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Summary Judgment: Tips on Winning and Losing

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., 900 Brawner Bldg., 888 17th Street N.W., Washington, D.C. 20006-3307. Telephone: 202-785-2145. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net.

Many of my papers can be downloaded from www.rickseymourlaw.com. Many of my other CLE papers are also downloadable from this site.

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I. Overview

A. The Numbers

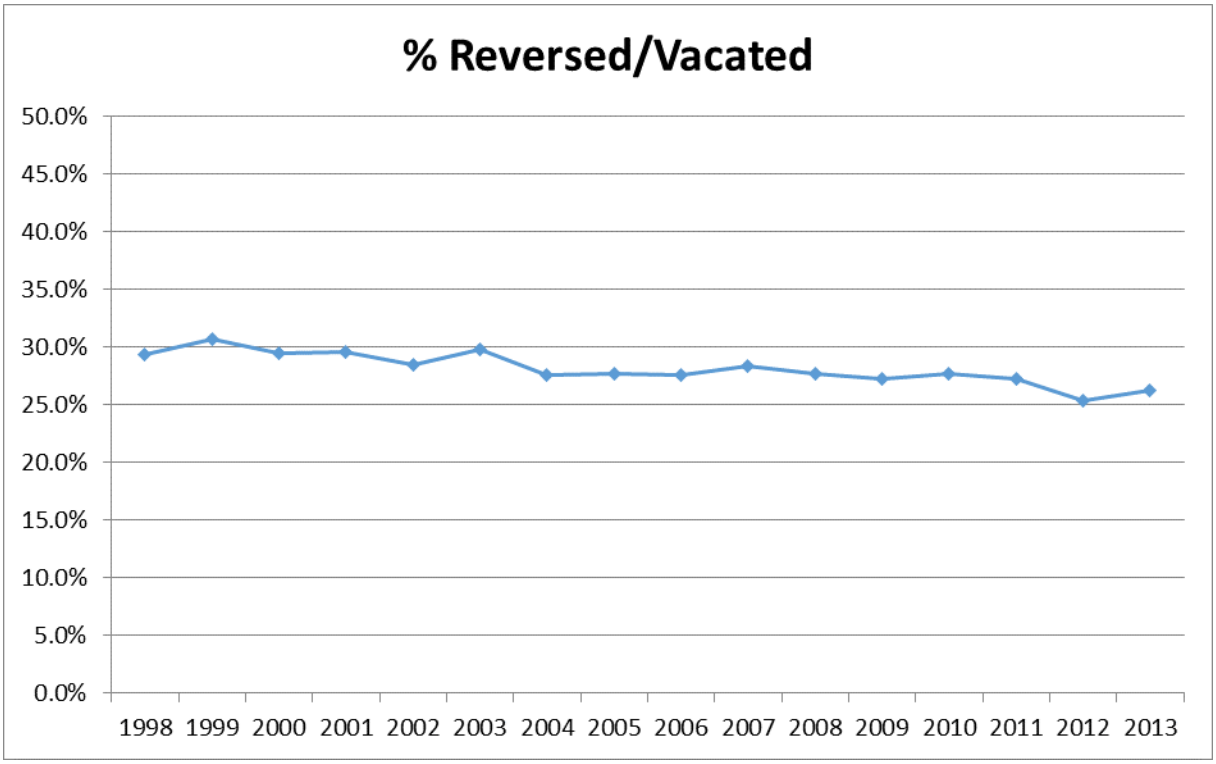
The following chart is based on running the following algorithms on WestLaw® for all appellate decisions reflected on WestLaw®, whether published or unpublished, for each calendar year and for 2013 to date:

> (discriminat! retaliat! harass! "hostile environment") & ("rule 56" "summary judgment") & (reversed vacated) & da (aft 01/01/1998) & da (bef 01/01/1999)
>
> (discriminat! retaliat! harass! "hostile environment") & ("rule 56" "summary judgment") & affirmed & da(aft 01/01/1998) & da (bef 01/01/1999)

It is imperfect, because many cases fit into both categories.

Calendar Year	Summary Judgments Reversed or Vacated	Summary Judgments Affirmed	Percent of Total Reversed or Vacated
1998	609	1466	29.3%
1999	714	1610	30.7%
2000	656	1569	29.5%
2001	672	1603	29.5%
2002	635	1592	28.5%
2003	673	1585	29.8%
2004	548	1435	27.6%
2005	609	1587	27.7%
2006	608	1599	27.5%
2007	599	1515	28.3%
2008	577	1505	27.7%
2009	573	1526	27.3%
2010	541	1410	27.7%
2011	527	1410	27.2%
2012	511	1507	25.3%
2013	212	597	26.2%

The following chart graphically illustrates the table:



The numbers are strikingly uniform, suggesting either that plaintiffs' counsel:

- are not learning to improve their selection of cases, or
- are not learning to improve their defences against summary judgment, or
- that we are all improving but new entrants into the field are cancelling out the improvements that would otherwise show up, or
- that nothing we do makes a difference.

