Arizona State Bar
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Trends in Employment Discrimination Law

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., Suite 900, Brawner Building, 888 17th Street, N.W., Washington, DC 20006-3307. Telephone: 202-785-2145. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net. This paper is updated at various times each year, and updates can be downloaded from www.rickseymourlaw.com. Many of my other CLE papers are also downloadable from this site.

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I. The Statistics

A. Judicial Case Filings

Twelve-Month Period	Number of Employment Discrimination Cases Filed in These 12 Months
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299
1999 (12 mos. to 12/31/99)	22,412
2000 (12 mos. to 12/31/00)	21,111
2001 (12 mos. to 12/31/01)	21,062
2002 (12 mos. to 12/33/02)	20,972
2003 (12 mos. to 12/31/03)	20,040
2004 (12 mos. to 9/30/04)	19,746
2005 (12 mos. to 9/30/05)	16,930
2006 (12 mos. to 9/30/06)	14,353
2007 (12 mos. to 12/31/07)	13,107
2009 (12 mos. to 3/31/10)	13,523
2011 (12 mos. to 9/30/11)	16,909 (including ADA employment cases)
2012 (12 mos. to 9/30/12)	16,976 (including ADA employment cases)
2013 (12 mos. to 9/30/13)	15,266 (including ADA employment cases)
2014 (12 mos. to 6/30/14)	13,881 (including ADA employment cases)
2015 (12 mos. To 6/30/15)	14,260 (including ADA employment cases)

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

There was a 16.4% decrease in Federal-court employment discrimination filings from 2012 to 2015. There were 8,452 FLSA filings in Federal court in 2015. There was a 6.3% drop in total civil filings from 2014 to 2015.

B. EEOC Charge Filings

The following shows what has happened with EEOC charges during the seven years from FY 2008 through FY 2015:

Type	FY 2008	FY 2015	Difference	Change
Total	95,402	89,385	-6,017	-6.3%
Race	33,937	31,027	-2,910	-8.6%
Color	2,943	2,833	-110	-3.7%
Sex	28,372	26,396	-1,976	-7.0%
National Origin	10,601	9,438	-1,163	-11.0%
Religion	3,273	3,502	229	7.0%
Retaliation—All Statutes	32,690	39,757	7,067	21.6%
Retaliation—Title VII	28,698	31,893	3,195	11.1%
Age	24,582	20,144	-4,438	-18.1%
Disability	19,543	26,968	7,425	38.0%
Equal Pay Act	954	973	19	2.0%
GINA		257	N.A.	N.A.

II. Government and Bar Activities

A. The EEOC's Addition of Pay Data to EEO-1 Forms

On January 29, 2016, the EEOC announced a proposal to add pay data and pay ranges to EEO-1 reports. The Commission explained its proposal in the announcement:

> The new pay data would provide EEOC and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor with insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination. This pay data would allow EEOC to compile and publish aggregated data that will help employers in conducting their own analysis of their pay practices to facilitate voluntary compliance. The agencies would use this pay data to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination.

See the announcement at http://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm.

The proposed changes were published in the Federal Register on February 1, 2016, with a sixty-day comment period. 81 Fed.Reg. 5113-5121 (Feb. 1, 2016).

B. The EEOC's Proposed Enforcement Guidance on Retaliation

On January 21, 2016, the EEOC released a proposed Enforcement Guidance on Retaliation and Related Issues, and announced a 30-day comment period expiring February 24, 2016. The Commission explained its proposal in the announcement:

The Commission's last guidance update on the subject of retaliation was issued in 1998. Since that time the Supreme Court and lower courts have issued numerous significant rulings regarding retaliation under employment discrimination laws.

"Retaliation is a persistent and widespread problem in the nation's workplaces," said EEOC Chair Jenny R. Yang. "Ensuring that employees are free to come forward to report violations of our employment discrimination laws is the cornerstone for effective enforcement. If employees face retaliation for filing a charge, it undermines the protections of our federal civil rights laws. The Commission's request for public input on this proposed enforcement guidance will promote transparency. It will also strengthen EEOC's ability to help employers prevent retaliation and to help employees understand their rights."

The percentage of retaliation charges has roughly doubled since 1998, making retaliation the most frequently alleged type of violation raised with EEOC. Nearly 43 percent of all private sector charges filed in fiscal year 2014 included retaliation claims. In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation violations comprised 53 percent of all violations found in the federal sector in fiscal year 2015.

The draft guidance is available for review at
http://www.regulations.gov/#!docketDetail;D=EEOC-2016-0001

(Paragraph indentations added to meet the basic requirements of English grammar, a subject foreign to the drafters of the Government Style Manual.)

Comment of Richard Seymour on the EEOC's Belated Updating of Enforcement Guidances: The EEOC clearly has an interest in its own credibility, and those of its Enforcement Guidances. To allow an important guidance to remain unchanged for eighteen years, while the legal landscape is changing significantly, significantly undermines the Commission's credibility. The Commission's "guidance" on arbitration agreements is another credibility-damaging case in point. An EEOC concerned with credibility needs to review every employment-related Supreme Court decision within months—not decades—to determine if any of its Guidances need to be changed. It should establish a rotating three-year schedule for reviewing each third of its Guidances to see if they should be changed in light of issues being raised or resolved in the lower courts—whether the Commission agrees or disagrees—to ensure that its Guidances remain useful to employees, employers, and the courts.

C. The EEOC's New Policy on Position Statements

On February 18, 2016, the EEOC released a new policy on position statements. See http://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm.

The announcement states:[1]

[1] Paragraph indentations added to meet the minimal requirements of English grammar, a topic alien to the drafters of the Government Style Manual.

EEOC Implements Nationwide Procedures for Releasing Respondent Position Statements and Obtaining Responses from Charging Parties

EEOC has implemented nationwide procedures that provide for the release of Respondent position statements and non-confidential attachments to a Charging Party or her representative upon request during the investigation of her charge of discrimination.

These procedures apply to all EEOC requests for position statements made to Respondents on or after January 1, 2016.

The new procedures provide for a consistent approach to be followed in all of EEOC's offices, which enhances service to the public. The procedures will also provide EEOC with better information from the parties to strengthen our investigations.

Background on Position Statements

During the investigation of a charge, EEOC may request that the Respondent employer submit a position statement and documents supporting its position. EEOC's resource guide for Respondents, "Effective Position Statements," advises Respondents to focus their position statements on the facts relevant to the charge of discrimination and to identify the specific documents and evidence supporting its position. A position statement focused on the allegations of the charge helps EEOC accelerate the investigation and tailor its requests for additional information.

A Respondent generally has 30 days to gather the information requested and to submit its position statement and attachments to the EEOC. If the Respondent relies on confidential information in its position statement, it should provide such information in separately labeled attachments. With EEOC's new Digital Charge System, Respondents can upload their position statement and attachments into the digital charge file rather than faxing or mailing the documents.

After EEOC reviews the Respondent's position statement and attachments on a specific charge, EEOC staff may redact confidential information as necessary prior to releasing the information to a Charging Party or her representative.

EEOC will provide the Respondent's position statement and non-confidential attachments to Charging Parties upon request and provide them an opportunity to respond within 20 days. The Charging Party's response will not be provided to Respondent during the investigation.

For more information about Respondent Position Statements, see:

- Questions and Answers for Charging Parties
- Questions and Answers for Respondents

For more information about requests for disclosure of information in a charge file after the investigation is closed, see EEOC's Freedom of Information Act page.

Comment of Richard Seymour on the EEOC's Announcement of Its Change on Position Statements: It is a major step forward for the agency to treat the availability of position statements and ability to submit responses as a national question to be resolved nationally, instead of leaving it up to the predilections of individual office directors. A national agency should have uniform national procedures and accountability, and not treat as offices as separate principalities. It is half a major step forward to make position statements available to charging parties, but only half a step because of the Commission's invitation to Respondents to conceal information they call "confidential" in attachments. If the Commission rigorously limits "confidential" treatment to things such as Social Security Numbers and personal health information of third parties (except where necessary for purposes of determining whether they are appropriate comparators), that would be reasonable. However, the common disarray in the Commission's investigations, stemming in part from inadequate funding, in part form inadequate training, and in part because of unaddressed quality problems, suggests that what will really happen is that employers will over-designate as "confidential" any information they do not want the charging part to rebut. And it is half a step forward because it allows charging parties to submit a response to whatever the respondent has decided the charging party should see in its position statement.

The announcement is a major disappointment to practitioners and those interested in making equal employment opportunity a reality because it continues the Commission's attitude of hostility to the parties on both sides of a charge of discrimination and because it hamstrings any investigation the EEOC is able to do. With an agency strapped for resources, the agency often dismisses charges with no apparent activity other than the docketing of a position statement. It is years since any EEOC investigator has asked to interview one of my clients; it is years since I saw an investigative file that contains a witness statement. Yet the EEOC insists on playing "keep away" with the information each side presents to it, insists on blinding itself to the useful information charging parties could provide if they saw the so-called "confidential" information a respondent provides, and insists on blinding itself to the useful information respondents could provide if they saw the charging party's rebuttal to their position statements.

The EEOC needs to revisit its new policy, embrace transparency as among the parties to a charge, and allow each side to respond to whatever the other side submits. After all, the parties—not the EEOC—possess the greatest information and most useful perspectives on the charge. A resource-strapped agency could not find a cheaper or more effective way to reach merits-based resolutions and gain credibility for adding value to the charge system.

D. The Securities and Exchange Commission's Approach to Confidentiality in Internal Investigations at Publicly-Traded Companies

On April 1, 2015, the SEC announced a settlement with KBR, Inc., as to its charges that KBR used unduly broad language in its confidentiality agreements with witnesses, that would interfere with their filing SEC complaints. Its press release stated:

> The SEC charged Houston-based global technology and engineering firm KBR Inc. with violating whistleblower protection Rule 21F-17 enacted under the Dodd-Frank Act. KBR required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even

be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. Since these investigations included allegations of possible securities law violations, the SEC found that these terms violated Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC.

KBR agreed to pay a $130,000 penalty to settle the SEC's charges and the company voluntarily amended its confidentiality statement by adding language making clear that employees are free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation.

(Paragraph indentation supplied to meet the minimum requirements of English grammar.) The announcement can be downloaded from http://www.sec.gov/news/pressrelease/2015-54.html, as I did on March 30, 2016.

E. The American Bar Association's Change to Ethics Rule 8.4

In August 2016, the ABA House of Delegates adopted an amendment to Model Rule 8.4, making it unethical for an attorney to engage in unlawful discrimination or harassment in the attorney's office. If personnel disputes involve such an allegation, employees now have the additional weapon of an ethics complaint.

The original Resolution 109 was substantially amended to address objections and secure passage. The ABA's Center for Professional Liability explained the changes:

REVISED HOD RESOLUTION 109 FILED AUGUST 3, 2016

In anticipation of the meeting of the House of Delegates on Monday, August 8, 2016, and in response to the thoughtful concerns that have been raised by ABA entities and others, the sponsors of House Resolution 109, which would amend Model Rule of Professional Conduct 8.4 to create new paragraph (g) and add new Comments, are filing a revised version with the Committee on Rules and Calendar.

In addition to being sponsored by the Association's Standing Committee on Ethics and Professional Responsibility, Resolution 109 as revised is supported by the Standing Committee on Professional Discipline, the Standing Committee on Client Protection, the Standing Committee on Professionalism, and the Center for Professional Responsibility Diversity Committee. We thank these Committees for their hard and thoughtful work on this important resolution.

The most important revisions are:

1. **A knowledge requirement has been incorporated.** The proposed rule now prohibits conduct a lawyer "knows or reasonably should know" is harassment or discrimination. This responds to concerns expressed by some regarding the scope of the prior proposal. These two terms – "knows" and "reasonably should know" – are defined in the Model Rules, and this dual standard – "knows or reasonably should know" – is

widely used throughout the Model Rules. *See* Model Rules 1.13(f), 2.3(b), 2.4(b), 3.6(a), 4.3 and 4.4(b).

2. **Jury selection concerns have been directly addressed.** The revisions also include inserting into new Comment [5] what some have called "The Batson Sentence" from current Comment [3] to Rule 8.4. The sentence reads: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

3. **Moving the "legitimate advocacy" exception into the rule itself from the Comments, and expanding it to also cover "advice".** In addition, the "legitimate advocacy" exception has been moved into the black letter of the Rule. It provides that new paragraph (g) does not preclude legitimate advice or advocacy consistent with these Rules.

4. **Eliminating the "perceived" language.** The revisions include deleting from the definition of discrimination references to "membership" and "perceived membership" in one or more of the listed groups, as such language was unnecessary and some found it confusing.

The question now is whether the various State and City Bar Associations will adopt the new rule. I hope not.

Comment of Richard Seymour on the Original Proposed Change to Model Rule 8.4: I submitted comments that commended the drafters for their intentions, but that opposed the rule on several grounds. The following are illustrative, but please ask me for a copy of my comments to get them all:

First, many State Bars are mandatory, so their restrictions on the content of speech are subject to stringent First Amendment standards that I think are clearly not met here.

Second, I believe that the primary focus of the rules of ethics should be on the manner in which attorneys practice law, represent their clients, and make themselves available to practice law. Ensuring that attorneys have good hearts in all their activities is a matter for their consciences and religion, not for the Bar.

Third, we have seen from the efforts of the Equal Employment Opportunity Commission and State and local Fair Employment Practice Agencies, and from courts and arbitrations, that the investigation and determination of the merits of discrimination and harassment claims is complex and often far from easy. Requiring State Bar authorities to replicate their work, in the context of deciding whether an attorney is still fit to practice law, would swamp their work and harm their existing functions.

Fourth, it is no answer to say that Bar committees can simply rely on the results of civil litigation, because a mere preponderance of the evidence in an ordinary EEO case, as found by a particular judge or jury on a particular day, is not enough, in my view to justify threatening an attorney's livelihood and good name.

Fifth, articles in the legal press show that claims against law firms are not uncommon, and the nuclear threat of jeopardizing an attorney's livelihood and good name merely by threatening or filing such a complaint would be abused and lead to unjustly strong pressures to settle and pay money to the complainant to get a withdrawal of the complaint or prevent its filing, even where the attorney has engaged in no wrong.

Sixth, the rule could turn out to be self-defeating, because the dire consequences may lead ethics committees and courts to look the other way in all but the most egregious cases.

III. Cases to Watch in the U.S. Supreme Court

As of October 12, 2016, the Court has not granted review in any employment-law cases for the October 2016 Term.

IV. The Constitution and Statutes

A. Difference Between First and Fourteenth Amendment Discrimination Claims

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 834-35 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court distinguished between First and Fourteenth Amendment discrimination claims:

> Constitutional claims must be addressed under the most applicable provision … and this Court has recognized the distinction between claims that target a plaintiff's religious practices and those in which a defendant arbitrarily discriminates against a plaintiff because of her religion … . The First Amendment's religion clauses guide the former, and the Fourteenth Amendment's Equal Protection Clause guides the latter. …

(Footnote and citations omitted.)

B. The First Amendment

1. Perceived Protected Activity

Heffernan v. City of Paterson, --- **U.S.** ---, 136 S.Ct. 1412, 1416 (2016), held that a public employee who did not engage in protected activity, but whose employer fired him in the mistaken belief he had, has a viable claim for retaliation under the First Amendment. The Court stated:

> The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity. … In this case a government official demoted an employee because the official believed, but *incorrectly* believed, that the employee had supported a particular candidate for mayor. The question is whether the official's factual mistake makes a critical legal difference. Even though the employee had not in fact engaged in protected political activity, did his demotion "deprive" him of a "right ... secured by the Constitution"? 42 U.S.C. § 1983. We hold that it did.

(Emphasis in original.) Justice Thomas, joined by Justice Alito, dissented.

2. Oral Complaints by Prison Inmates

Mack v. Warden Loretto, --- F.3d ---, 2016 WL 5899173, (3d Cir. Oct. 11, 2016), at *8 held that a prison inmate's "oral grievance … regarding the anti-Muslim harassment he endured at work constitutes protected activity under the First Amendment," so that he could sue the responsible officials for retaliation by causing his firing from his job at the prison commissary. The court also held that the "public concern" requirement for the coverage of public-employee speech by the First Amendment does not apply in the prison-inmate setting. *Id.* at *8 note 69.

3. Public-Sector Union Agency Shops

Friedrichs v. California Teachers Association, --- **U.S.** ----, 136 S.Ct. 1083 (2016), affirmed by an equally divided Court the opinion of the Ninth Circuit rejecting a challenge to "agency shop" arrangements. The questions presented were "(1) Whether Abood v. Detroit Board of Education[, 431 U.S. 209 (1977),] should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech."

4. Student Complaints

Jane Doe I v. Valencia Coll. Bd. of Trustees, --- F.3d ---, 2016 WL 5751119 (11th Cir. Oct. 4, 2016) (No. 15-15240), reversed the dismissal of plaintiffs' Complaint for failure to state a First Amendment retaliation claim. Valencia College is a public college. The plaintiffs were nursing students who complained about the defendants' requirement that they perform intravaginal ultrasounds on each other, and were allegedly threatened and retaliated against be because of their complaints. The lower court thought the student complaints were "school-sponsored expression," but the court of appeals disagreed:

> Instead of assessing the students' speech as school-sponsored expression under Hazelwood, the district court should have evaluated it as pure student expression under *Tinker* because it "merely happen[ed] to occur on the school premises." … Accordingly, the employees must tolerate the students' complaints about the transvaginal ultrasounds "unless they can reasonably forecast that the expression will lead to 'substantial disruption of or material interference with school activities.'" … We vacate the order dismissing the students' claim under the First Amendment.

Id. at *3 (citations omitted).

C. The Fourth Amendment

Jane Doe I v. Valencia Coll. Bd. of Trustees, --- F.3d ---, 2016 WL 5751119 (11th Cir. Oct. 4, 2016) (No. 15-15240), reversed the dismissal of plaintiffs' Complaint for failure to state a Fourth Amendment unreasonable-search claim. Valencia College is a public college. The plaintiffs were nursing students who complained that the intravaginal ultrasounds they were

required to perform on each other were unconstitutional searches. The court agreed, disagreed with other Circuits, and held that it was not necessary to show that the searches had an investigative or administrative purpose.

> Inserting a probe into a woman's vagina is plainly a search when performed by the government. Where the government physically intrudes on a subject enumerated within the Fourth Amendment, such as a person, a search "has undoubtedly occurred." … The Supreme Court has long recognized that compelled blood and urine tests implicate the Fourth Amendment. … Even under the broader test that a "search" is "any governmental act that violates a reasonable expectation of privacy" … each ultrasound clearly constituted a search. "[I]t is obvious" that the "compelled intrusio[n] into the body ... infringes an expectation of privacy that society is prepared to recognize as reasonable." …
>
> Although the employees did not conduct the transvaginal ultrasounds to discover violations of the law, the word "search" in the Fourth Amendment does not contain a purpose requirement. …

Id. at *3.

D. The Fourteenth Amendment

1. Affirmative Action

Fisher v. University of Texas at Austin, --- **U.S.** ----, 136 S.Ct. 2198 (2016), upheld the University's limited use of race "as a factor of a factor" in admitted students for the 25% of the student body not filled by Texas' legislatively mandated Top Ten Percent Plan. The Plan provided that the top 10% of high school graduates in the State could choose the public university they wished to attend, subject to the 75% cap at the University. The remaining 25% of places were filled by a "holistic" review of students based on a combination of their Academic Index (SAT score and high school performance) and Personal Achievement Index. One component of the PAI was based on race. The Court rejected petitioner's argument that the University's plan failed because it did not specify what "critical mass" of minority enrollment it sought to achieve:

> As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity."

136 S. Ct. at 2210 (citations omitted). The Court continued:

> Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of

minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

Id. at 2210-11. The Court also rejected her argument that the University had already achieved a "critical mass":

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African–American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African–American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian–American students tell a similar story. … Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. …

Id. at 2012. Petitioner's third argument was, oddly enough, that the University's consideration of race had only a minimal impact in advancing the University's compelling interest. The Court also rejected this argument:

Third, petitioner argues that considering race was not necessary because such consideration has had only a " 'minimal impact' in advancing the [University's] compelling interest." … Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African–American. … In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African–American. *Ibid.* Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Id. The Court similarly rejected petitioner's argument that nonracial means could have accomplished the same goal, and relied upon the ext4nsive record of such unsuccessful efforts the University had compiled. *Id.* at 2012-14. The Court held that the University was required to

continue evaluating its policy with new data as it becomes available, to ensure that it continues to meet the test of being narrowly tailored and strict scrutiny:

> That does not diminish, however, the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. … Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.
>
> As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's examination of the data it has acquired in the years since petitioner's application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come. Here, however, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

Id. at 2209-10. Justice Kennedy wrote the opinion of the Court, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Thomas dissented. Justice Alito dissented, joined by the Chief Justice and Justice Thomas. Justice Kagan took no part in the consideration or decision of the case.

2. Relevance of Title VII Disparate Treatment Standards

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 835 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court held:

> … When a plaintiff uses § 1983 as a parallel remedy to a Title VII harassment claim, the prima facie elements to establish liability are the same under both statutes. … Stating a hostile work environment claim under Title VII therefore establishes a viable claim to § 1983 relief. … As discussed above, Huri stated viable Title VII hostile work environment claims. Her § 1983 claims against McCallum, Filishio, and Lawless survive for the same reasons.

(Citations omitted.)

3. Conspiracy Claims

Bonenberger v. St. Louis Metropolitan Police Dept., 810 F.3d 1103, 1109 (**8th Cir.** 2016), affirmed the judgment on a jury verdict for the white male plaintiff Police Sergeant not promoted to Assistant Director of the Police Academy because the Department had decided it wanted to place a black woman in the position. The court rejected defendants' argument that plaintiff had not proven a conspiracy to deprive him of his civil rights, holding that the evidence was ambiguous and there was enough evidence to allow a jury to draw the inference of a meeting of the minds. The court stated:

> We have held "'[t]he question of the existence of a conspiracy to deprive the plaintiff[ ] of [his] constitutional rights should not be taken from the jury if there is a possibility the jury could infer from the circumstances a "meeting of the minds" or understanding among the conspirators to achieve the conspiracy's aims.'" Because Sergeant Bonenberger put forth "'at least some facts which would suggest that [Lieutenant Muxo and Lieutenant Colonel Harris] "reached an understanding" to violate [his] rights,'" this question was reserved for the jury.

4. Procedural Due Process: Name-Clearing Hearings

Buntin v. City of Boston, 813 F.3d 401 (**1st Cir.** 2015), affirmed the Rule 12(b)(6) dismissal of plaintiff's § 1983 claim for denial of a name-clearing hearing for her decedent, Hixon. The court held that:

> … a Section 1983 claim premised on the failure to afford a name-clearing hearing requires that the employee satisfy five elements: (1) the alleged defamatory statement must seriously damage the employee's standing and association in the community; (2) the employee must dispute the statement as false; (3) the statement must have been intentionally publicized by the government; (4) the stigmatizing statement must have been made in conjunction with an alteration of the employee's legal status, such as the termination of his employment; and (5) the government must have failed to comply with the employee's request for a name-clearing hearing.

Id. at 406 (citation omitted). The court held that plaintiff failed to make the required showing for three of these elements:

> … As an initial matter, there is no allegation that the City publicized the defamatory statements beyond the DUA hearings at which they were made. What is more, the complaint itself establishes that the alleged defamatory statements were not made in conjunction with an alteration in Hixon's employment status. Rather, they were made some two years after his termination at a hearing regarding Hixon's entitlement to unemployment benefits. Perhaps most importantly, the complaint does not suggest that the City denied Hixon a name-clearing hearing, or that Hixon even requested one in the first place.

Id. at 405.

Miller v. Metrocare Services, 809 F.3d 827 (**5th Cir.** 2016), affirmed the grant of summary judgment to defendants, who had fired plaintiff from his position as HR Director after they learned he had exempted himself from required annual criminal-record checks, and had falsely certified that he and numerous other employees had been checked and were cleared. The court held that a public employee's liberty interests are affected, and the right to a name-clearing hearing attaches, only when the employee is discharged under circumstances that are false and stigmatizing. The court continued:

> This court "employs a seven-element 'stigma-plus-infringement' test to determine whether § 1983 affords a government employee a remedy for deprivation of liberty without notice or an opportunity to clear his name." … The plaintiff must show: (1) he was discharged; (2) stigmatizing charges were made against him in connection with the discharge; (3) the charges were false; (4) he was not provided notice or an opportunity to be heard prior to the discharge; (5) the charges were made public; (6) he requested a hearing to clear his name; and (7) the employer denied the request. …

Id. at 833 (citations omitted). The court held it would not take the occasion to decide whether the ability to confront witnesses is an essential part of a name-clearing hearing, because the plaintiff here received an adequate hearing. "Miller, through his attorney, was allowed to present at length and was allowed to provide documents to the Board to combat the supposedly false, stigmatizing charges against him." *Id.* at 834

5. Qualified Immunity

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 835 (**7th Cir.** 2015), reversed the grant of qualified immunity to two of plaintiff's supervisors on her § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court stated: "Huri's Fourteenth Amendment right to be free from a hostile work environment was well-established by 2010, when Filishio and Lawless began supervising her."

E. 42 U.S.C. § 1981

Buntin v. City of Boston, 813 F.3d 401, 405 (**1st Cir.** 2015), reversed the Rule 12(b)(6) dismissal of plaintiff's § 1981 claim for failure to exhaust administrative remedies with the Massachusetts Commission Against Discrimination, because § 1981 does not require such exhaustion.

Village of Freeport v. Barrella, 814 F.3d 594, 598 (**2d Cir.** 2016), affirmed the lower court's denial of defendants' Rule 50 motion for judgment as a matter of law, but vacated the judgment and remanded for a new trial. The court defined "race" as including Hispanics under § 1981 and Title VII alike, stating:

> Based on longstanding Supreme Court and Second Circuit precedent, we reiterate that "race" includes ethnicity for purposes of § 1981, so that discrimination based on Hispanic ancestry or lack thereof constitutes racial discrimination under that statute. We also hold that "race" should be defined the same way for purposes of Title VII. Accordingly, we reject defendants' argument that an employer who promotes a white

Hispanic candidate over a white non-Hispanic candidate cannot have engaged in racial discrimination, and we AFFIRM the judgment of the District Court insofar as it denied defendants' motions for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure.

F. Age Discrimination in Employment Act

1. *Prima Face* Case: Meeting Legitimate Qualifications

Liebman v. Metro. Life Ins. Co., 808 F.3d 1294, 1299 (**11th Cir.** 2015), vacated the grant of summary judgment to the ADEA defendant and remanded the case. The court held that the lower court erred in dismissing the case in part because of its finding that plaintiff did not meet the defendant's legitimate qualifications:

> … Liebman had therefore been in virtually the same position for a total of nine years before his termination. Nine years in the same position, and nearly three decades at the company, is long enough to support the inference that he was qualified for his job.

See also the discussion of this case in the section below on "Self-Serving Testimony."

2. *Prima Face* Case: 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.

Liebman v. Metro. Life Ins. Co., 808 F.3d 1294, 1299 (**11th Cir.** 2015), vacated the grant of summary judgment to the ADEA defendant and remanded the case. The court held that the lower court erred in dismissing the case in part because plaintiff's replacement was also over 40, and continued:

The proper inquiry under *McDonnell Douglas* is whether Weiss was substantially younger than Liebman. *See O'Connor,* 517 U.S. at 313, 116 S. Ct. at 1310. Weiss is seven years younger than Liebman, and this difference qualifies as substantially younger. *See Damon v. Fleming Supermarkets of Fla., Inc.,* 196 F.3d 1354, 1360 (11th Cir.1999) (five years is enough); *Carter v. DecisionOne Corp.,* 122 F.3d 997, 1003 (11th Cir.1997) (per curiam) (three years is enough); *Carter,* 870 F.2d at 583 (four years is enough). Viewing the facts in the light most favorable to Liebman, the district court erred in finding that the third prong of the *McDonnell Douglas* test was not met.

3. Applicants for Employment Can Make ADEA Disparate-Impact Claims

Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292-1302 (**11th Cir.** 2015), reversed the Rule 12(b)(6) dismissal of plaintiff's ADEA disparate-impact claim, holding that applicants as well as employees may bring such claims. Judge Vinson dissented. *Id.* at 1306-16.

G. Title VII

1. EEOC's Duty to Conciliate Charges Before Suing on Them

Mach Mining, LLC v. E.E.O.C., --- U.S. ----, 135 S. Ct. 1645 (2015), held that the adequacy of the EEOC's conciliation efforts was subject to judicial review, but that the scope of the review is narrow. Justice Kagan's opinion for a unanimous Court summarized its holdings in its first paragraph:

> Before suing an employer for discrimination, the Equal Employment Opportunity Commission (EEOC or Commission) must try to remedy unlawful workplace practices through informal methods of conciliation. This case requires us to decide whether and how courts may review those efforts. We hold that a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit. But we find that the scope of that review is narrow, thus recognizing the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case.

Id. at 1649. The Court began by noting a strong presumption in favor of judicial review: "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Id.* at 1651. It then rejected the EEOC's argument that there should not be any judicial review because there was no standard by which the review could be conducted. It found there was in fact a manageable standard:

> But in thus denying that Title VII creates a "reviewable prerequisite to suit," the Government takes its observation about discretion too far. *Id.*, at 37 (quoting 738 F.3d, at 175). Yes, the statute provides the EEOC with wide latitude over the conciliation process, and that feature becomes significant when we turn to defining the proper scope of judicial review. … But no, Congress has not left *everything* to the Commission. Consider if the EEOC declined to make any attempt to conciliate a claim—if, after finding reasonable cause to support a charge, the EEOC took the employer straight to court. In such a case, Title VII would offer a perfectly serviceable standard for judicial review: Without any

"endeavor" at all, the EEOC would have failed to satisfy a necessary condition of litigation.

