Office of Congressional Workplace Rights

Office of the General Counsel

RECENT CASES DECIDING POTENTIAL CAA ISSUES
SEPTEMBER 29, 2021

Introduction

The Congressional Accountability Act (CAA) applies 13 employee protection statutes – soon to be 14 – to the legislative branch. Although the OCWR Board of Directors and Hearing Officers are not bound to follow the U.S. Courts of Appeals, they usually look to those courts' decisions for guidance. In this outline we round up some of the most significant and interesting recent federal appellate opinions involving most of the statutes applied by the CAA, including a few that will be reviewed by the Supreme Court in its upcoming term. We also recap some recent decisions by the Federal Labor Relations Authority (FLRA) and important guidance issued by other federal agencies, which also serve as guidance for the OCWR's Board and Hearing Officers.

Contents

Applicable Laws

The CAA currently applies all or part of the following statutes to the legislative branch:

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Rehabilitation Act
- Family and Medical Leave Act
- Fair Labor Standards Act
- Employee Polygraph Protection Act
- Worker Adjustment and Retraining Notification Act
- Uniformed Services Employment and Reemployment Rights Act
- Veterans Employment Opportunity Act
- Occupational Safety and Health Act
- Federal Service Labor-Management Relations Statute
- Genetic Information Nondiscrimination Act

Effective December 20, 2021, the Fair Chance to Compete for Jobs Act of 2019 – known as the **Fair Chance Act**, or colloquially as the "ban the box" law – will also apply to the legislative branch through section 207 of the CAA, **2 U.S.C. § 1316b**.[1] Originally passed in December 2019 as part of the National Defense Authorization Act for fiscal year 2020, the Fair Chance Act prohibits covered employers from inquiring about the criminal history of job applicants prior to making a conditional offer of employment, with certain exceptions such as jobs related to law enforcement or national security. The OCWR Board of Directors is required to model its regulations implementing the Fair Chance Act after those promulgated by the Office of Personnel Management (OPM) for the executive branch; because OPM has yet to issue such regulations, the OCWR will be issuing interim guidance for the legislative branch community.

Americans with Disabilities Act (ADA)/Rehabilitation Act

The employment discrimination provisions of the ADA (Title I) apply to the legislative branch through section 201 of the CAA, 2 U.S.C. § 1311, while section 210 of the CAA applies the ADA's public access provisions (Titles II-III), 2 U.S.C. § 1331.

Disability Discrimination in Employment

- *Waggel v. George Washington Univ.*, 957 F.3d 1364 (D.C. Cir. 2020) – A medical resident who was treated for cancer during her residency failed to establish that GW violated the ADA. She could not show that she requested an accommodation, and although she alleged that the employer should have known she needed an accommodation because it knew of her diagnosis and that she had requested FMLA leave, under the court's precedent a request for a medical leave of absence standing alone is insufficient to

[1] The CAA's anti-reprisal provision, which was formerly contained in section 207, has been re-designated as section 208. The statutory citation remains 2 U.S.C. § 1317.

constitute a request for accommodation under the ADA. The court acknowledged that there may be cases where an employee's need for an accommodation is so apparent that the employer must offer one regardless of whether the employee requested it, but in this case "the connection between Waggel's disability and her performance difficulties was not obvious" and therefore summary judgment in favor of GW was appropriate. Her disability discrimination claim also failed because she could not rebut the university's legitimate non-discriminatory explanation for her termination, which was based on amply documented problems with her academic and professional performance. (This case is summarized in the FMLA section of this outline as well.)

- *Trahan v. Wayfair Me., LLC,* 957 F.3d 54 (1st Cir. 2020) – It would not have been a reasonable accommodation for the plaintiff, a call center employee with PTSD, to work from home. The employer was in the process of developing a work-from-home program, but lacked the technological capabilities to support such an arrangement at the time the plaintiff requested it, and the court found that the employer was not required, as part of a reasonable accommodation, to allow the plaintiff to remain in place pending the availability of a work-from-home program. Additionally, the plaintiff did not explain how working from home would have enabled her to perform her job in accordance with the employer's reasonable expectations. Her PTSD triggers were inherently unpredictable and could occur anywhere, and were likely to reappear in Wayfair's team-oriented environment whether she was working from the call center or from her own residence.

- *Perez-Tolentino v. Iancu,* 983 F.3d 66 (1st Cir. 2020) – A former patent examiner entered into a settlement agreement containing a waiver of disability discrimination claims which allowed him to resign from his job at the Patent and Trademark Office (PTO) in lieu of being terminated. He then brought an action against the PTO and its director, alleging disability discrimination in violation of the Rehab Act and contending that his psychiatric disability voided the waiver. However, he did not allege that his ability to understand and evaluate the settlement agreement or the waiver was compromised by his mental state, and emphasized in his pleadings that his intellectual capability was not impaired and would not prevent him from performing the essential functions of his job. The court held that depression and anxiety were not sufficient to void a waiver where the surrounding circumstances otherwise demonstrate voluntariness.

- *Woolf v. Strada,* 949 F.3d 89 (2d Cir. 2020) – A sales representative had a serious migraine condition triggered by work-related stress and argued he was substantially limited in the major life activity of working. However, he did not show that his work-induced impairment substantially limited his ability to work in a class or broad range of jobs. He believed he could perform the same job if he were transferred to a different location or if he were managed by different supervisor. The Second Circuit joined other Circuits in holding that the ADAAA did not alter or erode its well-settled understanding that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. The court noted that the plaintiff's argument that his condition could be accommodated with a reassignment or transfer conflates two separate inquiries: on the one hand, whether the employee has a disability in the first instance, and on the other hand, whether the employee can perform the job with a reasonable accommodation.

- *Bey v. City of New York* – 999 F.3d 157 (2d Cir. 2021) – To protect against exposure to smoke and other toxic fumes, firefighters are required to wear a respirator (also known as a self-contained breathing apparatus or "SCBA"). The OSHA respiratory-protection standard, with which the employer in this case was required to comply, makes clear that individuals cannot use a tight-fitting respirator (such as an SCBA) if they have facial hair where the respirator seals against the mask-wearer's face. Black firefighters with Pseudofolliculitis Barbae (PFB), which results in persistent irritation and pain following shaving, brought discrimination claims alleging that their employer's rescission of an accommodation exempting plaintiffs from the department's clean-shave standard for personal grooming violated the ADA and Title VII. With respect to the ADA claim, the Second Circuit held that because the firefighters' requested accommodation – to be allowed to maintain closely cropped beards uncut by a razor – was specifically prohibited by OSHA regulations, it was not reasonable. Though the employer previously permitted firefighters to maintain short beards and no adverse safety events were reported, the employer's prior interpretation and implementation of the regulation did not deserve deference as OSHA, not the employer, had devised the standard. (This case is discussed in the Title VII section of this outline as well.)

- *Costabile v. New York City Health & Hosps. Corp.,* 951 F.3d 77 (2d Cir. 2020) – Plaintiff worked as a carpenter for NYCHHC for 14 years. During that period, he sustained several work-related injuries for which he took multiple leaves of absence, and he also had multiple sclerosis, which primarily impaired his vision. After sustaining a work-related injury in May 2014, he remained on a leave of absence for over a year. During his leave, pursuant to NYCHHC policy, the plaintiff provided NYCHHC with regular updates from his doctor as to his condition and ability to work. Pursuant to personnel policy, NYCHHC terminated him when he did not return to work after one year of leave. Plaintiff sued, asserting*, inter alia*, a failure-to-accommodate claim under the Rehab Act. On the employer's motion to dismiss for failure to state a claim, the court held that plaintiff failed to plausibly allege that his employer knew or should have known he was disabled (and was therefore obligated to initiate and interactive process) simply based on the employer's knowledge that he was on extended disability leave from work-related injuries, and updates from his doctor which simply confirmed that he still required leave.