B. Is Plaintiffs' Attorneys' Paranoia Justified?

Many plaintiffs' attorneys believe that reversals of summary judgment are tucked away in unreported decisions where they will be difficult to find. To test this, I ran the above algorithms on two WestLaw® databases for the five and a half years from January 1, 2008, through July 7, 2013: the CTA database of reported and unreported decisions combined, and the CTAR database of reported opinions. By subtracting the CTAR decisions from the CTA decisions, I obtained the unreported decisions. Not all unreported decisions appear on WestLaw®, but this is the best that can be done.

The results were surprising:

Database	Summary Judgments Reversed or Vacated	Summary Judgments Affirmed	Percent of Total Reversed or Vacated
All cases	2,970	7,985	27.1%
Reported cases	1,792	2,572	41.1%
Unreported Cases	1,178	5,413	17.9%

If anything, it is defense counsel who should be paranoid. In actuality, the unreported results may reflect the likely result of numerous *pro se* filings, and poor case selections and filings by attorneys who have not yet learned how to identify and handle an employment case properly, so that the resulting decisions are felt to provide little guidance to the bench and bar.

C. Distinguishing Among Summary Judgments

Many summary judgment decisions turn on points of law independent of an evaluation whether the plaintiff has shown enough facts to get to trial, such as whether the plaintiff has alleged a time-barred claim, or whether a State-law cause of action is tenable, or whether the claim has been properly exhausted, or whether jurisdictional requirements are met. Those are outside the scope of this paper.

For example, *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 629-30, 107 FEP Cases 129, 29 IER Cases 1183 (**7th Cir.** 2009), affirmed the grant of summary judgment to the defendant school board on plaintiff's § 1983 First Amendment retaliation claim, because there is no *respondeat superior* liability under § 1983 against a public agency when one of its officials takes an unlawful action that is not pursuant to official policy, plaintiff failed to name the alleged retaliating school principal as a defendant in her personal capacity, and plaintiff did not show that the school principal had final decision-making authority over the non-renewal of her contract. The court stated: "The Board's following Acevedo's recommendation is not enough to prove that Acevedo was a final policymaker. To maintain her § 1983 claim, Darchak must demonstrate that the Board either delegated final policymaking authority to Acevedo or ratified Acevedo's action."

For another example, *Rush v. Perryman*, 579 F.3d 908, 29 IER Cases 1179 (**8th Cir.** 2009), affirmed the denial of summary judgment based on qualified immunity, holding that a pre-termination executive session, followed by the plaintiff's termination for dishonesty and other problems, was no substitute for a name-clearing hearing.

These types of summary judgments depend on a rule of law, and can sometimes be avoided by more careful case selection and pleading, or by changing the rule of law. Changing the rule of law is outside the scope of this paper, which takes the law as it is.

It is worth noting that this type of summary-judgment motion would make sense to bring in arbitration, a forum that generally prefers to hear the case on the merits rather than have a trial on paper, because it can shorten the proceedings substantially.

II. Attempts to Hog-Tie Justice, Facilitating Summary Judgment

A. Court-Created Doctrines Barring Evidence of Discrimination, Distorting the Law to Grease the Wheels of the Summary-Judgment Engine

When one steps back from the details of individual cases and looks at the rules of decision that have come into being in order to take close cases away from juries, it is difficult to avoid the conclusion that defendants have offered to the courts as rules of thumb concepts that would be perfectly proper in jury arguments, and that the courts have fairly routinely accepted the jury arguments and hardened them into "no reasonable jury could disagree" rules of law. The rule of thumb concepts are then relied upon to destroy countless close cases until the Supreme Court disapproves them.

It is important to bear in mind that the disapproved concepts/rules of law are not simply substantive developments in the law that were ultimately disapproved; they were developed and accepted in order to allow evidence to be discarded. Discarded evidence cannot create a genuine dispute of material fact, and thus cannot stand in the way of granting summary judgment. Thus, these concepts/rules of law enable summary judgment to be granted in ever more close cases, depriving jurors of the opportunity to use common sense in weighing such concepts or rules of thumb against all the evidence in the case, and giving judges a standard that is then too often used indiscriminately.

There are numerous examples:

- The rulings that calling an adult African American man "boy" is not probative of racial discrimination unless it is accompanied by a derogatory adjective. This was disapproved in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (*per curiam*) ("Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.")

- The rulings that comparing the qualifications of the plaintiff and the successful candidate is not probative of discrimination unless the difference is extreme. This was disapproved in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (*per curiam*) ("Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext.")

- The rulings that comparators must be virtually identical to the plaintiffs before the comparison can be probative of discrimination. This was disapproved in *Miller-El v. Dretke*, 545 U.S. 231 (2005), which reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's

peremptory challenges by clear and convincing evidence. The Court cited *Reeves v. Sanderson Plumbing Products, id.* at 241, underscoring the relevance of this decision to employment law. The Court stated: "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id.* at 247 n.6.