Still more, the statute provides certain concrete standards pertaining to what that endeavor must entail. Again, think of how the statute describes the obligatory attempt: "to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b). Those specified methods necessarily involve communication between parties, including the exchange of information and views. As one dictionary variously defines the terms, they involve "consultation or discussion," an attempt to "reconcile" different positions, and a "means of argument, reasoning, or entreaty." American Heritage Dictionary 385, 382, 1318 (5th ed. 2011). That communication, moreover, concerns a particular thing: the "alleged unlawful employment practice." So the EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. … If the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation. And in insisting that the Commission do so, as the statutory language directs, a court applies a manageable standard.

Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need not doubt the EEOC's trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action. See *supra,* at 1650 – 1651. Nothing overcomes that presumption with respect to the EEOC's duty to attempt conciliation of employment discrimination claims.

Id. at 1652-53. As to the scope of review, the Court noted that both sides presented extreme positions that must be rejected. The EEOC simply wanted the Court to accept the EEOC's issuance of letters saying that conciliation had failed, but that was unacceptable because it would reduce judicial review to a required acceptance of the agency's say-so, and "the point of judicial review is instead to *verify* the EEOC's say-so—that is, to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge." *Id.* at 1653 (emphasis in original). For its part, Mach Mining argued for a very detailed review of the proceedings to determine whether the Commission bargained in good faith, analogous to the National Labor Relations Act duty of unions and employers to bargain in good faith. The Court also rejected that approach:

To begin, however, we reject any analogy between the NLRA and Title VII. The NLRA is about process and process alone. It creates a sphere of bargaining—in which both sides have a mutual obligation to deal fairly—without expressing any preference as to the substantive agreements the parties should reach. See §§ 151, 158(d). By contrast, Title VII ultimately cares about substantive results, while eschewing any reciprocal duties of good-faith negotiation. Its conciliation provision explicitly serves a substantive mission: to "eliminate" unlawful discrimination from the workplace. 42 U.S.C. § 2000e–

5(b). In discussing a claim with an employer, the EEOC must always insist upon legal compliance; and the employer, for its part, has no duty at all to confer or exchange proposals, but only to refrain from any discrimination. Those differences make judicial review of the NLRA's duty of good-faith bargaining a poor model for review of Title VII's conciliation requirement. In addressing labor disputes, courts have devised a detailed body of rules to police good-faith dealing divorced from outcomes—and so to protect the NLRA's core procedural apparatus. But those kinds of rules do not properly apply to a law that treats the conciliation process not as an end in itself, but only as a tool to redress workplace discrimination.

More concretely, Mach Mining's proposed code of conduct conflicts with the latitude Title VII gives the Commission to pursue voluntary compliance with the law's commands. Every aspect of Title VII's conciliation provision smacks of flexibility. To begin with, the EEOC need only "endeavor" to conciliate a claim, without having to devote a set amount of time or resources to that project. § 2000e–5(b). Further, the attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever "informal" means of "conference, conciliation, and persuasion" it deems appropriate. Ibid. And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever "unable to secure" terms "acceptable to the Commission." § 2000e–5(f)(1) (emphasis added). All that leeway respecting how to seek voluntary compliance and when to quit the effort is at odds with Mach Mining's bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices—as Mach Mining urges and many courts have done, see n. 1, *supra*—is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Id. at 1654-55. The Court also held that judicial proceedings along the lines suggested by Mach Mining would violate Title VII's requirement that conciliation efforts be kept confidential, and not used as evidence in any proceeding. *Id.* at 1655. The Court then described the proper scope of review:

By contrast with these flawed proposals, the proper scope of judicial review matches the terms of Title VII's conciliation provision, as we earlier described them. See *supra,* at 1652. The statute demands, once again, that the EEOC communicate in some way (through "conference, conciliation, and persuasion") about an "alleged unlawful employment practice" in an "endeavor" to achieve an employer's voluntary compliance. § 2000e–5(b). That means the EEOC must inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of "reasonable cause." *Ibid.* Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result. And the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice. Judicial review of those requirements (and nothing else) ensures that the

> Commission complies with the statute. At the same time, that relatively barebones review allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. And such review can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.,* statements made or positions taken) during those discussions.
>
> A sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice to show that it has met the conciliation requirement. … If, however, the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to decide that limited dispute. … Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. See § 2000e–5(f)(1) (authorizing a stay of a Title VII action for that purpose).

Id. at 1655-56.

Arizona ex rel. Horne v. Geo Group, Inc., 816 F.3d 1189, 1198-1200 (**9th Cir.** 2016), vacated the grant of summary judgment to the sex discrimination defendant. Both the State of Arizona and the EEOC sued Geo Group, a prison staffing company for allegedly allowing the sexual harassment of female correctional officers by male correctional officers, failing to take adequate remedial actions after complaints were made, and systematically retaliating against the female correctional officers who complained. The district court held that the EEOC and Arizona could not conciliate on a class basis, and were required to conciliate not only as to the claims of the original charging party and the five others identified in their investigation of Geo, but also as to fifteen others who were discovered only during litigation. The Ninth Circuit rejected Geo's arguments, cited *Mach Mining*, and held that the EEOC's and Arizona's efforts to conciliate on a class basis were adequate. It further held that the remedy for any actual failure to conciliate is not the dismissal of the claims in question, but a stay to allow conciliation to take place. The court then turned to the question of individual vs. class conciliation, and stated:

> If the EEOC and the Division were required to pursue individual conciliation on behalf of every aggrieved employee, they would be effectively barred from seeking relief on behalf of any unnamed class members they had yet to identify when they filed their suit. Civil litigants in private class actions may discover additional aggrieved employees who may wish to participate in the class. In light of the broad enforcement authority of the EEOC and the Division, it would be illogical to limit their ability to seek classwide relief to something narrower than the abilities of private litigants.6/
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> 6/ We are not called upon to consider whether the EEOC could maintain a nationwide class action against an employer based on an investigation of less than a dozen employees or whether such an investigation would be reasonable. *See CRST Van Expedited*, 679 F.3d at 667–69, 673–74. Here, Hancock's initial charge prompted an investigation that revealed multiple potential victims of discrimination, harassment, and retaliation and harassers who had worked at Geo's Florence West and CACF facilities.

> Florence West and CACF are both owned and operated by Geo. They are neighboring facilities on the same road. Florence West houses the return-to-custody and driving-under-the-influence unit and CACF houses the medium-security sex-offender unit. The facilities' units were identified in the Reasonable Cause Determination as part of the class, and the EEOC and Division attempted conciliation of those class claims.

Id. at 1200.

2. What Triggers the Duty of a Religious Reasonable Accommodation?

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., --- **U.S.** ----, 135 S. Ct. 2028 (2015), reversed the Tenth Circuit's grant of summary judgment to the Title VII defendant. Justice Scalia began his opinion for the Court by summarizing the question presented:

> Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. The question presented is whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.

Id. at 2031. Abercrombie had a "Look Policy" that forbade the wearing of caps—a term it did not define—as too informal for its desired appearance. The charging party, Samantha Elauf "is a practicing Muslim who, consistent with her understanding of her religion's requirements, wears a headscarf." *Id.* She applied and was rated as qualified to be hired, but Cooke, the assistant manager who interviewed her, asked Randall Johnson, the district manager, for guidance on the application of the Look Policy to a headscarf. "Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf." *Id.* The Court concluded:

> Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.FN2/
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> FN2/ The concurrence mysteriously concludes that it is not the plaintiff's burden to prove failure to accommodate. *Post,* at 2036. But of course that *is* the plaintiff's burden, if failure to hire "because of" the plaintiff's "religious practice" is the gravamen of the complaint. Failing to hire for that reason is *synonymous* with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other. If he is willing to "accommodate"—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary—adverse action "because of" the religious practice is not shown. "The clause that begins with the word 'unless,' " as the concurrence describes it, *ibid.,* has no function except to place upon the employer the burden of establishing an "undue hardship" defense. The concurrence provides no example, not even an unrealistic

hypothetical one, of a claim of failure to hire because of religious practice that does not say the employer refused to permit ("failed to accommodate") the religious practice. In the nature of things, there cannot be one.

Id. at 2032 (emphasis in original). The Court continued:

> The term "because of" appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. … Title VII relaxes this standard, however, to prohibit even making a protected characteristic a "motivating factor" in an employment decision. 42 U.S.C. § 2000e–2(m). "Because of" in § 2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.
>
> It is significant that § 2000e–2(a)(1) does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do. For example, the Americans with Disabilities Act of 1990 defines discrimination to include an employer's failure to make "reasonable accommodations to the *known* physical or mental limitations" of an applicant. § 12112(b)(5)(A) (emphasis added). Title VII contains no such limitation.
>
> Instead, the intentional discrimination provision prohibits certain *motives,* regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.
>
> Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.
>
> Abercrombie urges this Court to adopt the Tenth Circuit's rule "allocat[ing] the burden of raising a religious conflict." … This would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule. The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence. Its disparate-treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for accommodation,

or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.FN3/

Abercrombie argues in the alternative that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim. We think not. That might have been true if Congress had limited the meaning of "religion" in Title VII to religious *belief*—so that discriminating against a particular religious *practice* would not be disparate treatment though it might have disparate impact. In fact, however, Congress defined "religion," for Title VII's purposes, as "includ[ing] all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Thus, religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.

Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious ... practice," it is no response that the subsequent "fail[ure] ... to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

FN3/ While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—*i.e.,* that he cannot discriminate "because of" a "religious practice" unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.

Id. at 2032-34 (emphases in original; citation omitted).

3. EEOC Suits Under § 707

E.E.O.C. v. CVS Pharmacy, Inc., 809 F.3d 335 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII § 707(a) defendant. The EEOC sued because it claimed that defendant's standard severance agreements would deter former employees from filing EEOC charges. The court held that, even if this were the case, it would not constitute either discrimination or retaliation, and that Title VII did not authorize the EEOC to sue over practices it dislikes. The court stated:

> … Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII (i.e., unlawful employment practices involving discrimination or retaliation defined in Sections 703 and 704) in one consolidated proceeding.

Id. at 341 (citations omitted). The court rejected the Commission's effort to distinguish between actions it filed under § 707(a) and those it filed under §707(e); suits under the former "resistance" provision had to meet the standards of the latter "discrimination" provision. The Commission also dismissed the charging party's charge before it filed suit, and the court held that the EEOC had no authority under § 707(a) to institute any proceeding in the absence of a charge by a Commissioner or another. The court stated:

> The 1972 amendments gave the EEOC the power to file 'pattern or practice' suits on its own, but Congress intended for the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge.

Id. at 343. Finally, the court rejected the Commission's argument that there was no need to conciliate before filing a § 707(a) suit. The court stated:

> We therefore reject the EEOC's interpretation of Section 707(a) that would undermine both the spirit and letter of Title VII. Under Section 707(e), the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues "pattern or practice" violations. And because the EEOC has not alleged that CVS engaged in discrimination or retaliation by offering the Agreement to terminated employees, the EEOC failed to state a claim on which relief can be granted.

Id.

4. No Joint Employment Between Contractor and Federal Agency

Casey v. Dep't of Health and Human Services, 807 F.3d 395, 405-07 (**1st Cir.** 2015), affirmed the grant of summary judgment to the sole remaining Title VII gender discrimination defendant, on the ground that plaintiff was only the employee of a government contractor, and not a joint employee of both the contractor and the agency for which the contract was being performed. The court rejected plaintiff's arguments based on control, stating:

> We do not consider the issue of control in a vacuum. Rather, control "must be considered in light of the work performed and the industry at issue." … Here, as we have said, the CHPS Program was created pursuant to an interagency agreement between the FOH Division and the AFMC. The FOH Division was responsible for recruiting contractors to administer the CHPS Program. In 2007, when STG hired Casey, STG had been awarded the government contract to perform this function. It should thus come as no surprise that the DHHS, as one of the two government entities ultimately responsible for the CHPS Program, would exert some measure of control over STG's (and later Millennium's) performance.

> However, the measure of control that the DHHS employed in setting performance criteria and overseeing Burk's administration of the CHPS Program cannot be fairly viewed as rendering Burk an agent, or Casey an employee, of the DHHS. As courts have recognized, every government contract (indeed, most every service contract) requires some measure of oversight of the contractor by the hiring party. … On these facts, we agree with the magistrate judge that the DHHS did not exert such control over Casey's performance of her job duties as to establish an employment relationship.

Id. at 405-06 (citations omitted). The court next held that only the contractor "controlled the terms and conditions of Casey's employment by setting her salary and providing her with benefits. Likewise, it was STG that provided Casey with her annual W–2 form." *Id.* at 406. The court similarly held that only the contractor had the right to fire plaintiff. The court stated that while two agency representatives "no doubt had some measure of influence, there is simply no record support for the conclusion that anyone other than STG had the ultimate authority to fire Casey." *Id.* (citation omitted). Finally, the court relied on the understanding of both plaintiff and the agency that plaintiff was solely an employee of the contractor. *Id.* at 407.

5. "Race" and Hispanics

Village of Freeport v. Barrella, 814 F.3d 594, 598 (**2d Cir.** 2016), affirmed the lower court's denial of defendants' Rule 50 motion for judgment as a matter of law, but vacated the judgment and remanded for a new trial. The court defined "race" as including Hispanics under § 1981 and Title VII alike.

6. "Race" and Grooming Standards

E.E.O.C. v. Catastrophe Mgmt. Solutions, --- F.3d ---, 2016 WL 4916851 (**11th Cir.** Sept. 15, 2016) (No. 14-13482), affirmed the Rule 12(b)(6) dismissal of the EEOC's suit against defendant because its grooming policy prohibited the wearing of dreadlocks. The court explained:

> The Equal Employment Opportunity Commission filed suit on behalf of Chastity Jones, a black job applicant whose offer of employment was rescinded by Catastrophe Management Solutions pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks. The EEOC alleged that CMS' conduct constituted discrimination on the basis of Ms. Jones' race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2(a)(1) & 2000e–2(m). The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) because it did not plausibly allege intentional racial discrimination by CMS against Ms. Jones. See *E.E.O.C. v. Catastrophe Mgmt. Solutions*, 11 F.Supp.3d 1139, 1142–44 (S.D. Ala. 2014). The district court also denied the EEOC's motion for leave to amend, concluding that the proposed amended complaint would be futile. The EEOC appealed.
>
> With the benefit of oral argument, we affirm. First, the EEOC—in its proposed amended complaint and in its briefs—conflates the distinct Title VII theories of disparate treatment (the sole theory on which it is proceeding) and disparate impact (the theory it has expressly disclaimed). Second, our precedent holds that Title VII prohibits

> discrimination based on immutable traits, and the proposed amended complaint does not assert that dreadlocks—though culturally associated with race—are an immutable characteristic of black persons. Third, we are not persuaded by the guidance in the EEOC's Compliance Manual because it conflicts with the position taken by the EEOC in an earlier administrative appeal, and because the EEOC has not offered any explanation for its change in course. Fourth, no court has accepted the EEOC's view of Title VII in a scenario like this one, and the allegations in the proposed amended complaint do not set out a plausible claim that CMS intentionally discriminated against Ms. Jones on the basis of her race.

Id. at *1. The court explained its reference to the EEOC's changing positions:

> The Compliance Manual contravenes the position the EEOC took in an administrative appeal less than a decade ago. *See Thomas v. Chertoff*, Appeal No. 0120083515, 2008 WL 4773208, at *1 (E.E.O.C. Office of Federal Operations Oct. 24, 2008) (concluding, in line with federal cases like *Willingham*, that a grooming policy interpreted to prohibit dreadlocks and similar hairstyles lies "outside the scope of federal employment discrimination statutes," even when the prohibition targets "hairstyles generally associated with a particular race"). Because the EEOC has not provided a reasoned justification for changing course in the Compliance Manual, and has opted not to address *Thomas* in its reply brief, we choose to not give its guidance much deference or weight in determining the scope of Title VII's prohibition of racial discrimination. *See, e.g.*, *Young*, 135 S.Ct. at 1352 (declining to rely significantly on the EEOC Compliance Manual because its guidelines were promulgated recently, took a position about which the EEOC's previous guidelines were silent, and contradicted positions the EEOC had previously taken).

Id. at *10.

Comment of Richard Seymour on *E.E.O.C. v. Catastrophe Mgmt. Solutions*: Historically, neither plaintiffs nor defendants have paid much attention to the EEOC's decisions in its Federal-sector decisions. This case presents a wake-up call to both sides, particularly where the EEOC position is being advanced or challenged by a party.

7. Gender-Norming Physical Fitness Tests

Bauer v. Lynch, 812 F.3d 340 (**4th Cir.** 2016), vacated the grant of summary judgment to defendant. Plaintiff was an unsuccessful male applicant for an FBI Special Agent position, and complained that the FBI's gender-normed physical fitness tests were unlawful sex discrimination in violation of Title VII. Male applicants were required to complete 30 push-ups; female applicants only had to do 14. The court held at 351 that "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each."

H. The Americans with Disabilities Act and Rehabilitation Act

1. Medical Examinations and Wellness Programs

Parker v. Crete Carrier Corp., --- F.3d ---, 2016 WL 5929210 (**8th Cir.** Oct. 12, 2016) (No. 16-1371), affirmed the grant of summary judgment to the ADA defendant. The court explained the dispute?

> Crete Carrier Corporation required its truck drivers with Body Mass Indexes (BMIs) of 35 or greater to get medical examinations to determine whether they had obstructive sleep apnea. Crete ordered driver Robert J. Parker to undergo an examination because his BMI was over 35. Parker refused. Crete stopped giving Parker work. Parker sued Crete, alleging it violated the Americans with Disabilities Act (ADA) by requiring the examination and discriminating on the basis of a perceived disability. The district court1 granted summary judgment to Crete. Parker appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Id. at *1. Two advisory committees of the Federal Motor Carrier Safety Administration had recommended sleep studies of drivers with various risk characteristics, including BMIs of 35 or greater, because of the risk of sleepiness at work among those with the problem. The court rejected plaintiff's argument that defendant failed to consider his individual situation, and held that the ADA permits employers to require medical examinations for a reasonably-defined class of persons, even if some persons within the class may not have the condition the examination seeks to identify.

> When an employer requires a *class* of employees to submit to a medical exam, it also "must show that it has reasons consistent with business necessity for defining the class in the way that it has." *Conroy*, 333 F.3d at 101. An employer satisfies this burden by showing a "reasonable basis for concluding" that the class poses a genuine safety risk and the exam requirement allows the employer to decrease that risk effectively. *See id.* A class may include some individuals who testing reveals do not pose a safety risk. And it may exclude others who testing would reveal do pose a safety risk. All that is required is that "the employer has defined the class of employees reasonably." *See id.*

Id. at *3 (emphasis in original). The court held that the sleep-study examination was clearly job-related and consistent with business necessity. It rejected plaintiff's arguments that he should have been excused or removed from the class because he had no documented sleep issues, his medical provider thought it unnecessary, and the like, because these factors did not preclude his having obstructive sleep apnea. *Id.* at *4. The court also rejected plaintiff's "regarded as" claim.

2. Coverage: Need to Identify the Disability

Tate v. SCR Medical Transp., 809 F.3d 343 (**7th Cir.** 2015), held that the Rule 12(b)(6) dismissal of the *pro se* plaintiff's ADA claim because of failure to identify his disability was proper because defendant had been deprived of fair notice. However, it held that the lower court abused its discretion by failing to allow the plaintiff to amend his Complaint to identify the disability. See the discussion of this case below under "Pleadings."

3. Coverage: Existence of a Covered Disability

Cannon v. Jacobs Field Services North America, Inc., 813 F.3d 586 (**5th Cir.** 2016), reversed the grant of summary judgment to the ADA defendant, holding that there was a genuine issue of disputed fact whether the ADAAA's expanded definition of disability covers an applicant as to whom there was undisputed testimony "that he is unable to lift his right arm above shoulder level and that he has considerable difficulty lifting, pushing, or pulling objects with his right arm." *Id.* at 591. The court rejected the lower court's view that plaintiff's accommodation of his difficulties by increased reliance on his left shoulder meant he was not disabled. The question is whether he was substantially limited, not whether he had found a way around the limitation. Id. at 591 n.3.

Carothers v. Cty. of Cook, 808 F.3d 1140, 1147-48 (**7th Cir.** 2015), affirmed the grant of summary judgment to defendant on plaintiff's ADA claim, holding that her asserted disability of an anxiety disorder triggered by exposure to juvenile detainees involved only "a *unique aspect* of the *single specific job* of working as a hearing officer at a juvenile correctional center," and there was "no evidence that Carothers' anxiety disorder would prevent her from engaging in any other line of occupation."

4. Coverage: Is "Interacting with Others" a Major Life Activity?

Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (**4th Cir.** 2015), reversed the grant of summary judgment to the ADA defendant. The court summarized the case:

> Christina Jacobs worked as a deputy clerk at a courthouse in New Hanover County, North Carolina. Although she allegedly suffered from social anxiety disorder, her employer assigned her to provide customer service at the courthouse front counter. Believing that her mental illness hindered her ability to perform this inherently social task, Jacobs requested an accommodation—to be assigned to a role with less direct interpersonal interaction. Her employer waited three weeks without acting on her request and then terminated her.

Id. at 564. The district court held that she was not disabled. The court of appeals reversed, stating that the lower court improperly ignored plaintiff's evidence and drew inferences in favor of the movant:

> The district court also erred by concluding that Jacobs was not disabled within the meaning of the ADA. During the course of discovery both parties produced expert testimony by mental health specialists on this issue. After examining Jacobs, forensic psychologist Dr. Claudia Coleman concluded that "her mental disorders, Social Phobia and Anxiety Disorder, ... constitute a disability as defined by the [ADA]." J.A. 807. Forensic psychiatrist Dr. George Corvin, the AOC's expert, did not examine Jacobs. Instead, Dr. Corvin based his report on a review of her medical records, social media use, employment records, and the report of a private investigator who observed Jacobs while she was at work at a new job. Dr. Corvin concluded that it was possible that Jacobs met the diagnostic criteria for social anxiety disorder but that "her medical records alone are insufficient to establish such a diagnosis." J.A. 222. He also determined from the private

> investigator's report that Jacobs was currently succeeding in a new customer service job, and thereby inferred that she had not experienced "any significant level of anxiety or other psychiatric impairment" while working at the AOC. *Id.*
>
> The district court determined from "Dr. Corvin's report and the plaintiff's behavior [at] work" that Jacobs was not disabled. J.A. 1038. Inexplicably, the district court omits any mention of Dr. Coleman's conflicting report. Additionally, Dr. Corvin's report simply does not support the district court's finding of no disability—rather, Dr. Corvin concluded only that Jacobs's medical records were equivocal on this question.
>
> As in *Tolan,* the district court "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." 134 S.Ct. at 1868. Rather, the court incorrectly drew all inferences in favor of the AOC, not Jacobs. We therefore reverse the district court's determination that there is no genuine dispute as to whether Jacobs had a disability.

Id. at 570. The employer then denied that "interacting with others" was a major life activity. The court gave Chevron deference to the EEOC regulations, and held that it was:

> … Few activities are more central to the human condition than interacting with others. If "bending" and "lifting" are major life activities, 42 U.S.C. § 12102(2)(A), it is certainly reasonable for the EEOC to conclude that interacting with others falls in the same category. Identifying "interacting with others" as a major life activity comparable to "caring for oneself," "speaking," "learning," and "communicating" advances the broad remedial purpose of the ADA. We therefore defer to the EEOC's determination and hold that interacting with others is a major life activity.

Id. at 573. The court held that it was sufficient for plaintiff to show that her disorder substantially limits her interacting with others, and need not show it significantly restricts that activity. The court continued:

> A person need not live as a hermit in order to be "substantially limited" in interacting with others. According to the APA, a person with social anxiety disorder will either avoid social situations *or* "endure the social or performance situation ... with intense anxiety." *DSM–IV, supra,* at 451. Thus, the fact that Jacobs may have endured social situations does not per se preclude a finding that she had social anxiety disorder. Rather, Jacobs need only show she endured these situations "with intense anxiety." Id. At a minimum, Jacobs's testimony that working the front counter caused her extreme stress and panic attacks creates a disputed issue of fact on this issue. Her testimony is also consistent with Dr. Coleman's testimony that Jacobs suffered from social anxiety disorder within the meaning of the DSM–IV.
>
> The undisputed facts that Jacobs spoke to coworkers and attempted to perform her job at the front counter are therefore not fatal to her claim. That she attended several outings with coworkers in her nine months in the office is also hardly dispositive—answering questions at the front counter constitutes a performance situation that is different in character from having lunch with coworkers, and a reasonable jury may

> conclude that Jacobs's allegedly debilitating anxiety was specific to that situation. Finally, to the extent that Jacobs's Facebook activity constitutes a "mitigating measure" (that is, a form of exposure therapy by which Jacobs attempted to overcome her anxiety through social interaction that was not face-to-face and not in real time) we are not permitted to consider it in determining the existence of a substantial limitation on her ability to interact with others. 42 U.S.C. § 12102(4)(E)(i). We therefore find that a reasonable jury could conclude that Jacobs was substantially limited in her ability to interact with others and thus disabled within the meaning of the ADA.

Id. at 573-74 (footnotes omitted).

5. Coverage: "Regarded as Disabled"

Cannon v. Jacobs Field Services North America, Inc., 813 F.3d 586, 591-92 (**5th Cir.** 2016), reversed the grant of summary judgment to the ADA defendant, holding that there was a genuine issue of disputed fact whether plaintiff suffered from an impairment, and rejecting the district court's reliance on the former standard requiring proof of limitation of a major life activity. Since defendant rescinded its job offer right after learning of plaintiff's impairment, the court held that plaintiff satisfied both the actual and the "regarded as" prongs of coverage.

6. Essential Job Functions: Lifting, and the Team Concept

E.E.O.C. v. AutoZone, Inc., 809 F.3d 916, 920-21 (**7th Cir.** 2016), affirmed the judgment on a jury verdict for the ADA defendant. Zych, the charging party, had a permanent 15-pound lifting restriction. Her job, Parts Sales Manager, routinely involved the listing of numerous much heavier objects, such as car batteries, brakes, rotors struts, etc., stocking the items, bringing them from stock for the customer's inspection, and then carrying them to the costumer's car. The jury found that Zych was not a qualified individual with a disability. The court stated:

> From the substantial evidence presented at trial, a rational jury could have concluded that heavy lifting was a fundamental duty of the PSM position, rather than merely a marginal function. Since Zych could not lift more than 15 pounds with her right arm, there was sufficient evidence for a rational jury to find that she could not perform the essential functions of the PSM position.

7. Essential Job Functions: Regular Attendance

Minter v. District of Columbia, 809 F.3d 66 (**D.C. Cir.** 2015), affirmed the grant of summary judgment to the ADA and Rehabilitation Act defendant. The court affirmed summary judgment on plaintiff's June 1, 2007 second request for an accommodation, because at that point plaintiff was no longer a qualified individual with a disability. The court stated:

> It is undisputed that as of June 1, 2007, Minter had not performed a single day of work in more than three months. The only other evidence in the record regarding her ability to perform her employment functions on that date was her physician's certificate of June 19, 2007, which stated that she was and had been "Totally Disabled" since her injury on September 26, 2006. The June certificate further stated that she was disabled

"indefinitely." And the most that Minter herself could say later that month was that she "hope[d]" to return in another three months.

Id. at 69. The court held that this was too long, relying in part on EEOC, No. 915.002, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), *available at* 2002 WL 31994335, at *21. The court also rejected plaintiff's retaliation claim arising from her termination for job abandonment, finding that no jury could reasonably conclude that discrimination because of her request for an accommodation was the real reason for her termination. *Id.* at 71-72.

8. Reasonable Accommodations

a. Employee Excused from Need to Request Accommodation

Cannon v. Jacobs Field Services North America, Inc., 813 F.3d 586, 594-95 (**5th Cir.** 2016), reversed the grant of summary judgment to the ADA defendant, holding that there was a genuine issue of disputed fact whether plaintiff suffered from an impairment, and rejecting the district court's reliance on the former standard requiring proof of limitation of a major life activity. The lower court never ruled on plaintiff's claim of denial of a reasonable accommodation. The court stated: "Although a plaintiff must usually request an accommodation to commence an interactive process that considers that possibility, he is excused from doing so in a situation like this one in which the employer was unquestionably aware of the disability and had received a report from its own doctor recommending accommodations." (Citation omitted.)

b. Employer May Not Make Assumptions Instead of Clarifying

Lawler v. Peoria Sch. Dist. No. 150, --- F.3d ---, 2016 WL 4939538 (**7th Cir.** Sept. 16, 2016) (No. 15-2976), vacated the grant of summary judgment to the Rehabilitation Act defendant. The plaintiff teacher showed she had PTSD that was exacerbated by trying to teach classes with high numbers of students with behavioral or emotional disorders. She sought a transfer, and the school district refused. "The Director's outright refusal belies any contention that District 150 made a reasonable attempt to explore possible accommodations, such as looking for open positions in other schools or reducing the number of students with behavioral or emotional disorders in Lawler's classroom." *Id.* at *5. There were in fact seven suitable vacancies at the time, into which plaintiff could have been transferred. *Id.* Plaintiff had some performance problems, but the school district did not enquire into whether her PTSD had caused the performance problems. Plaintiff took two weeks of medical leave for an injury, and told the defendant that she was ready to return to work. The defendant argued that this was an abandonment of her request for an accommodation, but the court rejected this argument:

> Moreover, even if District 150 did think that Lawler had changed her mind about the need for an accommodation during her two weeks of medical leave, the school district failed to engage in the interactive process by making that assumption without seeking clarification from Lawler or Dr. Hamon. *See Spurling*, 739 F.3d at 1061–62 (explaining that employer has not engaged in interactive process if it has not sought clarification from employee or doctor when in doubt about employee's continuing desire for accommodation). Dunn said during her deposition that she interpreted Lawler's e-mail

> expressing confidence about returning to work as a representation that she could continue performing her job with the Day Treatment program and no longer sought a transfer. Dunn similarly testified that she interpreted Dr. Hamon's note approving Lawler's return to work without mentioning a transfer or other restrictions as indicating that Lawler no longer needed an accommodation. But Lawler continued to insist on transferring, and the letter from Dr. Gross found its way into the hands of both Lawler's direct supervisor and Dunn, the Director of Human Resources, after the school district's receipt of Lawler's e-mail and Dr. Hamon's work release, so even If Lawler had not formally submitted the physician's letter to them, they were on notice that Lawler still wanted her PTSD accommodated by a classroom transfer. *See Miller*, 107 F.3d at 486–87 (explaining that employer on notice that employee suffers disability must make reasonable effort to understand what employee's needs are even if not clearly communicated to employer); *Bultemeyer,* 100 F.3d at 1285 (same). A jury reasonably could conclude that District 150's failure to seek clarification from Lawler or her doctors caused the breakdown in the interactive process.