- *Frantti v. New York*, 850 F. App'x 17 (2d Cir. 2021) – A former state employee with gastrointestinal illness failed to make out a prima facie case of disability discrimination based on failure to accommodate. The appeals court, in affirming the district court's grant of summary judgment in favor of the employer, noted that being allowed to work remotely from home or an alternative work schedule would not have been reasonable accommodations for him: his job required him to perform involved analysis on complex, collaborative projects that unfolded over long periods of time. He also needed to be in the office and available on a consistent basis, for assignments and to communicate with co-workers and other parties. His employer could not technically accommodate remote work – "quaint as that may seem to us now during this extraordinary era of pandemic-necessitated remote work." Moreover, his illness was so severe that he could not work with regularity, even with his suggested accommodations.

- *Vaughn v. Phoenix House N.Y. Inc*., 957 F.3d 141 (2d Cir. 2020) – Plaintiff, a participant in a court-approved residential drug rehabilitation program, to which he had been assigned as an alternative to prison time for criminal charges, was not an "employee" under the FLSA, as would be required for his FLSA claim that he was required to perform job functions without pay. The court applied the "primary beneficiary test," used when addressing the question of whether an unpaid intern qualifies as an employee entitled to compensation under the FLSA, extending this analysis to plaintiff's analogous circumstances. The plaintiff was not an employee of Phoenix House: both parties clearly understood that there was no expectation of compensation, they understood that the plaintiff was not entitled to a paid job at the conclusion of program, and the program's duration was limited to the period in which it provided beneficial treatment.

- *Eshleman v. Patrick Indus., Inc.,* 961 F.3d 242 (3d Cir. 2020) – Plaintiff sued his former employer, alleging that his termination violated the ADA. While working for the defendant as a truck driver, the plaintiff had taken two months of medical leave for a lung procedure (surgery to remove a nodule and test it for cancer) and two vacation days for a severe upper respiratory infection. The district court dismissed the action, and the plaintiff appealed. In a matter of first impression, the Third Circuit found that the district court had improperly dismissed the suit, where it had only evaluated the "transitory" nature of plaintiff's alleged impairment while failing to separately consider whether such an impairment was "minor." The ADA excludes impairments that are "transitory and minor"; thus, the Court observed that "'transitory' is just one part of the two prong 'transitory and minor' exception." "The district court should have considered such factors as the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention is anticipated or necessary—as well as the nature and scope of any post-operative care."

- *Gibbs v. City of Pittsburgh,* 989 F.3d 226 (3d Cir. 2021) – Applicant with ADHD applied to work as a policeman and got a job offer conditioned on a psychological exam finding him capable of performing the job duties. Two psychologists who screened him recommended not hiring him after learning of his ADHD diagnosis, though his ADHD had not been a problem at jobs at five other police departments or as a Marine. In holding that the applicant plausibly alleged discrimination, the court noted that the city cannot dodge liability by labeling the psychologists' approval as a job qualification, which equates to using psychological testing as a cover to discriminate.

- *Laird v. Fairfax Cty., Va.,* 978 F.3d 887 (4th Cir. 2020) – A county employee who had multiple sclerosis requested and accepted a transfer as part of settlement of her EEOC complaint against the county. The new position had the same salary and similar responsibilities to her former position, and the county went beyond what the ADA required by creating a new position for the employee (and changing the title despite potential internal confusion). Once she transferred, she found the work "boring" and "thinkless" and thought that her opportunity for future promotion had been hurt by the transfer. She then sued, alleging unlawful discrimination based on her disability. The court held that the transfer was not an adverse action for purposes of plaintiff's ADA claim, since it was voluntarily requested and agreed upon.

- *Perdue v. Sanofi-Aventis U.S., LLC*, 999 F.3d 954 (4th Cir. 2021) – The plaintiff was a sales representative whose autoimmune disorder restricted how much she could travel for her job. Her employer had previously accommodated her disability by permitting her to share job responsibilities with a co-worker. However, when a company reorganization required her to transfer to a different territory, her manager denied her proposal for a job-sharing arrangement agreed to by a co-worker, and thereafter terminated her employment based on her inability to work. The plaintiff filed suit claiming that her employer had failed to accommodate her disability as required by the ADA. The Fourth Circuit held that an employer is not required to create a shared job as an ADA accommodation: the ADA's reassignment obligation only applies to positions that are both vacant and existing. The sales territory in question had one full-time sales position, which was not designated as a shared position. Therefore, the manager was not required to create such a position to accommodate the sales representative. Neither the fact that the employer had previously offered a job-sharing arrangement to the sales representative as an accommodation in her prior territory nor the fact that the sales representative's co-worker was willing to share her job were deemed relevant to the court's analysis: "Sanofi employees, with and without disabilities, may apply to create a job-share position. But when Perdue sought the job-share position, it did not exist."

- *Reyazuddin v. Montgomery Cty., Md.*, 988 F.3d 794 (4th Cir. 2021), *petition for cert. filed*, No. 21-299 (U.S. Aug. 30, 2021) – A county employee who was blind alleged that the county failed to provide a reasonable accommodation for her disability in violation of the Rehab Act and ADA. In 2009, the County consolidated its customer service employees into a single county-wide call center ("MC 311"), but didn't transfer the plaintiff (then a customer service representative in the county's health and human services department) along with her colleagues because the software the county used at the center wasn't accessible to blind people. Instead, she was offered (and worked) several alternate jobs for the county, but she wanted to resume her customer service position at MC 311. After a jury verdict finding that the county violated the Rehab Act and awarding $0 in compensatory damages, the county finally transferred the plaintiff to MC 311, but the district court denied her motion for attorney fees. The appeals court disagreed, holding that the employee was a prevailing party entitled to attorney fees because she proved her claim to a jury before the county capitulated and provided her requested accommodation.

- *Wirtes v. City of Newport News*, 996 F.3d 234 (4th Cir. 2021) – A detective was required to wear a "duty belt" supporting equipment such as a gun and baton. He eventually sustained nerve damage from years of wearing the duty belt. He requested multiple accommodations, including wearing a shoulder harness instead of a duty belt and being exempt from patrol duties. The city rejected his requests, viewing them as requests for permanent light-duty status, and instead offered him the option of either retiring early or accepting reassignment to a civilian position. He accepted the civilian position but shortly thereafter announced his retirement, then sued the city, alleging failure to accommodate in violation of the ADA. The Fourth Circuit held that it is generally inappropriate for an employer to unilaterally reassign a disabled employee to a position the employee does not want when another reasonable accommodation exists that would allow the disabled

employee to remain in their current, preferred position; reassignment is an ADA accommodation of last resort and involuntary reassignments are disfavored.

- *Elledge v. Lowe's Home Ctrs., LLC,* 979 F.3d 1004 (4th Cir. 2020) – A retailer did not violate the ADA by forcing an employee out of his market director of stores position because of his mobility limitations following knee surgery. When he sued under the ADA and ADEA, the employee contended that he could perform the essential functions of his job with the accommodations that Lowe's had already provided him (including allowing him to operate on a light-work schedule – i.e., walking limited to four hours per day and work limited to eight hours per day), arguing that these accommodations allowed him to perform the truly essential functions of his job, because during the relevant period the stores under his care continued to flourish. The court found that the plaintiff could not perform the essential functions of his job, noting that even the version of the record most favorable to him told the story of an individual who accepted or created certain accommodations, rejected others, and pushed himself beyond the limits of his doctor's orders. Under these circumstances, the court could not find that the claimed success of his stores proved his ability to perform the essential functions of his job. In fact, his manifest need to disregard his physician as well as to seek informal accommodation outside the interactive process created a situation that Lowe's could reasonably assume had limited long-term potential.