- The rulings that biased remarks are not probative of discrimination unless they are made by the decisionmaker, about the plaintiff, at the same time as the challenged employment action, and with specific reference to the challenged employment action. This was disapproved in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151–53 (2000). The Court held that the following remarks, as well as more favorable treatment of a younger employee, were probative of "age-based animus" by Chesnut, a key decisionmaker: "Petitioner testified that Chesnut had told him that he 'was so old [he] must have come over on the Mayflower' and, on one occasion when petitioner was having difficulty starting a machine, that he 'was too damn old to do [his] job.'" *Id.* at 151. The Court disapproved of the Fifth Circuit's holding that these remarks were stray remarks that were not probative of discrimination:

  > In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. Again, the court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner's *prima facie* case and undermining respondent's nondiscriminatory explanation. . . . The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination."

  Id. at 152 (citation omitted.)

- The rulings that there is a strong presumption against discrimination if the plaintiff was hired or promoted by the same person who later fired or demoted the plaintiff. This is the strong form of the rule, exemplified in *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991).

- The rulings that no plaintiff can claim sexual harassment unless the harassment was so severe that it would be expected to affect seriously the plaintiff's psychological well-being. This was disapproved in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) ("But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work

environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.").

- The rulings that after-acquired evidence of the plaintiff's wrongdoing automatically bars all relief and requires dismissal of the case, in a sort of trespasser-in-the-workplace approach. This was disapproved in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

These distortions in the law injure countless numbers of plaintiffs with meritorious claims, and it can take years or decades before such jury arguments/concepts are dethroned from their positions as no-reasonable-jury rules of law.

B. Disregarding Plaintiff's Non-Conclusory Factual Statements as "Self-Serving"

The cases in this section do not involve situations in which the plaintiff simply states an unsupported subjective conclusion of motive or a violation of law, and relies only on it, and it contradicts the plaintiff's prior testimony or undisputed evidence. It is clearly proper to reject such evidence on summary judgment. *E.g.*, *Libertarian Party of Virginia v. Judd*, __ F.3d __, 2013 WL 2360103 (**4th Cir.** May 29, 2013) (No. 12-1996) at p. *4.

Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11, 18, 181 L.R.R.M. (BNA) 2097, 88 Empl. Prac. Dec. P 42,649, 153 Lab.Cas. ¶ 10,775 (**1st Cir.** 2007), reversed the grant of summary judgment against the USERRA plaintiff, and stated:

> Moreover, whether a nonmovant's deposition testimony or affidavits might be self-serving is not dispositive. It is true that testimony and affidavits that "merely reiterate allegations made in the complaint, without providing specific factual information made on the basis of personal knowledge" are insufficient. *Santiago-Ramos*, 217 F.3d at 53 (citing *Roslindale Coop. Bank v. Greenwald*, 638 F.2d 258, 261 (1st Cir. 1981)). However, a "party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." *Santiago-Ramos*, 217 F.3d at 53 (internal quotation marks omitted) (quoting *Cadle Co. v. Hayes*, 116 F.3d 957, 961 n. 5 (1st Cir. 1997)). Therefore, provided that the nonmovant's deposition testimony sets forth specific facts, within his personal knowledge, that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment. See *Napier v. F/V Deesie, Inc.*, 454 F.3d 61, 66 (1st Cir. 2006); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 50-51 (1st Cir. 1999).

Navejar v. Iyiola, __ F.3d __, 2013 WL 2321349 (**7th Cir.** May 29, 2013) (No. 12-1182), reversed the grant of summary judgment against a prisoner's excessive-force claim, stating at p. *4:

> In this case, the absence of counsel likely prejudiced Navejar because the district court's ruling on summary judgment reveals two substantive errors. First, the court

adopted the erroneous legal argument raised by the defendants in moving for summary judgment that Navejar could not rely on "self-serving evidence" to create a material factual dispute. This is wrong. "[W]e long ago buried—or at least tried to bury—the misconception that uncorroborated testimony from the nonmovant cannot prevent summary judgment because it is 'self-serving.'" *Berry v. Chicago Transit Auth.*, 618 F.3d 688, 691 (7th Cir. 2010); *see also Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 504–06 (7th Cir. 2004); *Payne v. Pauley*, 337 F.3d 767, 770–73 (7th Cir. 2003). Here, Navejar attempted to present his side of the story at summary judgment through his affidavits and specific references to his deposition testimony. He contended that after he was subdued and handcuffed, Iyiola kicked him in the face, a prison guard stomped his head, guards dragged him across the floor, Grant and Iyiola pepper-sprayed him, and then left him alone for 30 minutes screaming in pain. With Navejar lacking counsel to reply to the defendants' erroneous contention that the district court may safely disregard his "self-serving" evidence, the district court accepted that contention and thereby prejudiced Navejar.

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."

