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Trends in Employment Discrimination Law

by

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Table of Contents

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 (including ADA employment cases)
2014 (12 mos. to 9/30/13)	11,937 (including ADA employment cases)

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

There was a 20.5% decrease in Federal-court employment discrimination filings from 2012 to 2014. FLSA filings in Federal court in 2014 (8,160 cases) went back to their 2012 level (8,150 cases), erasing the drop 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 5.3% drop in charge-filing. In FY 2013, it received 93,727 charges; in FY 2014, it only received 88,788 charges.

The following shows what has happened with EEOC charges during the six years from FY 2008 through FY 2014:

Type	FY 2008	FY 2014	Difference	Change
Total	95,402	88,788	-6,614	-6.9%
Race	33,937	31,073	-2,864	-8.4%
Color	2,943	2,756	-187	-6.4%
Sex	28,372	26,027	-2,345	-8.3%
National Origin	10,601	9,579	-1,022	-9.6%
Religion	3,273	3,549	276	8.4%
Retaliation—All Statutes	32,690	37,955	5,265	16.1%
Retaliation—Title VII	28,698	30,771	2,073	7.2%
Age	24,582	20,588	-3,994	-16.2%
Disability	19,543	25,369	5,826	29.8%
Equal Pay Act	954	936	-18	-1.9%

II. 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.

* * *

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.

B. The Fourteenth Amendment

1. 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.

2. Qualified Immunity

Austin v. Long, 779 F.3d 522 (**8th Cir**. 2015), involved a claim by a deputy prosecutor that the head prosecutor has fired him because of racial discrimination. The district court denied qualified immunity, holding that there were triable issues of fact as to whether the head prosecutor's reasons for firing plaintiff were pretextual. The court held that it has no jurisdiction to review that factual determination on an appeal from the denial of qualified immunity, but that it could review the determination for legal error.

C. Age Discrimination in Employment Act

1. Reasonable Factor Other than Age Defense in a Disparate-Impact Case

Fulghum v. Embarq Corp., 785 F.3d 395, 418-19 (**10th Cir.** 2015), *petitions for certiorari pending*, held that employers with a business reason—reducing costs and increasing profits—have shown a "reasonable factor other than age" allowing the elimination of healthcare benefits for Medicare-eligible retirees and the elimination or reduction of life insurance benefits for retirees regardless of any disparate impact on older retirees. The court also held the "equal costs – equal benefits" standard inapplicable to a disparate-impact case under the ADEA. *Id.*, at 421.

2. Sufficiency of Age Difference

Jenkins v. City of San Antonio Fire Dept., 784 F.3d 263, 268-69 (**5th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court held that plaintiff could not establish a *prima facie* case under the ADEA when the age difference was only two years.

Hilde v. City of Eveleth, 777 F.3d 998, 1008 (**8th Cir.** 2015), reversed the grant of summary judgment to the ADEA and Minnesota Human Rights Act defendant. The court held at that an eight-year difference in age was substantial enough to show age discrimination, in connection with the other evidence in the case:

> The district court held that the eight-year age gap between Hilde and Koivunen "dooms" Hilde's case, finding Koivunen was not "substantially younger." … This court has assumed without deciding that even a six-year gap is substantial. *Hammer v. Ashcroft*, 383 F.3d 722, 726 (8th Cir. 2004) ("We assume, arguendo, that the six-year age difference ... was sufficient to support a prima facie case."). *But see Girten v. McRentals*, Inc., 337 F.3d 979, 982 (8th Cir. 2003) (doubting whether nine-year gap is "sufficient to infer age discrimination"). Here, the commissioners thought Hilde was retirement-eligible because of his age. They also thought Koivunen would stay in the position for at least seven years before he could retire. Therefore, the age difference was substantial in this case.

3. Immunity for Employers Canceling Healthcare Benefits for Medicare-Eligible Retirees

Fulghum v. Embarq Corp., 785 F.3d 395, 419-21 (**10th Cir.** 2015), *petitions for certiorari pending*, held that the EEOC's exemption from the ADEA for employers limiting or eliminating healthcare benefits for Medicare-eligible retirees was valid.

D. Title VII

1. Pregnancy

Young v. United Parcel Service, Inc., __ U.S. __, 135 S.Ct. 1338 (2015), reversed the Sixth Circuit's affirmance of the grant of summary judgment to the pregnancy discrimination defendant. Plaintiff was a delivery driver required to lift up to 70 pounds by herself, and 150 pounds with assistance. She had had several miscarriages. "Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter." *Id.* at 1344. UPS accommodated other drivers with lifting restrictions based on one-the-job injuries, disabilities covered by the ADA, and those who had lost their DOT certifications. Justice Breyer began his opinion for the Court with the statement: "The Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat 'women affected by pregnancy ... the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.'" *Id.* at 1333-34. The Court sounded a caution:

> We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U.S.C. §§ 12102(1)-(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., § 1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes.

Id. at 1348. The Court encapsulated the dispute:

> But the meaning of the second clause is less clear; it adds: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as *other persons* not so affected but *similar in their ability or inability to work*." 42 U.S.C. § 2000e(k) (emphasis added). Does this clause mean that courts must compare workers *only* in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant "other persons" are, may consider other similarities and differences as well? If so, which ones?

> The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving "the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her inability to work." Reply Brief 15. Suppose the employer would not give " *that* [*pregnant*] *employee* " the "same accommodations" as another employee, but the employer's reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

Id. at 1348-49 (emphases in original). The Court rejected plaintiff's and the United States' argument that pregnant workers are to be compared to all non-pregnant workers because that would give pregnant employees a kind of "most-favored nation" status that Congress did not intend. The Court explained:

> The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.
>
> Lower courts have concluded that this could not have been Congress' intent in passing the Pregnancy Discrimination Act. . . . And Young partially agrees, for she writes that "the statute does not require employers to give" to "pregnant workers all of the benefits and privileges it extends to other" similarly disabled "employees when those benefits and privileges are ... based on the employee's tenure or position within the company." Reply Brief 15–16; see also Tr. of Oral Arg. 22 ("[S]eniority, full-time work, different job classifications, all of those things would be permissible distinctions for an employer to make to differentiate among who gets benefits").

Id. at 1349 (emphasis in original; citations omitted). The Court continued:

> We agree with UPS to this extent: We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "*any* other persons" (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind.

Id. (emphases in original). The Court rejected the EEOC's July 2014 guideline saying that the cause of the inability to perform a task did not matter, and held it was not entitled to deference:

> We come to this conclusion not because of any agency lack of "experience" or "informed judgment." Rather, the difficulties are those of timing, "consistency," and "thoroughness" of "consideration." The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. See Brief for Defendant–Appellee in *Ensley–Gaines v. Runyon,* No. 95–1038 (CA6 1996), pp. 26–27 (explaining that a reading of the Act like Young's was "simply incorrect" and "runs counter" to this Court's precedents). See also Brief for United States as *Amicus Curiae* 16, n. 2 ("The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to employees with similar limitations caused by on-the-job injuries"). Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.

Id. at 1352. The Court then rejected UPS's interpretation: "We find it similarly difficult to accept the opposite interpretation of the Act's second clause. UPS says that the second clause simply defines sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. But that cannot be so." *Id.* The Court held that this argument would make the second clause redundant of the first, and would fail to accomplish a major purpose of the PDA in overturning both the reasoning and result of *Gilbert v. General Electric Corp.*, 429 U.S. 125 (1976). The Court then held that a specially modified form of the *McDonnell Douglas* approach would, limited to the PDA context, would be appropriate to resolve the issue:

> If the employer offers an apparently "legitimate, non-discriminatory" reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.
>
> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

> This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine, supra,* at 255, n. 10. In particular, it is hardly anomalous (as the dissent makes it out to be, see *post,* at 8–9) that a plaintiff may rebut an employer's proffered justifications by showing how a policy operates in practice. In *McDonnell Douglas* itself, we noted that an employer's "general policy and practice with respect to minority employment"—including "statistics as to" that policy and practice—could be evidence of pretext. 411 U.S. at 804-05. Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines, cf. *post,* at 8–10.
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> Our interpretation of the Act is also, unlike the dissent's, consistent with Congress' intent to overrule *Gilbert* 's reasoning and result. The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been 'treated the same' as everyone else." *Post,* at 2. This logic would have found no problem with the employer plan in *Gilbert,* which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees— *i.e.,* it accommodated only sicknesses and accidents, and pregnancy was neither of those. See Part II–C, *supra*. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. See *post,* at 6–7. But Congress' intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the employer's disability plan as denying coverage to pregnant employees on a neutral basis.

Id. at 1354-55 (emphases in original). Justice Breyer delivered the opinion of the Court, in which the Chief Justice and Justices Ginsburg, Sotomayor, and Kagan joined. Justice Alito filed an opinion concurring in the judgment. Justice Scalia filed a dissenting opinion, joined by Justices Kennedy and Thomas. Justice Kennedy also filed a dissenting opinion.

2. Union Referrals to Employers with Jobs

Stuart v. Local 727, Int'l Bhd. of Teamsters, 771 F.3d 1014, 1018-20 (**7th Cir.** 2014) (Posner, J.), reversed the *sua sponte* dismissal of the Title VII plaintiff's sex discrimination claim against the defendant union. Judge Shadur of the district court held that Title VII did not extend to unions' discriminatory refusals to refer women to employers with available jobs:

> [T]he judge ruled that a failure to refer is not an actionable form of discrimination. . . . From this the district judge inferred that the plaintiff had to allege a refusal to hire, which is to say "a prospective employer's rejection of a prospective employee's specific *request* to be hired, while the 'failure to refer' concept would place someone such as [the plaintiff] in the position of a ticking time bomb (or more accurately a non-ticking time bomb) who could assert being victimized by discrimination whenever Local 727, knowing that at some earlier point she had evinced a desire to be considered for possible employment, failed to reach out to her even in the absence of a current application for a job that had opened up" (emphasis in original).

Id. at 1018-19 (citation omitted). The court of appeals rejected this reasoning:

> The judge's belief that "failure to refer" cannot violate Title VII contradicts the statute, which states that it is unlawful for a union to "fail or refuse to refer for employment any individual" because of the individual's sex. 42 U.S.C. § 2000e–2(c)(2). If a failure to refer were a consequence merely of inadvertence, and if despite the occasional such failure women received a reasonable number of referrals from the employer, there would be no basis for inferring discrimination on the basis of sex. But the complaint alleges that the plaintiff made repeated, futile requests for referral by the Movie/Trade Show Division, until Local 727's business agent told her "don't call us, we'll call you." At that point, for her to have continued to make requests to him for referrals would only have reduced her chances of ever being referred. The union knew she badly wanted driving jobs on film or TV projects, yet every time there was an opening wouldn't refer her for it, pursuant to a policy of never referring women drivers, though fully qualified, for such openings.
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> * * *
>
> The district judge's analysis if accepted would open a large gap in Title VII. Suppose a woman applies for a job as a crane operator on construction sites, a traditionally male job. The employer has an ironclad but of course undisclosed rule of never hiring women for such jobs. A woman applies and the employer tells her it has no openings now but will notify her as soon as there is one; but in fact the employer has decided that, pursuant to its policy, it will not notify her of *any* openings. 301 days go by and the employer informs her: "Ha ha; we don't hire women; you'll have to file your EEOC charge yesterday if you want to sue us."

Id. at 1019-20 (emphasis in original).

3. Referrals for Security Investigations

Rattigan v. Holder, 780 F.3d 413 (**D.C.Cir.** 2015), affirmed the grant of summary judgment to the Title VII defendant. The court stated the central issue at 415:

> Plaintiff Wilfred Rattigan claims that FBI supervisors whom he had formally accused of discrimination retaliated against him by sending the FBI's Security Division a memo purporting to demonstrate that he posed a security risk. On a previous appeal, we held that Rattigan could prevail only by showing "that agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false." *Rattigan v. Holder* ("*Rattigan II*"), 689 F.3d 764, 771 (D.C.Cir. 2012). We remanded to the district court to see whether his evidence could meet that standard.

The court explained the context of the case:

> Rattigan is a black male of Jamaican descent who worked at the U.S. Embassy in Riyadh, Saudi Arabia as the FBI's primary liaison to the Saudi intelligence service. In October 2001, he accused Cary Gleicher, Michael Pyszczymuka, and Leslie Kaciban, all

> supervisors in the FBI's Office of International Operations, of discriminating against him on the basis of race and national origin. He later pursued charges with the Equal Employment Opportunity Office.
>
> In November 2001, Gleicher sent Special Agent Leighton on a short assignment to Riyadh, where he evidently grew suspicious about Rattigan. On his return, Leighton brought his concerns first to Gleicher and then to Pyszczymuka, and, on Pyszczymuka's direction, documented them in a memo which Pyszczymuka then referred to the FBI's Security Division. The Security Division conducted an investigation and concluded that the security risks alleged by Leighton were "unfounded." *Rattigan II*, 689 F.3d at 766.
>
> Rattigan filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, alleging, among other things, that the decision to refer Leighton's memo to the Security Division amounted to unlawful retaliation. A jury found for Rattigan, but this court vacated the judgment on the ground that the district court's instructions violated *Department of the Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), by inviting the jury to second guess the Security Division's decision to initiate an investigation. Rattigan v. Holder ("*Rattigan I*"), 643 F.3d 975, 986 (D.C.Cir. 2011). We then granted the government's petition for rehearing and narrowed the realm within which Rattigan's claim could survive under *Egan*, imposing the "knowing falsehood" rule quoted above. *Rattigan II*, 689 F.3d at 771. Our remand ended in the district court's grant of summary judgment for the government. See *Rattigan v. Holder*, 982 F.Supp.2d 69 (D.D.C. 2013).

Id. at 415-16. Plaintiff admitted that four allegations were true, and the court held that no claim could arise from a true allegation. It stated it had already held that "the 'knowingly false' standard cannot be satisfied by assertion of a fact that, though true, is falsely framed so as to suggest a security concern." *Id.* at 416. The court then stated:

> As to the remaining allegations, Rattigan focuses on demonstrating that Leighton knew these were false. But this is another dead end. Under *Rattigan II* there can be liability for a security investigation referral only where "agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false." *Id.* at 771. Motive and knowing falsity must unite in the same person. But there is no evidence that Leighton, who was not the object of Rattigan's original discrimination claim, had any unlawful retaliatory motive when he documented his concerns. . . .

Id. The court stated: "In some circumstances, the law allows a plaintiff to impose liability on a principal by aggregating the unlawfully motivated report of one agent with the act of another. . . . But *Rattigan II,* as we've said, requires joinder in at least one person of the retaliatory purpose with the knowing falsehood." *Id.* at 417 (citations omitted). The court held that plaintiff failed to make this showing, and that it was not enough to argue that an alleged discriminating official "made inadequate efforts to get the memo *cleansed* of propositions 'unsupported in fact.' . . . But that is a far cry from knowingly reporting false statements." *Id.* (emphasis in original).

4. Criminal Background Checks

E.E.O.C. v. Freeman, 778 F.3d 463 (**4th Cir.** 2015), affirmed the grant of summary judgment to the Title VII defendant. The court summarized its decision at 464-65: "In 2001, Freeman began conducting background checks on its job applicants, which the Equal Employment Opportunity Commission ("EEOC") alleges had an unlawful disparate impact on black and male job applicants. The district court granted summary judgment to Freeman after excluding the EEOC's expert testimony as unreliable under Federal Rule of Evidence 702. Without this testimony, the district court found the agency failed to establish a prima facie case of discrimination. For the reasons below, we affirm the district court's exclusion of the EEOC's expert testimony and grant of summary judgment to Freeman." Defendant's policy was nuanced. The court described it at 465:

> Freeman is a provider of integrated services for expositions, conventions, and corporate events, with offices in major cities throughout the United States. In 2001, the company commenced background checks of job applicants' credit and criminal justice histories. Criminal background checks were required for all applicants, and credit history checks for "credit sensitive" positions involving money handling or access to sensitive financial information. Freeman's credit and criminal background check policies excluded applicants whose histories revealed certain prohibited criteria. If an applicant's history included one of the listed criteria, like a conviction for a crime of violence, the applicant was not hired.FN1 Freeman modified these criteria on July 20, 2006, and again on August 11, 2011, after which it no longer conducted credit checks.
>
> _____
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> FN1. Freeman required a form authorizing a background search to be completed with each job application, which, according to a company handbook, Freeman thought would "deter individuals with negative information from applying." However, the checks were not conducted until after a conditional offer of employment had been made. It appears most criteria, as well as making false statements on the job application, led to automatic disqualification. But, Freeman usually gave applicants a reasonable amount of time to resolve outstanding arrest warrants before rescinding an offer.

See the discussion of this case in Part VI (Litigation), subpart J ("Evidence"), topic 3 (Expert Testimony) below.

Comment of Richard Seymour on *E.E.O.C. v. Freeman*: As discussed below, the Commission's attack on Freeman's practices seems to have had nothing to do with Freeman's actual practices, which were nuanced and which were applied after a conditional job offer—in short, what a model employer is supposed to do under many versions of the "ban the box" legislation many jurisdictions have passed. Putting aside the question of case selection, the EEOC's failure to produce competent evidence of disparate impact—because of the exclusion of expert evidence that was impossible to credit—in all fairness absolutely required the grant of summary judgment.

E. The Americans with Disabilities Act and Rehabilitation Act

1. Regular Attendance as an Essential Job Function

E.E.O.C. v. Ford Motor Co., 782 F.3d 753 (**6th Cir.** 2015) (*en banc*), affirmed the grant of summary judgment to the ADA defendant, holding that, for most jobs—particularly interactive ones like the charging party's position as resale buyer—regular attendance is an essential job function. The charging party suffered from irritable bowel syndrome, and sought an accommodation allowing her to work from home several days a week:

> A sometimes-forgotten guide likewise supports the general rule: common sense. . . . Non-lawyers would readily understand that regular on-site attendance is required for interactive jobs. Perhaps they would view it as "the basic, most fundamental" "activity" of their job. Webster's Third New International Dictionary 777, 920 (1986) (defining "essential" and "function"). But equipped with a 1400–or–so page record, standards of review, burdens of proof, and a seven-factor balancing test, the answer may seem more difficult. Better to follow the commonsense notion that non-judges (and, to be fair to judges, our sister circuits) hold: Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones. That's the same rule that case law from around the country, the statute's language, its regulations, and the EEOC's guidance all point toward. And it's the controlling one here.
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> 2
>
> That rule has straightforward application here: Regular and predictable on-site attendance was essential for Harris's position, and Harris's repeated absences made her unable to perform the essential functions of a resale buyer. The required teamwork, meetings with suppliers and stampers, and on-site "availability to participate in ... face-to-face interactions," R. 60–2 at ¶ 11, all necessitate a resale buyer's regular and predictable attendance. For years Ford has required resale buyers to work in the same building as stampers, further evidencing its judgment that on-site attendance is essential. And the practice has been consistent with the policy: all other resale buyers regularly and predictably attend work on site. Indeed, even those who telecommute do so only one set day per week and agree in advance to come into work if needed. Sealing the deal are Harris's experiences and admissions. Her excessive absences caused her to make mistakes and caused strife in those around her. And she agreed that four of her ten primary duties could not be performed from home. R. 66–10 at 2. On this record, the EEOC cannot show that regularly attending work was merely incidental to Harris's job; it was *essential* to her job.
>
> It follows that Harris's up-to-four-days telecommuting proposal—which removed that essential function of her job—was unreasonable. . . . The *employee* bears the burden of proposing an accommodation that will permit her to effectively perform the essential functions of her job. . . . Harris proposed only one accommodation[,]one that would exempt her regular and predictable attendance from her resale-buyer job. In failure-to-accommodate claims where the employee requests an "accommodation that *exempts* her from an essential function," "the essential functions and reasonable accommodation analyses [ ] run together." . . . One conclusion (the function is essential) leads to the other

(the accommodation is not reasonable). That's this case. Harris's proposed accommodation was unreasonable.

Nor could Harris perform the essential functions of her job with Ford's past reasonable accommodations. Three times Ford allowed Harris to telecommute on an as-needed basis (on flex time, no less). And three times Ford developed plans to improve her attendance. But all six efforts failed because Harris proved unable "to establish regular and consistent work hours" or "perform the core objectives of the job." R. 60–3 at ¶ 3. The ADA does not give her a seventh try. Harris is not a "qualified individual" as a matter of law. 42 U.S.C. § 12111(8).

Id. at 762-63 (citations omitted). The court rejected the charging party's testimony is insufficient, and rejected the Commission's comparators because they had a set schedule, much more limited telecommuting than the Commission sought, and had agreed to come in on their telecommuting days if needed:

In addition to being legally and factually unsupported, the EEOC's view here would cause practical harm to private employers. The ADA encourages—indeed, requires—employers to make reasonable accommodations for its employees, including allowing telecommuting under the proper circumstances. 42 U.S.C. § 12111(9)(B). But if the EEOC's position carries the day, once an employer allows *one* person the ability to telecommute on a *limited* basis, it must allow *all* people with a disability the right to telecommute on an *unpredictable* basis up to 80% of the week (or else face trial). That's 180–degrees backward. It encourages—indeed, requires—employers to *shut down* predictable and limited telecommuting as an accommodation for *any* employee. A "good deed would effectively ratchet up liability," which "would undermine Congress' stated purpose of eradicating discrimination against disabled persons." . . . The practical effect? Companies would tighten telecommuting policies to avoid liability, and countless employees who benefit from currently generous telecommuting policies would suffer. A protective tool becomes a weapon if used unwisely; and telecommuting should not become a weapon.

Id. at 764-65 (citation omitted). The court was careful to prevent its opinion from being read too broadly:

One more point, for clarification. None of this is to say that whatever the employer says is essential necessarily becomes essential. *Contra* Dissent Op. at 773–74; 775–76. Suppose, for instance, that a fire department regularly allows certain firefighters to refrain from driving fire trucks. But then the department denies the same accommodation to a firefighter with a known disability that prevents her from driving the trucks. A genuine fact issue might exist as to whether driving a fire truck is actually essential—it is contradicted by materially similar job practices. *Cf. Rorrer*, 743 F.3d at 1042; *see also Solomon v. Vilsack*, 763 F.3d 1, 12 (D.C.Cir. 2014). Our ruling does not, in other words, require blind deference to the employer's stated judgment. But it does require granting summary judgment where an employer's judgment as to essential job functions—evidenced by the employer's words, policies, and practices and taking into account all relevant factors—is "job-related, uniformly-enforced, and consistent with

business necessity." *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 993 (10th Cir.2001). That aptly describes Ford's judgment regarding regular and predictable on-site attendance for resale buyers. The district court accordingly properly granted summary judgment.

Id. at 765-66. Judge McKeague wrote the majority opinion, and Judge Karen Nelson Moore wrote a dissenting opinion joined by Chief Judge Cole, Judges Clay, White, and Stranch.

2. Survival of ADA Claims

Vaello-Carmona v. Siemens Medical Solutions USA, Inc., 781 F.3d 1, 6-7 (**1st Cir.** 2015), reversed the denial of the decedent plaintiff's estate's motion to substitute itself as plaintiff, and reversed the dismissal of the ADA and Puerto Rican law claims against defendant. The court noted that the ADA is silent as to survivability, and that there is no general Federal survival statute for federal-question claims. The court stated: "Without statutory guidance, the lower courts are split as to whether to evaluate the survival of an ADA claim under federal common law or the law of the state in which the court hears the claim. We do not need to resolve this dispute because the parties agree that Puerto Rico law should apply to the ADA claim. Therefore, we assume, without deciding, that Puerto Rico law governs." (Footnote omitted.) The court held that, because the ADA provides monetary compensation for injuries to the decedent during his life, it is survivable under Puerto Rican law.

3. Direct Threat: Employer's Reasonable Belief is Sufficient

E.E.O.C. v. Beverage Distributors Co., LLC, 780 F.3d 1018 (**10th Cir.** 2015), affirmed in part and reversed in part the judgment of the district court granting relief to the EEOC on its ADA claims. The charging party wished to keep his employment by transferring to the warehouse, but had impaired vision. Defendant raised the "direct threat" defense. The court of appeals held that the jury instruction on direct threat was erroneous:

> The first part of the instruction required Beverage Distributors to prove more than what was legally necessary. According to the first part, Beverage Distributors had to prove that Mr. Sungaila posed a direct threat. That was not accurate under our case law. Beverage Distributors should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary. . . .
>
> The second part of the instruction did not cure the error. This part stated that the jury was to consider the reasonableness of Beverage Distributors' belief regarding the existence of a direct threat. But, the jury was never told why it was to consider the reasonableness of what Beverage Distributors thought. Thus, the error was not cured by a reference in the instruction to the reasonableness of the company's subjective belief.

Id. at 1021-22 (citations omitted). The court then held that the erroneous instruction could have been prejudicial:

> We conclude that the jury might have relied on the erroneous direct-threat standard; thus, reversal is warranted. The inaccurate standard appeared prominently in the instruction, and the verdict form directed the jury to consider that erroneous standard. *See*

Appellant's App. at 91 ("Did Defendant Beverage Distributors prove ... *both elements* of its affirmative defense that Mr. Sungaila's employment in the Night Warehouse position *posed a direct threat* to himself or other employees ... ?" (emphasis added)). Because the instruction and verdict form could have misled the jury on the standard, we must reverse.

4. Employees Abandoning the Interactive Process

E.E.O.C. v. Kohl's Dept. Stores, Inc., 774 F.3d 127, 133, 31 A.D. Cases 2 (**1st Cir.** 2014), affirmed the grant of summary judgment to the ADA reasonable-accommodation defendant. The court held that plaintiff was responsible for the failure of the interactive process by refusing to discuss alternatives after she did not get her preferred accommodation:

> Furthermore, we conclude that Manning's refusal to participate in further discussions with Kohl's was not a good-faith effort to participate in an interactive process. . . . Indeed, because Manning chose not to follow up with Carr's offer to discuss alternative accommodations, Manning was primarily responsible for the breakdown in the interactive process. . . .

Id. (citations and footnote omitted). The court was concerned by the charging party's testimony that the EEOC had told her not to communicate with defendant:

> . . . Assuming this is what happened, Manning should have been directed to do precisely the opposite: she should have been informed that she was obliged to continue to engage with the interactive process in good faith. It thus may well be that Manning's current predicament is due to erroneous advice provided by the EEOC. Such a fact, if true, would be troubling, given the EEOC's duty to investigate discrimination claims and authorize lawsuits. One would expect that the EEOC should know that an employee's failure to cooperate in an interactive process would doom her ADA claim.

Id. at 133 n.6.

F. Family and Medical Leave Act

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 23 Wage & Hour Cas.2d (BNA) 174 (**3d Cir.** 2014), reversed the grant of summary judgment to the FMLA defendant on plaintiff's interference and retaliation claims. Plaintiff's interference claim was based on the failure to receive the required notice of her FMLA rights. The court held that her simple denial of receipt was enough to create a triable fact, since the mailbox rule was in its weakest form when the mail was sent uncertified. She was out for 18 weeks and lost her job; she testified that she would have returned in 12 weeks if she had known the FMLA applied. The court held that this showed the necessary prejudice to support an interference claim. *Id.* at 318-24. The court also held that plaintiff's FMLA retaliation claim was not extinguished by her loss of employment because she took 18 weeks, rather than 12 weeks, of leave:

> However, Lupyan's return outside of the twelve week window does not preclude her retaliation claim under the circumstances here. "The FMLA's protection against retaliation is not limited to periods in which an employee is on FMLA leave, but encompasses the employer's conduct both during and after the employer's FMLA leave."