- *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020), *cert. granted*, No. 20-219, 2021 WL 2742781 (July 2, 2021) – The plaintiff, who is deaf and legally blind, alleged that a physical therapy provider failed to accommodate her because it did not provide an American Sign Language interpreter. The district court dismissed her complaint, which contained several counts, but the only issue before the Fifth Circuit on appeal was whether dismissal was proper on her claim for emotional distress damages under the Rehabilitation Act and the Affordable Care Act. Reasoning that employers who contract to receive federal funding are not "on notice" that they could be subjecting themselves to these types of damages, the Fifth Circuit held that such damages are not available under the Rehabilitation Act, and affirmed the lower court's dismissal of the plaintiff's claim. In doing so, the Fifth Circuit explicitly rejected the reasoning of an earlier Eleventh Circuit decision that had reached the opposite conclusion, setting up a circuit split. The Supreme Court has granted certiorari to address the question of whether a plaintiff can be awarded compensatory damages for emotional distress under Title VI of the Civil Rights Act and the statutes that incorporate its remedies, including the Rehabilitation Act.

- *Drake v. Spring Indep. Sch. Dist.*, No. 20-20376, 2021 WL 3176081 (5th Cir. July 27, 2021) – In determining whether an employee was a "qualified individual" under the ADA, the question was whether she was qualified at the time of her termination, not whether she was qualified prior to having taken leave. Because the plaintiff in this case had been on leave for several months, had exhausted her FMLA leave, and could not provide a return date, the court found that the employee was not a "qualified individual" protected from discharge under the ADA, as she was not able to perform the essential functions of her job even with a reasonable accommodation.

- *Clark v. Champion Nat'l Sec., Inc*., 952 F.3d 570 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 662 (2020) – Plaintiff, an insulin-dependent Type II diabetic, requested and was granted two accommodations for his diabetes. However, after he passed out due to low blood sugar related to his diabetes, he was terminated for violating the company's "alertness" policy. He sued under the ADA, but the district court dismissed his claim and the Fifth Circuit affirmed, finding that the plaintiff was not a "qualified individual" under the ADA because falling asleep at work meant that he could not perform the essential functions of his job. He had not requested an accommodation for his loss of consciousness, and he was unable to identify any reasonable accommodation that would have allowed him to perform his job while experiencing diabetes-induced amnesia and unconsciousness.

- *Darby v. Childvine, Inc.*, 964 F.3d 440 (6th Cir. 2020) – In an apparent issue of first impression at the Circuit Court level, the Sixth Circuit considered whether the plaintiff's genetic mutation constituted a disability under the ADA. The plaintiff had a family history of cancer and was identified as having the BRCA 1 genetic mutation and abnormal epithelial cell growth. As a precaution, although not diagnosed with breast cancer, the plaintiff took time off to undergo a double mastectomy. She was subsequently fired, and she sued under the ADA, asserting that she was a qualified individual with a disability in that the BRCA 1 mutation substantially limited her cell growth as compared to the general population. The district court dismissed her claim, reasoning that her condition could potentially "lead to a disability in the future" but was not a current disability under the ADA. The Sixth Circuit reversed, holding that although "a genetic mutation that merely predisposes an individual to other conditions, such as cancer, is not itself a disability under the ADA," the plaintiff in this case had alleged not only that she possessed the mutation, but also that she actually had abnormal cell growth. The court explained: "To qualify as a disability… a condition must substantially limit a major life activity, not merely have the potential to cause conditions that do. And a genetic mutation that is merely capable of altering normal cell growth cannot be an impairment that presently 'substantially limits' that growth. By the clear terms of the ADA, a plaintiff must allege more than a genetic mutation capable of interfering with normal cell growth to survive a motion to dismiss. Darby has done so." Therefore, the plaintiff had adequately alleged that she was a qualified individual with a disability under the ADA, and her claim should have been allowed to proceed.

- *McAllister v. Innovation Ventures, LLC*, 983 F.3d 963 (7th Cir. 2020) – The plaintiff sustained serious back and head injuries in a car accident in June 2016, requiring spinal surgery and ongoing treatment. On her medical leave request forms, her doctor stated that she could not perform "any & all" job functions and that she was "totally disabled" but might be able to return to work in early September 2016. This return date was pushed back several times, and eventually, upon learning that she would not be able to return to work in any capacity until at least February 2017, the employer terminated her. The Seventh Circuit found that the plaintiff had failed to create a genuine issue of material fact as to whether she could "perform the essential functions" of her job with or without accommodations, even if she had been assigned to another position, as there was insufficient evidence to contradict her doctors' statements that she could not work in any capacity. Nor would it have been a reasonable accommodation for the employer to extend her leave by an additional four months, on top of the two-and-a-half months of leave she

had already taken, because "Affording McAllister such prolonged leave effectively excuses her inability to work, which the ADA does not require of employers."

- *Pierri v. Medline Indus., Inc*., 970 F.3d 803 (7th Cir. 2020) – The ADA prohibits associational discrimination – i.e., an employer may not discriminate against an employee because the employee associates with an individual with disability. The Seventh Circuit recognizes multiple forms of associational discrimination, including but not limited to: (1) financial, such as when an employee's family member is covered by the employer's health plan and the family member has a costly disability; (2) contagion, where an employer fears that the employee may have become infected with a disease because of the known disease of an employee's associate; and (3) inattention, when the employee is distracted at work because his spouse or child has a disability that requires the employee's attention. In this case, the employee alleged that his employer discriminated against him for caring for his grandfather, who was ailing from liver cancer. He argued that he fell into the "inattention" category, but produced no evidence to support that he was distracted, that the employer regarded him as distracted, or that the employer took any action against him because of any real or imagined inattention. In any event, even if he could have proceeded under another theory of associational discrimination, his claim would still fail, because he could not show that he suffered any adverse action; his evidence only showed that his supervisor was rude to him and gave him an "average" performance rating. In fact, the evidence showed that the company made efforts to accommodate his desire to care for his grandfather, including changing his schedule and granting him intermittent FMLA leave.

- *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204 (9th Cir. 2020), *cert. granted in part,* No. 20-1374, 2021 WL 2742790 (U.S. July 2, 2021) – The plaintiffs, individuals living with HIV/AIDS who have employer-sponsored health plans which they rely upon to obtain prescription drugs, challenged a change to the health plan that required them to begin obtaining specialty medications through designated specialty pharmacies, rather than filling their prescriptions at community pharmacies as they have in the past. They sued under the Affordable Care Act (ACA) – which incorporates section 504 of the Rehabilitation Act and several other civil rights statutes, prohibiting discrimination on any ground covered by those laws – on a disparate impact theory, alleging that HIV/AIDS patients suffered a disproportionate burden because of their unique pharmaceutical needs. The lower court dismissed the plaintiffs' ACA claims, but the Ninth Circuit reversed and remanded, holding that the plaintiffs had "adequately alleged that they were denied meaningful access to their prescription drug benefit under their employer-sponsored health plans because the Program prevents them from receiving effective treatment for HIV/AIDS." The Supreme Court has granted certiorari to review the question of "Whether section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination." Although this case did not arise in the employment context, it could have implications for the viability of disparate impact claims in employment cases arising under the Rehabilitation Act.