Id. at *6.

c. Limits on Reasonable Accommodations

E.E.O.C. v. AutoZone, Inc., 809 F.3d 916, 922-23 (**7th Cir.** 2016), affirmed the judgment on a jury verdict for the ADA defendant. Zych, the charging party, had a permanent 15-pound lifting restriction. Her job, Parts Sales Manager, routinely involved the listing of numerous much heavier objects, such as car batteries, brakes, rotors struts, etc., stocking the items, bringing them from stock for the customer's inspection, and then carrying them to the costumer's car. The jury found that the charging party was not a qualified individual with a disability. The court rejected the EEOC's argument that the lower court abused its discretion in refusing to instruct the jury on its team concept argument, although the lower court allowed the EEOC to argue this to the jury. The Commission relied on the Seventh Circuit's prior decision in *Miller v. Illinois Dep't of Transportation*, 643 F.3d 190 (7th Cir. 2011), in which the employer allowed employees to trade off parts of their job they could not or would not do to other employees. It held that AutoZone's employee handbook encouraging cooperation was not an adoption of a labor distribution system in which employees traded off their duties, but was simply a commonplace expression of common sense. The court continued:

> … This case is more factually analogous to cases involving lifting restrictions in which the proposed accommodation was requiring someone else to do the lifting for the employee at issue. Here, as in those cases, such an accommodation is not reasonable because it is essentially delegating the PSM position to another employee. …

d. End of Duty to Provide Reasonable Accommodation

Dillard v. City of Austin, --- F.3d ---, 2016 WL 4978363 (**5th Cir.** Sept. 16, 2016) (No. 15-50779), affirmed the grant of summary judgment to the ADA reasonable-accommodation defendant, but held that the duty to provide a reasonable accommodation does not end while the plaintiff remains employed:

> When it entered summary judgment on this reasonable accommodation claim, the trial court reasoned that the City could have fired Dillard once he exhausted his leave under federal law and city policy in January of 2012—a time when he had not been medically cleared for work of any kind. … (holding that an employer need not accommodate with indefinite leave an employee who is unable to return to work in any role). The district court concluded that the City's obligation to reasonably accommodate Dillard ceased at that time.
>
> We disagree. Regardless of whether it could have discharged Dillard when his leave ran out, the City chose not to do so. Rather, it kept him on staff until it learned he was approved by his doctor for "limited duty" and placed him in the administrative assistant position. Because it continued to employ him, the City was obligated under the ADA to reasonably accommodate him once he was capable of returning to work. This follows from the principle that an employer's obligation to accommodate is triggered when an employee requests an accommodation. … Nothing in the Act extinguishes that obligation merely because an employer had a basis for getting rid of the employee in the past.

Id. at *3 (citations and footnote omitted). However, the court held that the City's duty ended when plaintiff made no effort to do a good job in the new position the City found for him, and this had no duty to transfer him yet again:

> Dillard's position neglects that the interactive process is a two-way street; it requires that employer and employee work together, in good faith, to ascertain a reasonable accommodation. … The City offered Dillard the administrative assistant position, and while he doubted his ability to do it, he accepted it. At this point, the ball was in his court: it was up to him to make an honest effort to learn and carry out the duties of his new job with the help of the training the City offered him. The same uncontroverted evidence of misconduct and poor performance that doomed Dillard's discriminatory termination claim is thus also decisive for his reasonable accommodation claim. We stress the evidence of misconduct (making personal calls, nonattendance, napping, lying, playing games) because even an employee unable to perform office tasks needs no special skill to avoid misusing company time, dishonesty, falling asleep, or absenteeism. As he did not attempt to fill his new role in good faith, Dillard cannot rely on the fact that he did not successfully adjust to that role to show that the City should have continued the interactive process by offering him a further alternative placement. *See Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 736 (5th Cir. 1999) ("[A]n employer cannot be found to have violated the ADA when responsibility for the breakdown of the 'informal, interactive process' is traceable to the employee and not the employer.").

Id. at *4.

Dunderdale v. United Airlines, Inc., 807 F.3d 849, 856-57 (**7th Cir.** 2015), affirmed the grant of summary judgment to the ADA defendant. The court held that defendant's duty to provide a reasonable accommodation for plaintiff, who was disabled because of a lifting restriction, disappeared when the airlines decided to allow employees to bid for plaintiff's position, which had previously been restricted to employees with disabilities. The court also

held that plaintiff was required to show a vacancy, at the time of his termination, in another position he could have filled. It held that it was not enough for plaintiff to show subsequent vacancies, and chided him for citing an unpublished 2006 decision. Judge Ripple dissented. *Id.* at 857-62.

e. A Reasonable Accommodation Is Not an Adverse Action

Kelleher v. Wal-Mart Stores, Inc., --- F.3d ----, 2016 WL 1257899 (**8th Cir.** March 31, 2016), affirmed the grant of summary judgment to the disability discrimination defendant. Plaintiff had multiple sclerosis and her doctor's restriction barred from working on ladders, an essential component of her position as a stocker. Defendant ultimately transferred her to a position as overnight cashier, which involved stocking around the store when not working as a cashier. She received a pay raise in her new position, and her stocking duties were arranged so that she did not have to use a ladder. The court held that defendant's transfer of plaintiff to the new position was a reasonable accommodation that avoided her termination, and was not an adverse employment action. The court explained at *4-*5:

> A transfer to a new position may be considered an adverse employment action if the plaintiff cannot perform the responsibilities of the new position due to disability. Here, however, Kelleher has failed to offer evidence that she is unable to perform the job of overnight cashier. Kelleher believes she was forced into a new position that she did not want and that she felt would humiliate her. She also asserts that the overnight cashier position included new responsibilities that she felt she could not do. But, as the district court noted, her reasons for her concerns are vague, unsupported by any medical evidence, and ultimately insufficient to establish her claim. While "[t]o be 'adverse' the action need not always involve termination or even a decrease in benefits or pay ... not everything that makes an employee unhappy is an actionable adverse action." … Kelleher may have been apprehensive about taking on the responsibilities of a new position. But there is no evidence that she was actually subject to harassment or comments by customers as a cashier; that there was any particular job responsibility she was medically unable to perform; or that management ever determined she was unable to fulfill her new responsibilities.
>
> Instead, Kelleher was transferred from her stocker position to an overnight cashier position with almost identical skill requirements, minus ladder use and with the addition of some interaction with customers. We conclude that this change did not amount to an adverse employment action, because "minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action."

(Citations omitted.)

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

Michael v. City of Troy Police Dep't, 808 F.3d 304, 308-09 (**6th Cir.** 2015), affirmed the grant of summary judgment to the ADA defendants on the basis of its determination that plaintiff was a "direct threat" to himself and others. Plaintiff was a police officer who had undergone

multiple brain surgeries. Defendants refused to reinstate him to duty as a police officer. They relied on evidence of plaintiff's aberrant behavior and the detailed testimony of two neuropsychologists. Plaintiff relied on the testimony of his fitness for duty from his own neuropsychologist and the testimony of two doctors for an insurance company who reviewed his file and pronounced him fit for work. The court found that plaintiff's medical experts' reports, while detailed, were not enough to rebut the defendant's experts:

> … That said, we doubt that the reports of Michael's medical witnesses each reflect an "individualized inquiry" as that term is used in the caselaw. That kind of inquiry requires an evaluation not only of the plaintiff's medical condition, but—more to the point—of "the effect, if any, the condition may have on *his ability to perform the job in question.*" … And on that point Michael's medical witnesses had relatively little to say. Only one of the doctors discussed the specific job functions of the City's patrol officers, and none ventured specifically to say that Michael could safely engage in high-speed driving or make snap decisions regarding whether to use lethal force. Those omissions are conspicuous.
>
> But there is a larger problem with Michael's argument. Reasonable doctors of course can disagree—as they disagree here—as to whether a particular employee can safely perform the functions of his job. That is why the law requires only that the employer rely on an "objectively reasonable" opinion, rather than an opinion that is correct. … Indeed, in many cases, the question whether one doctor is right that an employee can safely perform his job functions, or another doctor is right that the employee cannot, will be unknowable—unless the employer runs the very risk that the law seeks to prevent. Here, the City was not required to invite a section 1983 claim later in order to avoid an ADA claim now. Right or wrong, the opinions upon which the City relied were objectively reasonable; and that means the City is not liable.

(Citations omitted.) The court emphasized that defendants also relied on multiple instances of plaintiff's aberrant conduct, adding to the objective reasonableness of their decision.

10. Employees Failing to Initiate the Interactive Process

Murray v. Warren Pumps, LLC, --- F.3d ----, 2016 WL 1622833 (**1st Cir.** April 25, 2016), affirmed the grant of summary judgment to the disability discrimination, accommodation, harassment, and retaliation defendant. The court held that most of plaintiff's asserted requests for accommodation were too vague and general to be protected:

> We start by clearing some underbrush: we set aside those portions of Murray's deposition testimony that only broadly suggest requests for accommodation. For example, he generally testified that he sought breaks from "time to time," without detailing any particular occasions or explaining whether and how Warren Pumps actually denied any such requests. This vague and incomplete testimony has little evidentiary value. …

Id. at *3 (citations omitted). The court continued:

> Murray argues that the viability of his claim does not require evidence that he actually asked for an accommodation when Korzec instructed him to perform a strenuous task, or that Korzec actually compelled him to violate his medical restrictions on any particular occasion. It is enough, Murray contends, that Korzec "deliberately requested" that he perform tasks that would cause him "to violate his medical restrictions and accommodations granted by Warren Pumps." Whether or not this position might be tenable under other circumstances, it is unavailing in this case. See generally *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 n. 7 (1st Cir. 2001) (stating that different rules may apply when the "employee's need for an accommodation is obvious").
>
> An otherwise qualified employee with a disability who may need differing accommodations at different times (depending on his physical restrictions and varying job duties) will not be protected under the law when he fails to alert his employer that a particular task requested of him conflicts with a medical restriction. … "The employer has no duty to divine the need for a special accommodation where the employee merely makes a mundane request for a change at the workplace," … or simply relies on the employer's general awareness of his need for accommodations where the purported conflict with a medical condition in particular situations is not obvious … ., Enica, 544 F.3d at 339–40. See also Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 772 N.E.2d 1054, 1063–66 (Mass.2002) (summary judgment appropriate where the record established that the accommodations were "never requested or even suggested by the plaintiff").
>
> Warren Pumps and Murray together established the boundaries of a reasonable accommodation from the outset of his second term of employment in 2008. Murray agreed to self-monitor whether certain tasks were stressing his physical abilities, and to make appropriate adjustments himself or request accommodation. Although he insists throughout his deposition testimony that Korzec already "knew" of his restrictions, Murray makes no effort to account for the self-directed and discretionary nature of his mutually agreed accommodation. Nor does he account for the undisputed fact that Korzec was in charge of supervising fifty-five to sixty people on a regular basis.

Id. at *4-*5 (citations omitted).

Kelleher v. Wal-Mart Stores, Inc., --- F.3d ----, 2016 WL 1257899 (**8th Cir.** March 31, 2016) affirmed the grant of summary judgment to the disability discrimination, retaliation, and disability harassment defendant. Plaintiff requested a reasonable accommodation because her multiple sclerosis interfered with her job as a stocker, when she was assigned to departments that had high shelving and required the use of ladders. Defendant reassigned her to a position as an overnight cashier, which involved stocking across the store, did not require the use of ladders, and involved a pay raise. Plaintiff complained that defendant did not engage in the interactive process as to this transfer, and instead told her that the reassignment would enable her to save her job, so that her acceptance was not truly voluntary. The court rejected her claim, stating:

> 6/ To the extent Kelleher argues that Wal–Mart should have engaged in the interactive process with regard to her new position, we note that she never formally requested an accommodation after beginning the cashier job. The interactive process

> "must be initiated by the disabled employee, who must alert [her] employer to the need for an accommodation and provide relevant details of [her] disability." … Kelleher did not initiate that process here.

Id. at *5 n.6 (citations omitted).

11. Employees Abandoning the Interactive Process

Minter v. District of Columbia, 809 F.3d 66 (**D.C. Cir.** 2015), affirmed the grant of summary judgment to the ADA and Rehabilitation Act defendant. The court rejected plaintiff's first claim of a denial of reasonable accommodation, because the District's ADA coordinator's request for additional information showed that no decision had been made, and plaintiff thereafter abandoned her request for an accommodation by failing to respond to a series of requests for further information. The court affirmed summary judgment on the second request for accommodation, because at that point plaintiff was no longer a qualified individual with a disability.

I. Family and Medical Leave Act

Curtis v. Costco Wholesale Corp., 807 F.3d 215, 219-20 (**7th Cir.** 2015), affirmed the grant of summary judgment to the FMLA retaliation defendant, holding that plaintiff did not give the defendant sufficient notice of his intent to take FMLA leave, and so did not engage in a protected activity. The court stated: "Curtis's statement, (to a subordinate employee no less), that he was contemplating taking a 'medical leave' does not give Costco management sufficient information regarding the leave, the duration of the leave, the timing of the leave, and his health condition justifying the leave, to place Costco on notice."

Hasenwinkel v. Mosaic, 809 F.3d 427, 434 (**8th Cir.** 2015), affirmed the grant of summary judgment to the FMLA retaliation defendant. The court held that, even if a suspension with later payment of back pay would deter a reasonable employee from asserting FMLA rights, there can be no FMLA retaliation claim without an actual monetary loss:

> Even where a suspension with backpay could deter an employee from exercising rights under the FMLA, however, a plaintiff proceeding under the FMLA must show actual monetary loss to recover. The plaintiffs in *McClure* and *Burlington Northern* alleged discrimination under Title VII, which allows plaintiffs to recover non-pecuniary damages … whereas the FMLA limits damages to actual monetary loss. ….
>
> Hasenwinkel has not presented evidence of any tangible loss actually incurred and directly caused by her suspension. The closest Hasenwinkel comes to alleging monetary loss is noting in her appellate brief that "missing a paycheck ... can often spell disaster for employees." Yet Hasenwinkel has acknowledged that she was made whole when Mosaic furnished backpay, and she presented no evidence that missing a paycheck caused her to suffer a "disaster" or any other tangible harm. Because Hasenwinkel has not identified any monetary loss incurred as a result of her suspension, her argument that she is entitled to relief under the FMLA fails as a matter of law.

(Citations omitted.) The court then held that none of the other alleged mistreatment would have deterred a reasonable employee from asserting FMLA rights: "treating her unfairly and by ostracizing her from her coworkers," "holding her to a higher standard than other nurses, subjecting her to a negative performance evaluation, scrutinizing her work more closely, and declining to invite her to lunch." The court stated that these were "'petty slights or minor annoyances.'" *Id.*

Comment of Richard Seymour on *Hasenwinkel v. Mosaic*: The Eighth Circuit's reasoning seems to me to be dead wrong. *Burlington Northern* did not rely on the existence of common law damage claims in holding that a 37-day suspension with back pay at the end of the suspension was an adverse employment action; it relied on the hardship faced by the plaintiff in providing for her family as a result of a suspension and the uncertainty that she would ever receive back pay. There is no principled distinction between the FMLA and Title VII in the grounds of the *Burlington Northern* decision. Moreover, the Eighth Circuit's reasoning assumes there is no injury in a delayed wage payment, as long as the amount is actually paid. That is quite wrong, and the error is magnified by the Eighth Circuit's failure to put a time limit on the actual payment or to require interest for the delay. A delayed payment is a monetary injury, as any lender would attest. As in the *CSRT* case, the Eighth Circuit seems to be going out of its way to limit statutory rights with novel doctrines that do not stand up to analysis.

J. GINA

Ortiz v. City of San Antonio Fire Dep't, 806 F.3d 822, 826-27 (**5th Cir.** 2015), affirmed the grant of summary judgment to the GINA, ADA, and Title VII defendant. The court held that plaintiff's GINA challenge to the defendant's mandatory wellness program was misplaced because neither the requirement of a physical examination nor the stress test sought genetic information. The court similarly rejected plaintiff's claim of GINA retaliation because his grievances and complaints as to the wellness program and stress test did not refer to GINA, and a vague complaint is not protected activity. *Id.* at 827.

K. Breach of Collective Bargaining Agreement

DeGrandis v. Children's Hosp. Boston, 806 F.3d 13 (**1st Cir.** 2015), reversed the district court's Rule 12(b)(6) dismissal of plaintiff's claim that defendant breached a collective bargaining agreement in firing the plaintiff nearly six years before he filed suit. The court held that plaintiff's placement on a Memorandum of Understanding that allowed him to keep his job, but did not allow him to use the collectively bargained grievance and arbitration system, meant that his Complaint was a simple breach of contract case subject to the Massachusetts statute of limitations for contract cases, not a hybrid action involving a claim that the union had breached its duty of fair representation. As such, it was not subject to the six-month limitations period for hybrid actions.

L. Fair Labor Standards Act

1. Auto Dealership Service Advisors

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016), held that a Department of Labor regulation changing its view after 21 years, , on the question whether automobile dealership service advisors are exempt from FLSA overtime requirements, could not be given

Chevron deference because DOL failed to explain the reasons for its change of position. Justice Kennedy wrote the opinion for the Court, joined by the Chief Justice and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Ginsburg filed a concurring opinion, in which Justice Sotomayor joined. Justice Thomas filed a dissenting opinion, in which Justice Alito joined.

2. Are Municipal Regulators of Taxi Drivers their Employers?

Callahan v. City of Chicago, 813 F.3d 658, 660-62 (**7th Cir.** 2016), affirmed the Rule 12(b)(6) dismissal of the plaintiff leased-taxi driver's takings claim, and summary judgment to the City on her claims under the FLSA and State law for her failure to earn minimum wage, on the ground that the City's regulation of the taxi industry and taxi medallion owners does not make it the employer of drivers who do not own medallions and lease their taxis.

M. Joint Employers, Integrated Employers, and Successor Liability

Faush v. Tuesday Morning, Inc., 808 F.3d 208 (**3d Cir.** 2015), affirmed in part, and reversed in part, the lower court's grant of summary judgment against the Title VII, Pennsylvania Human Relations Act, and § 1981 plaintiff. Plaintiff had been placed with the defendant retailer by Labor Ready, a staffing company, and claimed that the retailer was a co-employer or joint employer. The court held that the proper test of an employment relationship was provided by *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318 (1992), an ERISA case, because the lack of a helpful definition of "employer," as in Title VII and the PHRA, indicates that the common-law test, not the broader definition in the Fair Labor Standards Act, applies. 808 F.3d at 213-14. It held that a rational jury could find that Tuesday Morning was an employer because of its supervision over the workers, its responsibility for their time reporting, its payments to Labor Ready on an hourly basis, its recognition of the duty to pay overtime if necessary, the lack of any distinction in duties between Tuesday Morning's hourly employees and Labor Ready employees, the fact that Labor Ready's workers were called "temporary employees," and the like. The court held that Tuesday Morning was indirectly compensating the Labor Ready workers. Finally, the court affirmed the dismissal of the § 1981 claim because plaintiff had no contract with Tuesday Morning, and had never applied for a job with it. *Id.* at 220. The court noted in *dictum* that there was a possible theory under which plaintiff could assert a § 1981 claim based on a third-party intended-beneficiary status under some parts of the contract between Tuesday Morning and Labor Ready, but plaintiff had not asserted such a claim and this case was therefore not an appropriate vehicle in which to explore such a theory. *Id.* at 220 n.13.

N. ERISA Benefit Plans

Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan, --- U.S. ---, __ S. Ct. __, 2016 WL 228344 (Jan. 20, 2016), held that a health benefit plan may not sue a beneficiary to recoup medical expenses it paid and seek recovery from the general assets of the beneficiary instead of the specific assets (a lawsuit recovery) subject to an equitable lien.

O. 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.
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> 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.
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> 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.

P. Protections for Non-EEO, Non-FLSA Internal Complaints

1. Solely Internal Complaints Protected

DeKalb County v. U.S. Dep't of Labor, 812 F.3d 1015, 1020-21 (**11th Cir.** 2016), held without contest at that internal complaints under the Federal Water Pollution Control Act are protected:

> The FWPCA makes it unlawful to "fire, or in any other way discriminate against ... any employee ... by reason of the fact that such employee ... has filed, instituted, or caused to be filed or instituted any proceeding under this chapter...." 33 U.S.C. § 1367(a). The Secretary has interpreted "proceeding" to shield from retaliation employees who make "informal" or "internal" complaints to supervisors and coworkers, even if those complaints ultimately lack merit. … The County does not challenge the Secretary's interpretation.

2. Risks in Complaining Only Internally

Kubiak v. City of Chicago, 810 F.3d 476 (**7th Cir.** 2016), affirmed the Rule 12(b)(6) dismissal of the plaintiff police officer's First Amendment retaliation claim. The court applied the "content, form, and context" test, *id.* at 482-83, to determine whether plaintiff's speech was on a matter of public interest or of purely personal interest. The court found that plaintiff's speech was on a matter of personal and not public interest, relying on the fact that she only complained internally. "But the fact that Kubiak's complaints were all made internally suggests that she was primarily motivated by personal concerns." *Id.* at 484.

V. Theories and Proof

A. The Inferential Model

1. Direct Evidence

Boss v. Castro, 816 F.3d 910, 916 (**7th Cir.** 2016), affirmed the grant of summary judgment to the racial-discrimination defendant Secretary of HUD. The court stated: "Direct evidence—an overt admission of discriminatory intent—is rare, and not at issue where, as here, no supervisor admits racial motivation." (Citation omitted.) It also stated:

> Further, a plaintiff's subjective beliefs are insufficient to create a genuine issue of material fact under the direct method. … And under the direct method, a finding of intentional discrimination may not be established merely with evidence that a person outside the protected class was treated better than the plaintiff. …

Id. at 917 (citations omitted).

2. Circumstantial Evidence

Boss v. Castro, 816 F.3d 910, 916-17 (**7th Cir. Cir.** 2016), affirmed the grant of summary judgment to the racial-discrimination defendant Secretary of HUD. The court stated:

> Circumstantial evidence typically includes (1) suspicious timing, ambiguous statements (oral or written) 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. *Id.* Circumstantial evidence "must point directly to a discriminatory reason for the employer's action." … For example, remarks by a defendant must at least reflect illegal motivation. …

(Citations omitted.)

Comment by Richard Seymour on *Boss v. Castro*: Plaintiff was proceeding *pro se*, but the court's insistence on the rejected theory that an employment plaintiff must show "pretext-plus" has been rejected in a number of Supreme Court decisions—*St. Mary's Honor Center v. Hicks,* 509 **U.S.** 502, 510-11 (1993); and — *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 146–49 (2000)—and is dead wrong. Attorneys handling appeals in the Seventh Circuit should take pains to make clear that the Circuit's standard has been ruled out by the Supreme Court, and they need to follow Supreme Court precedent, not their own conflicting precedent.

3. Adverse Employment Action

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 833 n.3 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's Title VII and § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court held that plaintiff had adequately alleged actionable adverse employment actions, and observed that a more difficult standard applied in discrimination cases:

> It bears mention: employees who bring a Title VII claim of discrimination (rather than retaliation) have a heavier burden: an "adverse employment action" in those cases must visit upon a plaintiff a significant change in employment status, and often involves the employee's current wealth, her career prospects, working conditions, *etc. Andrews v. CBOCS West, Inc.*, 743 F.3d 230, 235 (7th Cir. 2014); *Lewis v. City of Chi.*, 496 F.3d 645, 653 (7th Cir. 2007).

Bonenberger v. St. Louis Metropolitan Police Dept., 810 F.3d 1103, 1108 (**8th Cir.** 2016), affirmed the judgment on a jury verdict for the white male plaintiff Police Sergeant not promoted to Assistant Director of the Police Academy because the Department had decided it wanted to place a black woman in the position. The court rejected defendants' argument that plaintiff did not suffer an adverse employment action on the ground that the Assistant Director "was not a promotion and carried no increase in pay, benefits, or rank." The court explained:

> Based on these previous interpretations, we conclude the Assistant Academy Director position's supervisory duties, regular schedule and hours, greater prestige, and potential increased opportunity for promotion, in combination, offered a material change in working conditions for Sergeant Bonenberger. These materially different working conditions provide sufficient evidence to support the conclusion Sergeant Bonenberger suffered an adverse employment action. Because there were "probative facts to support the verdict," the district court did not err by denying appellants' motion for judgment as a matter of law on Sergeant Bonenberger's discrimination claims. …

(Footnote and citation omitted.)

4. Pretext

a. Supreme Court on Shifting Explanations and Lies About the Record

Foster v. Chatman, --- **U.S.** ----, 136 S. Ct. 1737, 1754–55 (2016), reversed the decision of the Supreme Court of Georgia and held that petitioner had adequately shown under *Batson* that the prosecutor's reasons for striking black members of the jury venire were pretexts for racial discrimination:

> As we explained in *Miller–El v. Dretke*, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). With respect to both Garrett and Hood, such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that "bear[s] upon the issue of racial animosity," we are left with the firm conviction that the strikes of Garrett and Hood were "motivated in substantial part by discriminatory intent." …
>
> IV
>
> Throughout all stages of this litigation, the State has strenuously objected that "race [was] not a factor" in its jury selection strategy. App. 41 (pretrial hearing); but see id., at 120 (Lanier testifying that the strikes were "based on many factors and not purely on race." (emphasis added) (new trial hearing)). Indeed, at times the State has been downright indignant. See Trial Record 444 ("The Defenses's [sic] misapplication of the law and erroneous distortion of the facts are an attempt to discredit the prosecutor.... The State and this community demand an apology." (brief in opposition to new trial)).

The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a "color-blind" manner. App. 41, 60 (pretrial hearing). The sheer number of references to race in that file is arresting. The State, however, claims that things are not quite as bad as they seem. The focus on black prospective jurors, it contends, does not indicate any attempt to exclude them from the jury. It instead reflects an effort to ensure that the State was "thoughtful and non-discriminatory in [its] consideration of black prospective jurors [and] to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual." Brief for Respondent 6. Batson, after all, had come down only months before Foster's trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared.

This argument falls flat. To begin, it "reeks of afterthought," *Miller–El*, 545 U.S., at 246, 125 S.Ct. 2317 having never before been made in the nearly 30–year history of this litigation: not in the trial court, not in the state habeas court, and not even in the State's brief in opposition to Foster's petition for certiorari.

In addition, the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury. The State argues that it "was actively seeking a black juror." Brief for Respondent 12; see also App. 99 (new trial hearing). But this claim is not credible. An "N" appeared next to each of the black prospective jurors' names on the jury venire list. See, e.g., id., at 253. An "N" was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on the "definite NO's" list. See id., 299–301. And a draft affidavit from the prosecution's investigator stated his view that "[i]f it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay." Id., at 345 (emphasis added); see also ibid. (recommending Garrett "if we had to pick a black juror" (emphasis added)). Such references are inconsistent with attempts to "actively see[k]" a black juror.

The State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.

b. <u>Defendant's Justification and Pretext Showings Are Not to Be Considered as Part of the *Prima Facie* Case</u>

Liebman v. Metro. Life Ins. Co., 808 F.3d 1294, 1299-1300 (**11th Cir.** 2015), vacated the grant of summary judgment to the ADEA defendant and remanded the case. The court held that the lower court erred in dismissing the case in part because of its finding that plaintiff did not meet the defendant's legitimate qualifications. The court stated:

Finally, the justifications offered by MetLife for Liebman's termination—namely that the company needed to reduce its budget for salaries and that many of Liebman's responsibilities were duplicative of Weiss's—were not a proper basis for rejecting

> Liebman's prima facie showing. Employer justifications become relevant only after the plaintiff has made his prima facie case. … When it found that Liebman was not qualified for his position based on MetLife's proffered reasons for firing him, the district court conflated the burden shifting stages of the *McDonnell Douglas* framework.

c. Means of Showing Pretext

Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 644-45 (**3d Cir.** 2015), explained the means by which a plaintiff can show that the defendant's proffered nondiscriminatory explanation (the "second step") was a pretext:

> If the employer satisfies this second step, the burden shifts back once more to the plaintiff to show, by a preponderance of the evidence, that the employer's proffered legitimate, nondiscriminatory reason was pretextual. … The first way to show pretext is for the plaintiff to point to evidence that would allow a factfinder to disbelieve the employer's reason for the adverse employment action. … In order to raise sufficient disbelief, the evidence must indicate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons" to satisfy the factfinder that the employer's actions could not have been for nondiscriminatory reasons. *Id.* Alternatively, the second way a plaintiff can establish pretext is to point to evidence that would allow a factfinder to believe that an invidious discriminatory reason was "more likely than not a motivating or determinative cause" of the employer's action. … Specifically, the plaintiff can show pretext this way by presenting evidence "with sufficient probative force" so as to allow the factfinder to "conclude by a preponderance of the evidence that age was a motivating or determinative factor." … Pointing to evidence demonstrating any of the following satisfies this second way to prove pretext: (1) the defendant previously discriminated against the plaintiff; (2) the defendant discriminated against others within the plaintiff's protected class; or (3) the defendant has treated similarly situated, substantially younger individuals more favorably. … If this step is satisfied, at trial the plaintiff must convince the factfinder that not only was the employer's proffered reason false, but the real reason was impermissible discrimination. …

(Citations omitted.)

d. Shifting or Inconsistent Explanations

McMillan v. Dep't of Justice, 812 F.3d 1364 (**Fed. Cir.** 2016), reversed the decision of the Merit Systems Protection Board and held that DEA agent McMillan established that the denial of his request for an extension of his your of duty in Lima. Peru was because of his military service, and was forbidden by USERRA. One of the elements of petitioner's proof was that the agency's explanations were internally inconsistent, such as blaming him for violating a chain-of-command policy that was not in place at the time of the asserted violation, when an open-door policy was instead in place; blaming him for unprofessional and inappropriate tone and demeanor, when his supervisor had been the one initially engaging in an unprofessional and inappropriate tone and demeanor, and the like. On the latter point, the court stated at 1377:

> Reliance on the content and tone of McMillan's email responses as a basis for the denial of his tour renewal request, however, is inconsistent with the employer's other actions, including emails sent from McMillan's third-line supervisor and Regional Director Stenkamp that appear equally, if not more, out of keeping with "ordinarily accepted standards of personal conduct." The email exchanges must be construed in context.