> … The nature of retaliation claims distinctly focuses on the employer's conduct and motivations for termination. Therefore, an employee is not precluded—as a matter of law—from bringing a retaliation claim simply because she exceeded the twelve-week FMLA entitlement. „„.

Id. at 324-25 (citations omitted).

Dalton v. ManorCare of West Des Moines IA, LLC, 782 F.3d 955 (**8th Cir.** 2015), affirmed the grant of summary judgment to the FMLA, ADA, and Iowa Civil Rights Act defendant. The court held that plaintiff could not show an interference claim where the employer granted all of her requested absences from work, and her two-day hospitalization, and where none of the absences was ever shown to be related to a serious health condition. Plaintiff had pruritis and was obese, but neither ever interfered with her ability to perform her job, and the court held they were not covered by the FMLA.

G. USERRA

DeLee v. City of Plymouth, 773 F.3d 172, 173 (**7th Cir.** 2014), reversed the grant of summary judgment to the USERRA defendant. Plaintiff was on military leave for eight months, and defendant prorated his annual longevity pay to correspond to the time he was at work. The court summarized the facts and its holding:

> Pursuant to a long-standing local ordinance, the City of Plymouth, Indiana pays its police officers "longevity pay" after each work anniversary, calculated by multiplying $225 by the number of years that the officer has been on the force. Faced with financial difficulties in 1989, Plymouth enacted a second longevity pay ordinance pertaining to police, which prorates longevity pay for officers who take a leave of absence during any given year, including for military service. During police officer Robert DeLee's twelfth year on the job, he missed nearly eight months of work while serving in the United States Air Force Reserves. And so, when he returned, Plymouth paid him one-third of his full longevity payment for that year. DeLee sued, arguing that longevity pay is a seniority-based benefit to which the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301–4335, entitles him in full. Because we conclude that Plymouth's longevity benefit is more appropriately characterized as a reward for lengthy service, rather than as compensation for work performed the preceding year, USERRA guarantees DeLee a full longevity payment for his twelfth year of employment. Accordingly, we reverse the district court's grant of summary judgment in favor of Plymouth.

H. Sarbanes-Oxley

Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 667-68 (**4th Cir.** 2015), affirmed the judgment on a jury verdict for the Sarbanes-Oxley retaliation plaintiff. The court held that the four-year limitations period of 28 U.S.C. § 1658(a) applied. It held open the possibility that a well-pleaded claim based on the discovery of securities fraud might be entitled to the five-year period of 28 U.S.C. § 1658(b).

> Appellee's complaint was not specific in identifying the securities law that she believed Appellants violated. Her allegation does, however, approximate the basic elements of a section 10(b) securities fraud claim. While a shareholder bringing a section 10(b) claim would bear the burden of establishing a strong inference of scienter, see 15 U.S.C. § 78u–4(b)(2)(A), Appellee is under no such obligation. Her retaliation claim can succeed without "discovery of the facts constituting" securities fraud. 28 U.S.C. § 1658(b)(1). It stands to reason, then, that § 1658(b)(1), which hinges on the discovery of such facts, does not apply. Section 1658(a) controls, and because Appellee brought her suit within that section's four-year window, her claim is not barred.

Id. at 668.

I. Fair Labor Standards Act

1. Security Screening

Integrity Staffing Solutions, Inc. v. Busk, __ **U.S.** __, 135 S.Ct. 513, 23 Wage & Hour Cas.2d (BNA) 1485 (2014), reversed the Ninth Circuit's reversal of the lower court's dismissal of plaintiffs' FLSA complaint. Justice Thomas, writing for the Court, summarized the case in his first paragraph:

> The employer in this case required its employees, warehouse workers who retrieved inventory and packaged it for shipment, to undergo an antitheft security screening before leaving the warehouse each day. The question presented is whether the employees' time spent waiting to undergo and undergoing those security screenings is compensable under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, as amended by the Portal–to–Portal Act of 1947, § 251 *et seq.* We hold that the time is not compensable.

Id. at 515. The Court explained the construction of the Portal-to-Portal Act's exclusion of preliminary and postliminary activities:

> … At issue here is the exemption for "activities which are preliminary to or postliminary to said principal activity or activities."
>
> This Court has consistently interpreted "the term 'principal activity or activities' [to] embrac[e] all activities which are an 'integral and indispensable part of the principal activities.'" … Our prior opinions used those words in their ordinary sense. The word "integral" means "[b]elonging to or making up an integral whole; constituent, component; *spec*[*ifically*] necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage." 5 Oxford English Dictionary 366 (1933) (OED); accord, Brief for United States as *Amicus Curiae* 20 (Brief for United States); see also Webster's New International Dictionary 1290 (2d ed. 1954) (Webster's Second) ("[e]ssential to completeness; constituent, as a part"). And, when used to describe a duty, "indispensable" means a duty "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected." 5 OED 219; accord, Brief for United States 19; see also Webster's Second 1267 ("[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory"). An activity

is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. As we describe below, this definition, as applied in these circumstances, is consistent with the Department of Labor's regulations.

Our precedents have identified several activities that satisfy this test. For example, we have held compensable the time battery-plant employees spent showering and changing clothes because the chemicals in the plant were "toxic to human beings" and the employer conceded that "the clothes-changing and showering activities of the employees [were] indispensable to the performance of their productive work and integrally related thereto." … And we have held compensable the time meatpacker employees spent sharpening their knives because dull knives would "slow down production" on the assembly line, "affect the appearance of the meat as well as the quality of the hides," "cause waste," and lead to "accidents." … By contrast, we have held noncompensable the time poultry-plant employees spent waiting to don protective gear because such waiting was "two steps removed from the productive activity on the assembly line." …

Id. at 517-18 (citations omitted). The Court held:

The security screenings at issue here are noncompensable postliminary activities. To begin with, the screenings were not the "principal activity or activities which [the] employee is employed to perform." 29 U.S.C. § 254(a)(1). Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers.

The security screenings also were not "integral and indispensable" to the employees' duties as warehouse workers. As explained above, an activity is not integral and indispensable to an employee's principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities. The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work.

Id. at 518. The Court held: "The Court of Appeals erred by focusing on whether an employer *required* a particular activity. The integral and indispensable test is tied to the productive work that the employee is *employed to perform*." *Id.* at 519 (citations omitted; emphasis in original). Finally, the Court held that it made no difference if the employer could have organized the activity so that it took only a *de minimis* time. *Id.* Justice Sotomayor, joined by Justice Kagan, filed a concurring opinion. *Id.* at 519-20.

2. Retaliation

Greathouse v. JHS Sec. Inc., 784 F.3d 105 (**2d Cir.** 2015), vacated the denial of damages for retaliation to the FLSA plaintiff who had secured a default judgment on his overtime claim. The lower court denied damages for retaliation based on the Second Circuit's decision in

Lambert v. Genesee Hospital, 10 F.3d 46 (2d Cir. 1993), because plaintiff had made an oral internal complaint instead of making a written complaint to the U.S. Department of Labor or filing a lawsuit. The court held that *Lambert* was no longer good law in light of the Supreme Court's decision in *Kasten v. Saint–Gobain Performance Plastics Corp.*, __ **U.S.** __, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011), but that the lower court needed to determine whether plaintiff's oral complaint was enough to put defendant on notice that he was invoking his rights under the FLSA. The court explained at 115-16:

> Our reading is subject, however, to certain limitations. As observed in part by the *Kasten* Court, whether the "fil[ing of a] complaint"—especially an oral complaint delivered directly to an employer—constitutes an act protected by FLSA is a context-dependent inquiry. In some circumstances, an employer may find it difficult to recognize an oral complaint as one invoking rights protected by FLSA. It seems to us inconsistent with *Kasten* to elevate a grumble in the hallway about an employer's payroll practice to a complaint "filed" with the employer within the meaning of section 215(a)(3). Indeed, the Supreme Court observed in *Kasten* that "the phrase 'filed any complaint' contemplates some degree of formality," 131 S.Ct. at 1334 (emphasis added), but described the level of formality necessary in terms of the employer's interests in knowing when it need take care to avoid action that might be seen as retaliatory: "where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns," *id*.
>
> Recognizing the potential for ambiguity in oral communications, yet desiring not to impair the enforcement framework adopted in the statute, the *Kasten* Court explained that "a complaint is 'filed' [only] when a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act." *Id.* at 1335 (internal quotation marks and alterations omitted). The employee need not invoke the Act by name, but, as the Court concluded, "[t]o fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Id.* Defining the exact contours of that standard is beyond the scope of this opinion, but it would, for example, exclude from the concept of "fil[ing a] complaint" a mere passing comment. This limitation, applied with the statute's remedial purpose in mind, informs and cabins our holding today.

(Footnote omitted.)

J. 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.

K. Joint Employers, Integrated Employers, and Successor Liability

E.E.O.C. v. Northern Star Hospitality, Inc., 777 F.3d 898, 901-02, 125 Fair Empl.Prac.Cas. (BNA) 1681 (**7th Cir.** 2015), affirmed the lower court's determination of successor liability. The court stated:

In a case involving more than one corporate entity, successor liability is "the default rule ... to enforce federal labor or employment laws." *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 769 (7th Cir. 2013). Without it, "the victim of the illegal employment practice is helpless to protect his rights against an employer's change in the business." *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 746 (7th Cir. 1985) ("A predecessor's illegal act may have left the employee without a job, promotion, or other employment benefits that he cannot now obtain from another employer, but that he might have received from the successor had the predecessor not violated the employee's rights."). Where the successor has notice of a predecessor's liability, there is a

presumption in favor of finding successor liability. *Worth v. Tyer*, 276 F.3d 249, 260 (7th Cir. 2001) (citing *EEOC v. Vucitech*, 842 F.2d 936, 945 (7th Cir. 1988)).

We recently articulated a five-factor test for successor liability in the federal employment-law context: (1) whether the successor had notice of the pending lawsuit; (2) whether the predecessor could have provided the relief sought before the sale or dissolution; (3) whether the predecessor could have provided relief after the sale or dissolution; (4) whether the successor can provide the relief sought; and (5) whether there is continuity between the operations and work force of the predecessor and successor. *Teed*, 711 F.3d at 765–66.

L. 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.

M. ERISA Benefit Plans

M & G Polymers USA, LLC v. Tackett, __ **U.S.** __, 135 S.Ct. 926, 202 L.R.R.M. (BNA) 3201, 59 Employee Benefits Cas. 1425 (2015), unanimously reversed the Sixth Circuit's presumption-laden interpretation of the provisions of collective bargaining agreements (CBAs) as providing lifetime benefits for retirees. Justice Thomas, writing for the Court, summarized the case in his first paragraph:

> This case arises out of a disagreement between a group of retired employees and their former employer about the meaning of certain expired collective-bargaining agreements. The retirees (and their former union) claim that these agreements created a right to lifetime contribution-free health care benefits for retirees, their surviving spouses, and their dependents. The employer, for its part, claims that those provisions terminated when the agreements expired. The United States Court of Appeals for the Sixth Circuit sided with the retirees, relying on its conclusion in International Union, *United Auto., Aerospace, & Agricultural Implement Workers of Am. v. Yard–Man, Inc.*, 716 F.2d 1476, 1479 (1983), that retiree health care benefits are unlikely to be left up to future negotiations. We granted certiorari and now conclude that such reasoning is incompatible with ordinary principles of contract law. We therefore vacate the judgment of the Court of Appeals and remand for it to apply ordinary principles of contract law in the first instance.

Id. at 930. The Court explained the difference between retirement benefit plans and welfare benefit plans, and the rules of construction that apply to CBAs:

> This case is about the interpretation of collective-bargaining agreements that define rights to welfare benefits plans. The LMRA grants federal courts jurisdiction to resolve disputes between employers and labor unions about collective-bargaining agreements. 29 U.S.C. § 185. When collective-bargaining agreements create pension or welfare benefits plans, those plans are subject to rules established in ERISA. ERISA defines pension plans as plans, funds, or programs that "provid[e] retirement income to employees" or that "resul[t] in a deferral of income." § 1002(2)(A). It defines welfare benefits plans as plans, funds, or programs established or maintained to provide participants with additional benefits, such as life insurance and disability coverage. § 1002(1).

> ERISA treats these two types of plans differently. Although ERISA imposes elaborate minimum funding and vesting standards for pension plans, §§ 1053, 1082, 1083, 1084, it explicitly exempts welfare benefits plans from those rules, §§ 1051(1), 1081(a)(1). Welfare benefits plans must be "established and maintained pursuant to a written instrument," § 1102(a)(1), but "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," … . As we have previously recognized, "[E]mployers have large leeway to design disability and other welfare plans as they see fit." … And, we have observed, the rule that contractual "provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. ——, ——, 134 S.Ct. 604, 611–612, 187 L.Ed.2d 529 (2013). That is because the "focus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place." *Id.*, at ——, 134 S.Ct., at 612 (internal quotation marks, brackets, and citation omitted).
>
> We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. … "In this endeavor, as with any other contract, the parties' intentions control." … "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." … In this case, the Court of Appeals applied the *Yard–Man* inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. … As we now explain, those inferences conflict with ordinary principles of contract law.

Id. at 933 (citations omitted). The Court held that the *Yard-Man* inferences place "a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *Id.* at 935. The Court continued:

> That rule has no basis in ordinary principles of contract law. And it distorts the attempt "to ascertain the intention of *the parties*." 11 Williston § 30:2, at 18 (emphasis added); see also *Stolt–Nielsen*, 559 U.S., at 682, 130 S.Ct. 1758. *Yard–Man* 's assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention.
>
> And the Court of Appeals derived its assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits. … For example, it asserted, without any foundation, that, "when ... parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Ibid.*; see also *ibid.* ("[I]t is unlikely that [retiree] benefits ... would be left to the contingencies of future negotiations"). Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case. 12 Williston § 34:3 … . *Yard–Man* relied on no record evidence indicating that employers and unions in that

> industry customarily vest retiree benefits. Worse, the Court of Appeals has taken the inferences in *Yard–Man* and applied them indiscriminately across industries. …

Id. (citations omitted). The Court held that the Sixth Circuit's system of inferences "rest on a shaky factual foundation," and explored the erroneous premises underlying the inferences. *Id.* at 936. The court then addressed the significance of CBAs' durational clauses:

> Further compounding this error, the Court of Appeals has refused to apply general durational clauses to provisions governing retiree benefits. Having inferred that parties would not leave retiree benefits to the contingencies of future negotiations, and that retiree benefits generally last as long as the recipient remains a retiree, the court in *Yard–Man* explicitly concluded that these inferences "outweigh[ed] any contrary implications derived from a routine duration clause terminating the agreement generally." … The court's subsequent decisions went even further, requiring a contract to include a specific durational clause for retiree health care benefits to prevent vesting. … These decisions distort the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties. See 1 W. Story, Law of Contracts § 780 (M. Bigelow ed., 5th ed. 1874); see also 11 Williston § 31:5.

Id. (citation omitted). The Court held that the illusory-promises doctrine was not implicated by the fact that some CBA provisions benefitted some retirees more than others:

> That doctrine instructs courts to avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract. See 3 Williston § 7:7 (4th ed. 2008). But the Court of Appeals construed provisions that admittedly benefited some class of retirees as "illusory" merely because they did not equally benefit *all* retirees. … That interpretation is a contradiction in terms—a promise that is "partly" illusory is by definition not illusory. If it benefits some class of retirees, then it may serve as consideration for the union's promises."

Id. (citation omitted) (emphasis in original). The Court continued with its discussion of common-law contract-interpretation principles:

> The Court of Appeals also failed even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises. See 3 A. Corbin, Corbin on Contracts § 553, p. 216 (1960) (explaining that contracts that are silent as to their duration will ordinarily be treated not as "operative in perpetuity" but as "operative for a reasonable time" (internal quotation marks omitted)). …

Id. The Court turned again to the durational clauses:

> Similarly, the Court of Appeals failed to consider the traditional principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." … That principle does not preclude the conclusion that the parties intended to vest lifetime benefits for retirees. Indeed, we have already recognized that "a collective-bargaining agreement [may] provid[e] in explicit terms that certain

> benefits continue after the agreement's expiration." … But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

Id. at 937. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, filed a concurring opinion. Its most important portion is:

> Today's decision rightly holds that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement. Under the "cardinal principle" of contract interpretation, "the intention of the parties, to be gathered from the whole instrument, must prevail." 11 R. Lord, Williston on Contracts § 30:2, p. 27 (4th ed. 2012) (Williston). To determine what the contracting parties intended, a court must examine the entire agreement in light of relevant industry-specific *938 "customs, practices, usages, and terminology." *Id*., § 30:4, at 55–58. When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further. *Id*., § 30:6, at 98–104. But when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. *Id*., § 30:7, at 116–124.
>
> Contrary to M & G's assertion, Brief for Petitioner 25, no rule requires "clear and express" language in order to show that parties intended health-care benefits to vest. "[C]onstraints upon the employer after the expiration date of a collective-bargaining agreement," we have observed, may be derived from the agreement's "explicit terms," but they "may arise as well from ... implied terms of the expired agreement." *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 203, 207, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991).

Id. at 937-38.

Fulghum v. Embarq Corp., 785 F.3d 395, 403 (**10th Cir.** 2015), *petitions for certiorari pending*, adopted the "clear and express" standard for promises of lifetime benefits in ERISA welfare benefit plans. The court also held that the six-year statute of repose set out in 29 U.S.C. § 1113 was inapplicable to breach of fiduciary duty claims under 29 U.S.C. § 1132(a)(3), and reversed their dismissal as untimely. *Id.* at .

N. Taking the Employer's Documents

State v. Saavedra, 222 N.J. 39, 46-48, 117 A.3d 1169, 1172-73 (N.J. 2015), affirmed the lower courts' denial of defendant Saavedra's motion to dismiss the indictment against her. The court summarized its ruling:

> In this appeal, we review the trial court's denial of defendant Ivonne Saavedra's motion to dismiss her indictment for official misconduct and theft by unlawful taking of public documents. We also consider defendant's constitutional and public policy challenges to the official misconduct and theft statutes as they apply to her case.

Defendant, an employee of the North Bergen Board of Education (Board), filed an action asserting statutory and common law employment discrimination claims against the Board. In the course of discovery in that action, defendant's counsel produced several hundred documents that allegedly had been removed or copied from the Board's files, and were in defendant's possession. According to the Board, the documents taken from its files included original and photocopied versions of highly confidential student educational and medical records that were protected by federal and state privacy laws. The Board reported the alleged theft of its documents to the county prosecutor.

The State presented the matter to a grand jury. A Board attorney testified before the grand jury about defendant's position with the Board, the Board's discovery through the civil litigation that defendant had possession of original and copied documents from its files, and the privacy implications of defendant's alleged appropriation of the documents. The grand jury indicted defendant for official misconduct and theft by unlawful taking.

Defendant moved to dismiss the indictment. She argued that the State failed to present evidence sufficient to support the indictment and withheld from the grand jury exculpatory evidence about defendant's motive in taking the documents. She also contended that because the documents were taken for use in her employment discrimination litigation, this Court's decision in *Quinlan v. Curtiss–Wright Corp.*, 204 N.J. 239, 8 A.3d 209 (2010), immunized her conduct as a matter of public policy and prohibited the State from prosecuting her. The trial court denied the motion, and the Appellate Division affirmed the trial court's determination.

We affirm the judgment of the Appellate Division. We hold that the trial court properly denied defendant's motion to dismiss her indictment. We conclude that the State presented to the grand jury a prima facie showing with respect to the elements of each offense charged in the indictment and that the State did not withhold from the grand jury exculpatory information or a charge regarding a defense that it was compelled by law to present. We further hold that defendant's indictment does not violate due process standards or New Jersey public policy by conflicting with this Court's decision in *Quinlan.* The *Quinlan* case, arising from a plaintiff employee's claim that her employment was terminated after she took documents belonging to her employer and used them in her employment discrimination litigation, concerned the legal standard that governs certain retaliation claims under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5–1 to –42. *Quinlan* does not govern the application of the criminal laws at issue in this appeal.

Our decision does not preclude defendant from asserting, as an affirmative defense before the petit jury at trial, that she has a claim of right or other justification based on New Jersey's policy against employment discrimination, because she removed the documents from her employer's premises in order to use them to prosecute her civil claim. The trial court will be in a position to evaluate any such assertion in the setting of a full record regarding defendant's conduct, the content of the documents, the Board's policies regarding the records, and the impact of federal and state privacy laws.

III. Theories and Proof

A. Direct Evidence

Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The court stated:

> Although serious questions have been raised about the continuing utility of analyzing discrimination claims through the "direct" and "indirect" methods of proof . . . . litigants and courts still properly discuss racial discrimination claims under Title VII and § 1981 using the language of either the direct or indirect method of proof . . . . All relevant evidence is considered together under both methods, yet we still consider the two methods separately when reviewing a grant of summary judgment. . . . The ultimate question is "whether a reasonable jury could find prohibited discrimination." . . . .
>
> Under the direct method, a plaintiff must produce direct or circumstantial evidence of intentional racial discrimination. . . . Direct evidence requires an admission of discriminatory intent, whereas "circumstantial evidence typically includes: (1) suspicious timing, ambiguous oral or written statements, or behavior toward, or comments directed at, other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; or (3) evidence that the employer offered a pretextual reason for an adverse employment action." . . . "Circumstantial evidence must point directly to a discriminatory reason for the employer's action." . . . . To avoid summary judgment, a plaintiff must present sufficient evidence from which a reasonable jury could find that the employer took an adverse action against him because he is a member of a protected class. . . .

Id. at 789-90 (citations omitted). The court held that plaintiff's evidence did not meet this standard:

> Dr. Eric Miller's comments to Dr. Simpson that he was a "bad actor," was not on his "best behavior," and would be a "better fit" elsewhere do not address race, do not refer to Simpson's race, and do not hint at racial animus. In order to suffice as direct evidence of discrimination, the comments must suggest that the decisionmaker "was animated by an illegal employment criterion" or had "a propensity ... to evaluate employees based on illegal criteria." . . . Eric Miller's comments in no way suggest that he or the Credentials Committee had concerns about Simpson's qualifications because of his race.

Id. at 791.

B. The Inferential Model

1. Adverse Employment Action

Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784, 790 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The court held that plaintiff's withdrawal of his application for medical staff privileges did not moot his claim for denial of the privileges, explaining: "A reasonable physician would have found the threat that his application for privileges would be rejected and that the rejection would have to be reported to the National Practitioner Data Bank to have been materially adverse."

2. Requiring Releases to Continue as an Independent Contractor

E.E.O.C. v. Allstate Ins. Co., 778 F.3d 444 (**3d Cir.** 2015), affirmed the grant of summary judgment to the Title VII, ADEA, and ADA discrimination and retaliation defendant. The court stated at 446: "In 1999, Allstate decided to reorganize its business and terminate the at-will employment contracts of some 6,200 sales agents, offering them the opportunity to work as independent contractors. As a condition of becoming independent contractors, agents were required to sign a release waiving existing legal claims against Allstate. The Equal Employment Opportunity Commission sued Allstate, claiming that the company violated federal antiretaliation laws. The District Court disagreed and the EEOC appealed. We will affirm." Allstate decided to terminate the employment of all of its insurance agents and move to an independent-contractor model. Employees were offered four options. The court described the options:

> In connection with their termination, the employee agents were offered four choices: (1) conversion to independent contractor status (the Conversion Option); (2) $5,000 and an economic interest in their accounts, to be sold by September 2000 to buyers approved by Allstate (the Sale Option) (3) severance pay equal to one year's salary (the Enhanced Severance Option); or (4) severance pay equal to thirteen weeks' pay (the Base Severance Option). Employees who chose the Conversion Option received a bonus of at least $5,000, were not required to repay any office-expense advances, and acquired transferable interests in their business two years after converting. All employees who chose not to convert and left the company were bound by noncompetition covenants in the original R830 and R1500 contracts.
>
> Allstate required those who selected any of the first three options to sign a release of all legal claims against the company related to their employment or termination, including discrimination claims arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). The Release covered only claims that had accrued by the time the terminated employees signed it, not future claims, and it did not bar them from filing charges with the EEOC, which many did. Almost all the terminated employee agents signed the Release, and thousands of them chose the Conversion Option.

Id at 447 (footnote omitted). The court described the EEOC's contentions:

> The EEOC offers a few reasons why we should hold that Allstate unlawfully retaliated against its terminated employee agents. First, the Commission contends that the Release does not fall within the well-established rule that employers can require releases in exchange for post-termination benefits. EEOC Br. 21–24. Second, it argues that Allstate's conduct was per se retaliatory because the company "withh[e]ld a privilege of the employees' employment—the offer in the conversion option to continue their careers as Allstate agents—if they refused to release all their claims." *Id.* at 20. Alternatively, the EEOC claims Allstate retaliated against the employee agents who refused to sign the Release by denying them the option to continue their careers with the company as independent contractors. According to the Commission, the holdouts' refusal to waive their claims constituted "protected opposition activity" that prompted Allstate to withhold the Conversion Option, an adverse employment action. *Id.* at 32–35. We first address the general validity of agreements like Allstate's Release before turning to the Commission's two theories of retaliation.

Id. at 449. The Court rejected the EEOC's theories of discrimination:

> The EEOC begins by arguing that the well-settled rule that releases of claims are generally valid does not apply to the situation presented in this appeal. EEOC Br. 21. The Commission's argument goes like this: the only consideration adequate for a release of claims is "*severance* benefits," and Allstate's offer of an option to sell insurance as an independent contractor does not qualify because the employee agents "were not terminated in any normal sense." *Id.* at 22–23 ("[T]he conversion option was not a 'severance' benefit, but rather the opportunity [for the agents] to continue their Allstate careers."). There are a few problems with the Commission's postulate.
>
> For starters, the notion that the Conversion Option was inadequate consideration for the Release is remarkably counterintuitive. The EEOC concedes that the Sale Option and the Enhanced Severance Option, both of which also required the employees to sign the Release, were valid. … It nevertheless contends that the Conversion Option—which was chosen by the vast majority of the terminated agents—was illegal. According to the Commission, Allstate could have complied with the antiretaliation statutes by simply firing all its employee agents for good, instead of giving them the opportunity to sell Allstate insurance in a different capacity. We are confident that federal laws designed to protect employees do not require such a harmful result.

Id. at 450. The court rejected the EEOC's argument that the Conversion Option was not supported by adequate consideration. It point out that the employee agents were not entitled to anything in the absence of the program, and continued: "the Conversion Option was significantly more advantageous because it: (1) offered guaranteed conversion, whereas Allstate had previously retained discretion to deny conversion; (2) came with a bonus; (3) excused repayment of any outstanding office-expense advances; and (4) gave the converting agent a transferable interest in his or her business after two years, rather than five. …" *Id.* at 451. The court rejected the EEOC's concern about the pressures employee agents were placed under in making their decisions: "We acknowledge the Commission's concerns about the prospects of employers trading releases for new business opportunities and terminated employees facing "financial pressure" when offered such a deal. EEOC Br. 32. But the EEOC fails to explain why this

financial pressure is more offensive to the antiretaliation statutes than the pressure one is bound to feel when required to sign a release in exchange for severance pay." *Id.* (footnote omitted).

