Arizona State Bar
Sedona, Arizona
October 19, 2013

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.

Table of Contents

I. The Statistics

A. Judicial Case Filings

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

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

The sharp decline since 1997 in the number of new fair-employment cases filed in Federal district courts seems to have stopped, and the number of new filings is increasing again. There is a 22.3% increase between 2007 and 2011.

B. EEOC Charge Filings

The information below was downloaded on March 23, 2013, from the EEOC web site, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm:

Category	FY 2007	FY 2009	FY 2012	Percent Change, FY 2007-FY 2012
Total charges	82,792	93,277	99,412	20.07%
Race	30,510	33,579	33,512	9.84%
Retaliation	26,663	33,613	37,836	41.90%
Sex	24,826	28,372	30,356	22.28%
Age	19,103	22,778	22,857	19.65%

Category	FY 2007	FY 2009	FY 2012	Percent Change, FY 2007-FY 2012
Disability	17,734	21,451	26,379	48.75%
National Origin	9,396	10,601	10,883	15.83%
Religion	2,880	3,386	3,811	32.33%
Equal Pay Act	818	942	1082	32.27%
GINA	N.A.	N.A.	280	∞

II. Governmental Actions

A. The EEOC's Strategic Enforcement Plan

After extensive consultation with employers, employees, unions, and counsel, the EEOC developed and has now released its national Strategic Enforcement Plan for the years 2002 through 2016. See http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.

Local offices of the EEOC are now developing their own local enforcement plans, which are intended to complement and implement the national Plan.

B. The EEOC's Quality Control Program

On February 12, 2013, the EEOC asked for public input on a nationwide Quality Control Program. See http://www.eeoc.gov/eeoc/newsroom/release/2-12-13.cfm. It set the deadline at 5:00 pm EDT on Friday, March 1, 2013, effectively providing a seventeen-day window for input.

The topics to have been addressed in this fast-disappearing window are:

> The agency encourages participation from individuals, employers, advocacy groups, agency stakeholders and other interested parties. While no specific format is required, we are most interested in recommendations for quality indicia of investigations or conciliations or general recommendations for improving the quality of our intake process, investigations and conciliations. Please also include a contact e-mail and/or mailing address.

If readers have comments they would like to submit, I suggest they disregard the deadline and submit them. Comments should be submitted to strategic.plan@eeoc.gov or received by mail at Executive Officer, Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

C. The OFCCP's Actions on Pay Discrimination

On February 28, 2013, the OFCCP withdrew two guidance documents from 2006 that address pay discrimination by federal contractors: *Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination* ("Compensation Standards"), 71 Fed.Reg. 35124, and the second is called *Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246* ("Voluntary Guidelines"), 71 Fed.Reg. 35114.

The OFCCP's "Frequently Asked Questions" page is at http://www.dol.gov/ofccp/regs/compliance/faqs/CompGuidance_faq.htm#Q1. It states the reasons for the change:

> These documents significantly constrained OFCCP's ability to investigate pay discrimination to the full extent permitted by law and did not accomplish their stated goals of making OFCCP compensation enforcement activities more consistent with other federal laws and more focused on systemic discrimination.
>
> The 2006 guidance documents narrowly define the types of evidence and issues OFCCP can consider when addressing unfair pay policies and practices that discriminate on the bases of gender, race and ethnicity. They conflict with how courts usually apply federal civil rights laws and evaluate discrimination - which is a flexible, fact-based approach that considers all available and relevant evidence and information. The guidance documents have resulted, since 2006, in severely limiting OFCCP's ability to enforce the ban of pay discrimination. Further, even though they were supposed to provide contractors with a clear, easy-to-use method to review their pay practices for discrimination, contractors rarely used them to demonstrate compliance. Finally, the guidance documents required OFCCP, when evaluating possible compensation discrimination, to deviate from its usual approach – i.e., relying on courts' interpretation of the relevant laws to determine the legitimate scope of OFCCP's inquiry – and instead use a highly restrictive protocol to determine contractor compliance.
>
> Because the Compensation Standards and Voluntary Guidelines were both ineffective at addressing pay discrimination for workers, and underutilized by contractors for the purpose of compliance, OFCCP determined, after public notice and comment, that all stakeholders would be better off with a different approach.

3. **What does it mean to say that the 2006 compensation guidance documents look at pay discrimination too narrowly?**

OFCCP enforces Executive Order 11246, which requires nondiscrimination consistent with Title VII as well as affirmative action by federal contractors and subcontractors. Compensation discrimination can take many forms - from paying women less than men for doing the same job, to discriminating against minorities in access to high paying positions or opportunities to earn overtime. Even when base salaries and wages are fair, workers can still experience discrimination in other types of pay, like bonuses or commissions. For this reason, courts consistently state in judicial decisions

applying Title VII that there is **no single way to prove** compensation discrimination, and **no particular limits on the kinds of evidence** or information that might be relevant to proving discrimination in a particular case.

However, both the Compensation Standards and Voluntary Guidelines require OFCCP to use the same kind of analysis, no matter what kind of industry, workers, evidence, data or pay practices the agency was reviewing. They apply cookie-cutter approaches designed only to look for a single kind of problem - pay differences between workers in narrowly designed job categories - and specifically avoid looking for pay differences based on discrimination in access to better paying jobs or opportunities. They require particular statistical tests for discrimination in most cases, even though the Supreme Court has said statistical evidence is not required to prove discrimination. They fragment the analysis as much as possible, making it harder for either the agency or contractors to identify broad patterns of discrimination that cut across individual jobs. Finally, they require OFCCP to have anecdotal evidence (such as specific workers who can testify about discrimination) in order to proceed in most cases, even though employers may have pay secrecy policies that make it very difficult for workers to know they are being underpaid - and even though courts do not require anecdotal evidence in systemic discrimination cases. After reviewing the 2006 Compensation Standards and Voluntary Guidelines, OFCCP concluded that they were inconsistent with many Title VII legal principles and case law about how to prove discrimination, and were limiting OFCCP's ability to enforce its mandate to prohibit pay discrimination.

(Emphases in original; paragraph indentations supplied.)

D. Advisory Committee on the Civil Rules

The Advisory Committee on the Civil Rules has released for public comment a number of proposals that are stated to make litigation quicker and more inexpensive. Its discovery proposals raise major concerns about further diversion of attorneys' time and expenses from the merits into side issues of counting interrogatories and requests for admissions, and the need to have increased conferences with the court about discovery before anything can move forward. See the report of the changes, the comments received, and the Advisory Committee's responses, at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf.

In addition to the proposed limits of 5 depositions of six hours each, 15 interrogatories, and 25 requests for admissions, there are other important recommendations. These include shortening the period for service from 120 days to 60 days, allowing the early serving of Rule 34 requests for production, and the like.

The naiveté of the Advisory Committee is breathtaking.

There will be an official comment period, and three hearings at which testimony will be received.

III. The Constitution and Statutes

A. The First Amendment

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grant of summary judgment against plaintiff Montone on her First Amendment retaliation claim. Montone had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list. The court held at 193-95 that Montone's complaints of sexual harassment, against herself and—importantly—against other female officers, were matters of public concern protected by the First Amendment. The court held at 195 that the mode and manner of her complaints did not cause any disruption to efficiency.

Gschwind v. Heiden, 692 F.3d 844, 34 IER Cases 458 (**7th Cir.** 2012), reversed the grant of summary judgment against the plaintiff former teacher. The case involves the rights of a teacher against a thug in his early teens, who the teacher observed beating up another boy, who sang a song in class about stabbing the teacher, who had previously been counseled by plaintiff about threatening another student, whose brother—also a thug—had beat up the Assistant Principal, and whose father—a thug himself—had threatened to file a class action suit against the school if his son was disciplined. Plaintiff filed a disorderly-conduct complaint against the student. The court stated: "He acknowledges having been afraid for his safety, but he explained in an affidavit in this litigation that his fear 'co-existed with a desire to report the singing of the song as a crime that had been committed, to help ensure the smooth and safe operation of the school and everyone inside.... The point of signing the disorderly conduct complaint was to bring to the public light the fact that such an incident had occurred.' He testified similarly in his deposition: 'as far as it [the complaint] being a matter of public concern, it involved disorderly conduct that occurred in the classroom. That disorderly conduct had to do with public safety issues.'" *Id.* at 845. The court stated that, the day after plaintiff filed the complaint, the Assistant Principal gave him his first "unsatisfactory" evaluation, and added: "A jury could easily find that the real reason was the threat of litigation by the student's belligerent father." The defendants admitted that they had told plaintiff they would recommend his employment not continue beyond the end of the school year. "Since, as we'll see, the board's policy was to rubber stamp personnel decisions by the school district's superintendent, who in turn rubber stamped personnel decisions by principals, it is apparent that the plaintiff was being fired—as he put it in his complaint, being "compelled to resign." The defendants do not deny that he was constructively discharged." *Id.* at 846 (citations omitted). The district court held that the First Amendment did not apply because plaintiff filed the complaint purely as a matter of private interest, and the public interest was not involved. The court of appeals disagreed. It rejected the argument that the secrecy of juvenile proceedings prevented the kind of public disclosure plaintiff said he wanted made, because those laws did not prevent plaintiff from speaking about the criminal charge, there were numerous exceptions within the juvenile laws leading to a substantial audience for his allegations, and his allegations had already been publicly reported. The court then held that the School District might be liable for an unconstitutional policy under *Monell*. It explained at p. 848:

> The superintendent authorized the principal to fire Gschwind, and the board approved that decision. When Gschwind complained to the superintendent about the

> decision of the principal and assistant principal to force him to resign, the superintendent replied that "it was the policy of the school district and the Board of Education to allow principals and assistant principals to make evaluation and employment decisions as they see fit with respect to the teachers they supervise and for the school district and the Board of Education to follow these decisions and recommendations." This was evidence of a policy of the school district of condoning unconstitutional terminations, since principals and assistant principals might "see fit" to fire teachers on unconstitutional grounds. . . .

The court also held that *Wal–Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), did not draw into question the ability of a court to hold an employer liable for the discretionary discriminatory actions of supervisors.

"**Policymaker" Means Different Things in Different Contexts:** *Hunt v. County of Orange*, 672 F.3d 606, 33 IER Cases 586 (**9th Cir.** 2012), held that a Lieutenant in the Sheriff's Department did not occupy a position for which political affiliation was important, but affirmed the grant of summary judgment to the defendant Sheriff because no prior decision had held that a person in the position of Lieutenant was not a policymaker for purposes of the First Amendment. The court cautioned against the mechanical application of factors, stating at 611-12:

> The essential inquiry in determining whether the *Elrod* "policymaker" exception applies is not whether the nine *Fazio* factors mechanically apply, or "whether the label 'policy-maker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; id. at 517 ("[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield....") (quoting Elrod, 427 U.S. at 366); *Fazio*, 125 F.3d at 1332 ("[A] public employee need not literally make policy in order to fit within the *Elrod* policymaker exception. Rather, an employer may fire a public employee for purely political reasons if the employer can demonstrate that political considerations are 'appropriate requirement[s] for the effective performance' of the job.") (quoting *Branti*, 445 U.S. at 518); Fazio, 125 F.3d at 1333 ("[T]he term policymaker as used in this context does not mean 'one who makes policy.' Rather, the term refers to a position in which political considerations are 'appropriate requirement[s] for the effective performance of the public office involved.' ") (quoting *Branti*, 445 U.S. at 519); *Thomas v. Carpenter*, 881 F.2d 828, 832 (9th Cir.1989) (holding that the exception applies only where the government has shown that the employee's political loyalty is essential to the effective performance of the tasks).

Judge Leavey concurred in part and dissented in part. *Id.* at 617-19.

B. 42 U.S.C. §§ 1981 and 1983

McCormick v. Miami University, 693 F.3d 654, 116 Fair Empl.Prac.Cas. (BNA) 24 (**6th Cir.** 2012), a case involving a graduate student suing over the failure to give her a Ph.D., held that § 1981 rights against State officials in their personal capacities may only be brought under § 1983. McCormick had a series of disabilities that delayed the completion of her graduate studies. She successfully received a Master's degree, but the faculty voted against promoting her

to the doctoral program. She sued under § 1981, because the statute of limitations under § 1983 had already expired. The Court collected the cases on the effect of the amendment of § 1981 by the Civil Rights Act of 1991, at 660:

> Since the amendment to § 1981, circuit courts have split as to whether the 1991 amendment created a new private cause of action, thereby overruling Jett. The Sixth Circuit has continued to hold that *Jett* remains binding authority and that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." *Arendale v. City of Memphis*, 519 F.3d 587, 598–99 (6th Cir.2008) (quoting *Jett*, 491 U.S. at 733). Our decision in *Arendale* is consistent with authorities in the Third Circuit, see *McGovern v. City of Philadelphia*, 554 F.3d 114, 117–18 (3d Cir.2009); the Tenth Circuit, *see Bolden v. City of Topeka*, 441 F.3d 1129, 1137 (10th Cir.2006); the Fifth Circuit, *see Oden v. Oktibbeha Cnty*., 246 F.3d 458, 463–64 (5th Cir.2001); the Eleventh Circuit, *see Butts v. Cnty. of Volusia*, 222 F.3d 891, 894 (11th Cir.2000); and the Fourth Circuit, see *Dennis v. Cnty. of Fairfax*, 55 F.3d 151, 156 n. 1 (4th Cir.1995). In contrast, the Ninth Circuit has expressly held that the Civil Rights Act of 1991 has overruled the Supreme Court's holding in *Jett*. *See Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1205 (9th Cir. 1996) ("We hold that the Civil Rights Act of 1991 creates an implied cause of action against state actors under 42 U.S.C. § 1981, and thus statutorily overrules *Jett's* holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against municipalities for violation of the civil rights guaranteed by 42 U.S.C. § 1981."); *but see Pittman v. Oregon,* 509 F.3d 1065, 1074 (9th Cir. 2007) (holding that § 1981 does not contain a cause of action against arms of the state).

C. 42 U.S.C. § 1985 Conspiracy Claims

Soto-Padro v. Public Bldgs. Authority, 675 F.3d 1, 4 (**1st Cir.** 2012), affirmed the grant of summary judgment to the defendants. The court stated:

> Section 1985 permits suits against those who conspire to deprive others "of the equal protection of the laws, or of the equal privileges and immunities under the law...." 42 U.S.C. § 1985(3). The elements of a section 1985 claim are straightforward: (1) "a conspiracy," (2) "a conspiratorial purpose to deprive the plaintiff of the equal protection of the laws," (3) "an overt act in furtherance of the conspiracy," and, lastly, (4) either (a) an "injury to person or property" or (b) "a deprivation of a constitutionally protected right." . . . A section 1985 claim "requires 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action,'" . . . though we have held, in the not-too-distant past, that this statute offers "no remedy" for discrimination based on political affiliation . . . .

(Citations omitted.)

D. Legislative Immunity

Schmidt v. Contra Costa County, 693 F.3d 1122 (**9th Cir.** 2012), affirmed the dismissal of the action brought by an unsuccessful judicial candidate for the loss of her job as Temporary

Superior Court Commissioner when the judges on the Superior Court's Executive Committee changed the qualifications for the position in a way that excluded her. The court held that the judges were acting in a legislative capacity, and thus enjoyed legislative immunity.

E. Title VII of the Civil Rights Act of 1964

1. Religious Discrimination and Accommodation

Sánchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 114 Fair Empl.Prac.Cas. (BNA) 912 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII religious discrimination defendant. Plaintiff worked as a Retail Sales Consultant, and sold cell phones and accessories in shopping centers. This job had a rotating shift, and required some Saturday work. "His yearly salary between 2003 and 2006 ranged from $23,129.59 to $26,425.47. Sánchez also earned yearly commissions ranging from $10,653.03 to $18,938.17." *Id.* at 4. Plaintiff became a Seventh Day Adventist, could not work on Saturdays, and requested an accommodation. Defendant stated that it would be an unreasonable hardship to exempt plaintiff from working Saturdays in his job category, and as an accommodation offered two other positions. One alternative position did not require Saturday work. The other did require Saturday work, but defendant stated it would not be an unreasonable hardship to exempt plaintiff from Saturday work. However, neither position involved commissions, so accepting either would have resulted in a significant cut in plaintiff's pay. Defendant offered plaintiff a two-month trial period to see if voluntary shift-sapping would alleviate the problem, but that did not work. The company warned plaintiff that failure to work as scheduled would lead to discipline, including termination, but did not discipline him at first. Defendant did not interview plaintiff for two jobs for which he bid, and rejected a transfer application to the same job in Massachusetts that he had been performing in Puerto Rico because it considered him unqualified. The court held that, rather than examining each proposed accommodation individually, defendant had not offered the proposed accommodations in isolation from each other but as part of a package, so it would view the combination of proffered accommodations together in determining whether defendant offered a reasonable accommodation. *Id.* at 12-13. The court held that the combination was reasonable. *Id.* at 13.

2. Sec. 703(h) and Objective Bonus Systems Based on Productivity

McReynolds v. Merrill Lynch & Co., Inc., 694 F.3d 873, 115 Fair Empl.Prac.Cas. (BNA) 1668 (**7th Cir.** 2012), affirmed the dismissal of plaintiffs' Title VII and § 1981 class racial discrimination claims. An earlier disparate-impact class action, *McReynolds I*, discussed below, challenged Merrill Lynch's employment practices that allegedly restricted African-American brokers' ability to obtain business and correspondingly limited their compensation. The Seventh Circuit reversed the denial of class certification, and that case is ongoing. This case, *McReynolds II*, was a new class action against Merrill and its acquirer, Bank of America, challenging the basing of retention bonuses on past productivity. The court held that plaintiffs' challenge was limited by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to . . . a system which measures earnings by quantity or quality of production . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin

. . . ." Plaintiffs conceded that the retention-bonus system was facially neutral. They did not allege discriminatory application of the retention-bonus system, but only that it gave continuing effect to past discrimination. The court held that this was not enough to avoid the limitation of § 703(h). It stated that "the allegations that Merrill Lynch knew that the production-credit system had a disparate impact on black brokers are legally insufficient. Instead, the complaint must allege enough factual content to support an inference that *the retention program itself* was adopted *because of* its adverse effects on black brokers." *Id.* at 885 (emphasis in original). The court held that plaintiffs' allegations of discriminatory intent were conclusory, and could not survive *Iqbal* and *Twombly*. The court also held that any practice that is lawful under Title VII cannot be unlawful under § 1981. Finally, the court held that plaintiffs can seek recovery for diminished retention bonuses because of past discrimination in the pending action challenging alleged past discrimination, *McReynolds I*.

3. Lilly Ledbetter Fair Pay Act's Amendment to Title VII

McReynolds v. Merrill Lynch & Co., Inc., 694 F.3d 873, 115 Fair Empl.Prac.Cas. (BNA) 1668 (**7th Cir.** 2012), affirmed the dismissal of plaintiffs' Title VII and § 1981 class racial discrimination claims. See the discussion above. The court rejected plaintiffs' argument that the Ledbetter Fair Pay Act created a new cause of action unlimited by § 703(h), and held that the Act affects only the timing of claims.

F. Age Discrimination in Employment Act

1. Impact Analysis

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

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

2. Succession Planning

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

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

G. The Americans with Disabilities Act and Rehabilitation Act

1. Employment Rights Under Title II of the ADA?

Elwell v. Oklahoma, ex rel. Bd. of Regents of University of Oklahoma, 693 F.3d 1303, 26 A.D. Cases 1422 (**10th Cir.** 2012), *cert. denied*, __ **U.S.** __, 133 S.Ct. 1255 (2013), held that Title II of the ADA, forbidding discrimination in the provision of benefits and services, does not cover employment discrimination.

2. Disability

Boitnott v. Corning Inc., 669 F.3d 172, 175-76, 25 A.D. Cases 1441 (**4th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant, holding that the plaintiff was not limited in a major life activity when he was able to work forty hours a week but not able to work overtime or to work a rotating shift.

Feldman v. Olin Corp., 692 F.3d 748, 26 A.D. Cases 1305 (**7th Cir.** 2012), reversed the grant of summary judgment to the ADA defendant. The court held that there were triable issues of fact whether plaintiff's fibromyalgia and sleep apnea were disabilities within the meaning of the ADA, and "whether he is 'qualified' to work in certain positions given his overtime restriction and requirement of working a straight shift instead of flex-time."

3. Patient Safety as Essential Function of Job

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

not subject its patients to potential physical and emotional trauma to comply with its duties under the MHRA and the ADA."

4. Attendance as Essential Function of Job

Samper v. Providence St. Vincent Medical Center, 675 F.3d 1233, 1237-38, 26 A.D. Cases 11 (**9th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant. Plaintiff was a part-time neonatal intensive-care unit ("NICU") nurse who suffered from fibromyalgia with chronic pain and sleeplessness. She was unable for years to meet the defendant's attendance policy, which the court fairly described as generous, and this caused problems. The court stated at 1235: "NICU nurses require special training such that the universe of nurses that can be called in at the last minute is limited." The court surveyed the law of the Circuits, and stated:

> It is a "rather common-sense idea ... that if one is not able to be at work, one cannot be a qualified individual." *Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir.1999). Both before and since the passage of the ADA, a majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions. Attendance may be necessary for a variety of reasons. Sometimes, it is required simply because the employee must work as "part of a team." *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir.1998). Other jobs require face-to-face interaction with clients and other employees. *Nowak v. St. Rita High Sch.*, 142 F.3d 999 (7th Cir.1998) (teacher); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442 (8th Cir.1998) (airline customer service agent); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209 (4th Cir.1994) (teacher). Yet other jobs require the employee to work with items and equipment that are on site. *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943 (7th Cir.2001) (en banc) (dockworker); *Jovanovic v. In–Sink–Erator*, 201 F.3d 894 (7th Cir.2000) (tool and die maker); *Waggoner*, 169 F.3d 481 (production worker); *Corder v. Lucent Techs., Inc.*, 162 F.3d 924 (7th Cir.1998) (telephone customer support); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir.1997) (computer consultant); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir.1996) (mechanic); *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir.1994) (housekeeping aide); *Carr v. Reno*, 23 F.3d 525 (D.C.Cir.1994) (coding clerk under the Rehabilitation Act); *Law v. U.S. Postal Serv.*, 852 F.2d 1278 (Fed.Cir.1988) (mail handler under the Rehabilitation Act).
>
> The common-sense notion that on-site regular attendance is an essential job function could hardly be more illustrative than in the context of a neo-natal nurse. This at-risk patient population cries out for constant vigilance, team coordination and continuity. As a NICU nurse, Samper's job unites the trinity of requirements that make regular on-site presence necessary for regular performance: teamwork, face-to-face interaction with patients and their families, and working with medical equipment. Samper herself admits that her absences sometimes affected "teamwork and cause[d] a hardship for [her] coworkers who must cover for[her]." Similarly, once at work, Samper's tasks required her to "lift babies, push cribs and isolettes." More critically, she had to "get up at a moment's notice to answer alarms [and] ... [o]ften ... run to codes."