- *Anthony v. Trax Int'l Corp.*, 955 F.3d 1123 (9th Cir. 2020) – The plaintiff, a terminated technical writer, filed a lawsuit under the ADA, alleging that the employer failed to

accommodate her disability. During the subsequent litigation, the employer discovered that the plaintiff did not in fact possess a bachelor's degree, which was a requirement for the technical writer position. The employer offered this "after-acquired evidence" as proof that the plaintiff was not a "qualified individual" under the ADA because she lacked the requisite educational background for the job. The Ninth Circuit agreed, distinguishing the circumstances of this case from those in which an employer uses after-acquired evidence to retroactively justify an adverse action. Here, the Ninth Circuit reasoned, the employer was not arguing that it terminated the employee because she lacked a bachelor's degree; instead, the lack of a bachelor's degree prevented the employee from establishing a prima facie case under the ADA.

- *Cooper v. Dignity Health*, No. 20-15377, 2021 WL 3667225 (9th Cir. Aug. 18, 2021) – An intraoperative neuromonitoring technologist who was responsible for monitoring nerve functioning of patients undergoing brain and spinal surgery, the plaintiff had requested to clock in to work up to fifteen minutes late each day as an accommodation for her mental health impairments. The employer argued that punctuality was an essential function of the plaintiff's job, producing ample evidence that punctuality was important to the efficiency of operations and continuity of patient care, and that the plaintiff's frequent tardiness was affecting her work performance, morale of other staff employees, and patient care. The lower court held that the plaintiff failed to raise a genuine issue of material fact as to this point, and therefore, because punctuality was an essential job function that the plaintiff was unable to perform, a late start time was not a reasonable accommodation, and her discrimination claim failed. The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the employer.

- *Kachur v. NAV-LVH, LLC*, 817 F. App'x 359 (9th Cir. 2020) – The ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation; an employee only needs to show that a leave of absence could plausibly have enabled him adequately to perform his job. Further, a request for a leave of absence is not per se unreasonable simply because the end date is not certain. The Ninth Circuit reversed the district court's grant of summary judgment in favor of the employer, holding that the employee's evidence created a genuine issue of material fact as to whether his requested accommodation of an extension of his unpaid medical leave in the wake of knee surgery was reasonable.

- *Exby-Stolley v. Bd. of Cty. Comm'rs*, 979 F.3d 784 (10th Cir. 2020) (en banc), *cert. denied*, No. 20-1357, 2021 WL 2637869 (U.S. June 28, 2021) – In a significant decision, the Tenth Circuit sitting en banc held that an adverse employment action is <u>not</u> a requisite element of a failure-to-accommodate claim under Title I of the ADA. The jury verdict in favor of the employer in this case and the affirmance by an appellate panel were based on a determination that the plaintiff had not demonstrated that she suffered an adverse action, which both courts deemed to be a requisite element of a failure-to-accommodate claim. However, upon rehearing en banc, a sharply divided Tenth Circuit reversed and remanded. The court distinguished between discrimination claims and failure-to-accommodate claims, noting that there is no language regarding adverse employment actions in the ADA's failure-to-accommodate provision, 42 U.S.C. § 12112(b)(5)(A), and went on to explain that "the district court's incorporation of an adverse-employment-

action requirement into an ADA failure-to-accommodate claim was contrary to (1) our controlling precedent; (2) the inherent nature of a failure-to-accommodate claim, as contrasted with a disparate-treatment claim; (3) the general remedial purposes of the ADA; (4) the EEOC's understanding of the elements of an ADA failure-to-accommodate claim; and (5) the regularly followed practices of all of our sister circuits." The court engaged in an in-depth analysis of each of these topics, and concluded that the district court and the appellate panel majority had erred in the face of a "virtual mountain of contrary legal authority and practice."

- *Skerce v. Torgeson Elec. Co.*, 852 F. App'x 357 (10th Cir. 2021) – Among the various alleged disabilities underlying the plaintiff's disability discrimination claim was an injured elbow. The district court granted summary judgment in favor of the employer with regard to that claim, on the theory that his elbow injury was temporary – the plaintiff had been cleared to return to work within 3 months of the injury – and therefore did not qualify as a disability under the ADA. However, the Tenth Circuit reversed because the district court erroneously analyzed the claim under the ADA rather than the ADAAA, which has a much broader definition of what constitutes a disability. The court remanded the case with instructions to the court to analyze the ADAAA claim based on his elbow injury under the *McDonnell Douglas* framework.

- *Dennis v. Fitzsimons*, 850 F. App'x 598 (10th Cir. 2021) – Plaintiff, a detective sergeant in a Sheriff's office, was terminated for violating several office policies. Among his offenses were showing up to work drunk and allegedly committing domestic violence. The plaintiff claimed that he was an alcoholic and therefore protected under the ADA and Rehabilitation Act, such that his termination violated those statutes. However, the court held that he had failed to establish a causal connection between his alcoholism and his termination, because both statutes "recognize a distinction between alcoholism the disease and alcohol-related misconduct" and his termination resulted from his conduct, not his condition.

ADA Public Access

- *Hamilton v. Westchester Cty*., 3 F.4th 86 (2d Cir. 2021) **–** While incarcerated at Westchester County Jail, plaintiff dislocated his knee and tore his meniscus, causing him to require crutches for walking and standing, and to experience excruciating pain. The district court dismissed his subsequent failure-to-accommodate claim on the basis that he had not plausibly alleged a qualifying disability under Title II of the ADA because temporary disabilities, such as his injuries, did not trigger the protections of the ADA. The appeals court did not reach the question of whether plaintiff plausibly alleged a qualifying disability under the ADA, but held that plaintiff's claim could not be dismissed as a matter of law simply because the injury causing these limitations was temporary. In doing so, it joined other circuits that have held that, under the ADAAA, a short-term injury can qualify as a disability.

- *Rinehart v. Weitzell*, 964 F.3d 684 (8th Cir. 2020) – The plaintiff, an inmate, had chronic episodic diverticulitis, which can flare up unexpectedly and cause diarrhea or constipation. As a result, he resided in a cell with an in-unit toilet, but at some point all of

the prisoners with the plaintiff's level of privileges were required to move to another area of the facility that did not have in-cell toilets. Because he did not move, he lost his privileges, and after he complained, his medical restriction was removed even though he still had diverticulitis. He sued under Title II of the ADA over the loss of privileges, and also claimed that the revoking of his medical classification was retaliation for complaining about the loss of privileges. The prison argued that given the episodic nature of the plaintiff's illness, the condition could not be a disability for ADA purposes. The Eighth Circuit disagreed, holding that a condition is a disability under the ADA if it substantially limits a major life activity *when it is active*. The plaintiff alleged that during his diverticulitis flare-ups, he experienced what the court described as "difficult and time-intensive digestive symptoms," which was sufficient to allege a disability under the ADA.