3. Inadequate "Legitimate Explanation"

Ledbetter v. Good Samaritan Ministries, 777 F.3d 955 (**7th Cir.** 2015) (Posner, J.), reversed the grant of summary judgment to the Title VII and § 1981 defendant, because the defendant failed to support its nondiscriminatory explanation adequately. The court stated at 957:

> There is much more that is odd about the case—none of it remarked by the district court. The affidavits of Heath and Anderson on which the court based summary judgment in the defendants' favor are each only a page long and each states only, so far as Ledbetter's termination is concerned, that "I affirmatively state that each and every fact attributed to me in Defendants' Motion for Summary Judgment and Supporting Memorandum is true and correct to the best of my knowledge." That's an odd mode of testifying (an affidavit is sworn testimony), and allows an inference that the affiants were parroting language inserted by the lawyers in what amounted to pleadings. It's true that we held this type of affidavit valid in *Dale v. Lappin*, 376 F.3d 652, 655 (7th Cir. 2004), but the affiant in that case was a prison inmate and the factual allegations that the affidavit stated were true were allegations contained in his own response to the defendants' motion for summary judgment.
>
> The present case is closer to *Payne v. Pauley*, 337 F.3d 767, 772–73 (7th Cir. 2003), which emphasizes the requirement in Fed.R.Civ.P. 56 that the affidavit of a lay witness be based on the witness's personal knowledge. The affidavits of Heath and Anderson don't say they're based on the affiants' personal knowledge. Nor do the two documents that the affidavits incorporate by reference. The requirement that an affidavit be based on the affiant's personal knowledge is crucial in this case. Heath and Anderson have no personal knowledge that Ledbetter made any false accusations after the October 5 meeting; the allegation that he did was hearsay. Indeed there is no admissible evidence that the events they contend were the reason for firing Ledbetter ever happened.

The court went on to explain a number of other errors in defendants' motion. The court ended its decision at 959:

> There are too many loose ends to have justified the district court in granting summary judgment in favor of the defendants. The judgment is therefore reversed and the case remanded. Ledbetter, who has no legal training, has been representing himself throughout this litigation. The district court should consider requesting a lawyer to represent him in the further proceeding that we are ordering.

Hilde v. City of Eveleth, 777 F.3d 998, 1006 (**8th Cir.** 2015), reversed the grant of summary judgment to the ADEA and Minnesota Human Rights Act defendant. The court held that defendant had not shown a legitimate nondiscriminatory reason:

> To assume that Hilde was uncommitted to a position because his age made him retirement-eligible is age-stereotyping that the ADEA prohibits. … The prohibited

stereotype—older employees are likely to be less committed to a job because they can retire at any time—figured in the City's decision. … Using retirement eligibility to presuppose lowered productivity or dedication would not "represent an *accurate* judgment about the employee" unless evidence other than age indicates that the employee would, in fact, retire. …

The City provides no evidence that the commissioners doubted Hilde's commitment to the job for any reason but for his age-based retirement eligibility. They admit he had a great reputation in the force and they held his continued service in the highest regard. The City argues that Hilde should have convinced them that though retirement eligible, he would not retire. …

* * *

The commissioners apparently never asked about his commitment to the job or whether he was considering retirement. The City has not met its burden of articulating a nondiscriminatory justification for its reliance on Hilde's retirement eligibility. "This is not to say that discrimination occurred here, but that summary judgment prematurely disposed of the issue." *Tramp*, 768 F.3d at 802.

4. Pretext

a. Subjective Criteria

Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. Defendant's officials denied medical staff privileges to plaintiff. Dr. Eric Miller, relying on Kimberly Miller's description of plaintiff's behavior when he arrived to pick up a signing bonus he thought would be there, told Dr. Simpson that he was a "bad actor," was not on his "best behavior," and would be a "better fit" elsewhere. The court held that this was not direct evidence of discrimination, and rejected plaintiff's attacks on them as pretextual:

> In addressing these concerns, Dr. Simpson challenges BDCH's right to rely on the self-serving, subjective opinions of Kimberly Miller, Dr. Eric Miller, and Dr. Joel Miller, regarding his qualifications. Disputing their subjective opinions is not enough by itself. We have noted that reliance "on subjective factors is not per se illegal" . . . ; however, under certain circumstances, an employer's subjective reason for an employment decision may be reasonably viewed as a pretext for discrimination . . . .

Id. at 794. The court emphasized that subjective criteria had to be met in order to obtain staffing credentials, and that the provision of credentials was not enough by itself to entitle an applicant to a position:

> These other criteria included documenting one's "background, experience, training, good judgment, and current competence, as demonstrated by peer data, references and otherwise"; adhering to professional ethics; having a good reputation and character as well as "the ability to work harmoniously with others" to ensure quality patient care and to ensure that the hospital "will be able to operate in an orderly manner."

Id. at 795.

Washington v. American Airlines, Inc., 781 F.3d 979 (**8th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 defendant. Plaintiff was denied a promotion after failing a practical examination of his skills as a machinist. The court held that plaintiff only had to show that race was a motivating factor. *Id.* at 981. The court rejected plaintiff's argument that the inclusion of subjective factors in the examination established pretext: "Washington asserts that the MPG–1 examination is too subjective, and that the company permitted examiner Howard to find that Washington had not machined the bushing correctly even though the company provides no guidelines for machining a bushing. That an examiner may employ subjective impressions when evaluating a process for machining, however, is not sufficient by itself to show discrimination based on race." *Id.* at 982 (citation omitted).

Hilde v. City of Eveleth, 777 F.3d 998, 1007-08 (**8th Cir.** 2015), reversed the grant of summary judgment to the ADEA and Minnesota Human Rights Act defendant. The court held that there was sufficient evidence to show a triable issue of fact as to defendant's alternate explanation—superior qualifications—for promoting another candidate. The court stated:

> True, an employer's subjective choice between two candidates with "similar qualifications" does not itself imply discrimination. … In this case, there is more: the commissioners did not follow their hiring protocol. They deliberately manipulated Hilde's scores to ensure the candidates would be "similarly qualified," calling into question the objectivity of the entire hiring process. …
>
> Additionally, before the interviews, the commissioners ranked Hilde's training-and-employment score (based on "relevant experience") lowest of all candidates without explanation—although his years-of-experience score was the highest. There was no overall objective disparity between Hilde and Koivunen's qualifications (although Koivunen had fewer years of experience) to support the City's argument that Koivunen's credentials were "obviously" superior. Hilde's extremely low training-and-employment score, without justification, is further evidence of pretext when compared to the higher scores of other finalists with less training and experience. Thus, Hilde has met his burden of showing the City's reasoning—that Koivunen was the most qualified candidate—may be pretext for discrimination.

b. Plaintiff Shows Plausibility of Pretext

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 325-26, 23 Wage & Hour Cas.2d (BNA) 174 (**3d Cir.** 2014), reversed the grant of summary judgment to the FMLA defendant on plaintiff's interference and retaliation claims. Plaintiff had taken 18 weeks of leave and lost her job because of failure to return within 12 weeks. As to the retaliation claim, the court rejected as a matter of law defendant's defense that she had exceeded 12 weeks of leave, and held that plaintiff's proof—three mutually inconsistent explanations of policy by three managers—had shown a triable issue of fact as to defendant's other justification: that the number of students had declined so there was no position for her to fill.

c. The "Honest Belief" Rule

(1) Rule Avoided By Evidence of "Dishonest Belief"

Soto-Feliciano v. Villa Cofresi Hotels, Inc., 779 F.3d 19, 29 (**1st Cir.** 2015), reversed the grant of summary judgment to the age discrimination defendants. The lower court relied on defendants' explanation that they honestly believed plaintiff had committed misconduct at work, and that this evidence outweighed the evidence of age discrimination. The court stated:

> We find that the gaps in the defendants' account that Soto identifies raise a genuine issue of material fact concerning pretext. For example, the record shows that complaints about Soto's conduct were never documented in writing or placed in Soto's personnel file. And that was the case even though the District Court found that it was hotel policy to follow that course for lodging such complaints. The record further indicates that, with respect to complaints about Soto, the hotel did not follow its acknowledged policy of "progressive discipline," in which verbal warnings are followed by written ones. Instead, Soto was suspended for two incidents of alleged insubordination and one alleged threat without first having been warned about those instances at all.

The court linked these gaps to the evidence of age-biased remarks directed at plaintiff. *Id.* at 29-30.

Note of Richard Seymour on *Soto-Feliciano v. Villa Cofresi Hotels, Inc.*: It is extraordinary that the First Circuit did not even mention the established principle that a court is not to weigh the evidence at summary judgment. The district court did so, and the court of appeals held that it weighed the evidence wrongly, but never suggested that the exercise of weighing the evidence is improper on summary judgment.

Hutchens v. Chicago Bd. of Education, 781 F.3d 366, 372-74 (**7th Cir.** 2015), reversed the grant of summary judgment to the Title VII and § 1983 racial discrimination defendants, and held that the *pro se* plaintiff had made an adequate showing of pretext. The case is remarkable for its actually drawing reasonable inferences on behalf of the nonmoving plaintiff, rather than the district court's drawing of even unreasonable inferences on behalf of the movant defendants. For example, the court stated:

> Remarkably in light of our summary of the record, the district judge, in granting summary judgment said that the honesty of the defendants' beliefs about the relative qualities of Hutchens and Glowacki could not reasonably be questioned. In fact, as our summary of the evidence reveals, there is considerable doubt about the honesty of Rivera and Cushing, the main witnesses for the defense, and Sherfinski, who seems to have had a private quarrel with Hutchens over the loudness of the music in the room in which they both worked. Anderson was just a cat's paw of Rivera, Vides' testimony was on the whole favorable to Hutchens—Williams's even more so—and McDonagh's testimony was hearsay.
>
> The district judge remarked that Anderson is black, as if to imply that Anderson's decision to lay off Hutchens rather than Glowacki could not have been dicriminatory. In fact Anderson had never met Hutchens, and there is nothing to suggest that he knew her

race. Moreover, he was as we said a cat's paw, which is to say an unknowing tool of Rivera. . . . He based his decision to retain Glowacki rather than Hutchens (despite the latter's greater seniority and apparently superior credentials) on what Rivera told him—and as she did not mention Hutchens he had no alternative to retaining Glowacki, which automatically terminated Hutchens.

The judge said that Hutchens' having taught at a "prison school" made her less qualified for a professional-development position than Glowacki. There is no reason, let alone evidence, for such a conclusion. The "prison school" in Cook County Jail is a public high school administered by the Board of Education. It differs from other public high schools mainly in the average age and composition of its student body. It must be tough to teach, year after year, inmates many of whom are older than most high school seniors (for remember that the students at York range in age from 17 to 21). The district judge thought it a significant point in favor of the defendants that only 1 percent of Chicago's public schools are "prison schools," and that therefore Hutchens couldn't have been familiar with the Professional Development Unit. But she had been hired into that unit with knowledge of her background, which included not only her time at the "prison school" but also five years of teaching at one of Chicago's very best public high schools. The nature, and significance for the professional-development job, of Glowacki's parochial school and public elementary school careers, were not explored at all. (Of course, zero percent of public schools in Chicago are parochial schools.)

The judge did not remark the surprising fact that the defendants failed to submit a single document that might have corroborated any of the testimony of Rivera or Cushing—testimony, riddled with unreliable hearsay (not all hearsay is unreliable, but this hearsay is), that needed documentary backup. Instead the judge summed up his take on the case by stating that "What is clear is that Defendants honestly believed that Glowacki was the better employee." What is clear is that this was the decision-maker's belief—Anderson's—since Glowacki was the only candidate offered to him (as in a Soviet election). What is unclear is whether he based the decision on the honest beliefs of Rivera or on dishonest beliefs, and whether the testimony given by Rivera and Cushing in their depositions had any significant truth value at all.

A reasonable jury could credit Hutchens' evidence while rejecting Rivera's and Cushing's, and impressed by Hutchens' credentials, her seniority over Glowacki, her earlier receipt of National Board Certification, her other credentials superior to Glowacki's, her writing skills, and her toughness in teaching inmates of Cook County Jail year after year, could conclude that she was better qualified for the job than Glowacki. It's true that having found all these facts in favor of Hutchens, that reasonable jury might nevertheless deem Hutchens a victim not of racism but of error, ineptitude, carelessness, or personal like or dislike, unrelated to race. Certainly the Professional Development Unit seems to have been poorly managed, with little effort at recordkeeping despite the befuddled recollections of key members of the unit; Hutchens may have been a victim of incompetence rather than of racism.

> But equally (so far as one can judge from a record limited to evidence obtained in pretrial discovery) a reasonable jury might deem Rivera's and Cushing's testimony a tissue of lies (the polite term is "pretext"), Hutchens distinctly better qualified for retention than Glowacki (about whom the record contains little information), and the latter's being retained instead of Hutchens a consequence (for why else all the lies?) of a preference for a person of the same race, by the persons who testified against Hutchens. . . . The district judge himself, by emphasizing his belief that the defendants' witnesses had been "honest," implied correctly that if they were liars a reasonable jury could conclude that Hutchens' race had been a decisive factor in the decision to prefer Glowacki over her. But these are factual issues for a jury to resolve.

(Citations omitted.) One dispute between the parties was the quality of plaintiff's writing skills, with the evidence diametrically opposed. The court stated at p. *7: "Hutchens appeared pro se in this appeal. Whether because of, or in spite of, not being a lawyer, her two briefs—opening and reply—are indeed well written."

(2) Rule Followed

Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580, 590-91, 124 Fair Empl.Prac.Cas. (BNA) 513 (**6th Cir.** 2014), affirmed the grant of summary judgment to the Title VII and ADEA defendants. The court relied on the "honest belief" rule in finding that plaintiff had not shown a triable issue as to pretext:

> The honest-belief rule provides that an employer is entitled to "summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial, or baseless." … An employer's pre-termination investigation need not be perfect in order to pass muster under the rule. … The key inquiry is instead "whether the employer made a reasonably informed and considered decision before taking an adverse employment action." … And to rebut an employer's invocation of the rule, the plaintiff must offer some evidence of "an error on the part of the employer that is too obvious to be unintentional." …
>
> Loyd argues that the hospital's proffered reason for firing her has no basis in fact. She notes, among other things, that two of the four witness statements taken in this case were not available to the hospital when it made its decision to terminate Loyd's employment on July 1, 2011. But even if we assume that Loyd's assertion is true, the two witness statements (Kowalak and Sikorski) that indisputably were available to the hospital in June 2011 show that Loyd acted in an insubordinate manner.
>
> * * *
>
> In sum, the hospital took witness statements and made a reasonable assessment of the available evidence before terminating Loyd. The law does not require the hospital to do anything more. … To require otherwise would unduly frustrate an employer's ability to terminate insubordinate employees for legitimate, nondiscriminatory reasons.

Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. Defendant's officials denied medical staff privileges to plaintiff. The court stated:

> Dr. Simpson offered no evidence to raise a reasonable inference that the Credentials Committee did not honestly have concerns about his application. "[W]hen an employer articulates a plausible, legal reason for [its action], it is not our province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for [its action]." . . . Simpson offered explanations in response to the concerns, and while those explanations may have relieved any cause for concern in his eyes, it is the Credentials Committee's assessment of his application that matters.
>
> The sincerity of the Credentials Committee's concern over his need to take an oral exam to obtain his license, Dr. Simpson argues, "is undercut by the reasonableness of the belief." We have said that the "determination of whether a belief is honest is often conflated with analysis of reasonableness; the more objectively reasonable a belief is, the more likely it will seem that the belief was honestly held." . . . Yet we have also said that "'[a]n inquiry into pretext requires that we evaluate the honesty of the employer's explanation, rather than its validity or reasonableness.'" . . . . "[T]he '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 [its decision].'" . . .
>
> The concern over Simpson's need to sit for an oral exam, where this was the first time the Credentials Committee had considered a candidate who was licensed in other states yet was required to sit for an oral exam, was reasonable. Simpson's report to BDCH that the oral exam consisted of a few questions about his education and employment background does not relieve the Committee's concerns as to why the Medical Licensing Board required him to sit for an oral exam. Simpson has not raised a reasonable inference that the concern was not honestly held.

Id. at 795-96 (citations omitted).

5. Limitation on Inferences to be Drawn for Nonmovant

Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. Plaintiff relied on inferences of racism from statements of an official "that he was a 'bad actor,' was not on his 'best behavior,' and would be a 'better fit' elsewhere." *Id.* at 791. The court held that such inferences would be unreasonable:

> Nor do the comments reasonably suggest that Dr. Eric Miller or the Credentials Committee was motivated by racial animus. Dr. Simpson asserts that the "better fit" comment "*just might* have been about race," and thus even in isolation could raise a triable issue of fact. At the summary judgment stage, however, circumstantial evidence of discrimination "must point 'directly to the conclusion that an employer was illegally motivated, without reliance on speculation.'" . . . In the context of this case, the "better

fit" comment does not raise an inference of illegal motivation without reliance on sheer speculation.

> Comments such as "better fit" or "fitting in" are not necessarily about race or discriminatory. As BDCH observes, we and other courts have used the phrase "better fit" in describing legitimate, nondiscriminatory reasons for a hiring decision adverse to the plaintiff. . . . And we have rejected the notion that the use of "better fit" language must be a pretext for unlawful discrimination. . . .

Id. at 791 (citations omitted).

Comment of Richard Seymour on *Simpson v. Beaver Dam Community Hospitals*: While the case has particularly unpersuasive features that explain the result and may have driven the court's language, the court's language will be applied to a legion of cases. This is why it is important that the court seems to have gotten its task completely backwards. No plaintiff is required to prove that the only possible meaning of a statement is undiluted racial discrimination in order to survive summary judgment; it is only to show that a reasonable jury could decide that an ambiguous remark could reflect discrimination. To make matters worse, the court's insistence on circumstantial evidence pointing directly to discrimination is simply a resurrection of the rejected "pretext plus" standard. Bad cases make bad law, but do they need to make law this bad?

6. Causation

Velazquez-Perez v. Developers Diversified Realty Corp., 753 F.3d 265, 274 (**1st Cir.** 2014), affirmed in part, and vacated in part, the grant of summary judgment to the Title VII male sexual discrimination and *quid pro quo* sexual harassment plaintiff. The court summarized the standard:

> In short, an employer can be held liable under Title VII if: the plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation. Here, a reasonable jury applying this test could find in favor of Velázquez.

Malin v. Hospira, Inc., 762 F.3d 552, 562 n. 3, 123 Fair Empl.Prac.Cas. (BNA) 1568, 23 Wage & Hour Cas.2d (BNA) 165 (**7th Cir.** 2014), reversed the grant of summary judgment to the Title VII and FMLA retaliation defendants. The court did not decide whether plaintiff needed to show "but for" causation on an FMLA retaliation claim, because plaintiff was able to show "but for" causation on both her Title VII and FMLA claims. The court held that there was no inconsistency in this:

* * *

> Our circuit has not addressed, and the parties have not briefed, whether but-for causation should apply to FMLA retaliation claims in light of *Gross* and *Nassar.* We need not resolve the question here, however, because Malin can avoid summary judgment on both claims even if but-for causation applies to her FMLA retaliation claim. A single

event can have multiple but-for causes, so Malin's FMLA leave request and her sexual harassment complaint could both have been but-for causes of Hospira's allegedly retaliatory conduct. A jury could find that both claims have merit.

7. Partial Causation Under New York City Law

Velazco v. Columbus Citizens Foundation, 778 F.3d 409, 411 (**2d Cir.** 2015) (*per curiam*), reversed the grant of summary judgment to defendants on plaintiffs' New York City Human rights Law claims, even though the lower court held there was not a triable issue of fact on whether age was a motivating factor for plaintiff's termination. The court relied on New York City's Local Civil Rights Restoration Act of 2005, which mandated a liberal construction of the provisions of the New York City Human Rights Law. It stated:

> We have therefore held that "[p]ursuant to these revisions, courts must analyze NYCHRL claims separately and independently from any federal and state law claims." … Indeed, "even if the challenged conduct is not actionable under federal and state law, federal courts must consider separately whether it is actionable under the broader New York City standards."

(Citations omitted.) The court remanded the case for a determination "as to whether the evidence was insufficient to support any causal link between age bias and plaintiff's firing, as required by the NYCHRL … ." *Id.* at *2 (citations omitted).

C. Constructive Discharge

E.E.O.C. v. Kohl's Dept. Stores, Inc., 774 F.3d 127, 134-35, 31 A.D. Cases 2 (**1st Cir.** 2014), affirmed the grant of summary judgment to the ADA reasonable-accommodation defendant. The court held that the EEOC failed to meet the objective standard required for a constructive-discharge claim, because plaintiff improperly gave in to her worst fears and assumed there would be no accommodation:

> To establish a claim of constructive discharge, the EEOC must show that Manning's working conditions were "so onerous, abusive, or unpleasant that a reasonable person in [her] position would have felt compelled to resign." . . . In other words, work conditions must have been so intolerable that Manning's decision to resign was "void of choice or free will"—that her only option was to quit. . . . This standard is entirely objective—we do not put weight on the employee's subjective beliefs, "'no matter how sincerely held.'" . . .
>
> Here, the EEOC fails to meet this objective "reasonable person" standard. The EEOC argues that Manning's fears that she would go into ketoacidosis or slip into a coma were objectively reasonable because her doctor told her that continuing to work erratic shifts could cause these serious medical complications. Even assuming, arguendo, that being concerned about these health issues is objectively reasonable, we still find that Manning's choice to resign was "grossly premature, as it was based entirely on [her] own worst-case-scenario assumption" that Kohl's would not provide her with accommodations. See id. According to the record, after Manning left the meeting in Carr's office on March 31, 2010, Carr followed Manning into the break room. Carr gave

> Manning her first opportunity to reconsider her resignation and offered to discuss other potential accommodations with Manning. Manning ignored this first overture, despite seeing that Carr was willing to discuss and negotiate alternative accommodations. On April 9, 2010, Carr called Manning over the phone, repeating her request that Manning reconsider both her resignation and her refusal to discuss alternative accommodations. Manning also ignored this second overture.
>
> "[A]n employee is obliged not to assume the worst, and not to jump to conclusions too [quickly]." *Id.* (internal quotation marks omitted). Here, Manning not only jumped to a conclusion prematurely, but she also actively disregarded two opportunities to resolve her issues. We agree with the Seventh Circuit that a reasonable person would simply not feel "compelled to resign" when her employer offered to discuss other work arrangements with her. . . . Because we find that a reasonable person in Manning's position would not have concluded that departing from her job was her only available choice, the EEOC has failed to meet the "reasonable person" element for a constructive discharge claim. We consequently hold that summary judgment against the EEOC on the constructive discharge claim is warranted as a matter of law.

Judge Kayatta dissented. *Id.* at 135-40.

D. Retaliation

1. Protected Activity

E.E.O.C. v. Allstate Ins. Co., 778 F.3d 444 (**3d Cir.** 2015), affirmed the grant of summary judgment to the Title VII, ADEA, and ADA discrimination and retaliation defendant. The court stated at 446: "In 1999, Allstate decided to reorganize its business and terminate the at-will employment contracts of some 6,200 sales agents, offering them the opportunity to work as independent contractors. As a condition of becoming independent contractors, agents were required to sign a release waiving existing legal claims against Allstate. The Equal Employment Opportunity Commission sued Allstate, claiming that the company violated federal antiretaliation laws. The District Court disagreed and the EEOC appealed. We will affirm." The court held that the refusal to sign a release of all claims was not protected opposition activity. "In our view, such inaction does not communicate opposition sufficiently specific to qualify as protected employee activity." *Id.* at 452 (citations omitted.) The court stated:

> Because Allstate's Release barred its signatories from bringing any claims against Allstate concerning their employment or termination, employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination. Indeed, as Allstate notes, the plaintiffs in the Romero case brought claims for breach of contract and breach of fiduciary duty. … Accordingly, the EEOC cannot show that any adverse action taken by Allstate was triggered by opposition to unlawful discrimination, dooming its retaliation case at the outset.

Id.

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1067-68, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict

against the Title VII sexual discrimination and retaliation defendant. Construing Title VII's opposition clause, the court held: "We agree with the EEOC that a complaint to a harassing supervisor qualifies as protected activity." The court held that it did not matter if the employer had designated the supervisor as a person to whom such complaints could be made. *Id.* "Therefore, it would be unfair to read into the provision a requirement that a complainant only engages in protected activity when s/he opposes the harassment to a 'particular official designated by the employer.'" *Id.* (citation omitted). The court rejected the Fifth Circuit's contrary view.

Orton-Bell v. Indiana, 759 F.3d 768 (**7th Cir.** 2014), affirmed the grant of summary judgment to the Title VII retaliation defendant. The court affirmed summary judgment on plaintiff's sexual harassment claim as to "the incident involving night-shift staff having sex on her desk" because there was no evidence to show that their doing so, or their failure to sanitize the desk afterwards, was because she was a woman. *Id.* at 773-75. Plaintiff based her retaliation claim solely on her complaints about this incident, but never said in her complaints that she thought it had happened because she was a woman. The court held that the complaints were not protected activity. *Id.* at 776-77.

2. Complaints About Harassing Activity Made "Too Early"

Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 268-69 (**4th Cir.** 2015) (*en banc*), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment and retaliation defendants, and overruled an earlier decision of the court that had created a "free to fire at will" exception to the anti-retaliation laws for employees who complained about harassment before the conduct had increased to the level at which it was—or would shortly become—actionable. The court summarized its ruling:

> Reya C. Boyer–Liberto, the African–American plaintiff in these civil rights proceedings, alleges that within a single twenty-four-hour period in September 2010, while working as a cocktail waitress at the Clarion Resort Fontainebleau Hotel in Ocean City, Maryland (the "Clarion"), she was twice called a "porch monkey" and threatened with the loss of her job by a Caucasian restaurant manager. Soon after reporting to higher-ups at the hotel that she had been racially harassed, Liberto was fired by the Clarion's owner, Dr. Leonard P. Berger. This action against the Fontainebleau Corporation and Berger ensued, with Liberto asserting claims of hostile work environment and retaliation, under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The district court awarded summary judgment to the defendants . . . and a not-fully-unanimous panel of this Court affirmed . . . . The panel's decision was vacated, however, by our grant of rehearing en banc.
>
> As explained below, we now vacate the judgment of the district court and remand for further proceedings on Liberto's claims. In so doing, we underscore the Supreme Court's pronouncement in *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), that an isolated incident of harassment, if extremely serious, can create a hostile work environment. We also recognize that an employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not

engendered by that incident alone. Finally, we specify that, to the extent today's decision is in conflict with *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir. 2006), *Jordan* is hereby overruled.

3. "Acting Outside the Role of a Manager" Under the FLSA and Title VII

DeMasters v. Carilion Clinic, 796 F.3d 409 (4th Cir. 2015), reversed the grant of summary judgment to the Title VII retaliation defendant. The case was procedurally extraordinary. The opinion listed the names of the Third Circuit judges who decided the case and stated at 912 n.*: "As all members of the Court of Appeals for the Fourth Circuit are recused in this case, a panel from the neighboring Third Circuit was appointed for this appeal." The court's first sentence set out the context of the case:

> In 2011, after five years of employment as an employee assistance program consultant in Carilion's behavioral health unit, Appellant J. Neil DeMasters allegedly was fired for acting "contrary to his employer's best interests," failing to take the "pro-employer side," and leaving his employer "in a compromised position," as a result of his support of a fellow employee's sexual harassment complaint and his criticism of the way the employer had handled the investigation.