Plaintiff requested an accommodation of being excused from the attendance policy, but never quantified the number of additional absences, on top of the five per rolling twelve months permissible under the employer's policy. The court held that this was unreasonable:

> Indeed, Samper's request so far exceeds the realm of reasonableness that her argument leads to a breakdown in well-established ADA analysis. In most cases, the essential function and reasonable accommodation analyses are separate: first, a court inquires as to the job's essential functions, after which the plaintiff must establish that she can perform those functions with or without reasonable accommodations. . . . Samper essentially asks for a reasonable accommodation that *exempts* her from an essential function, causing the essential functions and reasonable accommodation analyses to run together. Samper's approach would eviscerate any attendance policy, leaving the hospital with the potential for unlimited absences.

Id. at 1240 (emphasis in original; citation omitted). Although the hospital had unhappily put up with plaintiff's absences for years, it was not required to continue doing so The court stated at 1240-41: "Ultimately, despite Providence's patience and accommodations, 'there was literally nothing in the record to suggest that the future would look different from the past,' leaving Providence with little choice but to terminate Samper." (Citation omitted.)

5. Rotating Shifts and Overtime as Essential Functions of Job

See the discussion of *Boitnott* and *Feldman* immediately above.

Feldman v. Olin Corp., 692 F.3d 748, 26 A.D. Cases 1305 (**7th Cir.** 2012), reversed the grant of summary judgment to the ADA defendant. The court held that there was a triable issue of fact whether working overtime was an essential function of the job. The court stated at p. 755-56:

> Feldman points to several straight-time positions that were open during his seven month lay-off that he believes Olin should have reassigned him to, including two straight-time shifts in the bag house and four adjustor positions. Olin retorts that all of these required overtime as an essential function of the job. Once again, however, we cannot resolve this in Olin's favor at the summary judgment stage, because the evidence on each of these points is mixed. Notably, Olin concedes that overtime is not listed as a required job feature in the written job descriptions. Olin counters that it should not have to list a requirement that is required by all of its jobs, but Feld-man points to evidence of some jobs that do specifically list mandatory overtime as a require-ment in their written descriptions. Feldman has also furnished data indicating that overtime is rarely worked by bag house operators. On the other hand, Olin argues that the consequences of exempting bag house workers from overtime would be dire, as fires sometimes break out that require all essential personnel to work until the fires are put out, even if that requires overtime. There is evidence, in short, going both ways, and so we cannot conclude that overtime was an essential function of the bag house or adjustor positions. See *D'Angelo*, 422 F.3d at 1232–33 (evidence that employees rarely performed a task created a genuine issue of material fact regarding whether the task was essential).

The case cited is *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1230 (**11th Cir.** 2005).

Kallail v. Alliant Energy Corporate Services, Inc., 691 F.3d 925, 26 A.D. Cases 1281 (**8th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant. It held that working a rotating shift was an essential element of the job, and plaintiff by her own claim admitted she was not qualified to perform this essential element. The court explained at 931:

> A rotating shift can be an essential function of a position, *Rehrs*, 486 F.3d at 359, and we agree with the district court that it was an essential function of the Resource Coordinator position at Alliant. Alliant has determined that the rotating shift is essential to the Resource Coordinator position, and lists it as a requirement on the written job description for the position. According to Alliant, the rotating shift provides enhanced experience and training for Resource Coordinators by allowing them to become familiar with all geographic territories in Alliant's service area, and to receive on-the-job training by working with different partners and Senior Resource Coordinators. This enhanced training also allows Alliant to handle emergencies more effectively, because each Resource Coordinator summoned during an emergency will have experience working in all geographic areas and with all personnel. Shift rotation also enhances the non-work life of Resource Coordinators by spreading the less desirable shifts—nights and weekends—among all Resource Coordinators. If Kallail were switched to a straight day shift and not required to work the rotating shift, then other Resource Coordinators would have to work more night and weekend shifts.

The court distinguished different practices at other facilities.

6. Punctuality as Essential Function of Job

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

> Although a court will give considerable deference to an employer's determination as to what functions are essential, there are a number of relevant factors that may influence a court's ultimate conclusion as to a position's essential functions. . . . "Usually, no one listed factor will be dispositive." *Id.* A court must avoid deciding cases based on "unthinking reliance on intuition about the methods by which jobs are to be performed." . . . Instead, a court must conduct "a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." . . .
>
> The district court appears to have relied heavily on its assumption that physical presence is "an essential requirement of virtually all employment" and on the City's

representation that arriving at a consistent time was an essential function of McMillan's position. While the district court's conclusion would be unremarkable in most situations, we find that several relevant factors here present a somewhat different picture: one suggesting that arriving on or before 10:15 a.m.—or at any consistent time—may not have been an *essential* requirement of McMillan's particular job. For many years prior to 2008, McMillan's late arrivals were explicitly or implicitly approved. Similarly, the fact that the City's flex-time policy permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential. Interpreting these facts in McMillan's favor, along with his long work history, whether McMillan's late and varied arrival times substantially interfered with his ability to fulfill his responsibilities is a subject of reasonable dispute.

This case highlights the importance of a penetrating factual analysis. Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment. While a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry, drawing all inferences in favor of the non-moving party. Such an inquiry was not conducted here.[3]

---

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

(Citations omitted.)

7. Making On-Site Visits as Essential Function of Job

Robert v. Board of County Com'rs of Brown County, 691 F.3d 1211, 19 Wage & Hour Cas.2d (BNA) 1024, 26 A.D. Cases 1300 (**10th Cir.** 2012), affirmed the grant of summary judgment to the defendants on plaintiff's ADA and other claims. The court summarized its ruling at 1214: "Catherine Robert had worked as supervisor of released adult offenders for ten years when she developed sacroiliac joint dysfunction. After a lengthy leave of absence, including the period authorized by the Family and Medical Leave Act ("FMLA"), Robert remained unable to perform all of her required duties, and she was terminated. For the reasons

stated hereafter, we conclude that Robert's discharge did not constitute discrimination in violation of the Americans with Disabilities Act ("ADA"), retaliation in violation of the FMLA, breach of contract, or abridgment of procedural due process." The court relied on the fact that, when able, plaintiff spent 25% (her estimate) or 50% (defendants' estimate) of her time on on-site visits, and that she could not leave her home as of the time of her termination. The court stated at 1217: "The offender supervision officer job description further confirms the importance of fieldwork to her position; the fact that the location of her duties is specified in the 'Working Conditions' and 'Job Locations' sections, rather than the 'Essential Functions' section, does not render her fieldwork nonessential." *Id.* (citation omitted). The court held that defendants' willingness to excuse plaintiff temporarily from performing on-site visits as an accommodation did not mean that the on-site visits were not essential functions of her job. *Id.* at 1217. The court added: "For the same reason, we assign no particular import to Sloan's statement that she would not have recommended the county terminate Robert in July had Sloan received a doctor's authorization stating that Robert could work from home." The court held that a request to be relieved of performing this essential function would only be a reasonable accommodation if plaintiff provided a reasonable estimate of when she could return to performing the function, and if the duration of the leave was itself reasonable. *Id.* at 1217-19. The court stated at 1218: "In any event, the doctor's prediction that Robert could walk with a cane in a month's time does not suffice to assure the county that she would then be able to perform site visits and other fieldwork. As Robert herself recognized, she needed near-full mobility to ensure her safety as she visited felony offenders in their homes, workplaces, and treatment facilities, an activity that could be dangerous." (Footnote omitted.)

8. Is There an Obligation to Re-Assign Disabled Employees Without Competition?

E.E.O.C. v. United Airlines, Inc., 693 F.3d 760, 26 A.D. Cases 1431 (**7th Cir.** 2012), granted rehearing after consultation with all other judges in the Seventh Circuit, vacated the earlier decision at 673 F.3d 543, 546-47, 25 A.D. Cases 1569 (**7th Cir.** 2012), overruled the Seventh Circuit's prior decision in *EEOC v. Humiston–Keeling*, 227 F.3d 1024 (**7th Cir.** 2000), in light of *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). The case involved the EEOC's challenge to defendant's failure to provide an automatic reassignment, to any vacant position a disabled employee can perform with reasonable accommodation, where the disabled employee is no longer able to perform his or her job, even with a reasonable accommodation. Defendant's policy provided for opportunities for transfers in this situation, but the transfer process is competitive and the EEOC objected to that feature. The court also rejected the equation of seniority rules with "best qualified" selection policies in *Mays v. Principi*, 301 F.3d 866 (**7th Cir.** 2002). The court explained at 764:

> The EEOC argues, and we agree, that the *Mays* Court incorrectly asserted that a best-qualified selection policy is essentially the same as a seniority system. In equating the two, the *Mays* Court so enlarged the narrow, fact-specific exception set out in *Barnett* as to swallow the rule. While employers may prefer to hire the best qualified applicant, the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy. To strengthen this critique, the EEOC points out the relative rarity of seniority

> systems and the distinct challenges of mandating reassignment in a system where employees are already entitled to particular positions based on years of employment.

The court remanded the case for a determination whether creation of an automatic reassignment rule would impose an undue hardship in general, and if there are case-specific factors that would lead to a different result. *Id.*

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

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

IV. Theories and Proof

A. The Inferential Model

1. Qualified Individuals

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

2. Adverse Employment Actions: Resignation or Termination?

Burton v. Teleflex Inc., 707 F.3d 417, 117 Fair Empl.Prac.Cas. (BNA) 685 (**3d Cir.** 2013), reversed the grant of summary judgment to the ADEA, Title VII, and Pennsylvania-law defendant. The lower court assumed plaintiff had made out a *prima facie* case, but held that plaintiff had resigned as a matter of law and that plaintiff had not shown pretext. The court of appeals held that this was a disputed question of material fact. At a meeting outside the office, after defendant had taken away a major responsibility from her, plaintiff's supervisor, Boarini, was reluctant to meet with her after he had demanded that they meet. She testified that she asked Boarini whether he wanted her to resign. Defendant then decided that she had resigned, and sent her a letter accepting her resignation. The court of appeals held that plaintiff had presented plausible evidence from which a jury could reasonably conclude that she had not resigned, but need terminated:

> At his deposition, Boarini admitted that Burton never said that she was resigning. Moreover, Teleflex acknowledged that Burton never submitted a resignation letter or formally notified the company in any way that she was resigning despite the fact that Burton's employment agreement provided that she must provide written notice to the

company at least 30 days before her resignation is to be effective. As we pointed out at oral argument, there is no evidence that Burton ever said she was resigning to anyone above her in the chain of command. Boarini also admitted that he did not contact Burton after the incident on June 3, 2008 to confirm that she resigned or to ask her for a letter of resignation.

According to Boarini, Faris and Fulton told him on June 3, 2008, that Burton had told them that she resigned. The District Court credited the testimony of these employees in deciding that Burton had in fact resigned. However, the court did not credit the testimony of Burton herself, who denied having told anyone that she resigned. Nor did the District Court consider the conflicting testimony of Edward Burton, who spoke to Burton subsequent to her conversation with Boarini. They discussed Burton's conversation with Boarini, but Edward claimed that Burton said nothing about having resigned or having been fired. Edward testified that Burton continued to work after June 3, 2008, and that sometime before June 16, 2008, Burton called the office to send in quotes and was told by the receptionist that her call could not be put through. By crediting the testimony of the Teleflex employees and disregarding the Burtons' conflicting testimony, the District Court improperly made credibility determinations, which it may not do at summary judgment. . . .

Several other pieces of evidence are relevant to the issue of whether Burton resigned or was terminated. First, in Burton's personnel file, on a form indicating that she was no longer to be paid by Teleflex, the boxes indicating that she either "quit without notice," "resigned," or "retired" were not checked. . . . Instead, the form was completed to say: "[l]eft co[mpany] to pursue other opportunities." . . . At her deposition, Teleflex Human Resources Director Margie Heilig ("Heilig") conceded that she could not state from where she got that information because it involved a conversation with an attorney. Boarini testified that he had "no idea" why the form was filled out in that particular way.

Second, approximately one month prior to Burton's confrontation with Boarini at the trade show, Boarini and two other Teleflex employees were emailing about the departure of Edward Burton from Teleflex. At one point, the email chain shifts to discussing Burton. An official at Teleflex, Tim Kelleher ("Kelleher"), tells Boarini and another employee in an email: "I also talked to [Edward] about [Burton] and the lack of communication and sharing of information and our concerns about her after he leaves. He has agreed to facilitate a three way conversation between [Edward], [Burton] and me *to get her to play ball.*" (. . . (emphasis added).) Kelleher, the drafter of the email, testified that his reference to getting Burton to play ball merely meant that he wanted Edward to discuss with Burton her lack of communication. While that is certainly a plausible explanation, it is equally plausible that a reasonable juror could perceive the comment as a reference to pushing Burton out of the company.

Third, the District Court also cited "plaintiff's conduct after receipt of the June 16, 2008 letter" as a reason for finding that Burton had resigned. . . . The District Court claimed that "plaintiff made no protest that the resignation had not occurred." . . . Boarini testified that he and others at Teleflex were surprised that they received no follow-up directly from Burton following her receipt of the June 16, 2008 letter. Burton also testified that she did not initiate any contact with Teleflex after receiving the letter, but that she did not do so

because she considered herself to have been fired, and believed she "no longer had any rights." (App. 385.) Upon receipt of the June 16, 2008 letter, Burton contacted her attorney Michael Jarman, and from that point forward she only communicated with Teleflex "by and through [her] Attorney Jarman." (App. 323.) She further testified that she would not have contacted Teleflex on her own without first speaking to her attorney. The District Court thus did not consider that Burton communicated with Teleflex through her attorney following the June 16, 2008 letter, which undercuts its conclusion that she did not contest the resignation letter.

Burton also testified that, during a party that she held for her former employees shortly after her separation from Teleflex, she denied having resigned and clarified that she believed she had been fired. Furthermore, Teleflex notified its customers of Burton's departure on June 16, 2008, the same day it sent her the letter purporting to accept her resignation. This fact undercuts the District Court's reliance on Burton's conduct after receiving the June 16, 2008 letter. Once clients were notified of Burton's alleged resignation, she could reasonably have concluded that Teleflex had fired her, leaving her no ability to contest her separation and return to her position.

Fourth, the District Court ignored evidence that Burton continued to perform work for Teleflex after her conversation with Boarini on June 3, 2008. On June 4, 2008, Burton met with Faris at the trade show to train him on quoting prices to customers. Faris acknowledged that he had a meeting with Burton at the trade show after her purported resignation, and that during the meeting Burton was talking about working together. Burton also testified that she had a previously scheduled vacation from June 9 to June 13, which could explain her absence from the office during this time period. Other evidence also indicates that, while she was on her vacation, Burton called in to the office to send in price quotes for customers, but that the receptionist would not put her through.[FN9]

At this stage of the litigation, there is sufficient evidence from which a reasonable juror could conclude that Burton was terminated. The District Court ignored the fact that Burton never tendered her resignation, Burton never told anyone to whom she reported at Teleflex that she was resigning, Teleflex relied on hearsay statements to conclude that Burton had resigned, and Teleflex never once asked Burton if she had resigned. While there is certainly evidence to suggest that Burton did resign, this evidence is refuted by Burton. The District Court therefore erred when it determined that "[t]he evidence ... weighs in favor of a finding that [Burton] resigned, even viewing the evidence in the light most favorable to [her]." . . .

Id. at 428-30.

3. Taking Ownership of Nondiscriminatory Explanation

Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 19 Wage & Hour Cas.2d (BNA) 1017, 26 A.D. Cases 1293 (**8th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant. Plaintiff argued that the employer had no explanation for his termination because the President of defendant was the ultimate decisionmaker, and the President testified that he did not remember making the decision. The court rejected this argument, and plaintiff's

corresponding argument that the President's failure to take responsibility for the decision demonstrated pretext. It stated at 1004:

> We are unconvinced by this line of argument, because Trinity presented admissible evidence that detailed the reasons for Pulczinski's termination. That presentation was sufficient to constitute a legitimate, nondiscriminatory reason for the employment action. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The company produced the written report of Roussin and Freeman, which recommended that the company terminate Pulczinski for attempting to cause a slowdown in work. Cole, who possessed the ultimate authority to terminate Pulczinski, testified that Pulczinski was fired for attempting to incite a work slowdown. That Cole does not specifically remember terminating Pulczinski does not mean that Trinity failed to articulate a legitimate, nondiscriminatory justification. Whether a defendant has met its burden of production involves no credibility assessment. *Hicks*, 509 U.S. at 509.
>
> The purported refusal of individual employees to take ownership of the decision does not make out a sufficient case of pretext. This is not a case in which none of the decisionmakers was willing to accept responsibility for the termination. *Cf. Christensen v. Titan Distrib., Inc.*, 481 F.3d 1085, 1095 (8th Cir. 2007). Roussin and Freeman acknowledged authoring the report that recommended Pulczinski's firing. Roussin called to inform Pulczinski of the termination. It was Cole's duty to approve of terminations in the normal course of business, and he does not remember making the decision to fire Pulczinski. But Cole is based in Dallas, Texas, and he oversees approximately 1,000 employees across five different plants. He did not deny taking the action, and testified that he "very well could have been involved." That the president of the company does not specifically remember approving Pulczinski's termination is not sufficient to show pretext and discriminatory motive.

4. Pretext

a. Plaintiff Shows Plausibility of Pretext

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

> PA makes three arguments why Gao's retention could not lead any reasonable jury to find pretext. First, PA points to Kelly's deposition testimony that Gao took a pay cut to stay. Kelly's testimony, however, clashes with record evidence, a document prepared by human resources staff at the firm in early 2003, that suggests Gao's salary remained constant. Whether Gao suffered adverse professional consequences from the restructuring is a classic question of fact for the jury. PA also argues that Gao's practice

was marginally more profitable than Barnett's in 2003. But Kelly testified that profitability had nothing to do with Barnett's termination, and there is no evidence in the record to support PA's claim that profitability played any role in the decision to keep Gao.

Finally, PA speculates that Kelly may have offered to split Gao's salary with Rubin because Gao "had transportation experience" but Barnett did not. Appellee's Br. at 57. PA cites Gao's 2002 performance appraisal, which lists several projects Gao worked on that appear to be related to airports and the airline industry. But Miller, the partner who completed Gao's 2002 performance appraisal, also testified that Gao "was very China-focused. He had capabilities in aviation but really very, very small, still in the learning phase." (Emphasis added). Besides, Barnett had similar aviation industry experience. She had worked on a project for Khalifa Airlines, an Algerian carrier. Of course, a jury could choose to credit PA's argument that its partners considered Gao's aviation industry experience to be meaningfully distinguishable from Barnett's. The issue, however, cannot be resolved at summary judgment.

Summa v. Hofstra University, 708 F.3d 115, 129-31, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court held that plaintiff showed adequate evidence of pretext by presenting plausible scenarios under which a reasonable jury could reject defendants' proffered nondiscriminatory explanations:

With respect to the spring football manager position, Summa presented evidence that she had repeatedly discussed the spring season with the football coaching staff and, more tellingly, presented an e-mail that listed her stipend for the year as "Fall: $700 Spring: $300." Defendants now argue that they did not know she was returning for the spring because she did not contact the football office until immediately before the start of Spring Ball, but this claim is undermined by the documentary evidence regarding her spring salary. Furthermore, drawing all inferences in Summa's favor as we must at this stage, a jury could also conclude that the fact that she waited until just before the spring season and contacted the department only for the purpose of obtaining the schedule corroborates her account that she had been told she had the position already lined up, thus obviating any need to contact the department at an earlier time. The evidence in the record also demonstrates that Cohen did not know whether the position was actually filled when he denied Summa the spring manager position, and Battaglia's e-mails concerning the hiring process for student managers suggest that indeed the position was not filled. This evidence would allow a reasonable jury to conclude that the position was, in fact, available and was denied to Summa in retaliation for her complaints regarding her treatment during the fall season. Thus, Summa has made a sufficient showing of pretext, undermining the reason proffered by the University for the removal of her position as manager of the football team for the spring.

Summa has also made a sufficient showing of pretext with respect to the rescission of the graduate assistantship position. The district court concluded that Summa's presentation of her area of interest in addition to her major without explicitly identifying it

as such was a sufficient reason for the University not to hire her as a graduate assistant. However, the district court began its analysis too late in the sequence of events: it failed to consider the evidence that (a) Summa had already been offered the position; (b) Miller–Suber, who was well aware of Summa's NYSDHR complaint, both suggested and encouraged Connolly to re-interview Summa when Connolly could simply have signed off on the form based on her staff's evaluation of Summa; and (c) Miller–Suber encouraged and affirmed Connolly's decision to rescind her offer. Moreover, the e-mail informing Summa of the Connolly interview falsely stated that the office had never hired a graduate assistant before *and* misrepresented the nature of her meeting with Connolly, stating simply that Summa should "meet" Connolly. The e-mail did not say that Summa's offer, which a jury could find she had already accepted, was in danger of being rescinded if the interview did not go well. Moreover, a jury is not required to credit Connolly's testimony that she was unaware of the NYSDHR complaint. Connolly admitted to speaking with Miller–Suber, who knew of the complaint, and Summa described Connolly's attitude toward her as cold. The fact that Connolly took detailed notes and prepared a memo explaining her hiring decision, which by her own admission was not her regular practice, further supports an inference that she knew of Summa's complaint and felt the need to carefully document her decision in case any questions should arise in the future.