Darchak v. City of Chicago Bd. of Educ., 580 F.3d 622, 631, 107 FEP Cases 129, 29 IER Cases 1183 (**7th Cir.** 2009), reversed the grant of summary judgment. The court stated:

> The district court dismissed this claim for two reasons. First, the court stated that Darchak "provide[d] no support for her allegations besides her own self-serving deposition transcript." It is true that uncorroborated, self-serving testimony cannot support a claim if the testimony is based on "speculation, intuition, or rumor" or is "inherently implausible." *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003). But testimony based on first-hand experience is none of those things. Darchak's testimony presents specific facts, even if that testimony may be less plausible than the opposing litigant's conflicting testimony (a question we need not—nay, cannot—reach). *Id.*

Argenyi v. Creighton University, 703 F.3d 441, 446, 27 A.D. Cases 959 (**8th Cir.** 2013), reversed the grant of summary judgment to the ADA and Rehabilitation Act defendant in this student-rights case. The court stated:

> In granting summary judgment to Creighton the district court disregarded Argenyi's affidavit, termed it "self-serving," and concluded that "there [was] an absence of evidence to support [his] claim." There was, however, a variety of supporting evidence in the record. Argenyi's affidavit must be considered, and its particular factual allegations scrutinized for "independent documentary evidence" to support them. *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1191 (8th Cir. 1995). In a case such as this it is especially important to consider the complainant's testimony carefully because "the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective." U.S. Dep't of Justice, The

Americans with Disabilities Act Title II Technical Assistance Manual, at II–7.1100 (1993).

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.

C. The Odd Notion that Most Expressions of Bigotry Are Irrelevant

Darchak v. City of Chicago Bd. of Educ., 580 F.3d 622, 632, 107 FEP Cases 129, 29 IER Cases 1183 (**7th Cir.** 2009), reversed the grant of summary judgment to defendant on plaintiff's national-origin discrimination claim. The court held that the lower court erred in disregarding plaintiff's testimony—about biased remarks by Principal Acevedo—on the ground that plaintiff had not shown they were made in reference to the non-renewal of her contract:

> This brings us to the district court's second reason for dismissing Darchak's discrimination claim: the court determined that Darchak failed to demonstrate that Acevedo's comments were causally related to her decision not to renew [Darchak's contract]." . . . This appears to be a question of timing. But the bare fact that Darchak was not fired immediately after Acevedo allegedly made these remarks does not destroy the potential causal connection. The structure of the school year dictated the employment timetable, and Acevedo may not have been able to recommend nonrenewal of Darchak's contract any earlier than she did. In any event, we have previously found that three to four months between a remark and an employment action is not so long as to defeat the inference of a causal nexus, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir.2000), and not much more time than that, if any, elapsed here.
>
> The connection between Acevedo's discriminatory remarks and her ultimate recommendation not to renew Darchak's contract raises a question of intent. The fact that Acevedo rehired another Polish teacher is evidence of a possible answer to that question, but, as a question of intent, it is properly put to the jury, not to the court on summary judgment. *Payne*, 337 F.3d at 770. It is possible the district court simply did not believe Darchak; indeed, as we have noted, she presented no evidence of Acevedo's comments besides her own testimony, and the only other person present during these conversations—Acevedo—denies having made them.FN4 But we repeat that it is not the court's job to assess the persuasiveness of Darchak's testimony. *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir.1997) (warning courts against "invad[ing] the province of the factfinder by attempting to resolve swearing contests and the like" and collecting cases). Employment discrimination cases often center on parties' intent and credibility, which must go to a jury unless "no rational factfinder could draw the contrary inference," *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 894 (7th Cir.1996). That is not the case here.
>
> _____
>
> FN4. Also suggestive is that Darchak failed to complain about discrimination until she filed this lawsuit. This can defeat a claim where an employer has in place anti-discrimination policies and the employee fails to take advantage of them, see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998), but the Board may not maintain a *Faragher/Ellerth* defense here because in addition to Acevedo's discriminatory remarks, Darchak has also shown that she suffered a tangible employment action. *See Jackson v. County of Racine*, 474 F.3d 493, 500-01 (7th Cir.2007) (*Ellerth* and *Faragher* established that in situations where "the supervisor's harassment resulted in 'a tangible employment action, such as discharge, demotion, or undesirable reassignment,' ... the employer's vicarious liability is strict, in the sense that no defense is available once the other elements of the case have

been proven.") (internal citation omitted). The district court dismissed a putative hostile work environment claim on *Faragher/Ellerth* grounds, but Darchak has not challenged that ruling.

Id. at 632-33.

D. Attempted Insulation by Using Intermediaries

Halpert v. Manhattan Apartments, Inc., 580 F.3d 86, 88, 107 Fair Empl.Prac.Cas. (BNA) 459, 92 Empl. Prac. Dec. ¶ 43,668 (**2d Cir.** 2009) (*per curiam*), was a *pro se* case in which the court vacated the grant of summary judgment to the ADEA defendant. Plaintiff applied for a job with defendant and was explicitly rejected because of his age. The lower court granted summary judgment to defendant because an employee of an independent contractor had done the interviewing. The court stated:

> By its terms, employer liability under the ADEA is direct: an employer may not "fail or refuse to hire ... any individual ... because of such individual's age." 29 U.S.C. § 623(a)(1). That prohibition applies regardless of whether an employer uses its employees to interview applicants for open positions, or whether it uses intermediaries, such as independent contractors, to fill that role. As the Seventh Circuit has explained in the context of Title VII, when liability for discrimination is direct rather than derivative, "it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer." *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005). If a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable if that individual improperly discriminates against applicants on the basis of age.
>
> A company is not, of course, liable for the hiring decisions made by independent contractors who are hiring on their own behalf. Nor is a company liable simply because a job applicant unreasonably (and incorrectly) believes that he is interviewing for a job with the company and that the independent contractor has the authority to make hiring decisions on behalf of the company. General principles of agency law determine whether the independent contractor or other third party has been given actual authority to hire on behalf of the company, or whether the company, through its own words or conduct, has created apparent authority in that individual in the eyes of the job applicant. *See Minskoff v. Am. Express Travel Related Servs. Co.*, 98 F.3d 703, 708 (2d Cir.1996). Significantly, however, the company's potential liability does not depend on whether the individual hiring for the company as its agent is an employee or an independent contractor under the broadest meaning of those words as they are determined by the common law agency test. FN1 An independent contractor can act as an agent, or an apparent agent, of the company for the limited purpose of interviewing and potentially hiring job applicants while still retaining his independence for any number of other purposes.

(Footnote omitted.)

III. Two Curative Decisions

A. Thwarting "Critical Mass" Determinations in Harassment Cases

Aulicino v. New York City Dept. of Homeless Services, 580 F.3d 73, 83-84, 107 FEP Cases 277 (**2d Cir.** 2009), reversed the grant of summary judgment as to the white plaintiff's Title VII claim of a racially hostile work environment. The court held that two periods of harassment by two different supervisors, with a gap in between, could not be analyzed together with the gap in between, as indicating a low overall intensity of racially hostile activity, but had to be analyzed without the gap.

B. Acts that Unbar Time-Barred Claims

Mikula v. Allegheny County, 583 F.3d 181, 186, 107 FEP Cases 238 (**3d Cir.** 2009) (*per curiam* on rehearing), reversed in part the grant of summary judgment against plaintiff's Title VII pay discrimination claim. The court held on rehearing that even the employer's failure to respond to a request for a pay raise was a pay decision that started the period of limitations running again. The court stated:

> Despite our earlier decision, we now hold that the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. *See Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir.2003) (allowing a claim to proceed where the employer gave raises only to similarly situated white employees). We reaffirm, however, our earlier conclusion that the August 2006 investigation report does not constitute a compensation decision or other practice. While, in the abstract, the result of the investigation affected Mikula's compensation, finding that an employer can be liable under Title VII for investigating an internal discrimination complaint and communicating its findings to the employee would have the unfortunate effect of encouraging employers to ignore such complaints.

IV. What It's All Supposed (and Not Supposed) to Be About

Hoyle v. Freightliner, LLC, 650 F.3d 321, 334-35, 111 Fair Empl.Prac.Cas. (BNA) 1537 (**4th Cir.** 2011), reversed the grant of summary judgment to the sexual harassment defendant, and affirmed the grant of summary judgment on other claims. The court stated:

> On appeal, Freightliner pursues a similar approach and undertakes to defend the district court's summary judgment on the issue of severity/pervasiveness by cataloging some of the myriad cases that have come before this court and that involved behavior considerably more offensive and opprobrious than that shown here. While this tack is understandable, and assuming that other cases involve more heinous behavior in male dominated workplaces than that shown here, *we have never held that a weak case is necessarily one that should be disposed of on summary judgment*. The question at the summary judgment stage is not whether a jury is sure to find a verdict for the plaintiff; the question is whether a reasonable jury could rationally so find. . . . On this record, we are satisfied that the answer to that query is "yes" and that it was error for the district court to rule to the contrary as a matter of law. *We have never held that a grant of*

summary judgment in favor of a defendant is a legitimate substitute for a jury verdict in favor of a defendant, and we decline to do so here.

(Citation omitted; emphases supplied.)

V. Facing Up to the "Honest Belief" Rule and its Limitations

Sometimes, much of the effort of plaintiffs' attorneys is wasted by focusing only on the question whether the employer's stated rationales accurately reflected the underlying facts. In a case requiring proof of discriminatory or retaliatory purpose, a good-faith mistake is a *defense*, not a path to liability.

Plaintiffs' counsel should instead focus on digging up evidence that the employer did not really base its decision on that rationale, or—even better—that it knew the underlying facts were different, or—best of all—arranged not to know if the underlying facts were different.

To plaintiffs in a case turning on intent, the employer's insincerity is worth a price beyond pearls, its hypocrisy can be taken to the bank, and its lies are lovely. We just have to find them where they exist and exploit them properly, or settle the case or withdraw it if the employer has been straight and sincere.

Defendants must also recognize when they are open to claims that their decisonmakers have attempted to game the system by concocting a sham. Cover-ups are extremely dangerous, and can expose the employer to significant punitive damages.

Some cases illustrating these principles are set forth below.

Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 246, 98 Fair Empl.Prac.Cas. (BNA) 1258 (**1st Cir.** 2006), *cert. denied*, 549 U.S. 1279 (2007), affirmed the lower court's denial of a new trial on damages after the jury found racial and religious harassment but refused to award damages, and affirmed the grant of summary judgment on plaintiff's Title VII and § 1981 discharge claim. The court stated:

> Azimi's denial of wrongdoing is not enough to raise an inference of pretext, on these facts, where the company undertook a reasonable investigation, heard his side of the story, and decided that his accuser's was more credible. "In assessing pretext, a court's 'focus must be on the perception of the decisionmaker,' that is, whether the employer believed its stated reason to be credible," subject to some limitations not present here. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991) (quoting *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 256 (1st Cir. 1986)); *see also Rivera-Aponte v. Rest. Metropol # 3, Inc.*, 338 F.3d 9, 11-12 (1st Cir. 2003) ("Whether a termination decision was wise or done in haste is irrelevant, so long as the decision was not made with discriminatory animus."). Although an "employer's good faith belief is not automatically conclusive," *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 46 (1st Cir. 2002), "[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real [and unlawful] motive" of discrimination, *Mesnick*, 950 F.2d at 824 (internal quotation mark

omitted) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir.1990)). Azimi has not made that showing here.

Tingle v. Arbors at Hilliard, 692 F.3d 523, 530-31, 115 Fair Empl.Prac.Cas. (BNA) 1680, 34 IER Cases 469 (**6th Cir.** 2012), affirmed the grant of summary judgment to the Title VII and State-law defendant. The court stated:

> If an employer has an "honest belief" in the nondiscriminatory basis upon which it has made its employment decision (i.e. the adverse action), then the employee will not be able to establish pretext. *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir.2001) (stating that "as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect"). As we have stated, "[w]hen an employer reasonably and honestly relies on particularized facts in making an employment decision, it is entitled to summary judgment on pretext even if its conclusion is later shown to be 'mistaken, foolish, trivial, or baseless.' " *Chen*, 580 F.3d at 401 (quoting *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 713–15 (6th Cir.2007)).
>
> The employer's claim of honest belief is necessarily tied to the nature of its investigation and disciplinary decision process. We have noted that the "key inquiry ... is 'whether the employer made a reasonably informed and considered decision before taking' the complained-of action." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598–99 (6th Cir.2007) (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir.1998)). The employer certainly must point to particularized facts upon which it reasonably relied. But "we do not require that the decisional process used by the employer be optimal or that it left no stone unturned." *Smith*, 155 F.3d at 807; *see also Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 398 (6th Cir.2008).
>
> To defeat a summary judgment motion in such circumstances, the "plaintiff must produce sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants ... did not honestly believe in the proffered nondiscriminatory reason for its adverse employment action." *Braithwaite v. Timken Co.*, 258 F.3d 488, 493–94 (6th Cir.2001) (internal citations, quotation marks, and brackets omitted) (alteration in original). For example, the plaintiff may produce evidence that an error by the employer was "too obvious to be unintentional." *Smith*, 155 F.3d at 807 (citation omitted). However, "[a]n employee's bare assertion that the employer's proffered reason has no basis in fact is insufficient to call an employer's honest belief into question, and fails to create a genuine issue of material fact." *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285 (6th Cir.2012) (quoting *Joostberns v. United Parcel Servs., Inc.*, 166 Fed.Appx. 783, 791 (6th Cir.2006)).

Faas v. Sears, Roebuck & Co., 532 F.3d 633, 642, 103 Fair Empl.Prac.Cas. (BNA) 1241 (**7th Cir.** 2008), affirmed the grant of summary judgment to the ADEA defendant. The court stated:

"Pretext 'means a dishonest explanation, a lie rather than an oddity or an error.' " *Id.* (quoting *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 685 (7th Cir. 2000)); *see also Hudson v. Chi. Transit Auth.*, 375 F.3d 552, 561 (7th Cir. 2004) ("Pretext is more than a mistake on the part of the employer; it is a phony excuse."). "Showing pretext requires '[p]roof that the defendant's explanation is unworthy of credence.'" *Filar v. Bd. of Educ. of City of Chi.*, 526 F.3d 1054, 1063 (7th Cir. 2008) (quoting *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097).

Simmons v. Sykes Enterprises, Inc., 647 F.3d 943, 947-48, 112 Fair Empl.Prac.Cas. (BNA) 596 (**10th Cir.** 2011), affirmed the grant of summary judgment to the ADEA defendant. The court rejected plaintiff's claim of pretext, stating:

> Our relevant inquiry for determining pretext is "whether the employer's stated reasons were held in good faith at the time of the discharge, even if they later prove to be untrue, or whether plaintiff can show that the employer's explanation was so weak, implausible, inconsistent or incoherent that a reasonable fact finder could conclude that it was not an honestly held belief but rather was subterfuge for discrimination." *Young v. Dillon Cos., Inc.*, 468 F.3d 1243, 1250 (10th Cir. 2006). In making this determination we "look at the facts as they appear to the person making the decision to terminate." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000).
>
> Any argument by Ms. Simmons for pretext based on whether she actually disclosed the confidential information fails to address our inquiry of whether Sykes honestly relied in good faith upon the reported inconsistencies both in Ms. Simmons' statements and between her statements and the statements of others. "Evidence that the employer should not have made the termination decision—for example, that the employer was mistaken or used poor business judgment—is not sufficient to show that the employer's explanation is unworthy of credibility." *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1169–70 (10th Cir. 2007).