The court also relied on petitioner's third-level supervisor's rudeness as demonstrating express hostility to petitioner's military service, stating at 1378:

> The third *Sheehan* factor that may lead to an inference of discriminatory motivation is the "expressed hostility towards members protected by the statute together with knowledge of the employee's military activity." 240 F.3d at 1014. While the Board made no finding one way or the other, Stenkamp's emails to McMillan ordering him not to represent DEA during the SVTC cannot be reasonably construed as anything but hostile to McMillan's military assignment. … While Stenkamp may not have been hostile to McMillan's need to do his military service, he certainly was hostile to McMillan's military obligations once he focused on what those obligations entailed.

Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562, 575-77 (**4th Cir.** 2015), reversed the grant of summary judgment to the ADA defendant. The court held that defendant's proffering different—although not internally inconsistent—explanations to the EEOC than were given at the time it fired plaintiff, the facts its own witnesses contradicted each other, and the defendant's failure to document or corroborate any of its asserted reasons, were all evidence of pretext.

Bagwe v. Sedgwick Claims Management Services, Inc., 811 F.3d 866 (**7th Cir.** 2016), affirmed the grant of summary judgment to the Title VII, § 1981, and Illinois-law defendant. The court held that semantic differences in the reasons different decisionmakers gave for firing plaintiff were not inconsistent, and were not probative of discrimination:

> Here, the decisionmakers' explanations that Ms. Bagwe identifies are entirely consistent and supported by the record. Ms. Street and Ms. Jackson told Ms. Bagwe that her termination had "nothing to do with performance," which is in keeping with Sedgwick's assertions that Ms. Bagwe was fired for interpersonal reasons. Sedgwick stated in its EEOC statement that Ms. Bagwe "was interfering with everyone's ability to do their job and service their clients satisfactorily," which is not inconsistent with Sedgwick's admission that Ms. Bagwe never had an impact on the company's bottom line. As Ms. LeClaire explained in her deposition, the "metrics ha[d] been ... met" under Ms. Bagwe's leadership, but the company decided to terminate her because "morale was low in the office." Contrary to Ms. Bagwe's suggestion, these semantic differences are not evidence of pretext. Ms. Bagwe may have met the company's goals, but she had done so in a manner that jeopardized the ability of those around her to do their job. A company can certainly insist on a management style that ensures a smooth operating atmosphere.

Id. at 881 (footnotes omitted). Similarly, the court held that differences in the recollections of decisionmakers over how the decision was reached were not probative of pretext:

> Here, the decisionmakers at Sedgwick have provided a consistent *rationale* for Ms. Bagwe's termination: she demonstrated ineffective leadership skills. Their differing recollections over exactly who spoke with whom do not call that rationale into question.

Id. at 882 (emphasis in original).

e. The "Honest Belief" Rule

Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 647-49 (**3d Cir.** 2015), affirmed the grant of summary judgment to the ADEA defendant. The court held that, even assuming plaintiff had made out a *prima facie* case, she had not shown a genuine dispute as to pretext. Plaintiff attacked the defendant's reasons for disciplining her in three incidents, the third of which resulted in firing her, as insufficient to justify discipline under the defendant's standards, but the court held that the standards had not been shown to be implausible. Plaintiff admitted some of the conduct in question and attempted to mitigate it, but did not show that the defendant failed to believe she had engaged in the conduct, or decided on the discipline for other reasons. The court stated:

> Rather than casting doubt on the sincerity of High Voltage's reasons for firing him, Lord merely quibbles with the wisdom of his employer's decision. For example, he challenges Bohlen's determination that he waited too long to notify human resources about Reimer's conduct. He notes that he reported the Reimer incidents just 12 days after they began and only 2 days after the latest one. He does not dispute, however, that Bohlen and Kopecky had instructed him to report any such incidents *immediately* and that he failed to follow these instructions. Likewise Lord questions the company's judgment that it was "inappropriate" for him to respond to the mistaken disciplinary write-up by threatening to file a lawsuit rather than first trying to resolve the misunderstanding. Whether this particular justification was wise or warranted is beside the point. What matters is whether Bohlen and Kopecky honestly believed it. Lord has no evidence that they did not.

Id. at *5. Judge Rovner dissented from this part of the opinion.

Comment of Richard Seymour on *Lord v. High Voltage Software*: Along with its ruling that no reasonable jury could find that a co-worker's conduct was "because of sex" when he grabbed plaintiff by the genitals, the court's ruling on retaliation is appallingly reasoned and would license employers to retaliate with impunity if they thought a complaint or statement of intent to file a charge was "insubordinate" or too deeply felt.

f. Unusual Actions

Porter v. Houma Terrebonne Housing Authority Bd. of Com'rs, 810 F.3d 940, 950-51 (**5th Cir.** 2015), reversed the grant of summary judgment to the Title VII retaliation defendant. The court held that plaintiff had shown a triable issue as to pretext, in part by showing that there was reason to doubt the credibility of the decision-maker. The court explained:

> The record also contains substantial evidence that might lead a finder of fact to doubt Thibodeaux's credibility. …

* * *

> Thibodeaux, who had been present at the hearing in which Porter testified against him, acted within his sole discretion to reject Porter's rescission. Porter has raised issues about his credibility, and about the truth of his assertion that she was unhappy in the position. He acted unusually, based on his prior behavior, in rejecting her letter of rescission. These circumstances create "'a conflict in substantial evidence' on the question of whether the [HTHA] would not have taken the action 'but for' [Porter's] protected activity."

(Footnote omitted.)

B. Mixed Motives

Connelly v. Lane Const. Corp., 809 F.3d 780, 788 (**3d Cir.** 2016), vacated the district court's Rule 12(b)(6) dismissal of plaintiff's Title VII and Pennsylvania law discrimination and retaliation claims. The court held that a plaintiff is not required to choose between mixed-motives and pretext theories in her Complaint, but can defer the question and may even proceed under both theories at trial. The court stated:

> Connelly's Amended Complaint does not specify whether she intends to proceed under a "mixed-motive" or a "pretext" theory, and understandably so. The distinction between those two types of cases "lies in the kind of proof the employee produces on the issue of [the employer's] bias" … and identifying the proof before there has been discovery would seem to put the cart before the horse. Indeed, we have said that, even at trial, an employee "may present his case under both theories," provided that, prior to instructing the jury, the judge decides whether one or both theories applies. … Thus, for purposes of noting the elements Connelly must plead to state a disparate treatment claim, we take it as given that she may advance either a mixed-motive or a pretext theory.

(Citations omitted.)

C. Retaliation

1. Protected Activities Require Specificity to Show Coverage

Cole v. Bd. of Trustees of N. Illinois Univ., --- F.3d ---, 2016 WL 5394654 (7th Cir. Sept. 27, 2016) (No. 15-2305), affirmed the dismissal of plaintiff's Title VII retaliation claim for having fled an ethics complaint. The court emphasized the need for any complaint to be explicitly about a protected characteristic:

> This requires more than simply a complaint about some situation at work, no matter how valid the complaint might be. To be protected under Title VII, his complaint must have indicated "the discrimination occurred because of sex, race, national origin, or some other protected class.... Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient." Id. at 776, quoting *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006).

Nothing in Cole's ethics complaint suggested that he was complaining of race discrimination. The grievances he listed had no overt connection to race. He raised allegations of incorrect pay, employees' supervision of their own children, commodity orders under his name, improper use of university supplies, the break-in at his office, the scrap metal incident, and unjustified police surveillance. He did not mention race or race discrimination in his complaint at all. His argument is that he was implicitly complaining of race discrimination because he was the only African–American foreman or sub-foreman in the department and the only subject of the conduct of which he complained. But his membership in a protected class, without anything more, is not enough to transform his general complaint about improper workplace practices into a complaint opposing race discrimination. See, e.g., *Tomanovich*, 457 F.3d at 664 (complaint of pay discrimination was not protected activity where employee "did not claim that the discrimination resulted from his national origin or his membership in another protected class"); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1147 (7th Cir. 1997) (complaints about "management style, in general terms" were not protected activity under Title VII). The district court correctly granted defendants summary judgment on the retaliation claim.

2. Participation Clause Compared to Opposition Clause

E.E.O.C. v. Rite Way Service, Inc., --- F.3d ----, 2016 WL 1397778 (**5th Cir.** April 8, 2016), reversed the grant of summary judgment to the Title VII retaliation defendant. The charging party participated in an internal company investigation of another employee's sexual harassment complaint. The court held that her participation in the internal investigation was not protected by the participation clause of § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), but is covered under the opposition clause as long as she had a reasonable belief that the conduct she described was in violation of Title VII.

3. The "Reasonable Belief" Standard for Opposition-Clause Claims

E.E.O.C. v. Rite Way Service, Inc., --- F.3d ----, 2016 WL 1397778 (**5th Cir.** April 8, 2016), reversed the grant of summary judgment to the Title VII retaliation defendant. The charging party participated in an internal company investigation of another employee's sexual harassment complaint. The court rejected the EEOC's argument that after *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271 (2009), plaintiffs are no longer required to show that they had a "reasonable belief" that the conduct they were describing was forbidden by Title VII. It noted that every Circuit to address the issue had adhered to the "reasonable belief" standard despite the Court's having reserved this issue in *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (*per curiam*). It explained:

> Despite the universal and longstanding application of this "reasonable belief" standard, the EEOC urges us to forego it in this retaliation case because Tennort did not affirmatively complain about Harris's conduct, but merely spoke up in response to questioning. The EEOC contends that this result would be consistent with Crawford, where no such reasonable belief standard was imposed.

> The EEOC's argument makes too much of the absence of a discussion of reasonable belief in *Crawford*. That case presented a narrow issue: whether passive reporting could ever meet Section 704(a)'s requirement of "oppos[ing]" an employment practice. It did not grapple with whether the conduct opposed in that case was "an unlawful employment practice" as elsewhere required in the opposition clause. If anything, creating a lower threshold for reactive plaintiffs bringing retaliation claims would be at odds with *Crawford*'s reasoning that the language of the opposition clause does not permit courts to treat reactive opposition any differently than proactive opposition.
>
> Nor are we persuaded to dispense with the reasonable belief standard for the policy reasons articulated by the EEOC. It argues that requiring reactive complainants to have a reasonable belief regarding the unlawfulness of the behavior they have witnessed would "frustrate the ... function and purpose" of Title VII. But many of the points it makes have no greater force in the reactive context than in the proactive one. For example, the EEOC warns that "third party witnesses" will not "come forward in an internal investigation" out of uncertainty whether they "would be protected from retaliation," thus "deter[ring] the reporting of Title VII violations essential for the enforcement of the statute's antidiscrimination provision." This same argument can and has been made about proactive complainants. … Indeed, the reasonable belief standard is itself a product of this concern—a compromise position struck by courts to avoid too parsimonious a grant of protection under the opposition clause yet still maintain a connection between what the plaintiff is "opposing" and the discriminatory conduct Title VII forbids.
>
> Indeed, despite its attempt to do away with the reasonable belief standard in *Crawford* cases, the EEOC recognizes that the opposed conduct must have something to do with Title VII in order to support a retaliation claim. We do not understand it to be arguing, for example, that an employee who believes she was fired for making statements about accounting fraud in response to an internal investigation would be able to bring a Title VII retaliation case. But the EEOC has not articulated a standard that would require some relationship between the opposition and a Title VII violation, albeit a showing less than a "reasonable belief" that Title VII was violated. We are reluctant to create yet another standard for assessing Title VII liability, as some confusion already exists concerning those that govern underlying violations and the one that governs reasonable belief in the retaliation context.

Id. at *3-*4 (citations and footnotes omitted). The court then mentioned that everyone agreed that the supervisory conduct in question, while sexual in nature, was not severe or pervasive. The lower court held that the charging party's description of that conduct could not be protected because the underlying conduct was not a violation. The court of appeals held that this was the wrong approach:

> But the reasonable belief standard recognizes there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII. The existence of this gray area between actual violation and perceived violation is best illustrated in cases where we have affirmed summary judgment on an employee's

discrimination claim while simultaneously reversing summary judgment on his or her opposition clause claim.

Id. at *5. The court then held that plaintiff has shown enough for the "reasonable belief" issue to go to the jury:

> But opposition clause claims grounded in isolated comments are not always doomed to summary judgment. …
>
> The conduct of which Tennort complained is closer to *Long* in which we concluded that the reasonable belief question should go to the jury. She heard Harris tell Quarles that he was looking at and admiring her rear end. Unlike Breeden and Satterwhite, this was conduct directed at a specific fellow employee. That it came from a person in a supervisory position is another important consideration. …
>
> We also consider the context in which the comment was made. Harris had been Tennort's and Quarles's supervisor for less than a week. Just days earlier, Tennort saw Harris pretend to slap Quarles on the bottom and exclaim "ooh wee." While Tennort did not report the earlier behavior to Rite Way, it is relevant to how she assessed the seriousness of Harris's later comment that he was "gonna look" at Quarles's rear end because he was a man: as a chance off-color comment or as repeated conduct, something more concerning. …
>
> Finally, we consider the setting in which Tennort voiced her complaint. This is where the reactive nature of Tennort's complaint sets it apart from the more common proactive opposition case. Tennort was rehired at the beginning of the 2011–2012 school year. As part of the rehiring process, she received a pamphlet informing her that "sexual harassment"—including "unwelcomed sexual ... comments" and "other verbal or physical conduct of a sexual nature that has the purpose or effect of ... creating an intimidating, hostile, or offensive work environment"—is a type of workplace "discrimination" that Rite Way does not tolerate. Shortly thereafter, she saw a new supervisor make two sexually-fraught and unwelcome comments to a subordinate within the span of a week. And then she was asked about one of those incidents by a member of Rite Way's human resources department—using language strongly insinuating that Rite Way would rather Tennort not corroborate Quarles's sexual harassment complaint and would subject her to reprisal if she did. If Tennort had not yet reached a view that Harris violated federal employment law when he made offensive comments and gestures about Quarles's rear end, the circumstances surrounding her questioning may very well have caused her to do so. We thus conclude that there is a fact issue concerning whether Tennort could have reasonably believed that the conduct about which she chose to speak violated Title VII.

Id. at *5-*6 (citations and footnote omitted).

4. "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.

Rosenfield v. GlobalTranz Enterprises, Inc., 811 F.3d 282, 287-88 (**9th Cir.** 2015), reversed the grant of summary judgment to the FLSA retaliation defendant. Plaintiff was a manager who was fired after repeatedly warning the defendant it was violating the FLSA. The court held that the "fair notice" requirement depends on context and should not have been decided on summary judgment. The court stated:

> We question the parties' joint assumption, which is shared by the Secretary of Labor and the Equal Employment Opportunity Commission, as amici curiae, that the so-called "manager rule" differs from *Kasten's* "fair notice" rule; the two rules likely are consistent. *Compare Kasten*, 131 S. Ct. at 1335 ("[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.*" (emphasis added)), *with McKenzie*, 94 F.3d at 1486–87 ("[T]he employee must [take certain actions] or otherwise engage in activities that reasonably could be perceived as *directed towards the assertion of rights protected by the FLSA.*" (emphasis added) (footnote omitted)). But we find it unnecessary to weigh in definitively on that question.

> Whether the manager rule is broader, narrower, or the same, the Supreme Court's opinion in *Kasten* controls and provides the legal rule of decision.
>
> We decline to refine the Supreme Court's general formulation of the rule when applied to complaints by a manager. Because *Kasten* requires consideration of the content and context of an alleged FLSA complaint, the question of fair notice must be resolved on a case-by-case basis. An employee's managerial position is only one consideration, and the Supreme Court's general rule provides adequate guidance for considering that fact. Moreover, an employee's status as a "manager" is not entirely binary. A different perspective on fair notice may apply as between a first-level manager who is responsible for overseeing day-to-day operations and a high-level manager who is responsible for ensuring the company's compliance with the FLSA. Refining the general rule to focus on only one specific factual element may obscure important nuances.

(Emphasis in original.) District Judge Benson, sitting by designation, dissented.

5. Adverse Employment Actions

Porter v. Houma Terrebonne Housing Authority Bd. of Com'rs, 810 F.3d 940 (**5th Cir.** 2015), reversed the grant of summary judgment to the Title VII retaliation defendant. The court summarized the case at 942:

> In this case, our court considers a retaliation claim by an employee whose attempt to rescind her resignation was denied. Tyrikia Porter worked for the Houma Terrebonne Housing Authority for several years. She offered her resignation in June of 2012, but before finishing her employment, she testified against the Executive Director, Wayne Thibodeaux, claiming sexual harassment. When Porter attempted to rescind her resignation at the urging of other superiors at work, Thibodeaux rejected her rescission.

After surveying cases in the Fifth and other Circuits holding that the failure to allow rescission of a resignation is not an adverse employment action, the court distinguished them all:

> These cases suggest that failure to accept rescission has generally not amounted to an adverse employment action in retaliation cases, but they are not dispositive in the instant case for two reasons. First, *Burlington Northern* requires us to consider the context of the alleged adverse employment actions, and emphasized that there are all manner of ways employers may retaliate against employees, some even unrelated to the employment. Second, and relatedly, the fact that an employee has no statutory or contractual right to rescind a letter of resignation does not necessarily mean that failing to accept such a rescission is never an adverse employment action. Most at-will employees have no right to employment in the first place, but not hiring them on the basis of their engagement in protected activities is nonetheless the ultimate adverse employment action, even under the strict, pre-*Burlington Northern* standard for what counts. Just as an at-will employer does not have to hire a given employee, an employer does not have to accept a given employee's rescission. Failing to do so in either case *because* the employee has engaged in a protected activity is nonetheless an adverse employment action.

Id. at 947 (emphases in original; footnotes omitted). The court held that the failure to allow rescission of plaintiff's resignation was an adverse employment action in the context of the facts:

> First, prior to her testimony, she was asked to consider rescinding her resignation by the Chairman of the Housing Authority Board, Allan Luke. Her direct supervisor, Jan Yakupzack, also asked her to consider rescission after her testimony, and spoke with her mother and pastor. While neither of these individuals had authority to make the decision itself, their requests may have contributed to a reasonable belief that Porter was at liberty to rescind, especially considered in the light most favorable to Porter.
>
> Second, her request to stay on a month longer than her initial effective resignation date was immediately approved, plausibly creating an expectation that her resignation was still negotiable and not finalized. Porter also had Yakupzack's support, which is especially significant in light of the fact that Thibodeaux's decision not to accept Porter's rescission was the only separation decision he ever made contrary to Yakupzack's advice. Finally, Porter identified four individuals who had resigned their positions at the HTHA and then been allowed to rescind those resignations.
>
> Overall, while a reasonable employee might not normally expect that she was entitled to rescind her resignation, in this particular context, a reasonable employee in Porter's shoes might have expected it. In light of the expectation, a fact-finder could determine that Porter would have been "well dissuad[ed] from making ... a charge of" sexual harassment if she knew it would destroy the chance that her rescission would be accepted.

Id. at 947-48 (footnote omitted).

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 833 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's Title VII and § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court held that plaintiff had adequately alleged actionable adverse employment actions:

> … Whether she was subjected to an adverse employment action is also apparent: the litany of malfeasance she alleges—screaming, false disciplinary reports, mistreatment of her daughter, exclusion from social functions, denial of time off, *etc.*—would certainly cause a reasonable worker to think twice about complaining about discrimination—that's all it takes in the retaliation context. …

(Citations omitted.)

6. Adverse Employment Actions Cannot Be Proven by Barebones Recitals

Wheat v. Florida Parish Juvenile Justice Comm'n, --- F.3d ----, 2016 WL 67197, 128 Fair Empl.Prac.Cas. (BNA) 841 (**5th Cir.** Jan. 5, 2016), affirmed in part and reversed in part the dismissal on summary judgment of plaintiffs' Title VII and FMLA retaliation claims. The court held that plaintiff failed to make out a prima facie case of an adverse employment action by

showing merely that she was assigned to janitorial duties on her return from FMLA leave. The court stated that plaintiff failed to show any context explaining how such an assignment was materially adverse. "A bare-bones allegation that an assignment of janitorial duties is a materially adverse action is only an unsupported conclusory claim. Such a bare allegation fails to provide the contextual detail that is required for materially adverse actions." *Id.* at *3. The court further explained at *4:

> There is no indication that she raised the slightest objection to this assignment. There is no indication of how much time was spent doing these "janitorial duties" as opposed to doing "intake" work. The district court was never told whether she was asked to perform unpleasant "janitorial tasks" (e.g., cleaning bathrooms), "janitorial tasks" that were minor in nature (e.g., changing lightbulbs, dusting a few desks, or simply cleaning up her own desk), or, indeed, whether her tasks could reasonably be classified as janitorial at all. Nor was the district court told what portion of Wheat's work day was devoted to "janitorial duties." Was it all of her workday … 75 percent of her workday … less than 5 minutes per week, or any part of her workday at all? Neither the district court nor we have the slightest idea.

(Citations omitted.) The court also held that an untimely evaluation and denial of a 4% step increase in her pay were not by themselves adverse employment actions under *Burlington Northern*: "In short, Wheat produced no evidence to show that the delay in her evaluation or the failure to grant her 4% step increase—accompanied by a right of appeal that she did not exercise—constituted a materially adverse action." *Id.* at *5. The court also held that the denial of plaintiff's request for a transfer was not shown to be an adverse employment action under *Burlington*: "As with the janitorial duties, Wheat has presented no evidence that the denial of the reassignment made her job 'objectively' worse." *Id.* at *6. Judge Reeves concurred in part and dissented in part.

7. Causation

a. Temporal Proximity

McMillan v. Dep't of Justice, 812 F.3d 1364, 1373 (**Fed. Cir.** 2016), reversed the decision of the Merit Systems Protection Board and held that DEA agent McMillan established that the denial of his request for an extension of his tour of duty in Lima. Peru was because of his military service, and was forbidden by USERRA. One of the factors helping to establish causation was temporal proximity. The court stated:

> McMillan requested a tour extension on September 14, 2010, *less than two months after his military leave*. *Id.* at 19. It was denied the next day on September 15, 2010. Id. at 19–20. The timing of the adverse action, therefore, favors McMillan's claim that there was discriminatory motivation in violation of USERRA.

(Emphasis in original.)

Ya-Chen Chen v. City Univ. of New York, 805 F.3d 59, 72 (**2d Cir.** 2015), affirmed the grant of summary judgment to the Title VII, Equal Protection Clause, and New York City Human Rights Law defendants, holding that no reasonable jury could infer that the refusal to

reappoint plaintiff to her assistant professorship was in retaliation for her having filed an Affirmative Action Complaint. The court discussed at length the complaints against plaintiff by faculty members for her excessive aggressiveness and lack of tact and collegiality, and the seriousness with which key persons involved in the decision viewed her mishandling of a situation with a student, all of which predated her complaint. The court, like the district court, assumed without deciding that plaintiff had established a *prima facie* case, but held she had not shown adequate evidence of pretext. The court rejected temporal proximity as a way to show causation, and therefore pretext:

> Perhaps recognizing these issues, Chen counters that allegations of her "overaggressiveness and lack of tact," even if true, would not have caused CUNY to deny her reappointment were it not for her Affirmative Action Complaint. In support, she cites the timing of her Complaint in relation to the employment decision and the positive elements of her evaluations. But this evidence, in context, does not support the inference that Chen suggests. We have long held that "temporal proximity" between a protected complaint and an adverse employment action "is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext" … and the inference is particularly weak in this case. The executive committee of every department at CCNY conducts annual reviews of assistant professors, and the Executive Committee of the Department of Foreign Languages and Literatures evaluated Chen's candidacy at the same time as it reviewed the other assistant professors in the Department. As a result, the timing of its decision about Chen's reappointment cannot, under these circumstances, plausibly support an inference that Chen would have been reappointed had she not filed her Affirmative Action Complaint. CCNY's annual review process, by its nature, must take into account the types of collegiality and student interaction concerns that Calichman's evaluation raised; these concerns would thus have come up at Chen's review regardless of her protected activities.

(Citation omitted.)

Connelly v. Lane Const. Corp., 809 F.3d 780, 792 (**3d Cir.** 2016), vacated the district court's Rule 12(b)(6) dismissal of plaintiff's Title VII and Pennsylvania law discrimination and retaliation claims. The court held that the gap of almost a year between plaintiff's complaint of harassment and defendant's failure to recall her to her truck-driving job at the start of the next construction season was not too long to allow an inference of causation. It stated:

> Given the seasonal character of Connelly's work, we question the District Court's conclusion about temporal proximity. Because Lane only hired Connelly during construction seasons, traditionally laying workers off in October or November and then rehiring them in March or April of the following year, it may be that a retaliatory decision to not rehire her would not become apparent until after the off-season that ran from October 2010 to March 2011.

(Footnote omitted.) The court observed in note 11 that in any event causation, not temporal proximity, is a required element of a retaliation claim.

Porter v. Houma Terrebonne Housing Authority Bd. of Com'rs, 810 F.3d 940,950 (**5th Cir.** 2015), reversed the grant of summary judgment to the Title VII retaliation defendant. The court held that a two-and-a-half month period between plaintiffs' testimony about sexual harassment and defendant's failure to allow her to rescind her resignation was enough to make a *prima facie* showing of temporal proximity. The court also relied on this temporal proximity as part of the evidence showing a triable issue as to pretext:

> Moreover, while "temporal proximity alone is insufficient to prove but for causation" in arguing pretext, the less than seven-week space between Porter's testimony and Thibodeaux's decision is evidence suggesting pretext.

(Footnote omitted.)

b. Mere Assumption of Causation in Adverse Reference Not Sufficient

Bagwe v. Sedgwick Claims Management Services, Inc., --- F.3d ----, 2016 WL 304043 (**7th Cir.** Jan. 26, 2016), affirmed the grant of summary judgment to the Title VII, § 1981, and Illinois-law defendant on plaintiff's retaliation claims, stating that even if hearsay evidence were accepted at face value, no inference of retaliation can be drawn when an employer notifies a potential subsequent employer that the employee was troublesome, where there was no reference to race or national origin or prior complaints, and there was substantial evidence that plaintiff was legitimately regarded by her former employer as troublesome. *Id.* at *10.

D. Disparate Impact

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., --- **U.S.** ----, 135 S. Ct. 2507, 2518 (2015), a Fair Housing Act case, stated:

> Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci, supra,* at 578, 129 S. Ct. 2658. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Abril-Rivera v. Johnson, 806 F.3d 599, 606-08 (**1st Cir.** 2015), affirmed the grant of summary judgment to the Title VII defendant on plaintiffs' disparate-impact claims. Plaintiffs challenged the planned closure of the Puerto Rico FEMA call center as having a disparate impact against them because of their Puerto Rican national origin. The physical facility housing the Call Center had serious problems, including that its roof would not withstand a Category III

hurricane. FEMA decided to close the structure rather than fix the structure or relocate the office. The court described the problems faced by FEMA:

> The record is clear that the 2008 inspection revealed serious safety concerns, and FEMA's decision to reduce staffing levels while addressing those concerns and evaluating the future of the PR–NPSC was reasonable. Even plaintiffs' counsel conceded that these concerns should not have been ignored. Indeed, once FEMA became aware of the problems at the PR–NPSC, it had no choice but to address them; FEMA would have been subject to an entirely different sort of legal liability had it failed to do so. And Title VII did not require FEMA to re-staff the center the minute that the majority of the safety concerns were resolved, particularly given that defendants had begun contemplating the closing of the center by that time.
>
> Regarding the closing of the center, the undisputed facts show numerous business justifications for the conclusion that the PR–NPSC should not have remained open. For example, (1) remedying the deficiencies identified in the 2008 inspection would have been very expensive; (2) establishing and operating a new facility in Puerto Rico would have been even more expensive; (3) even though the PR–NPSC employees took Spanish- and English-language calls, the Puerto Rico facility was established specifically for bilingual services, and by 2008, the volume of Spanish-language calls had decreased; and (4) the existing NPSC system could absorb the workload if the PR–NPSC closed. As defendants correctly note, FEMA had ample basis to close a facility "which still had ongoing safety issues, was in poor condition, and lacking critical modern infrastructure, and which was no longer needed, given declining claims processing needs[,] rather than to pay approximately $9 million to move to a new facility or to renew the lease and renovate the facility," which was "never designed for long-term FEMA use."

Id. at 607. In addition, the court noted that the lease on the Center would have expired before the repairs could have been completed. Citing *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, the First Circuit stated:

> Accordingly, "before rejecting a business justification ... a court must determine that a plaintiff has shown that there is 'an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs.'" … If employers' business "judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that ... raises serious constitutional concerns." …

Id. at 606-07 (citations omitted).

Ernst v. City of Chicago, --- F.3d ---, 2016 WL 4978377 (**7th Cir.** Sept. 19, 2016) (No. 14-3783), reversed the lower court's findings that defendants' physical skills test for paramedic applicants was job-related and consistent with business necessity. Women performed well on the job, but poorly on the test, and the validation efforts consisted of comparing the correlation between the physical skills test scores and the scores on work sample tests that had not been validated. The court's discussion of what was right and what was wrong in the validation study is extensive.