Furthermore, evidence of disparate treatment of similarly situated individuals allows for the conclusion that the reasons advanced by an employer in the Title VII context are pretextual. *Raniola*, 243 F.3d at 625. Here, the undisputed evidence indicates that Summa was the only potential graduate assistant who had an in-person interview with Connolly, and she was the only one whose references were contacted. Further, on this record, drawing all inferences in favor of Summa, Miller–Suber involved herself in the hiring process with respect to Summa to a far more substantial degree than she did with the other graduate assistant, including encouraging Connolly to rescind the offer. The difference in treatment between Summa and the other graduate assistant is thus evidence from which a reasonable jury could conclude that the reason proffered by the University was a pretext for a retaliatory motivation.

Finally, with respect to the third adverse employment action—the termination of Summa's student employment privileges—we also hold that Summa has presented sufficient evidence to conclude that the reason advanced by Miller–Suber and the University was pretextual. While it is undisputed that Summa double-booked hours on at least one time sheet, Miller–Suber admits that she had never even looked into the billing practices of any other student employee and had never previously terminated student employment privileges for the practice. Miller–Suber also admitted that she had once terminated a manager for allowing such double-billing to occur. Thus, as Miller–Suber knew that a manager had permitted student employees to double-bill, she must, of course, also have known that one or more of the *students* working for that manager had double-billed. Yet in that situation, it was only the manager, and not the students, who was investigated and punished. This starkly different treatment of students who had committed the same wrong as Summa would allow a reasonable jury to conclude that Miller–Suber's cited reason for the termination was indeed pretext for a retaliatory motive. Therefore, with respect to each of the three adverse employment actions alleged

> in the instant case, Summa has made a sufficient evidentiary showing to survive summary judgment.

(Emphasis in original.) The *Raniola* case cited above is *Raniola v. Bratton*, 243 F.3d 610, 625 (2d Cir.2001).

See also the discussion of *Burton v. Teleflex Inc.*, 707 F.3d 417, 117 Fair Empl.Prac.Cas. (BNA) 685 (**3d Cir.** 2013), above.

b. Plaintiff Must Show "Pretext-Plus"

Teruggi v. CIT Group/Capital Finance, Inc., 709 F.3d 654, 117 Fair Empl.Prac.Cas. (BNA) 773, 34 IER Cases 1745, 27 A.D. Cases 951 (**7th Cir.** 2013), affirmed the grant of summary judgment to the ADEA, ADA, and State-law defendant. The court's decision must be seen in the light of the seriousness of the plaintiff's misconduct: he sent a supplier's confidential business information outside the company, including to a competitor of that company. The court stated at 659-60:

> Teruggi has chosen to use the direct method with circumstantial evidence. To survive summary judgment on his claims under the ADA, ADEA, and IHRA, he must offer evidence from which an inference of discriminatory intent can be drawn, such as: "(1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive better treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action."

(Citations omitted.) The court's articulation is also true for the inferential model. The court articulated the standard a plaintiff must meet in order to show pretext as one requiring evidence directly pointing to a discriminatory motive: "To be convincing, Teruggi's evidence 'must point directly to a discriminatory reason for the employer's action . . . and be directly related to the employment decision.'" *Id.* at 660 (citation omitted). There are similar statements elsewhere in the decision.

Comment of Richard Seymour on *Teruggi v. CIT Group/Capital Finance, Inc.*: The decision is confusing in two respects. *First*, it sounds as if plaintiff made an election of proceeding only under the direct method. There is no reason in law for a plaintiff to be required to make such an election unless he or she is making a mixed-motives claim under pre-*desert Palace* standards, and mixed-motives analysis is not even available for ADEA claims. The evidence should have been evaluated under *McDonnell Douglas*, and the court's comments on pretext may be explained on the basis that they apply only to cases rejecting the inferential model and relying exclusively on direct evidence. *Second*, if the court's statement is seen as applicable to the inferential model, they are surprising but may have been driven by the context. Few would disagree that, where the evidence is overwhelming that the plaintiff engaged in misconduct so serious that it is difficult to conceive of any reasonable penalty short of termination, the standard for showing pretext is very high, and ideally should point directly to a discriminatory reason directly related to the termination. Practitioners should keep an eye on this case, to see if future panels limit it to its facts, or to plaintiffs rejecting the inferential model.

c. Plaintiff Does Not Have to Show "Pretext-Plus"

Burton v. Teleflex Inc., 707 F.3d 417, 117 Fair Empl.Prac.Cas. (BNA) 685 (**3d Cir.** 2013), reversed the grant of summary judgment to the ADEA, Title VII, and Pennsylvania-law defendant. The court stated at 430: "To the extent the District Court's pretext analysis suggested that Burton was required to show evidence of discriminatory animus to demonstrate pretext, that suggestion is unsupported by our precedent." (Citation omitted.) The court continued:

> As discussed above, we find that Burton's evidence created a genuine dispute of fact regarding the credibility of Teleflex's proffered reason for her discharge—i.e., that a reasonable fact finder could find the claim that Burton resigned to be "unworthy of credence." . . . . In the face of such evidence, Burton did not need to present evidence of discriminatory animus and she should not have been required to do so.

Id. at 431 (citation omitted).

d. Proof of Pretext Must Relate to the Challenged Decision

Teruggi v. CIT Group/Capital Finance, Inc., 709 F.3d 654, 117 Fair Empl.Prac.Cas. (BNA) 773, 34 IER Cases 1745, 27 A.D. Cases 951 (**7th Cir.** 2013), affirmed the grant of summary judgment to the ADEA, ADA, and State-law defendant. Plaintiff offered evidence of a few age- and disability-related comments occurring long before his termination and unrelated to it, and a denial of a requested accommodation by one official although others had granted various accommodations and no other request had been denied. The court rejected the evidence as not allowing a reasonable inference of discrimination. It stated at 660-61:

> Rather, he has offered "an amorphous litany of complaints about a myriad of workplace decisions." . . . For example, he expresses frustration over CIT's decisions to interview him after offering the senior vice president position to DiStefano, to monitor his email account for nearly a year without informing him, and to discharge him for what he believes is an inconsequential violation of company policy. Yet these complaints do not point to discriminatory intent, either individually or collectively. We know nothing about DiStefano's age or disability status to support an inference that CIT wanted him in the senior vice president position because he was younger than Teruggi or not disabled. And the company's decision to monitor Teruggi's work email for over a year rather than discipline him for sending emails to his personal email account does not hint of discrimination. Neither, for that matter, does Teruggi's argument that the company should not have fired him for what he perceives to be a minor violation of company policy because the supplier later disclosed the same information. At best, Teruggi's evidence calls into question the wisdom of Cashman's discharge decision. But we are not ultimately concerned with whether CIT made the *right* decision when it terminated Teruggi's employment; rather, we focus our inquiry on whether Teruggi has presented evidence from which a factfinder can make the reasonable inference that CIT made a *discriminatory* decision based on Teruggi's age or disability.

(Footnote and citation omitted.)

e. The "Honest Belief" Rule

Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 19 Wage & Hour Cas.2d (BNA) 1017, 26 A.D. Cases 1293 (**8th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant. The court rejected plaintiff's argument that an employer must show not only that it had an honest belief that its mistaken understanding of the facts was correct, but also that the belief was reasonable. The court explained at 1003:

> Pulczinski encourages us to adopt a modified "honest belief" rule employed by the Sixth Circuit. Under that approach, an employer must "establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708 (6th Cir.2006) (internal quotation omitted). In that circuit, an employer's failure to make that showing results in a finding that the employer's proffered nondiscriminatory explanations for its actions were pretextual. *Id.* Like the Seventh Circuit in *Little v. Illinois Department of Revenue*, 369 F.3d 1007, 1012 n. 3 (7th Cir.2004), we reject Pulczinski's suggested approach as inconsistent with the statute. A plaintiff must prove that the employer acted because of a known disability—that is, he must show intentional discrimination. A showing that the employer made a mistaken and unreasonable determination that an employee violated company rules does not prove that the employer was motivated by a known disability. "[E]ven if the business decision was ill-considered or unreasonable, provided that the decisionmaker honestly believed the nondiscriminatory reason he gave for the action, pretext does not exist." *Id.* at 1012.

f. Shifting Explanations

Pagán-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 19 Wage & Hour Cas.2d (BNA) 993 (**1st Cir.** 2012), upheld the judgment on a jury verdict for the FMLA plaintiff. The court held that the finding of pretext was justified by defendant's shifting explanations. The court stated at 10:

> Finally, Walgreens' shifting explanations also support the jury's verdict. We have noted that "[o]ne way [to establish pretext] is for the plaintiff to show that the employer gave different and arguably inconsistent explanations for taking the adverse employment action." *McDonough v. City of Quincy*, 452 F.3d 8, 18 (1st Cir.2006) (quoting *Dominguez–Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir.2000)) (internal quotation marks omitted). This case is an archetypal example of this phenomenon. Here, Pagán was initially given no explanation for his termination, despite repeated inquiries. By his own persistence, he eventually obtained an explanation that he was terminated because his supervisors had determined that he abandoned his job. Subsequently, after it became clear that Pagán could show that no such abandonment occurred, Walgreens changed the basis for his termination to his supposed dishonesty during its investigation of his two-week absence. The jury could reasonably have deemed these shifting explanations to be a red flag suggesting that Walgreens' decision to dismiss Pagán was motivated by retaliatory animus.

Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1004-05, 19 Wage & Hour Cas.2d (BNA) 1017, 26 A.D. Cases 1293 (**8th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant. The court rejected plaintiff's arguments that pretext was shown by shifting explanations, because the two explanations were consistent.

g. Adequacy of Investigation

Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1004-05, 19 Wage & Hour Cas.2d (BNA) 1017, 26 A.D. Cases 1293 (**8th Cir.** 2012), affirmed the grant of summary judgment to the ADA defendant. The court stated:

> Pulczinski also argues that Trinity's failure to conduct a sufficient investigation could establish pretext. He complains that the company failed to interview every employee who might have had relevant information, including each member of Pulczinski's crew. The appropriate scope of an internal investigation, however, is a business judgment, and we do not review the rationale behind such a decision. . . . Shortcomings in an investigation alone, moreover, are not enough to make a submissible case. . . . Employers are allowed to make even hasty business decisions, so long as they do not discriminate unlawfully, and there is no evidence here that the company purposely ignored relevant information or otherwise truncated the inquiry because of an animus against Pulczinski due to his son's disability. . . .

(Citations omitted.)

h. No Self-Referential Corroboration

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

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

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

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

i. After-the-Fact Justifications

Hudson v. United Systems of Arkansas, Inc., 709 F.3d 700, 704, 117 Fair Empl.Prac.Cas. (BNA) 952 (**8th Cir.** 2013), affirmed the denial of the Title VII sex discrimination defendant's motion for judgment as a matter of law. Plaintiff, the company Controller, needed to take time off from work for periodic medical procedures. She was fired when she attempted to return to work after taking longer off than usual, because of complications. Defendant's President stated that she violated the rule requiring executive-level employees to call him personally on his cell phone when they have an unscheduled absence. The court held that the jury was entitled to disregard the testimony of the President of the company, stating:

> . . . Petkovsek's account did not go "essentially undisputed," as he claims on appeal. Three current or former executive employees testified that they had never heard of Petkovsek's alleged cell phone policy. In response to Petkovsek's testimony that he had told Hudson about the cell phone policy months before her termination, a portion of his pretrial deposition was introduced in which he stated that he believed he first told her about it the day she was fired. . . .

j. Inferences to Be Drawn from Presenting Pretextual Evidence

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grants of summary judgment against plaintiff Montone, who had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list, and against the Astriab plaintiffs in a second case, who were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or who were not promoted at all allegedly because they were ranked lower than Montone. The court held at 191-92 that the lower court erred in holding that evidence of pretext was not also evidence of motive:

It is by now axiomatic that a plaintiff in an employment retaliation case may avoid summary judgment by offering evidence that discredits the reasons articulated by the defense for the adverse employment action. *See, e.g., Stephens v. Kerrigan,* 122 F.3d 171, 181 (3d Cir.1997). By presenting evidence that casts doubt on Troy's articulated rationale for suspending all promotions to the lieutenant position, Montone is entitled to have the trier-of-fact decide whether it was a general dislike of her that motivated Troy, or whether it was personal animosity that sprung from Montone's vocal opposition to the candidacy of Troy's patron. Indeed, in Stephens, we held that summary judgment was not appropriate where plaintiffs "made a sufficient showing to discredit [defendant's] proffered reasons for not promoting from the lieutenants lists and thus [were] entitled to have a fact finder determine whether their political affiliation or non-support was a substantial or motivating cause of the failure to promote." 122 F.3d at 183. The District Court here similarly agreed with Montone that Jersey City and Troy's proffered reasons were pretextual, but then granted summary judgment to the defendants rather than allowing a fact finder to determine whether Montone's political activities during the election were the real reason behind her non-promotion.

5. <u>Causation</u>

Leal v. McHugh, __ F.3d ___, 2013 WL 5379419, 120 Fair Empl.Prac.Cas. (BNA) 44 (**5th Cir.** Sept. 26, 2013) (No. 12-40069), affirmed in part and reversed in part the grant of defendant's motion to dismiss against the ADEA and retaliation plaintiffs. The court held that the lower court erred in conflating allegations of "but-for" causation as one of defendants' motivations and the forbidden "motivating factor" approach. The court stated at p. *8:

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

(Footnotes omitted.)

B. Retaliation

1. Protected Conduct

a. Whose "Reasonable Belief" Suffices?

Summa v. Hofstra University, 708 F.3d 115, 126, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. Plaintiff was a graduate student working as football team manager, and the harassers were members of the football team. "Hofstra concedes that each of Summa's asserted claims—namely, (1) the denial of the football manager position for 2007 Spring Ball; (2) the denial of the graduate assistantship position in the Office of University Relations; and (3) the termination of Summa's privilege of student employment—constitutes an adverse employment action." *Id.* The district court held that plaintiff could not reasonably have believed the harassment was a violation of Title VII, and thus held that her complaints were not protected. Rejecting this view, the court of appeals stated:

> That the school considered these complaints to be "student-on-student" issues is of no moment, as the first element of the prima facie case explicitly contemplates the belief of the plaintiff, not of the employer. . . . It is clear from Summa's formal EEO complaint that she believed that the event was employment related. Furthermore, this was an entirely reasonable belief because Summa was not on the football team bus in her capacity as a graduate student, but rather was there solely in her capacity as an employee of the Athletics Department.

Id. The court held that plaintiff had established protected conduct.

b. Harassment Complaints About Trivia Not Protected

Grosdidier v. Broadcasting Bd. of Governors, 709 F.3d 19, 24, 117 Fair Empl.Prac.Cas. (BNA) 946 (**D.C. Cir.** 2013), affirmed the grant of summary judgment to the Title VII defendant on plaintiff's retaliation claim. The court held that plaintiff did not engage in protected activity because no person could have believed that the conduct of which plaintiff complained constituted harassment. The court stated: "The type of conduct referenced in Grosdidier's complaints, such as circulating an email with a suggestive image of a well-known musician straddling a cannon and excessive hugging and kissing between a female coworker and several male coworkers and visitors, is insufficient to support a good faith belief that the conduct was 'so objectively offensive as to alter the 'conditions' of [her] employment.'"

Comment by Richard Seymour on *Grosdidier*: I do not think this decision affects the question whether employees are protected when they complain of conduct before it reaches the critical mass of being severe or pervasive under *Faragher* and *Ellerth*. The above descriptions involve all that was potentially amiss over a period of years, with no evidence at all suggesting that there was an increasing crescendo of conduct that would imminently become severe or pervasive. The best that can be said for the complaints is that they reflected a hyper-sensitive approach that nowhere came within a football field of offending a reasonable person.

c. Oral Complaints Protected

Summa v. Hofstra University, 708 F.3d 115, 126-27, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court held that plaintiff's oral complaints were protected:

> Finally, as Summa correctly notes, the district court erroneously confined its consideration to her written complaints. The written notes of the University's Equality Officer evidence that Summa complained about the entire course of harassment over the semester. In determining the reasonableness of Summa's belief, the court should have considered these complaints as well because "[t]he law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges."

(Citation omitted.)

2. Causation

Butler v. Crittenden County, 708 F.3d 1044, 117 Fair Empl.Prac.Cas. (BNA) 757 (**8th Cir.** 2013), affirmed the dismissal of plaintiff's § 1983 retaliation claim arising from her filing an EEOC charge because she was terminated before she filed a charge. It rejected her claim of retaliation for making internal complaints because she was first suspended for tardiness that occurred prior to her first internal complaint, and she was fired for continuing to be tardy.

a. Intervening Cause

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

b. Knowledge of Protected Activity

Summa v. Hofstra University, 708 F.3d 115, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court stated at 124:

> It is apparent that a number of Hofstra officials—including Cohen, Equality Officer Maureen Murphy, and Linda O'Malley of the Office of the Dean of Students—were aware of Summa's complaints throughout 2006 and 2007. And, at a minimum, the University's legal office knew about the instant litigation. Nothing "more is necessary

than general corporate knowledge that the plaintiff has engaged in a protected activity" . . . and it is apparent Hofstra had such knowledge here.

(Citation omitted.) The court continued at 127:

> The district court concluded that Summa could not establish that her November 2006 complaints caused her replacement as football manager because there was no evidence that the *decisionmaker* responsible for hiring spring managers, Equipment Manager Battaglia, either knew about Summa's complaints or knew that Summa had wanted to return as a manager. To the extent that decisionmaker knowledge is relevant in establishing causation, that knowledge may be satisfied by demonstrating that "the agent who decides to impose the adverse action but is ignorant of the plaintiff's protected activity *acts pursuant to encouragement by a superior* (who has knowledge) to disfavor the plaintiff." *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 148 (2d Cir. 2010) (emphasis added). While there is no direct evidence that Cohen specifically told Battaglia not to hire Summa, crediting Summa, as we must, Cohen and Perry told her the position continued into the spring and the email regarding the position clearly identified both the fall and spring seasons. A reasonable jury could conclude that these facts, coupled with the fact that these coaches then either allowed Battaglia to replace her or told Battaglia that new managers were needed, constitute Battaglia's superiors encouraging him to disfavor Summa. Battaglia's affidavit states only that at the time he selected students to serve as managers, he was not aware that Summa had any interest in returning. The affidavit does not say who told him to hire managers, and a jury could reasonably infer that it was Cohen who told Battaglia that they needed to hire new managers. This conclusion is further supported by Perry's deposition testimony that he had hired student managers in the past because Cohen told him it needed to be done. A jury could reasonably conclude that the same procedure characterized manager hiring in the spring.

c. Temporal Proximity

Summa v. Hofstra University, 708 F.3d 115, 128-29, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), vacated the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's claim of retaliation for having made complaints of sexual harassment. The court held that causation could be shown simply by temporal proximity. It referred to the "first actual opportunity to retaliate" rule, *id.* at 128, and stated:

> Only four months passed between Summa's November 2006 complaints and the denial of the spring season manager position. There is strong reason to find this four-month time span sufficient in this case to establish causation because Summa's complaints were based on events that occurred on the very last day of the fall season. The start of the spring season was the first moment in time when the football coaching staff could have retaliated against Summa as she was not directly working for them over the intervening months. This Court has recently held that even gaps of four months can support a finding of causation. *Hubbard v. Total Commc'ns, Inc*., 347 Fed.Appx. 679, 681 (2d Cir. 2009) (summary order). Here, this close temporal relationship is made even closer by the fact that the adverse action occurred at the first actual opportunity to retaliate. . . .

The court also stated: "The seven-month gap between Summa's filing of the instant lawsuit and the decision to terminate her employment privileges is not prohibitively remote." *Id.* at 128 (citation omitted).

Desardouin v. City of Rochester, 708 F.3d 102 (**2d Cir.** 2013), affirmed the grant of summary judgment to the Title VII, § 1983, and New York State Human Rights Law retaliation defendants. Plaintiff secretly taped conversations involving her superiors in the Police Department, a felony, and then lied about it. The court held that termination for this offense was a legitimate nondiscriminatory reason. Plaintiff sought to defeat the causal link between this explanation and her termination by showing that she was fired four months after the taping. The court rejected her reasoning: "Because her misconduct reasonably required some time to investigate, the four-month interval did not impair the legitimacy of the Defendants' proffered reason for the termination." *Id.* at 106.

Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152 (**3d Cir.** 2013), reversed the grant of summary judgment to the Federal Rail Safety Act defendant. The court stated at 160: "Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action." (Citation omitted.)

C. Comparators

1. Adequate Comparators

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

> Of course, we are conscious that a court must not act as "a super-personnel department that reexamines an entity's business decisions[.]" . . . PA was entitled to restructure the Transportation Group to return it to profitability and to fire people to do so. PA was also entitled to fire Barnett if Kelly believed that her consulting practice did not "fit" within the restructured Group. But there is evidence in the record from which a reasonable jury could conclude that lack of "fit" was not why PA fired Barnett, and that unlawful discrimination was. Summary judgment is inappropriate where, as here, the most significant disputes between the parties are factual in nature. . . .
>
> The most important factual dispute is why PA fired the fifty-seven year-old female, Barnett, but retained the forty-one year-old male, Gao. Different outcomes for Barnett and Gao matter because in nearly all respects material to PA's explanation, Gao was similarly situated to Barnett. The most significant differences between the two are that Gao is male and younger than Barnett. Those are differences a jury should be allowed to consider.
>
> The record is replete with evidence that PA partners, including Kelly, believed that Gao's consulting practice did not "fit" in the Transportation Group. In the September

> 30 chart created by Miller and Kelly, both Barnett and Gao received two check marks out of a possible three in the "Skill and Capability" rating. Each also received an accompanying notation: "Trade" in Barnett's case, and "China" in Gao's. According to Miller, these ratings meant that Barnett and Gao both had strong skills in their respective areas of expertise – trade and China – but that neither was likely to make meaningful contributions to the Group's focus on the aviation industry.