Id. at 412-13. The court held that the "manager rule" developed under the FLSA does not apply to Title VII. After detailing differences in the anti-retaliation language of the two statutes, and detailing a number of ways in which such a rule would interfere with other doctrines intended to serve the goals of the statute, the court stated:

> Carilion's policy arguments do not change our view. While Carilion harkens to *Hagan*, 529 F.3d at 628, to warn of a "litigation minefield" without the "manager rule," we find it much more troubling that, under Carilion's approach, the categories of employees best able to assist employees with discrimination claims—the personnel that make up EAP, HR, and legal departments—would receive no protection from Title VII if they oppose discrimination targeted at the employees they are duty-bound to protect. *See Boyer–Liberto*, 786 F.3d at 283 (observing "effective [Title VII] enforcement could ... only be expected if employees felt free to approach officials with their grievances") (second alteration in original) (quoting *Burlington N.*, 548 U.S. at 66–67, 126 S.Ct. 2405).

Id. at 423.

4. Adverse Employment Actions Are From the Perspective of the Decisionmaker, Not the Employee

E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 768 (**6th Cir.** 2015) (*en banc*), affirmed the grant of summary judgment to the ADA retaliation defendant. The court held that the EEOC did not establish that defendant took any adverse employment actions against plaintiff. It stated:

> The meetings between Harris and Gordon do not create a genuine fact issue. To start, we doubt a reasonable jury could view these meetings—which Ford says were

> meant to *help* Harris, a worker with a long history of attendance and performance problems—as meant to *hurt* her. We "look at the facts as they appear to the person making the decision to terminate [the employee]," not at "the employee's subjective [beliefs]." . . . Harris's unexpressed "subjective skepticism regarding the truth of" whether Gordon was actually trying to help her does not alone "raise a triable issue as to pretext." . . . Plus, these kinds of meetings do "not constitute harassment simply because they cause the employee distress." . . .

(Citations omitted.)

Comment of Richard Seymour on *E.E.O.C. v. Ford Motor Co.*: As with some other aspects of the decision, the court was faced with two unacceptable choices: the untethered subjective feeling of the employer's agent, and the untethered subjective feeling of the employee, and chose the employer's subjective feeling without ever considering the need for an objective, reasonable-person standard. Logically, the Sixth Circuit could extend its deeply-flawed reasoning to change the subjective element of the harassment standard to an untethered "person in the position of the harasser" standard. This is nonsensical.

5. Adverse Employment Actions

Jenkins v. City of San Antonio Fire Dept., 784 F.3d 263, 269 (**5th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court held that plaintiff could not establish a *prima facie* retaliation case as to the failure to transfer him laterally to another position with the same rank and pay, where he only offered his own subjective view of why he preferred the other position, there was strong evidence of the desirability of his current position, and there was no supporting evidence other than his subjective view:

> . . . Despite his assertion that the District Chief of CS & E is perceived as less prestigious and provides fewer avenues for advancement, Jenkins acknowledges that the role was vital to the Fire Department and that as District Chief of CS & E he served as the face of Fire Prevention within the community. Furthermore, whether an employment action is materially adverse is an objective query, and here Jenkins relies solely on his subjective impressions for support. *See White*, 548 U.S. at 68–69. Thus, while Jenkins clearly coveted the role of District Chief of Inspections, his subjective preference is not enough to make his non-selection materially adverse.

6. Causation

a. "But For" Causation

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1076, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court held that a challenged jury instruction adequately stated the "but for" causation standard because it used the phrase "because of" and that incorporated the "but for" standard.

E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 770 (**6th Cir.** 2015) (*en banc*), affirmed the grant of summary judgment to the ADA retaliation defendant. The court held that the "but for" standard of causation applied to such claims.

b. Temporal Proximity

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1076-77, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court held that a challenged jury instruction adequately instructed the jury on temporal proximity:

> New Breed also contends that the retaliation instructions were erroneous because they informed the jury that it could find causation based on temporal proximity alone. New Breed reiterates its argument that temporal proximity alone is no longer sufficient under *Nassar*. Even assuming that this is the case, the instant jury instructions were not erroneous. The retaliation instructions informed the jury that "[c]lose timing between the claimant's protected activity and an adverse action against the clamant *may* provide the causal connection needed to make out a prima facie case of retaliation." . . . (emphasis added). The instructions then went on to state: "However, you should be mindful that the fact that an adverse employment action occurred close in time to a protected activity does not always mean that one caused the other." *Id.* Following this statement, the instructions made clear that the EEOC could only establish its retaliation claim if it showed that the claimants were subjected to adverse employment actions "because of" their protected activity. . . .

E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 767-78 (**6th Cir.** 2015) (*en banc*), affirmed the grant of summary judgment to the ADA retaliation defendant. The court stated that temporal proximity cannot by itself establish pretext:

> The EEOC offers other evidence that, in its view, shows that Ford fired Harris because she filed a charge with the EEOC, not because of these performance issues. Timing is on the EEOC's side: The mere four months between Harris's charge and her discharge seems suspicious. But while this "gives us pause," "temporal proximity cannot be the sole basis for finding pretext." *Donald v. Sybra, Inc.*, 667 F.3d 757, 763 (6th Cir. 2012). So the EEOC needs more to reach a jury. . . .

Comment of Richard Seymour on *E.E.O.C. v. Ford Motor Co.*: There is an important distinction between the use of close temporal proximity by itself to establish the causation element of a prima facie case—which courts have strongly tended to favor—and its use by itself to establish pretext—which courts have strongly tended to disfavor. The distinction seems to me to make a great deal of practical sense. For example, if an employee is fired within days after an employer learns the employee filed an EEOC charge, that is enough to establish the element of causation in the weak prima facie case allowing the matter to go forward and the employer to present an explanation. If the explanation is that the employee had just ruined a major piece of equipment, had just assaulted a supervisor, or the employer had decided on his termination prior to the filing of the charge, it is clear that any presumption based on close temporal proximity has been rebutted and the employee needs to prove more in order to prevail.

Carter v. Chicago State University, 778 F.3d 651, 658 (**7th Cir.** 2015), affirmed the grant of summary judgment to defendant on plaintiff's FMLA retaliation claim arising from the denial of his appointment as acting chair of his department. The court held that a seven-month gap between plaintiff's return from FMLA leave and the denial of the appointment was too long, in the absence of any other evidence, to support a causal link between the return and the denial.

Malin v. Hospira, Inc., 762 F.3d 552, 560-61, 123 Fair Empl.Prac.Cas. (BNA) 1568, 23 Wage & Hour Cas.2d (BNA) 165 (**7th Cir.** 2014), reversed the grant of summary judgment to the Title VII and FMLA retaliation defendants. As discussed in the section below on Evidence, in the topic on Hearsay, plaintiff announced to her manager in 2003 her intention to complain to Human Resources about sexual harassment, and her second-level manager, Carlin, screamed on the phone to her manager to do anything possible to keep her from complaining to Human Resources. She complained anyway. In a 2006 reorganization of her department, defendant's contractor praised her work but she was effectively demoted instead of being promoted. She was then assigned to do the work of the vacant position for which she had applied but was not even considered, received excellent performance reviews for her work but did not receive the increase in pay or managerial rank suitable to that position, and someone else was ultimately selected to fill the job. The district court held that the three-year time gap between her complaint and the denial of promotion was so large that it barred any finding of causation. The court stated:

> We reiterate what we have said consistently and repeatedly in retaliation cases stretching back more than a decade: a long time interval between protected activity and adverse employment action may weaken but does not conclusively bar an inference of retaliation. … Rather, if the time interval standing alone is long enough to weaken an inference of retaliation, the plaintiff is entitled to rely on other circumstantial evidence to support her claim. … Hospira's attempt to reduce this analysis to a simple matter of timing is not persuasive.
>
> The evidence in this case permits an inference that Carlin had a long memory and repeatedly retaliated against Malin between 2003 and 2006. Malin was denied promotions numerous times between 2003 and 2006. During that time, Carlin was the final decision-maker on all promotions in the IT department, both at Abbott and after the spin-off at Hospira. Malin's immediate supervisors repeatedly told her that she would be an excellent fit for newly-available positions at higher salary grades and that they would recommend that she be promoted into them. Nevertheless, Malin did not receive any promotions at Hospira between 2003 and 2006. On one occasion, several years after Malin's complaint, a perplexed supervisor commended Malin's work, asked why he was not allowed to increase her salary grade, and asked her what had happened with Shah. These incidents are circumstantial evidence that Carlin remembered Malin's complaint about Shah and acted to prevent her from being promoted at Hospira long after the complaint was made. Based on this evidence, a reasonable jury could find that Carlin (and thus Hospira) retaliated against Malin when he decided not to promote her, and effectively to demote her, as part of the 2006 reorganization even though the reorganization and Malin's protected activity were separated by several years.
>
> Hospira's arguments regarding Malin's Title VII retaliation claim overlook all promotion decisions that involved Malin between 2003 and 2006. Hospira points out that

> those intervening decisions are not actionable because they are outside the scope of Malin's EEOC charge and occurred more than 300 days before she filed that charge. See 42 U.S.C. § 2000e–5(e)(1) (requiring that a Title VII plaintiff file an EEOC charge within 300 days of the alleged unlawful employment action); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). FN2 That's correct as a matter of law but does not mean those events are not relevant in evaluating Hospira's actions in 2006 and 2007. The district court erred by failing to consider any hiring decisions involving Malin between 2003 and 2006 in evaluating Malin's Title VII retaliation claim.
>
> FN2. Malin has not argued that she experienced a continuing violation, which might have allowed her to reach beyond the 300–day statute of limitations. See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112–13, 122 S.Ct. 2061, 153 L.Ed.2d 106; *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 723–24 (7th Cir.2004) (discussing availability of continuing violation doctrine).

Id. at 560-61 (citations omitted).

7. Plaintiff's Argument Undercutting Causation

Carter v. Chicago State University, 778 F.3d 651, 658 (**7th Cir.** 2015), affirmed the grant of summary judgment to defendant on plaintiff's FMLA retaliation claim arising from the denial of his appointment as acting chair of his department. Plaintiff did not appeal the judgment for defendant on a jury verdict, as to the denial of his appointment as chair of the department. Plaintiff argued that the denial of his appointment as chair, a month after his return, was linked to the denial of his appointment as acting chair six months later. The court held that the evidence showed no such link, and continued:

> In addition, Carter's chair appointment claim went to jury trial, and that jury decided against him. If Carter were correct that the two claims were somehow linked, any such link would be harmful, not helpful, to his case: the jury verdict is dispositive against him. Consequently, we reject this argument.

E. Disparate Impact

E.E.O.C. v. Freeman, 778 F.3d 463 (**4th Cir.** 2015), affirmed the grant of summary judgment to the Title VII defendant. The court summarized its decision at 464-65: "In 2001, Freeman began conducting background checks on its job applicants, which the Equal Employment Opportunity Commission ("EEOC") alleges had an unlawful disparate impact on black and male job applicants. The district court granted summary judgment to Freeman after excluding the EEOC's expert testimony as unreliable under Federal Rule of Evidence 702. Without this testimony, the district court found the agency failed to establish a prima facie case of discrimination. For the reasons below, we affirm the district court's exclusion of the EEOC's expert testimony and grant of summary judgment to Freeman." See the discussion of this case in Part VI (Litigation), subpart J ("Evidence"), topic 3 (Expert Testimony) below.

IV. Types of Evidence to Prove or Rebut Discrimination

A. Cat's Paw

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1077, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court held that the lower court did not err in instructing the jury that '[a]n employer is deemed to have notice of harassment reported to *any* supervisor or department head who has been authorized or is reasonably believed by a complaining employee to have been authorized to receive and respond to or forward such complaints to management.'" (Emphasis in original.) It held that an employee's complaint to Calhoun, the harasser who fired her, qualified as knowledge of the employer. It also held that Calhoun's knowledge meant that the "cat's paw" decisionmakers he persuaded to fire three other employees was also legally sufficient to meet the "employer's knowledge" prong of the *prima facie* case. It stated:

> . . . Calhoun knew of Hines's protected conduct because she communicated her complaints about the harassment directly to him before he terminated her employment. New Breed's objection is similarly unavailing as to Pete, Pearson, and Partee. As noted previously, New Breed's liability for Pete's, Pearson's, and Partee's terminations is premised on a theory a cat's paw liability—that the relevant decision makers were conduits of Calhoun's retaliatory animus. . . . To prevail on this theory, the EEOC only had to show that the retaliatory animus of the biased supervisor influenced the decision maker. . . . Therefore, the retaliation instructions did not have to instruct the jury that the decision makers had to possess knowledge of the protected activity in order to find that the adverse employment actions were occasioned by Calhoun's retaliatory animus. Accordingly, the district court's retaliation instructions were not an abuse of discretion under the circumstances of this case.

Id. (citations omitted).

B. Comparators

1. Comparators Are Not *Per Se* Direct Evidence

Simpson v. Beaver Dam Community Hospitals, Inc., 780 F.3d 784, 794 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The court stated: "In addition, the fact that BDCH granted medical staff privileges to three white family physicians after threatening to reject Dr. Simpson's application is not direct evidence of racial discrimination. Simpson argues that under the direct method of proof, he need not show pretext or that similarly situated employees outside the protected class were treated better. That may be so. But contrary to what Simpson seems to think, we have not held that a finding of intentional discrimination may be established under the direct method merely with evidence that a person outside the protected class was treated better than the plaintiff or that the employer sought a replacement for the plaintiff."

2. Standards for Comparators

Orton-Bell v. Indiana, 759 F.3d 768, 777 (**7th Cir.** 2014), affirmed the grant of summary judgment to the defendant on plaintiff's Title VII sex discrimination claim. The court held that plaintiff's male comparator was adequate even though they were in different chains of command and had greatly different longevity with the employer:

> In general, a plaintiff who believes another individual is "similarly situated" must at least show that this "comparator" (1) "dealt with the same supervisor," (2) "w[as] subject to the same standards," and (3) "engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish [his] conduct or the employer's treatment of [him]." . . . Although in different branches of the chain of command, Orton–Bell and Ditmer were both fired by the same ultimate supervisor (Finnan) for the same conduct in violation of the same standards.
>
> The only question is whether there are "differentiating or mitigating circumstances as would distinguish" the DOC's treatment of Orton–Bell. Orton–Bell and Ditmer are primarily differentiated by the fact that she was a counselor of two years and he was a twenty-five-year veteran of the DOC's Custody branch. But this cuts both ways. Maybe the DOC was generous with Ditmer because of his long career. But that also put him in a position to know better. Thus his offense was also worse. Ditmer violated the DOC's standards of conduct while in the sensitive leadership position of Major in Charge of Custody (a para-military leadership role); Orton–Bell was a substance abuse counselor. If there is any dissimilarity it is that the affair compromised Ditmer's ability to perform his job far more than it compromised Orton–Bell's ability to perform hers. And unlike Orton–Bell, this was not Ditmer's first work affair. . . . Accordingly, because judging comparators is a common-sense inquiry, and Orton–Bell and Ditmer were fired by the same supervisor for the same conduct that violated the same standard—and both appealed the termination—we conclude that for the purposes of this claim, Ditmer is similarly situated.

(Citations omitted.) Similarly, the court rejected defendant's argument that Ditmer was treated more favorably as a result of a settlement he entered into the defendant, because defendant failed to explain why it did not offer the same package to plaintiff. *Id.* at 778.

Austin v. Long, 779 F.3d 522 (**8th Cir**. 2015), involved a claim by a deputy prosecutor that the head prosecutor has fired him because of racial discrimination. The district court denied qualified immunity, holding that there were triable issues of fact as to whether the head prosecutor's reasons for firing plaintiff were pretextual. The court held that it has no jurisdiction to review that factual determination on an appeal from the denial of qualified immunity, but that it could review the determination for legal error. The court stated at 525:

> Long asserts that the employees here were not similarly situated because their misconduct was of a different nature, but the "similarly situated coworker inquiry is a search for a substantially similar employee, not for a clone." *Id.* Coworkers can be similarly situated in all relevant respects if their misconduct is comparable to or "more serious than that of the plaintiff." *Id.* The district court did not err in concluding that the conduct of

prosecutors who had been convicted for driving under the influence and who had been formally sanctioned for ethics violations was comparable to or more serious than Austin's failure to contribute funds to his operational expense account—his only misconduct established by the undisputed summary judgment record here. …

(Citation omitted.)

3. Adequate Comparators

McMullin v. Mississippi Dept. of Public Safety, 782 F.3d 251, 126 Fair Empl.Prac.Cas. (BNA) 1177 (**5th Cir.** 2015) (Jolly, J.), vacated the grant of summary judgment to the Title VII racial discrimination defendant. The court began the opinion:

> In this appeal from a summary judgment dismissing a complaint in a Title VII race-discrimination case, plaintiff, Lieutenant Gayle McMullin, presented evidence, which, if believed by a jury, would show a fumbling, bumbling case of determined efforts to deny a promotion to McMullin. Lieutenant McMullin alleges that the Mississippi Department of Public Safety ("the Department") failed to promote her to the position of Training Director and instead promoted a less-qualified officer of lower rank to fill the position, based on race.

Id. at 252 (footnote omitted). Plaintiff is a white woman, and the alleged discriminatory officials were African-American. The court stated:

> **E. Qualifications Comparison**
>
> At the time of Master Sergeant Pack's promotion, Lieutenant McMullin had twenty-five years of experience with the Department and had been a full-time, training coordinator and instructor for the MS Academy for six years (2006 to March 2012). Lieutenant McMullin spent approximately half of her career with the Department in training, including serving as a training officer and counselor in twelve patrol schools. Lieutenant McMullin had never been disciplined by the Department. The Department does not dispute that Lieutenant McMullin was qualified for the Director's position.
>
> Master Sergeant Pack, by contrast, had a lower rank, seven fewer years of service with the Department, and served as training officer and counselor in four or five patrol schools. And, he had been fired twice while working for the Department and assigned to the Mississippi Bureau of Narcotics. Master Sergeant Pack was terminated first in October 1995 for having sex with a confidential informant. He was later reinstated because other officers who engaged in similar activity had not been terminated. He was again terminated in December 2001 for (1) seizing cash from a potential target without accounting for the seizure, (2) participating in sexually explicit behavior during a vacation in Florida, and (3) observing but not reporting illegal drug activity during that vacation. Subsequently, Master Sergeant Pack and the Department entered into a settlement which rescinded his second termination, restored him to the same rank and grade, and gave him full benefits and back pay.

> Colonel Berry stated that he did not know that Master Sergeant Pack had been fired before he promoted him to the Director position, but Colonel Berry added that the prior terminations and misconduct would not have affected his decision to promote Master Sergeant Pack.
>
> A jury could conclude that the promotion of Master Sergeant Pack, with his dubious record of service and Colonel Berry's stated failure to review the record of Master Sergeant Pack before his promotion, was evidence of discriminatory motive based on race.

Id. at 255-56.

4. Defense Comparators

Washington v. American Airlines, Inc., 781 F.3d 979 (**8th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 defendant. Plaintiff was denied a promotion after failing a practical examination of his skills as a machinist. The court held that plaintiff only had to show that race was a motivating factor. *Id.* at 981. The court relied on a comparator favoring defendant in rejecting an inference that race was a motivating factor: "Howard, moreover, also determined that a Caucasian applicant failed to complete the MPG–1 examination satisfactorily in September 2007, so Howard's work with this applicant pool does not suggest that his negative evaluation of Washington was based on race." *Id.*

C. Discriminatory Statements

1. Courts That Have Utterly Lost Their Way

E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 768 (**6th Cir.** 2015) (*en banc*), affirmed the grant of summary judgment to the ADA retaliation defendant. The court held that biased statements are irrelevant unless made by the decisionmaker at the time of the decisionmaking. It stated:

> But putting that aside, an even more fundamental point resolves this issue: The meetings involved only Gordon, a *non* decisionmaker. Actions by nondecisionmakers cannot alone prove pretext. . . . Neither can decisionmakers' statements or actions outside of the decisionmaking process. . . . Both principles apply to Gordon. When Ford decided to terminate Harris, Gordon was *on vacation*. . . . And critically (and undisputedly), no one at Ford consulted with him or received a recommendation from him before making its termination decision. . . . So by definition, Gordon was a nondecisionmaker outside of this decisionmaking process. As Harris's direct supervisor, he of course had an *effect* on her termination: He oversaw her overall poor performance and reported her failures during the performance-enhancing plan to his supervisors. . . . But we do not define "decisionmaker" at such a high level of generality. The record uniformly shows that Gordon had no direct relation to the actual termination decision, and thus his allegedly harassing conduct cannot be imputed to Ford.

(Citations omitted.)

Comment of Richard Seymour on *E.E.O.C. v. Ford Motor Co.*: Most courts may have reached the same result on the actual facts, and would not have indulged in the sweeping approach of the *en banc* majority. *First*, the court allowed for no exceptions: not for the relevance of such statements as indicating a discriminatory atmosphere. *Second*, the court did not recognize the relevance of such statements as reflecting the continuing mind-set of supervisors and decisionmakers absent evidence of a change of heart at some specific time, a mind-set that a jury can reasonably infer tainted the employment decisions at issue. *Third*, the court completely ignored the Supreme Court's holdings in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151–53 (2000), and its reliance on 40-year-old statements of bias in a manual, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

2. Statements Showing Bias

Soto-Feliciano v. Villa Cofresi Hotels, Inc., 779 F.3d 19 (**1st Cir.** 2015), reversed the grant of summary judgment to the age discrimination defendants. "Soto testified that his direct kitchen supervisor, Héctor Pérez, made these age-related remarks 'continually' during the summer of 2009. According to Soto, Pérez, the hotel's restaurant and kitchen manager, said to Soto throughout this period: 'Fool you are too old'; '[f]ool, you are too slow.' And while Pérez, unlike Sandra Caro, is not a named defendant, he was Soto's direct supervisor in the hotel kitchen. That makes his remarks, like hers, relevant to Soto's discrimination claim." *Id.* at 26 (citation omitted). The court noted that the remarks of Perez and HR head Caro were not ambiguous, were not age-biased in general but were specifically directed at plaintiff, were made by the decisionmaker (Caro) and plaintiff's direct supervisor Perez) rather than from co-workers, that Caro's remarks were made while discussing plaintiff's job performance and her intention to replace him, and were made less than two weeks before plaintiff's suspension. *Id.* at 26-27. The court continued:

> Thus, no great inferential leap would be necessary for a jury to find from these comments that the defendants fired Soto due to his age, at least if these comments were considered on their own. *See Hodgens*, 144 F.3d at 171 ("Statements by supervisors carrying the inference that the supervisor harbored animus against protected classes of people or conduct are clearly probative of pretext."). With such evidence of discriminatory motive in the record, a rational jury would not have to rely on a "tenuous insinuation" to find that the employer's asserted reason for firing Soto "was actually a pretext for age discrimination." *Mesnick*, 950 F.2d at 826 (emphasis in original). This case, therefore, is not one in which the "vast majority of [plaintiff's] evidence related to pretext ... [but] had nothing at all to do with age or with the employer's true motives." Id.

Id. at 27.

D. Departure from Ordinary Procedures or Standards

McMullin v. Mississippi Dept. of Public Safety, 782 F.3d 251, 256, 126 Fair Empl.Prac.Cas. (BNA) 1177 (**5th Cir.** 2015) (Jolly, J.), vacated the grant of summary judgment to the Title VII racial discrimination defendant. The court relied in part on the fact that bypassing the white female plaintiff to promote an African-American male resulted in the Department's ignoring 25 years of practice:

The Director's position at issue in this case had been filled by a captain for at least twenty-five years prior to Captain Gillard's departure and the dissemination of the Position Open Notice in March 2012. Colonel Berry, however, circulated a notice to fill the instant vacancy with a lieutenant instead of a captain. The Department gave the position to Master Sergeant Pack, after promoting him to the rank of lieutenant.

E. <u>Manipulative Obfuscation</u>

McMullin v. Mississippi Dept. of Public Safety, 782 F.3d 251, 126 Fair Empl.Prac.Cas. (BNA) 1177 (**5th Cir.** 2015) (Jolly, J.), vacated the grant of summary judgment to the Title VII racial discrimination defendant. The court relied heavily on manipulative obfuscation by the head of the Department:

> When asked why he sought a lieutenant instead of a captain to fill the vacancy, Colonel Berry provided vague answers throughout his deposition, including "Start and work our way from the bottom up" and "Start with the lieutenant and work our way up to the captain." Then, Colonel Berry hinted that perhaps there were, in fact, two vacant positions: one captain position and one lieutenant position.
>
> Q: So as director of the Mississippi Highway Patrol, you changed the rank of the Training Director from captain to lieutenant?
>
> A: *No. In training, it's always been a captain and a lieutenant. It's going to start at the top and fill the lieutenant slot, then go to the captain's slot.*
>
> Q: The captain's slot is still open?
>
> A: *Yeah. The Director of ... training has been in the captain slot.*
>
> Q: And, you're going to fill the captain's slot at some point?
>
> A: *Yes, sir*.
>
> Colonel Berry said he would fill the "captain's slot" when this lawsuit was resolved. But, even after making these statements, Colonel Berry was unable to confirm his suggestions that (1) there were two Director positions and (2) the "captain slot" remained unfilled. For instance, Colonel Berry stated that Master Sergeant Pack (the person ultimately promoted to the rank of lieutenant and then appointed as Captain Gillard's replacement) was the "acting" Director because he was not a captain: "The lieutenant is the *acting* director over the Training Department." Emphasis added. But, Colonel Berry acknowledged that no order stated that Master Sergeant Pack was the "acting" Director over the HP Training Division, and he vacillated when asked whether Master Sergeant Pack was "Director" or "Acting Director," even stating that the Human Resources Director was not informed that Master Sergeant Pack was an "acting" Director.
>
> Eventually, Colonel Berry changed his storyline and said that the *single* Director position was not vacant but was being "held by a lieutenant" and that Master Sergeant

Pack is the "Director of training." Later in his deposition, Colonel Berry said that the Department "will make [the Director's position] a captain." He agreed that the position "is *designated* as a captain's position but is currently *filled* by a lieutenant" and added that the position is "*held* by a lieutenant until we *fill* the captain's position." Emphases added. Colonel Berry also agreed that the "rank of training [D]irector was not changed but was *filled* by lieutenant instead of captain" and added, "It's being *held* by a lieutenant instead of a captain right now." Emphases added.

A jury could conclude that Colonel Berry's testimony reflected manipulative reasoning to obfuscate the actual facts of the promotion of Master Sergeant Pack.

Id. at 256-57 (emphases in original; footnote omitted).

F. Harassment

1. Harassment Must Be "Because of Sex"

Orton-Bell v. Indiana, 759 F.3d 768, (**7th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the sexual harassment defendant. The court affirmed summary judgment as to "the incident involving night-shift staff having sex on her desk." *Id.* at 773. The court explained:

Orton–Bell has shown that night-shift staff having sex on her desk was subjectively offensive, and we agree entirely that it is objectively offensive and severe. It was also pervasive because it was revealed to her that, for some time, she had been working at a desk un-sanitized after being used as a platform for sex by night-shift employees. And her supervisors' admitted deliberate indifference is enough for a jury to find the fourth element satisfied. . . . The difficulty is Orton–Bell's proving the second element, that her gender caused the harassment. She had to show that the night-shift employees had sex on her desk, and that the investigator told her to clean it up and the supervisor did not intervene *because Orton–Bell was a woman.*

Id. at 774 (citation omitted; emphasis in original). The court held that conduct involving sex, such as the actions of the night-shift personnel and their failure to sanitize her desk afterward, is not the same as targeting plaintiff because of her gender. It stated:

The notion that night-shift staff had sex on her desk *because* she was a woman is pure speculation. The only evidence of any motive held by the night-shift staff (who have not been identified) for having sex on her desk is that her office had curtains and was in a lockable suite near the infirmary, but accessible with the master key that a night-shift lieutenant would have. . . . Likewise, there is no evidence that Investigator Silvers's comment that she should clean her desk every morning, and Superintendent Finnan's comment that he did not care as long as offenders were not involved, was based on her being a woman.FN5 Those comments are not inherently sex-based, nor do they evince either attraction or "hostility" to Orton–Bell on account of her being a woman in the workplace. If there were evidence that the night-shift staff were using her office because she was a woman, and her supervisors were indifferent, that would be enough. If there was evidence that night-shift staff similarly used a man's office, and her supervisors

intervened in that circumstance but not in her circumstance, that would be enough. There is neither. Her supervisors' insensitive and inattentive responses were callous mismanagement; but absent evidence that this inaction was based on her sex, it did not violate Title VII.