- *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021) – Departing from the Ninth Circuit's 2019 decision in *Robles v. Domino's Pizza*, *LLC*, 913 F.3d 898 (9th Cir.), *cert. denied,* 140 S. Ct. 122 (2019), the Eleventh Circuit held that a web site is not a "place of public accommodation" under Title III of the ADA. The case involved a sight-impaired customer who relied upon screen-reading software and was unable to access Winn-Dixie's web site. The district court found that the web site had a sufficient nexus with Winn-Dixie's physical stores to qualify it as a place of public accommodation, because it was "heavily integrated" with the physical stores and operated as a "gateway" to physical store locations. That holding was consistent with the rulings of other district courts within the Eleventh Circuit as well as other Circuit Courts that have considered the issue. However, the Eleventh Circuit reversed, after analyzing the "unambiguous and clear" language defining "place of public accommodation" in Title III and concluding that "pursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places. Necessarily then, we hold that websites are not a place of public accommodation under Title III of the ADA." Further, the court held that because nothing prevented the plaintiff from shopping at the physical Winn-Dixie store – which he had in fact done for many years – Winn-Dixie's web site did not constitute an "intangible barrier" to his ability to access and enjoy fully and equally the services of Winn-Dixie's services. Although the court distinguished the facts of this case from those in *Robles*, this decision could be seen as creating a circuit split; regardless, issues regarding website accessibility are increasingly making their way through the courts, and it is conceivable that the Supreme Court could consider such a case within the next few years.

Family and Medical Leave Act (FMLA)

The FMLA, applied to the legislative branch through CAA section 202, 2 U.S.C. § 1312, allows employees to take job-protected leave for certain medical reasons or to care for family members under specified circumstances.

- *Waggel v. George Washington Univ.*, 957 F.3d 1364 (D.C. Cir. 2020) – A medical resident who was treated for cancer during her residency alleged both retaliation and interference claims under the FMLA. Her retaliation claim failed because either she could

not establish a causal connection between the alleged retaliatory actions and her exercise of FMLA rights, or she could not rebut the legitimate non-retaliatory reasons proffered by the university. Nor was a stray comment by a supervisor that the plaintiff had "taken too much sick leave," by itself, enough to establish a genuine issue of material fact. As for her interference claim, the only issue on appeal was whether a supervisor's alleged attempt to discourage her from retaining a lawyer to represent her rose to the level of interference with her FMLA rights. The supervisor had stated in an email to the plaintiff, "Please do not reference your attorney going forward, particularly to the people in your Department. It does not make for a safe working environment. It is your choice to continue to pursue this avenue." To begin with, the court pointed out that the plaintiff offered no support for her contention that hiring an attorney was protected activity under the FMLA: "To fall under the FMLA's protection, Waggel must show she retained her attorney to oppose or complain about unlawful activity, namely, the University's alleged retaliation for her FMLA leave… But the record shows Dean Berger's email was responding to Waggel's statement that she had retained an attorney to pursue the goal of 'graduat[ing] on time.'" Even if hiring a lawyer could constitute protected activity, the court held that "a reasonable employee could not be discouraged from exercising FMLA rights by the innocuous comments at issue here. Drawing all inferences in Waggel's favor, Dean Berger's comments merely suggest something that is both plausible and lawful: Waggel's retention of an attorney prompted the University to become more cautious in communicating with her. Without more, an employer's statements mentioning the lawful consequences of initiating litigation and asking an employee to refrain from threats do not run afoul of the FMLA's prohibition on interference." (This case is summarized in the ADA section of this outline as well.)

- *Campos v. Steves & Sons, Inc.*, 10 F.4th 515 (5th Cir. 2021) – An employee took FMLA leave to have open-heart surgery, from which he experienced complications that left him comatose and in critical condition for several weeks. After about 3 months of leave, he returned to work with a medical release document stating that he was cleared to return to work with no restrictions. The document was signed by a licensed vocational nurse (LVN) rather than a doctor, but the employer did not suggest that it was inadequate. The employer terminated the plaintiff a month later. He claimed both interference and retaliation under the FMLA, and the district court granted summary judgment for the employer on both claims. The Fifth Circuit affirmed the interference claim, because he could not show prejudice resulting from either the employer's failure to provide him with a Designation Notice or some confusing text messages from his supervisor. However, the Fifth Circuit reversed and remanded the retaliation claim, because fact issues existed with regard to the employer's proffered non-retaliatory reasons for terminating the plaintiff. Three reasons were given – an improper medical release form, the exhaustion of the plaintiff's FMLA leave, and the plaintiff's refusal to accept an alternative position – but the plaintiff offered evidence to rebut all of them. First, the employer accepted the medical release form even though it was signed by an LVN, and never told the plaintiff that it was insufficient; second, the company's acceptance of that return-to-work form cast doubt on its assertion that the plaintiff had exhausted his FMLA leave; and third, the evidence in the record called into question whether there was in fact an offer of an alternative position and a rejection of that position by the plaintiff.

- *Hester v. Bell-Textron, Inc.*, No. 20-11140, 2021 WL 3720103 (5th Cir. Aug. 23, 2021) – The plaintiff had taken FMLA leave related to his epilepsy and glaucoma. In the months leading up to the start of that leave, he had received warnings for poor performance, and he was ultimately fired during the pendency of his FMLA leave. The employer asserted that he was fired because of his performance problems, and the district court dismissed his FMLA interference claim on the grounds that the only allegation supporting causation was the timing of the termination. However, the Fifth Circuit reversed, holding that the plaintiff had sufficiently alleged a causal link between the exercise of his FMLA rights, both because of the temporal proximity between his leave and the firing, and because of the fact that the employer did not fire him at the time of his pre-leave performance issues but waited until two months into his FMLA leave to do so. The court held that "As a pleading matter, the alleged timeline of events indicates that Bell-Textron's termination decision was not 'completely unrelated' to the exercise of [the plaintiff's] FMLA rights."

- *Lindsey v. Bio-Med. Applications of La., L.L.C.*, 9 F.4th 317 (5th Cir. 2021) – There are two forms of potential FMLA violations: interference with a benefit and retaliation for using the benefit. The employee in this case alleged both, claiming that she was pressured to continue working while she was on FMLA leave, and that she was ultimately terminated because she took FMLA leave. The lower court granted summary judgment in favor of the employer on both claims. The Fifth Circuit reversed the lower court's grant of summary judgment on the retaliation claim, because employment records suggested that the employer's proffered reason for terminating the employee (attendance issues) were a post hoc rationalization for the firing. However, summary judgment was upheld with respect to the interference claim. The court distinguished between giving employees the option to work while on FMLA leave, which does not constitute interference with benefit of leave under FMLA, and coercing an employee to work while on FMLA leave by making the work a condition of continued employment, which would constitute impermissible interference. The court found that the statements in the plaintiff's sworn declaration regarding pressure she felt to work while on leave contradicted her deposition testimony, and thus the declaration could not be used to defeat the employer's summary judgment motion.

- *Scalia v. Dep't of Transp. & Pub. Facilities*, 985 F.3d 742 (9th Cir. 2021) – The Secretary of Labor had filed a complaint against an Alaskan state agency, arguing that it was miscalculating FMLA for rotational employees who worked on a schedule of one week on, one week off. The Secretary argued, and the district court agreed, that only the weeks when a given employee was scheduled to work could be charged against the employee's FMLA leave, but the Ninth Circuit disagreed and reversed the lower court's ruling. According to the Ninth Circuit, an analysis of the language and purpose of the FMLA shows that a "workweek" under the statute means a week-long period when the employer is in operation, and is not dependent on the individual employee's schedule.

- *Battino v. Redi-Carpet Sales of Utah, LLC*, No. 20-4081, 2021 WL 4144974 (10th Cir. Sept. 13, 2021) – The Tenth Circuit allowed for the possibility that equitable estoppel may apply in FMLA cases, where an employee who is erroneously informed by her employer that she is eligible for FMLA leave relies to her detriment on that assurance. For example, if an employee had known that she was not eligible for FMLA leave, she

might have chosen to put off surgery until the future; in such a situation, the employer may be estopped from asserting a defense of non-coverage. However, in this particular case, the plaintiff failed to show that she relied to her detriment on her employer when they informed her they were granting her FMLA leave.