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

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

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

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

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

2. Inadequate Comparators

Butler v. Crittenden County, 708 F.3d 1044, 117 Fair Empl.Prac.Cas. (BNA) 757 (**8th Cir.** 2013), affirmed the dismissal of plaintiff's § 1983 racial and sexual discrimination claim. The court rejected plaintiff's comparators on tardiness because the most tardy employee not fired had fewer than half plaintiff's instances is tardiness in 2008 alone.

3. Single Defense Comparator Does Not Justify Summary Judgment

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grant of summary judgment against plaintiff Montone on her First Amendment retaliation claim. Montone had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list. The court held at 192 that the lower court erred by

relying on the promotion to Lieutenant of just one of the several Sergeants who had supported the opponent:

> The District Court also erred in giving substantial weight to evidence that Troy promoted at least one of candidate Manzo's supporters, Edwin Gillan. . . . While this may be relevant evidence for the fact finder to consider when ultimately determining if Montone was in fact retaliated against based on her political activity, it does not preclude a jury from finding that Montone's support for Manzo was the motivating factor in not receiving a promotion. At the summary judgment stage, Montone need only "'make a showing sufficient to establish the existence of [the] element[s] essential to [her] case....'" . . . Her showing in this case is not overcome by the fact that one supporter of Healy's opponent was promoted, especially given the evidence of how active Montone was in supporting Manzo. The three-prong test for retaliation for political affiliation does not require that Montone prove that every other supporter of Healy's opponent also suffered retaliation.

(Citation omitted.)

D. Discriminatory Statements

1. RIF Spreadsheets Listing Age

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

> . . . Barnett points to a spreadsheet produced by COO Tindale's secretary in February 2003 for Tindale and CEO Moynihan in advance of the first meeting they convened about the Group. The spreadsheet includes comments from the authors of the internal audit about the productivity of each employee in the Group. The spreadsheet also reports the age of each employee, including Barnett.
>
> Neither Moynihan nor Tindale could recall why ages were part of the spreadsheet, and PA asserts that there is no evidence of a link between the spreadsheet and Barnett's firing. Kelly testified that he did not see the spreadsheet and made the decision to fire Barnett on his own, without any prodding from Moynihan or Tindale. The district court determined the spreadsheet "irrelevant" to Barnett's discrimination claims, because "Kelly, alone, made the decision to terminate Ms. Barnett," and credited Kelly's testimony that his decision to fire Barnett was not influenced by Moynihan and Tindale. . . .
>
> The district court was too quick to resolve this issue in PA's favor. A reasonable jury could find the spreadsheet to be probative of discrimination, because the jury might infer that PA's leadership included age as a factor in its personnel decisions. A jury could likewise refuse to credit Kelly's testimony that he did not consult with Moynihan and

> Tindale on firing decisions in October 2003, given evidence that PA's CEO and COO led meetings discussing which Transportation Group employees to fire only a few weeks before.
>
> Of course, a reasonable jury could draw the inference that including ages in the spreadsheet was a one-off case of mistaken initiative by the secretary. But so could it reasonably infer that Moynihan and Tindale wanted ages in the spreadsheet to help PA leadership decide whom to fire and whom to keep. Barnett was entitled to all reasonable inferences in her favor to be drawn from the record evidence. . . . By resolving these fact-bound questions in PA's favor, the district court committed error.

(Citations omitted,)

2. Ambiguous Statements

Morales-Cruz v. University of Puerto Rico, 676 F.3d 220, 225, 114 Fair Empl.Prac.Cas. (BNA) 1185 (**1st Cir.** 2012), affirmed the Rule 12(b)(6) dismissal of plaintiff's Title VII and § 1983 gender-stereotyping sex discrimination and retaliation claims. The court held that no gender bias could be inferred from the types of gender-neutral statements made about plaintiff:

> The amended complaint alleges that various officials described the plaintiff as "fragile," "immature," "unable to handle complex and sensitive issues," engaged in "twisting the truth," and exhibiting "lack of judgment." These descriptors are admittedly unflattering—but they are without exception gender-neutral. All of them apply equally to persons of either gender and, while they might yield the conclusion that the plaintiff's termination was related to the professor-student fling, they do not support a reasonable inference that the defendants denied the plaintiff an extension of her probationary period because of failed gender stereotype expectations. By definition, terms that convey only gender-neutral meanings are insufficient to anchor a gender-stereotyping claim.

(Citation omitted.) The court held that defendants' occasional references to her as "that girl" did not show any gender-related basis for the denial of tenure and her subsequent termination" "The plaintiff offers no meaningful context for the use of the term "that girl." On this record, that usage does not amount to more than an offhand comment." *Id.* The court further held that plaintiff's complaint about the use of these terms could not be considered to be protected conduct, thus defeating her retaliation claim. *Id.* at 226-27.

Solis v. Walgreen Co., 2013 WL 1942159 (N.D.Calif. May 9, 2013) (No. 5:11-CV-00605-EJD), granted summary judgment to the California Fair Employment and Housing Act defendant. The court held at p. *5 that the decision-maker's Facebook boast of having gotten rid of many employees, including plaintiff, was tasteless but not probative of disability discrimination.

3. Statements Showing Bias

Sharp v. Aker Plant Services, Inc., 726 F.3d 789 (**6th Cir.** 2013), reversed the grant of summary judgment to the ADEA defendant, finding direct evidence of age bias from the explanation plaintiff's supervisor gave him at the time of discharge in a RIF, that a younger

employee was being retained because he would be able to work for the defendant longer. The lower court had treated this as nondiscriminatory succession planning, and had dismissed the biased statements as stray remarks. The court rejected defendant's argument that the declarant was not the decisonmaker, because he made the recommendations, he was the only person who knew the employees in question, and his recommendations were followed. Therefore, he was the decisionmaker:

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

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

> Aker argues that even if it is saddled with Hudson's comments, those comments do not constitute direct evidence that age was the but-for factor in the decision to fire Sharp. We cannot agree. "Direct evidence of discrimination is that evidence which, if believed, requires the conclusion that unlawful discrimination was [the] motivating factor in the employer's actions." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (en banc) (internal quotation marks omitted). "It does not require the fact finder to draw any inferences to reach that conclusion." *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir. 2006) (citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).
>
> "In assessing the relevancy of a discriminatory remark, we look first at the identity of the speaker." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir. 1998). Discriminatory remarks by decision makers and those who significantly influence the decisionmaking process can constitute direct evidence of discrimination. *Bartlett v. Gates*, 421 F. App'x 485, 489 (6th Cir. 2010); *DiCarlo v. Potter*, 358 F.3d 408, 417 (6th Cir. 2004); *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 550 (6th Cir. 2004). But "'only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age,' satisfy this criteria." *Scott v. Potter*, 182 F. App'x 521, 526 (6th Cir. 2006) (quoting *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989)). "[T]o prevail on direct evidence at the summary judgment stage, it seems that plaintiffs must prove 'by a preponderance of the evidence . . . that age was the "but-for" cause of the challenged employer decision.'" *Bartlett*, 421 F.App'x at 488-89 (quoting *Geiger v. Tower Auto.*, 579 F.3d 614, 621 (6th Cir. 2009)). Aker contends that Hudson's tape-recorded remarks do not constitute direct evidence of age discrimination because they were stray remarks that were unrelated to the decisionmaking process. It is true that "general, vague, or ambiguous comments do not constitute direct evidence of discrimination because such remarks require a factfinder to draw further inferences to support a finding of discriminatory animus." *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 708 (6th Cir. 2008) (citing *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 524-25 (6th

> Cir. 2007) (evidence that supervisor removed employee from account because he was "too old" did not constitute direct evidence of age discrimination because it was not related to his termination), *overruled on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.4 (2009)); *Rowan*, 360 F.3d at 548-49 (employer's nebulous remarks about general need to lower average age of workforce and stray comment that "the older people should go, bring in some new blood," made years before employees' termination, were not direct evidence of unlawful age bias)). However, Hudson's comments were not so vague, general, or ambiguous as to qualify as stray comments. To the contrary, Hudson's remarks were offered to explain the very decision at the heart of this lawsuit. They specifically described Hudson's — and Aker's — rationale in choosing which employees to fire and which to retain. *See Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 755 (6th Cir. 2012) (holding that a supervisor's statement, "I did not want [plaintiff] volunteering for additional military duty when he was needed at UPS," was sufficient direct proof of anti-military animus under Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(c)(1)).
>
> Aker also challenges the connection between Hudson's comments and the adverse employment action, making much of the fact that the tape-recorded conversation occurred after the layoff decision and after Sharp had been notified. Aker's argument ignores the fact that Atkins and Dellinger relied solely on Hudson's input when they decided which employees to let go. Hudson's comments were a retrospective description of the decision-making process thatled to the terminations. They were both "temporally [and] topically related" to the decision to choose Sharp to lay off. *See Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 725 (6th Cir. 2012). If we are to take Hudson at his word, he kept the younger Kirkpatrick and fired the older Sharp because Sharp was "of the same age [as Hudson] and we're all going to retire and I had an opportunity to bring the next generation[] in, so that's what we decided to do." If there ever was a window into the mind of an employment decision maker, that was it.

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

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

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

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

Hudson v. United Systems of Arkansas, Inc., 709 F.3d 700, 704-05, 117 Fair Empl.Prac.Cas. (BNA) 952 (**8th Cir.** 2013), affirmed the denial of the Title VII sex discrimination defendant's motion for judgment as a matter of law. The court relied in part on statements made by defendant's President, stating:

> We conclude that a legally sufficient basis existed for a reasonable jury to determine that Hudson had made a showing that she had been discriminated against by her employer. . . . Hudson also produced evidence that Petkovsek "belittle[d] women employees all of the time," talked down to them, and called them "girl" or "little girl." Once he told Hudson that she "g[a]ve good phone," which she took to be a reference to oral sex. Finally, Hudson testified that immediately before telling her to "get out" of her office during their confrontation, Petkovsek ordered her to "sit down, little girl." . . .

(Citations omitted.)

4. Backlash: Defendant's Explanation for Discriminatory Remarks Can Itself Be Direct Evidence of Bias

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

> Aker also argues that Sharp acknowledged, and Hudson agreed, that Hudson's comments could apply to anyone because a younger individual could leave at any time. Assuming that is true, potential longevity is no measuring stick at all. It simply becomes

another way to "artfully" say: "We've chosen the younger candidate because, well, he is younger." That constitutes direct evidence that age was the reason for terminating Sharp, and summary judgment in favor of Aker should not have been granted.

Id., at 801.

5. The Inferences to be Drawn from a Biased Statement

Teruggi v. CIT Group/Capital Finance, Inc., 709 F.3d 654, 117 Fair Empl.Prac.Cas. (BNA) 773, 34 IER Cases 1745, 27 A.D. Cases 951 (**7th Cir.** 2013), affirmed the grant of summary judgment to the ADEA, ADA, and State-law defendant. The court held that plaintiff was pursuing only the direct-evidence model, and rejected his evidence of biased discriminatory statements as insufficient to allow a reasonable inference that bias affected the decision to fire him:

> The strongest pieces of Teruggi's mosaic that could point to age or disability discrimination are Cashman's comments about Teruggi's retirement plans, being "old," and being on drugs, but even those are not sufficient either alone or when combined with the rest of the evidence to point to a discriminatory motive. To raise an inference of discrimination, comments must be "(1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action." . . . Although Cashman made the decision to discharge Teruggi, the comments he made about Teruggi's age and disability predated the termination decision by at least eighteen months and were not in reference to the adverse employment action. And to the extent that one might interpret Cashman's January 2009 statement that Teruggi was "back on drugs" as related to either Teruggi's age or his disability, there is no apparent connection between that comment and the termination decision.

Id. at 661 (citation omitted).

E. Statistically Significant, But Is It Systemic?

Apsley v. Boeing Co., 691 F.3d 1184, 115 Fair Empl.Prac.Cas. (BNA) 1573, 54 Employee Benefits Cas. 1024, 26 A.D. Cases 1439 (**10th Cir.** 2012), affirmed the grant of summary judgment to the ADEA defendant. Plaintiffs alleged a pattern of systemic discrimination against older workers in selections for termination in a RIF. Their expert analysis showed shortfalls in the retention of older workers that were statistically significant at the level of more than five standard deviations, meaning that they could have occurred by chance less than once in 50,000 times. However, both of his findings of statistical significance would have disappeared if 48 to 60 more older workers had been recommended for retention or been retained, out of several thousand such decisions. The lower court granted summary judgment on this basis, holding that plaintiffs had not shown that the disparities had practical significance. The Tenth Circuit affirmed, but criticized this reasoning:

> The disparities upon which the Employees rely are indeed small in light of the thousands of total hires and recommendations at issue. But just as a relatively small percentage difference between heads and tails would be quite surprising in the million-coin-flip experiment, what is noteworthy here is that the observed disparity persisted over

> the course of eight or nine thousand individual recommendations and offers. We are suspicious of the Companies' selective rehire practices for the same reason we would suspect a coin that came up heads 510,000 out of 1,000,000 times. In other words, it is precisely because we are looking at thousands of hiring decisions that the statistics are noteworthy.

Id. at 1199-1200 (footnote omitted.) The court instead focused on plaintiff's allegations of a systemwide pattern of discrimination. Plaintiffs' breakdowns by divisions showed that stronger disparities occurred in only a few of the 28 divisions. Citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977), the court stated:

> Because they "alleged a systemwide pattern or practice," they "had to prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts." *Id.* (internal quotation marks omitted). To overcome summary judgment, they had to introduce sufficient evidence to allow a rational juror to conclude "by a preponderance of the evidence that racial discrimination was the [Companies'] standard operating procedure—the regular rather than the unusual practice." *Id.* The statistical evidence before us would not permit any reasonable trier of fact to resolve this matter in the Employees' favor.
>
> To the contrary, we agree with the district court that the Employees' statistics suggest, at most, isolated or sporadic instances of age discrimination. *See Apsley*, 722 F.Supp.2d at 1245 ("Although Plaintiffs have produced evidence that may indicate that discrimination did occur during the divestiture, they have failed to put forth the 'substantial proof' necessary to show that intentional age discrimination was Defendants' standard operating procedure." (quoting *King v. Gen. Elec. Co.*, 960 F.2d 617, 624 (7th Cir.1992))). As the district court properly noted, the Employees' own figures show that the Companies recommended and hired over 99% of the older employees they would have been expected to recommend and hire in the absence of any discrimination. *Id.* at 1239. While this disparity might still lead a social scientist to suspect that the divestiture process was not wholly free of age-based discrimination, *Castaneda*, 430 U.S. at 496 n. 17, 97 S.Ct. 1272, it would not permit a jury to find that such discrimination was the Companies' standard operating procedure, *Teamsters*, 431 U.S. at 336, 97 S.Ct. 1843.

Id. at 1200-101.

RTS Comment on *Apsley v. Boeing Co.*: The decision suggests that if plaintiff had framed their case more narrowly, limiting it to just the divisions where the most significant problems occurred, and alleged systemic discrimination only within those divisions, they may have had a far more winnable case. It is too often overlooked that bringing an overly broad case helps to conceal actual discrimination by diluting and muddying sharp showings from individual units with statistics from nondiscriminatory units. This is a cautionary tale for plaintiffs enamored of having a big case.

F. Comparators

1. Defendants' Comparators on Summary Judgment

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35

IER Cases 32 (**3d Cir.** 2013), vacated the grants of summary judgment against plaintiff Montone, who had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list, and against the Astriab plaintiffs in a second case, who were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or who were not promoted at all allegedly because they were ranked lower than Montone. The court held at 192 that the lower court erred in giving weight to a defense comparator in granting summary judgment:

> The District Court also erred in giving substantial weight to evidence that Troy promoted at least one of candidate Manzo's supporters, Edwin Gillan. . . . While this may be relevant evidence for the fact finder to consider when ultimately determining if Montone was in fact retaliated against based on her political activity, it does not preclude a jury from finding that Montone's support for Manzo was the motivating factor in not receiving a promotion. At the summary judgment stage, Montone need only "'make a showing sufficient to establish the existence of [the] element[s] essential to [her] case....'" . . . Her showing in this case is not overcome by the fact that one supporter of Healy's opponent was promoted, especially given the evidence of how active Montone was in supporting Manzo. The three-prong test for retaliation for political affiliation does not require that Montone prove that every other supporter of Healy's opponent also suffered retaliation.

(Citations omitted.)

G. Evidence of Patterns

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grant of summary judgment against plaintiff Montone on her First Amendment retaliation claim. Montone had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list. The court held at 192 that the lower court erred in failing to consider evidence of a pattern of political patronage in Jersey City:

> The District Court's dismissal of evidence of a pattern of political patronage in Jersey City was also improper. *See Montone*, 2011 WL 2559514, at *3 ("Evidence that, during Mayor Healy's administration, other people have gotten jobs or promotions in Jersey City for political reasons may have some minimal probative value as background, but it is clearly insufficient by itself to support an inference that Plaintiff was retaliated against.") As we held in *Goodman*, "a history of improper promotion practices using sponsorship as a factor" may, when presented with other facts, prove to be "sufficient circumstantial evidence to permit a reasonable jury to find that political affiliation was a substantial factor in the decision not to promote...." *Id.* at 674. In this case, there are other facts that, when combined with evidence of political patronage, suffice to defeat summary judgment. In particular, there is the evidence of recommendations that the number of lieutenants on the police force be increased as well as evidence that there were promotions to every other rank but lieutenant during Troy's tenure as Police Chief that, when considered in combination with a history of political patronage, supports a reasonable inference that Montone was not promoted in retaliation for her political activity.

H. Harassment

1. Severity or Pervasiveness

Desardouin v. City of Rochester, 708 F.3d 102 (**2d Cir.** 2013), reversed the grant of summary judgment to the Title VII, § 1983, and New York State Human Rights Law sexual harassment defendants. The court discussed the elements of a hostile work environment at 105:

> The plaintiff must also show "either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment.". . . If a plaintiff relies on a series of incidents, they must be "more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." . . . In determining whether the threshold has been met, relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." . . .

(Citations omitted.) The court then held that plaintiff had shown a disputed issue of material fact about the severity or pervasiveness of the harassment in question:

> McIntyre's comments, though not presenting an obvious case of hostile work environment, are sufficiently beyond the line drawn in *Harris* to warrant a trial. The comments persisted on a weekly basis over an interval that lasted at least two and perhaps three months. Though not threatening, they were more than merely offensive. For a male to say to a female employee under his supervision that her husband was "not taking care of [her] in bed" is the sort of remark that can readily be found to be a solicitation for sexual relations coupled with a claim of sexual prowess and can just as readily be found to have been perceived as such by the female employee. The weekly repetition of such a remark over several weeks only served to reenforce its offensive meaning and to make sexual intimidation, ridicule, and insult a pervasive part of Desardouin's workplace, effectively changing the terms and conditions of her employment. . . . Indeed, Desardouin's affidavit stated that she found McIntyre "threatening," and that he made "sexual advances" toward her and another employee. The allegations of repeated solicitation of sexual relations in a vulgar and humiliating manner suffice to warrant a trial.

Id. at 105-06 (citation omitted).

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 168, 117 Fair Empl.Prac.Cas. (BNA) 8 (**3d Cir.** 2013), reversed the grant of summary judgment to the Title VII and Pennsylvania Human Rights Act sexual harassment defendant. The court held that the harassing incidents must be viewed together, not separately: "The District Court's reasoning suggests that it improperly parsed out each event and viewed them separately, rather than as a whole. On remand, the District Court must consider the totality of the circumstances, rather than parse out the individual incidents, to determine whether the acts that collectively form the continuing violation are severe or pervasive."

Butler v. Crittenden County, 708 F.3d 1044, 1050, 117 Fair Empl.Prac.Cas. (BNA) 757 (**8th Cir.** 2013), affirmed the dismissal of plaintiff's § 1983 sexual harassment claim. The court held that the conduct was neither severe nor pervasive: "Although there was evidence that Strong asked Butler on several dates, sought to touch her hair, and complimented her perfume, he never touched her inappropriately or engaged in 'physically threatening or humiliating' conduct. . . . Moreover, he ceased his advances after jail administrators confronted him about Butler's complaint and later removed him from supervision over her. We conclude that in these circumstances Strong's acts did not rise to the level of a prima facie case of a hostile work environment."

2. Unwelcomeness

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 168-69, 117 Fair Empl.Prac.Cas. (BNA) 8 (**3d Cir.** 2013), reversed the grant of summary judgment to the Title VII and Pennsylvania Human Rights Act sexual harassment defendant. The court rejected the lower court's view that plaintiff's engagement in sexual banter and failures to complain to supervisors showed as a matter of law that the conduct was not unwelcome:

> We agree with the District Court that an objectively reasonable person in Mandel's place might be offended by the alleged incidents. We are troubled, however, by the District Court's conclusion that Mandel failed to show that she was detrimentally affected by the alleged incidents:
>
> > Here, Mandel only complained about one of the alleged incidents (Bachert's name calling), and she complained to a friend at work and not a supervisor. Further, she has presented no evidence that she had any psychological distress or that her ability to perform her job was impaired. Finally, the record contains evidence that Mandel actively participated in creating a work environment in which vulgarity and sexual innuendo were commonplace. Mandel's use of explicit language and her e-mails involving ongoing sexual jokes demonstrate a casual ease with this type of workplace behavior. The use of sexual humor does not on its own demonstrate that Mandel is incapable of being offended by degrading comments, but when combined with a lack of evidence of any subjective distress, a reasonable jury could not find that Mandel has proven that the harassment had a detrimental effect on her.
>
> Although Mandel engaged in certain unprofessional conduct, the comments and conduct to which she was subject were often worse and apparently uninvited. Mandel complained about being told to make coffee, and although she did not complain to her supervisors about the other alleged incidents, there is some evidence that she complained to other employees. She also resigned shortly after Bachert called her a "bitch" during a meeting and alleged in her sworn EEOC Charge and questionnaires that she was detrimentally affected. A jury could reasonably conclude that Mandel did not invite these comments or conduct and that, despite her own conduct, was offended by them. Because the inherently subjective question of whether particular conduct was unwelcome presents difficult problems of proof and turns on credibility determinations, the District Court erred in granting summary judgment.