_____

FN5. If those who had made harassing comments based on sex were the same people who engaged in sex on Orton–Bell's desk at night, or were the same supervisors who ignored her complaint, an inference of discriminatory motive might be reasonable. But that is not the case here. There is neither any evidence of who the night-shift staff were and whether they made such comments, nor is there any evidence that Finnan or Silvers had made harassing comments.

Id. at 774-75.

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

Velazquez-Perez v. Developers Diversified Realty Corp., 753 F.3d 265 (**1st Cir.** 2014), affirmed in part, and vacated in part, the grant of summary judgment to the Title VII male sexual discrimination and *quid pro quo* sexual harassment plaintiff. The court described the context:

> Viewing the evidence in a light favorable to Velázquez, drawing reasonable inferences in his favor, and resolving issues of credibility in his favor as well, a jury could reasonably decide that Martínez conveyed to Velázquez a threat: engage in a romantic and sexual relationship with me, or I will manage to undercut you at work and get you fired. Velázquez first perceived that threat in the emails Martínez sent him right after he rebuffed her at a hotel in April, and a rational jury could find his perception reasonable. Indeed, when he reported Martínez's behavior to Albino, his boss, Albino construed Martínez's intentions in precisely that manner, telling Velázquez he should try to repair his relationship with Martínez—perhaps by sleeping with her—because if Velázquez did not, "[s]he's going to get you terminated."
>
> Over the following summer, Martínez harshly criticized Velázquez in emails to him and emails to Albino and González. It also appears that Velázquez may have unintentionally aided her efforts by failing to comply with Albino's directions on several matters. Once Martínez had compiled an arsenal of allegations against Velázquez, she then expressed her romantic interest one last time in their second hotel encounter. And when he again rebuffed her, Martínez set to carrying out her threat.

Id. at 270-71. The court described Martinez's lobbying company officials to get Velázquez fired. She threatened the local manager in Puerto Rico to report the matter to senior HR officials in Ohio if he did not fire Velázquez, and she followed through. Within days, Velázquez was fired. "While González claims that he changed his mind because Velázquez lied to him in their final meeting, the record would not compel a jury to accept that testimony. Instead, the record would allow a reasonable factfinder to view Martínez's persistent and forceful lobbying as a proximate cause of the discharge." *Id.* at 271. The court held that while Martinez had the ability to give some direction to Velázquez, she was not his supervisor. The fact that she had to lobby

other officials for his termination, and had to lobby HR officials in Ohio, demonstrated that she did not have the power to impose tangible employment actions. The court explained:

> As *Vance* recognizes, at some point the ability to provide advice and feedback may rise to the level of delegated authority sufficient to make someone a supervisor. *Id.* at 2452. For example, where the employer vests formal authority in a person who, due to physical remoteness, must rely entirely (or, perhaps, mostly) on the recommendation of another, the person whose recommendation is relied upon may be deemed to have been delegated the authority to make the decision. *Id.* (citing *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 509 (7th Cir.2004) (Rovner, J., concurring in part and concurring in judgment)). There is nothing in *Vance*, though, to warrant ignoring the difference between providing advice and feedback to one who has independent sources of information and truly makes the decision, and providing a recommendation to one whose acceptance of the recommendation is pro forma. *Vance* makes clear that the latter situation can support a finding of delegated supervisory authority. Were we also to treat the former situation as such a delegation, much of the clarity and predictability *Vance* seeks to ensure would be lost.

Id. at 272. The court held that the standards for identifying supervisors are the same in *quid pro quo* cases as in hostile environment cases. *Id.* at 273.

3. The Negligence Standard

Velazquez-Perez v. Developers Diversified Realty Corp., 753 F.3d 265, 273 (**1st Cir.** 2014), affirmed in part, and vacated in part, the grant of summary judgment to the Title VII male sexual discrimination and *quid pro quo* sexual harassment plaintiff. The court held that, while Martinez was not plaintiff's supervisor, her manipulation of company officials to bring about plaintiff's termination after he refused to enter into a sexual relationship with her could make the defendant liable under the negligence standard. Citing *Staub*, the court explained:

> Our conclusion that Martínez was not a supervisor does not necessarily absolve DDR of potential liability for Velázquez's discharge. The Supreme Court has not yet ruled on the precise question of whether employer liability premised on a finding of negligence can be limited to cases of "hostile workplace" discrimination, as opposed to discriminatory termination. *See Staub v. Proctor Hosp.*, —— U.S. ——, 131 S.Ct. 1186, 1194 n. 4, 179 L.Ed.2d 144 (2011) ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."). The Court has cautioned, though, that the distinction between hostile workplace claims and quid pro quo claims is "of limited utility." . . . And we see no basis for applying that distinction to permit a negligent employer to escape (or incur) liability on one type of claim but not the other. The same considerations of simplicity touted in *Vance* that counsel against heightening the potential for liability on quid pro quo claims counsel as well against lessening the potential for liability.

(Citation omitted.)

4. Tangible Employment Actions

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1069-70, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court held that a discharge is a tangible employment action even when the harasser uses other decisionmakers as cat's paws to accomplish the firing.

5. Severity or Pervasiveness

Velazquez-Perez v. Developers Diversified Realty Corp., 753 F.3d 265, 275-76 (**1st Cir.** 2014), affirmed in part, and vacated in part, the grant of summary judgment to the Title VII male sexual discrimination and sexual harassment plaintiff. The court held that the conduct in question was not severe or pervasive:

> Even viewing the record in the light most favorable to Velázquez, neither Martínez's gifts nor her comments at the hotel in August approach "severe" harassment under our precedent, particularly given the lack of physical touching, implicit physical coercion, extreme language, or obscene behavior. . . . We doubt that a jury could even find these few post-April incidents hostile or abusive, in isolation or in aggregate. . . . And, even if a jury found Martínez's actions hostile or abusive, a handful of relatively mild incidents over a five month period could not be deemed "pervasive" harassment. . . . Even further assuming that the factfinder could add into the equation Martínez's criticisms of Velázquez's work, which were not explicitly sexual but may have been motivated by sexual rejection, Velázquez still could not show that the harassment reached the required level of severity or pervasiveness. . . . Notably, Velázquez failed to offer any evidence that Martínez's behavior "unreasonably interfere[d] with [his] work performance." . . . Indeed, there is no evidence that Velázquez was aware of the bulk of the criticisms Martínez was surreptitiously feeding to his supervisors.

(Citations omitted.)

Orton-Bell v. Indiana, 759 F.3d 768, 775 (**7th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the sexual harassment defendant. The court reversed the grant of summary judgment as to the sexually-related remarks made to plaintiff. The court found that the regular barrage of comments met the "severe or pervasive" test:

> Superintendent Mize, the official formerly in charge of the entire prison, harassed her, ogled her, and ostensibly forbade her from wearing jeans based on his opinion that "her ass looked so good that it would cause a riot." Walking through the pat-down area, she says she was searched more thoroughly while men watched and made sexual comments. And she relays that these kind of comments were not rare, but were part of a never-ending barrage. We have found less egregious comments in less egregious contexts to be sufficiently severe. . . . And while "[t]he occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers would be neither pervasive nor offensive enough to be actionable" . . . these comments were perpetual and directed at Orton–Bell.

(Citations omitted.)

6. The "Subjective Offensiveness" Test

Orton-Bell v. Indiana, 759 F.3d 768, 775-76 (**7th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the sexual harassment defendant. The court reversed the grant of summary judgment as to the sexually-related remarks made to plaintiff. The court found that the regular barrage of comments met the "severe or pervasive" test, and rejected the lower court's holding that plaintiff's one instance of e-mailed vulgar banter proved the remarks were not subjectively offensive:

> With regard to subjective offensiveness, Orton–Bell testified that this environment was oppressive and interfered with her ability to do her job. Regardless, the district court held that Orton–Bell had not shown that the environment was subjectively offensive. The record does reveal an instance where, in an email conversation with a co-worker named Bruce Helming, she participated in vulgar banter. However, while that may lead a jury to conclude that she was not subjectively offended by the environment, one private conversation via email is not enough for us to conclude, as a matter of law, that she was not subjectively offended by the many other public, unwelcome sexually charged comments in the environment.

7. Adequacy of Employer's Response

Orton-Bell v. Indiana, 759 F.3d 768, 777 (**7th Cir.** 2014), affirmed in part, and reversed in part, the grant of summary judgment to the sexual harassment defendant. The court reversed the grant of summary judgment as to the sexually-related remarks made to plaintiff. The court held that defendant was liable under the negligence standard where plaintiff showed that she made repeated complaints to defendants' officials in accordance with defendants' policy for such complaints, and that no corrective action was taken.

Arizona v. ASARCO LLC, 773 F.3d 1050, 1059-60 (**9th Cir.** 2014) (*en banc*), unanimously affirmed the judgment for the plaintiff State of Arizona and plaintiff-intervenor Aguilar on her Title VII sexual harassment claim. "The jury awarded no compensatory damages, but awarded $1 in nominal and $868,750 in punitive damages." *Id.* at 1054. The district court reduced the award to the cap of $300,000. The court rejected defendant's argument that its conduct did not merit an award of punitive damages:

> . . . In its decision, the district court noted that ASARCO did have an anti-discrimination policy in force. But it also recounted particular evidence in the record, specifically that ASARCO's management "did not provide prompt and effective remedial action" when made aware of Aguilar's complaints. Instead, the court pointed to evidence that ASARCO "treated Aguilar's claims dismissively, did nothing to investigate Aguilar's claims, or took steps that were not reasonably calculated to and did not stop the harassment." The court noted that, based on its evaluation of the evidence, ASARCO repeatedly, over the course of months, failed to adequately respond to discrete instances of harassment against Aguilar. Moreover, the court reasoned, because the evidence demonstrated that ASARCO "is a serial violator of antidiscrimination laws" (as evidenced by the sexually explicit graffiti targeting other employees), the deterrence aim of punitive damages awards warranted a significant award that would discourage future misconduct by ASARCO.

> Our review of the record confirms that the district court did not clearly err in its assessment of the facts. Indeed, there is significant and compelling evidence that management was aware of, and did little to resolve, lewd, inappropriate, and sexually aggressive behavior directed to Aguilar; sexually explicit, targeted pictures of Aguilar on the walls of the bathroom rented specifically for her use; and overly aggressive management and criticism of Aguilar by supervisors. Aguilar complained to management multiple times. The sexually explicit graffiti in the bathroom was not removed while she was working in the filter plant. As the district court correctly noted, to the extent ASARCO did have an antidiscrimination or harassment policy, the existence of such a policy alone is not enough to save it. . . . if it does not enforce the antidiscrimination policy and, by its actions, supports discrimination."). . . .

(Citations omitted.)

V. Litigation

A. Exhaustion

Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 670 (**4th Cir.** 2015), affirmed the judgment on a jury verdict for the Sarbanes-Oxley retaliation plaintiff. The court followed Title VII precedents on exhaustion against defendants not named in the charge. It held that plaintiff adequately exhausted his administrative remedies against two company officials not named in his OSHA complaints, and had not tried to avoid notice or circumvent the requirements:

> We recognize that a primary objective of exhaustion requirements is to put parties on notice of the allegations against them. In the context of Title VII actions, exhaustion gives the employer an opportunity to investigate and resolve the issue and "prevents the employer from later complaining of prejudice, since it has known of the allegations from the very beginning." … Here, though, there can be no doubt that Mroz and Phillips were well aware of Appellee's allegations. Mroz was the company's chief executive, and Phillips its chairman. In its October 2009 letter notifying SouthPeak of Appellee's administrative complaint, OSHA listed Phillips as the contact person for the company. Subsequently, SouthPeak's counsel discussed the complaint with both Mroz and Phillips. Surely, it could not have gone unnoticed that the complaint identified Mroz and Phillips as "person(s) who are alleged to have violated the Act." J.A. 645. It should not have been all that surprising, then, when Appellee named the two executives in the instant civil action.

(Citation omitted.)

B. Timeliness

1. Plaintiff Not Required to File a Charge After the First Incident in a Multi-Year Course of Actions

Stuart v. Local 727, Int'l Bhd. of Teamsters, 771 F.3d 1014, 1017 (**7th Cir.** 2014) (Posner, J.), reversed the *sua sponte* dismissal of the Title VII plaintiff's sex discrimination claim against the defendant union. Judge Shadur of the district court had dismissed plaintiff's claim based on the defendant's pleading the affirmative defense of untimeliness, prior to discovery or any motion. The court set forth the context of its decision:

> In March 2010 the plaintiff filled out and submitted to the union a Referral—Movie application and at the same time paid the union's initiation fee, began making dues payments to the union, and in exchange received a card designating her a member of the union. She explained to the union's business agent that she wanted to be on the Movie/Trade Show referral list, and he told her she was on the list (although the union's lawyer told us at oral argument that there is no such list). Months later, having received no referrals from the Movie/Trade Show Division, she called the business agent a number of times to ask about possible driving jobs. He told her to stop calling him—he'd call her when he had something. She received a similar response from a Transportation Coordinator whom she called.

Id. at 1017. Over the next four and a half years, the demand for such referrals increased but she received no referrals. Referrals were not based on seniority, "and no woman has *ever* been referred by the Division for a driving job." *Id.* The court stated that male drivers with a Class B CDL were referred for such jobs but the union business agent told her she was not getting referrals because she did not have a Class A license. *Id.* It got worse: "She filed a charge of sex discrimination with the EEOC in October 2011, and received her right to sue letter in September 2013." *Id.* The district court held that her charge was untimely because the detailed allegations of her Complaint showed that she knew of the sexual discrimination more than 300 days before she filed her charge, so her charge was time-barred despite the allegations of her Complaint that the union had made multiple sex-based referrals within the 300 days before her charge. The Seventh Circuit rejected this reasoning:

> In his opinion dismissing the suit with prejudice, the judge said that the plaintiff had been "hoist by her own petard." ("Hoist with his own petard," famously spoken in *Hamlet,* means "lifted" by the explosion of one's own little bomb—a "petard" is a small bomb.) By this he apparently meant that her complaint, because it contained a detailed account of the history of the locals' treatment of women drivers, acknowledged "that she knew full well of the 'boys club' (male-only) situation that existed in the Movie/Trade Show Division even before jurisdiction over that Division was transferred from Teamsters' Local 714 to Local 727 in May 2008.... None of the things about which she now complains ... was a mystery to her." And those "things" had begun happening long before the 300–day period culminating in the filing of her EEOC charge.
>
> But so what? There is no rule that a plaintiff who has been repeatedly discriminated against by her employer cannot challenge any of the discriminatory acts

> under Title VII unless she files her EEOC charge within 300 days after the first such act. . . . That would be an absurd rule. It would require an employee to infuriate her employer or union by complaining about what might be an inconsequential act of discrimination that she did not expect to be repeated. It would mean that if she'd first been discriminated against in 2000 and next (and more seriously) in 2010, she could not sue for the 2010 discrimination without proving that she had *not* been discriminated against, after all, in 2000, since if she had been she would have been barred by the rule declared by the district judge from basing a suit on the discrimination in 2010.

Id. at 1018 (citation omitted).

2. 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.

3. Presumption as to Date of Receipt of Notice of Right to Sue

Jenkins v. City of San Antonio Fire Dept., 784 F.3d 263, 266-67 (**5th Cir.** 2015), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court affirmed the lower court's presumption that an EEOC Notice of Right to Sue is received three days after it was mailed, and adopted this as the rule in the Fifth Circuit. The court rejected plaintiff's effort to rely on the EEOC regulation applicable to Federal-sector claims, which provided a five-day presumption.

4. Note as to What Really Happens with EEOC Notices of Right to Sue

On April 30, 2015, I received a copy of a Dismissal and Notice of Right to Sue dated April 22, 2015. The EEOC's postage-meter postmark was also April 22, 2015. However, the U.S. Postal Service put its own postmark on the envelope showing that it was mailed on April 28, six days *after* the postage-meter date and the date on the Notice. This can be a major problem when charging parties first contact counsel near the end of the period. Based on the responses from numerous plaintiffs' attorneys to my on-line posting about this, there is a general problem of the EEOC dating and stamping mail and then letting it sit around for several days before putting it in the mail.

Judges and counsel for both sides would be well advised to view EEOC dates on Notices of Right to Sue with caution, and to take evidence form the EEOC as to the local office's mailing practices before relying on the dates.

5. Defendant Estopped from Asserting Untimeliness

Stuart v. Local 727, Int'l Bhd. of Teamsters, 771 F.3d 1014, 1020 (**7th Cir.** 2014) (Posner, J.), reversed the *sua sponte* dismissal of the Title VII plaintiff's sex discrimination claim against the defendant union. Judge Shadur of the district court dismissed the case because of defendant's pleading of an affirmative defense of untimeliness, prior to discovery or any motion. The court of appeals held that the union was estopped from asserting an untimeliness defense:

> The plaintiff points to another ground, besides the absurdity of thinking that a refusal to hire cannot be actionable discrimination if it is a blanket refusal rather than a refusal made in response to a specific request, for overturning the dismissal of the complaint. That ground is equitable estoppel—the doctrine that tolls the statute of limitations if the defendant engages in conduct that prevents the plaintiff from filing suit or a claim within the statutory deadline. By telling the plaintiff to stop inquiring about openings for drivers, because she would be notified of such openings without having to call Local 727's business agent, the agent, on the approach taken by the district judge, placed her in an impossible position: she could infuriate him by continuing to call him to inquire about openings and emphasize her interest in them; she could sue the local prematurely for discrimination (because she didn't at that time know that the Division had an ironclad policy against referring women); or she could simply forgo any remedy under Title VII. By impaling her on this three-pronged fork, the business agent prevented her from suing within 300 days for the union's failing to refer her. If contrary to what we believe to be the law, only an express refusal would be actionable, the agent prevented her from complying with the statute of limitations and so Local 727 is equitably estopped to plead the statute.

C. Bars to Suit

1. Limitations

Rutledge v. Illinois Dept. of Human Services, 785 F.3d 258, 260-61 (**7th Cir.** 2015), reversed the *sua sponte* dismissal of the *pro se* Rehabilitation Act § 504 plaintiff's claim, and remanded the case for further proceedings on timeliness. The court raised the question whether an eight-year investigation of the claim of misconduct underlying plaintiff's termination would have tolled the period of limitations. The court also relied on the lack of evidence of when plaintiff's suspension was turned into a termination, and thought it possible that that had not yet occurred. Finally, the court pointed out that the layers of review for the termination of a State employee with a property interest in his job can take a substantial time:

> . . . In the case of many Illinois state employees, discharge requires a hearing, written approval by the director of the employing agency, and judicial review of the director's division. . . . So it can take a long time for a discharge to ripen, though we don't know whether these provisions were applicable to this plaintiff. That is an issue for the district court to explore on remand.

(Citations omitted).

2. Claim Preclusion

See the discussion of *Blunt v. Lower Merion School District*, 767 F.3d 247, 281 (**3d Cir.** 2014), *petition for certiorari filed* (Jan. 27, 2015) (No. 14-926), in the section below on "Class Actions and Collective Actions," in the section on "Consequences of Including Future Class Members in Definition."

3. Issue Preclusion or Collateral Estoppel

See the discussion of *Blunt v. Lower Merion School District*, 767 F.3d 247, 281 (**3d Cir.** 2014), *petition for certiorari filed* (Jan. 27, 2015) (No. 14-926), in the section below on "Class Actions and Collective Actions," in the section on "Consequences of Including Future Class Members in Definition."

4. Judicial Estoppel

Robinson v. Concentra Health Services, Inc., 781 F.3d 42, 45-47 (**2d Cir.** 2015), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The court held that plaintiff's representation that she was totally disabled on his Social Security disability benefits program application, and her receipt of benefits based on that representation, along with her deposition testimony to the same effect, judicially estopped her from claiming she was qualified at the time of her termination tha thereafter. The court held that plaintiff was not entitled to do an about-face and attempt in litigation to retract her prior statements of complete disability. It stated: "Although Robinson may have continued to work at Concentra until September 2010, this fact demonstrates only that her statements to the SSA and the ALJ may have been false, but does not sufficiently explain the contradiction between the statements and her current litigation position." *Id*. at 47.

Rutledge v. Illinois Dept. of Human Services, 785 F.3d 258, 259 (**7th Cir.** 2015), reversed the *sua sponte* dismissal of the *pro se* Rehabilitation Act § 504 plaintiff's claim. The court held that an application for Veterans Administration benefits and the VA's classification of the plaintiff as 100% disabled did not judicially estop the plaintiff from asserting he is a qualified person with a disability, because the VA classification is based on the "average person" and is not tailored to the individual seeking benefits:

> The judge's second ground was that the finding by the Department of Veterans Affairs that the plaintiff was 100 percent disabled meant that he "was unable to perform his job [for the Illinois Department of Human Services] as a residential case worker, with or without accommodation, at any time after 2004" (the date of the VA's determination). That's wrong too. A veteran is deemed totally disabled if he suffers from an impairment that would "render it impossible for the *average* person to follow a substantially gainful occupation," even if the veteran applying for benefits is able, through exceptional ability or exertion, to work full time. 38 C.F.R. § 4.15 (emphasis added); *Veterans Benefits Manual* §§ 3.1.1.2, 5.1.3 (Barton F. Stichman et al., eds., 2014 ed.). There is no paradox in a person deemed totally disabled by the Social Security Administration or the Department of Veterans Affairs or some other agency nevertheless wanting, finding, and holding a job, whether out of desperation or by extraordinary effort or because his

> employer feels sorry for him or because the agency that found him totally disabled was mistaken in thinking that his physical or mental ailments, even if very serious, were *totally* disabling.

(Emphases in original.) The court noted that the defendant had hired plaintiff after the VA's determination. *Id.*

D. Pleading

Johnson v. City of Shelby, __ **U.S.** __, 135 S.Ct. 346, 347, 190 L.Ed.2d 309 (2014) (*per curiam*), summarily reversed the Fifth Circuit's affirmance of the dismissal of plaintiff's claim for failure to explicitly allege a violation of § 1983. The Court stated:

> Our decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009), are not in point, for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. See Fed. Rules Civ. Proc. 8(a)(2) and (3), (d)(1), (e). For clarification and to ward off further insistence on a punctiliously stated "theory of the pleadings," petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to §1983. See 5 Wright & Miller, *supra*, §1219, at 277–278 ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief." (footnotes omitted)); Fed. Rules Civ. Proc. 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires.").

Wooten v. McDonald Transit Associates, Inc., 775 F.3d 689, 695 (**5th Cir.** 2015), vacated the default judgment on behalf of the ADEA plaintiff. The court explained:

> We begin by determining whether Wooten's complaint, either standing alone or considered together with his testimony at the hearing, adequately states a claim upon which default judgment could properly be entered. We conclude that Wooten's complaint is impermissibly bare, but if viewed in combination with his live testimony, it provides a sufficient basis to support the default judgment against McDonald Transit. Correspondingly, we must address the question on which we reserved judgment in *Nishimatsu:* May fatally defective pleadings be corrected by proof taken at a default-judgment hearing? 515 F.2d at 1206 n. 5. We answer this matter of first impression in the negative and therefore conclude that the district court erred in entering default judgment on Wooten's deficient complaint.

Soto-Feliciano v. Villa Cofresi Hotels, Inc., 779 F.3d 19, 26 (**1st Cir.** 2015), reversed the grant of summary judgment to the age discrimination defendants. The district court had refused

to consider the age-biased remarks of plaintiff's supervisor because they had not been pleaded in the Complaint. The court of appeals rejected this reasoning:

> But the District Court refused to consider Pérez's remarks because Soto's complaint did not reference them. The District Court based that decision on our prior statement that "summary judgment is not a procedural second chance to flesh out inadequate pleadings." *Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990). *Fleming*, however, does not oblige a plaintiff to set forth in the complaint every fact of relevance to an otherwise properly pled claim, let alone every fact of relevance to an as-yet-unfiled summary judgment motion that aims to defeat that same claim. And, unlike the plaintiff in *Fleming*, Soto is not introducing a new theory of liability in referencing Pérez's remarks. He is merely augmenting the evidentiary basis for the very same age discrimination claim that he had already sufficiently pled.

E. Discovery Limitations

Rattigan v. Holder, 780 F.3d 413 (**D.C.Cir.** 2015), affirmed the grant of summary judgment to the Title VII defendant. The court held that the lower court did not abuse its discretion in denying discovery of the personnel folders of the FBI supervisors plaintiff had accused of discrimination and retaliation, and in denying other requested discovery that did not focus "on the key issue of knowing falsehood on the part of the three alleged retaliators." The district court gave plaintiff three opportunities to narrow his requests, but plaintiff did not do so adequately. *Id.* at 417-19. The court of appeals stated: "Rattigan had three chances to frame his discovery request in specific terms. The district court did not abuse its discretion in declining to give him a fourth." *Id.* at 419.

F. Summary Judgment

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

Tolan v. Cotton, __ **U.S.** __, 134 S.Ct. 1861, 188 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 vpp. *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 contribute 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. Judicial Criticism of Defendants' Summary-Judgment Practice

Malin v. Hospira, Inc., 762 F.3d 552, 564-65, 123 Fair Empl.Prac.Cas. (BNA) 1568, 23 Wage & Hour Cas.2d (BNA) 165 (**7th Cir.** 2014), reversed the grant of summary judgment to the Title VII and FMLA retaliation defendants. The court stated in Part C of its opinion:

C. Summary Judgment Practice

We close by noting our disappointment with Hospira's approach to summary judgment practice, which is such a common part of modern federal civil litigation and especially employment discrimination cases. Both in the district court and in this appeal, Hospira has misrepresented the record and Malin's legal arguments. For example, Hospira repeatedly cherry-picked isolated phrases from Malin's deposition and claimed that these "admissions" doomed her case. When the testimony is read in context, however, it becomes clear that Malin made no such admissions, and that Hospira's presentation of the evidence amounted to nothing more than selectively quoting deposition language it likes and ignoring deposition language it does not like.

For example, on the subject of Malin's qualifications for the empty Relationship Quality Management position, Hospira claimed that Malin conceded that Anil Monga, who was eventually hired to fill the position, was better qualified than she was. That is simply incorrect: Malin actually testified that in some ways Monga was more qualified than she and that in some ways she was more qualified than Monga. Similarly, Hospira claimed that Malin admitted she had no information to support her claim that Hospira retaliated against her for requesting FMLA leave. Her deposition testimony made clear, however, that she was talking about the basis for her subjective belief that she was being retaliated against, not whether she had introduced evidence of retaliation in her lawsuit. These misrepresentations of the record did not comport with parties' duty of candor to the courts.