VI. Types of Evidence to Prove or Rebut Discrimination

A. Timing

Murray v. Warren Pumps, LLC, --- F.3d ----, 2016 WL 1622833 (**1st Cir.** April 25, 2016), affirmed the grant of summary judgment to the disability discrimination, accommodation, harassment, and retaliation defendant. The court rejected plaintiff's reliance on timing between his request for an accommodation and his termination:

> But a successful retaliation claim also requires proof that, among other things, there was a causal connection between the protected activity and the adverse action taken by the employer. … When, as now, an employee relies solely on a chronological relationship between the protected activity and later termination to support "an inferred notion of a causal connection between the two," "the temporal proximity must be very close." Murray's claim stumbles at this step.

Id. at *6 (citations omitted).

E.E.O.C. v. Rite Way Service, Inc., 819 F.3d 235, 244-45 (**5th Cir.** 2016), reversed the grant of summary judgment to the Title VII retaliation defendant. The charging party participated in an internal company investigation of another employee's sexual harassment complaint. Defendant argued in the alternative that customer complaints about the charging party's work performance in cleaning her designated areas of a high school justified her termination. The court held that a jury could reasonably reject this contention as a pretext for retaliation:

> Rite Way asks us to affirm the district court on the basis of an alternative argument presented below, which focused on the sufficiency of the EEOC's causation evidence. It emphasizes certain customer complaints "concerning areas of the school for which Tennort was responsible," arguing that this evidence of Tennort's deficiencies is "uncontroverted." The customer complaints constitute strong evidence of a nonretaliatory justification for Tennort's termination.7
>
> But the EEOC has competing evidence that would allow a jury to find that the customer complaints were a pretextual reason for firing Tennort after she corroborated a sexual harassment claim made against her supervisor. … This evidence includes the strong temporal proximity between her written report and her termination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 148–49, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (noting that "the evidence establishing the plaintiff's prima facie case" remains relevant to pretext and that "the strength of the plaintiff's prima facie case" will factor into whether employer is entitled to judgment as a matter of law (citations omitted)). It includes the fact that Tennort's two-year employment record with Rite Way was unimpeached until she spoke out about Harris's actions and soon thereafter became a problem employee. *See*, *e.g.*, *Evans v. City of Houston*, 246 F.3d 344, 354–56 (5th Cir.2001) (vacating summary judgment based on, among other evidence, "the close temporal proximity between [plaintiff's] appearance at her co-worker's [race and age discrimination] grievance hearing and her demotion" and "the lack of any documentary

evidence dated before her appearance or demotion that would tend to support a theory of disciplinary problems"); *cf. Schroeder v. Greater New Orleans Fed. Credit Union*, 664 F.3d 1016, 1024–25 (5th Cir.2011) (similar, in case involving alleged retaliation for whistleblowing under the Federal Credit Union Act). …

(Footnote omitted.)

Kelleher v. Wal-Mart Stores, Inc., 817 F.3d 624, 633-34 (**8th Cir.** 2016), affirmed the grant of summary judgment to the disability discrimination, retaliation, and disability harassment defendant. The court rejected plaintiff's showing of a causal relationship between her protected activity and a lowered performance evaluation with a cut in her pay increase, on the ground that timing alone is not enough:

> Wal–Mart asserts that Kelleher's decrease in ratings was a result of timeliness issues that were not resolved, and further provides evidence that the manager who gave Kelleher the reduced rating was not aware that Kelleher had submitted an RFA. Kelleher does not contest that Wal–Mart has produced a legitimate, non-retaliatory reason for her reviews. Instead, she addresses whether Wal–Mart's reason was pretextual, noting what she considers to be suspicious timing between her request for an accommodation and her first "solid performer" review. Temporal proximity alone is insufficient to show that an employer's proffered reason for action was a pretext for discrimination. … Since Kelleher does not offer proof beyond timing, she has failed to establish pretext. Moreover, other evidence in the record—which Kelleher does not dispute—showed that management at Kelleher's store wanted to keep her employed and tried to find a suitable position for her. With temporal proximity alone to support her argument for pretext, Kelleher has failed to create a genuine issue for trial on her retaliation claim.

Comment of Richard Seymour on *Kelleher v. Wal-Mart Stores, Inc.*: *Kelleher* is an example of a spate of recent decisions undermining the value of suspicious timing as evidence of pretext or of discriminatory intent. While the result in this particular case seems just. I do not believe the wholesale rejection of timing by itself as proof of causation is sound. In appropriate cases, this should be a jury issue, not a matter-of-law issue taking the case out of the hands of the jury. My practice pointer for both sides in evaluating and arguing their cases would be to look not only at the timing, but at whether the timing was consistent with ordinary practices at the place of work. Consistency should rightfully bolster the defendant's position, and inconsistency should bolster the plaintiff's position.

B. Cat's Paw

Bordelon v. Bd. of Educ. of the City of Chicago, 811 F.3d 984, 992 (**7th Cir.** 2016), affirmed the grant of summary judgment to the ADEA defendant. The plaintiff former Principal argued that the Local School Council that voted not to renew his contract was substantially influenced by his supervisor, Coates. The court rejected his argument stating:

> Because Coates and the Board were not the decision-makers in this case, Bordelon must show that Coates bore a discriminatory animus that influenced the Council. Bordelon did not point to evidence "that the biased subordinate actually harbored discriminatory

animus against the victim of the subject employment action," so the cat's paw theory of liability cannot save his case from summary judgment

C. Comparators

1. Standards for Comparators

Bagwe v. Sedgwick Claims Management Services, Inc., 811 F.3d 866, 884 (**7th Cir.** 2016), *petition for cert. filed*, (No. 15-1428, May 23, 2016), affirmed the grant of summary judgment to the Title VII, § 1981, and Illinois-law defendant. The court stated:

> … To be similarly situated, an employee must be "directly comparable to [a plaintiff] in all material respects." … Typically, we consider whether the employees "(i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications—provided the employer considered these latter factors in making the personnel decision." …

(Citations omitted.) The court rejected plaintiff's reliance on her white male successor as a comparator, because he was also fired for the ostensible reason of poor performance, and plaintiff's speculation as to a different reason was not probative.

Smith v. Chicago Transit Auth., 806 F.3d 900, 907 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII racial discrimination defendant. The court held that plaintiff's evidence of a white comparator given better treatment was too general to be probative:

> … Smith hasn't identified a similarly situated employee who was accused of similar misconduct but was treated more leniently. He points to only one managerial-level employee as a comparator: David Schaefer, a white manager who was assigned to the same terminal and was also accused of sexually harassing other employees on several occasions. But the record contains no further information about Schaefer. Smith doesn't tell us, for example, who Schaefer's supervisor was or what Schafer was accused of doing. We don't know the results of any sexual-harassment investigation, whether he was disciplined, and if so, what discipline was meted out. With such significant gaps in the evidentiary record, Smith plainly hasn't carried his burden of establishing a prima facie case of discrimination under the indirect method of proof.

Hutton v. Maynard, 812 F.3d 679, 685 (**8th Cir.** 2016), affirmed the grant of summary judgment to the Title VII retaliation defendant. Plaintiff claimed he lost his position as Police Chief because he had informed Mayor Maynard he wanted to promote a black officer. The court rejected plaintiff's proffered comparators because "Hutton offered nothing more than names, providing no explanation as to why or how the named individuals were in any way similarly situated such that they should be considered valid comparators." (Citation omitted.)

2. Adequate Comparators

E.E.O.C. v. AutoZone, Inc., 809 F.3d 916, 921 (**7th Cir.** 2016), affirmed the judgment on a jury verdict for the ADA defendant. Zych, the charging party, had a permanent 15-pound

lifting restriction. Her job, Parts Sales Manager, routinely involved the listing of numerous much heavier objects, such as car batteries, brakes, rotors struts, etc., stocking the items, bringing them from stock for the customer's inspection, and then carrying them to the costumer's car. The jury found that Zych was not a qualified individual with a disability. The court rejected the EEOC's argument that Kurta, an employee with one arm, was a proper comparator, indicating that a lifting restriction was unnecessary. The court relied on the facts that Kurta was in a different job category and unlike Zych would never be in the store alone, did not have a lifting restriction, routinely lifted parts weighing more than 15 pounds, only needed help when the shape of the objects made it difficult to carry them with one arm, and unlike Zych participated in the unloading of trucks.

3. Pre- and Post-Protected Activity Plaintiffs as Their Own Comparators

Wheat v. Florida Parish Juvenile Justice Comm'n, 811 F.3d 702, 709-11, 128 Fair Empl.Prac.Cas. (BNA) 841 (**5th Cir.** 2016), affirmed in part and reversed in part the dismissal on summary judgment of plaintiffs' Title VII and FMLA retaliation claims. The court held that defendants' more lenient treatment of plaintiff before she exercised her FMLA and Title VII rights, compared to its harsh treatment of her afterwards, created a jury issue of causation. Similarly, its inconsistent treatment of other employees, sometimes harsh and sometimes not, created a dispute of material fact. Without deciding whether the "but for" standard applies to FMLA retaliation claims, the court held the standard was satisfied. Judge Reeves concurred in part and dissented in part.

4. Lack of Comparators

Ya-Chen Chen v. City Univ. of New York, 805 F.3d 59, 73 (**2d Cir.** 2015), affirmed the grant of summary judgment to the Title VII, Equal Protection Clause, and New York City Human Rights Law defendants, holding that no reasonable jury could infer that the refusal to reappoint plaintiff to her assistant professorship was in retaliation for her having filed an Affirmative Action Complaint. The court discussed at length the complaints against plaintiff by faculty members for her excessive aggressiveness and lack of tact and collegiality, and the seriousness with which key persons involved in the decision viewed her mishandling of a situation with a student, all of which predated her complaint. The court, like the district court, assumed without deciding that plaintiff had established a prima facie case, but held she had not shown adequate evidence of pretext. The court rejected plaintiff's comparators was a way of showing pretext:

> Chen has presented no evidence of how CCNY treated assistant professors who were subject to comparable allegations of inappropriate conduct with a student or of a lack of collegiality.FN11/ Without such comparators—or *some* other evidence suggesting that the college acted on retaliatory motives—no reasonable jury could decide that CUNY's decision to prioritize the complaints against Chen over her professional achievements evinces such motives. … After all, "universities are free to establish departmental priorities ... and to act upon the good faith judgments of their departmental faculties or reviewing authorities" … and Title VII is not an invitation for courts to "sit as a super-personnel department that reexamines" employers' judgments … .

FN11/ Chen argues that two assistant professors who began teaching in 2007—Carlos Riobo and Vanessa Valdes—were reappointed notwithstanding less significant scholarly achievements and service to the university. She has not, however, presented any admissible evidence showing that either professor was subject to, or should have been subject to, similar complaints about collegiality or interactions with students.

Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 646 (**3d Cir.** 2015), affirmed the grant of summary judgment to the ADEA defendant. The court rejected plaintiff's argument that an inference of age discrimination was raised by the fact that the hospital had not shown any younger nurse was disciplined for the same asserted misconduct:

> The argument that the absence of disciplinary incidents involving younger staff members is evidence of more favorable treatment, defies this Court's precedent and logic. This Court has emphasized that evidence of more favorable treatment cannot be viewed in a vacuum, but rather that the record must be viewed as a whole. … Viewing the record in its entirety, which includes Willis's documented issues with communication and interpersonal skills, this argument works against Willis. … Instead of showing disparate treatment of Willis as an employee in a protected class, the record, particularly the three disciplinary incidents, supports the concerns of Willis's supervisors that she had difficulty working appropriately with others. …

(Citations omitted.)

5. Rumors and Alarums of Comparators

Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 649-50 (**3d Cir.** 2015), affirmed the grant of summary judgment to the ADEA defendant. The court held that plaintiff could not show that defendant's nondiscriminatory explanation for her termination was a pretext for age discrimination by relying on a rumor—"scuttlebutt"—of a possible unidentified comparator of unknown age given unknown treatment for different conduct.

Carothers v. County of Cook, 808 F.3d 1140, 1150-51 (**7th Cir.** 2015), affirmed the grant of summary judgment to defendant on the African-American plaintiff's racial discrimination claim. The court rejected plaintiffs' reliance on comparators when defendant showed significant differences between plaintiff and the comparators, or showed similarity of treatment, and plaintiff had no evidence but her own speculation to counter it.

D. Discriminatory Statements

1. Statements Showing Bias

E.E.O.C. v. Rite Way Service, Inc., 819 F.3d 235, 244-45 (**5th Cir.** 2016), reversed the grant of summary judgment to the Title VII retaliation defendant. The charging party participated in an internal company investigation of another employee's sexual harassment complaint. Defendant argued in the alternative that customer complaints about the charging party's work performance in cleaning her designated areas of a high school justified her

termination. The court held that a jury could reasonably reject this contention as a pretext for retaliation:

> Rite Way asks us to affirm the district court on the basis of an alternative argument presented below, which focused on the sufficiency of the EEOC's causation evidence. It emphasizes certain customer complaints "concerning areas of the school for which Tennort was responsible," arguing that this evidence of Tennort's deficiencies is "uncontroverted." The customer complaints constitute strong evidence of a nonretaliatory justification for Tennort's termination.
>
> But the EEOC has competing evidence that would allow a jury to find that the customer complaints were a pretextual reason for firing Tennort after she corroborated a sexual harassment claim made against her supervisor. … And it includes two cryptic statements from her supervisors from which a jury could infer retaliatory intent. First, the HR manager who took her statement warned "you know what they do to people who do stuff like this." Second, the supervisor who replaced Harris—Harris's own brother-in-law—told Tennort on the first day she began working under him that Mississippi is an "at will" state and that she would be denied unemployment benefits when she was fired. Statements such as these evincing the type of animus prohibited by Title VII can be considered at the pretext stage. *See Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 478 (5th Cir. 2015) (discussing how ageist comments, along with other evidence, could support a jury finding of discriminatory intent); *see also Wright v. Southland Corp.*, 187 F.3d 1287, 1305–06 (11th Cir. 1999) (stating that a jury could find retaliatory intent on the basis of "[t]he threat of 'You will regret it,' made by a human resources director" to employee who had filed an EEOC complaint); *Rhoads v. FDIC*, 257 F.3d 373, 392–94 (4th Cir. 2001) (reversing summary judgment because there was sufficient evidence of retaliatory intent, including a supervisor's statement that plaintiff "would regret" consulting with a lawyer about her American with Disabilities Act claim).

Hutton v. Maynard, 812 F.3d 679 (**8th Cir.** 2016), affirmed the grant of summary judgment to the Title VII retaliation defendant. Plaintiff claimed he lost his position as Police Chief because he had informed Mayor Maynard he wanted to promote a black officer. There was no evidence that this played any role in his termination, it was not raised before the City Council, which approved his termination, and the officer was ultimately promoted after plaintiff's termination. Plaintiff relied on the following statements to save his case:

> Hutton alleged that Maynard and Maynard's friends, including a City Council member, openly displayed racially discriminatory animus towards African American citizens of the city. Hutton said that they referred to African American citizens with terms such as "those people," "them people," and "the people from the other side of the tracks." One of Maynard's friends used the "n-word" and, according to Hutton, Maynard took no offense at the use of the term.

Id. at 682 (footnote omitted). The court held that this was not enough:

> The district court determined that evidence of Maynard and his friends referring to African American people with derogatory language did not constitute direct evidence

> of a racially discriminatory animus because Hutton provided no context or time-frame in which the remarks were allegedly made. Moreover, Hutton did not demonstrate any specific link between the alleged remarks and his termination. On appeal, *Hutton does not point* to any additional direct evidence. Instead, he relies in large part on *Beshears v. Asbill,* in which a decision-maker commented that older employees had problems with adaptation and flexibility, and the comments were "made during the decisional process by individuals responsible for the very employment in controversy." 930 F.2d 1348, 1354 (8th Cir.1991). Hutton offers no such employment-related statements by a decision-maker here. We therefore agree with the district court that Hutton has failed to establish direct evidence of retaliation.

Id. at 684. The court also held that this did not constitute circumstantial evidence of discrimination:

> Finally, Hutton asserts that Maynard's use of and tolerance for racist language reflects a bigoted attitude that is sufficient to prove pretext. Perhaps a decision-maker's general discriminatory attitude toward a particular race or group of people as evidenced by derogatory comments or the expression of bigoted views would, under some circumstances, be sufficient to defeat a motion for summary judgment at the pretext stage. But Hutton does not allege that the offensive statements in this case were made in connection with any part of his employment, or in connection with city business of any kind. Nor is it alleged that these statements were made near the time of Hutton's decision to promote Parks or the time of his termination. Free-standing racist comments are deplorable in their own right. But in this case, the comments Maynard and his friends made to one another, untethered as they were from the adverse employment action at issue, do not prove that the reasons for Hutton's termination as Chief of Police were pretextual.

Id. at 685-86.

2. Questions About Retirement Plans

Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 649 (**3d Cir.** 2015), affirmed the grant of summary judgment to the ADEA defendant. The court held that plaintiff could not show that defendant's nondiscriminatory explanation for her termination was a pretext for age discrimination by relying on a question about plaintiff's retirement plans:

> … The sole conversation involving age, which was limited to Willis's comment about when she planned to retire, does not support discrimination on Children's part. … As the District Court noted, it is common business practice, and not impermissible discrimination, for an employer to inquire about retirement plans in anticipation of staffing needs. ...

3. Other Statements That Are Ambiguous At Best

Murray v. Warren Pumps, LLC, --- F.3d ----, 2016 WL 1622833 (**1st Cir.** April 25, 2016), affirmed the grant of summary judgment to the disability discrimination, accommodation,

harassment, and retaliation defendant. The court held that plaintiff's complaints did not create a material issue as to his claim of a hostile work environment. The court stated:

> First, he points to "snide comments" that Korzec made to him when Murray was unable to perform certain tasks. For example, Korzec told him that he "could work faster," that he might accomplish more if he were at the shop more, and that "a younger person could do [the task] very easily." However, Murray's rather generic deposition testimony ended there. He did not tie Korzec's statements to any particular event or otherwise provide surrounding details to place the remarks in context. In fact, Murray acknowledged that he could not even identify when Korzec made any such comments, other than generally stating that they occurred sometime in 2011. Accordingly, Korzec's statements fit into the category of isolated, stray remarks whose substance and frequency cannot provide adequate foundation for a hostile work environment claim. …
>
> Next, Murray avers that the "questioning" that he endured from Korzec and Belechto about his need for time off for medical appointments constitutes harassment. As the district court emphasized, however, Murray provided no evidence tending to show that these inquiries by his supervisor and by the human resources officer "fell outside the appropriate and necessary duties of their jobs." … Indeed, our own review of Murray's somewhat muddled testimony leaves us uncertain whether the nature of the company's inquiries even related to his back condition at all. *See Ahern v. Shinseki*, 629 F.3d 49, 59 (1st Cir.2010) ("[G]enerally disagreeable behavior and discriminatory animus are two different things.").
>
> All told, these minor instances of employment skirmishes cannot ground Murray's hostile work environment claims. Therefore, the district court's ruling in favor of the defendants on this theory of relief must be upheld.

Id. at *6.

Bordelon v. Bd. of Educ. of the City of Chicago, 811 F.3d 984, 990-91 (**7th Cir.** 2016), affirmed the grant of summary judgment to the ADEA defendant. The plaintiff former Principal relied on several statements as showing evidence of age discrimination, which did not stand up on close examination as having age-related implications. For example, plaintiff's supervisor spoke to the Local School Council about its being time for plaintiff to "give it up," but the members present saw nothing age-related, and one testified that she thought the remark referred to the consistent pattern of low test scores plaintiff had been unable to change. A former assistant to plaintiff's supervisor made remarks suggestive of age, but they were her remarks or conclusions, not those of her supervisor. For example, she referred to plaintiff having been on a list of older black principals to be disciplined, but the list was of principals with low test scores at their schools, and one younger principal was on it.

Carothers v. County of Cook, 808 F.3d 1140, 1149 (**7th Cir.** 2015), affirmed the grant of summary judgment to defendant on the African-American plaintiff's racial discrimination claim. The court rejected plaintiff's argument that she had shown direct evidence of discrimination, holding that a reference to taking employees "to the woodshed" had no racial connotations despite plaintiff's belief that this is how slaves were punished in the South before the Civil War,

and that an approving reference to a statement by Malcolm X three years before her termination was not evidence of racial discrimination.

E. Departure from Ordinary Procedures or Standards

Bagwe v. Sedgwick Claims Management Services, Inc., 811 F.3d 866, 882 (**7th Cir.** 2016), affirmed the grant of summary judgment to the Title VII, § 1981, and Illinois-law defendant. The court rejected plaintiff's argument that defendant had departed from past policies and customs in handling her termination. It stated:

> An employer's departure from its own policies may be circumstantial evidence of discrimination. … However, there must be evidence of a specific policy that is regularly enforced and followed in similar situations. … In this case, Ms. Bagwe fails to present any regularly enforced company policy that Sedgwick failed to follow. Ms. Bagwe contends that Ms. Browne was obligated to speak with all of Ms. Bagwe's supervisors and review all documentation and that Ms. Papaioannou was obligated to attend her termination meeting. However, she does not point to any evidence of a company policy that imposed these obligations. Ms. Bagwe also contends that Sedgwick failed to complete the "Termination Checklist and Questionnaire" on the day of her termination and failed to follow the checklist's recommendation to allow an employee to return to her office after being fired. However, the record indicates that when Ms. Jackson, the Senior Vice President of Human Resources, attends a termination meeting, the checklist is not employed. …

(Citations omitted.)

F. Hiring Younger Employees

Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 649 (**3d Cir.** 2015), affirmed the grant of summary judgment to the ADEA defendant. The court held that plaintiff could not show that defendant's nondiscriminatory explanation for her termination was a pretext for age discrimination by relying on the hiring of younger nurses:

> … Unable to identify any statements by neonatal nurse leadership indicating an age bias, Willis asserts that leadership replacing experienced staff with inexperienced nurses constitutes evidence that Children's has discriminated against others within her protected class. … Willis's argument fails in light of her admission that the experienced staff Children's replaced were not fired, but left voluntarily, without conditions suggesting age discrimination. … Natural staff turnover and increased hiring related to expansion do not support Willis's argument that Children's discriminated against others in her protected class.

G. Harassment

1. Harassment Claims May Be Based on Events Outside the Workplace

Nichols v. Tri-National Logistics, Inc., 809 F.3d 981, 985-86 (**8th Cir.** 2016), reversed the grant of summary judgment to the sexual harassment defendants. Plaintiff was an over-the-

road truck driver temporarily assigned to work with a driver who allegedly harassed her on multiple occasions and in multiple ways. The court held that the lower court erred by refusing to consider the alleged harasser's conduct in the truck during parts of a 34-hour mandatory rest period.

> Under Title VII "offensive conduct does not necessarily have to transpire at the workplace in order for a juror reasonably to conclude that it created a hostile working environment." … Nichols' time in Pharr was part of her work trip because she stopped there during a mandatory rest period, and Oliver told her he would only find her a driver after it was completed. The TNI truck was the only form of transport available to her at the time, and Oliver instructed Nichols she could not use it to drive to a motel.

(Citations omitted.)

2. Harassment Is Not Excused Because of an Asserted Choice of the Plaintiff

Nichols v. Tri-National Logistics, Inc., 809 F.3d 981, 986 (**8th Cir.** 2016), reversed the grant of summary judgment to the sexual harassment defendants. Plaintiff was an over-the-road truck driver temporarily assigned to work with a driver who allegedly harassed her on multiple occasions and in multiple ways. The court held that the lower court erred by refusing to consider the alleged harasser's conduct in the truck during parts of a 34-hour mandatory rest period. The court stated:

> The district court treated Nichols' decision to remain with the truck as her own choice, but the law does not require an employee to "quit or want to quit" when faced with a Hobson's choice. … Such a requirement could force an employee to choose between her employment and her right to file a legal claim. The appropriate test is whether Nichols subjectively perceived her work environment as offensive. …

(Citations omitted.)

3. Harassment Must Be "Because of" a Protected Characteristic

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 307-08 **(6th Cir.** 2016), affirmed the judgment on a jury verdict for the Title VII male-on-male sexual harassment plaintiff. The court stated there were three main ways to show that same-sex harassment was because of sex:

> Following *Oncale,* this Circuit allows a plaintiff alleging same-sex harassment in hostile work environment cases to establish the inference of discrimination based on sex in three ways: "(1) where the harasser making sexual advances is acting out of sexual desire; (2) where the harasser is motivated by general hostility to the presence of men in the workplace; and (3) where the plaintiff offers 'direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'"

(Citations omitted.) The court rejected defendant's argument that the conduct was mere horseplay:

> Plaintiff took the third of these evidentiary routes at trial by attempting to persuade the jury that Defendant operated a mixed-sex workplace in which Leonard exposed men and only men to unwelcome touching. On appeal, Defendant argues that no reasonable jury could find discrimination based on sex because Leonard's behavior was mere "horseplay" beyond the reach of Title VII. Viewing the evidence in the light most favorable to Plaintiff and giving him the benefit of all reasonable inferences, as we must, we cannot accept this self-serving characterization of Leonard's behavior. "Horseplay" was much discussed at trial, and the jury apparently found that pinching and slapping someone on the buttocks or grinding one's pelvis into another's behind goes far beyond horseplay. This conclusion is not so unreasonable as to entitle Defendant to judgment as a matter of law.

Lord v. High Voltage Software, Inc., --- F.3d ---, 2016 WL 5795797 (**7th Cir.** Oct. 5, 2016) (No. 13-3788), affirmed the grant of summary judgment to defendant on plaintiff's Title VII sexual harassment claim, because plaintiff had not presented adequate proof that his co-worker's conduct was "because of sex." His co-worker Reimer had poked and slapped plaintiff on the buttocks, and grabbed him between the legs. The court explained:

> Lord argues that the judge went astray in his case by requiring his same-sex harassment claim to "fit neatly" into one of the three scenarios that *Oncale* describes. That argument overlooks a more fundamental shortcoming: There is no evidence from which a trier of fact could infer that he was harassed because of his sex. Nothing suggests that Reimer was homosexual, and Reimer's behavior was not so explicit or patently indicative of sexual arousal that a trier of fact could reasonably draw that conclusion. … And neither the audio-bug joke nor Reimer's conduct reflect a general hostility to the presence of men in the workplace: Lord points to no facts suggesting that only male employees at High Voltage were the objects of this sort of teasing.
>
> Instead, Lord relies entirely on the fact that the audio-bug joke and Reimer's conduct had sexual overtones. But the Supreme Court has said that's not enough. *See Oncale*, 523 U.S. at 80, 118 S.Ct. 998 ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."). "Sexual horseplay differs from sex *discrimination*, and Title VII covers only discriminatory conduct." … Absent some evidence of the latter, the former is insufficient to support a Title VII claim. … Because no reasonable jury could conclude that Lord was targeted for harassment because of his sex, summary judgment for High Voltage was appropriate.

Id. at *3-*4 (emphasis in original). Judge Rovner concurred in this part of the decision, and dissented on the dismissal of plaintiff's retaliation claim.

Comment of Richard Seymour on *Lord v. High Voltage Software*: When one male employee grabs another male employee by the genitals, it ought to be quite plain that a reasonable juror could infer that this conduct is because of sex. Would the court apply the same "we cannot see it, so it does not exist" rule if a male employee grabbed a woman's privates? The crime of sexual assault is equally present in both scenarios. Both elements of the decision are badly reasoned.

Cole v. Bd. of Trustees of N. Illinois Univ., --- F.3d ---, 2016 WL 5394654 (**7th Cir.** Sept. 27, 2016) (No. 15-2305), held that racial harassment plaintiff had not shown that most of a series of incidents had occurred because of his race:

> Before turning to the third and fourth prongs of the analysis, we briefly address an important nuance of the requirement that the harassment be based upon race. It was on that basis that the district court pared down Cole's hostile work environment claim to encompass only the discovery of the noose, finding insufficient evidence that the other incidents were racially motivated. Although a connection between the harassment and the plaintiff's protected class need not be explicit, "there must be *some* connection, for 'not every perceived unfairness in the workplace may be ascribed to discriminatory motivation merely because the complaining employee belongs to a racial minority.'" …
>
> Nevertheless, forms of harassment that might seem neutral in terms of race (or sex or other protected status) can contribute to a hostile work environment claim if other evidence supports a reasonable inference tying the harassment to the plaintiff's protected status. See *Landrau–Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 614 (1st Cir. 2000) ("Alleged conduct that is not explicitly racial in nature may, in appropriate circumstances, be considered along with more overtly discriminatory conduct in assessing a Title VII harassment claim."); *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir. 1999) ("[W]e underscore that [the co-worker's] conduct need not have been explicitly sexual or racial in order to create a hostile environment.... The complained of conduct must have either a sexual or racial character *or purpose* to support a Title VII claim.") (emphasis in original). Evidence that a workplace is tainted by overt racial hostility can support an inference that other harassment that at first seems race-neutral also has an undercurrent of racial animus. See, e.g., *Henderson v. Irving Materials, Inc.*, 329 F.Supp.2d 1002, 1010 (S.D. Ind. 2004). A harasser's actions or remarks that do not seem based on unlawful animus may be "sufficiently intertwined" with discriminatory remarks to conclude that discriminatory animus motivated all of them. *Shanoff v. Illinois Dep't of Human Services*, 258 F.3d 696, 705 (7th Cir. 2001). Whether the inference is appropriate depends on the circumstances of the case; if so, the superficially neutral events are properly considered as part of "the entire context of the workplace." *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1046 (7th Cir. 2002).
>
> That said, we agree with the district court that the record in this case does not support a reasonable inference that most of the hostility Cole encountered was connected to his race. There is almost no evidence of racial animus in the record: no hostile or ambiguous remarks, no racial slurs, nothing beyond the notable exception of the noose itself and the later secondhand report of a racist sign posted somewhere, at some unknown time by some unknown person. The other events on Cole's list—the paper towel order, the scrap metal, and so on—are connected to race only insofar as they happened to Cole and Cole alone, and he was the only African–American foreman on staff. As *Zayas* and *Beamon* suggest, that by itself is not enough to raise a genuine factual dispute as to whether those events constitute race-based harassment. The same is true of the remarks Richards made about Cole's student workers. Calling them "worthless" may have been reprehensible but without more did not amount to race discrimination solely because they were African–American. *Zayas*, 740 F.3d at 1159

Id. at *5-*6.