Why Plaintiffs Should Always Cite Rule 412, Fed.R.Evid.: *Targonski v. City of Oak Ridge*, 921 F.Supp.2d 820, 833-34 (E.D.Tenn. 2013), denied the Title VII sexual harassment plaintiff's motion *in limine* to exclude her sxually explicit Facebook postings involving naked Twister, a naked party in her hot tub, and her interest in having an all-female orgy that her husband would film, where these were relevant to whether she was offended by sexual remarks in the workplace. The court stated:

> In addition to perhaps arguing that her above-cited Facebook postings have not been authenticated, plaintiff contends that the documents are "impermissible character evidence" with "essentially zero" relevance and a chance of unfair prejudice of "more than zero." Plaintiff is incorrect.
>
> The Facebook postings with which the court is familiar are neither irrelevant nor are they impermissible character evidence. [Doc. 22, p. 2–3, 19–20]. Instead, the postings are quite relevant to a key trial issue. The court has previously noted, "To be actionable under Title VII, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" . . . 26 L.Ed.2d 295 (1993))).
>
> In its summary judgment ruling, the court discussed the relevance of plaintiff's Facebook postings.
>
> > In November or December of 2009, plaintiff told her supervisor, Sergeant Matthew Tedford, that she suspected Officer John Thomas was spreading sexual rumors about her. Plaintiff claims that Thomas also directly told her that her "husband [was] trying to get him [Thomas] to have an orgy" involving Thomas's then-girlfriend, Cassie Bridges, and that "he felt like I was a lesbian and I wanted to be part of it." . . . Plaintiff further testified, "After that, of course, that's when people started saying, we know what John is saying about you. That's when the rumors start[ed] coming to me."
> >
> > * * *
> >
> > Plaintiff testified at her deposition, "I'm a Christian and I strive really hard to be a moral person. So for someone to start thinking of me as someone who has orgy parties at my house while my son is home, that's severely humiliating to me." Plaintiff further testified that she would never "go out and talk to people about" such things, even in a joking manner. Curiously, however, on February 23, 2010, plaintiff was herself discussing on Facebook her desire for a female friend to join her "naked in the hot tub." The previous day on her Facebook page, plaintiff was discussing "naked Twister." May 22, 2010 postings on plaintiff's Facebook page by her Facebook "friends" talked about female orgies involving plaintiff, Cassie Bridges, and others, to be filmed by plaintiff's husband.
> >
> > * * *
> >
> > Plaintiff claims that Officer Thomas's rumors created a hostile work environment based on her gender, for which defendant should be liable for failing to stop. In response, defendant argues that ... plaintiff could not possibly have found the workplace rumors to be offensive when she herself was making similar statements on Facebook.

[Doc. 22, p. 1–3, 16–17].

> The challenged Facebook evidence is not prohibited character evidence offered to prove that plaintiff on a particular occasion acted in accordance with a character or trait by, for example, actually engaging in "naked Twister" or any of the other activities discussed on her Facebook page. Instead, the evidence is relevant to the source of the alleged rumors and to whether plaintiff could truly have found those alleged rumors offensive. Further, as the court has previously noted, plaintiff has herself authenticated the Facebook evidence. [Doc. 22, p. 20]. Lastly, the mere fact that evidence is unfavorable to plaintiff does not make that evidence "unfairly prejudicial."

The court did not discuss whether the Facebook postings were public or restricted, whether they were accessible to other police officers, or Rule 412, F.R.Evid.

3. Adequacy of Employer's Response

Espinal v. National Grid NE Holdings 2, LLC, 693 F.3d 31, 115 Fair Empl.Prac.Cas. (BNA) 1418 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII racial harassment defendant, where the harassment involved co-workers, the employer learned of the incidents and promptly attempted to investigate them, plaintiff refused to co-operate with the investigation or even to name his harassers, and walked out of an investigative meeting. "Nonetheless, National managers did respond to plaintiff's allegations. They met with union National warned that any employee caught engaging in harassment would be terminated. The meeting was a prompt and appropriate response." No further incidents occurred after this warning was issued. *Id.* at 37.

Summa v. Hofstra University, 708 F.3d 115, 124-25, 117 Fair Empl.Prac.Cas. (BNA) 676 (**2d Cir.** 2013), affirmed the grant of summary judgment to the Title VII, Title IX, and New York State Human Rights Law defendants on plaintiff's sexual harassment claim. Plaintiff was a graduate student working as football team manager, and the harassers were members of the football team. The court held that the University exercised a high degree of control over the players, and applied the negligence standard applicable to co-worker harassment. The court held that the University responded timely and appropriately to plaintiff's complaints. It stated:

> The first time Summa complained to Cohen about the behavior of the football players was in late September 2006, regarding the objectionable Facebook postings. It is undisputed that Cohen promptly spoke to the three players involved in making the offending postings and instructed the players to remove the posts. The players complied, and no further online postings or other public displays were directed at Summa. Summa next complained to Cohen about the incidents surrounding the movie viewing on the team bus on November 18, 2006. Again, it is undisputed that as soon as Summa complained to Assistant Coach Perry about the content of the movie, he turned it off. Upon the players' raucous reaction, Perry immediately instructed them to be quiet and stationed himself near Summa for the rest of the bus ride. Upon arriving back at the University, Summa relayed her complaint to Cohen, who, within 48 hours, investigated the incident, immediately talking with the coaching personnel who had been on that bus, and removed Taylor from the football team. The fact that this incident was one of "three

> strikes" that lead to Taylor's expulsion does not undermine the appropriateness of Cohen's actions. The standard for reviewing the appropriateness of an employer's response to co-worker harassment "is essentially a negligence one, and reasonableness depends among other things on the gravity of the harassment alleged." . . . Each complaint that was brought directly to Cohen's attention was dealt with quickly and in proportion to the level of seriousness of the event. The fact that Cohen took action at once—completed within just days in all cases—speaks to the appropriateness of the University's response in this case. Because defendants took the needed remedial action in this case, the harassment carried out by some players on the football team cannot be imputed to the University and its personnel. In addition to the prompt response to the particular incidents of harassment, upon the report of the movie incident to the school's EEO officer—which took place after the offending player had already been expelled from the football team—the University had the entire Athletics staff undergo sexual harassment training before the start of the next football season. In addition to directly addressing the particular incidents of harassment of which it was aware, the University also took proactive steps to create a better environment for all employees in the future. Thus, district court properly granted summary judgment in favor of Hofstra and Cohen with respect to Summa's harassment claims.

(Citation omitted.)

May v. Chrysler Group, LLC, 692 F.3d 734, 115 Fair Empl.Prac.Cas. (BNA) 1409 (**7th Cir.** 2012), reversed the lower court's grant of a new trial on punitive damages as an abuse of discretion, and reinstated the jury's verdict of $3.5 million in punitive damages to the Title VII and § 1981 racial harassment defendant. Plaintiff testified that there were 70 or so instances of harassment over a period of three years. The court held that the jury reasonably concluded that defendant had done too little to curb the harassment. For example, a camera covering the area of plaintiff's toolbox would have shown who left the threatening notes there. Defendant should have removed an HR official from the investigation when plaintiff listed her husband as a possible perpetrator, and showed a basis for the listing because the husband had ordered him to do something dangerous. Defendant declared its opposition to harassment but did little to make that stated opposition real, even while the harassment went on for years. The court held that defendant was not excused from its obligation to take corrective action because it claimed it thought plaintiff was faking the incidents; the jury rejected that position. The court held that defendant showed much more concern for lowering costs than it showed for plaintiff. It stated:

> We have already explained why it was appropriate for Chrysler to be held responsible for the hostile work environment: Its response was shockingly thin as measured against the gravity of May's harassment. And that would have been true if this kind of harassment would have lasted only for months or a year. The harassment in this case continued for over three years. There were over seventy incidents. As the harassment persisted over months and years, Chrysler had to "progressively stiffen" its efforts. *EEOC v. Xerxes Corp.*, 639 F.3d 658, 670 (4th Cir.2011) (quoting *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir.1998)). It was unreasonable for Chrysler to "vainly hope [ ] that ... the same response as before [would] be effective." *Id.*
>
> If it was negligent to respond to weeks and months of death threats with a pair of

meetings and documentation, what happens when that inadequate response does not improve over the course of a year? Two years? Three years? At some point the response sinks from negligent to reckless, at some point it is obvious that an increased effort is necessary, and if that does not happen, punitive damages become a possibility. The facts in this case do not force us to hazard a precise rule about when sticking with the same inadequate strategy becomes reckless. May's harassment continued for years, the threats were extremely serious, and there was scant evidence of an increased effort over time. In short, the jury had plenty to go on. Recall, Chrysler held a pair of meetings in September 2002, documented the events, did gate-ring analysis for many incidents, and used a handwriting analyst. Those measures were all in place approximately one year into the harassment. It continued for two more years.

Chrysler argues that they cannot be liable for punitive damages because they made a good-faith effort to comply with the requirements of Title VII. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir.2001). A good-faith effort at compliance, however, is not a matter of *declarations* about how much the employer cared about a victim of harassment or about how hard certain HR employees say they worked to rectify the situation. When those declarations are belied by the employer's actions, talking a good game will not immunize an employer from a judgment that it was reckless. The jury reasonably determined that Chrysler's *actions* did not add up to a good faith effort to end May's harassment, and, much less, that its actions were (at least) reckless.

Id. at 745-46 (emphases in original).

4. Failure to Complain, and Adequacy of Complaints

See the discussion of *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168-69, 117 Fair Empl.Prac.Cas. (BNA) 8 (**3d Cir.** 2013), in the section above on "Unwelcomeness."

I. Independent Investigations

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

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

* * *

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

J. Affirmative Action

Maraschiello v. City of Buffalo Police Dept., 709 F.3d 87, 117 Fair Empl.Prac.Cas. (BNA) 665 (**2d Cir.** 2013), affirmed the grant of summary judgment to defendants on plaintiff's Title VII claim. Plaintiff was a Police Captain who was on the 2006 promotional list for the rank of Inspector. The defendants had been sued for disparate impact in the City's promotional examinations prepared by the New York State Civil Service Department, and retained an expert to evaluate their examination for Inspector and its job-relatedness. She found problems, in that the job analysis was over thirty years old and the form of the test was not normally considered useful in predicting success in the types of jobs in question. The City let bids on the development of a new test that would be better. One of its aims was to reduce disparate impact. The new test was given, plaintiff chose not to compete on the test, the 2006 list on which he was first was canceled, and the first vacancy since that 2006 list was filled from the new test. Both plaintiff and the promotee were white males. Plaintiff sued, arguing that the cancellation of the 2006 list and the new examination were impermissible under *Ricci v. DeStefano*, 557 U.S. 557 (2009), because one motive had been to increase minority promotions. The court held that *Ricci* was distinguishable. The court stated at 96-96:

> . . . Even if it were determined that the City's choice to adopt a new test was motivated in part by its desire to achieve more racially balanced results—and there is evidence in the record that at least suggests this—Maraschiello cannot demonstrate that the generalized overhaul of departmental promotional requirements amounted to the sort of race-based adverse action discussed in *Ricci*. Indeed, *Ricci* specifically permits an employer to "consider[ ], before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of race." 557 U.S. at 585.

V. Litigation

A. Exhaustion

Balas v. Huntington Ingalls Industries, Inc., 711 F.3d 401, 408, 117 Fair Empl.Prac.Cas. (BNA) 1065 (**4th Cir.** 2013), affirmed the dismissal of some of plaintiff's Title VII claims for failure of exhaustion, because she asserted the claims on her EEOC intake questionnaire but not in her EEOC charge. The court explained:

> In determining what claims a plaintiff properly alleged before the EEOC, we may look only to the charge filed with that agency. We have noted that "it would be objectively illogical to view a private letter from a complaining party to the EEOC as constructively amending a formal charge, given that one of the purposes of requiring a party to file charges with the EEOC is to put the charged party on notice of the claims raised against it." *Sloop v. Mem'l Mission Hosp., Inc.*, 198 F.3d 147, 149 (4th Cir. 1999). *Sloop's* reasoning applies here, despite Balas's contentions to the contrary. Balas argues that her letters, written before formal charges were filed, should be treated differently. We disagree. Given that Balas's employer was never apprised of the contents of her letters (nor could she expect it to have been), the point at which they were written makes no difference for the goals of putting her employer on notice or encouraging conciliation.
>
> While we recognize that EEOC charges often are not completed by lawyers and as such "'must be construed with utmost liberality'" . . . we are not at liberty to read into administrative charges allegations they do not contain. Instead, persons alleging discrimination have a different form of recourse if they determine that their initial charge does not read as they intended: they may, as Balas did, file an amended charge with the EEOC. *See* 29 C.F.R. § 1601.12(b). The intake questionnaire and the letters Balas submitted to the EEOC cannot be read as part of her formal discrimination charge without contravening the purposes of Title VII.
>
> Balas also argues that she should not be penalized for the EEOC's "negligence" in failing to send a copy of her intake questionnaire and letters to the EEOC to her employer. However, she points to no authority—and we find none—requiring the EEOC to undertake such an action or providing the EEOC with the discretion to do so. We decline to impose such an obligation upon the EEOC.

(Footnotes and citations omitted.)

Comment of Richard Seymour on *Balas v. Huntington Ingalls Industries, Inc.*: This is another shocking example of the EEOC's failure to perform its job properly. If it insists on re-writing the allegations of timely letter charges or intake questionnaires—an action it often performs inadequately, and sometimes even after the deadline for filing a charge has passed—it should send the supporting intake letters and questionnaires to the respondents and recognize as crystal clear that would-be charging parties do not send "private letters" to the EEOC, but send it information to be used to enforce their rights. There is absolutely no purpose in the EEOC's playing "keep away" when jurisdictional matters are at stake. The EEOC's omissions in this area are in absolute conflict with the purposes of the statutes it is supposed to be enforcing.

Butler v. Crittenden County, 708 F.3d 1044, 117 Fair Empl.Prac.Cas. (BNA) 757 (**8th Cir.** 2013), affirmed the grant of summary judgment to the §§ 1981, 1983, 1985, and State-law defendants, but held that a § 1983 plaintiff alleging a constitutional violation is not required to comply with Title VII exhaustion requirements.

B. Timeliness

1. Hostile Environment

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 168, 117 Fair Empl.Prac.Cas. (BNA) 8 (**3d Cir.** 2013), reversed the grant of summary judgment to the Title VII and Pennsylvania Human Rights Act sexual harassment defendant. The court held that permanence of the harassment is not required to establish a continuing violation under *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

C. Bars to Suit

1. Limitations

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

> Notwithstanding these considerations, the Government argues that the discovery rule should apply instead. Under this rule, accrual is delayed "until the plaintiff has 'discovered'" his cause of action. . . . The doctrine arose in 18th-century fraud cases as an "exception" to the standard rule, based on the recognition that "something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." . . . This Court has held that "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" . . . And we have explained that "fraud is deemed to be discovered when, in the exercise of reasonable diligence, it could have been discovered." . . .
>
> But we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties. . . .

(Citations omitted.) The Court continued at 1222:

> There are good reasons why the fraud discovery rule has not been extended to Government enforcement actions for civil penalties. The discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed. Most of us

> do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so. Instead, courts have developed the discovery rule, providing that the statute of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered.

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

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

2. Claim Preclusion

Dookeran v. County of Cook, 719 F.3d 570, 578 (**7th Cir.** 2013), affirmed the grant of summary judgment to the Title VII and State-law defendant because of *res judicata*. Plaintiff was a physician working at one of defendant's hospitals. Four years after he was hired, he disclosed for the first time, during a biennial reappointment proceeding, that a previous employer had fired him for creating a hostile work environment. The hospital revoked his staff privileges. He obtained judicial review in State court and lost. Later, he received a Notice of Right to Sue and filed suit. The court held that plaintiff's discrimination and retaliation claims could have been raised in his judicial-review proceedings, and he thus had a full and fair opportunity to litigate them. This was sufficient for claim preclusion under Illinois law. Judge Hamilton dissented. *Id.* at 578-82.

3. Unknown Claims

Yassan v. J.P. Morgan Chase and Co., 708 F.3d 963, 974, 117 Fair Empl.Prac.Cas. (BNA) 761 (**7th Cir.** 2013), held that plaintiff's severance agreement and release were binding under New York law, and that plaintiff could not defeat the release of all claims, known and unknown, by contending that defendant had induced him to sign the release by fraud. The court stated: "Chase may have misrepresented its reasons for terminating Yassan, and Chase may have had ulterior motives for terminating Yassan. But Yassan explicitly released Chase from all tort claims, including fraud. Yassan should have considered the possibility that Chase was lying to him before he signed a release waiving any claims that arose out of Chase lying to him."

4. Collateral Estoppel

Smith v. Perkins Bd. of Education, 708 F.3d 821, 117 Fair Empl.Prac.Cas. (BNA) 658 (**6th Cir.** 2013), rejected the defense of collateral estoppel and reversed the grant of summary judgment to defendant on plaintiff's ADA claim. Plaintiff was a teacher who had participated in an extensive evidentiary hearing before a neutral referee, with 27 witnesses and 139 exhibits. The referee found that the school board had shown good cause for plaintiff's termination. Plaintiff did not seek available review in county court. The court held at 825-28 that the general doctrine of Federal courts being collaterally estopped by unreviewed State administrative proceedings did not apply to ADA cases. The court relied on prior Supreme Court decisions in Title VII and ADEA cases.

5. Judicial Estoppel

E.E.O.C. v. CRST Van Expedited, Inc., 670 F.3d 897, 917-22, 114 Fair Empl.Prac.Cas. (BNA) 719, 95 Empl. Prac. Dec. ¶ 44,432 (**8th Cir.** 2012), *petition for rehearing filed*, affirmed the dismissal of three intervenors' sexual harassment claims because they did not disclose their claims against the defendant in their bankruptcy petitions, or in amendments to their claims, before their complete discharges. Quoting *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001), the court stated:

> "First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Id. at 918-19. One of the women had sought to re-open her and her husband's bankruptcy proceeding after the final discharge, but this was not enough to save her claim because she knew of her claim and filed a charge with the EEOC at least three months before she received a full discharge. However, the court reversed the lower court's ruling barring the EEOC from seeking relief for these intervenors. Relying on *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the court held that the EEOC did not stand in the shoes of the persons for whom it sought relief, and that the lower court abused its discretion in judicially estopping the EEOC. It stated at 922: "Under *Waffle House* a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped." Judge Murphy concurred in part and dissented in part. *Id.* at 935-38.

6. Standing

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grant of summary judgment against the Astriab

plaintiffs on their First Amendment claim. Montone, plaintiff in a separate case, had campaigned for the opponent of the man who won and became Jersey City's Mayor. She was fifth on the promotion list for Lieutenant. The Astriab plaintiffs in a separate case were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or were not promoted at all allegedly because they were ranked lower than Montone. The court recognized at 196 the novelty of the issue: "No other court of appeals has, to our knowledge, addressed the question presented by this case: whether a plaintiff has standing to bring an action for First Amendment political affiliation retaliation pursuant to § 1983 based on the defendant's alleged deprivation of another's First Amendment rights." It held that the Astriab plaintiffs had standing as indirect victims of political affiliation discrimination. *Id.* at 195-99. It stated at 199:

> That the retaliatory conduct at issue here was not directed at the *Astriab* plaintiffs is not dispositive, because the First Amendment concerns implicated by political affiliation retaliation are the same whether a plaintiff is the "direct" or "indirect" victim of illegal political retaliation. . . . An employee might be equally dissuaded from engaging in protected political activity where it is his fellow workers who experience retaliation for that employee having engaged in the "core" First Amendment activities of free "political belief and association." . . . The *Astriab* plaintiffs' interest in being promoted in a public agency employment position free from the influences of political association thus falls within the "zone of interests" protected by the First Amendment.

(Citations omitted.)

D. Removal

Yassan v. J.P. Morgan Chase and Co., 708 F.3d 963, 970-73, 117 Fair Empl.Prac.Cas. (BNA) 761 (**7th Cir.** 2013), held that a case dismissed for want of prosecution a day before the notice of removal was nonetheless a case actively pending in Illinois State court and subject to removal, because an Illinois savings statute allowed a new case to be brought on the same cause of action within one year, subject to the period of limitations. Moreover, the court stated at 970: "Indeed, at oral argument, both sides acknowledged an informal practice of "almost automatically" vacating dismissals for want of prosecution under [Illinois] § 5/2–1301(e) within thirty days of issuance in Illinois state courts. At the time immediately prior to Chase filing a notice of removal, Yassan's case could have benefitted from this informal practice." The case was thus still being actively contested on the date of removal, satisfying the "pending" requirement of 28 U.S.C. § 1441(a). The court went through a similarly complex analysis to find that the lower court implicitly reinstated the case.

E. Pleading

Smith v. Perkins Bd. of Education, 708 F.3d 821, 117 Fair Empl.Prac.Cas. (BNA) 658 (**6th Cir.** 2013), reversed the *sua sponte* grant of summary judgment to defendant based on plaintiff's inadequate pleading of her claim of intentional infliction of emotional distress, without granting plaintiff the right to replead the claim. The court held that the denial of the right to replead the claim showed the prejudice necessary to reverse the grant of summary judgment.