> Hospira seems to have based its litigation strategy on the hope that neither the district court nor this panel would take the time to check the record. Litigants who take this approach often (and we hope almost always) find that they have misjudged the court. We caution Hospira and other parties tempted to adopt this approach to summary judgment practice that it quickly destroys their credibility with the court.
>
> This approach to summary judgment is also both costly and wasteful. If a district court grants summary judgment in a party's favor based on its mischaracterizations of the record, the judgment will in all likelihood be appealed, overturned, and returned to the district court for settlement or trial. This course is much more expensive than simply pursuing a settlement or trying the case in the first instance. Further, the costs incurred while engaging in these shenanigans stand a real chance of being declared excessive under 28 U.S.C. § 1927, even if the abusive party prevails at trial on remand. … Risking such pitfalls in the hope of avoiding a trial is a dramatic miscalculation of the risks and rewards of each approach. …

(Citations omitted.)

3. Responding to a Summary-Judgment Motion

Jackson v. Federal Express, 766 F.3d 189, 194-95, 124 Fair Empl.Prac.Cas. (BNA) 529 (2d Cir. 2014), affirmed the grant of summary judgment to defendant on all claims as to which plaintiff had not opposed the motion for summary judgment. The court appointed pro bono counsel to represent the plaintiff on the claims as to which she did not oppose summary judgment, and explained how such claims should be handled (and were in fact handled in the case at bar:

> A non-response does not risk a default judgment, however. … Before summary judgment may be entered, the district court must ensure that each statement of material fact is supported by record evidence sufficient to satisfy the movant's burden of production even if the statement is unopposed. … In doing so, the court may rely on other evidence in the record even if uncited. Fed.R.Civ.P. 56(c)(3). And, of course, the court must determine whether the legal theory of the motion is sound. Thus, Rule 56 does not allow district courts to automatically grant summary judgment on a claim simply because the summary judgment motion, or relevant part, is unopposed. However, as discussed *infra*, a partial response arguing that summary judgment should be denied as to some claims while not mentioning others may be deemed an abandonment of the unmentioned claims.

4. Admissibility, on Summary Judgment, of Statements in EEOC Charge

E.E.O.C. v. LHC Group, Inc., 773 F.3d 688, 701, 30 A.D. Cases 1798 (**5th Cir.** 2014), reversed the grant of summary judgment to the ADA defendant because the lower court excluded statements in the charging party's EEOC charge. The court explained:

> Second, it is true that courts are often reluctant to credit evidence in EEOC charges, grievances, and claims-fearing that the documents are "inherently unreliable

because the charge is drafted in anticipation of litigation." . . . On summary judgment, however, courts are precluded from weighing credibility. The EEOC charge is competent for use at summary judgment unless it is inadmissible under the Federal Rules of Evidence or fails to comport with Federal Rule of Civil Procedure 56(c)'s requirements. . . .

Here, although the statements contained in the EEOC charge suffer from two layers of potential hearsay infirmities, they fit comfortably within two hearsay exemptions. First, the statements in Sones's charge were made by LHC employees speaking on behalf of the company; they are therefore not hearsay under Federal Rule of Evidence 801(d)(2). Second, Sones's charge repeating the statement is not hearsay because it is not being offered for the truth of the matter asserted, i.e., for the proposition that Sones was in fact a liability. See Fed.R.Evid. 801(c)(2). Finally, Sones reproduced the statements in a signed, verified document based on her personal knowledge of the conversation, in accordance with Rule 56(c). See Fed.R.Civ.P. 56(c)(4). Therefore, the district court abused its discretion in ruling that the contents of Sones's EEOC charge were not competent evidence for summary judgment.

(Case citations omitted.)

G. Class Actions and Collective Actions

1. Reversing Decertification of Class After *Wal-Mart v. Dukes*

Brown v. Nucor Corp., 785 F.3d 895 (**4th Cir.** 2015), reversed the district court's decertification of class claiming racial discrimination in promotions under Title VII and 42 U.S.C. § 1981. The court summarized the issues decided at 898:

This case concerns the certification of a class of black steel workers who allege endemic racial discrimination at a South Carolina plant owned by Nucor Corporation and Nucor Steel Berkeley (collectively, "Nucor"). Plaintiffs-appellants ("the workers") accuse Nucor of both discriminatory job promotion practices and a racially hostile work environment under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The district court originally denied class certification for both claims, and this Court reversed. *See Brown v. Nucor Corp.*, 576 F.3d 149 (4th Cir .2009) ("*Brown I* ").

The district court has revisited certification and decertified the promotions class in light of the Supreme Court's opinion in *Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). We thus again confront the question of whether the workers' have presented a common question of employment discrimination through evidence of racism in the workplace. Despite *Wal–Mart's* reshaping of the class action landscape, we hold that the district court has for a second time erred in refusing to certify the workers' class, where (1) statistics indicate that promotions at Nucor depended in part on whether an individual was black or white; (2) substantial anecdotal evidence suggests discrimination in specific promotions decisions in multiple plant departments; and (3) there is also significant evidence that those promotions decisions were made in the context of a racially hostile work environment.

> Against that backdrop, the district court fundamentally misapprehended the reach of *Wal–Mart* and its application to the workers' promotions class. We thus vacate the district court's decision in part and remand for re-certification of the class.

(Footnote omitted.) The court rejected four separate lines of analysis on which the district court relied. *First*, it rejected the lower court's holding that plaintiffs' statistical evidence was insufficient under *Wal-Mart*:

> First, *Wal–Mart* discounted the plaintiffs' statistical evidence in large part because the statistics failed to show discrimination on a store-by-store basis. . . . As such, the plaintiffs could not establish that a store greeter in Northern California, for instance, was subject to the same discrimination as a cashier in New Hampshire. These dissimilarities between class members were exacerbated by the sheer size of the *Wal–Mart* class—1.5 million members working at 3,400 stores under "a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." . . . The scale and scope of the putative class, combined with the nature of the evidence offered, was thus essential to *Wal–Mart's* holding. Had the class been limited to a single Wal–Mart store spanning multiple departments, or had the plaintiffs' evidence captured discrimination at a store level, a very different Rule 23(a)(2) analysis would have been required.
>
> In contrast to *Wal–Mart*, this litigation concerns approximately 100 class members in a single steel plant in Huger, South Carolina. The class members shared common spaces, were in regular physical contact with other departments, could apply for promotions in other departments, and were subject to hostile plant-wide policies and practices. . . . Such differences are not merely superficial. Instead, a more centralized, circumscribed environment generally increases the uniformity of shared injuries, the consistency with which managerial discretion is exercised, and the likelihood that one manager's promotions decisions will impact employees in other departments. That is particularly the case where, as discussed further below, the entire Nucor plant was allegedly infected by express racial bias and stereotypes—a culture that management took few affirmative steps to meaningfully combat.

Id. at 909-10 (citations omitted). *Second*, the court of appeals rejected the lower court's decision to treat each department in the plant as a separate entity:

> The district court made a still more fundamental error by choosing to treat the Nucor departments as autonomous operations in the first place instead of part of a single facility, contravening both this Court's instructions in *Brown I* and the district court's own prior findings. The district court's original order to certify the class recognized that a department-by-department approach had been foreclosed, writing:
>
> > Since the Fourth Circuit rejected this Court's characterization of the production departments as separate environments, the Court must proceed under the assumption that the production departments were permeable, if not unitary. This assumption is buttressed by the fact that Nucor's bidding is plant-wide, and this Court already has held that "potential applicants are eligible to prove they would have applied for a promotion but for the discriminatory practice."

J.A. 9705. *Wal–Mart* provided no grounds for the court to reconsider that finding because nothing in the Supreme Court's opinion suggests that single, localized operations must be analytically dissected into component departments. Here, all of the workers' evidence concerns a single connected facility.

Even if not required by our prior ruling, treating the plant as a single entity remains sound. In addition to the direct and circumstantial evidence of discrimination in promotions decisions in multiple departments, racial bias in one Nucor plant department itself diminished the promotional opportunities for black workers in all the departments—including those who wanted promotions into the infected department and those who sought promotions to other departments and needed their supervisors' recommendations. To that end, the workers cogently observe that requirements for dual approvals for promotions—by originating and destination department heads—"carr[ied] the effects of racial discrimination from one department and supervisor to another, either by systemic tolerance, acquiescence or design." Appellants' Reply Br. 24 (citing *Smith v. Bray*, 681 F.3d 888, 897 & n. 3 (7th Cir. 2012)).

Id. at 911 (footnote omitted). *Third*, the court of appeals rejected the lower court's finding of a lack of commonality:

Here, however, the workers have provided substantial evidence of unadulterated, consciously articulated, odious racism throughout the Nucor plant, including affirmative actions by supervisors and a widespread attitude of permissiveness of racial hostility. The examples in the record are ubiquitous: bigoted epithets and monkey noises broadcast across the plant radio system, emails with highly offensive images sent to black workers, a hangman's noose prominently displayed, a white supervisor stating that "niggers aren't smart enough" to break production records, and abundant racist graffiti in locker rooms and shared spaces. Moreover, no more than one black supervisor worked in the Nucor production departments until after the EEOC charge that preceded this litigation. It strains the intellect to posit an equitable promotions system set against that cultural backdrop, particularly in light of the other evidence presented.

The dissent rejects the idea that evidence of a racially hostile work environment may help establish a claim for disparate treatment in promotions decisions. *Post* at 945–46. Indeed, the dissent goes so far as to observe that "locker rooms and radios bear no relationship to promotions decisions." *Id.* at 946. Such a perspective, however, is perplexingly divorced from reality and the history of workplace discrimination. It is difficult to fathom how widespread racial animus of the type alleged here, an animus that consistently emphasized the inferiority of black workers, bears no relationship to decisions whether or not to promote an employee of that race. Although the dissent asserts that "nothing in the record supports" making a connection between the work environment and promotions practices, we are not limited to the record in making such elementary judgments. Justice is not blind to history, and we need not avert our eyes from the broader circumstances surrounding employment decisions, and the inferences that naturally follow.

Id. at 912 (footnote omitted). The court held that the quality of the evidence of classwide discrimination was far stronger in the case at bar than the evidence in *Dukes*, stating that *Dukes* relied on "approximately one affidavit for every 12,500 class members," while plaintiffs here relied on "an approximate ratio of one anecdote for every 6.25 class members." *Id.* at 912-13. The court went on to criticize assigning any weight to the "happy camper" affidavits defense counsel had obtained from some employees after the EEOC charges were filed:

> Balanced against such evidence, the district court gave "limited weight" to approximately 80 affidavits from Nucor employees largely disclaiming discrimination at the plant—affidavits taken by company lawyers *after* the EEOC charges had been filed. . . . Common sense and prudence, however, instruct that the affidavits do little to rebut the evidence of discrimination insofar as they were given under potentially coercive circumstances, where the company reserved its ability to use them *against* other employees in any future lawsuit (a fact that was omitted from the Statement of Participation given to affiants). *See* J.A. 6003 (the Statement of Participation), 9379 (Nucor's statement that it intended "to use the affidavits for every purpose permitted under the Federal Rules of Evidence," including the opposition to class certification and the impeachment of witnesses); *see also Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (observing that after a class action has been filed, "[a] unilateral communications scheme ... is rife with potential for coercion"); *Quezada v. Schneider Logistics Transloading & Distrib.*, No. CV 12–2188 CAS, 2013 WL 1296761, at *5 (C.D.Cal. Mar. 25, 2013) (finding in a class action context that "[f]ailing to inform the employees of the evidence-gathering purpose of the interviews rendered the communications fundamentally misleading and deceptive because the employees were unaware that the interview was taking place in an adversarial context, and that the employees' statements could be used to limit their right to relief"); *Longcrier v. HL–A Co.*, 595 F.Supp.2d 1218, 1228 (S.D.Ala. 2008); *Mevorah v. Wells Fargo Home Mort., Inc.*, No. C 05–1175 MHP, 2005 WL 4813532, at *4 (N.D.Cal. Nov. 17, 2005). Of course, companies may investigate allegations of discrimination and take statements from employees. But when it comes to assessing the probative value of those statements—when weighed against the numerous declarations of employees who took the often grave risk of accusing an employer of a workplace violation—courts should proceed with eyes open to the imbalance of power and competing interests. Moreover, as previously observed, the company-obtained affidavits still contain numerous allegations of discrimination in promotions decisions—allegations that carry significant weight given the circumstances in which they were made. . . .

Id. at 913-14. The court went on to state that plaintiffs' evidence pointed strongly to race as the only reason why so few blacks were promotes, and to hold that a disparate-impact claim based on a discretionary system of promotion was a viable theory in a single-plant case, supported by evidence of the quality adduced here:

> But for a localized, circumscribed class of workers at a single facility, a policy of subjective, discretionary decision-making can more easily form the basis of Title VII liability, particularly when paired with a clear showing of pervasive racial hostility. In such cases, the underlying animus may help establish a consistently discriminatory exercise of discretion.

This Court's recent opinion in *Scott v. Family Dollar Stores, Inc.* specifically provides several ways that such a disparate impact claim may satisfy Rule 23 after *Wal–Mart*, including: (1) when the exercise of discretion is "tied to a specific employment practice" that "affected the class in a uniform manner"; (2) when there is "also an allegation of a company-wide policy of discrimination" that affected employment decisions; and (3) "when high-level personnel exercise" the discretion at issue. Scott, 733 F.3d at 113–14.

The first and second of *Scott's* alternatives are most relevant to this case. A specific employment practice or policy can comprise affirmative acts or inaction. *Cf. Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) (explaining an employer's responsibility to act to rectify a hostile or offensive work environment under Title VII). Regarding affirmative acts, the district court has established that Nucor's promotions practice provides that "[e]mployees in each of the production departments may bid on positions available in other departments," and that in order to promote one of the bidders, "the supervisor, the department manager, and the general manager must approve a written change of status and then submit the change of status form to the personnel office." J.A. 477–78.

For purposes of class certification, the workers have provided sufficient evidence that such a policy, paired with the exercise of discretion by supervisors acting within it, created or exacerbated racially disparate results. The promotions system, requiring approvals from different levels of management, created an environment in which the discriminatory exercise of discretion by one department head harmed the promotions opportunities for all black workers at the plant by foreclosing on opportunities in that department and generally impeding upward mobility. Moreover, the disproportionate promotions of white workers had to be ratified by the general manager, Ladd Hall, who was thus on notice, or should have been on notice, that there were pronounced racial disparities in department-level promotion practices, as indicated by the statistical and anecdotal evidence presented.

The workers have also presented sufficient evidence of a practice of *inaction* by the general manager who ignored the evidence of, and complaints regarding, discrimination in promotions at the plant. *See, e.g.*, J.A. 996–97, 1016, 1056, 1087, 1104. Such managerial inaction occurred despite Nucor's status as an "Equal Opportunity Employer" and its claim to have a "plantwide policy barring racial discrimination." Resp'ts' Br. 6. One black worker, Ray Roane, has testified that he complained directly to Hall about discrimination in promotions. J.A. 996–97. Hall threatened his job. J.A. 997. Consistent with that evidence, the workers observe in the context of their hostile work environment claim that despite a policy of investigating complaints of racial harassment, "[n]ot even one of the five department managers has been shown to have lifted a finger to redress the racially hostile work environment found to exist both plant-wide and in each department." Appellants' Br. 25. The workers have sufficiently alleged that such a uniform policy of managerial inaction also contributed to racial disparities in promotions decisions.

> Consistent with *Scott*, the workers have further demonstrated that the exercise of discretion at Nucor was joined by "a company-wide policy of discrimination" that was encouraged, or at least tolerated, by supervisors and managers. *See Scott*, 733 F.3d at 114. In addition to the evidence of a hostile work environment previously described in detail, one white supervisor has expressly stated in a deposition that he heard the head of the Beam Mill declare, "I don't think we'll ever have a black supervisor while I'm here." J.A. 1885–86. Such facts provide a critical nexus between the racial animus at the plant and promotions decisions that impacted all black workers by foreclosing opportunities for them. Or, using *Wal–Mart's* language, the evidence of pervasive racial hostility in the working environment provides a "common mode of exercising discretion that pervade[d] the entire company." *Wal–Mart*, 131 S.Ct. at 2554–55.
>
> In the end, *Wal–Mart* simply "found it unlikely" that thousands of managers across different regions "would exercise their discretion in a common way without some common direction." *Tabor*, 703 F.3d at 1222. Here, however, the workers have provided ample evidence supporting their allegation of a common, racially-biased exercise of discretion throughout the plant—demonstrated through alleged incidents of specific discrimination in promotions decisions, statistical disparities, and facts suggesting pervasive plant-wide racism. The district court abused its discretion in finding that such evidence was insufficient to meet the burden that *Wal–Mart* imposes.

Id. at 916-17.

2. Consequences of Including Future Class Members in Definition

Blunt v. Lower Merion School District, 767 F.3d 247, 281 (**3d Cir.** 2014), *petition for certiorari filed* (Jan. 27, 2015) (No. 14-926), affirmed the grants of dismissal and of summary judgment to defendants on plaintiffs' § 1981, § 1983, ADA, Rehabilitation Act, and IDEA claims on behalf of African-American students. The court held that some claims were barred by *res judicata* or collateral estoppel because of a prior class settlement, even though the claims arose after the settlement, because the class definition in the settled case included future students. The court stated at 281 n. 51: "We have not overlooked appellants' argument that the *Gaskin* settlement could not bar claims that arose after its effective date. Rather, we reject that argument because the settlement included claims of 'future' students and therefore necessarily it included the claims that arose after its effective date." Judge Ambro wrote a concurring opinion. 767 F.3d at 303-04. Judge McKee wrote a concurring and dissenting opinion. *Id.* at 304-05.

H. Arbitration

1. Employer's Waiver of Arbitration Agreement

Ruiz v. Donahoe, 784 F.3d 247 (**5th Cir.** 2015), denied the Postal Service's petition for rehearing of the court's reversal of the grant of summary judgment to it, based on its argument for the first time in the litigation that plaintiff was bound by an arbitration provision in a collective bargaining agreement. The USPS argued that the district court and the Fifth Circuit therefore lacked subject-matter jurisdiction. The court held that "agreements to arbitrate implicate forum selection and claims-processing rules not subject matter jurisdiction," and that

defendant "has waived his argument regarding the CBA's mandatory grievance and arbitration procedures by failing to raise it before the district court or this court prior to the present petition for rehearing." *Id.* at 250 (footnotes omitted),

2. Vacatur

Raymond James Financial Services, Inc. v. Fenyk, 780 F.3d 59, 60 (**1st Cir.** 2015), reversed the district court's decision grant of vacatur of an arbitration award of $600,000 to a broker. The court described the issues and its holding:

> An arbitration panel awarded appellant Robert Fenyk $600,000 in back pay based on a claim that he was unlawfully terminated from his job as a stock broker because he is an alcoholic. The district court vacated the award, concluding that the arbitrators lacked authority to grant that remedy because Fenyk brought no claims under the state law the arbitrators applied. Fenyk now seeks reinstatement of the award, arguing that the district court failed to give due deference to the arbitrators' ruling.
>
> We reverse the district court's judgment. Although the arbitration decision may have been incorrect as a matter of law, it was not beyond the scope of the panel's authority.

The law on the Florida statute of limitations was unclear at the time of the award, and was clarified by the Florida Supreme Court only two weeks after the award. The court of appeals stated: "Given the legal uncertainty reflected in the certified question presented to the Florida Supreme Court, and the fact that even 'serious error' by arbitrators will not invalidate their award, any error by the panel in refusing to dismiss Fenyk's claims as untimely does not rise to the level necessary to justify vacatur." *Id.* at 63-64. While the award was under Florida law, plaintiff's claim was filed under Vermont law and his motion to amend his claim was denied in arbitration. However, the parties had treated Florida and Vermont law as the same in their submissions. The court stated:

> The panel's award of damages based on Florida law, despite its denial of Fenyk's request to amend his Statement of Claim to include a claim under the FCRA, troubled the district court. We understand its discomfort. Yet we cannot conclude, in the particular circumstances of this case, that the arbitrators' decision to impose liability on RJFS under Florida law "willfully flouted the governing law" or otherwise exceeded the bounds of the arbitrators' authority to resolve the parties' dispute. *Stolt–Nielsen*, 559 U.S. at 672 n. 3, 130 S.Ct. 1758 (internal quotation marks omitted). The reliance on Florida law would be a different matter if the pertinent statutes in Florida and Vermont materially diverged. RJFS acknowledged in its post-hearing brief, however, that the two states' anti-discrimination laws are substantially equivalent in covering disability discrimination. . . .

Id. at 66. The court noted that Raymond James had traded the opportunities for review in judicial decisions for the simplicity and dispatch of arbitration. *Id.* at 67-68.

3. Arbitrator's Authority to Award Sanctions

Seagate Technology, LLC v. Western Digital Corp., 854 N.W.2d 750, 165 Lab.Cas. ¶ 61,529, 39 IER Cases 345 (Minn. 2014), a case involving misappropriation of trade secrets, held that the arbitrator had authority to receive all of the respondents' evidence, but then refuse to consider it, as a sanction for knowingly introducing falsified exhibits into evidence. Barring the respondents' defense resulted in an award of more than $500 million (a subsequent news account placed the award at $635 million). Respondents were the parties that had invoked Seagate's arbitration clause. The court first held that punitive sanctions were available in arbitration under the parties' agreement authorizing the arbitrator to award sanctions and other appropriate relief:

> The arbitration agreement empowered the arbitrator to settle "any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach" of the employment agreement, and the agreement states that "[t]he arbitrator may grant injunctions or other relief in such dispute or controversy." The agreement also says that the arbitration will be conducted in accordance with the "the rules then in effect of the American Arbitration Association." The American Arbitration Association Employment Arbitration Rules and Mediation Procedures (AAA Employment Rules) do not specifically address punitive sanctions, but they do authorize arbitrators to "grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs." AAA Employment R. 39(d) (2009).
>
> * * *
>
> We look first at the language in the arbitration agreement authorizing the arbitrator to "grant injunctions or other relief" in "any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach" of the employment agreement. "Relief" is defined as "[t]he redress or benefit, esp[ecially] equitable in nature (such as an injunction or specific performance), that a party asks of a court." *Black's Law Dictionary* 1482 (10th ed. 2014). Here, the punitive sanctions issued were requested by Seagate as a redress for the wrong committed by Western Digital and Mao when Mao fabricated evidence. In addition, although punitive sanctions are issued in large part to punish one party, because they also benefit the other party, they are appropriately categorized as a form of relief. The Legislature has also categorized punitive measures as a form of relief, such as when discussing the authority of an arbitrator to award "*punitive* damages or other exemplary *relief*." … These sources confirm that punitive sanctions qualify as "injunctions or other relief" as authorized by the arbitration agreement.

Id. at 562-63 (emphasis added by court to statutory language; statutory citation and footnote omitted). The court then held that a punitive sanction was also authorized under the AAA's Employment Arbitration Rules:

> The sanctions issued were also authorized by the AAA Employment Rules, which were incorporated into the arbitration agreement and allow the arbitrator to grant "any

> remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs." AAA Employment R. 39(d). As we have established, punitive sanctions fall within the ordinary meaning of relief. Punitive sanctions can also be properly construed as a remedy. Remedy is defined as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief" and "anything a court can do for a litigant who has been wronged or is about to be wronged." *Black's Law Dictionary* 1485 (10th ed. 2014) (quoting Douglas Laycock, *Modern American Remedies* (14th ed. 2010)). Here, the sanctions were issued in part to redress a wrong, the fabrication of evidence, which harmed Seagate during the arbitration. Thus, the sanctions constitute a remedy provided to Seagate.

Id. at 763. The court then cited cases holding that dismissal was an appropriate sanction for a plaintiff, and a default judgment an appropriate sanction for a defendant, committing fraud on a court, satisfying the second element of AAA Employment Rule 39(d). *Id.* at 763-64. The court rejected respondents' argument that a court would never have awarded such a sanction, holding that arbitrators are not limited to the remedies a court would award, and are only limited to the remedies available to a court:

> Western Digital argues that it did not act with a level of culpability to warrant punitive sanctions and that the arbitrator exceeded the level of authority given to a court to issue punitive sanctions. Likewise, Mao argues that the arbitrator exceeded his authority by not applying sanctions law in the same way that a Minnesota court would have. But the arbitration agreement did not specify that the remedies or relief must be awarded utilizing judicial principles or limitations; instead, the agreement broadly authorized the arbitrator to grant "injunctions or other relief." In addition, although AAA Employment Rule 39(d) requires the relief to be one available to the parties in a court action, it does not require the arbitrator to employ the sanction using the same standards as any particular court. "Where the arbitrators are not restricted by the submission to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law." …
>
> Furthermore, we have previously held that arbitrators have broad power to fashion remedies within the scope authorized by the language of the arbitration agreement. … And we have recognized that "an award will not be vacated merely because the court may believe the arbitrators erred." … In addition, the AAA Employment Rules do not limit an arbitrator's authority to forms of relief that would have been granted by a court; rather, Rule 39(d) references forms of relief that "would have been available " in a court. AAA Employment R. 39(d) (emphasis added). This language implies that while arbitrators may be limited to the types of relief available in a court, they are not limited in the manner of awarding these forms of relief by the same rules as a court would have been. Because punitive sanctions were a permissible form of relief and because the arbitrator had discretion in fashioning a remedy, we hold that the arbitrator did not clearly exceed his authority in violation of Minn.Stat. § 572.19, subd. 1(3), by issuing punitive sanctions against Western Digital and Mao.

Id. at 764 (citations and footnote omitted). The court continued:

> We recognize that entrusting an arbitrator with broad powers over forms of relief could theoretically lead to unfair results in arbitration. Certainly Mao and Western Digital, implicitly if not explicitly, argue that the award here was a result of an out-of-control arbitrator or was otherwise unjust. Some believe that arbitration has benefits, potentially including faster resolution and less expense than the judicial system as well as a high degree of confidentiality. … But the benefits come with costs, including significantly less oversight of decisions, evidentiary and otherwise, and very limited review of the final award. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (stating that by agreeing to arbitrate, parties "trade[ ] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").
>
> Here, despite the best efforts of experienced appellate counsel to argue otherwise, Mao and Western Digital's decision to demand arbitration necessarily limited the availability of the protections and advantages of the judicial system. *See Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1011 (10th Cir.1994) ("Those who choose to resolve a dispute by arbitration can expect no more than they have agreed. One choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law."). In addition, we reiterate that the scope of arbitrator authority is a matter of contract … and parties are always free to fashion arbitration agreements in ways that limit the arbitrator's power to award certain types of relief.

Id. at 765 (citation and footnote omitted). The court rejected respondents' argument that the sanction barring their evidence required vacatur of the award. It stated that the arbitrator had heard all of respondents' evidence, and had simply refused to consider the evidence as a sanction, and that cases awarding vacatur for failure to hear evidence were not apposite. *Id* at 766. The court continued:

> The scope of Minn.Stat. § 572.19, subd. 1(4), is properly limited to situations involving the presentation and admission of evidence at the hearing, not situations involving the use or weighing of evidence in constructing the final award or other form of relief. This conclusion is supported by the language of Minn.Stat. § 572.19, subd. 1(4), including the incorporation of Minn.Stat. § 572.12. Minnesota Statutes § 572.19, subd. 1(4), focuses on how an arbitrator should conduct a hearing. It addresses an arbitrator's refusal to postpone the hearing, an arbitrator's refusal to "*hear* evidence material to the controversy," and an arbitrator's violations of Minn.Stat. § 572.12, which again centers on how a hearing should be conducted. Minn.Stat. § 572.19, subd. 4 (emphasis added); see Minn.Stat. § 572.12 (detailing how to conduct a hearing, including that an arbitrator shall appoint a time and place for the hearing, notify the parties about the hearing, adjourn the hearing, and receive evidence at the hearing). Nothing in either Minn.Stat. § 572.19, subd. 1(4), or Minn.Stat. § 572.12, describes how an arbitrator is to fashion a remedy for misconduct or the final award; the entire focus of these statutes is how the hearing itself should be conducted, not the deliberation process that happens after the hearing.

