm.

The court held that the same result would occur even if the district judge accepts an untimely Rule 59(e) motion. "When a motion is filed more than 28 days after the entry of judgment, whether the movant calls it a Rule 59(e) motion or a Rule 60(b) motion, we treat it as a Rule 60(b) motion. . . . A district court's acceptance of an untimely Rule 59(e) motion does not save the motion from this fate." *Id.* at 666-67 (citations omitted). The court explained at 667:

> The concern that parties or courts could use Rule 60(b) to circumvent the time limit for filing appeals animates our case law. . . . Where this concern is not present, a district court may grant relief under Rule 60(b)(1) to correct errors that might also be corrected on direct appeal. . . .
>
> Absent such circumstances, a party invoking Rule 60(b) must claim grounds for relief "that could not have been used to obtain a reversal by means of a direct appeal." . . . Therefore, errors of law and fact generally do not warrant relief under Rule 60(b)(1) and certainly do not require such relief. . . .

(Citations omitted.) The court stated at 668 that plaintiff's arguments went to the propriety of the grant of summary judgment, and continued: "To protect her ability to raise these arguments, she had to file either a timely Rule 59(e) motion or a timely notice of appeal, and she did neither." The court then rejected the use of the Rule 60(b)(6) catch-all provision, stating that the provision was very narrow and continuing: "The narrow operation of this provision reinforces our interest in barring the use of Rule 60(b)(6) as a substitute for direct appeal." *Id.* The court concluded, *id.*:

> The fact that the district court may have mistakenly considered Banks's arguments under Rule 59(e) does not compel or even permit us to review the merits of the underlying judgment, and we express no opinion on whether summary judgment was correctly awarded to the defendants. . . .

N. Appeals

Ray Haluch Gravel Co. v. Central Pension Fund of Intern. Union of Operating Engineers and Participating Employers, __ **U.S.** __, 134 S.Ct. 773, 777, 187 L.Ed.2d 669 (2014),

unanimously held that the time to appeal from the merits of a judgment of liability is not tolled by the pendency of a contractual fee award. Justice Kennedy wrote for the Court:

> Federal courts of appeals have jurisdiction of appeals from "final decisions" of United States district courts. 28 U.S.C. § 1291. In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), this Court held that a decision on the merits is a "final decision" under § 1291 even if the award or amount of attorney's fees for the litigation remains to be determined. The issue in this case is whether a different result obtains if the unresolved claim for attorney's fees is based on a contract rather than, or in addition to, a statute. The answer here, for purposes of § 1291 and the Federal Rules of Civil Procedure, is that the result is not different. Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.

O. Sanctions

Knoll v. City of Allentown, 707 F.3d 406 (**3d Cir.** 2013), affirmed the lower court's denial of plaintiff's motion for new trial and for reconsideration of the denial. Plaintiff lost some of her claims on summary judgment, and lost the remainder at trial. She moved for a new trial but failed to order a transcript prior to filing her motion, which violated the local rules. Even after defendant pointed out the lack, she failed to order the transcript. The district court denied her motion for failure to comply with the local rules, and denied reconsideration. On appeal, the Third Circuit stated its holding at 408:

> In *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir.1984), we held that a district court must consider six factors before it may dismiss a case as a sanction before trial on the merits. This appeal requires us to decide whether *Ploulis* applies in the post-trial context. We hold it does not.

The court explained at 410: "The concern animating *Poulis*—that dismissal will deprive a party of her day in court and preclude review of potentially meritorious claims—does not apply in the post-trial context. After all, the parties have already received an adjudication on the merits." The court went on to observe that plaintiff could still obtain review on appeal. The court discussed the importance of the district courts' ability to manage their cases, and held that the lower court did not abuse its discretion:

> Indeed, in dismissing the motion, the District Court specifically noted the fact that "plaintiff did not order a transcript or file a verified motion showing good cause [to excuse that requirement] after the defendant cited the rule in its response to the motion for new trial." Knoll's motion for reconsideration then remained pending for one year, four months, and twenty-three days before it was denied. At no point did Knoll comply with the rule or even address why she had not complied.

Id. at 411. Finally, the court held that the lower court did not demonstrate bias against her by observing, in the course of denying defendant's motion for Rule 11 sanctions because defendant

failed to follow the "safe harbor" rule, that the court considered plaintiff's case "silly" and her motion for a new trial "patently frivolous." *Id.*

E.E.O.C. v. v. Propak Logistics, Inc., 746 F.3d 145, 122 Fair Empl.Prac.Cas. (BNA) 247 (**4th Cir.** 2014), affirmed the lower court's award of $189,113.50 in attorney's fees to the defendant for the EEOC's filing of a "class case" on behalf of non-Hispanic applicants when it knew it could not get injunctive relief because defendant had closed all of its facilities, when it knew it could not identify any victims of the alleged practice, when it waited five and a half years after the filing of the EEOC charge before it filed suit, where it took no investigative activity during long parts of that period, and when it waited until after records were destroyed before it notified defendant of its pursuit of a class-type claim. The original charging party had obtained a Notice of Right to Sue, filed suit, and later dismissed it. The lower court issued summary judgment to defendant because of laches. The EEOC appealed, but later dropped the appeal. The Court of Appeals held that the EEOC's argument that laches did not apply to the government as a plaintiff were irrelevant:

> The summary judgment holding of laches was based on the EEOC's unjustified delay in bringing the lawsuit, and on the resulting prejudice affecting Propak's ability to defend itself in the action. That decision rested primarily on the unavailability of key witnesses and documents that Propak needed to support its defense.
>
> In contrast, the district court awarded attorneys' fees chiefly on the basis that the EEOC's lawsuit effectively was moot at its inception. In reaching this conclusion, the court emphasized that, when the complaint was filed, the EEOC had failed to identify the class of victims who could be entitled to monetary relief, and injunctive relief was unavailable because Propak had closed its facilities in North Carolina. These findings, which were central to the court's conclusion that the EEOC unreasonably initiated the lawsuit, were not material to the court's laches decision articulated on summary judgment. Thus, the court's fee award reflected proper consideration of the *Christiansburg* standard by assessing whether the EEOC acted unreasonably in initiating the litigation.

Id. at 152 (footnote omitted).

Mitchell v. Lyons Professional Services, Inc., 708 F.3d 463, 117 Fair Empl.Prac.Cas. (BNA) 770 (**2d Cir.** 2013), reversed the lower court's refusal to enter a writ of execution on defendants after plaintiffs obtained a default judgment, as a sanction for plaintiffs' counsel's repeated violations of court orders. The Second Circuit held that the lower court had satisfied all of the procedural requirements for imposing a sanction, but had failed to consider whether an alternative sanction falling more heavily on counsel rather than his clients would have been adequate.

Smith v. Psychiatric Solutions, Inc., 750 F.3d 1253, 1260-61 (**11th Cir.** 2014), affirmed the award of over $5,000 in attorneys' fees for defending plaintiff's Rule 11 motion to the successful employer in a retaliatory discharge case brought under Sarbanes-Oxley and the Florida Whistleblower Act. The court held that the district court reasonably concluded that part

of the Rule 11 motion was intended to address substantive issues on the merits, and the remainder involved matters too trivial or inconsequential to be covered by Rule 11.

P. Federal Employees

Kloeckner v. Solis, __ **U.S.** __, 133 S.Ct. 596, 116 Fair Empl.Prac.Cas. (BNA) 1153, 96 Empl. Prac. Dec. P 44,692, 184 L.Ed.2d 433 (2012) (Kagan, J.), summarized its holding in the first paragraph of the unanimous opinion:

> A federal employee subjected to an adverse personnel action such as a discharge or demotion may appeal her agency's decision to the Merit Systems Protection Board (MSPB or Board). See 5 U.S.C. §§ 7512, 7701. In that challenge, the employee may claim, among other things, that the agency discriminated against her in violation of a federal statute. See § 7702(a)(1). The question presented in this case arises when the MSPB dismisses an appeal alleging discrimination not on the merits, but on procedural grounds. Should an employee seeking judicial review then file a petition in the Court of Appeals for the Federal Circuit, or instead bring a suit in district court under the applicable antidiscrimination law? We hold she should go to district court.

VII. Appellate Tips for Effective Advocacy

Willis v. Cleco Corp., 749 F.3d 314, 319, 122 Fair Empl.Prac.Cas. (BNA) 513 (**5th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. Plaintiff was a Senior Human Relations official and reported a racist comment about African-American students and employees made to his second-level supervisor, Melancon, and subsequently ran into problems at work culminating in his termination for what appeared to be sufficient reasons. While summary judgment was reversed on his discriminatory termination claim, it was affirmed on one of his retaliation claims. The court explained:

> Willis claims that he was actually placed on the Work Improvement Plan in retaliation for reporting Cooper's statements, and that the district court erred in granting summary judgment. This claim is waived because it is inadequately briefed. In *United States v. Scroggins*, 599 F.3d 433 (5th Cir. 2010), we summarized our precedents under Fed. R.App. P. 28:
>
> > A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it. It is not enough to merely mention or allude to a legal theory. We have often stated that a party must ‘press' its claims. At the very least, this means clearly identifying a theory as a proposed basis for deciding the case—merely intimating an argument is not the same as ‘pressing’ it. In addition, among other requirements to properly raise an argument, a party must ordinarily identify the relevant legal standards and any Fifth Circuit Cases. We look to an appellant's initial brief to determine the adequately asserted bases for relief.
>
> *Id.* at 446–47 (citations and quotations omitted). Willis's legal argument about the Work Improvement Plan claim is asserted in these two sentences:

> A reasonable jury looking at the facts in a light most favorable to Willis could infer that Cleco's reasons for placing Willis on the Work Improvement Plan were pretextual. Therefore, the court granting Cleco's Motion for Summary Judgment as to Willis retaliation claims should be reversed.
>
> In this, Willis fails to identify a theory as a proposed basis for deciding the claim, and does not explain, in any perceptible manner, why the facts would allow a reasonable jury to decide in his favor. This claim is inadequately briefed, and we hold that it is waived.

(Footnote omitted.)