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 834 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's Title VII and § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court stated that "it is certainly within reason to conclude that Defendants, due to Huri's garb and appearance, knew she was a Muslim and an Arab." The nature of the harassment, which included multiple references to "good Christians" and Christian prayer circles, also made the motivation for the harassment clear.

4. The Negligence Standard

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 311 **(6th Cir.** 2016), affirmed the judgment on a jury verdict for the Title VII male-on-male sexual harassment plaintiff. The court explained the negligence standard:

> To impose liability on an employer for the harassing conduct of a plaintiff's co-worker, a "plaintiff must show that the employer's response to the plaintiff's complaints 'manifest[ed] indifference or unreasonableness in light of the facts the employer knew or should have known.'" … A plaintiff must therefore show that the employer "knew or should have known of the harassment" and "failed to take prompt and appropriate corrective action." … "Generally, a response is adequate if it is reasonably calculated to end the harassment." … Appropriate steps "may include promptly initiating an investigation." … Even separating the harasser and victim immediately may not be enough without further action on the employer's part. …

(Citations omitted.)

5. Severity or Pervasiveness

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 310-11 **(6th Cir.** 2016), affirmed the judgment on a jury verdict for the Title VII male-on-male sexual harassment plaintiff. The court discussed defendant's cases, and its argument that isolated horseplay cannot create a hostile working environment. It then stated:

> By contrast, all of the incidents Plaintiff experienced or of which he was aware that took place over the roughly six months that he and Leonard both worked in the plant involved the element of physical invasion we have found so crucial in cases like *Williams.* According to Plaintiff, the three incidents between him and Leonard took place over the course of a few months: about a week separated the first and second incidents, and the third incident occurred a month or more after that. Plaintiff described these incidents as escalating from a slap on the rear, to a painful grab on the rear, to grab by the hips and "hunching," i.e., briefly simulating sex. A threatening gesture after the first incident and a verbal threat after the second apparently did nothing to prevent subsequent incidents. The incident Plaintiff observed with Gill similarly involved inappropriate touching. Taking into account all the circumstances and viewing the facts in the light

most favorable to the Plaintiff, we cannot say that the jury's determination that a hostile or abusive work environment existed was unreasonable.

Cole v. Bd. of Trustees of N. Illinois Univ., --- F.3d ---, 2016 WL 5394654 (**7th Cir.** Sept. 27, 2016) (No. 15-2305), affirmed the dismissal of plaintiff's racial harassment claim, but underscored the usual severity of nooses in the workplace:

> The hostile environment claim thus depends on the discovery of the noose and the ineffectual investigation. The absence of further instances does not necessarily defeat Cole's claim. "One instance of conduct that is sufficiently severe may be enough." … An assault, for example, may create an objectively hostile environment even if it is an isolated occurrence. … In addition to the questions of severity and pervasiveness, in determining whether an environment is sufficiently abusive to be actionable, we are guided by factors such as whether conduct is "physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with an employee's work performance." …
>
> The district court concluded that the environment was not actionable because Cole could not produce evidence that the noose had been displayed or intentionally left *for him* to find. We hesitate to conclude that a single factor like this is dispositive, particularly because the evaluation of hostile work environment claims depends so much on the facts and circumstances of a particular case. … Given the status of the hangman's noose as "a visceral symbol of the deaths of thousands of African–Americans at the hand of lynch mobs," *Erie Foods*, 576 F.3d at 636, we do not flatly reject as "insufficiently severe" an entire set of cases involving such claims. On the other hand, evidence that a noose was displayed or directed toward a particular person or group could certainly prove relevant. A noose on display is generally likely to have more of an impact on employees than one hidden away in a co-worker's desk. Likewise, a noose directed at a particular employee or group would fall more toward the "physically threatening" end of the scale than the "merely offensive" end and is thus more likely to be actionable.
>
> These cautions aside, we need not and do not lay down here firm rules for when a noose in the workplace is or is not severe enough to be actionable. Cole failed to present evidence to support the fourth element of his claim: a basis for employer liability. …

Id. at *6 (citations omitted).

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 834 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's Title VII and § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court stated: "And it is premature at the pleadings stage to conclude just how abusive Huri's work environment was. It is enough to say that it is plausible that the screaming, prayer circles, social shunning, implicit criticism of non-Christians, and uniquely bad treatment of Huri and her daughter could plausibly be abusive."

Kelleher v. Wal-Mart Stores, Inc., --- F.3d ----, 2016 WL 1257899 (**8th Cir.** March 31, 2016), affirmed the grant of summary judgment to the disability discrimination, retaliation, and disability harassment defendant. The court held that plaintiff failed to show a material issue as to harassment:

> Kelleher herself states that management was "abusive with a lot of people," and she does not identify any discriminatory statements made to her. "[R]andom 'looks'" and eye rolls in Kelleher's direction may be unpleasant to tolerate but, without more, they are not sufficiently severe to affect the terms, conditions, or privileges of Kelleher's employment. They do not, therefore, rise to the level of harassment.

Id. at *6. The court distinguished a hostile work environment from harassment, and held that plaintiff had not shown actionable adverse consequences because of her disability:

> While Kelleher alleges that she was held to a higher standard and assigned more difficult tasks, "[e]vidence, not contentions, avoids summary judgment." Kelleher offers no examples or evidence of an increased workload beyond stating that she had four pallets to stock one night. Any looks or misconduct were minor, not physically threatening, and did not interfere with her work performance. Therefore, Kelleher has failed to establish that she faced a hostile work environment.

Id. at *7 (citation omitted).

Arizona ex rel. Horne v. Geo Group, Inc., 816 F.3d 1189, 1206-07 (**9th Cir.** 2016), vacated the grant of summary judgment to the sex discrimination defendant. Both the State of Arizona and the EEOC sued Geo Group, a prison staffing company for allegedly allowing the sexual harassment of female correctional officers by male correctional officers, failing to take adequate remedial actions after complaints were made, and systematically retaliating against the female correctional officers who complained. The district court also granted summary judgment on the sexual harassment claim of one female officer, Sofia Hines, and the Ninth Circuit held that plaintiffs had shown material issues of fact as to severity and pervasiveness:

> In our case, Hines contends Hilsden made unwanted physical contact with her by "spank[ing]" her butt in front of inmates and a cadet. Although Hilsden claimed that his touching was an accident, Hines disputes this fact. Hines also alleges that Hilsden was "always talking dirty, always trying to pick up somebody" including saying that "I have my own nuts," and would make gestures while talking dirty. Hines asserts that other officers harassed her when they bumped into her, used profanity in front of her, and told her "it's your bra" that set off the metal detecting scanner. While each of these incidents may not in itself be sufficient to support a hostile work environment claim, their cumulative effect is sufficient to raise material issues of fact as to whether the conduct was so severe or pervasive to alter the conditions of the workplace. We express no view on whether Hines was actually sexually harassed or harassed on the basis of her sex, but hold that viewing the facts in her favor, the district court erred in dismissing Hines's hostile work environment claim.12/

12/ The district court also erred insofar as it required that Hines's harassment claim be sexual in nature. While sexual harassment must be sexual in nature, "offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees." *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 842 (9th Cir.2005); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."). Here, the operative complaints allege both "sex-based hostile work environment and sexual harassment."

6. The "Subjective Offensiveness" Test

Nichols v. Tri-National Logistics, Inc., 809 F.3d 981, 986 (**8th Cir.** 2016), reversed the grant of summary judgment to the sexual harassment defendants. Plaintiff was an over-the-road truck driver temporarily assigned to work with a driver who allegedly harassed her on multiple occasions and in multiple ways. The court held that there were genuine disputes of material fact as to the subjective offensiveness of the conduct about which plaintiff complained. After discussing plaintiff's multiple complaints to defendant about the harassment, the court stated:

> … A psychiatrist who performed an independent medical examination testified that Nichols felt sexually harassed and suffered from depression and post-traumatic stress disorder due to Paris' aggressive conduct seeking sex. Although Nichols need not prove psychological injury, the psychiatrist's testimony bolsters her claim that she felt abused and harassed.

7. To Whom Must the Victim Complain?

Nichols v. Tri-National Logistics, Inc., 809 F.3d 981, 986 (**8th Cir.** 2016), reversed the grant of summary judgment to the sexual harassment defendants. Plaintiff was an over-the-road truck driver temporarily assigned to work with a driver who allegedly harassed her on multiple occasions and in multiple ways. The court held: "The test of whether a company is considered to have actual knowledge of harassing conduct is whether sufficient information comes 'to the attention of someone who [had] the power to terminate the harassment.'"

8. Adequacy of Employer's Response

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 311-12 **(6th Cir.** 2016), affirmed the judgment on a jury verdict for the Title VII male-on-male sexual harassment plaintiff. The court held:

> When the investigation was finally initiated, management called Leonard in to speak with them, and apparently took him at his word that he had put his arm around Plaintiff and that Plaintiff backed into him. HR manager Wade Phillips testified that Defendant did not follow its own policies; the outcome of the investigation was not the required written report but a page of barely legible notes. That write-up, such as it was, contained red flags on which Defendant appears to have followed up only minimally, as indicated by a note regarding Nick Clark's complaint about Leonard to Phillips, which

Clark later said had been handled, and Devonna Odum's mention of rumors about Jim touching an employee named Stephen Hackney. Although Hunter claimed to have spoken to Hackney, no notes appear under his name. At the conclusion of the investigation, Keck and Hunter never communicated to David McIntosh, who was in charge of discipline, that the bathroom incident between Leonard and Roper had occurred and that Leonard had been told that future complaints of sexual harassment would result in discharge. Thus, despite the prior warning, Defendant only suspended Leonard for a day and a half to two days. According to Leonard, he was never even deprived of pay.

Defendant argues that the steps it took were so clearly prompt and appropriate as to entitle it to judgment as a matter of law. Yet Defendant fails to grasp that what it failed to do is just as important. In … in which we affirmed the denial of a defendant's renewed motion for judgment as a matter of law, we identified a number of steps that a reasonable jury might have thought the defendant should have taken, but did not. In this case, a reasonable jury could have concluded that Defendant's total inaction for ten days, where Defendant knew that Leonard had touched Plaintiff, and had told Leonard that further complaints would result in termination, was unreasonable. Defendant did not separate the two men, suspend Leonard pending an investigation, or initiate its investigation in a timely manner; a reasonable jury could find that the failure to take any of these steps or others rendered its response neither prompt nor appropriate in light of what it knew or should have known regarding Leonard's prior misconduct.

Cole v. Bd. of Trustees of N. Illinois Univ., --- F.3d ---, 2016 WL 5394654 (**7th Cir.** Sept. 27, 2016) (No. 15-2305), held that the defendant's prompt investigation of a noose incident protected it from liability for racial harassment:

A prompt investigation is the first step toward a reasonable corrective action. … The undisputed facts here show that once Cole notified Richards of the discovery of the noose, she spoke to him about it (albeit insensitively, we must assume) and delivered her own notes on the incident to the university police. She also reported the incident to Nicklas, then vice president of public safety and community relations, as well as Perez and Daurer. She did nothing more after that, but in these circumstances it was reasonable for the administration, having involved the university police, to leave the investigation to them.

To be clear, we do not hold that an employer necessarily fulfills its responsibility to take appropriate corrective action if it has reported an incident to some other party. The question is whether the employer took corrective action "reasonably likely" to prevent harassment from recurring. In some cases—perhaps many cases—turning a matter over to someone else and taking no further action may not be enough. But under the circumstances shown by undisputed facts here, the university was not negligent. When Cole informed Richards that he had discovered the noose, he also told her that he had taken it to the police; that he believed it was intended as a joke by an employee who had since retired; that he was not offended; and that he hoped nothing would come of the matter. When Cliffe investigated the matter, Cole told her the same thing. Under those circumstances—faced with an incident that lacked any other threatening overtones and that Cole himself characterized as a joke by someone no longer employed in the

> department—it was reasonable for Richards to leave the matter to university police once she had reported it and to forgo additional action within the Building Services Department.
>
> Cole suggests that this holding would undermine an employee's ability to recover for a hostile work environment if the employee downplays the effects of that environment on himself. We do not endorse such a rule. An employer may be negligent in failing to take reasonable measures to prevent additional harassment even if the victim feigns unconcern about an incident or asks the employer not to pursue it. Such requests could come out of fear of retaliation or escalation. The employer's responsibility is to protect its employees from hostile, abusive situations, regardless of how distraught (or not) an employee may appear about a given incident. We hold only that under these circumstances, the university was not negligent when it allowed the university police to handle the investigation. That Richards reacted badly when Holmes was questioned, that the investigation ended without identifying the perpetrator, and that the noose was later lost have no bearing on that conclusion. Those facts have no effect on whether the steps taken to prevent future harm were reasonable. … To the extent Cole means to suggest a conspiracy to protect the perpetrator, we see no evidence of that in this record.

Id. at *7.

Nichols v. Tri-National Logistics, Inc., 809 F.3d 981, 987 (**8th Cir.** 2016), reversed the grant of summary judgment to the sexual harassment defendants. Plaintiff was an over-the-road truck driver temporarily assigned to work with a driver who allegedly harassed her on multiple occasions and in multiple ways. The court held:

> Unlike the employer in *CRST,* TNI did not remove Paris from her truck within 24 hours, proceed to investigate the alleged misconduct, or reprimand Paris. Nichols notified TNI about his harassment on May 25, and seven days elapsed before TNI arranged for Chris Loya to pick her up in Laredo. TNI could have ordered Nichols to leave Paris' truck as soon as it learned about the problem and promptly help her find another driving partner, reprimanded Paris for his behavior, or arranged lodging for her in Laredo instead of permitting her to accompany him to Pharr on May 30. Instead, TNI allegedly took no action to remove her despite her consistent complaints of sexual harassment, but allowed her to go to Paris' apartment in Pharr, and stranded her there with no available alternate form of transportation.

The court distinguished the cases on which the dissent relied. It stated: "The dissent suggests that TNI's response was reasonable in comparison to several other cases it cites, but none of these cases involved a workplace at all like the confined environment of an over the road truck cab in which Nichols was isolated for a multi day trip." *Id.* (citations omitted). Judge Smith dissented.

VII. Litigation

A. Exhaustion

Moreland v. Johnson, 806 F.3d 961 (**7th Cir.** 2015), reversed the dismissal of plaintiff's Federal-sector Title VII retaliation claim for failure to exhaust administrative remedies. The pro se plaintiff from Texas had followed the suggestion of the Administrative Judge hearing her discrimination claim that she should file a new retaliation complaint for having been denied administrative time and reimbursement of her expenses for the hearing in Milwaukee. Her agency dismissed the new complaint, saying she should have brought it as an amendment to her existing complaint. She appealed the dismissal to the EEOC's Office of Federal Operations, which affirmed. The court stated: "But in addition EEOC OFO told her that it wasn't too late for her to incorporate the allegations of her second complaint into her first administrative proceeding, even though an appeal from the administrative law judge's decision was pending. It was rather an odd suggestion, since if adopted it would have converted that appeal, so far as the new allegations were concerned, into a trial-level proceeding." *Id.* at 964. Instead, plaintiff filed suit. The lower dismissed her retaliation claim for failure to exhaust, and the court of appeals reversed. The court first held that the EEOC's regulation against spinoff complaints made no sense in this context: "When one considers how long it took to decide the first case, it becomes apparent that folding the second case (the retaliation case) into it would have protracted the first case unconscionably. Instead of taking four years to decide, it might have taken six years, or even more." Id. at 965. The court concluded that any fault lay with OFO for failure to consolidate the claims itself. It stated: "Anyway a complainant's failure to exhaust administrative remedies prior to bringing suit against her employer 'does not preclude establishing the claim in federal court when the failure to amend the charge to reflect a new claim is due to the fault of the EEOC.'" Id. (citation omitted).

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 832 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's Title VII claim of harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. The court held that plaintiff adequately alleged a hostile work environment in her first EEOC charge by using the term "harassment." It stated: "We decline to punish Plaintiff, whose first charge was drafted *pro se,* for describing her plight with the same interchangeable phraseology frequently used by this Court." The court added: "Given Huri's inclusion of nationality- and religion-based harassment in the her first EEOC charge, her employers had no reason to be surprised by her Title VII hostile work environment allegations covering her time as a child care attendant. We conclude those allegations are reasonably related to the contents of Huri's first EEOC charge, which implicates the same individuals and behavior pertinent to this suit."

Comment of Richard Seymour on *Huri v. Office of the Chief Judge of the Circuit Court of Cook County*: There are two important cautions for practitioners in this decision, apart from the importance of not making silly arguments that result in the loss of all credibility and the opposing party's victory on many other questions. *First*, the court's reliance on plaintiff's having filed her first EEOC charge *pro se* may have been mere window dressing, but raises the question whether a charging party represented by counsel would have lost the case based on the failure to use the talismanic words "hostile work environment." *Second*, the court's reliance on "the same individuals and behavior" may set a standard for how closely a lawsuit

must relate to the wording of an EEOC charge. Counsel for plaintiffs who are retained in time may want to think about amending charges to cover all possible grounds for suit before issuance of a Notice of Right to Sue, even though this would delay suit.

B. Timeliness

1. When Time Starts Running in Constructive Discharge Cases

Green v. Brennan, --- **U.S.** ----, 136 S. Ct. 1769, 1774 (2016), stated its holding succinctly:

> We address here when the limitations period begins to run for an employee who was not fired, but resigns in the face of intolerable discrimination—a "constructive" discharge. We hold that, in such circumstances, the "matter alleged to be discriminatory" includes the employee's resignation, and that the 45–day clock for a constructive discharge begins running only after the employee resigns.

The Court held that a constructive-discharge claim is a substantively separate claim from a claim as to the discrimination that produced a constructive discharge, and is not merely a remedial add-on to that claim. "But the Court did not hold in *Suders* that a constructive discharge is tantamount to a formal discharge for remedial purposes exclusively. To the contrary, it expressly held that constructive discharge is a claim distinct from the underlying discriminatory act." *Id.* at 1779 (citation omitted). The Court also rejected the argument that a plaintiff must show that the employer intended to force the employee to resign:

> The concurrence sets out a theory that there are two kinds of constructive discharge for purposes of the limitations period: constructive discharge "claims" where the employer "makes conditions intolerable with the specific discriminatory intent of forcing the employee to resign," and constructive discharge "damages" where the employer does not intend to force the employee to quit, but the discriminatory conditions of employment are so intolerable that the employee quits anyway. *Post*, at 1785 – 1788 (ALITO, J., concurring in judgment). According to the concurrence, the limitations period does not begin to run until an employee resigns under the "claim" theory of constructive discharge, but begins at the last discriminatory act before resignation under the "damages" theory.
>
> This sometimes-a-claim-sometimes-not theory of constructive discharge is novel and contrary to the constructive discharge doctrine. The whole point of allowing an employee to claim "constructive" discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him. *Suders*, 542 U.S., at 141–143, 124 S.Ct. 2342. We do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along.

Id. at 1779–80. Finally, the Court held that the period of limitations begins to run when the employee gives notice of his resignation:

> Likewise, here, we hold that a constructive-discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date of that resignation.

Id. at 1782. Justice Alito's opinion concurring in the judgment began with this sentence: "In its pursuit of a bright-line limitations rule for constructive discharge claims, the Court loses sight of a bedrock principle of our Title VII cases: An act done with discriminatory intent must have occurred within the limitations period." *Id.* at 1782. Justice Sotomayor wrote the opinion for the Court, joined by the Chief Justice and Justices Kennedy, Ginsburg, Breyer, and Kagan. Justice Alito filed an opinion concurring in the judgment. Justice Thomas filed a dissenting opinion.

2. Time Measured from an Actionable Event, Not a Non-Actionable Precursor Event

Buntin v. City of Boston, 813 F.3d 401, 405 (**1st Cir.** 2015), reversed the Rule 12(b)(6) dismissal of plaintiff's § 1981 claim, holding that it was timely filed within the four-year period of limitations for claims challenging post-formation conduct. The court rejected defendants' argument that the four-year period started running when plaintiff's decedent, Hixon's, received a written warning. The court stated:

> … But, claims for discrimination and retaliation accrue when the alleged unlawful act "has a crystallized and tangible effect on the employee and the employee has notice of both the act and its invidious etiology." … Here, Hixon did not learn of his suspension and termination, the alleged unlawful acts, until February 7 and 10, respectively. Therefore, Buntin's lawsuit, launched just as time was about to expire on February 6, 2015, beat the statute of limitations buzzer (albeit just barely).

(Citation omitted.)

3. Charge-Filing Deadline Equitably Tolled Until Plaintiff Learned of Facts Showing Disparate Impact

Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1303-06 (**11th Cir.** 2015), reversed the Rule 12(b)(6) dismissal of plaintiff's hiring claim based on expiration of the charge-filing period. Relying on *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), and *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1267 (11th Cir. 2003), the court stated that the standard was that equitable tolling applies "'until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Id.* at 1303. The court held that no misrepresentation by the employer is required. *Id.* at 1304. It added:

> Second, a person's "mere suspicion of age discrimination, unsupported by personal knowledge," does not trigger the limitations period. … Instead, the clock does not begin to run until she has enough information to support her cause of action. …

Id. at 1405 (citations omitted). The court added that "our precedent makes clear that a plaintiff need not undertake an entirely futile investigation into hidden discriminatory practices in the

name of 'due diligence,'" so plaintiff's "failure to ask RJ Reynolds why he had not been hired is not fatal to his claim." (Footnote omitted.) Judge Vinson dissented. *Id.* at 1306-16.

4. The "Piggyback" Rule

Arizona ex rel. Horne v. Geo Group, Inc., 816 F.3d 1189, 1203-04 (**9th Cir.** 2016), vacated the grant of summary judgment to the sex discrimination defendant. Both the State of Arizona and the EEOC sued Geo Group, a prison staffing company for allegedly allowing the sexual harassment of female correctional officers by male correctional officers, failing to take adequate remedial actions after complaints were made, and systematically retaliating against the female correctional officers who complained. The district court recognized the "piggyback" rule, but held that the only female correctional officers with timely claims would be those whose claims arose within 300 days prior to the EEOC's and Arizona's Reasonable Cause determinations, not those arising within 300 days prior to the original charge. The Ninth Circuit held that this was error:

> We hold that the district court erred in requiring that aggrieved employees allege an act that occurred within the 300 days before the Reasonable Cause Determination. The proper starting date of the EEOC and Division's class action is 300 days prior to Hancock's charge, not the Reasonable Cause Determination. …
>
> * * *
>
> Thus, the district court erred in limiting the time for which aggrieved employees may allege unlawful acts to 300 days preceding the Reasonable Cause Determination in an EEOC class action. The district court may have been concerned that Hancock's initial charge did not provide sufficient notice to Geo of the existence of class claims by other aggrieved female employees, particularly those employed at the CACF, a different facility than where Hancock worked. … However, this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (i.e., 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation. Nothing in the text of the statute supports the district court's imputation of the employee's time limit into the EEOC's duty to notify the employer of the results of its investigation.
>
> Moreover, we have held that a single charge of discrimination may be sufficient to put an employer on notice that additional people may be subject to the same unlawful employment practices. … In *Paige,* we held that the plaintiff could maintain a class action alleging disparate impact in promotions even though he had not raised class claims in the administrative charge. *Id.* We explained that "even if neither the EEOC nor the [state] charges on their face explicitly alleged class discrimination, it is plain that an EEOC investigation of class discrimination on the basis of race could reasonably be expected to grow out of the allegations in the charges." …
>
> * * *
>
> It follows from *Domingo, Paige,* and *Lucky Stores,* that an employer may be on notice of classwide allegations of discrimination from a single charge. Here, Hancock's charge alleged that she had been subject to discrimination, harassment, and retaliation. Although Hancock's alleged incident with Kroen may have been isolated, she further elaborated that she complained about the harassment and Geo did nothing to remedy it.

> Furthermore, she alleged that after she complained, Geo initiated an investigation against her based on false pretenses, and placed her on administrative leave. Thus, the charge was not limited to an "isolated act" of discrimination by one individual against another. … The EEOC and the Division then brought an enforcement action against Geo on the *same* grounds articulated in Hancock's charge: discrimination, harassment, and retaliation against female correctional officers.

(Citations omitted.) The court of appeals went on to address two additional errors in the lower court's rulings on the scope of the lawsuit:

> We also hold that in an EEOC class action, an aggrieved employee is not required to file a new charge of discrimination if her claim is already encompassed within the Reasonable Cause Determination or if the claim is "like or reasonably related" to the initial charge.
>
> * * *
>
> The district court refused to consider any aggrieved employees' discrimination or retaliation that occurred after the Reasonable Cause Determination without analyzing whether the allegations were included in the Reasonable Cause Determination, whether the allegations were "like or reasonably related to" Hancock's charge, or whether the allegations were consistent with Hancock's original theory of the case. Pursuant to *Hearst* and *Farmer Bros.*, the district court's outright exclusion of alleged discrimination and retaliation that occurred after the Reasonable Cause Determination was misguided.

Id. at 1204-05.

C. Bars to Suit

1. Judicial Estoppel

Horn v. Martin, 812 F.3d 1180, 1183 (**8th Cir.** 2016), affirmed the grant of summary judgment to the Title VII racial and sexual discrimination and retaliation defendant, because plaintiff's failure to disclose her claim against her employer during her Chapter 13 bankruptcy proceeding judicially estopped her from asserting her claim against defendant. Plaintiff received her Notice of Right to Sue, and filed her lawsuit a month before the bankruptcy trustee discharged her from $18,391.49 in unsecured debts. The court held at *2 that plaintiff could not excuse her failure to notify the bankruptcy court of her claim as being the product of a good-faith mistake, because her receipt of the Notice of Right to Sue during the bankruptcy proceeding meant that she was aware of her claims.

2. *Res Judicata*

Cox v. Nueces Cty., --- F.3d ---, 2016 WL 5888385, at *1 (5th Cir. Oct. 10, 2016) (No. 16-40141), affirmed the dismissal of the plaintiff former deputy sheriffs' First Amendment retaliation claims, because they could have brought the claims in their County Civil Service challenge to their termination based on political discrimination and the State-court review proceedings after an adverse decision by the civil service commission, and did not. The court stated that "Texas precedent makes clear that constitutional claims can and should be brought in

state-court reviews of civil service commission findings." *Id.* at *2. The court also held that the bar of *res judicata* could not be avoided merely because the plaintiffs had "abstained" from raising their First Amendment claims in the review proceedings, because they never asked the court to abstain from deciding those issues. It stated: "That notion is specious. A threshold requirement for any sort of abstention is that the plaintiffs inform the court of any request to abstain." *Id.* at *3.

Lawler v. Peoria Sch. Dist. No. 150, --- F.3d ---, 2016 WL 4939538 (7th Cir. Sept. 16, 2016) (No. 15-2976), vacated the grant of summary judgment to the Rehabilitation Act defendant and held that *res judicata* did not bar plaintiff's claim. Plaintiff had filed her Rehabilitation Act claim in Federal court, and then filed her State-law claims in State court. The State-law claims were decided adversely to her, and a final judgment was entered. The court held that under Illinois law the defendant had waived *res judicata* by acquiescing in plaintiff's claim-splitting. The court continued:

> Even though Lawler filed her state-court complaint within weeks of filing her federal suit, District 150 waited more than 18 months to raise res judicata as a potential affirmative defense in the federal case. District 150 hasn't given any reason for this delay, nor has it explained why its prolonged inaction should not be treated as acquiescence. What is more, even if we did not interpret District 150's conduct as acquiescence, the only claim that could plausibly have been barred by the rule against claim-splitting would be Lawler's contention that, after she had sought an accommodation, District 150 retaliated by giving her the negative performance evaluation that prevented her rehire when the school district reversed its RIF. Lawler's claim that District 150 failed to accommodate her need for a transfer in September 2011, long before the RIF was announced, has little, if any, overlap with Lawler's state-court case, which dealt only with whether she was improperly dismissed and whether the School Code obligated the school district to hire her back when the RIF was deemed unnecessary.

Id. at *4.

3. Collateral Estoppel

Turner v. U.S. Dep't of Justice, 815 F.3d 1108 (**8th Cir.** 2016), affirmed the dismissal of plaintiff's Administrative Procedures Act (APA) challenge to her termination from the FBI, allegedly in retaliation for whistleblowing. The court found that plaintiff was collaterally estopped by the final decision in her first APA case against the agency, *Turner* I. In *Turner I*, plaintiff claimed retaliation for having complained of sexual discrimination. She filed two administrative complaints, but when the Office of Professional Responsibility ruled against her she did not follow the administrative avenues of review but instead sued under the APA. The district court in that case held that the Civil Service Reform Act preempted her remedy under the APA. Notably, the CSRA does not provide judicial review for FBI agents, but only required administrative remedies providing similar protections. She did not appeal. Plaintiff then made a separate administrative complaint that she had been retaliated against for reporting that FBI agents and officials had looted valuables from the rubble after the 9/11 attacks. The result was that she won on the merits, but was denied back pay when her constructive termination claim

was denied. She then sued under the APA, challenging the final decision, and her second claim was dismissed on the ground of collateral estoppel. The court stated at *3:

> Under the doctrine of collateral estoppel, also called issue preclusion, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (Am. Law Inst.1982). Collateral estoppel applies "to questions of jurisdiction as well as to other issues." … We have held that collateral estoppel consists of five elements:
>
> > (1) the party sought to be precluded in the second suit was a party ... in the prior suit; (2) the issue sought to be precluded is the same as the issue involved in the prior action; (3) the issue was "actually litigated" in the prior action; (4) the issue was determined by a valid and final judgment; and (5) the determination in the prior action was "essential to the judgment."
>
> *Morse v. Comm'r*, 419 F.3d 829, 834 (8th Cir. 2005).
>
> Although it is undisputed that Turner was a party to *Turner I*, Turner argues that collateral estoppel does not apply because the issues in the two lawsuits are different. She contends that Turner I did not address the issue whether courts possess subject matter jurisdiction to review final agency action taken under the CSRA and the related DOJ regulations. We disagree.