VI. Procedure

A. Notice

E.E.O.C. v. Exxon Mobil Corp., Slip Copy, 2009 WL 2710072 (5th Cir. Aug. 27, 2009) (No. 08-10624) (unpublished), held that the lower court erred in granting summary judgment to the ADEA defendant based on two fact-based determinations necessary to resolve the claim, where the lower court had restricted discovery to the first of those issues. The court rejected defendant's argument that the EEOC had waived any objection by failing to object to the discussion of the second issue in defendant's summary-judgment brief. The court explained at p. *3:

> We agree with Exxon that the EEOC could have been more alert in the summary-judgment proceedings. Nevertheless, the EEOC was entitled to rely on the district court's specific order that both parties restrict discovery and summary-judgment motions solely to the issue of congruity. The district court's assumption concerning the rationale justifying the FAA's regulation was beyond the scope of its scheduling order; and insofar

as the court's decision depended on this assumption, it amounted to a sua sponte grant of summary judgment on an issue and on grounds about which it did not give the EEOC proper notice. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence."); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir.1994) ("The district court failed to give ten days notice of its *sua sponte* motion to grant summary judgment, as required by Federal Rule of Civil Procedure 56(c). This court has strictly enforced this notice requirement." (footnotes omitted)).

The district court's error of assuming that the rationale for the FAA regulation remained valid-consequently exceeding the scope of its earlier order-was not harmless. The EEOC had indicated the sort of evidence that it would adduce to challenge the continuing validity of the FAA regulation's rationale: at minimum, expert testimony that reliable, individualized testing had been available to ascertain which among older pilots are unsafe. The district court's scheduling order precluded the EEOC from pursuing discovery or presenting such evidence and arguments on summary judgment. The district court nevertheless resolved the issue in Exxon's favor at summary judgment by assuming that the FAA regulation's rationale remained valid, even though the issue had been disputed and was not properly before the court.

In short, the continuing validity of the FAA regulation's rationale was, and is, a crucial and determinative issue in this case. The district court prejudiced the EEOC when it effectively granted summary judgment to Exxon by resolving this issue without giving the EEOC fair notice.FN4

B. 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.

C. Defendant's Burden When Moving on Basis of Affirmative Defense

Laouini v. CLM Freight Lines, Inc., 586 F.3d 473, 106 Fair Empl.Prac.Cas. (BNA) 1798 (**7th Cir.** 2009), reversed the grant of summary judgment to the ADEA defendant. The lower court granted summary judgment because it held that plaintiff did not timely file his EEOC charge. The court held at 475: "Failure to timely file an administrative charge is an affirmative defense, and the burden of proof at summary judgment therefore rests on the defendant." The court also noted at 479 that the Indianapolis office of the EEOC had a practice of accepting charges received by fax and considering them filed as of the fax receipt date, even though the EEOC regulations did not explicitly authorize that means of receiving charges. Plaintiff had faxed and mailed the charge; the fax would have been timely if received by the EEOC, and the mail was received by the EEOC after the deadline. The lower court gave controlling weight to the EEOC investigative file, which did not show receipt of a faxed charge. Reversing, the court stated at 477-79:

> Although fax confirmations may not always be conclusive proof of receipt, we believe that in this case—where it was not the plaintiff who had to prove receipt, but the defendant who had to prove the absence of receipt—the fax confirmation creates a factual dispute sufficient to preclude summary judgment. Whether it was plaintiff's counsel or his assistant who faxed the charge, the fax confirmation independently verifies that a three-page document was sent from counsel's office to the EEOC before 4:30 p.m. on April 12, the final day for timely filing. As the district court observed, the confirmation itself does not prove the content of the document, but counsel swore in an affidavit that the fax consisted of Laouini's two-page charge and a cover sheet, and there is no evidence to undermine his representation.FN1 And although at summary judgment the plaintiff did not present evidence establishing that confirmation of a successful transmission necessarily means that the document printed out on the other end, a reasonable factfinder could certainly infer as much. It is commonly understood that "success" in this context means that the two fax machines have performed an electronic "handshake" and that the data has been transmitted from one machine to the other. *See, e.g.*, Information Security Management Handbook 277 (Harold F. Tipton & Micki Krause eds., 6th ed. 2008) ("[O]ne significant advantage the fax has over other forms of data exchange is that the sender immediately knows if the transmission was successful.... [A]ll fax machines have the capability to print a fax confirmation sheet after each fax sent. This sheet confirms if the fax has been successfully transmitted...."); How to Understand Faxes, http:// www.how-to.com/article/ details/160 ("Once your fax has been delivered, your system ... will create a page with the end result of the transmission. If the fax was sent successfully, the page will say 'Okay.' "); How to Get Confirmation of a Sent Fax, http://www.ehow.com/how__2015874__confirm-fax-sent.ht ml ("A confirmation report is a document confirming that your faxes were sent and received.").
>
> The fax confirmation is thus strong evidence of receipt, and, contrary to the district court's conclusion, CLM offered no evidence to meet its burden of proving non-receipt. In this court CLM asserts that the EEOC "denies ever having received the fax," but this representation mischaracterizes the evidence. The EEOC never "denied" anything; it simply offered up Laouini's file, which does not contain a faxed copy of the charge of discrimination. The district court concluded that this ended the factual dispute,