- *Herren v. La Petite Acad., Inc.*, 820 F. App'x 900 (11th Cir. 2020) – The Eleventh Circuit reversed the district court with respect to the plaintiff's FMLA interference claim, because the district court had erroneously applied the same standard to both her interference and retaliation claims, improperly placing the burden on the plaintiff to show causation. Although retaliation claims are analyzed under a *McDonnell Douglas* burden-shifting framework, interference claims are not. To establish an FMLA interference claim, a plaintiff is not required to establish the employer's intent, but rather to demonstrate only that she was entitled to FMLA leave but denied the right to use it. The burden then shifts to the employer to raise lack of causation as an affirmative defense, by demonstrating that it terminated the employee for reasons unrelated to the FMLA leave.

- *Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265 (11th Cir. 2020) – In holding that the plaintiff had produced sufficient evidence to survive summary judgment on her FMLA retaliation claim, the Eleventh Circuit made clear that notifying an employer of a future need to take FMLA leave is protected activity even if the employee does not know the anticipated timing or duration of the leave. Where an employee has a chronic condition that flares up unexpectedly – as in the case of this plaintiff, who had endometriosis and uterine fibroids – the need for leave is unforeseeable, and the employee is not required to give 30 days' notice or provide the timing and duration of the anticipated leave, only to provide sufficient information for her employer to reasonably determine whether the FMLA may apply to the leave request.

- *Ramji v. Hosp. Housekeeping Sys., LLC*, 992 F.3d 1233 (11th Cir. 2021) – Neither offering workers' compensation nor giving an injured employee a light-duty assignment relieves the employer of its obligation to inform the employee of her rights under the FMLA, and failure to provide such notice to the employee constitutes interference with those rights.

Title VII of the Civil Rights Act of 1964

Title VII, applied by section 201 of the CAA, 2 U.S.C. § 1311, prohibits discrimination on the basis of race, color, religion, sex, or national origin.

The most recent landmark Supreme Court decision under Title VII, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), established that discrimination based on sex encompasses discrimination based on sexual orientation and gender identity. Since then, several federal appellate courts have attempted to clarify the impact of *Bostock* not only on sex discrimination claims, but in other contexts as well, as demonstrated in several of the cases that follow. For more on *Bostock*, please see our July 29, 2020 Brown Bag outline: https://www.ocwr.gov/sites/default/files/SCOTUS%20Recap%202019-20%20Brown%20Bag%20Lunch%20Outline.pdf

Interestingly, a non-Title VII Supreme Court case – *Babb v. Wilkie*, which arose under the ADEA – has had significant implications for Title VII cases as well. *Babb* established that the language "free from any discrimination" in the ADEA means that age need not be the "but-for" cause of discrimination in order for an employer to be liable under that statute, if an employment decision was "tainted by" considerations of age. Because the same language appears in Title VII's federal-sector provision, courts have held that the "but-for" standard and the *McDonnell Douglas* framework do not apply to Title VII claims brought by federal employees. Importantly, the same language – "free from any discrimination" – also appears in section 201(a) of the CAA, 2 U.S.C. § 1311(a).

Not all of the cases summarized below rely on *Bostock* or *Babb*, but all discuss interesting legal issues that may arise under Title VII.

Sex Discrimination/Sexual Harassment

- *Stoe v. Barr*, 960 F.3d 627 (D.C. Cir. 2020) – An accomplished scientist working in the Department of Justice's Office of Science and Technology, who routinely performed work above her grade level and possessed an "indisputably exemplary" work performance record, was passed over for a promotion to Division Director, with the position being given to a younger male candidate. She sued the DOJ based on sex and age discrimination. She established a prima facie case of discrimination, and the DOJ articulated a legitimate nondiscriminatory reason for her non-selection, asserting that it hired the male candidate because he performed better in the interview. The central inquiry for the court was whether the plaintiff had produced sufficient evidence for a reasonable jury to conclude that the DOJ's proffered reason was pretextual, and that the real reason for her non-selection was unlawful discrimination. The court answered this question in the affirmative: a jury could reasonably find in the plaintiff's favor, based on her superior qualifications, accumulated evidence of gender discrimination in the workplace, manipulation and unfairness of the selection process, and shifting and false explanations for the plaintiff's non-selection. Therefore, the district court's grant of summary judgment for the employer was reversed, and the case remanded so it could proceed to a jury trial.

- *Hernandez v. Wilkinson,* 986 F.3d 98 (1st Cir. 2021) – A female employee of the Drug Enforcement Agency filed suit claiming sex discrimination and retaliation in violation of Title VII. The First Circuit affirmed the district court's grant of summary judgment for the employer. A proposed suspension document referred to the employee frequently wearing revealing clothing, and she asserted this document proved that a supervisor had been watching her inappropriately and had sexually harassed her by doing so. The First Circuit held that she did not provide evidence of severe or pervasive harassment, noting that frequent and/or intense staring at an employee's body can be the basis for a hostile work environment claim, but simply looking at a colleague – without evidence that those looks were severe, an unreasonable interference with work, or physically threatening or humiliating – does not constitute sexual harassment under Title VII.

- *Doe v. City of Detroit*, 3 F.4th 294 (6th Cir. 2021) – A transgender city employee brought an action under Title VII alleging that the city subjected her to a hostile work environment and then retaliated against her. During the plaintiff's transition, an unknown

city employee left her harassing messages that commented on her transgender identity and said that she should be put to death. She reported the incidents to the city, which took various steps to uncover the perpetrator and protect her. Despite its efforts, the city was unable to identify the perpetrator. When the plaintiff received additional threatening notes, the city reported the matter to the police, installed a lock on the plaintiff's office door, and suspended a co-worker who had made critical remarks regarding the plaintiff on Facebook. The city denied additional requests including video surveillance and a remote working arrangement. The plaintiff claimed that the city's response to the ongoing harassment was unreasonable. The Sixth Circuit affirmed dismissal of the claim, noting that Title VII does not hold an employer liable because they are unable to identify harassers. Further, the remote work arrangement was properly denied because there was no evidence that the plaintiff could effectively work from home.

- *Roberts v. Glenn Indus. Grp., Inc.,* 998 F.3d 111 (4th Cir. 2021) – The male plaintiff alleged that he was subjected to sexually explicit and derogatory remarks concerning his sexuality by his male supervisor and was physically assaulted by the same supervisor on several occasions. He sued his employer, alleging same-sex sexual harassment and retaliation in violation of Title VII. The district court, relying on *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), rejected the plaintiff's claims that his supervisor harassed him on the basis of sex and granted summary judgement to the employer. *Oncale* set forth three evidentiary routes by which plaintiffs can prove that their alleged same-sex harassment is based on sex: (1) when there is credible evidence that the harasser is homosexual and the conduct involves explicit or implicit proposals of sexual activity; (2) when the conduct indicates general hostility to the presence of the victim's sex in the workplace; and (3) when evidence shows that the harasser treated members of one sex worse than members of the other sex in a mixed-sex workplace. On appeal, the Fourth Circuit concluded that *Oncale* does not limit the routes by which a plaintiff may prove same-sex sexual harassment to only the three considered by the district court, and it therefore reversed the district court's ruling. The Fourth Circuit explained that *Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes.