Sheppard v. David Evans and Assoc., 694 F.3d 1045, 1050, 115 Fair Empl.Prac.Cas. (BNA) 1665 (**9th Cir.** 2012), reversed the dismissal, on *Iqbal* grounds, of plaintiff's ADEA and Oregon-law Complaint. The court stated:

> Here, Sheppard's amended complaint alleges a "plausible" prima facie case of age discrimination. Her complaint alleges that: (1) she was at least forty years old; (2) "her performance was satisfactory or better" and that "she received consistently good performance reviews"; (3) she was discharged; and (4) her five younger comparators kept their jobs.
>
> Sheppard's allegation that her five younger comparators kept their jobs gives rise to an "inference of age discrimination" because it plausibly suggests that Evans "had a continuing need for [Sheppard's] skills and services [because her] various duties were still being performed." *See Diaz*, 521 F.3d at 1207 (internal marks and quotation marks omitted). It also plausibly suggests that employees outside her protected class "were treated more favorably" than Sheppard. *See id.*

F. Summary Judgment

1. *Sua Sponte* Grants of Summary Judgment

Smith v. Perkins Bd. of Education, 708 F.3d 821, 117 Fair Empl.Prac.Cas. (BNA) 658 (**6th Cir.** 2013), reversed the grant of summary judgment to defendant on plaintiff's ADA claims of denial of reasonable accommodation under the ADA and State law. The court referenced new Fed. R. Civ. Pro. 56(f), the court stated at 829: "The inquiry is thus two-fold: losing parties must demonstrate both that they lacked sufficient notice of the district court's action and that they suffered prejudice as a result." The court stated at 830:

> Considering the totality of these proceedings, Plaintiff could not have been aware that summary judgment would be entered against her on grounds that had not been raised by either party. The argumentation through three briefs—an opening motion, a response, and a reply—dealt entirely with collateral estoppel and the operation of Ohio Rev.Code § 4112.14(C). No mention was made of the possibility that summary judgment would be granted on some other basis. Indeed, the further factual development of Plaintiff's claims through discovery was put on hold in anticipation of the district court's decision on collateral estoppel. Plaintiff could not have been expected to "come forward with all of [her] evidence," *Celotex Corp.*, 477 U.S. at 326, because Defendants intended summary judgment to obviate the need to conduct any further discovery of that evidence.

2. Requests for Additional Discovery

a. How to Do It

Smith v. Perkins Bd. of Education, 708 F.3d 821, 117 Fair Empl.Prac.Cas. (BNA) 658 (**6th Cir.** 2013), reversed the *sua sponte* grant of summary judgment to defendant on plaintiff's ADA claims of denial of reasonable accommodation under the ADA and State law. The court held that plaintiff must show prejudice as well as lack of notice, and rejected defendants' argument that she could not show prejudice. The court stated at 831:

> Defendants' argument assumes that Plaintiff cannot come forward with any additional evidence in support of her claims. The fact that a discovery dispute was held in abeyance pending a decision on summary judgment reveals the misguided nature of that assumption. Plaintiff was seeking in discovery the very evidence that Defendants now accuse her of lacking. She was prevented from further developing the record because summary judgment was granted and the discovery dispute was prematurely ended. To demonstrate prejudice, Plaintiff need only show that she "could have produced new favorable evidence." . . . Had Plaintiff been given notice that the district court was considering granting summary judgment on alternative grounds, she could conceivably have sought or produced additional evidence to defend against summary judgment.

The court continued: "The district court summarily concluded that some of Plaintiff's requested accommodations were not reasonable, but no evidence had been introduced on the issue. The district court must allow Plaintiff to develop the record."

b. How Not to Do It

Sánchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 10, 114 Fair Empl.Prac.Cas. (BNA) 912 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII religious discrimination and retaliation defendant. The court affirmed the lower court's denial of plaintiff's former Rule 56(f), Fed. R. Civ. Pro., motion for additional discovery before responding to defendant's motion for summary judgment. The court stated: "Under the then-existing Rule 56(f), a party confronted with a motion for summary judgment had to show *due diligence* in seeking discovery in order to be granted additional discovery time." (Emphasis in original.) The lower court had asked the parties to enter into a stipulation of facts, and stated that discovery would follow if the parties could not stipulate. The parties did enter into a stipulation, plaintiff received defendant's initial disclosures and some documents he requested from the company, and plaintiff never informed the lower court that he needed additional discovery.

3. Drawing Inferences

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grants of summary judgment against plaintiff Montone, who had campaigned for the opponent of the man who ultimately won and became Jersey City Mayor and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list, and against the Astriab plaintiffs in a second case, who were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or who were not promoted at all allegedly because they were ranked lower than Montone. The court held at 190 that the lower court impermissibly made credibility determinations and drew inferences in favor of the movant. For example, the lower court accepted defendants' interpretation of a possibly ambiguous statement, did not credit the recipient of the statement as to his understanding of what it meant, and did not consider other evidence supporting plaintiffs' view of the statement.

Collins v. American Red Cross, 715 F.3d 994, 998-99 (**7th Cir.** 2013), affirmed the grant of summary judgment to the Title VII racial discrimination and retaliation defendant. Plaintiff alleged that her termination was caused by retaliation for her having filed an EEOC charge of

racial discrimination. She relied on the internal investigation report, which found that the internal complaints against plaintiff were "substantiated"; one of those complaints was that plaintiff had told others the Red Cross was "out to get" minorities. The investigative report and notes of interviews did not contain any direct support for this finding, so plaintiff argued that the finding must have been based on her prior EEOC charge. The court stated:

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

(Citations omitted; emphasis in original.)

4. <u>Failure to Consider All the Facts</u>

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grants of summary judgment against plaintiff Montone, who had campaigned for the opponent of the man who ultimately won and became Jersey City Mayor and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list, and against the Astriab plaintiffs in a second case, who were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or who were not promoted at all allegedly because they were ranked lower than Montone. The court held at 200 that the lower court erred by failing to consider all the facts that could support reasonable inferences supporting plaintiffs:

> Among the evidence not mentioned by the District Court in its analysis of the summary judgment motions were the Jersey City government agreements authorizing the promotion of officers to the rank of lieutenant. The District Court also failed to consider personnel orders signed by Troy ordering promotions in every rank except lieutenant. Additionally, the District Court disregarded correspondence from O'Reilly and Police

> Director Samuel Jefferson, as well as deposition testimony from Healy, indicating that the defendants expressly refused to promote any of the plaintiffs to lieutenant upon expiration of the 2003–2006 promotion list, but almost immediately after the issuance of the 2006–2009 list, promoted twelve sergeants to lieutenant, only one of whom was an *Astriab* plaintiff. Furthermore, the District Court neglected to consider Jersey City and Healy's answers to interrogatories, as well as deposition testimony by several *Astriab* plaintiffs, detailing conversations with Troy in which he explained that Montone and certain *Astriab* plaintiffs would not be promoted because of Montone's involvement in the 2004 mayoral election.

(Footnote omitted.)

5. Getting it Right the First Time: Motions to Reconsider

Grosdidier v. Broadcasting Bd. of Governors, 709 F.3d 19, 24, 117 Fair Empl.Prac.Cas. (BNA) 946 (**D.C. Cir.** 2013), affirmed the grant of summary judgment to the Title VII defendant. The court stated: "Even considering the additional evidence she proffered in her motion for reconsideration, which the district court properly declined to consider because she should have submitted it in opposing summary judgment . . . the evidence viewed as a whole was not sufficient to show the requisite reasonable belief." (Citation omitted.)

6. Affidavits Contradicting Deposition Testimony

Baker v. Silver Oak Senior Living Management Co., L.C., 581 F.3d 684, 690-92, 107 Fair Empl.Prac.Cas. (BNA) 363 (**8th Cir.** 2009), reversed the grant of summary judgment to the ADEA retaliation defendant. The court held that the lower court abused its discretion in striking plaintiff's affidavit in opposition to summary judgment, because the flow of questions in her deposition made her answers reasonable, and they were not in contradiction with her statements in her affidavit. The court explained:

> The district court dismissed Baker's retaliation claims on the ground that she never engaged in activity protected by the statutes, that is, that Baker had not "opposed any practice" made unlawful by the ADEA or the MHRA. Although Baker averred in an affidavit that she "repeatedly told [Thomas] that terminating these employees was wrong," and "repeatedly told her that you cannot get rid of employees just because they are old," the district court declined to consider this evidence. The court viewed the affidavit as a "sudden revision" of Baker's deposition testimony and as an "an attempt to create an issue of fact regarding having engaged in protected activity, where none existed before." Relying on *City of St. Joseph v. Southwestern Bell Telephone*, 439 F.3d 468, 475-76 (8th Cir. 2006), the district court struck the affidavit, and granted summary judgment for Silver Oak on the retaliation claims.
>
> On appeal, Baker contends that the district court improperly struck her affidavit. She argues that her statements to Thomas, as recounted in the stricken affidavit, constitute opposition to age discrimination that is protected under the ADEA and the MHRA.

Our decisions in *City of St. Joseph* and *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir.1983), address the district court's authority to strike an affidavit submitted by a party in resistance to a motion for summary judgment. We said in *Camfield Tires* that district courts should examine alleged inconsistencies between an affidavit and previous deposition testimony "with extreme care." *Id.* at 1366. The authority to disregard an affidavit and grant summary judgment on the remaining record, we explained, is limited to situations "where the conflicts between the deposition and affidavit raise only sham issues." *Id.*

Applying this standard, we conclude that the district court erred by striking Baker's affidavit. We are not convinced that Baker's affidavit was directly contrary to her previous statements, or that it raised only a "sham issue" concerning protected activity. Rather, Baker was entitled to present evidence by way of affidavit concerning the details of her alleged statements to Thomas in opposition to age discrimination.

Silver Oak contends that Baker's affidavit is directly contrary to testimony in her deposition about conversations with Thomas. Near the end of her deposition, Baker was questioned whether she had been given the chance to explain "all the reasons" why she thought she was "terminated based on age." One question later, she was asked whether she "ever complain[ed] to Ms. Thomas about age discrimination," and she responded "no." Viewing this testimony in context, however, a reasonable factfinder need not conclude that Baker's affidavit is directly contrary to her deposition. The deposition question about complaints to Thomas came immediately after an inquiry about why Baker thought she was terminated based on age. It would have been reasonable for a deponent to understand the question about complaints to Thomas to ask whether Baker had complained to Thomas that Baker herself had been terminated based on age. Baker's affidavit, by contrast, asserted that Baker had complained to Thomas about instructions that Baker should terminate other employees at Silver Oak. The two pieces of evidence do not present the sort of direct contradiction that is necessary to justify striking part of the plaintiff's evidentiary submission on the ground that it presents a "sham issue."

Elsewhere in her deposition, Baker testified that she never made allegations about age discrimination to the human resources department at Silver Oak, never submitted a written complaint to Silver Oak, and never complained about age discrimination to Lindsey, Upshaw, or the director of human resources. None of these questions, however, asked about Baker's oral communications with Thomas, and Baker had no obligation in her deposition to volunteer information that was not requested. *Bass v. City of Sioux Falls*, 232 F.3d 615, 618 (8th Cir.1999).

Silver Oak also points out that Baker was asked in an interrogatory to state all of the evidence supporting any allegation in her complaint, and that Baker responded by incorporating her Rule 26 disclosures and her charge of discrimination with the EEOC and the MCHR. In her charge with the EEOC and the MCHR, Baker stated that she refused Thomas's requests to fire older workers, and that "Thomas ordered [her], over [her] objections, to write up a disciplinary report on Carr ... for incidents for which Carr was not at fault." The interrogatory answer did not set forth the specific statements to Thomas that were recounted later in Baker's affidavit, but we have never held that the

> failure to include specific details of all communications in an interrogatory answer precludes a plaintiff from supplementing her submission in a subsequent deposition or affidavit. The omission of detailed information from an interrogatory response can be a proper basis for impeachment, but it does not trigger the narrow authority established in *Camfield Tires* to disregard entirely a portion of the plaintiff's evidence.
>
> We therefore conclude that the district court erred by striking Baker's affidavit. Considering the affidavit, there is sufficient evidence for a jury to find that Baker engaged in protected activity under the ADEA and the MHRA before she was terminated. By protesting to Thomas that it was wrong to terminate older employees, and that Silver Oak could not discharge employees "just because they are old," Thomas clearly opposed conduct that she reasonably believed to be unlawful age discrimination. *See Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100 (8th Cir.1995). Accordingly, the district court erred by dismissing Baker's retaliation claims on the ground that Baker did not engage in protected activity under the statutes.

(Footnote omitted.)

There are numerous similar decisions.

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

Hernandez v. Valley View Hosp. Ass'n, 684 F.3d 950, 956 n.3, 115 Fair Empl.Prac.Cas. (BNA) 592 (**10th Cir.** 2012), reversed the grant of summary judgment on plaintiff's racial harassment claim, and stated:

> To be disregarded as a sham, an affidavit must contradict prior sworn statements. *See Law Co., Inc. v. Mohawk Constr. & Supply Co., Inc.*, 577 F.3d 1164, 1169 (10th Cir.2009). Ms. Hernandez's affidavit does not contradict her prior deposition testimony. She did not testify, as Valley View claims, that she heard only two jokes. At her deposition, Valley View asked her to describe Mr. Lillis's racial jokes. She described the barbeque and tamale jokes and "[s]tuff like that." . . . Valley View's counsel then asked her to describe other jokes. She answered: "So many. It's like—just remembering makes me—" at which point Valley View's counsel interrupted her answer. . . . Ms. Hernandez's testimony reflects that she described the barbeque and tamale jokes as examples. Her affidavit and Ms. Nunez's provided additional examples that did not contradict her testimony.

Nothing is to be Disregarded Where Misunderstandings of Dialect May Explain a Possible Contradiction: *Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151, 1161-62, 34

IER Cases 480 (**11th Cir.** 2012), reversed the gran tof summary judgment to the FELA and Federal Safety Appliance Act defendant. The court stated:

> However, we do not believe that Strickland's deposition and affidavit are necessarily so directly contrary to one another that a determination as a matter of law may be made. *Accord Bone*, 622 F.2d at 893–95 (holding, in similar context, that summary judgment was improper). Instead, as Strickland points out in his affidavit, it is possible that the apparent contradiction derives not from purposeful fabrication but instead from dialectical misunderstanding. Under such circumstances, any apparent contradiction becomes "an issue of credibility or go[es] to the weight of the evidence." *Tippens*, 805 F.2d at 953.

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

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

7. ***Sua Sponte* Grants of Summary Judgment**

Smith v. Perkins Bd. of Education, 708 F.3d 821, 117 Fair Empl.Prac.Cas. (BNA) 658 (**6th Cir.** 2013), reversed the grant of summary judgment to defendant on plaintiff's ADA claims of

denial of reasonable accommodation under the ADA and State law. The court referenced new Fed. R. Civ. Pro. 56(f), the court stated at 829: "The inquiry is thus two-fold: losing parties must demonstrate both that they lacked sufficient notice of the district court's action and that they suffered prejudice as a result." The court stated at 830:

> Considering the totality of these proceedings, Plaintiff could not have been aware that summary judgment would be entered against her on grounds that had not been raised by either party. The argumentation through three briefs—an opening motion, a response, and a reply—dealt entirely with collateral estoppel and the operation of Ohio Rev.Code § 4112.14(C). No mention was made of the possibility that summary judgment would be granted on some other basis. Indeed, the further factual development of Plaintiff's claims through discovery was put on hold in anticipation of the district court's decision on collateral estoppel. Plaintiff could not have been expected to "come forward with all of [her] evidence," *Celotex Corp.*, 477 U.S. at 326, because Defendants intended summary judgment to obviate the need to conduct any further discovery of that evidence.

G. Class Actions and Collective Actions

1. Commonality

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

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

2. Class Action Fairness Act (CAFA)

Standard Fire Ins. Co. v. Knowles, __ **U.S.** __, 133 S.Ct. 1345 (2013), unanimously held that a plaintiff in a State-court putative class action cannot defeat removal to Federal court under the Class Action Fairness Act by certifying that the class would not seek more than $5 million in damages. The class had not yet been certified. The Court held that the precertification

stipulation bound the named plaintiff, but did not bind absent class members because he did not yet have authority to speak for them. It was thus ineffective to defeat Federal-court jurisdiction under CAFA. The Court held that the stipulation might not survive the certification process, and stated at 1350: "We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process."

3. Making Offers of Settlement to the Representative Party

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

F. Arbitration

1. Availability of Class Certification

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

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

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

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

become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.*

Id. at 2068. The court concluded at 2071:

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

2. Class-Action Waivers

American Express Co. v. Italian Colors Restaurant, __ **U.S.** __, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), upheld a class-action waiver in a commercial case, notwithstanding evidence that the plaintiff merchants did not individually have enough at stake to warrant proceeding with their challenge to petitioner's fees, and that class treatment was the only effective means for the enforcement of their rights. The Court summarized its holding:

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

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

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

Id. at 2313.

3. Noncompetition Agreements

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

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

(Citations omitted.)

4. Administrative Closings of Federal Court Cases

Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 117 Fair Empl.Prac.Cas. (BNA) 956 (**3d Cir.** 2013), affirmed the lower court's decision not to vacate the ADEA arbitration award in favor of the employer. Plaintiff and defendant entered into the arbitration agreement at a settlement conference with the district court. The lower court then marked the case closed. The court of appeals held that this administrative closure was subject to re-opening, did not create an appealable order, and had no effect on jurisdiction. "District courts often use administrative closings to prune their overgrown dockets. . . . The practical effect is "to remove a case from the court's active docket and permit the transfer of records associated with the case to an appropriate storage repository." . . . Administrative closings are particularly useful "in circumstances in which a case, though not dead, is likely to remain moribund for an appreciable period of time. . . ." *Id.* at 247. The court stated:

> Words matter. "The judicial process works best when orders mean what they say. Surprising interpretations of simple language—perhaps on the basis of a judicial intent not revealed in the words—unnecessarily create complex questions and can cause persons to forfeit their rights unintentionally." . . . Consistent with this principle, we have rejected previous attempts to characterize an administrative closing as a final order in disguise . . . as have other circuits . . . .

Id. at 248 (footnote and citations omitted). Plaintiff was therefore entitled to move to vacate the decision in the same case. *Id.* at 248-49. In a striking application of waiver and counter-waiver, the court of appeals held that, by failing to mention it in the district court, defendant waived its defense that Freeman waived his contention of "evident partiality" by failing to raise it in the arbitral proceeding. The court discussed the interplay of the absence of knowledge and waiver, *id.* at 249-50, and concluded:

> But we need not adopt any approach today. The doctrine of appellate waiver is not somehow exempt from itself. . . . This means that a party can waive a waiver argument by not making the argument below or in its briefs.

Id. at 250 (citation omitted).

5. Waiver of Jury Trial

Klein v. Nabors Drilling USA L.P., 710 F.3d 234, 239 (**5th Cir.** 2013), reversed an order declining to compel arbitration. The court held that the language of the arbitration agreement saying that no rights were waived could not be read to invalidate the agreement. It explained:

> Klein's reliance on the Acknowledgment's provision indicating that the Program is not intended "to violate or restrict any rights of employees guaranteed by state or federal law" is also misplaced. Despite the provision's breadth, interpreting it to include "the procedural right to a jury trial" would create an unnecessary conflict with the Program's unambiguous language regarding arbitration as the exclusive procedural mechanism for resolving disputes. Our task is to interpret each provision in a manner consistent with the contract as a whole—not to tailor our interpretation of the entire contract to fit one provision. When interpreting the provisions together, it becomes clear that the Acknowledgment disclaims a restriction only on *substantive* rights that would have been available to Klein in a judicial forum. . . .

(Emphasis in original.)

6. The "Evident Partiality" Standard

Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 117 Fair Empl.Prac.Cas. (BNA) 956 (**3d Cir.** 2013), explored the law regarding bias of an arbitrator, held it was not present, and affirmed the lower court's decision not to vacate the ADEA award in favor of the employer. The court explained the "evident partiality" standard for disqualification of an arbitrator:

> In response to the parties' confusion, we take this opportunity to reaffirm what we said in *Kaplan.* An arbitrator is evidently partial only if a reasonable person would have to conclude that she was partial to one side. *Id.* The conclusion of bias must be ineluctable, the favorable treatment unilateral. *See Andersons*, 166 F.3d at 329 ("The alleged partiality must be direct, definite, and capable of demonstration.").
>
> This standard requires a stronger showing—namely, partiality that is evident—than does the appearance standard, and for good reason. Most importantly, the relevant statutory language indicates that the two standards should be different. . . . The Federal Arbitration Act requires a party to show "evident partiality." 9 U.S.C. § 10(a)(2). The word "evident" suggests that the statute requires more than a vague appearance of bias. Rather, the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it. By contrast, the judicial standard requires recusal if a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This language suggests that the judicial inquiry focuses on appearances—"not on whether the judge actually harbored

subjective bias." *In re Antar*, 71 F.3d 97, 101 (3d Cir.1995).

> In addition, parties often select arbitrators precisely because they are industry insiders. Parties want someone who understands their business—even if that person already has some familiarity with the parties and issues. *See Commonwealth Coatings*, 393 U.S. at 150, 89 S.Ct. 337 (White, J., concurring) ("It is often because they are [people] of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."); *see also* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L.Rev. 1724, 1728 (2001) ("Arbitrators are selected for their experience in their respective industry and their reputation for integrity and fairness." (quotation marks and citation omitted)). An overly strict appearance standard would exclude some of the most qualified arbitrators.