> but the court did not address the possibility that the charge was received but misplaced or simply discarded when the mailed copy arrived the following Monday. Indeed, CLM did not produce any evidence from the EEOC about its internal fax-handling and retention policies. The author of the memo in the EEOC file—the investigator assigned to review the merits of the charge—does not purport to have any involvement in the handling of fax transmissions received in his office, nor does the author of that memo say that he made any effort to discuss with those who are responsible for incoming faxes whether one was received from Laouini's lawyer or even whether any fax was received late in the afternoon on April 12. A bureaucratic officer's uninformed belief that a document was not received is no more conclusive than a fax-transmission record indicating that it was. *Cf. In re Longardner & Assocs.*, Inc., 855 F.2d 455, 459 (7th Cir.1988) (explaining that denial of receipt does not rebut presumption of mail delivery but creates question of fact); *Nimz Transp., Inc.*, 505 F.2d at 179 (concluding that absence of document in clerk's file is insufficient to rebut presumption that document mailed was "received, and thereby filed"). Because a reasonable factfinder could weigh the evidence in this case and conclude that the EEOC received Laouini's charge but simply lost, misplaced, or otherwise failed to timely process it, summary judgment was inappropriate.

(Footnote omitted.) Footnote 1 raised the question whether counsel could testify on the matter without being disqualified, but said that defendant had not raised the issue.

D. ***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.

E. Requests for Additional Discovery

1. 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."

2. 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.

F. 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.

Dulaney v. Packaging Corp. of America, 673 F.3d 323, 332, 114 Fair Empl.Prac.Cas. (BNA) 980, 95 Empl. Prac. Dec. ¶ 44,443 (**4th Cir.** 2012), vacated the grant of summary judgment to the Title VII sexual harassment defendant. The court stated: "By providing dispositive weight to individual documents without considering circumstances, such as those described above, the district court effectively drew inferences in favor of the wrong party."

Collins v. American Red Cross, __ F.3d __, 2013 WL 856512, 117 Fair Empl.Prac.Cas. (BNA) 1077 (**7th Cir.** March 8, 2013 (No. 11-3345), 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 at p. *3:

> 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.)

G. <u>The Need to Point Out Facts in an Opposition</u>

Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 114 Fair Empl.Prac.Cas. (BNA) 545 (**5th Cir.** 2012), affirmed the grant of partial summary judgment to the Title VII racial harassment, discrimination, and retaliation defendant. Defendant objected to some of the facts plaintiff highlighted on appeal, and the court stated:

> Among other arguments, Yellow Transportation counters that plaintiffs at times highlight facts from the voluminous summary judgment record that were not identified for the district court and thus were not considered in ruling on summary judgment. The district court denied reconsideration of the summary judgment in part because some of the evidence these plaintiffs were citing had not been pointed out at the time of the original decision. A district court's decision on summary judgment is largely controlled by what the parties presented. If somewhere in a record there is evidence that might show a dispute of material fact, the district court needs to be pointed to that evidence as opposed to having to engage in an extensive search.

Id. at 650-51 (citations omitted). The court also stated: "Hernandez's allegations regarding the investigation into his encounter with Green were not raised in the district court as to this claim. It is too late to identify them on appeal." *Id.* at 660.

H. Failure to Consider All the Facts

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.)

I. 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.)

J. Cross-Motions for Summary Judgment and "Case Stated" Adjudication

Sánchez-Rodriguez v. AT & T Mobility Puerto Rico, Inc., 673 F.3d 1, 11, 114 Fair Empl.Prac.Cas. (BNA) 912 (**1st Cir.** 2012), affirmed the grant of summary judgment to the Title VII religious discrimination defendant. Both sides entered into a stipulation of facts, and filed cross-motions for summary judgment. The lower court stated that it would decide the matter on a "case stated" basis, under which it would draw inferences from the stipulation and decide the merits. The court of appeals held that this was error:

> We agree with Sánchez that it was error for the district court to decide this case on a "case-stated" basis. "Case-stated" resolution is appropriate "when the basic dispute between the parties concerns only the factual inferences that one might draw from the more basic facts to which the parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses." . . . Despite Sánchez's lack of diligence in pursuing discovery, he did attempt to introduce additional factual evidence in the form of the Sánchez Affidavit. Moreover, it is clear that Sánchez's dispute with AT & T concerns something more than "factual inferences" that can be drawn from "basic facts" to which he and AT & T agreed. Rather, Sánchez disputed AT & T's assertions that certain "facts" were true at all, such as the "fact" that AT & T had a neutral scheduling system that might be disturbed by giving him Saturdays off.

(Citation omitted.) However, the court affirmed the grant of summary judgment on alternative grounds.