- *Olivarez v. T-Mobile USA, Inc.,* 997 F.3d 595 (5th Cir. 2021) – A transgender employee was granted six months of leave and then sought additional, indefinite leave. The employer denied the additional leave and terminated his employment. The Fifth Circuit held that the employee did not allege facts sufficient to support an inference of disparate treatment – in particular, he did not allege that a similarly situated cisgender comparator was treated better. The court made clear that, despite the plaintiff's argument to the contrary, individuals alleging violations of Title VII based on sexual orientation or gender identity discrimination are held to the same pleading and evidentiary standards as plaintiffs claiming other types of sex-based discrimination. "*Bostock* defined sex discrimination to encompass sexual orientation and gender identity discrimination. But it did not alter the meaning of discrimination itself. At the pleading stage, a Title VII plaintiff must plead sufficient facts to make it plausible that he was discriminated against '*because of*' his protected status. At the summary judgment stage, when the claim relies on circumstantial evidence, a Title VII plaintiff must identify a more favorably treated

comparator in order to establish discrimination. Bostock does not alter either of those standards." (citation omitted)

- *Newbury v. City of Windcrest, Tex.,* 991 F.3d 672 (5th Cir. 2021) – In a case involving allegations of same-sex sexual harassment, the Fifth Circuit affirmed the grant of summary judgment in favor of the employer, because the plaintiff failed to show that a female colleague's rude treatment was related to sex. She did not allege that the conduct was "motivated by sexual desire" or "otherwise sexual in nature or a display of explicit sexual animus," but rather that the harassing colleague treated females worse than males. However, the Fifth Circuit found that her evidence showed only that the alleged offender was "rude to some colleagues and friendly to others. [Plaintiff's] allegation that [the harasser's] rudeness was motivated by sexual animus is speculative and unsupported by the record." The plaintiff attempted to rely on *Bostock* to argue that her claim should survive, but the Fifth Circuit rejected her reliance on *Bostock* as misplaced: "Although the Court [in *Bostock*] expanded the groups of individuals protected by Title VII, it in no way altered the preexisting legal standard for sexual harassment. Indeed, it reaffirmed the existing standard from *Oncale*." (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)).

- *Marshall v. Ind. Dep't of Corr.,* 973 F.3d 789 (7th Cir. 2020) – An employee who identified as homosexual was terminated after several incidents of misconduct, including complaints that he sexually harassed a subordinate. He alleged that the employer fired him because he was gay, in violation of Title VII. The district court granted summary judgment for the employer, and the Seventh Circuit affirmed, holding that the plaintiff's claim failed for lack of a similarly-situated comparator. Although the plaintiff identified several heterosexual men who were not terminated after complaints that they sexually harassed colleagues, those comparators were not similarly situated, because they did not have the same level of authority over their victims, were not disciplined by the same supervisor, and did not have the same kind of prior disciplinary record as the plaintiff. Because he failed to show a similarly situated person outside the protected class was treated better than he was, his claim could not succeed.

- *Maner v. Dignity Health*, 9 F.4th 1114 (9th Cir. 2021) – In a case of first impression, the Ninth Circuit followed the trend of other Circuit Courts in rejecting a "paramour preference" theory of sex discrimination. Plaintiff, a male lab technician who had been terminated, alleged that he was treated unfavorably compared to a female coworker who was in a romantic relationship with the head of the lab. He did not allege any animus against male employees or negative treatment on the basis of his sex, only favoritism toward the female employee resulting from her romantic relationship with the employer. In affirming the lower court's award of summary judgment in favor of the employer, the Ninth Circuit held that "discrimination motivated by an employer's 'paramour preference' is not unlawful sex discrimination against the complaining employee within the ordinary public meaning of Title VII's terms" and explained that Title VII prohibits discrimination based on a person's sex characteristics, not their sexual activity. Applying the analysis in *Bostock*, in which the Supreme Court asked whether changing the employee's sex would have changed the employer's actions, the Ninth Circuit explained that in cases like this one, "The employer discriminates in favor of a supervisor's sexual

or romantic partner and against all other employees because they are not the favored paramour, no matter the sex of the paramour or of the complaining employees. Changing the sex of the complaining employees would not yield a different choice by the employer because the identity of the favored paramour would remain the same. The motive behind the adverse employment action is the supervisor's special relationship with the paramour, not any protected characteristics of the disfavored employees."

- *Christian v. Umpqua Bank*, 984 F.3d 801 (9th Cir. 2020) – In a third-party sexual harassment case, a female bank employee alleged she was harassed and stalked by a customer and that the bank did not do enough to address the harassment. The district court granted summary judgment for the bank, but the Ninth Circuit reversed, holding that the district court erred in not considering evidence of incidents in which the plaintiff did not have direct contact with the harasser – including the numerous times that the customer visited the bank when the plaintiff wasn't there, repeatedly asking her coworkers how he could get a date with her, and also sending her letters and flowers – and also in not considering certain incidents as part of an overall pattern simply because they were separated by several months. The court explained that offensive conduct occurring outside the presence of the plaintiff may still be considered hostile: "Christian learned from her colleagues that the customer was persistently contacting them to obtain information about her. That she did not witness the customer's conduct firsthand is no matter: She heard his message loud and clear. Where, as here, a plaintiff becomes aware of harassing conduct directed at other persons, outside her presence, that conduct may form part of a hostile environment claim and must be considered." The court found that a reasonable jury could conclude the harasser's behavior was severe or pervasive enough to create a hostile work environment, and also that genuine fact issues existed as to whether the bank "took prompt, appropriate, and effective action" to stop or deter the customer from harassing its employee.

- *Tudor v. Se. Okla. State Univ.*, No. 18-6102, 2021 WL 4166701 (10th Cir. Sept. 13, 2021) – The Tenth Circuit upheld a jury verdict in favor of a transgender professor who alleged that she had been denied tenure on the basis of her transgender status. Recognizing that *Bostock* makes gender identity discrimination unlawful under Title VII as discrimination "because of sex," the appellant university dropped its argument on that basis. The court then found that sufficient evidence supported the jury's verdict. Of particular interest is that the plaintiff succeeded on her "cat's paw" theory of discrimination, having presented sufficient evidence that although the university's president was the ultimate decision-maker, he had merely rubber-stamped the decision that was driven by the vice-president, who had displayed animus toward the plaintiff because of her transgender status and had recommended denial of tenure despite the faculty committee having voted 4-1 in favor of granting tenure.

- *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038 (10th Cir. 2020) – In a case of first impression, the Tenth Circuit held that "sex-plus-age" claims are cognizable under Title VII. The court noted that "Ample precedent holds that Title VII forbids 'sex-plus' discrimination in cases in which the 'plus-' characteristic is not itself protected under the statute," or even when the "plus" characteristic is not protected at all. Relying on the Supreme Court's reasoning in *Bostock*, the court explained: "In *Bostock*, the Court

held, 'if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.' Thus, termination is 'because of sex' if the employer would not have terminated a male employee with the same 'plus-' characteristic. Although in some cases a plaintiff may be able to bring both a Title VII sex-plus-age claim and an ADEA age discrimination claim, the two claims would address two distinct kinds of discrimination—sex discrimination and age discrimination, respectively." The court rejected the employer's argument that the plaintiffs' ability to pursue their age discrimination claims under the ADEA precluded them from using age as the "plus" characteristic under Title VII, stating clearly that "Nothing in the ADEA limits a plaintiff's ability to bring a claim under Title VII." A sex-plus-age claim is still a claim for discrimination based on sex, because the employer is allegedly treating a subclass of women (in this case, women over 40) less favorably than the corresponding subclass of men (i.e., men over 40). (This case is summarized in the ADEA section of this outline as well.)