Id. at 1111-12 (citation and footnote omitted). The court continued:

> Thus, because the *Turner I* court decided the issue of subject matter jurisdiction on the same basis that is at issue here—the exclusivity of the CSRA—Turner is precluded from re-litigating the matter. Stated differently, because the district court in *Turner I* did not dismiss her case on the basis of her failure to exhaust administrative remedies, the fact that she challenged final agency action in this case is irrelevant for collateral estoppel purposes.

Id. at 1113. The court rejected the argument that t*h*e issues were different because the second suit involved review of a final agency judgment and the first did not. It stated

> Were the district court in this case to decide whether § 704 permits judicial review of final agency action under the CSRA, it would necessarily decide whether "the statute explicitly precludes judicial review." … Thus, even if we were to construe application of different sections of the APA as raising potentially different issues, collateral estoppel would still bar the action because both actions involve application of the same legal standard.

Id. (citation omitted).

D. Pleading

1. Adequacy of Complaint

Buntin v. City of Boston, 813 F.3d 401, 405-06 (**1st Cir.** 2015), reversed the Rule 12(b)(6) dismissal of plaintiff's § 1981 claim. The court rejected defendants' argument that plaintiffs' allegations were too conclusory:

> We disagree. Buntin's complaint sets forth, in fairly significant detail, the specific facts and circumstances surrounding the events of February 4 through 10, 2011, during which time Hixon was allegedly disciplined in an unlawfully discriminatory manner, then suspended and terminated discriminatorily and in retaliation for having protested his disparate treatment. These allegations are "specific and factual," and they plausibly suggest that Buntin is entitled to relief on a Section 1981 claim for discriminatory termination and retaliation.

Connelly v. Lane Const. Corp., 809 F.3d 780 (**3d Cir.** 2016), vacated the district court's Rule 12(b)(6) dismissal of plaintiff's Title VII and Pennsylvania law discrimination and retaliation claims. The court stated:

> It is thus worth reiterating that, at least for purposes of pleading sufficiency, a complaint need not establish a prima facie case in order to survive a motion to dismiss. A prima facie case is "an evidentiary standard, not a pleading requirement," *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002), and hence is "not a proper measure of whether a complaint fails to state a claim." …

Id. at 788-89 (footnote omitted). The court held that merely conclusory allegations "are not entitled to the presumption of truth." *Id.* at 789-90. It continued:

> … *Twombly* and *Iqbal* distinguish between legal conclusions, which are discounted in the analysis, and allegations of historical fact, which are assumed to be true even if "unrealistic or nonsensical," "chimerical," or "extravagantly fanciful." *Iqbal*, 556 U.S. at 681, 129 S. Ct. 1937. Put another way, *Twombly* and *Iqbal* expressly declined to exclude even outlandish allegations from a presumption of truth except to the extent they resembled a "formulaic recitation of the elements of a ... claim" or other legal conclusion.

Id. at 789 (footnote omitted). The court's specific rulings clarified its standard:

> Although the District Court considered the Amended Complaint to be "extremely vague and conclusory," it did not specifically identify any allegations that, being mere legal conclusions, should have been discounted. … In our plenary review of the motion to dismiss, we consider the following allegations in the Amended Complaint to be disentitled to any presumption of truth: (1) that Connelly's supervisors at Lane "subjected her to disparate treatment based on her gender and retaliation for making complaints about discrimination and sexual harassment" … ; (2) that Lane, "[b]y subjecting Connelly to discrimination based on her gender and retaliation," violated Title VII and the PHRA … ; (3) that Connelly was an "employee" of Lane "within the meaning of Title VII and the PHRA" … ; (4) that "[a]t all times relevant to this case, [Lane] was an

> 'employer' within the meaning of Title VII and the PHRA" … ; and (5) that "Connelly has exhausted her federal and state administrative remedies." … All of these allegations paraphrase in one way or another the pertinent statutory language or elements of the claims in question. To the extent that Connelly's allegation that she "was sexually harassed" by Manning states a legal conclusion, that is also excluded, although her factual allegations describing Manning's behavior and her reaction to him, along with her allegation that his threatened physical contact was "unwanted," are accepted as true. …

Id. at 790. The court held that plaintiff had adequately pleaded disparate treatment:

> … More specifically, Connelly has alleged that (i) during her tenure at Lane, she was the only female truck driver at the Pittsburgh facility; (ii) she was qualified to drive all but one of Lane's trucks; (iii) Lane failed to rehire her at the start of the 2011 construction season, despite recalling the six other union truck-drivers—all male, and two with less union seniority than Connelly; and (iv) since failing to rehire Connelly, Lane has employed no other female truck drivers. …

Id. at 791. The court also held that plaintiff had alleged a plausible claim of retaliation regardless of temporal proximity, stating:

> In any case, the question of temporal proximity does not render Connelly's retaliation claim facially implausible. Connelly alleged that, after she complained of Manning's unwanted advances, and after overcoming another supervisor's resistance to her grievance by complaining directly to the Ethics Line, her relationship with both her supervisors and male co-workers became "increasingly strained" throughout the year. … Thus, Connelly has alleged facts that could support a reasonable inference of a causal connection between her protected activity in May 2010 and the gradual deterioration of her relationship with her employer until she was laid off in October 2010.
>
> In finding no causal connection between Connelly's protected acts and Lane's failure to rehire her in 2011, the District Court noted that Lane continued to rehire Connelly for four consecutive years despite her many complaints, and even encouraged her to continue calling the Ethics Line. While we agree that those facts could be viewed as cutting against Connelly, that is not what the applicable standard of review allows at this point in the case. We must adhere to the requirement that all alleged facts be construed in the light most favorable to the plaintiff, which, if done, permits the view that gender discrimination was a motivating factor or determinative factor in the decision not to recall Connelly in 2011. Likewise, the fact that Lane continued to rehire Connelly for four years despite her complaints about co-workers, but declined to rehire her at the first such opportunity after she complained of harassment by a supervisor, can be construed to support a reasonable inference of a causal connection between the protected act and the adverse employment action.

Id. at 792-93.

Tate v. SCR Medical Transp., 809 F.3d 343 (**7th Cir.** 2015), held that the Rule 12(b)(6) dismissal of the *pro se* plaintiff's ADA claim because of failure to identify his disability was

proper because defendant had been deprived of fair notice. However, it held that the lower court abused its discretion by failing to allow the plaintiff to amend his Complaint to identify the disability. The court reversed the Rule 12(b)(6) dismissal of plaintiff's sexual harassment and retaliation claims, holding that the following language written on the lower court's standard six-line *pro se* complaint form sufficed: "During my employment, I was subjected to sexual harassment. I complained to no avail. On September 5, 2014, I was discharged." *Id.* at 345-46.

Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826, 832-33 (**7th Cir.** 2015), reversed the grant of a Rule 12(b)(6) motion to dismiss plaintiff's Title VII and § 1983 claims of discrimination, retaliation, and harassment by self-styled "good Christians" because of her Moslem religion and Saudi national origin. Relying on *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010), the court stated:

> … Plausibility does not mean probability: a court reviewing a 12(b)(6) motion must "ask itself *could* these things have happened, not *did* they happen." *Id.* (emphasis there). The standard simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the allegations. …
>
> In *Swanson,* this Court had occasion to apply current pleading standards to a discrimination claim (under the Fair Housing Act rather than Title VII, but that difference is immaterial here—both statutes forbid discrimination on account of race). A complaint that identified "the type of discrimination" the plaintiff thought occurred, "by whom, ... and when" was "all [the plaintiff] needed to put in her complaint." *Swanson*, 614 F.3d at 405. *See also EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 781–82 (7th Cir. 2007) (religious discrimination plaintiff need only say that the employer held the worker's religion against him).

The court also stated at 834: "Defendants have fair notice of Huri's claims and the grounds upon which those claims rest, and the details in her Second Amended Complaint present a story that 'holds together.' *Swanson*, 614 F.3d at 404. Dismissal of the Second Amended Complaint was therefore error."

2. Opportunity to Amend Complaint, to Correct a Deficiency

Tate v. SCR Medical Transp., 809 F.3d 343, 346 (**7th Cir.** 2015), held that the Rule 12(b)(6) dismissal of the *pro se* plaintiff's ADA claim because of failure to identify his disability was proper because defendant had been deprived of fair notice. However, it held that the lower court abused its discretion by failing to allow the plaintiff to amend his Complaint to identify the disability. The court stated:

> … This was a serious mistake given the inadequacy of the plaintiff's allegation of disability discrimination. The judge should not only have complied with the rule; he should have told the plaintiff what is required to allege disability discrimination. We've often said that before dismissing a case under 28 U.S.C. § 1915(e)(2)(B)(ii) a judge should give the litigant, especially a pro se litigant, an opportunity to amend his com plaint. … Indeed the court should grant leave to amend after dismissal of the first

complaint "unless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted." …

(Citations omitted.)

E. Discovery of U-Visa Applications

Cazorla v. Koch Foods of Mississippi, L.L.C., --- F.3d ---, 2016 WL 5400401 (5th Cir. Sept. 27, 2016) (No. 15-60562), involved a § 1292(b) permissive appeal from an order allowing discovery of the U-visas of plaintiffs and the more than 100 persons for which the EEOC was attempting to obtain relief. The court described the context of its decision:

> Hispanic employees of Koch Foods ("Koch"), a poultry processor, allege harassment and abuse on the job. Koch claims they made up the allegations in order to get U visas, which are available to abuse victims who assist in government investigations. The company sought discovery of any information related to the employees' U visa applications. Plaintiffs objected, pointing out that the discovery would reveal to Koch the immigration status of any applicants and their families. The district court allowed the discovery in part, and both sides appealed. We VACATE the district court's certified discovery orders and REMAND.

Id. at *1. The court explained the U-visa program and defendant's argument:

> … Since 2000, this program has offered temporary nonimmigrant status to victims of "substantial physical or mental abuse" resulting from certain offenses, including sexual assault, abusive sexual contact, extortion, and felonious assault.[3] For a victim to receive a U visa, a law enforcement agency such as the Equal Employment Opportunity Commission (EEOC) must certify that he or she is aiding an investigation into the alleged offenses, and the U.S. Customs and Immigration Service (USCIS) must conduct its own *de novo* review of relevant evidence and confirm the victim's eligibility. U visas generally entitle their holders and their family members to four years of nonimmigrant status; holders may also apply for lawful permanent residence (a "green card") after three years. Finally, aliens with "pending, bona fide" U visa applications may obtain work authorization.
>
> Koch claims that the claimants made up their accusations in hopes of securing U visas, and that the EEOC solicited and certified their false claims in order to build a high-profile, class-based discrimination suit against the company. This appeal concerns Koch's attempt to obtain concrete evidence of this malfeasance—namely, any and all records relating to the claimants' speculated U visa applications—through discovery.

Id. at *1-*2 (footnotes omitted). The court held that the U-visa records were clearly relevant for impeachment, and distinguished cases in which immigration status had no connection to the merits of the claims. The court held that the EEOC could not be compelled to provide the discovery because of the statute cresting the U-visa program, but that this did not bar obtaining the discovery from the individuals themselves. The specific allegations of abuse were horrific, and the court accepted that unlawful immigrants were often threatened with reports to

immigration authorities and the possibility of deportation to punish them for engaging in protected activity, and to deter such activity. The court held that the discovery responses could keep the individual identities of the U-visa applicants anonymous for purposes of liability, since the focus then was on groupwide actions, but that the individual identities may need to be revealed at the remedial stage of plaintiffs prevail.

F. Summary Judgment

1. The Moving Party's Obligations

Chaib v. Geo Group, Inc., 819 F.3d 337, 340-41 (**7th Cir.** 2016), affirmed the grant of summary judgment to the race, sex, and national origin discrimination and retaliation Title VII and § 1981, and Indiana workers' compensation, defendant. The court held that the defendant had no obligation to present the facts in the light most favorable to the employee:

> Before turning to the heart of Chaib's argument, we address her contention that the district court erred by not requiring GEO Group, as the moving party, to present the facts in the light most favorable to Chaib. Chaib has confused the obligation of the moving party with that of the court. The court, of course, must view the record in the light most favorable to the non-moving party and give the benefit of reasonable inferences to the non-moving party. … Counsel preparing an effective motion for summary judgment will bear this principle in mind, of course. Misrepresenting the record or ignoring evidence favorable to the opponent to claim a fact is undisputed can quickly undermine the persuasive force of a motion. … But the idea that a district court would deny an otherwise well-founded motion for summary judgment because the moving party did not present the facts in a manner favorable to the opposition would be unworkable and waste a great deal of time and money. Neither the local rules of the Southern District of Indiana nor our precedents require the district court to take such action.

(Citations omitted.)

2. Modes of Analysis on Summary Judgment

Smith v. Chicago Transit Auth., 806 F.3d 900, 904-05 (**7th Cir.** 2015), affirmed the grant of summary judgment to the Title VII racial discrimination defendant. The court explained the different modes of analysis:

> At the summary-judgment stage, claims of employment discrimination are evaluated under the "direct" method of proof or the "indirect" method of proof announced in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), depending on the kind of evidence the plaintiff presents in opposition to the motion. The "direct" method is a bit of a misnomer: it simply refers to anything other than the *McDonnell Douglas* indirect approach. Under the direct method of proof, the plaintiff can defeat summary judgment by presenting sufficient direct evidence of the employer's discriminatory intent or "a convincing mosaic of circumstantial evidence ... that point[s] directly to a discriminatory reason for the employer's action." … Examples

of relevant circumstantial evidence include "suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group." …

The indirect method is a formal way of analyzing a discrimination case when a certain kind of circumstantial evidence—evidence that similarly situated employees not in the plaintiff's protected class were treated better—would permit a jury to infer discriminatory intent.[1] The plaintiff must first meet his burden of production on the familiar four-part test for establishing a prima facie case: (1) he is a member of a protected class; (2) he performed his job to his employer's expectations; (3) he suffered an adverse employment action; and (4) one or more similarly situated individuals outside his protected class received better treatment. … If the plaintiff does so, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.* The burden then shifts back to the plaintiff to provide evidence establishing a genuine dispute about whether the employer's stated reason was a pretext for prohibited discrimination. "Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." …

(Citations omitted.)

3. Evidence that the Decision-Maker is Not Credible

Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (**4th Cir.** 2015), reversed the grant of summary judgment to the ADA defendant. The court summarized the case:

Christina Jacobs worked as a deputy clerk at a courthouse in New Hanover County, North Carolina. Although she allegedly suffered from social anxiety disorder, her employer assigned her to provide customer service at the courthouse front counter. Believing that her mental illness hindered her ability to perform this inherently social task, Jacobs requested an accommodation—to be assigned to a role with less direct interpersonal interaction. Her employer waited three weeks without acting on her request and then terminated her.

Id. at 564. The court discussed at 575-77 a series of inconsistences and contradictions in defendant's evidence that would allow a reasonable jury to find they were pretextual. The court also stated:

In addition, substantial circumstantial evidence contradicts Tucker's testimony that she decided to fire Jacobs after learning that Jacobs had been sleeping on the job. *See Reeves*, 530 U.S. at 151, 120 S.Ct. 2097 (stating that courts need not credit the moving party's evidence when it is either contradicted or impeached by the nonmoving party). First, even though Jacobs's alleged sleeping was purportedly central to Tucker's decision to fire her, Tucker did not discuss it in the termination meeting or in responding to the EEOC. Rather, the story emerged for the first time during discovery in this suit. Second, Tucker's deposition testimony contains numerous inconsistencies. For example, she testified about a discussion that purportedly took place during the termination meeting,

but that discussion is entirely absent from the unaltered audio recording of that meeting. *See Deville v. Marcantel*, 567 F.3d 156, 165 (5th Cir.2009) (per curiam) ("Summary judgment is not appropriate when 'questions about the credibility of key witnesses loom large' and the evidence could permit the trier-of-fact to treat their testimony with 'skeptical scrutiny.'" (ellipsis omitted) (quoting *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 331 (5th Cir.2000))).

Third, Radewicz—who testified that she observed Jacobs sleeping at her desk and called Tucker while she was away on vacation to let her know—also testified that she was coached by Tucker regarding specific details of her testimony on the morning of her deposition. Fourth and finally, Radewicz's testimony is significantly implausible. Tucker testified that, while she was on vacation, she asked to be called only in the event of an emergency and that the only call she received was from Radewicz. In order to credit Tucker and Radewicz, then, a jury would have to believe that the only "emergency" that occurred in the courthouse during Tucker's three-week vacation was Jacobs's purportedly sleeping on the job. We therefore conclude that Jacobs's circumstantial evidence is sufficient to create a genuine dispute of fact as to whether she was fired for sleeping on the job.

Id. at 576-77 (footnote omitted).

Porter v. Houma Terrebonne Housing Authority Bd. of Com'rs, 810 F.3d 940, 950-51 (**5th Cir.** 2015), reversed the grant of summary judgment to the Title VII retaliation defendant. The court held that plaintiff had shown a triable issue as to pretext, in part by showing that there was reason to doubt the credibility of the decision-maker. The court explained:

The record also contains substantial evidence that might lead a finder of fact to doubt Thibodeaux's credibility. Thibodeaux disavowed memory of any "sexy voice" comments, until confronted with the recording of the voicemail in which he made them. He denied authorship when confronted with an e-mail from his account attributing Porter's behavior to her menstrual cycle, questioning the email's authenticity. Finally, Chairman of the Board Allan Luke recalled that Thibodeaux earlier stated to him that he *did* remember making a "sexy voice" comment and blocking Porter from leaving a room, "to make a point," even though Thibodeaux later denied both allegations.

* * *

Thibodeaux, who had been present at the hearing in which Porter testified against him, acted within his sole discretion to reject Porter's rescission. Porter has raised issues about his credibility, and about the truth of his assertion that she was unhappy in the position. … These circumstances create "'a conflict in substantial evidence' on the question of whether the [HTHA] would not have taken the action 'but for' [Porter's] protected activity."

(Footnote omitted.)

4. FLSA Summary Judgment Improper Where Principal Duties Are Contested

Grage v. N. States Power Co.-Minnesota, 813 F.3d 1051, 1056 (**8th Cir.** 2015), reversed the grant of partial summary judgment on liability to plaintiff, holding that the jury must determine plaintiff's primary duties. The court stated:

> As stated above, NSP and Grage describe her primary duties as a Supervisor I quite differently. However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" should be left to the jury. *Torgerson*, 643 F.3d at 1042 (quoting *Reeves*, 530 U.S. at 150). For this reason alone, granting summary judgment for either party was improper. Here, there are fundamental factual issues that must be decided by a jury. Specifically, the jury needs to weigh the evidence and determine the primary duties Grage performed as a Supervisor I before the court can decide the legal question of whether those duties exclude her from overtime pay under the FLSA. This is not a case where a "rational trier of fact" could not possibly find in favor of the nonmoving party. Id. Factual issues aside, the district court concluded that Grage did not fall within the administrative exemption of the FLSA because she was part of the production of NSP's gas and electricity, not an administrative employee involved in the company's management or general business operations as intended by 29 C.F.R. § 541.201. However, properly instructed, a rational jury could easily disagree. Indeed, NSP's principal endeavor is the production and distribution of energy, i.e., gas and electricity for which commodities customers remunerate NSP.

5. Vague Assertions Will Not Defeat Summary Judgment

Jaburek v. Foxx, 813 F.3d 626, 631-32 (**7th Cir.** 2016), affirmed the grant of summary judgment on plaintiff's claim of discrimination in failure to promote her to the position of Program Analyst because there was no evidence she had ever applied for the position, her e-mails to her supervisors stating that she was doing the work of a Program Analyst were not the same as an application for promotion, there was no evidence anyone else had been promoted to the position in the relevant time period, and her vague testimony about her request for a desk audit of her position was not enough to show a genuine dispute. The court stated:

> Nor is her vague testimony about her request for a desk audit enough to show that she applied for a promotion. She did not specify when she made this request, nor did she give any detail about what she said and whether her request was a step toward a request for a promotion. She merely noted that the auditors "didn't get back" to her. By contrast, Foxx produced the affidavits of Hale, Wilson, and Lay, all of whom swore that Appellant never complained about her lack of compensation, never requested a desk audit from them, and never applied for the position. Even viewing the evidence in the light most favorable to Appellant, there is no evidence that she actually applied for the position of Program Analyst. Having not applied for the position, she could not have been rejected for the position. …

(Citation omitted.)

6. Incorporations of Arguments By Reference Insufficient to Dispute Material Facts

Curtis v. Costco Wholesale Corp., 807 F.3d 215, 219 (**7th Cir.** 2015), affirmed the grant of summary judgment to the FMLA defendant. The court held that plaintiff's response to the defendant's statement of undisputed facts was thoroughly inadequate:

> A review of Curtis's responsive separate statement shows the district court did not abuse its discretion. Curtis failed to admit or deny facts and provided only boilerplate objections, such as "relevance" and "vague and ambiguous." The district court did not abuse its discretion in deeming these facts admitted. …
>
> Most importantly, Curtis failed to provide citation to any admissible evidence in support of his denials. Curtis argues that his references to other paragraphs within his responsive statement or his additional separate statement are sufficient to meet the requirement that he cite to "specific references to the affidavits, parts of the record, and other supporting materials relied upon" to support his denials. N.D. Ill. R. 56.1(b)(3)(B). We disagree with Curtis for two reasons. First, in this case, Curtis's additional separate statement is procedurally flawed: it is replete with legal arguments, rather than presenting clear, undisputed material facts supported by admissible evidence. Reference to legal arguments to support a denial of a material fact is not contemplated by the rule. Second, and perhaps more importantly, if we were to accept Curtis's reasoning, we would undermine our established precedent that district courts are not required to "wade through improper denials and legal argument in search of a genuinely disputed fact." …
>
> The purpose of Rule 56.1 is to have the litigants present to the district court a clear, concise list of material facts that are central to the summary judgment determination. It is the litigants' duty to clearly identify material facts in dispute and provide the admissible evidence that tends to prove or disprove the proffered fact. A litigant who denies a material fact is required to provide the admissible evidence that supports his denial in a clear, concise, and obvious fashion, for quick reference of the court. The district court did not abuse its discretion in finding Curtis failed to comply with Rule 56.1 requirements.

(Citations omitted.) The court also rejected plaintiff's argument that the lower court was required to make a ruling on each material fact.

G. Class Actions and Collective Actions

1. Supreme Court

a. *Tyson Foods, Inc. v. Bouaphakeo*

Tyson Foods, Inc. v. Bouaphakeo, --- **U.S.** ----, 136 S.Ct. 1036 (2016) (Kennedy, J.), affirmed the $2.9 million judgment on a jury verdict for the plaintiffs in an FLSA class action and Iowa Wage Payment and Collection Law class action. The Court noted at *5: "A total of 444 employees joined the collective action, while the Rule 23 class contained 3,344 members." The case involved claims for overtime for time spent donning and doffing protective gear in a

hog slaughtering and butchering operation, where different workers donned and doffed different protective gear, depending on their tasks that day. The Court described the questions and methodology used for the representative sample:

> The case proceeded to trial before a jury. The parties stipulated that the employees were entitled to be paid for donning and doffing of certain equipment worn to protect from knife cuts. The jury was left to determine whether the time spent donning and doffing other protective equipment was compensable; whether Tyson was required to pay for donning and doffing during meal breaks; and the total amount of time spent on work that was not compensated under Tyson's gang-time system.
>
> Since the employees' claims relate only to overtime, each employee had to show he or she worked more than 40 hours a week, inclusive of time spent donning and doffing, in order to recover. As a result of Tyson's failure to keep records of donning and doffing time, however, the employees were forced to rely on what the parties describe as "representative evidence." This evidence included employee testimony, video recordings of donning and doffing at the plant, and, most important, a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mericle conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department.
>
> Although it had not kept records for time spent donning and doffing, Tyson had information regarding each employee's gang-time and K-code time. Using this data, the employees' other expert, Dr. Liesl Fox, was able to estimate the amount of uncompensated work each employee did by adding Mericle's estimated average donning and doffing time to the gang-time each employee worked and then subtracting any K-code time. For example, if an employee in the kill department had worked 39.125 hours of gang-time in a 6–day workweek and had been paid an hour of K-code time, the estimated number of compensable hours the employee worked would be: 39.125 (individual number of gang-time hours worked) + 2.125 (the average donning and doffing hours for a 6–day week, based on Mericle's estimated average of 21.25 minutes a day) - 1 (K-code hours) = 40.25. That would mean the employee was being undercompensated by a quarter of an hour of overtime a week, in violation of the FLSA. On the other hand, if the employee's records showed only 38 hours of gang-time and an hour of K-code time, the calculation would be: 38 + 2.125 - 1 = 39.125. Having worked less than 40 hours, that employee would not be entitled to overtime pay and would not have proved an FLSA violation.
>
> Using this methodology, Fox stated that 212 employees did not meet the 40–hour threshold and could not recover. The remaining class members, Fox maintained, had potentially been undercompensated to some degree.

Id. at 1043-44. Defendant did not request a *Daubert* hearing as to plaintiffs' experts and methodology, and did not use a rebuttal expert. "Instead, as it had done in its opposition to class certification, petitioner argued to the jury that the varying amounts of time it took employees to don and doff different protective equipment made the lawsuit too speculative for classwide

recovery." *Id.* at 1044. The jury found that donning and doffing was an integral part of the job at the beginning and ending of a shift, but not tor lunch breaks, and cut the requested award by more than half. The Court made the following observations that are likely to be discussed often in future cases:

> Petitioner challenges the class certification of the state-law claims and the certification of the FLSA collective action. The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.
>
> Furthermore, as noted above, Iowa's Wage Payment Collection Law was used in this litigation as a state-law mechanism for recovery of FLSA-mandated overtime pay. The parties do not dispute that, in order to prove a violation of the Iowa statute, the employees had to do no more than demonstrate a violation of the FLSA. In this opinion, then, no distinction is made between the requirements for the class action raising the state-law claims and the collective action raising the federal claims.

Id. at 1045. Tyson Foods argued that plaintiffs did not meet the predominance test, because although the question of compensability was an important common question, the case required individual proof from each individual. The Court stated:

> … Petitioner argues that these necessarily person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper.
>
> Respondents counter that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample. Whether this inference is permissible becomes the central dispute in this case. Petitioner contends that Mericle's study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution. Reliance on a representative sample, petitioner argues, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.
>
> Calling this unfair, petitioner and various of its *amici* maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702.

> It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases. Evidence of this type is used in various substantive realms of the law. Brief for Complex Litigation Law Professors as *Amici Curiae* 5–9; Brief for Economists et al. as *Amici Curiae* 8–Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action," *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. 804, 809, 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011).
>
> In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation § 11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge ... any substantive right." 28 U.S.C. § 2072(b).
>
> One way for respondents to show, then, that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.

Id. at 1046-47. The Court then rejected defendant's and its *amici*'s arguments that the Court's earlier decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), precluded the use of representative samples:

> Reliance on Mericle's study did not deprive petitioner of its ability to litigate individual defenses. Since there were no alternative means for the employees to establish their hours worked, petitioner's primary defense was to show that Mericle's study was unrepresentative or inaccurate. That defense is itself common to the claims made by all class members. Respondents' "failure of proof on th[is] common question" likely would have ended "the litigation and thus [would not have] cause[d] individual questions ... to overwhelm questions common to the class." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,* 568 U.S. ——, ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013). When, as here, "the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification." Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 107 (2009).
>
> Petitioner's reliance on *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), is misplaced. *Wal–Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.

Wal–Mart involved a nationwide Title VII class of over 1½ million employees. In reversing class certification, this Court did not reach Rule 23(b)(3)'s predominance prong, holding instead that the class failed to meet even Rule 23(a)'s more basic requirement that class members share a common question of fact or law. The plaintiffs in *Wal–Mart* did not provide significant proof of a common policy of discrimination to which each employee was subject. "The only corporate policy that the plaintiffs' evidence convincingly establishe[d was] Wal–Mart's 'policy' of allowing discretion by local supervisors over employment matters"; and even then, the plaintiffs could not identify "a common mode of exercising discretion that pervade[d] the entire company." *Id.,* at 355–356, 131 S.Ct. 2541 (emphasis deleted).

The plaintiffs in *Wal–Mart* proposed to use representative evidence as a means of overcoming this absence of a common policy. Under their proposed methodology, a "sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master." *Id.,* at 367, 131 S.Ct. 2541. The aggregate damages award was to be derived by taking the "percentage of claims determined to be valid" from this sample and applying it to the rest of the class, and then multiplying the "number of (presumptively) valid claims" by "the average backpay award in the sample set." *Ibid.* The Court held that this "Trial By Formula" was contrary to the Rules Enabling Act because it "'enlarge[d]'" the class members' "'substantive right[s]'" and deprived defendants of their right to litigate statutory defenses to individual claims. *Ibid.*

The Court's holding in the instant case is in accord with *Wal–Mart*. The underlying question in *Wal–Mart,* as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. By extension, if the employees had brought 1½million individual suits, there would be little or no role for representative evidence. Permitting the use of that sample in a class action, therefore, would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.

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

This is not to say that all inferences drawn from representative evidence in an FLSA case are "just and reasonable." *Mt. Clemens,* 328 U.S., at 687, 66 S.Ct. 1187. Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents'

> experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence.

Id. at 1047-48. The Court held that it was premature to address the new question defendant raised, as to whether there were any ways to exclude uninjured class members from sharing in the recovery, and remanded the question of distribution of the award to the lower courts. The Court observed that the defendant may have invited error:

> Finally, it bears emphasis that this problem appears to be one of petitioner's own making. Respondents proposed bifurcating between the liability and damages phases of this proceeding for the precise reason that it may be difficult to remove uninjured individuals from the class after an award is rendered. It was petitioner who argued against that option and now seeks to profit from the difficulty it caused. Whether, in light of the foregoing, any error should be deemed invited, is a question for the District Court to address in the first instance.