Id. at 253 (citation omitted). The court rejected plaintiff's argument that Kaplan applies only to actual-bias cases, and not to nondisclosure cases. *Id.* at 254. The court also rejected plaintiff's claim that the rules of the American Arbitration Association require the absence of even an appearance of bias, stating: "That rule, however, does not govern our review. We are not at liberty to jettison the words of Congress in favor of a third-party standard." *Id.* (citation omitted). The court rejected plaintiff's argument that the arbitrator's receipt of a small amount of campaign funds—less than 1% of what she raised—for an unsuccessful run for a Supreme Court judgeship showed evident partiality, where the funds were actually raised by a committee rather than by the arbitrator personally, where the records were publicly available, and where plaintiff's counsel's firm contributed five times as much. *Id.* at 254-55. The court also held that the arbitrator's having co-taught a course with an attorney from a minority owner of defendant was too insubstantial to satisfy the evident partiality standard: "As for Lally–Green's teaching relationship, we conclude that it too fails to show 'evident partiality'—even if we accept Freeman's claim that she did not disclose the relationship beforehand. By itself, a professional relationship with a party's minority owner is not 'powerfully suggestive of bias.' . . . . Nor is it a specific fact 'that indicate[s] improper motives on the part of an arbitrator.' . . . The Federal Arbitration Act requires more than suppositions based on mutual familiarity " *Id.* at 255-56. Finally, the court rejected plaintiff's claim that the arbitrator fraudulently induced him to select her as arbitrator because she failed to disclose the depth of her association with defendant. It stated at 257: "Freeman fails miserably in his effort to satisfy these elements."

G. Evidence

1. Lying to the EEOC

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

> At trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement. Miller was told not to apply for jobs in supply

> chain management and was not selected for a new job at Raytheon, despite Raytheon's policy of searching "every corner of the earth" and "exhausting all opportunities to place the individual" before releasing an employee pursuant to a RIF. Although Raytheon emphasizes that these actions occurred after Miller's termination, the jury was entitled to view them as circumstantial evidence of discrimination. . . .

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

2. "Self-Serving" Testimony

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

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

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

(Citations and footnote omitted.)

Emeldi v. University of Oregon, 698 F.3d 715, 729 n.8 (**9th Cir.** 2012) (*en banc*), *cert. denied*, __ U.S. __, 133 S.Ct. 1997 (2013), a student Title IX case, stated in relevant part:

> Specifically, the dissent complains that Emeldi did not provide other evidence supporting her assertions. An example concerns Emeldi's complaint that at Horner's graduate student group meetings Emeldi was not on the agenda or if on it her meaningful work was not discussed. These statements are not speculative but based on Emeldi's personal knowledge and would be admissible at trial. Emeldi had direct percipient knowledge of what happened at the graduate student group meetings she attended. The dissent argues there are no minutes in the record so one cannot verify their substance, and that "there is no proffered testimony of other students or faculty members to give credence to Emeldi's perceptions that Horner was slighting her (and presumably other women students)." But her declaration that she "was publicly and chronically ignored in research team meetings by Rob Horner" generates a genuine dispute of material fact. The dissent's insistence on corroborating testimony of others inserts into the law governing summary judgments a precondition that has never been recognized. *See SEC v. Phan*, 500 F.3d 895, 910 (9th Cir.2007) (holding that district court erred in disregarding declarations as "uncorroborated and self-serving"); *see also* 10A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2727 (3d ed. 2011) ("[F]acts asserted by the party opposing the motion [for summary judgment], if supported by affidavits or other evidentiary material, are regarded as true."). Like much of the dissent, this point goes to

the weight of Emeldi's evidence, not to its admissibility and sufficiency to withstand summary judgment.

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

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

3. Expert Evidence

E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 833, 27 A.D. Cases 801 (**7th Cir.** 2013), affirmed the verdict for the EEOC on the second trial of its ADA termination and failure-to-accommodate claim against defendant. The court rejected defendant's argument that the trial court should have excluded the report of the EEOC's expert, plaintiff's treating physician, for failure to submit an expert report under Rule 26. It explained that the expert, Dr. Katchen, had been treating the charging party since 1997, far before the litigation arose. "Because Dr. Katchen's testimony focused on his treatment of Shepherd and his medical opinions were not formed for this litigation, the magistrate judge did not abuse his discretion in permitting Dr. Katchen to testify."

4. Spoliation

Grosdidier v. Broadcasting Bd. of Governors, 709 F.3d 19, 28, 117 Fair Empl.Prac.Cas. (BNA) 946 (**D.C. Cir.** 2013), affirmed the grant of summary judgment to the Title VII defendant on plaintiff's promotion discrimination claim. Two of the three interviewers on the selection panel destroyed their notes of the interviews in violation of an EEOC regulation requiring their retention for a year. Their contemporaneous written recommendation, and all documents they reviewed, were retained. The court of appeals held that the lower court erred by denying an adverse inference on the ground that there was no evidence of bad faith, because an adverse inference can be grounded in the negligent failure to preserve relevant documents. The court stated:

> As a Title VII litigant, Grosdidier is within the class protected by the EEOC regulation, and the destroyed notes are likely to have had information regarding her responses and those of the other applicants during the interview as well as the types of questions asked of her and other applicants, all of which could be relevant to her contention that the BBG is hiding the real reason for its selection decision. Grosdidier is therefore entitled to an adverse inference, albeit not her requested inference, which was tantamount to a directed verdict. . . . In moving for a spoliation inference, however, she identified, alternatively, a list of specific adverse inferences regarding the content of the destroyed notes. The existence of some evidence of what the panelists were thinking, including the interview notes of one panelist, multiple contemporaneous writings regarding the reasoning behind the panel's recommendation, and application materials of other applicants, weighs in favor of limiting the scope of the inference, but not in denying any inference at all. Unlike in *Talavera*, 638 F.3d at 312, where the non-discriminatory reason for the plaintiff's non-selection turned on her performance during an interview, there is no evidence to suggest Grosdidier's interview performance played the same pivotal role. Under the circumstances, a permissive inference bounded by constraints of reason is appropriate—i.e., the factfinder may draw reasonable inferences in favor of Grosdidier based on the non-accidental destruction of two of the three sets of interview notes.

The court held that an adverse inference does not always confer immunity to summary judgment, stating: "The inference Grosdidier requires must be sufficient to create a genuine issue of material fact, not simply one that lends some support to her pretext contention." The court also held that all of plaintiff's alternative requested inferences were unreasonable in light of the evidence to the contrary, and thus that the failure to accord her an adverse inference in considering summary judgment was harmless error. *Id.*

5. Cumulation of Circumstantial Evidnce

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

> Considered in isolation, we agree with Raytheon that each category of evidence presented at trial might be insufficient to support the jury's verdict. But based upon the accumulation of circumstantial evidence and the credibility determinations that were required, we conclude that "reasonable men could differ" about the presence of age discrimination. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc), *overruled in part on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir .1997) (en banc). Whether or not this court would have reached the same result, the Boeing standard requires affirmance of the jury verdict. *Smith v. Santander*, 703 F.3d 316, 318 (5th Cir.2012).

6. Admission of Evidence in EEOC Charge, But Not Plaintiff's Deposition

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 168, 117 Fair Empl.Prac.Cas. (BNA) 8 (3d Cir. 2013), held that the lower court erred in excluding three instances of harassment that

were mentioned in plaintiff's sworn affidavit attached to her EEOC charge but were not mentioned in her deposition. The court stated: "Because an affidavit attached to a signed EEOC charge may raise genuine issues of material fact . . . the District Court erred in excluding those incidents." (Citation omitted.)

7. Hearsay

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grants of summary judgment against plaintiff Montone, who had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list, and against the Astriab plaintiffs in a second case, who were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or who were not promoted at all allegedly because they were ranked lower than Montone. The court held at 190 n.6 that statements made by defendant then Police Chief Troy were not hearsay because they were admissions of a party-opponent: "We hold that these statements made by Troy are not hearsay under Federal Rule of Evidence 801(d)(2), and thus the District Court properly considered the statements in resolving the summary judgment motions. *See* Fed.R.Evid. 801(d)(2)(A) (defining as "not hearsay" a statement that is "offered against an opposing party and ... was made by the party in an individual or representative capacity....").

8. Pattern of Actions or Omissions

Montone v. City of Jersey City, 709 F.3d 181, 117 Fair Empl.Prac.Cas. (BNA) 1082, 35 IER Cases 32 (**3d Cir.** 2013), vacated the grants of summary judgment against plaintiff Montone, who had campaigned for the Jersey City then-Mayor's opponent and thereafter was not promoted to Lieutenant in the Police Department despite being fifth on the promotion list, and against the Astriab plaintiffs in a second case, who were not timely promoted to Lieutenant because promotions to this one rank were frozen allegedly to punish Montone, or who were not promoted at all allegedly because they were ranked lower than Montone. The court held at 192 that the lower court erred in understating the importance of evidence of a pattern of political patronage:

> As we held in *Goodman*, "a history of improper promotion practices using sponsorship as a factor" may, when presented with other facts, prove to be "sufficient circumstantial evidence to permit a reasonable jury to find that political affiliation was a substantial factor in the decision not to promote...." *Id.* at 674. In this case, there are other facts that, when combined with evidence of political patronage, suffice to defeat summary judgment. In particular, there is the evidence of recommendations that the number of lieutenants on the police force be increased as well as evidence that there were promotions to every other rank but lieutenant during Troy's tenure as Police Chief that, when considered in combination with a history of political patronage, supports a reasonable inference that Montone was not promoted in retaliation for her political activity.

9. Other Instances of Discrimination

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 168, 117 Fair Empl.Prac.Cas. (BNA) 8 (**3d Cir.** 2013), reversed the grant of summary judgment to the Title VII and Pennsylvania Human Rights Act sexual harassment defendant, but held that the lower court did not abuse its discretion in refusing to consider the evidence of two other witnesses as to their own harassment, because they were employees of the corporate parent of the subsidiary for which plaintiff had worked.

Griffin v. Finkbeiner, 689 F.3d 584, 598-99, 115 Fair Empl.Prac.Cas. (BNA) 1422 (**6th Cir.** 2012), reversed the grant of summary judgment to the Title VII and Ohio-law racial discrimination and retaliation defendants, held that the lower court erred in rejecting evidence of other instances of discrimination merely because different supervisors were involved, and held that the error was not harmless:

> Whether the same actors are involved in each decision is a factor, but *Sprint* makes clear that it cannot be the only factor in the decision whether to admit "other acts" evidence. Notably, the testimony in *Sprint* involved supervisors "who played no role in the adverse employment decision challenged by the plaintiff." 552 U.S. at 380, 128 S.Ct. 1140. Here, the district court did not consider other ways in which the excluded evidence could be "related ... to the plaintiff's circumstances and theory of the case," *id.* at 388, 128 S.Ct. 1140, such as temporal and geographical proximity, whether the various decisionmakers knew of the other decisions, whether the employees were similarly situated in relevant respects, or the nature of each employee's allegations of retaliation. . . .
>
> The district court's error in excluding the evidence was not harmless. *See* Fed.R.Evid. 103(a) (a party challenging the exclusion of evidence must show that "the error affects a substantial right"). When determining if an evidentiary error is harmless, we have held that, "if 'one cannot say, with fair assurance, ... that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'" . . . Like most employment-discrimination plaintiffs, Daugherty relied largely on circumstantial evidence to present his case of retaliation to the jury. In such cases, "each piece of evidence served to complete part of the puzzle of th[e] case" and the absence of any one piece may have influenced the jury verdict. . . . "Other acts" evidence can provide probative context to an individual employment decision, especially when, as here, the circumstances of that decision are already somewhat suspicious due to evidence of pretext that was sufficient to survive summary judgment. Under a proper analysis, the district court may have admitted the evidence regarding Morehead, Iberra, and Graven. This evidence may not have swayed the jury if it had been admitted, but we "cannot say, with fair assurance" that it could not possibly have done so. . . .

(Citations omitted.)

H. Argument to the Jury

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

> The appellees' counsel made four inappropriate statements during her closing argument. The first three are "golden rule" arguments. A golden rule argument—which asks "jurors to place themselves in the position of a party" . . .—is "universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence." . . . For example, it is impermissible (1) to ask jurors how much the loss of the use of their legs would mean to them . . . (2) to tell jurors "do unto others as you would have them do unto you" . . . ; or (3) to tell jurors, in a reverse golden rule argument, "I don't want to ask you to place yourself in [the plaintiff's] position" . . . .
>
> While all circuits that have considered the issue have held a golden rule argument improper if made with respect to damages, there appears to be, as the district court noted, a circuit split regarding whether such argument is improper if made with respect to liability. At least four circuits have found such a golden rule argument permissible. . . . On the other hand, the Third Circuit has rejected the liability-damages distinction. . . .
>
> We join our sister circuits and hold that a golden rule argument is improper and may thus serve as the basis for a new trial. Further, we do not recognize a *per se* distinction between a golden rule argument relating to damages and the same argument regarding liability. Courts forbid golden rule arguments to prevent the jury from deciding a case based on inappropriate considerations such as emotion. . . . It is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to determine damages. Accordingly, we agree with the Third Circuit that a golden rule argument made with respect to liability as well as damages is impermissible.
>
> We conclude that the appellees' counsel's first three above-quoted statements are golden rule arguments. The third statement, addressed to damages, is plainly improper; she asked the jury to "put yourselves in the plaintiffs' shoes" in "determin[ing] how to make plaintiffs whole." . . . This is a quintessential invocation of the golden rule and the district court was correct to sustain the objection and instruct the jury to disregard it. While the propriety of the first two statements is a closer question, we nonetheless conclude that they also constitute golden rule arguments addressing liability. The appellees' counsel stated, *inter alia,* "would *you* hesitate to speak up if *you* knew that speaking up would mean that your boss would call a meeting," . . . (emphases added), and "[w]ouldn't *you* think twice about complaining about workplace discrimination." . . . (emphasis added). The appellees argue that the statements are permissible because they explain the legal standard for retaliation under *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). But the *Burlington Northern* standard—which forbids

> "employer actions that would have been materially adverse to a *reasonable* employee"—is an objective standard. 548 U.S. at 57, 126 S.Ct. 2405 (emphasis added). Because it is objective, "[i]t avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* at 68–69, 126 S.Ct. 2405. As the district court necessarily found in sustaining the objections, however, the appellees' counsel's statements did not describe an objective standard. Rather, they asked the jurors to decide how each of them—not a reasonable person—would feel if he were in the appellees' situation.
>
> The fourth statement, while not a golden rule argument, is also inappropriate. The appellees' counsel stated:
>
> > By protecting plaintiffs' right to complain about unlawful conduct without reprisal, you preserve the rights not just of plaintiffs but of everyone. By ensuring that plaintiffs are made whole for what they have endured, you ensure that others will be free to exercise their rights without fear. Yours is an important job and we trust that you will [do what] is right and ensure that justice is done.
>
> . . . This is a so-called "send a message" argument that, alone, might not be grounds for reversal . . . . Here, given the fact that the appellees' counsel made this argument after the district court had sustained *three* objections to golden rule arguments—her send a message argument was also inappropriate because, like the golden rule arguments, it diverted the jury's attention from its duty to decide the case based on the facts and the law instead of emotion, personal interest or bias.

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

I. <u>The Jury Verdict</u>

Pagán-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 14, 19 Wage & Hour Cas.2d (BNA) 993 (**1st Cir.** 2012), held that the lower court properly made its own determination of good faith for purposes of its liquidated-damages determination, although the jury's finding of liability arguably necessarily precluded a finding of good faith. The court held that plaintiff made this argument for the first time on appeal, and had expressly agreed below that the district court was an independent factfinder on the issue of good faith for purposes of liquidated damages. The court held that plaintiff had waived his argument.

E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 831-32, 27 A.D. Cases 801 (**7th Cir.** 2013), affirmed the verdict for the EEOC on the second trial of its ADA termination and failure-to-accommodate claim against defendant. The court held that the second jury was not barred by issue preclusion from determining that the charging party was able to perform the essential functions of his job. The first jury had been asked to determine this question only as of January

2004. The second just was asked to determine this question only for a time period ending September 12, 2003, the date of a flare-up of a back condition that kept the charging party out of work for the remainder of the year. The court held at 832: "Just as AutoZone treated Shepherd's health differently after the September 12, 2003, flare-up, we too recognize that Shepherd's health was not the same after his disabling flare-up. Because the two juries considered different issues, AutoZone is unable to meet the first element of issue preclusion." (Footnote omitted.)

J. Back Pay

Pagán-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 11-13, 19 Wage & Hour Cas.2d (BNA) 993 (**1st Cir.** 2012), held that the lower court properly included lost overtime compensation in plaintiff's back pay award, based on her year-to-date weekly average of overtime hours prior to the leave.

K. Liquidated Damages

Pagán-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 15, 19 Wage & Hour Cas.2d (BNA) 993 (**1st Cir.** 2012), held that the lower court properly denied liquidated damages for the FMLA violation. The court explained:

> Figueroa consulted with a Walgreens attorney several times to understand the company's legal obligations and obtain guidance in how to proceed. Additionally, Figueroa's initial letter to Pagán invited him to apply for disability leave. The company reconsidered its termination decision after Pagán raised the issue with a human resources supervisor. Perhaps most significantly, there was ample evidence of communications breakdowns at the Juana Díaz store that prevented Figueroa and the other managers who made the decision to terminate Pagán from learning of the facts of his hospitalization and absence in a timely manner. For whatever reason, the medical certificate that Pagán provided on May 17 was not passed along to Figueroa, nor was Pagán's notice that he would be absent for another week on doctor-ordered recuperative rest. Although it is undisputed that Figueroa was aware of Pagán's initial visit to the emergency room, the court could rely on this evidence to conclude that he did not know of the full extent of Pagán's illness and was genuinely confused by Pagán's two-week absence.

Miller v. Raytheon Co., 716 F.3d 138, 146 (**5th Cir.** 2013, affirmed the jury's finding of ADEA and Texas-law liability against the defendant, and held that liquidated damages were appropriate. The court noted that this was a close case, and stated:

> Even if Raytheon superficially applied its nondiscriminatory RIF standards to Miller, considerable circumstantial evidence added to the inference of age discrimination that Raytheon went out of its way to avoid rehiring Miller, in contravention of its usual procedures, and to obscure the reasons for its decisions. JMOL was correctly denied on the issue of willfulness.

The court had found that Raytheon lied in its response to plaintiff's EEOC charge. (See above.) However, the court vacated the amount of liquidated damages. Plaintiff was awarded $277,000 for lost pension benefits he would have obtained if he had continued working for fifteen more

years. The court held that this type of forward-looking determination was like front pay, and that it was not subject to doubling as liquidated damages. The court stated at 147 n.3:

> As we did in *Bourdais*, *id.* at 301 n. 9., we decline to set out an inflexible rule on the treatment of "pension benefits" as damages or front pay under ADEA. The term is ambiguous. In some cases, it refers to employer contributions to a 401(k) plan; in others, to the right to receive certain benefits in the future; in others, the accrual of seniority entitlements to enhanced payments. *Compare e.g., Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371, 374–75 (2d Cir. 2000) ("pension credits" in form of "service and salary credits" coextensive with back pay award should be treated as back pay).

L. Taxation and Withholding for Back Pay and Front Pay

Noel v. New York State Office of Mental Health Central New York Psychiatric Center, 697 F.3d 209, 115 Fair Empl.Prac.Cas. (BNA) 1569 (**2d Cir.** 2012), affirmed in part and reversed in part the judgment below. Plaintiff recovered a Title VII judgment for back pay and front pay in the amount of $280,000 and for other relief. The defendant withheld Federal and State income taxes and the employee share of F.I.C.A. taxes from this amount, as well as retirement contributions and union dues, without discussion with plaintiff. The lower court held that the deductions were improper and that the State's failure to discuss the matter with plaintiff's counsel before making the deductions was sanctionable and warranted payment of plaintiff's attorneys' fees. It "entered a judgment in the amount of $164,987.59, representing a second payment of the monies previously withheld and paid over, plus interest and fees." The Second Circuit held that the State was required to withhold these taxes from the award, and that doing so was not contumacious. It reversed that part of the judgment, but affirmed the part of the judgment requiring reimbursement of the retirement contributions and union dues. The court explained at 214-15:

> Both Noel's back and front pay were calculated with express reference to his employment relationship with the State and to all the wages and benefits that would have accrued absent the State's unlawful discrimination. These amounts are "wages" because they constitute "remuneration" for services during an employee-employer relationship. "Employment" is defined broadly as "*any* service, of whatever nature, performed ... by an employee for the person employing him." I.R.C. § 3121(b) (emphasis added). Noel does not dispute that, had there been no judgment, these earnings would have been subject to withholding. We believe that this result is not changed because Noel had to obtain a judgment to secure the wages.
>
> The obligation on employers to collect taxes by withholding a specified portion of the tax from wages paid is mandatary [sic]. Specifically, I.R.C. § 3102(a) provides that FICA taxes "shall be collected by the employer ... as and when paid." Likewise, the Code uses mandatory language with respect to the withholding of income taxes. *See id.* § 3402(a)(1) ("[E]very employer making payment of wages *shall deduct and withhold upon such wages* a tax determined in accordance with tables or computational procedures prescribed by the Secretary.") (emphasis added)). Moreover, an employer who fails to withhold FICA and income taxes from the wages of his employees, or who fails to pay those withheld taxes over to the government, can be held personally liable for an amount

that is equal to the amount that should have been withheld and paid over. *See id.* § 6672; *see also Hochstein v. United States*, 900 F.2d 543, 546–47 (2d Cir.1990) (describing the elements of personal liability for willfully failing to withhold taxes).

(Footnote omitted.) The court stated that its holding was in line with those of other Circuits, and cited numerous cases. See note 4. The court affirmed the $70,000 fee award against the State for failure to consult with plaintiff's counsel.