> Based on an analysis of the statutory language, we conclude that it is appropriate to read Minn.Stat. § 572.19, subd. 1(4), as a provision concerned with the admissibility of evidence and the manner in which the hearing is conducted, not as a provision limiting the arbitrator's authority to use, or refuse to use, certain evidence when providing relief or fashioning an award after the hearing has been completed. In this case, Western Digital and Mao do not challenge any of the arbitrator's actions during the hearing, as Western Digital and Mao were allowed to present their case in full and the arbitrator received the evidence in question. But the arbitrator chose not to factor this evidence into the final award because of sanctions that were awarded and, as discussed above, were permissible as within the arbitrator's authority. In short, Western Digital and Mao's challenge, which is primarily about the arbitrator's refusal to use certain evidence in fashioning the final award, is outside the scope of Minn.Stat. § 572.19, subd. 1(4).

Id. at 766-67 (emphasis in original).

I. Evidence

1. Hearsay

Malin v. Hospira, Inc., 762 F.3d 552, 554-55, 123 Fair Empl.Prac.Cas. (BNA) 1568, 23 Wage & Hour Cas.2d (BNA) 165 (**7th Cir.** 2014), reversed the grant of summary judgment to the Title VII and FMLA retaliation defendants. The court described the following situation, and then addressed the evidentiary questions:

> In July 2003, Malin told her direct supervisor, Bob Balogh, that she was going to complain to Human Resources about sexual harassment by her indirect supervisor, Satish Shah. While Malin was still in his office, Balogh called his and Shah's boss, Mike Carlin, and told him about Malin's plan. Malin heard Carlin shouting through the phone. When Balogh hung up the phone, he told Malin that Carlin had told him to do everything in his power to stop Malin from going to Human Resources. Malin told Balogh that she was going ahead, and she made a formal sexual harassment complaint to Human Resources based on Satish Shah's behavior.

Id. at 554. The court continued:

> Evidence of Carlin's hostility to Malin's complaint is central to the case, so we pause to address an evidentiary issue. Evidence supporting or opposing summary judgment must be admissible if offered at trial, except that affidavits, depositions, and other written forms of testimony can substitute for live testimony. … Hospira argues that Malin's testimony about what Balogh said Carlin told him to do is inadmissible hearsay. That is incorrect. At the first level of potential hearsay, Carlin's instruction was not a statement of fact being offered to prove the truth of any matter asserted, so it was not hearsay at all. At the second level, Balogh's report to Malin of Carlin's instruction fits squarely within the definition of a statement in Federal Rule of Evidence 801(a). Malin offers that out-of-court statement to prove the truth of its contents: that Carlin screamed at Balogh and told him to do all he could to stop Malin from making a formal complaint about Shah.

> Malin therefore needs a hearsay exception to admit Balogh's statement into evidence. She has two. Balogh described Carlin's screamed admonition to Malin immediately after it occurred, so we agree with the district court that the comment qualifies as a present sense impression under Federal Rule of Evidence 803(1). Further, according to Malin, Balogh was visibly startled by Carlin's comment and told her about it immediately, "while under the stress of excitement that it caused." See Fed.R.Evid. 803(2). The comment is thus also admissible as an excited utterance under Rule 803(2). … FN1
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> _____
>
> FN1. We do not decide whether Balogh's statement might have been a party admission excluded from the definition of hearsay under Rule 801(d)(2). At the time, all the participants were working for Abbott before it spun off defendant Hospira as a separate corporation.

2. Foundation Not Supplied by Production in Discovery

Blunt v. Lower Merion School District, 767 F.3d 247, 295 (**3d Cir.** 2014), *petition for certiorari filed* (Jan. 27, 2015) (No. 14-926), affirmed the grants of dismissal and of summary judgment to defendants on plaintiffs' § 1981, § 1983, ADA, Rehabilitation Act, and IDEA claims on behalf of African-American students. The court affirmed the lower court's discounting, on summary judgment, of "a powerpoint presentation discussing a 'Minority Achievement Program' (MAP)." The court stated that there was no record evidence that the presentation was ever used, of who authored it, or how it was connected to the school district. *Id.* The court held that nothing could be assumed from the fact that the school district had produced it in discovery. *Id.*, n. 67. Judge Ambro wrote a concurring opinion. 767 F.3d at 303-04. Judge McKee wrote a concurring and dissenting opinion. *Id.* at 304-05.

3. Judicial Notice on Appeal, Involving a Motion to Dismiss

In re Omnicare, Inc. Securities Litigation, 769 F.3d 455, 465-69 (**6th Cir.** 2014), involved both parties' request that the court of appeals take judicial notice of documents in connection with plaintiff's appeal from the grant of defendants' motion to dismiss the complaint for failure to state a claim. The court held that "judicial notice is not an alternative avenue for amending the complaint after a district court dismisses the suit for failure to state a claim." *Id.* at 466. It held that the standard of FRE 201(b) also applies to requests that an appellate court take judicial notice. *Id.* at 465-66. The court held that a plaintiff cannot use judicial notice as a means of supplementing its Complaint on a motion to dismiss, because this would violate the task of a complaint in putting the court and the defendants on fair notice of the allegations. Here, plaintiff made an "awkward request to amend," which the lower court denied, and plaintiff did not appeal the denial. "KBC cannot circumvent this process by asking us to amend the Complaint, effectively, through the vehicle of judicial notice." *Id.* at 467. Moreover, since judicial notice applies only to facts not reasonably subject to dispute, the most a court could do under FRE 201 is take judicial notice of the existence and public filing of the four documents in question, but it could not take judicial notice of their contents. "Under this standard, we could take notice only of the fact that Omnicare filed the Audit Committee Charter and what that filing said, but we could not consider the statements contained in the document for the truth of the matter asserted, even at the motion-to-dismiss stage." *Id.* The court held that a document

referenced in the Complaint as a factual matter did not become part of the Complaint. "This statement noting the document's existence says nothing about its contents and cannot fairly be read to refer Omnicare and the court to the contents of the agreement. Accordingly, it is outside the Complaint." *Id.* at 468. The court then turned to plaintiff KBC's request that it take judicial notice of documents filed in a different court proceeding, and then of a document filed in the lower court in the proceeding at bar. Both requests failed. The court explained:

> Third, KBC requests that this court take notice of the Stone Opposition and the Stone Declaration because they are records from a related court proceeding. . . . Appellate courts can take notice of the actions of other courts . . . but generally, a court will recognize only indisputable court actions, such as the entry of a guilty plea or the dismissal of a civil action . . . . Importantly, "a court cannot notice pleadings or testimony as true simply because these statements are filed with the court." . . . As a result, we could take notice only of the fact that Stone filed his opposition and declaration, but the subject matter of those filings is the heart of the matter contested in this suit. Therefore, this court cannot take notice of those filings for the truth of the matter asserted. And again, the existence of the documents does not address the deficiencies in KBC's complaint. Therefore, there is little to be gained by taking judicial notice of either of these filings.
>
> Fourth, KBC asks that this court take notice of the Stone Declaration because it was incorporated by reference in a supplemental district-court filing. . . . As noted above, KBC needed either to incorporate the Stone Declaration into the Complaint by reference or amend the Complaint so it contained the information in the document. KBC did not do so, and it cannot now use judicial notice as a vehicle to wipe out its failure to follow proper procedure.

Id. The court granted defendants' motion to take judicial notice of the full text of documents referenced in the Complaint, stating: "Omnicare notes that the Complaint references or quotes excerpts from these documents and asks us to consider those quotations in their full context. . . . . Importantly, it does not request that we consider the documents for the truth of their content." *Id.* at 469.

4. Other Instances of Discrimination or Harassment

Arizona v. ASARCO LLC, 773 F.3d 1050, 1059-60 (**9th Cir.** 2014) (*en banc*), unanimously affirmed the judgment for the plaintiff State of Arizona and plaintiff-intervenor Aguilar on her Title VII sexual harassment claim. "The jury awarded no compensatory damages, but awarded $1 in nominal and $868,750 in punitive damages." *Id.* at 1054. The district court reduced the award to the cap of $300,000. In holding that defendant's conduct was sufficiently reprehensible to justify an award of punitive damages, the court relied on defendant's toleration of harassment suffered by other women, and its refusal to take remedial action after other women complained. The court held that the trial court did not abuse its discretion in admitting evidence of sexually explicit graffiti in bathrooms the plaintiff had not used:

> . . . ASARCO argues evidence that sexually explicit graffiti was also targeted at the other employees was too factually dissimilar and temporally remote from Aguilar's experience

and that, as a result, the evidence was more prejudicial than probative under Federal Rule of Evidence 403.

We disagree. Any prejudice to ASARCO was limited by the circumscribed nature of the evidence and the limiting instruction given by the district court. The evidence had probative value in helping the jury assess whether Aguilar had proved the elements of harassment. Moreover, contrary to ASARCO's assertion, this evidence formed only a small part of the evidence presented by Aguilar.

Id. at 1060.

5. Expert Testimony

E.E.O.C. v. Freeman, 778 F.3d 463 (**4th Cir.** 2015), affirmed the grant of summary judgment to the Title VII defendant. The court summarized its decision at 464-65: "In 2001, Freeman began conducting background checks on its job applicants, which the Equal Employment Opportunity Commission ("EEOC") alleges had an unlawful disparate impact on black and male job applicants. The district court granted summary judgment to Freeman after excluding the EEOC's expert testimony as unreliable under Federal Rule of Evidence 702. Without this testimony, the district court found the agency failed to establish a prima facie case of discrimination. For the reasons below, we affirm the district court's exclusion of the EEOC's expert testimony and grant of summary judgment to Freeman." "The EEOC produced a report by Kevin Murphy, an industrial/organizational psychologist, and one by Beth Huebner, an associate professor of criminology, which purported to replicate Murphy's results." *Id.* at 465-66. The EEOC then produced, after the expert report deadline, three new reports from Murphy with different calculations and "a new, expanded database." Huebner also produced a supplemental report after the deadline. *Id.* at 466. The district court excluded Murphy's testimony "on the basis that it was 'rife with analytical errors' and 'completely unreliable' under Federal Rule of Evidence 702." *Id.* The court of appeals panel unanimously agreed:

> The district court identified an alarming number of errors and analytical fallacies in Murphy's reports, making it impossible to rely on any of his conclusions. Freeman provided the EEOC with complete background check logs for hundreds, if not thousands, of applicants who Murphy did not include in his database of fewer than 2,014 background checks conducted largely before October 14, 2008. … Only 19 post-October 14, 2008 applicants were included in Murphy's database, all but one of whom failed the checks. … However, Freeman, through its background check vendor, "conducted more than 1,500 criminal background investigations and more than 300 credit investigations on applicants between October 15, 2008 to August 31, 2011" with Freeman producing in discovery "race and gender information for hundreds of these applicants." … Murphy furthermore omitted data from half of Freeman's branch offices. This is despite the fact that he did not seek to utilize a sample size from the relevant time period, but purported to analyze all background checks with verified outcomes.
>
> Most troubling, the district court found a "mind-boggling" number of errors and unexplained discrepancies in Murphy's database. For example, looking at a subset of 41 individuals for whom the EEOC is seeking back pay, 29 had at least one error or

> omission. Seven were missing from the database altogether. Seven were listed in the database without a race code, "one was incorrectly coded as passing the criminal background check, two were incorrectly coded as failing the criminal background check, one ha[d] an incorrect race code, five ha[d] incorrect gender codes, nine [we]re listed twice and double-counted in Murphy's results, and three who failed the credit check [we]re not coded with a credit check result." … The EEOC claims these errors were present in the original data, a contention dispelled by comparing the information from the discovery materials to Murphy's database. It was in fact Murphy who introduced these errors into his own analysis.
>
> The EEOC also contends that Murphy fixed any errors in his analysis in subsequently-filed, supplemental reports. The district court examined a third report by Murphy and found that he did not make certain corrections to his database, despite claims of doing so. Contrary to his assertions, Murphy did not change "incorrect coding of race and pass/fail status for several individuals." … The district court also found that Murphy "managed to introduce fresh errors into his new analysis," like double-counting applicants who had failed their background checks. *Id.* And Murphy's new, expanded database still omitted hundreds of applicants for whom Freeman produced complete information in discovery.
>
> The sheer number of mistakes and omissions in Murphy's analysis renders it "outside the range where experts might reasonably differ." … We therefore cannot say the district court abused its discretion in ultimately excluding Murphy's expert testimony as unreliable.

Id. at 466-67. Judge Agee, who joined in the opinion of the court but also filed a separate concurring opinion, issued a *cri de coeur* asking why the EEOC continued to rely on so unreliable an expert:

> Although I concur in Judge Gregory's opinion, I write separately to address my concern with the EEOC's disappointing litigation conduct. The Commission's work of serving "the public interest" is jeopardized by the kind of missteps that occurred here. … And it troubles me that the Commission continues to proffer expert testimony from a witness whose work has been roundly rejected in our sister circuits for similar deficiencies to those we observe here. It is my hope that the agency will reconsider pursuing a course that does not serve it or the public interest well.

Id. at 468. Judge Agee discussed in detail what he saw as very significant problems with the expert work in this case, and in other cases in which the same expert's work had been rejected. This is just one of his criticisms:

> Murphy undeniably "cherry-picked." The very few pieces of post–October–2008 data that Murphy included consisted of 19 applicants. Of those 19, one was a double-counted applicant, one was a "fail" miscoded as a "pass," and the remaining were all "fails" under one or the other (or both) checks. This 100% failure rate among the 19 post–October–2008 applicants wildly varies from the 3.5% failure rate for criminal checks and 9.9% failure rate for credit checks reflected in the rest of the data. *See* J.A.

> 326 (noting that "the likelihood of failing either [check] is low"). Thus, not only was Murphy capriciously selective in his use of post–October–2008 data, but the high number of "fails" among his few selections suggests that he fully intended to skew the results. The district court certainly thought so, terming Murphy's work "an egregious example of scientific dishonesty." …

Id. at 470. Judge Agee went on, in the same sad and sorrowful vein. At one point, he stated: "These problems would be troubling enough standing alone, but they are even more disquieting in the context of what appears to be a pattern of suspect work from Murphy." *Id.* He stated that in addition to the EEOC's duty to conciliate, the Commission had "'a duty to cease enforcement attempts after learning that an action lacks merit,'" and that "the EEOC failed in the exercise of this second duty." *Id* at 472 (citation omitted). He concluded:

> The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its "significant resources, authority, and discretion" will affect all "those outside parties they investigate or sue." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). Government "has a more unfettered hand over those it either serves or investigates, and it is thus incumbent upon public officials, high and petty, to maintain some appreciation for the extent of the burden that their actions may impose." Id. The Commission's conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so.

Id, at 472-73.

6. Party Admissions

Nigro v. Sears, Roebuck and Co., 778 F.3d 1096, 1098 (**9th Cir.** 2015), reversed the grant of summary judgment to the California Fair Employment and Housing Act (FEHA) defendant, rejecting the lower court's view that a statement by plaintiff's supervisor, corroborating plaintiff's testimony, was hearsay:

> Nigro's direct supervisor Jason Foss also testified that Chris Adams said to him—referring to Nigro—that "I'm done with that guy." The district court found Foss's testimony to be inadmissible hearsay. But Foss's statement attributed to Adams should be admissible as a party admission. See Fed.R.Evid. 801(d)(2)(D). Because Adams's statements and the evidence proffered by Nigro could allow a reasonable jury to infer that Sears terminated Nigro because of his disability, there is a genuine issue of material fact. ….

7. "Self-Serving" Testimony

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 320-21, 23 Wage & Hour Cas.2d (BNA) 174 (**3d Cir.** 2014), reversed the grant of summary judgment to the FMLA defendant on plaintiff's interference and retaliation claims. On the interference claim, the court held that plaintiff's uncorroborated denial in her affidavit burst the presumption created by the "mailbox

rule" and was enough to create a triable issue of fact whether she received the required FMLA notice from defendant. The court stated at *2:

> Accordingly, a single, non-conclusory affidavit or witness's testimony, when based on personal knowledge and directed at a material issue, is sufficient to defeat summary judgment. *See, e.g., Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161–63 (3d Cir. 2009). This remains true even if the affidavit is "selfserving."FN2 *Id.*
>
> FN2. As with any other kind of evidence, the declarant's interest in the outcome is merely one factor for the ultimate finder of fact to weigh in determining the reliability of the evidence. It is not a reason to automatically reject the evidence. Indeed, the testimony of a litigant will almost always be self serving since few litigants will knowingly volunteer statements that are prejudicial to their case. However that has never meant that a litigant's evidence must be categorically rejected by the fact finder.

Nigro v. Sears, Roebuck and Co., 778 F.3d 1096, 1098 (**9th Cir.** 2015), reversed the grant of summary judgment to the California Fair Employment and Housing Act (FEHA) defendant, rejecting the lower court's view that plaintiff's testimony was "self-serving" and should not be considered on summary judgment. The court stated:

> We have previously acknowledged that declarations are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or her position. … The source of the evidence may have some bearing on its credibility, and thus on the weight it may be given by a trier of fact. But that evidence is to a degree self-serving is not a basis for the district court to disregard the evidence at the summary judgment stage. *See* 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2727 (3d ed. 2011) ("[F]acts asserted by the party opposing the [summary judgment] motion, if supported by affidavits or other evidentiary material, are regarded as true."). Here, Nigro's declaration and deposition testimony, albeit uncorroborated and self-serving, were sufficient to establish a genuine dispute of material fact on Sears's discriminatory animus. We conclude that the district court erred in disregarding Nigro's testimony in granting Sears's motion for summary judgment.

8. Error to Allow Undisclosed Defense Witness

Standley v. Edmonds-Leach, 783 F.3d 1276 (**D.C.Cir.** 2015), reversed the judgment on a jury verdict for the D.C. police officer defendant and D.C. governmental defendants in this excessive-force case. The court held that the trial court erred in allowing the defendants to introduce the testimony of a previously undisclosed witness who testified on the substance of the case, not just on impeachment, and that the error prejudiced plaintiff. The court summarized the case:

> Melissa Standley appeals the judgment on her tort claims for D.C. Public Library Special Police Officer Karen Edmonds–Leach and the District of Columbia on the ground that the district court abused its discretion in allowing the defendants to call a witness they failed to identify prior to trial in accordance with Federal Rule of Civil Procedure 26(a). Standley maintains, as she argued in the district court, that the witness's testimony

was not offered "solely for impeachment," as the rule's exception requires, and that the error was prejudicial. We agree that the district court erred as a matter of law in misstating the exception under Rule 26(a). Because the witness's testimony was not confined to impeachment and because the outcome of the trial turned on the jury's assessment of the credibility of Standley and Officer Edmonds–Leach, we further agree that the testimony of the relatively disinterested witness likely influenced the outcome of the trial. Accordingly, this court cannot say with fair assurance that the district court's error did not affect Standley's substantial rights, and we must reverse and remand the case for a new trial.

Id. at 1277-78. The court noted that Rule 26(a)'s disclosure requirements exclude from disclosure witnesses and documents that are used solely for impeachment, and that Rule 26(b) did not include such an exclusion. However, plaintiff did not argue that defendants violated their Rule 26(b) duty of disclosure when she asked about witnesses. Instead, the case was decided on the basis that the defendants elicited proper impeachment testimony from the undisclosed witness on two points, but then went beyond them to obtain testimony corroborating the testimony of Officer Edmonds-Leach. The court stated:

In applying Rule 26(a)'s impeachment exception, some courts have concluded that the impeachment exception is limited to evidence that has no potential utility other than impeachment. For example . . . the Fifth Circuit held that a video surveillance tape served in part a substantive function so "regardless of its impeachment value," it should have been disclosed prior to trial. The First Circuit . . . and other courts, have taken the same approach. . . . Likewise . . . the Seventh Circuit concluded that because the testimony of witnesses offered to impeach was a part of the defendant's "primary line of defense," the witnesses should have been disclosed prior to trial and their testimony was properly excluded. On the other hand, the Seventh Circuit has also held that undisclosed evidence with both impeachment and substantive qualities may be presented at trial so long as it is strictly used to impeach. . . . Specifically, that court held that it was error to exclude evidence the defendant offered not to prove its defense, but rather to impeach the plaintiff's expert witness. . . . Under either approach, the courts have focused on the word "solely" and our sister circuits have read that term strictly. *See* 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2053 n. 57 (3d ed. 2014) (collecting cases).

The district court in *Hayes v. Cha*, 338 F.Supp.2d 470, 503–04 (D.N.J.2004), summarized the competing considerations. On the one hand, the district court acknowledged that some circuits, such as the Seventh Circuit . . . reject the proposition that "solely" means that the evidence can have no substantive non-impeachment value. . . . Those courts reason that evidence used to attack a witness's credibility often contains some substantive element, and reading Rule 26(a)'s "solely for impeachment" exception to bar use of such evidence if not earlier disclosed could "result in an erosion of evidence capable of warranting the impeachment designation." . . . On the other hand, the district court recognized that such an approach "strikes at the heart of the amended rules' broad intent" in favor of disclosure. . . . "Automatic disclosure was adopted to end two evils that had threatened civil litigation: expensive and time-consuming pretrial discovery

techniques and trial-by-ambush." . . . A too expansive reading of the impeachment exception "could cause a resurgence of these evils." . . .

Id. at 1283-84 (citations omitted). Because the lower court ended its analysis prematurely by wrongly holding that there was nothing but a semantic difference between impeachment and rebuttal, the court of appeals held the lower court committed clear legal error. Because the testimony of a witness the jury could reasonably view as impartial could be expected to have decisive weight in the jury's resolution of the credibility dispute between plaintiff and the arresting officer, the court held the error was prejudicial, and remanded for a new trial.

9. Electronic Evidence

a) Discovery of Electronic Evidence

Potts v. Dollar Tree Stores, Inc., 2013 WL 1176504, 117 Fair Empl.Prac.Cas. (BNA) 1352 (M.D.Tenn. March 20, 2013) (No. 3:11-CV-01180), stated the following at p. *3:

> The Sixth Circuit has not yet ruled on the scope of discovery of private Facebook pages, but other courts hold that:
>
> > [M]aterial posted on a 'private Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy. Nevertheless, the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view. Rather, consistent with Rule 26(b) ... [and decisional law] ... there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engaged in the proverbial fishing expedition, in the hope that there **might** be something of relevance in Plaintiffs Facebook account.
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> *Thompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D.Mich. 2012): *see also* McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614 (N.Y.App.Div.2010) (holding that Defendant failed to establish a factual predicate with respect to the relevancy of the evidence on the Facebook page and that Defendant essentially sought permission to conduct a fishing expedition). The Defendant lacks any evidentiary showing that Plaintiff's public Facebook profile contains information that will reasonably lead to the discovery of admissible evidence. Plaintiff produced her day planner, documentation of "write-ups" and "store visits," emails between Plaintiff, Trowery and other employees at Dollar Tree, as well as all relevant information stored on her computer. Plaintiff asserts that she no longer has possesses any photographs of the Dollar Tree store. Thus, the Court concludes that Defendant has not made the requisite showing for full access to Plaintiff's private Facebook or other social media pages.
>
> As to the physical production of Plaintiff's computer, the Court concludes that information stored on the computer could lead reasonably lead to the discovery of admissible evidence. Yet, the parties shall agree to a word search of Plaintiff's computer

by an agreed neutral party to assess whether Plaintiff's computer contains relevant information.

b) Authentication of Electronic Evidence

Suffolk Technologies, LLC v. AOL Inc., 752 F.3d 1358, 1365-66 (**Fed.Cir.** 2014), affirmed the grant of summary judgment to the defendant alleged infringers of a patent. The court held that an old Usenet Internet posting was sufficiently authenticated:

> Suffolk next argues that summary judgment was inappropriate because "serious questions undermining the reliability and accuracy of the Gundavaram post should have been submitted to the jury." Appellant's Br. 33. According to Suffolk, a juror may decide to not credit "a second-hand reproduction of an old Usenet post" that was admittedly altered. *Id.* Suffolk points out that each post was altered to bear a timestamp of 12:00 a.m. and that the email addresses were altered to protect users from spambots. Suffolk then argues that these small alterations "could suggest to a jury that other parts of the post may also have been inaccurate or altered." *Id.* at 35.
>
> This argument, however, is unpersuasive. Suffolk presents no affirmative evidence challenging the Post's material facts. And Gundavaram himself authenticated the Post, testifying that he recognized "the style of my writing," "certain stylistic things in the code," and "certainly the e-mail address that I wrote from." J.A. 6192–93.
>
> In sum, the asserted evidentiary weaknesses in the Post are insufficient, without more, to create a genuine issue of material fact. We therefore affirm the district court's holding that there were no genuine issues of material fact concerning the Post.

United States v. Hassan, 742 F.3d 104, 133-34 (**4th Cir.** 2014), *cert. denied sub nom. Sherifi v. United States*, 2014 WL 1747984 (**U.S.**, June 9, 2014), affirmed the defendants' convictions for a variety of terrorism-related charges, including conspiracy to murder. The court held that the government adequately authenticated the electronic information it introduced at trial:

> Hassan's and Yaghi's Facebook pages were captured via "screenshots," taken at various points in time and displaying Hassan's and Yaghi's user profiles and postings. The screenshots of the Facebook pages also included photos and links to the YouTube videos. On the Facebook pages, Hassan and Yaghi had posted their personal biographical information, as well as quotations and listings of their interests. Each Facebook page also contained a section for postings from other users, on what is called a "wall." Meanwhile, the videos in question were retrieved from Google's server. In establishing the admissibility of those exhibits, the government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers. FN25

After evaluating those submissions, the trial court ruled that the requirements of Rule 902(11) had been satisfied. The court then determined that the prosecution had satisfied its burden under Rule 901(a) by tracking the Facebook pages and Facebook accounts to Hassan's and Yaghi's mailing and email addresses via internet protocol addresses. In these circumstances, there was no abuse of discretion*134 in the admissions of any of the Facebook pages and YouTube videos.

FN25. The appellants' contention that the Facebook and Google certifications are insufficient because they were made for litigation purposes several years after the postings occurred is entirely unpersuasive. It would make no sense to require a records custodian to contemporaneously execute an affidavit attesting to the accuracy of a business record each time one is created or maintained, when there is no pending litigation or need for such a certification.

10. Juror Misconduct

Warger v. Shauers, __ **U.S.** __, 135 S.Ct. 521, 524 (2014), held:

Federal Rule of Evidence 606(b) provides that certain juror testimony regarding what occurred in a jury room is inadmissible "[d]uring an inquiry into the validity of a verdict." The question presented in this case is whether Rule 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voir dire*. We hold that it does.