Id. at 1050. Chief Justice Roberts joined the 6-2 opinion in full, but wrote a concurring opinion, which Justice Alito joined. The Chief Justice observed that a general verdict, without special interrogatories, made it impossible to determine whether the jury accepted the time-study expert's conclusions but trimmed them equally, or found that they overstated or understated the losses in different departments, as to which the expert had made different findings. On remand, he was not certain the verdict could stand. *Id.* at 1050-*53. Justice Thomas, joined by Justice Alito, dissented. *Id.* at 1053-61.

Comment of Richard Seymour on *Tyson Foods, Inc. v. Bouaphakeo*: There are four take-aways for changes in litigation arising from this case. *First*, defense counsel will be less likely to rely on abstract arguments like "speculation" in lieu of focusing on the facts and expert analysis.

Second, there will be new arguments that plaintiffs seeking judicial approval of collective actions must meet Rule 23-level requirements. Generally, practitioners and the lower courts have treated judicial approval of a collective action under 29 U.S.C. § 216(b) as requiring a much lesser showing than class certification under Rule 23. The Court's *dicta* is likely to result in arguments by defense counsel that the Court was changing the requirements for approval of a collective action. Plaintiffs' counsel may have to take class-certification-type discovery in order to meet such a higher burden, and should argue (a) that it is incorrect to push unconsidered *dicta* anywhere near having such an extreme effect, particularly since plaintiffs had already met Rule 2e3 standards in *Bouaphakeo* and the Court saw no need to make a distinction; (b) if they have to meet a higher burden, the time to file consent forms should be tolled while this is taking place, or (c) that the right time for examining Rule 23-type questions is at the decertification stage so that consent forms can be filed timely.

Third, opt-in rates for FLSA, ADEA, and Equal Pay Act collective actions are traditionally quite low because of fears of reprisal, distrust of the legal system, worries by undocumented workers, and similar factors, but by the simple expedient of having a Rule 23 class for State-law claims, plaintiffs were able to include *more than seven times as many class members as collective-action members*.

Fourth, in those cases in which plaintiffs seek jury trials—many FLSA plaintiffs' attorneys do not—the use of special interrogatories may be essential to protect against the kind of problem described by the Chief Justice.

b. ***Campbell-Ewald Co. v. Gomez***

Campbell-Ewald Co. v. Gomez, --- U.S. ----, 136 S.Ct. 663, 666 (2016), stated its holding in the first paragraph of the Court's opinion:

> Is an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated? This question, on which Courts of Appeals have divided, was reserved in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ——, ——, —— –, n. 4, 133 S. Ct. 1523, 1528, 1529, n. 4, 185 L.Ed.2d 636 (2013). We hold today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists.

The Court also held "While a class lacks independent status until certified, see *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S. Ct. 553, 42 L.Ed.2d 532 (1975), a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* at 672. Finally, the Court reserved an interesting question, stating:

> We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.

Id.

2. Reversing Denial of Class Certification Where One Issue Satisfies Predominance

Costello v. BeavEx, Inc., 810 F.3d 1045 (**7th Cir.** 2016), reversed the denial of class certification for claims under the Illinois Wage Payment and Collection Act. The IWPCA requires that employers make three separate showings in order to defeat the presumption of an employment relationship. The lower court held that the first prong, showing the employer's lack of control in fact, required individualized inquiry and defeated the predominance requirement. Reversing, the Seventh Circuit held that the second prong easily satisfied the predominance requirement and its resolution would not be tantamount to a decision on the merits. Moreover, the court held, the first prong also satisfied the predominance requirement because nothing in Illinois law precluded classwide evidence on the "control in fact" issue.

3. FLSA Collective Actions and Rule 23 State-Law Class Actions

Calderone v. Scott, --- F.3d ---, 2016 WL 5403589 (11th Cir. Sept. 28, 2016) (No. 15-14187), held at *1 that there was nothing inconsistent or irreconcilable in having both an opt-in FLSA collective action and an opt-out Rule 23 class action on State wage & hour claims:

> This interlocutory appeal asks whether employees may maintain a collective action against their employer under § 216(b) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*, at the same time as a class action brought based on state law and pursuant to Federal Rule of Civil Procedure 23(b)(3). The FLSA's § 216(b) requires plaintiffs to "opt in" to be considered class members. In contrast, a Rule 23(b)(3) class action requires plaintiffs to "opt out" if they do not wish to be bound by the court's judgment. The District Court found that, under *LaChapelle v. Owens–Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) (per curiam), these two types of actions are "mutually exclusive and irreconcilable."
>
> We reverse because we conclude that an FLSA collective action and a Rule 23(b)(3) state-law class action may be maintained in the same proceeding. We join the D.C., Second, Third, Seventh, and Ninth Circuits in so holding. *See Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 528–30 (9th Cir. 2013), *rev'd on other grounds*, *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. ——, 135 S.Ct. 513, 190 L.Ed.2d 410 (2014); *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 259–62 (3d Cir. 2012); *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 247–49 (2d Cir. 2011); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 973–74 (7th Cir. 2011); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 424 (D.C. Cir. 2006).

(Footnote omitted.)

4. 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 promotees, 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.

H. Arbitration

1. Preemption of State Laws by the FAA

DIRECTV, Inc. v. Imburgia, --- U.S. ----, 136 S. Ct. 463 (2015), held that the petitioner's consumer arbitration agreement with its class-action waiver was enforceable, notwithstanding language that stated it would not be enforceable if "the law of your State" made the waiver unenforceable. The State in question was California, and at the time of the agreement State law barred enforcement of arbitration agreements with class action waivers. The Court's later decision in *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) held that this California rule was pre-empted by the Federal Arbitration Act, 9 U.S.C. § 2. The Court held that the phrase "law of your State" must be construed to refer to *valid* law of the State, and that the agreement was therefore enforceable.

I. Evidence

1. Defendant's Unpreserved Objection to Hearsay

Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 537 (**1st Cir.** 2015), affirmed the district court's denial of its motion for a new trial of the FLSA and Massachusetts-law retaliation

claims against it. The lower court admitted testimony from plaintiff that a manager had told him he would be fired for bringing a wage & hour class action, and later stated it thought it had made a mistake. However, defendant did not raise the point in its motion for a new trial, so only plain-error review was available. The court held that defendant waived even plain-error review by its inadequate briefing:

> But FSS raised this new-trial argument only by referencing it in a single sentence in the summary of argument, and in another lone sentence in the argument section that is accompanied by a citation to a single case that involved a preserved evidentiary argument and so did not involve plain-error review. FSS thus makes no argument on appeal for why we should conclude the District Court's error here (if indeed there was error) was clear and obvious, prejudicial, and resulted in a miscarriage of justice, as we would have to conclude to reverse under the plain-error standard.

2. Other Instances of Discrimination or Harassment

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 313 **(6th Cir.** 2016), affirmed the judgment on a jury verdict for the Title VII male-on-male sexual harassment plaintiff. The court also affirmed the lower court's denial of defendant's motion for a new trial based on the receipt of evidence of other instances of the harasser's harassment of other men, of which plaintiff and defendant were unaware during plaintiff's employment, because such instances were relevant to proving that the harassment was because of the plaintiff's male sex.

3. Party Admissions

Village of Freeport v. Barrella, 814 F.3d 594, 614-15 (**2d Cir.** 2016), affirmed the lower court's denial of defendants' Rule 50 motion for judgment as a matter of law, but vacated the judgment and remanded for a new trial. The court held that the defendants' public announcements praising the selection of the new Police Chief as the first Latino Police Chief in the Village's history was not an admission of discrimination. The court stated:

> We begin with the obvious point that an employer need not feign ignorance of an employee's race to avoid violating federal antidiscrimination law. Indeed, the Supreme Court has expressly acknowledged the lawfulness of affirmative-action initiatives designed to remedy past discrimination, as long as they do not employ tools, "such as quota systems, set-aside programs, and differential scoring cutoffs, which utilize express racial classifications and which prevent non-minorities from competing for specific slots." Accordingly, an employer's stated desire for diversity in the workplace does not, without more, establish discriminatory intent with respect to any particular employment decision.
>
> Moreover, neither § 1981 nor Title VII categorically forbids politicians from considering an appointment's political implications. As the Seventh Circuit has observed, "it is not a violation of Title VII"—or of § 1981—"to take advantage of a situation to gain political favor." Indeed, the urge of politicians to take credit for hiring or promoting members of hitherto underrepresented communities has often "been a powerful means of achieving the social and political integration of excluded groups."

> Of course, ethnic politics is not always benign. A governmental employer may not excuse otherwise unlawful discrimination by pleading that it was simply responding to voters' preferences. Our point is only that an otherwise lawful employment decision—one that was made for race-neutral reasons or as part of a lawful affirmative-action plan—does not become unlawful merely because the decision-maker believed that some voters might evaluate that decision at least partly through the lens of identity politics.

(Footnotes omitted.)

4. "Self-Serving" Testimony

Liebman v. Metro. Life Ins. Co., 808 F.3d 1294, 1299 (**11th Cir.** 2015), vacated the grant of summary judgment to the ADEA defendant and remanded the case. The court held that the lower court erred in dismissing the case in part because of its finding that plaintiff did not meet the defendant's legitimate qualifications. The court relied in part on plaintiff's long tenure with the defendant, and continued:

> Beyond that (and viewing the facts in the light most favorable to Liebman), there is significant evidence that he was qualified for his position. For example, he received many leadership awards during his 27 years at MetLife. In 2009, 2010, and 2011, his was the top branch for MetLife's Cypress Financial Group. The district court characterized Liebman's reliance on this evidence as presenting "self-serving statements" that he was a wonderful employee. But even if a party's statements "are self-serving, ... that alone does not permit us to disregard them at the summary judgment stage." *Feliciano v. City of Miami Beach,* 707 F.3d 1244, 1253 (11th Cir.2013); *see also Price v. Time, Inc.,* 416 F.3d 1327, 1345 (11th Cir.2005) ("Courts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving."). The district court erred in disregarding Liebman's sworn statements and in finding that Liebman failed to establish that he was qualified for the position.

5. Litigiousness

Nelson v. City of Chicago, --- F.3d ----, 2016 WL 234535 (**7th Cir.** Jan. 20, 2016), a § 1983 false arrest case, reversed the judgment for defendants and remanded the case. The court stated that evidence of litigiousness should ordinarily be barred, and described the exceptions:

> As a general matter, "a plaintiff's litigiousness may have some slight probative value, but that value is outweighed by the substantial danger of jury bias against the chronic litigant." … There are rare exceptions when the evidence is admitted for reasons other than to show the plaintiff's litigious character and it is sufficiently probative to survive Rule 403 balancing. For example, in … a workplace sexual-harassment suit, we affirmed the district court's decision to admit testimony that the plaintiff had sued three of his former employers because the evidence was probative of his "*modus operandi* of creating fraudulent documents in anticipation of litigation." We also noted that the evidence helped explain why the employer in that case had kept a detailed record of the plaintiff's actions. …. Finally, the evidence provided insight into the plaintiff's mental

state and alleged damages because he had not mentioned the earlier suits to his expert psychologist. …

Here, however, neither of the reasons for admitting this evidence holds up. We fail to see how evidence of Nelson's other suits qualifies as impeachment. Nothing in his direct testimony could be contradicted by evidence that he had filed other suits against the City. The judge apparently thought that Nelson's testimony about his public-service experience left a general impression that he had a "cordial relationship" with local police. But Nelson never claimed to have wholly placid relations with the Chicago Police Department. Rather, he testified: "I complain when I see some-thing wrong, I fully do.... If I see the officer doing wrong, I complain about it. If they ['re] doing right, I praise them for doing the[ir] jobs."

The damages rationale fares no better. Without knowing more about the facts underlying the prior suits, there's no way for the jury to meaningfully evaluate this evidence vis-à-vis Nelson's claimed damages in this case. The City had no interest in putting the facts of the prior lawsuits before the jury, so it's not surprising that it did not do so. As such, the only possible purpose for admitting this evidence was to brand Nelson as a litigious person who (at best) had thin skin or (at worst) had a vendetta against the Chicago Police Department and was gaming the system to make an easy buck. Those inferences are especially prejudicial in a false-arrest suit with no third-party witnesses because the plaintiff is always vulnerable to the accusation that he made everything up. The gratuitous question about Nelson's lawyer—apparently meant to suggest the attorney and her client were in cahoots in a scheme to defraud the City—compounded the prejudice.

The defendants insist that Nelson's testimony about his favorable settlements with the City would lead the jury to conclude that his earlier claims were meritorious. Maybe so; but we think there's a significant chance that the jury also concluded that the City had paid Nelson enough already. That was certainly the thrust of the defense attorney's closing argument. The evidence of his prior lawsuits should not have been admitted.

The court held that "the formulaic recitation of a pro forma limiting instruction" was not enough to cure the prejudice.

6. Error in Admitting Speculation as Lay Opinion Testimony

Village of Freeport v. Barrella, 814 F.3d 594, 612 (**2d Cir.** 2016), affirmed the lower court's denial of defendants' Rule 50 motion for judgment as a matter of law, but vacated the judgment and remanded for a new trial. The court stated at:

In short, the District Court permitted Gros and Maguire to testify that Hardwick had recommended individuals for promotion based on their race, despite those witnesses' admissions that they had no personal knowledge of Hardwick's selection process and only the vaguest idea of the relevant candidates' qualifications. Such testimony was not helpful to the jury in the sense required by Rule 701(b), and the District Court's decision to allow the jury to consider it was an "abuse of discretion."

(Footnote omitted.) The court held that the error was prejudicial because it was a close case.

J. Instructions

Ernst v. City of Chicago, --- F.3d ---, 2016 WL 4978377 (7th Cir. Sept. 19, 2016) (No. 14-3783), vacated and remanded the jury verdict for defendant on plaintiff's disparate-treatment claim involving the City's adoption of new and allegedly unnecessary physical skills tests for hiring. Plaintiffs south to prove that the adoption of this scoring system was intentionally discriminatory against women, but the lower court refused to issue such an instruction. The court explained:

> Here, the jury should have been instructed on the plaintiffs' burden of proving that Chicago was motivated by anti-female bias, when Chicago created the entrance exam that caused these plaintiffs not to be hired. … Instead, jurors were instructed on a different burden, which failed to address Chicago's motive for creating the skills test: "To determine that a Plaintiff was not hired because of her gender, you must decide that the City would have hired the Plaintiff had she been male but everything else had been the same." This instruction focused on gender as a factor in the specific decisions not to hire these five plaintiffs, without expressly stating the mandatory question: whether Chicago had an anti-female motivation for creating its skills test. The magistrate judge's version of Instruction 24 more accurately reflected Title VII's focus on whether there was a discriminatory motive behind Chicago's conduct. …
>
> This legal error would be enough to establish prejudice, but the record goes a step further. It shows that the jurors saw this instruction as the pivotal issue before them, particularly when they sent a note stating that "[t]he jury cannot deliberate further without a response to our question." Only four minutes after the district judge instructed them to take Instruction 24 at face value, they returned a defense verdict. Under these circumstances, we must remand the disparate-treatment claims for a new trial with proper instruction, namely, the magistrate judge's version of Jury Instruction 24.

Id. at *4-*5 (citations omitted).

E.E.O.C. v. AutoZone, Inc., 809 F.3d 916, 923 (**7th Cir.** 2016), affirmed the judgment on a jury verdict for the ADA defendant. Zych, the charging party, had a permanent 15-pound lifting restriction. Her job, Parts Sales Manager, routinely involved the listing of numerous much heavier objects, such as car batteries, brakes, rotors struts, etc., stocking the items, bringing them from stock for the customer's inspection, and then carrying them to the costumer's car. The jury found that the charging party was not a qualified individual with a disability. The court rejected the EEOC's argument that the lower court abused its discretion in refusing to instruct the jury on its team concept argument. It explained:

> Furthermore, "a judge need not deliver instructions describing all valid legal principles." … "Rather than describing each possible inference of the evidence, the judge may and usually should leave the subject of the interpretation of the evidence to the argument of counsel." … In this case, the EEOC's proposed team concept instruction was an attempt to have the jury draw an inference that heavy lifting was not an essential

> function of the PSM position because Zych's co-workers could lift the items that Zych was unable to. The district court was not obligated to promulgate such an inference within the jury instructions. Rather, it was proper for the district court to instead allow the EEOC to make its team concept argument to the jury in its closing arguments.

(Citations omitted.) The court held that, considering the instructions as a whole and the EEOC's abandonment of the theory by failing to argue it to the jury, the EEOC was not prejudiced by the denial of the instruction:

> Although the district court denied the instruction, the judge allowed the EEOC to argue its team concept theory to the jury during its closing arguments. Yet, the EEOC abandoned this theory, and instead claimed during closing arguments that heavy lifting was a "marginal function" of the PSM position. Since the EEOC decided not to present the team concept argument, despite the district court expressly stating that it could, the EEOC cannot now claim that it was prejudiced by the district court's refusal to admit its proposed jury instruction.

Id. (footnote omitted).

K. After-Acquired Evidence

Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 539 (**1st Cir.** 2015), affirmed in part, and reversed in part, the judgment on a jury verdict for the FLSA and Massachusetts-law retaliation plaintiff. The jury awarded $90,000 in back pay, which was trebled under Massachusetts law. The court rejected defendant's contention that its stated reason for firing plaintiff, which the jury had rejected as a pretext for retaliation, was after-acquired evidence blocking plaintiff's back-pay claim:

> FSS next argues that the back-pay damages should be eliminated under the "after-acquired evidence doctrine," which we have described as cutting off damages "at the time that the defendant discovers evidence that *would have* led it to fire the plaintiff on legitimate grounds." … But FSS's tip-reporting policy stated only that failure to file a tip-reporting sheet each pay period "may" lead to termination. There was no evidence in the record that a skycap had been terminated for failure to report tips, much less any evidence indicating that Travers's infractions would have led to termination. We thus conclude that the District Court did not abuse its discretion in withholding this equitable remedy. …

L. Back Pay

1. Equitable Defenses to Back Pay: Plaintiff's Tax Fraud

Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 538-39 (**1st Cir.** 2015), affirmed in part, and reversed in part, the judgment on a jury verdict for the FLSA and Massachusetts-law retaliation plaintiff. The jury found that plaintiff's back pay was $90,000. This amount was trebled under State law. The court rejected defendant's argument that plaintiff had unclean hands because he under-reported his tips, and that he should not have been awarded back pay. The court stated:

> The doctrine of unclean hands only applies when the claimant's misconduct is directly related to the merits of the controversy between the parties, that is, when the tawdry acts in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication." … FSS cites no evidence, however, indicating that Travers's under-reporting of tips affected his equitable relationship with FSS in the context of this retaliation case, and not just his relationship with the government in the context of a potential tax complication. … And, even assuming Travers did harm FSS by under-reporting his tips, FSS does not cite evidence indicating the magnitude or nature of that harm. Accordingly, we decline to disturb the District Court's weighing of the equities. We thus conclude the District Court acted well within its discretion in rejecting the unclean-hands argument.

2. Calculation of Back Pay

Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 539 (**1st Cir.** 2015), affirmed in part, and reversed in part, the judgment on a jury verdict for the FLSA and Massachusetts-law retaliation plaintiff, a former skycap. The jury found that plaintiff's back pay was $90,000. This amount was trebled under State law. The court rejected defendant's argument that back pay should have been calculated on the basis of the daily tips he reported, not on the basis of the tips he testified to receiving. The court stated:

> Finally, FSS argues that the back-pay award of $90,000 is unsupported by the evidence if we credit the amount of tips Travers reported to FSS—sometimes just $40 a day—rather than the much higher amounts of $200 to $250 a day that he testified to receiving. But FSS cites no authority for its assertion that a jury, in making the loss calculation, could not rely on Travers's testimony about what he had lost and that a jury was required instead to rely only on what Travers reported in terms of tip income. Thus, because evidence that the jury was entitled to credit supported the back-pay award—as the jury could have found that Travers did not report the full extent of his tip income—we see no basis for reversal. …

(Citations omitted.)

3. Interim Earnings

NLRB v. Community Health Services, Inc., --- F.3d ----, 2016 WL 231409 (**10th Cir.** Jan. 20, 2016), affirmed an NLRB remedial order that awarded back pay, without a reduction for interim earnings, in a case in which the employer had reduced the employees' hours of work but had not fired them. The court upheld each of the Board's justifications, including the Board's position that there is no duty under the National Labor Relations Act to mitigate damages when the employer reduces hours or pay, but does not fire the employee.

M. Front Pay

Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 545-46 (**1st Cir.** 2015), affirmed in part, and reversed in part, the judgment on a jury verdict for the FLSA and Massachusetts-law retaliation plaintiff, a former skycap. The jury awarded 20 years of front pay, $450,000, which

the district judge reduced to zero. The court held that an award of twenty years of back pay was speculative on the record, but that some front pay should have bene awarded:

> But the District Court did not merely reject a $450,000 front-pay award. The District Court ordered the complete elimination of front-pay damages, notwithstanding the evidence of the losses Travers testified that he would sustain going forward and notwithstanding his testimony that he had intended to stay in his job at FSS had he not been fired. That evidence, however, was sufficient to permit a reasonable jury to award some front-pay damages greater than zero. … Accordingly, we vacate the District Court's order eliminating the jury's front-pay award and remand for the District Court to consider the issue anew.

(Citations omitted.)

N. Compensatory Damages

Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 540-41 (**1st Cir.** 2015), affirmed the lower court's refusal to order a remittitur to $10,000, instead of the $50,000 remittitur it ordered, of plaintiff's FLSA and Massachusetts-law retaliation compensatory-damages award.

> Here, there was testimony about the emotional impact on Travers of FSS's firing him for his efforts to recover in court for other alleged wrongs of FSS. Specifically, Travers testified that when he was eventually fired "[i]t hurt a lot" because he "loved that job," and that he "put in a lot of time" and "prided [him]self in ... working there, and for so long, too." He further testified that, despite his lack of education and low-income upbringing, this job allowed him to "support [his] kids"—and that when he lost the job "it was embarrassing" and "hard to explain" to people, such as his sick mother.
>
> Thus, Travers testified that, after the firing, he was "depressed," "didn't want to take [his] son out" or "do any of the things [he] usually did," and "didn't want to get up in the morning some days." He also testified that the stress of trying to pick up more shifts at other jobs "was a little bit hard [ ] on [his] family life," and that it especially led to more fights with his girlfriend. And, according to Travers's girlfriend, this depressed mood persisted for "a couple of months, three, four, five months."

(Footnotes omitted.) The court held that this was enough to support a $50,000 damages award. *Id.* at 541-42. The court held that the jury could reasonably have rejected the defendant's argument that plaintiff's emotional distress was caused by his mother's Alzheimer's. *Id.* at 541 n.8. The court also held that compensatory damages under Massachusetts law were not subject to trebling under that law. *Id.* at 546.

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.)

O. Attorneys' Fees

1. Title VII Fee Awards Against the EEOC

CRST Van Expedited v. EEOC, --- **U.S.** ----, 136 S. Ct. 1642, 1646 (2016), reversed the denial of attorneys' fees to the defendant, based on the Eighth Circuit's view that a precondition for such an award was prevailing on the merits, and a dismissal because the EEOC had failed in its presuit obligations of investigation and conciliation was not prevailing on the merits. The court held:

> This case involves the interpretation of a statutory provision allowing district courts to award attorney's fees to defendants in employment discrimination actions. Under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.,* which prohibits discrimination in employment, a district court may award attorney's fees to "the prevailing party." § 2000e–5(k). The Court of Appeals for the Eighth Circuit held that a Title VII defendant prevails only by obtaining a "ruling on the merits." … This Court disagrees with that conclusion. The Court now holds that a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed.

The Court stated: "The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Id.* at 1652. Justice Kennedy wrote the opinion for a unanimous Court. Justice Thomas filed a concurring opinion.

2. State Courts Bound to Follow Federal Law When Awarding Fees to Prevailing Defendants Under Federal Law

James v. City of Boise, --- U.S. ----, 136 S. Ct. 685, 686-87 (2016) (*per curiam*), unanimously reversed the Supreme Court of Idaho, which awarded attorneys' fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. § 1988, based on its view that State courts are not required to follow Federal constructions of the statutes they are applying. The Court stated:

> Section 1988 is a federal statute. "It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." … And for good reason. As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the

same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 348, 4 L.Ed. 97 (1816). The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise. The judgment of the Idaho Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

3. Amount

Pickett v. Sheridan Health Care Ctr., 813 F.3d 640 (**7th Cir.** 2016), affirmed a fee award in a Title VII retaliation case, at $425 an hour for lead counsel. The district court rejected plaintiff's affidavits from other attorneys attesting to higher hourly rates, because those attorneys did not have the disciplinary history of plaintiff's attorney. The court explained at 646:

> Since discipline is a factor in a lawyer's reputation and the court had to consider Rossiello's reputation in calculating his hourly rate, the district court did not err by considering Rossiello's disciplinary history.

The court affirmed the denial of prejudgment interest on the fees claimed before the decision on the second appeal, because plaintiff did not request it when moving for fees. It stated at 647:

> We have said that if a plaintiff has failed to plead prejudgment interest relief in her complaint, the plaintiff must request prejudgment interest, at the latest, in a post-trial motion or else it is waived. … We have found no abuse of discretion where a district court has denied a party's request for prejudgment interest that was made for the first time after a remand and a second entry of judgment.

(Citations omitted.)

P. Recalling Jury When Error Found in Verdict Form After Jury Discharged

Dietz v. Bouldin, --- **U.S.** ----, 136 S. Ct. 1885, 1890 (2016), involved a jury that was discharged before anyone realized that it had failed to award the stipulated medical expenses. Defendant admitted negligence, so the only disputed issue at trial for the jury to resolve was whether plaintiff was entitled to damages above $10,136. The court sent the marshal to bring the jurors back; only one had left the courthouse but that person returned. Over the plaintiff's objection, the court re-empaneled the jurors, explained the problem, and ordered the jury to return the next day to resume a new deliberation on damages. The jury did so, and returned a verdict for plaintiff for more than the stipulated medical expenses. The court set forth its holding succinctly:

> In this case, a jury returned a legally impermissible verdict. The trial judge did not realize the error until shortly after he excused the jury. He brought the jury back and ordered them to deliberate again to correct the mistake. The question before us is whether a federal district court can recall a jury it has discharged, or whether the court can remedy the error only by ordering a new trial.

> This Court now holds that a federal district court has the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict. Because the potential of tainting jurors and the jury process after discharge is extraordinarily high, however, this power is limited in duration and scope, and must be exercised carefully to avoid any potential prejudice.

Justice Sotomayor delivered the opinion of the Court, in which the Chief Justice and Justices Ginsburg, Breyer, Alito, and Kagan joined. Justice Thomas filed a dissenting opinion, in which Justice Kennedy joined.

Q. New Trial

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 312 **(6th Cir.** 2016), affirmed the judgment on a jury verdict for the Title VII male-on-male sexual harassment plaintiff. The court also affirmed at the lower court's denial of defendant's motion for a new trial based on plaintiff's counsel's asserted misconduct. The court explained the standard:

> Where the motion is based on alleged attorney misconduct, as here, the movant must make a "concrete showing" that the conduct "consistently permeated" the trial such that the moving party was unfairly prejudiced by the misconduct. … This Court then considers "the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case ... and the verdict itself." …

(Citations omitted.) The court held that the problems in question did not rise to this level.

R. Sanctions

Egan v. Pineda, 808 F.3d 1180, 1180-81 (**7th Cir.** 2015), affirmed a $5,000 sanction against plaintiff's attorney for including in his 100-paragraph Complaint allegations that the female plaintiff "was repeatedly caused to be subjected to unwelcome verbal and physical actions of a sexual nature and was further victimized by acts of sexual assault by the' male employees in her work environment throughout her employment tenure … ." A named defendant, David Pineda, was a former owner of the corporate defendant. The court stated:

> … The paragraph we quoted could thus be understood to be accusing Pineda of having subjected the plaintiff to unwelcome "physical actions of a sexual nature" and of having been responsible for sexual assaults on her by male employees of Huntington. Yet at her deposition Egan emphatically denied having been sexually assaulted (or otherwise subjected to unwanted physical contact) by Huntington personnel during her employment by the firm. When asked why she had alleged such conduct in her complaint she said she hadn't written or even seen the quoted passage or signed the complaint. Spicer concedes that the allegations in the paragraph were false. Pineda filed a motion for sanctions against Spicer for filing a false, and very damaging, complaint against him.

The court was not impressed by plaintiff's counsel's explanation that the inclusion of this language was a proofreading error:

> … How could it have been a "simple" error, let alone a proofreading error? Proofreading means carefully reading a text to find and correct typographical, grammatical, stylistic, and spelling errors. Maybe Spicer meant that someone else had written paragraph 75 and that he (Spicer) in proofreading it had failed to catch the errors. But the errors were not typographical, grammatical, etc.; the paragraph was clearly written; a perfect proofread would not have discovered that the paragraph was asserting a falsehood. Spicer's brief in this court offers no alternative to "oversight" and "proofreading error" as excuses for paragraph 75. Those excuses are pathetic and leave us in the dark about how or why he falsified the complaint.

The court held that the inherent authority of courts to impose sanctions for bad faith conduct includes sanctions for "'recklessly making a frivolous claim.'" (Citation omitted.) In affirming the sanction, the court of appeals also relied on the fact that plaintiff's counsel waited until six months after plaintiff's deposition to file a stipulation that the paragraph in question was untrue.

Haeger v. Goodyear Tire & Rubber Co., 813 F.3d 1233 (**9th Cir.** 2016), a personal injury case, affirmed a sanctions order awarding more than $2.7 million in attorneys-fee sanctions against the defendant and two of its attorneys, and ordering it to file a copy of the sanctions order in every case involving the same defective type of tire, to place the parties and the courts in those cases on notice of its bad-faith approach to discovery. The defendant had objected, but had stated it was producing all of the relevant documents. However, it withheld tests that were material to the questions presented, attempted to conceal its withholding of the tests, inadvertently revealed that its supposedly curative production was also incomplete, and presented deceitful testimony in the sanctions hearing.