M. Injunctive Relief

EEOC v. KarenKim, Inc., 698 F.3d 92, 101, 116 Fair Empl.Prac.Cas. (BNA) 385 (**2d Cir.** 2012), affirmed in part, and reversed in part as an abuse of discretion, the lower court's denial of injunctive relief in a sexual harassment case, where the harasser was in a long-term romantic relationship with the owner of the company, and she had refused to respond to complaints about his harassment:

> While it is not our role to fashion the specific measures necessary to prevent the recurrence of Manwaring's misconduct and the resulting hostile work environment at KarenKim, we conclude that, at minimum, the district court exceeded the scope of its discretion in declining to order (a) that KarenKim is prohibited from directly employing Manwaring in the future, and (b) that KarenKim is prohibited from permitting Manwaring to enter its premises. To be sure, the district court was well within its discretion in concluding that some of the EEOC's requested relief—such as requiring KarenKim to distribute wallet-sized photographs of Manwaring to its employees, or to hire and pay for an independent monitor to continually review KarenKim's employment practices and investigate possible instances of sexual harassment—are overbroad and disproportionate to the scale of KarenKim's unlawful behavior. And, while we share the EEOC's concerns regarding the adequacy of KarenKim's newly-adopted policies requiring sexual harassment training and instituting a complaint procedure, we leave to the district court's sound discretion whether reformation of these policies is necessary to prevent recurrence of the misconduct in this case.

(Footnote omitted.)

N. Compensatory Damages

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

> Raytheon challenges the district court's reduced award of damages for mental anguish. Compensatory damages for emotional harm, including mental anguish, will not be presumed simply because the complaining party is a victim of discrimination. *DeCorte v. Jordan*, 497 F.3d 433, 442 (5th Cir. 2007). The award of damages must be supported

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

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

E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 833-34, 27 A.D. Cases 801 (**7th Cir.** 2013), affirmed the verdict for the EEOC on the second trial of its ADA termination and failure-to-accommodate claim against defendant. The court upheld the verdict of $100,000 in compensatory damages and the remitted amount of $200,000 in punitive damages. Defendant appealed the denial of its motion for remittitur of the compensatory damages to $10,000. The court first set out the standard at 833:

To determine whether an award of compensatory damages is excessive, we consider whether the damages awarded (1) were monstrously excessive; (2) had no rational connection between the award and the evidence; and (3) were roughly comparable to awards made in similar cases. . . .

(Citations omitted.) The court described the factual basis for the award:

We agree with the magistrate judge that the EEOC provided sufficient evidence to support the award of compensatory damages. First, Shepherd testified about the symptoms of his back condition and the details of his disabling September 12, 2003, back injury. Additionally, evidence from Shepherd's wife provided a detailed account of the effect that Shepherd's injuries had on his daily life while working at AutoZone. Finally, Dr. Katchen testified in great detail about his diagnosis and treatment of Shepherd's myofascial pain. This evidence provides a basis for concluding that the compensatory damages were not monstrously excessive, but were instead rationally connected to Shepherd's pain.

Id. at 833-34. The court then surveyed other cases with similar awards, and observed at 834:

In fact, Shepherd's case is more extreme than some of these cases because Shepherd experienced near-daily pain that left him incapable of performing common activities, such as putting on his clothes and taking a shower. We have recognized that cases that include even the slightest "physical element" are often associated with more substantial compensatory-damages awards. . . .

Hudson v. United Systems of Arkansas, Inc., 709 F.3d 700, 705, 117 Fair Empl.Prac.Cas.

(BNA) 952 (**8th Cir.** 2013), affirmed the trial court's denial of remittitur of an award of $100,000 in damages for mental anguish in this Title VII sex discrimination case.. The court held that it would not consider arguments that it was error to submit the emotional-distress claim to the jury, because United Systems did not object below to the submission of such damages to the jury, and its motion for remittitur did not preserve such an objection. The court stated:

> Remittitur is a device for reviewing the amount of a damages award, not whether there was a basis for any award at all. . . .
>
> * * *
>
> Awards for pain and suffering are often "highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." . . . In previous cases, for example, we have upheld jury awards of $200,000 for a sexual harassment claim; $50,000, $100,000, and $125,000 for discrimination claims under Title VII; and $165,000 for a disability discrimination claim under the Americans with Disabilities Act. . . . Considering this precedent and the record made in this case, we cannot conclude that the award of $100,000 to Hudson was monstrous, shocking, or grossly excessive. . . .

O. Punitive Damages

1. Upholding Entitlement

E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 834-38, 27 A.D. Cases 801 (**7th Cir.** 2013), affirmed the verdict for the EEOC on the second trial of its ADA termination and failure-to-accommodate claim against defendant. The court upheld the verdict of $100,000 in compensatory damages and the remitted amount of $200,000 in punitive damages. Defendant appealed the denial of its motion to bar punitive damages and argued that the failure to provide an accommodation was at most caused by negligence, a defense to punitive damages in the Seventh Circuit. The court of appeals rejected this argument on the facts:

> AutoZone, however, understood that Shepherd had a back injury and regarded it as a disability. Thompson, Smith, and Moore did not deny Shepherd an accommodation because they doubted the veracity of Dr. Katchen's medical reports or because they were relying on another doctor's analysis, as United Airlines did in *Gile*. Instead, a rational jury could have concluded that they failed to accommodate Shepherd's disability because they ignored AutoZone's established procedures for handling accommodation requests. Failing to follow up on an accommodation request might only be negligence if it occurs infrequently, but an employer's response sinks from negligence to reckless indifference when it repeatedly fails to accommodate an employee's disability. . . . Because Shepherd repeatedly asked Moore for an accommodation, and asked for an accommodation so often that Moore became frustrated by his persistence, a rational jury could have decided that AutoZone's response was not mere negligence, but reckless indifference.

Id. at 837 (citation omitted). The court held that the managers in question acted within the scope of their employment, and were highly enough placed, that their actions were those of the defendant for purposes of punitive-damage liability:

> Second, a rational jury could have imputed liability to AutoZone through a manager acting in the scope of employment at AutoZone. We look to general principles of agency law to determine whether managers act within the scope of their employment. . . . To do so, we "consider the kind of authority the employer has given the employee, the amount of discretion given to the employee in executing his job duties, and the manner in which those duties are carried out." . . .
>
> Moore was the lead disability coordinator in AutoZone's benefits department and was responsible for coordinating employees' accommodations. When Smith and Thompson needed to consult a corporate-level officer about how to accommodate Shepherd's disability, they consulted Moore. Additionally, Moore had much discretion in her job; Moore's supervisor, James, was not familiar with Shepherd's case and did not instruct Moore on how to address his disability. Because Moore had the authority and discretion to make decisions about employees' accommodations, a rational jury could have concluded that Moore was acting in a managerial capacity in the scope of her employment when she authorized accommodations for AutoZone employees. Therefore, a rational jury could have imputed liability to AutoZone based on the evidence presented at trial.

Id. (citations omitted). Finally, the court held that the "good faith" defense did not apply even if a written policy existed:

> Third, a rational jury could have concluded that AutoZone did not engage in good-faith efforts to enforce an anti-discrimination policy. AutoZone did not introduce a written anti-discrimination policy into evidence, but instead relied on James, AutoZone's benefits manager, to explain AutoZone's procedures for handling disability accommodations in her testimony. Although the employer is not required to present a written or formal anti-discrimination policy, "it is difficult to ascertain the contours of this policy without physical evidence of its existence." . . .
>
> Nor did AutoZone present evidence that an anti-discrimination policy was properly enforced in Shepherd's case. We have held that an employer is unable to establish good-faith efforts when "top management officials" disregard the company's anti-discrimination policy. . . . Although Thompson and Smith were not "top management officials," Moore was the lead disability coordinator at AutoZone and worked within the upper management of AutoZone's corporate structure. As already discussed, a rational jury could have concluded that Moore exhibited reckless indifference to Shepherd's federal employment rights, and a rational jury could also have concluded that she disregarded AutoZone's anti-discrimination procedures.

Id. at 837-38 (citations omitted). The court then examined the due process questions. Discussing the factors identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for the determination of reprehensibility, the court stated:

> These five factors weigh against AutoZone. First, Shepherd suffered physical—not just economic—harm. Mopping the floors aggravated Shepherd's back condition, and Shepherd suffered severe, and ultimately disabling, pain as a result. Second, AutoZone's conduct demonstrated a reckless disregard for Shepherd's health. AutoZone was aware that

> Shepherd suffered from a back injury but did not adequately accommodate his disability and required him to mop the floors anyway. Third, Shepherd was financially vulnerable. When Shepherd was asked at trial why he continued to mop the floors even though it caused him pain, he stated he could not afford to lose his job because he had a wife and children. Fourth, AutoZone's dismissiveness of Shepherd's health concerns occurred on multiple occasions and was not an isolated incident. Indeed, Shepherd had contacted Moore so often that she expressed frustration with Shepherd's persistence. The fifth factor considers whether the harm was caused intentionally or accidentally. Shepherd's flare-ups were not the result of a mere accident, but were instead the result of AutoZone's reckless indifference. Therefore, when we consider these factors as a whole, we conclude that AutoZone's conduct was sufficiently reprehensible to justify imposing punitive damages.

Id. at 839.

May v. Chrysler Group, LLC, 692 F.3d 734, 115 Fair Empl.Prac.Cas. (BNA) 1409 (**7th Cir.** 2012),, reversed the lower court's grant of a new trial on punitive damages as an abuse of discretion, and reinstated the jury's verdict of $3.5 million in punitive damages to the Title VII and § 1981 racial harassment defendant. The court's holding on entitlement to punitive damages was at 747:

> The bottom line in this case is simple, even if a little difficult to digest. May was subjected to repulsive harassment for more than three years. Chrysler suspected that May did it all himself. The jury, however, disagreed; Chrysler, it concluded, had not taken reasonable measures to stop the harassment. That was liability. (And, as explained, we have no doubt that the record easily supports the jury's decision on that issue.) With liability fixed, May's case for punitive damages is straightforward and persuasive: Chrysler did not increase its (meager) efforts over a long stretch of time in the face of remarkably awful harassment, and that was reckless. It would be nonsensical to eliminate the award of punitive damages based on sympathy for an argument that May's harms were self-inflicted if another issue, already resolved (liability), requires that they were not. On these unusual facts, there's no splitting the difference. The jury's verdict on liability is affirmed and the jury's verdict on punitive damages will be reinstated.

2. Amount

E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 838-40, 27 A.D. Cases 801 (**7th Cir.** 2013), affirmed the verdict for the EEOC on the second trial of its ADA termination and failure-to-accommodate claim against defendant. The court upheld the verdict of $100,000 in compensatory damages and the remitted amount of $200,000 in punitive damages. Defendant appealed the denial of its motion for remittitur of punitive damages to $10,000. The court held that the remitted award did not violate due process, stating at 839-40:

> The jury awarded the EEOC $100,000 in compensatory damages, $500,000 in punitive damages, and $115,000 in back pay. The magistrate judge later remitted the punitive damages to $200,000. This is a two-to-one ratio between punitive and compensatory damages, and if back pay is added to the compensatory damages, the value of the punitive damages is actually less than the value of the back pay and compensatory

damages by $15,000. We conclude that these ratios are well within the range of constitutionally acceptable values.

May v. Chrysler Group, LLC, 692 F.3d 734, 747-48, 115 Fair Empl.Prac.Cas. (BNA) 1409 (**7th Cir.** 2012), reversed the lower court's grant of a new trial on punitive damages as an abuse of discretion, and reinstated the jury's verdict of $3.5 million in punitive damages to the Title VII and § 1981 racial harassment defendant. The court explained at p. *13:

> After reviewing the parties' submissions, we are convinced that the punitive damage award does not violate the Constitution and should therefore be reinstated in full. The award is substantial—five times the original compensatory damages and eleven times the remitted amount—but Chrysler's long-term recklessness in the face of repeated threats of violence against May and his family is sufficiently reprehensible to support it. *State Farm*, 538 U.S. at 419 (discussing "indifference to or a reckless disregard of health or safety" and "repeated actions" as opposed to "isolated incident" as significant factors in assessing the reprehensibility of defendant's conduct). We recognize that "few awards exceeding a single-digit ratio between punitive and compensatory damages, *to a significant degree*, will satisfy due process." *Id.* at 425 (emphasis added) (ratio of 145 to 1 grossly excessive). But "[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *BMW*, 517 U.S. at 583 ("breathtaking" 500 to 1 ratio grossly excessive); *see also Kapelanski v. Johnson*, 390 F.3d 525, 534 (7th Cir.2004) (3.3 to 1 ratio "easily permissible"); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir.2003) (37 to 1 ratio upheld). Of the three "guideposts" we are required to consider in deciding whether an award of punitive damages violates due process—reprehensibility of defendant's conduct, ratio of compensatory to punitive damages award, and disparity of the award with "civil penalties authorized or imposed in comparable cases," *State Farm*, 538 U.S. at 428 (quoting *BMW*, 517 U.S. at 575)—only the third factor supports a conclusion that the award is excessive. If this case were only under Title VII, and not also § 1981, May's damages would be capped at $300,000. That is a relevant consideration. But especially where the other two (and more important) guideposts cut the other way, "although the punitive damages awarded here are more than the damages available under Title VII for analogous conduct, the difference is not enough, by itself, to suggest that the punitive damages award violates due process." *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1284 (11th Cir.2008) (quoting *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir.2003)) (punitive damages for a hostile work environment under § 1981 five times the Title VII statutory cap not excessive).

P. Attorneys' Fees

1. "Prevailing Party" Status

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

legitimate conduct, and merely required defendants to obey the law. The Court rejected this reasoning:

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

2. Hourly Rates

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

3. Fees After Rule 68 Offer for "All Claims" But Silent on Fees

Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 117 Fair Empl.Prac.Cas. (BNA) 966 (**7th Cir.** 2013), reversed the denial of attorneys' fees and costs after plaintiff accepted defendant's Rule 68 offer of judgment, which had not specifically referred to fees or costs. The court began its opinion by stating at 690:

> This appeal requires us to address once more the problems posed by ambiguous offers of judgment under Rule 68 of the Federal Rules of Civil Procedure. And once more we must teach defendants making Rule 68 offers to be specific and clear in their offers. Any ambiguities will be resolved against them.

Defendant's offer stated that it included "all of Plaintiff's claims for relief," but this was insufficient to cover costs and fees. The court explained at 692:

> Offers of judgment under Rule 68 are different from contract offers. When a contract offer is made, the offeree can reject it without legal (as distinct from economic) consequences. Plaintiffs who receive Rule 68 offers, however, are "at their peril whether they accept or reject a Rule 68 offer." . . . Costs are usually a relatively minor aspect of most federal litigation, but when the costs in question include attorney fees, as in this case, Rule 68 takes on much greater significance, often exceeding the damages a successful plaintiff might recover. A plaintiff who rejects a Rule 68 offer but later wins a judgment in such a case may lose her entitlement to a substantial portion of otherwise awardable attorney fees and costs if she does not win more than the rejected Rule 68 offer. . . .
>
> Contrary to the district court's reasoning, therefore, we treat Rule 68 offers differently than we treat ordinary contract offers. . . . For example, Rule 68 offers may

> not be revoked during the 14–day period established by the Rule. We have rejected the applicability of the contract doctrine of rescission to Rule 68 offers, and we have been reluctant to allow defendants to challenge the meaning of an offer of judgment, either before or after acceptance. . . . Most important, because the consequences of a Rule 68 offer are so great, the offering defendant bears the burden of any silence or ambiguity concerning attorney fees. . . .

(Citations omitted.) The court rejected defendant's argument that plaintiff's demand for fees and costs were part of her "claims for relief." It stated:

> Prudential Pizza's logic would allow a defendant to force a plaintiff to guess the meaning of the offer, which the Rule and *Webb* do not permit. Rule 68(a) requires the offer to include 'specified terms.' If Prudential Pizza's offer was meant to include attorney fees and costs, the offer was not specific. It simply did not refer to Sanchez's attorney fees or costs. It referred to Sanchez's 'claims' but failed to specify what those claims were, such as whether they included her claim against the other defendant."

Id. at 692-93. The court held that attorneys' fees and costs are no part of a claim; they are part of plaintiff's demand. "Claims and demands for relief are different animals in civil procedure." *Id.* at 693.

Q. <u>Post-Judgment Motions</u>

Hudson v. United Systems of Arkansas, Inc., 709 F.3d 700, 117 Fair Empl.Prac.Cas. (BNA) 952 (**8th Cir.** 2013), affirmed the denial of the Title VII sex discrimination defendant's motion for judgment as a matter of law. The court stated at 703:

> Although we take the record as a whole, we are to "disregard all evidence favorable to the moving party that the jury [was] not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 . . . (2000). Thus, evidence that was favorable to United Systems should be credited only if it was "uncontradicted and unimpeached," and only "to the extent that [it came] from disinterested witnesses." *Id.* (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2259 (2d ed. 1995)).

The court held that the jury was entitled to disregard the testimony of the President of the company, stating at 704-05:

> We conclude that a legally sufficient basis existed for a reasonable jury to determine that Hudson had made a showing that she had been discriminated against by her employer. . . . Petkovsek's account did not go "essentially undisputed," as he claims on appeal. Three current or former executive employees testified that they had never heard of Petkovsek's alleged cell phone policy. In response to Petkovsek's testimony that he had told Hudson about the cell phone policy months before her termination, a portion of his pretrial deposition was introduced in which he stated that he believed he first told her about it the day she was fired. Hudson also produced evidence that Petkovsek "belittle[d] women employees all of the time," talked down to them, and called them "girl" or "little girl." Once he told Hudson that she "g[a]ve good phone," which she took

> to be a reference to oral sex. Finally, Hudson testified that immediately before telling her to "get out" of her office during their confrontation, Petkovsek ordered her to "sit down, little girl." The jury was not required to believe Petkovsek's contradicted and impeached testimony, *Reeves*, 530 U.S. at 151, or to accept United Systems' proffered reasons for Hudson's dismissal. Hudson's evidence met her burden of "persuad[ing] the jury, from all the facts and circumstances," that her termination was "based upon intentional discrimination." . . . United Systems was thus not entitled to judgment as a matter of law.

(Citations omitted.)

R. Appeals

Feldman v. Olin Corp., 692 F.3d 748, 26 A.D. Cases 1305 (**7th Cir.** 2012), rejected the argument that plaintiff's original notice of appeal did not preserve the right to appeal the subsequent award of sanctions against plaintiff's counsel. The court held that there were two defects as to its jurisdiction to review the sanctions order:

> FRAP 4(a)(2) permits courts to treat a notice of appeal filed after a court announces a decision or order, but does not formally enter final judgment, as filed on the date of the entry of the judgment or order. But this rule applies "only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991). The Supreme Court has specifically said that Rule 4(a)(2) does not "permit[ ] a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment" because "[a] belief that such a decision is a final judgment would not be reasonable." *Id.*; *see also Carter v. Ashland, Inc.*, 450 F.3d 795, 797 (8th Cir. 2006) ("We conclude Rule 4(a)(2) does not save the instant notice of appeal filed prematurely from the dismissal order, because the order 'left unresolved' the amount of the attorney's fees and costs."). Nor does Rule 4(a)(4)(B)(i) help. That rule applies to motions for attorney's fees only "if the district court extends the time to appeal under Rule 58," FED R.APP. P. 4(a)(4)(A)(iii), and the court did not do so here.

Id. at 758-59. In addition, the court held that one other jurisdictional matter "dooms this appeal." The original notice of appeal was filed by plaintiff, but that the district court subsequently sanctioned plaintiff's *counsel*, relieving plaintiff of that burden and rendering his appeal of the sanctions order moot. "Thus, even if we were somehow to find the early notice of appeal to be effective at a later date, any issue Feldman might have had with those fees is now moot. Feldman's attorneys were the only parties who could appeal a fee award imposed against them, but they did not file an appeal from the November order and their attempt to file an appeal from the February order was far too late." *Id.* at 759.

S. Sanctions

Torres-Santiago v. Municipality of Adjuntas, 693 F.3d 230 (**1st Cir.** 2012), vacated the grant of attorneys' fees to the successful defendants. The case involved numerous claims,

numerous plaintiffs, and numerous defendants. The court held that most claims were reasonable to pursue at the outset of the case. The court held at 241-42 that the grant of summary judgment to defendants on some claims did not mean that the claims were unreasonable for purposes of § 1988, because the standards are different. The lower court had also denied summary judgment on some claims. The court stated at p. 242 that "The denial of summary judgment for the municipality and Mayor, while not determinative of the reasonableness of the claims against them, was highly probative of the reasonableness of those claims, and the district court was wrong to conclude otherwise . . . ." Defendants later made an offer of settlement. The court rejected the lower court's finding that the rejection of a sound settlement offer thereafter made the claims unreasonable to pursue. It rejected the lower court's award of fees that included time spent on claims that the Court of Appeals held were reasonable to pursue. It remanded as to the claims it found unreasonable when filed, stating: "The district court may in its discretion award to defendants the fees, if any, that are attributable *solely* to the additional costs associated with the unreasonable claims against Báez and Caraballo." *Id.* at 244 (emphasis in original).

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

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

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

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

Id. at 411. Finally, the court held that the lower court did not demonstrate bias against her by observing, in the course of denying defendant's motion for Rule 11 sanctions because defendant failed to follow the "safe harbor" rule, that the court considered plaintiff's case "silly" and her motion for a new trial "patently frivolous." *Id.*

Feldman v. Olin Corp., 692 F.3d 748, 26 A.D. Cases 1305 (**7th Cir.** 2012), stated in *dictum* (because the court had no jurisdiction over plaintiff's purported appeal) that it was error for the lower court to have ordered a sanction of attorneys' fees against counsel for plaintiff under Rule 11, Fed. R. Civ. Pro., because defendant gave no notice prior to filing its motion. "That alone should have led to the dismissal of the motion." *Id.* at 758. The court did have jurisdiction to consider Feldman's appeal from the lower court's denial of sanctions against a defendant, and that there was sufficient evidence of improper conduct by that defendant that the denial of sanctions without explanation was an abuse of discretion. *Id.* at 759.

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

T. Federal Employees

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

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

VI. Appellate Tips for Effective Advocacy

Maraschiello v. City of Buffalo Police Dept., 709 F.3d 87, 92, 117 Fair Empl.Prac.Cas. (BNA) 665 (**2d Cir.** 2013), affirmed the grant of summary judgment to defendants on plaintiff's § 1983, equal protection, and defamation claims because he only mentioned them in a cursory manner in his brief and did not present meaningful argument on these issues.