J. Instructions

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1075-77, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. Defendant moved for a new trial on the ground that the court did not properly instruct the jury on its good-faith efforts defense. The court held at 1075 that defendant waived its post-verdict challenge to the adequacy of the instructions on punitive damages by failing to assert an objection at the charging conference. It made a different objection to a different part of the punitive-damages instruction, but made no objection to the relevant part. "To avoid the consequences of this waiver, New Breed contends that the fact that it submitted a proposed instruction including the *Kolstad* affirmative defense served to preserve its objection." *Id.* at 1075. The court rejected that argument. Defendant then cited an unrelated exchange in another part of the charging conference, in which the district court said it did not have to object each time where it had submitted a different version. "There is no indication that the district court's statement was intended to insulate New Breed from making any substantive objections to the jury instructions for the remainder of the charge conference." *Id.* "Furthermore, as noted above, New Breed did in fact object to the language of the punitive damages instructions—though not to the absence of the good-faith affirmative-defense language. Thus, one can strongly infer that New Breed did not interpret the district court's statement to mean that New Breed did not have to raise each of its objections during the charge conference. Therefore, the record reflects that New Breed did acquiesce to the punitive damages instructions." *Id.* The court then rejected defendant's

argument that the failure to include the good-faith affirmative-defense language constituted plain error:

> . . . Where a party fails to preserve its objection to jury instructions, we review the instructions for plain error. . . . Plain error is defined as an "obvious and prejudicial error that requires action by the reviewing court in the interests of justice." . . . Admittedly, the jury instructions only referred to the first two prongs of the *Kolstad* test. . . . New Breed did not, however, even argue in its closing that it made good-faith efforts to comply with Title VII. Alleging "prejudicial" error based on an affirmative defense not argued to the jury does not provide a basis for a Rule 51 plain-error reversal. . . .

Id. at 1075-76 (citations omitted).

See the discussion of *E.E.O.C. v. Beverage Distributors Co., LLC*, 780 F.3d 1018 (**10th Cir.** 2015), in the section above on the Americans with Disabilities Act, in the Direct Threat topic.

K. Verdict Form

See the discussion of *E.E.O.C. v. Beverage Distributors Co., LLC*, 780 F.3d 1018 (**10th Cir.** 2015), in the section above on the Americans with Disabilities Act, in the Direct Threat topic.

L. Jury Verdict

Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 674-75 (**4th Cir.** 2015), affirmed the judgment on a jury verdict for the Sarbanes-Oxley retaliation plaintiff. The court held that the verdict was not inconsistent, although it allocated all economic damages against the defendant company and allocated all non-economic damages against the defendant officials.

M. Compensatory Damages

Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 672 (**4th Cir.** 2015), affirmed the judgment on a jury verdict for the Sarbanes-Oxley retaliation plaintiff. The court held that non-economic compensatory damages are available for Sarbanes-Oxley retaliation claims:

> The Department takes the position that the statute countenances emotional distress awards, and indeed the Department's Administrative Review Board has a history of upholding non-pecuniary compensatory damages in Sarbanes–Oxley Act whistleblower cases. *See Menendez v. Halliburton, Inc.*, Case Nos. 09–002, –003, 2013 WL 1282255, at *11 (Admin.Rev.Bd. March 15, 2013). In these circumstances, where Congress has explicitly empowered the Department to enforce § 1514A by formal adjudication, we afford deference to the Department's interpretation. … We therefore join the Department, and the Fifth and Tenth Circuits, in concluding that emotional distress damages are available under § 1514A(c).

(Citation omitted.)

N. Additional Damages to Compensate for Increased Taxation of a Lump-Sum Award Spanning Several Years

E.E.O.C. v. Northern Star Hospitality, Inc., 777 F.3d 898, 904, 125 Fair Empl.Prac. Cas. (BNA) 1681 (**7th Cir.** 2015), affirmed the lower court's award of a "tax bump," explaining:

> Today, we join the Third and Tenth Circuits in affirming a tax-component award in the Title VII context. Upon Miller's receipt of the $43,300.50 in back pay, taxable as wages in the year received, *see* IRS Pub. No. 957 (Rev. Jan. 2013), *available at* www.irs.gov/pub/irs-pdf/p957.pdf, Miller will be bumped into a higher tax bracket. The resulting tax increase, which would not have occurred had he received the pay on a regular, scheduled basis, will then decrease the sum total he should have received had he not been unlawfully terminated by Hospitality. Put simply, without the tax-component award, he will not be made whole, a result that offends Title VII's remedial scheme. *See Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir.1998) ("We have noted previously that 'the remedial scheme in Title VII is designed to make the plaintiff whole.'" (quoting *McKnight v. General Motors Corp.*, 908 F.2d 104, 116 (7th Cir.1990))).
>
> To be sure, the district court should have told us how it arrived at the fifteen percent figure amounting to $6,495. Silence on the issue tends to frustrate appellate review, and it would be wise for district courts to show their work if and when they adjudge similar tax-component awards in the future. *Eshelman*, 554 F.3d at 443 (emphasizing district courts should adjudge tax-component remedies in the discrimination context based on "circumstances peculiar to the case"). Nevertheless, in this case, the district court did not abuse its wide discretion in granting this modest, equitable remedy.

(Footnote omitted.)

E.E.O.C. v. Beverage Distributors Co., LLC, 780 F.3d 1018 (**10th Cir.** 2015), reversed the judgment on a jury verdict for plaintiff but held, in the event that the EEOC won again, that the lower court did not abuse its discretion in awarding a "tax bump" to compensate the plaintiff for the additional taxes he would have to pay because of receiving a multi-year lump sum back pay award in a single year. The court rejected defendant's argument that such a "tax bump" was not a permissible exercise of discretion in a typical employment discrimination case, because the elimination of tax averaging had made such a remedy more appropriate than it had earlier been.

O. Punitive Damages

1. *Kolstad*'s First Prong: Malice or Reckless Indifference in a "Cat's Paw" Retaliation Case

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1073, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court rejected defendant's argument that the decisionmakers as to some of the retaliatory terminations could not have acted

with reckless indifference since they did not know of the protected activity. The court held that the harasser's knowledge and manipulation of the decisionmakers satisfied this element of *Kolstad*:

> We find that the evidence is sufficient to show that Calhoun acted with malice or reckless indifference to federally protected rights in retaliating against the claimants. Evidence was presented to show that Calhoun subjected Hines, Pete, and Pearson to sexual harassment and then, either directly or indirectly, engineered the terminations of all three women and Partee after they all complained about his harassment. Thus, the jury had before it evidence from which it could reasonably conclude that Calhoun "engage [d] in conduct that carrie[d] with it a *perceived risk* that [his] actions [would] violate federal law." . . . We also reject New Breed's assertion that the inquiry is on the other decision makers' knowledge and conduct and not Calhoun's. The EEOC only had to show that the "individual[ ] perpetrating the discrimination [or, here, retaliation]" acted with malice or reckless disregard for federally protected rights. . . . We find that the EEOC satisfied this burden based on Calhoun's conduct. Thus, the jury's punitive damages award as to the retaliation claim is satisfied as to the first prong of *Kolstad,* the only prong under which it is challenged.

(Citations omitted; emphasis in original.)

2. ***Kolstad*'s Second Prong: Scope of Employment**

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1073-74, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court held that harasser Calhoun abused his authority to harass three of the persons for whom the EEOC obtained relief. The court stated, without elaboration:

> We find that the claimants have demonstrated that Calhoun's sexually harassing conduct meets the first two requirements of *Kolstad's* second prong. New Breed employed Calhoun to manage and supervise the department in which Pete, Pearson, and Hines worked. Calhoun took advantage of his managerial role and used it as a means to supervise women in a sexually harassing way. Whether Calhoun's harassing conduct was "actuated, at least in part, by a purpose to serve" the employer, the third requirement of *Kolstad's* second prong, is less clear. However, it is not at all difficult to conclude that his retaliatory conduct toward them was thus actuated. And because on appeal, New Breed has not challenged under *Kolstad's* second prong the award of punitive damages for retaliation, we hold that the evidence of sexual harassment and/or retaliation is sufficient under *Kolstad's* second prong.

3. ***Kolstad*'s Third Prong: "Good Faith Efforts"**

E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1074, 126 Fair Empl.Prac.Cas. (BNA) 1403 (**6th Cir.** 2015), affirmed the judgment for more than $1.5 million on a jury verdict against the Title VII sexual discrimination and retaliation defendant. The court rejected defendant's argument that it had established a good-faith defense:

> Regarding the third *Kolstad* prong, we reject New Breed's contention that it is entitled to a new trial because it made good-faith efforts to prevent sexual harassment and retaliation. In assessing whether an employer engaged in good-faith efforts to comply with Title VII, we focus "both on whether the defendant employer had a written sexual harassment policy and whether the employer effectively publicized and enforced its policy." . . . The evidence showed that, although 80% of New Breed's workers at the Avaya facility were temporary employees, New Breed only distributed its anti-harassment and anti-discrimination policies to permanent employees. A jury could have reasonably found that this was not "effective publication." Additionally, after Pete made the anonymous call to the compliance line to report the harassment, the only action New Breed took to investigate the claim was to interview Calhoun to inquire into whether the charges were true. Woods did post a response to the compliance line requesting additional witnesses. However, while waiting for the additional information, Woods made no effort to interview any of the women in Calhoun's department, only Calhoun himself. When Woods did finally conduct additional interviews, the witnesses interviewed did not include Pete, the now-identified caller, and Pearson, one of the witnesses Pete identified on the compliance hotline. . . . The jury could have found this to be insufficient investigative action to enforce New Breed's anti-harassment policy. *See, e.g., Parker*, 491 F.3d at 603 (finding that supervisor "was, at the very least, recklessly indifferent to [plaintiff's] plight" when, *inter alia,* he merely spoke to the alleged harasser and took no further disciplinary action after the harasser's denial of any wrongdoing). Additionally, the fact that Pete, Pearson, and Partee were all terminated during Woods' investigation could also have led the jury to reject New Breed's assertion that it engaged in good-faith efforts to prevent retaliation. Thus, the evidence of New Breed's good-faith compliance with Title VII was not such that a jury could not reasonably find in the EEOC's favor. . . .

(Citations omitted.)

4. Permissible Amount of Punitive Damages

Arizona v. ASARCO LLC, 773 F.3d 1050 (**9th Cir.** 2014) (*en banc*), unanimously affirmed the judgment for the plaintiff State of Arizona and plaintiff-intervenor Aguilar on her Title VII sexual harassment claim. "The jury awarded no compensatory damages, but awarded $1 in nominal and $868,750 in punitive damages." *Id.* at 1054. The district court reduced the award to the cap of $300,000. The panel had held that the 300,000-to-1 ratio of punitive damages to nominal damages offended due process. The court rejected defendant's due-process challenge to the amount of the award:

> Still, this case presents a different question than the Supreme Court considered in *Gore*. Here, Aguilar has asserted a claim under a statute, Title VII, which includes a carefully crafted provision, § 1981, that imposes a cap on punitive damages. The landscape of our review is different when we consider a punitive damages award arising from a statute that rigidly dictates the standard a jury must apply in awarding punitive damages and narrowly caps hard-to-quantify compensatory damages and punitive damages. *See Abner*, 513 F.3d at 164 (noting that, through § 1981a, "Congress has effectively set the tolerable proportion" in Title VII cases and that, because the statutory

cap does not offend due process, "the three-factor *Gore* analysis" is irrelevant); *see generally* Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 Iowa L.Rev. 473, 490–94 (2012) (arguing that, after *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008), and in light of § 1981a, courts need not reach "the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under Title VII").

Id. at 1055. The court stated: "Because nominal damages measure neither damage nor severity of conduct, it is not appropriate to examine the ratio of a nominal damages award to a punitive damages award." *Id.* at 1058 (citations and footnote omitted).

P. Attorneys' Fees

1. Fees Where Plaintiff Recovers $1 in Nominal Damages but Also Punitive Damages

Arizona v. ASARCO LLC, 773 F.3d 1050, 1060-61 (**9th Cir.** 2014) (*en banc*), unanimously affirmed the judgment for the plaintiff State of Arizona and plaintiff-intervenor Aguilar on her Title VII sexual harassment claim. "The jury awarded no compensatory damages, but awarded $1 in nominal and $868,750 in punitive damages." *Id.* at 1054. The district court reduced the award to the cap of $300,000, and awarded $350,902.75 in attorneys' fees and costs. Defendant argued that plaintiff had achieved virtually nothing because she received only $1 in nominal damages and lost on all claims except her sexual harassment claim. The court stated at 1061:

> We conclude that the district court did not abuse its discretion in granting the attorneys' fees motion. First, given the overlap between Aguilar's harassment claim and her other claims, ASARCO's argument that she prevailed on merely one claim is incorrect. . . . More importantly, even if Aguilar was only awarded nominal, and not compensatory, damages, any analogy to *Farrar* disappears because, unlike in that case, Aguilar was awarded almost $900,000 in punitive damages from the jury, and was ultimately granted $300,000 in punitive damages from the district court. . . .

(Citations omitted.)

2. USERRA Claimant Not Entitled to Fees for Prevailing Before MSPB

Erickson v. U.S. Postal Service, 759 F.3d 1341 (**Fed.Cir.** 2014), *petition for cert. filed*, 83 USLW 3723 (Jan. 9, 2015) (No. 14-1025), held that plaintiff was not entitled to a fee award for work his attorneys performed in his two successful appeals from the MSPB to the Federal Circuit, ultimately resulting in an award of reinstatement and back pay. The court held that authority to award attorneys' fees against the government involves a waiver of sovereign immunity. Although the MSPB has discretion to award attorneys' fees for work done before the MSPB, the court held that this does not extend to awards for work done on appeal from MSPB decisions:

> A waiver of sovereign immunity "must be 'unequivocally expressed' in statutory text," and "[a]ny ambiguities in the statutory language are to be construed in favor of

> immunity." *FAA v. Cooper*, __ U.S. __, 132 S.Ct. 1441, 1448, 182 L.Ed.2d 497 (2012). Ambiguity exists "if there is a plausible interpretation of the statute that would not authorize money damages against the government." *Id.* It is far from clear that section 4324(c)(4) authorizes the Board to award attorney fees for work done in the course of judicial review of Board decisions. We therefore follow our prior precedents in analogous contexts and hold that the Board lacks statutory authority to grant an award for fees incurred in Mr. Erickson's appeals to this court.

Id. at 1345. The court held that it had no plenary authority to award fees for work before it, because USERRA did not give it that power. *Id.* The court held that a remand because of Board error makes an employee a prevailing party for purposes of the Equal Access to Justice Act, and the 30-day deadline for filing a fee application starts with the remand order. *Id.* at 1346. However, Erickson's application was filed after that deadline had expired. *Id.* The court also held that entitlement to fees under the EAJA depended on the government's position not having been "substantially justified," and the employee also failed to meet that standard:

> . . . In Mr. Erickson's case, the government prevailed before the Board in the proceedings that led to both of the appeals to this court. The cases on appeal were close, and even though Mr. Erickson prevailed on both occasions, we are not prepared to say that the government's position in defending the Board's decisions was not "substantially justified." Mr. Erickson would therefore not be entitled to a fee award under EAJA even if he had filed his EAJA applications on time.

Id. Finally, the court held that the employee was not entitled to fees under the Back Pay Act. It accepted for purposes of decision that the back pay provisions of the BPA applied to preference-eligible employees of the Postal Service even if not to non-preference-eligible USPS employees, but held that the attorneys' fee provisions of the BPA do not apply to any USPS employees. *Id.* at 1347-51.

3. Effect of Rule 68, Fed.R.Civ.Pro., When Plaintiff Wins But Recovers Less than the Offer

Hescott v. City of Saginaw, 757 F.3d 518, 528-29 (**6th Cir.** 2014), rejected the losing § 1983 defendant's effort to obtain an award of attorneys' fees as part of "costs" under 42 U.S.C. § 1988, on the ground it had made a Rule 68 offer of judgment rejected by plaintiffs, and plaintiffs recovered less than the amount of the offer. The court collected authorities and joined them:

> The City next argues that the term "costs" in Rule 68 contemplates and includes an award of attorneys' fees such that the rule, as interpreted in *Marek v. Chesny,* not only prohibits the Hescotts from recovering their own post-offer attorneys' fees, but also requires that the Hescotts pay the City's post-offer attorneys' fees. Though this appears to be an issue of first impression in our court, all but one of our sister circuits to consider the matter has roundly rejected the City's argument. We join those circuits in holding that because § 1988 is not a "two-way fee-shifting statute," Rule 68 cannot force a prevailing civil-rights plaintiff to pay a defendant's post-offer attorneys' fees. *See, e.g., Payne v. Milwaukee Cnty.*, 288 F.3d 1021, 1026 (7th Cir.2002).

In *Marek,* the Supreme Court held that attorneys' fees are included within the definition of "costs" under Rule 68 so long as fees are "properly awardable [as costs] under the relevant substantive statute." 473 U.S. at 9, 105 S.Ct. 3012. The Court reasoned that because a prevailing party in a civil-rights suit may recover attorneys' fees "as part of the costs" under § 1988, a plaintiff who receives a judgment less than the defendant's Rule 68 settlement offer cannot recover his or her own post-offer attorneys' fees. *Id.* The Court did not, however, determine whether Rule 68 also imposes the *losing party's* post-offer fees upon a prevailing civil-rights plaintiff. *Id.* at 4 n. 1, 105 S.Ct. 3012.

Over the years, one appellate court after another has answered that question in the negative. *See Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1030–31 (9th Cir. 2003); *Le v. Univ. of Pa.*, 321 F.3d 403, 411 (3d Cir. 2003); *Payne v. Milwaukee Cnty.*, 288 F.3d 1021, 1027 (7th Cir. 2002); *EEOC v. Bailey Ford, Inc.*, 26 F.3d 570, 571 (5th Cir. 1994) (per curiam); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986); *see also* 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3006.2 (2d ed. 1997) ("[T]he Supreme Court was careful to specify in *Marek* that only 'properly awardable' costs were to be awarded to defendants, and the lower courts have properly held that this means that civil-rights defendants can recover their fees as a part of costs under Rule 68 only if they can satisfy the otherwise-applicable standard for recovery by defendants.").

Today, we join those circuits in concluding that a losing civil-rights defendant cannot recover its post-offer attorneys' fees under Rule 68 because such a party does not satisfy the requirements for a fee award under § 1988. In determining that Rule 68 "costs" can sometimes include attorneys' fees, the *Marek* Court drew a "strict link" between the rule and the underlying statute that authorizes a fee award. . . . The *Marek* Court stated twice that the term "costs" in Rule 68 refers to "all costs *properly awardable* " under the relevant statute. 473 U.S. at 9, 105 S.Ct. 3012 (emphasis added). Thus, the appropriate inquiry is whether attorneys' fees are "properly awardable" to the City under § 1988. . . .

Under § 1988, a civil-rights defendant may recover attorneys' fees only if the defendant is a "prevailing party" *and* proves that the plaintiff's action was "frivolous, unreasonable, or without foundation." . . . Here, the City falls short under this test; the City did not prevail on the Hescotts' Fourth Amendment claim and, therefore, could not possibly prove that the action was frivolous, unreasonable, or without foundation. Accordingly, attorneys' fees were not "properly awardable" to the City under § 1988, and the district court correctly denied them.

The City relies largely on dicta from *Marek* for the proposition that that the term "costs" in Rule 68 includes an award of attorneys' fees under § 1988, even for losing civil-rights defendants. We are not persuaded. Every quotation that the City highlights from *Marek* applies with equal force and validity to the limited holding in that case—namely, that prevailing civil-rights plaintiffs may be forced to bear their *own* post-offer attorneys' fees as part of the cost-shifting provisions from Rule 68. We agree that "[t]he

Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits," and that "application of Rule 68 will require plaintiffs to think very hard about whether continued litigation is worthwhile." *Marek*, 473 U.S. at 5, 11, 105 S.Ct. 3012 (internal quotation marks omitted). Paying a portion of one's own attorneys' fees that would otherwise be recoverable from the defendant certainly will give civil-rights plaintiffs pause before rejecting a settlement offer.

But the statements the City clings to do not compel an answer to the question *Marek* carefully avoided: whether prevailing civil-rights plaintiffs must also pay their *adversaries'* post-offer attorneys' fees under Rule 68. Congress answered that question with an emphatic "no" when it limited attorneys' fees to *prevailing parties* under § 1988, and the Supreme Court further narrowed the statute's benefit to defendants in *Hughes* and *Christiansburg Garment.* We cannot force through the back-door of a court rule what Congress and the Supreme Court expressly barred at the front gates. *See Grosvenor*, 801 F.2d at 947 n. 7 ("Any interpretation of Rule 68 that significantly undercuts the substantive policies underlying § 1988 conflicts with [the Rules Enabling Act]."); *Crossman*, 806 F.2d at 333 ("These two words—'properly awardable'—are so essential to the holding of *Marek* that, even if the Supreme Court had not expressly included them, we would have implied their existence to prevent *Marek* 's chilling effect on the initiation of civil rights actions from attaining glacial magnitude.").

(Emphases in original; some citations omitted.)

4. Intervenor in Government Suit for Monitoring Is Not Prevailing Party

United States v. Tennessee, 780 F.3d 332 (**6th Cir.** 2015), reversed the award of $100,000 in attorneys' fees for post-judgment monitoring work, awarded to a public advocacy group and others that intervened in the Justice Department's enforcement case under the Civil Rights of Institutionalized Persons Act. The court described the Circuit split as to whether there needs to be a separate determination of prevailing-party status at the decree-monitoring stage in order to support a fee award under *Buckhannon*, *id.* at 338-39, and stated:

But in this case we need not answer that question or take sides in the circuit split. For even under *Delaware Valley,* as discussed above, a plaintiff must at least show that its post-judgment monitoring work was "necessary to enforce the remedy ordered by the District Court[.]" 478 U.S. at 559. Whether a plaintiff's post-judgment monitoring is necessary, of course, depends on the facts of the particular case. And the colossal fact in this case is that the State has already paid $10.6 million to the court-appointed monitor. What People First must show, therefore, is not merely that some "monitoring was necessary" in this case, but also that $10.6 million of monitoring by the court-appointed monitor was not enough, and that People First was thus entitled to do another $100,000 of self-appointed monitoring at taxpayer expense. People First has not made that showing, or even tried. Nor did the district court's opinion explain why there was some genuine necessity for People First to add to the monumental amount of monitoring for

which the State had already paid. For these reasons standing alone, People First is not entitled to fees for its self-appointed monitoring.

Id. at 339. The court continued:

> People First's work over the course of this litigation has brought important benefits to members of the class. For good reason, therefore, People First has been paid $3.6 million for that work. But just as consent decrees themselves "are not entitlements" … neither do they bring a perpetual entitlement to fees. For the reasons stated above, People First did not prove its entitlement to the additional fees awarded here.

Id. at 340 (citation omitted).

5. Amount

Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 676-77 (**4th Cir.** 2015), affirmed an award of $ 354,127.05 in attorneys' fees to the Sarbanes-Oxley retaliation plaintiff, and affirmed the lower court's refusal to adjust the fee downward because of the partial remittitur of the damage award to $737,000 inclusive of $44,000 in prejudgment interest. The court stated at *14:

> Likewise, although we have advised courts to compare the damages award to the amount sought, a court should not reduce a fee award "simply because the plaintiff failed to prevail on every contention raised in the lawsuit." … A court may consider whether a fee award seems reasonable in light of the amount of damages awarded. However, "a substantial disproportionality between a fee award and a verdict, standing alone, may not justify a reduction in attorney's fees." …

Id. at 676 (citations omitted). The court also affirmed the lower court's decision to make the two defendant officials jointly and severally liable with the defendant corporation for payment of the fee award:

> Here, Appellants call on us to redistribute the fee award in proportion to each appellant's share of the damages awarded. We have never required a defendant's share of a fee award to equal his share of damages, nor have other circuits. *See, e.g.*, *Corder v. Gates*, 947 F.2d 374, 383 (9th Cir.1991) ("We have never mandated apportionment based on each defendant's relative liability under a jury's verdict."). Such a requirement would take away the discretionary power that district courts have traditionally enjoyed in this area.
>
> Even if, in the first instance, we might not have decided to hold Appellants jointly and severally liable for the fee award, we cannot say that the district court's decision was an abuse of discretion. Mroz and Phillips were high-level executives at SouthPeak. Both were involved in the decision to fire Appellee. The claims against all three Appellants were the same, and although the damages awards ended up differing, the work that Appellee's counsel put into developing, investigating, and pursuing those claims cannot be so easily divided. Accordingly, we affirm.

Id. at 677-78.

Q. Sanctions

Waste Management of Washington, Inc. v. Kattler, 776 F.3d 336, 342 (**5th Cir.** 2015), held that the district court abused its discretion in citing plaintiff's attorney for contempt for failing to turn over plaintiff's tablet computer, or an image of it, where counsel had made a good-faith objection that it contained privileged documents, and the plaintiff did not waive privilege. The court held: "Therefore, a party's good-faith claim of attorney-client privilege can serve as a valid defense to a finding of contempt."

VI. Appellate Tips for Effective Advocacy

E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 768-69 (**6th Cir.** 2015) (*en banc*), affirmed the grant of summary judgment to the ADA retaliation defendant. The court held that the EEOC had waived its "cat's paw" argument:

> Nor can Gordon's conduct in these meetings be imputed to Ford through the so-called "cat's paw" theory. That theory would hold Ford liable if Gordon, motivated by retaliatory animus, intended to cause Harris's termination and proximately caused the actual decisionmakers to terminate her. *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S.Ct. 1186, 1194, 179 L.Ed.2d 144 (2011). In its five appellate briefs and in its brief below, the EEOC never so much as hinted that this theory might apply, which doubly forfeited the argument. . . . That was a wise move by the EEOC, for, among other reasons, no evidence shows a "direct relation between the injury asserted [termination] and the injurious conduct alleged [Gordon's intimidation]." . . . The dissent would nevertheless apply this theory. Dissent Op. at 41–42. But that contravenes the rule that the *parties* (not judges) raise the arguments. And it expands this theory—fattens the cat, so to speak—far too much. This argument was forfeited, and, in any event, Gordon was no monkey, and Ford, not his cat. . . .

Judge McKeague wrote the majority opinion, and Judge Karen Nelson Moore wrote a dissenting opinion joined by Chief Judge Cole, Judges Clay, White, and Stranch.

Nixon v. City and County of Denver, 784 F.3d 1364, 1366 (**10th Cir.** 2015), affirmed the grant of summary judgment to the First Amendment retaliation defendant. The court stated:

> The first task of an appellant is to explain to us why the district court's decision was wrong. Recitation of a tale of apparent injustice may assist in that task, but it cannot substitute for legal argument. Later the appellant may have the additional burden of responding to the appellee's arguments that the district court's judgment can be affirmed on grounds not relied upon by that court. But, again, addressing these arguments will not help the appellant if the reasons that were given by the district court go unchallenged. On this appeal, counsel for appellant Ricky Nixon tells a story of injustice and argues against positions not adopted by the district court. Counsel utterly fails, however, to explain what was wrong with the reasoning that the district court relied on in reaching its decision. As

a result, we address only one sentence of the opening brief on its merits before affirming the judgment below.

VII. Appellate Tips to District Judges for Effective Adjudication

Stuart v. Local 727, Int'l Bhd. of Teamsters, 771 F.3d 1014, 1020 (**7th Cir.** 2014) (Posner, J.), reversed the *sua sponte* dismissal of the Title VII plaintiff's sex discrimination claim against the defendant union. Judge Shadur of the district court dismissed the case because of defendant's pleading of an affirmative defense of untimeliness, prior to discovery or any motion. The holdings in this case are described extensively in the sections above on Title VII and on Timeliness. The court admonished the district court:

> The judgment is reversed. Because of the abruptness and irregularity of the district judge's handling of this case (we can't understand his deciding to dismiss the complaint with prejudice, thereby preventing the plaintiff from amending the complaint, or his instructing his law clerk to request the plaintiff's EEOC charge from the plaintiff's lawyer, without telling the defendant, even though the charge was not part of the record), and the unmistakable (and to us incomprehensible) tone of derision that pervades his opinion, we have decided that further proceedings in the district court should be before a different district judge. See Circuit Rule 36.