- *Durham v. Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2020) – After being advised by her doctor not to lift more than 50 lbs., a pregnant Emergency Medical Technician requested a light-duty or dispatcher assignment for the duration of her pregnancy. Her request was denied, and the EMT sued under the Pregnancy Discrimination Act, which amended Title VII to include pregnancy, childbirth, or related medical conditions within the definition of "sex" under the statute, and requires that pregnant workers "shall be treated the same for all employment-related purposes… as other persons not so affected but similar in their ability or inability to work[.]" *See* 42 U.S.C. § 2000e(k). The district court granted summary judgment in favor of the employer, because the comparator employees who were offered accommodations – men who had sustained on-the-job injuries – were limited to lifting 10 or 20 lbs. as compared to the 50-lb. limit imposed upon the plaintiff, and therefore the district court did not consider those employees "similar in their ability or inability to work." However, the Eleventh Circuit reversed, explaining that all the plaintiff needed in order to establish this element of the her prima facie case was to show that neither she nor the comparator employees could satisfy the EMT job requirement of lifting 100 lbs.: "Neither a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Since neither can meet the lifting requirement, they are the same in their 'inability to work' as an EMT."

Race Discrimination

- *Henderson v. Mass. Bay Transp. Auth*., 977 F.3d 20 (1st Cir. 2020) – A Black construction employee sued his employer, alleging race discrimination and retaliation in violation of Title VII, when he was not promoted to a supervisory position. Because he performed poorly on the interview for the promotion, so poorly that his scores placed him 19th of the 20 candidates to receive an interview, the court held he did not show that the others ranked above him were chosen for discriminatory reasons and he would have gotten the job otherwise. In reaching this decision, the court cited the Supreme Court's decision in *Bostock*: "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation ... [which] is established whenever a particular outcome would not have happened 'but for' the purported cause." (citations omitted).

- *Mandala v. NTT Data, Inc.,* 975 F.3d 202 (2d Cir. 2020) – African American applicants were hired at a technology services provider before their offers of employment were revoked because of past criminal convictions. The applicants brought a putative class action against the provider, alleging that its policy not to hire persons with certain criminal convictions had a disproportionately large effect on African American applicants in violation of Title VII. The Second Circuit held that national arrest and incarceration statistics were not representative of the pool of potential applicants qualified for the provider's positions, and thus applicants could not rely on such statistics to plead a Title VII disparate impact claim. The provider's hiring policies governed skilled positions, including salesforce developer and web developer, requiring some educational or technical experience not shared by the general population, and while statistics showed that African Americans were more likely to have been convicted of crimes, it did not make it plausible that an African American web developer was more likely to have been convicted of crime than a Caucasian counterpart.

- *Bey v. City of New York*, 999 F.3d 157 (2d Cir. 2021) – To protect against exposure to smoke and other toxic fumes, firefighters are required to wear a respirator (also known as a self-contained breathing apparatus or "SCBA"). The OSHA respiratory-protection standard, with which the employer in this case was required to comply, makes clear that individuals cannot use a tight-fitting respirator (such as an SCBA) if they have facial hair where the respirator seals against the mask-wearer's face. Black firefighters with Pseudofolliculitis Barbae (PFB), which results in persistent irritation and pain following shaving, brought discrimination claims alleging that their employer's rescission of an accommodation exempting plaintiffs from the department's clean-shave standard for personal grooming violated the ADA and Title VII. With respect to the firefighters' Title VII claim, the court held that plaintiffs established a prima facie Title VII discrimination case, but compliance with OSHA's regulations was a business necessity, presenting a complete defense. (This case is discussed in the ADA section of this outline as well.)

- *Kengerski v. Harper*, 6 F.4th 531 (3d Cir. 2021) – A White county employee brought a Title VII action against his employer, alleging that he was terminated in retaliation for reporting a superior's racist comments about the employee's biracial relative and other racist text messages. The Third Circuit held, as matter of apparent first impression, that employees could be discriminated against in violation of Title VII because of their interracial relationships with distant relatives such as a grand-niece. While one might expect the degree of an association to correlate with the likelihood of severe or pervasive race discrimination on the basis of that association, the degree of association is irrelevant to whether an employee is eligible for the protections of Title VII in the first place.

- *Collier v. Dallas Cty. Hosp. Dist.*, 827 F. App'x 373 (5th Cir. 2020), *cert. denied*, No. 20-1004, 2021 WL 1952066 (U.S. May 17, 2021) – The plaintiff, a Black operating-room aide, alleged a race-based hostile work environment, based on two instances of racist graffiti (the N-word being carved into an elevator, and two swastikas drawn on the wall of a storage room, both of which were left for months without being painted over) and on being called "boy" by a nurse. The court acknowledged that "other courts have found that the prolonged duration of racially offensive graffiti, especially once it has been reported, could militate in favor of a hostile-work-environment claim" and that "other courts of

appeals have found instances where the use of the N-word itself was sufficient to create a hostile work environment." However, based on the facts of this specific case, the court determined that the instances described by the plaintiff, although "disturbing," were not sufficiently severe or pervasive to establish a hostile work environment under Fifth Circuit precedent. In support of this determination, the court noted that the conduct the plaintiff complained of "was not physically threatening, was not directed at him (except for the nurse's comment), and did not unreasonably interfere with his work performance."

- *Briggs v. Univ. of Cincinnati*, No. 20-4133, 2021 WL 3782657 (6th Cir. Aug. 26, 2021) – Plaintiff, a Black male, alleged that his employer violated both Title VII and the Equal Pay Act by paying him less than a White female colleague for doing the same work. In a succinct summary of the different analysis required under each of the two laws, the Sixth Circuit explained that once the plaintiff established a prima facie case of disparate treatment, "[W]ith respect to the EPA, we ask whether [the employer] has proven that the wage differential was based on a factor other than sex that was applied for a legitimate business reason; with respect to Title VII, we ask only whether [the employer] has produced evidence from which a reasonable jury could infer it had a legitimate, non-discriminatory reason for its actions." In this case, the district court had granted summary judgment in favor of the employer on both counts, but the Sixth Circuit reversed, holding that genuine issues of fact remained as to whether "factors other than sex" were the reason for the pay disparity between the two employees, and that although the employer had "satisfied its lower Title VII burden of articulating a legitimate business explanation for the disparity," the plaintiff had produced sufficient evidence to create a genuine issue of material fact as to whether the employer's proffered reason was pretextual. (This case is summarized in the FLSA section of this outline as well.)

- *Frith v. Whole Foods Mkt., Inc.*, 517 F. Supp. 3d 60 (D. Mass. 2021), *appeal docketed*, No. 21-1171 (1st Cir. Mar. 4, 2021) – The district court ruled that Whole Foods did not violate Title VII when it told its employees they could not wear masks and apparel referring to the Black Lives Matter (BLM) movement while at work. This case is currently being considered by the First Circuit Court of Appeals.

Religious Discrimination/Accommodation

- *Rasmy v. Marriott Int'l, Inc*., 952 F.3d 379 (2d Cir. 2020) – Plaintiff, who identified as being of Egyptian heritage and a devout Coptic Christian, worked as a banquet server. For years, various coworkers made inflammatory and derogatory comments. After he was fired, he brought an action against his employer and co-workers, asserting claims for hostile work environment and retaliation in the context of allegations of religious and national origin discrimination. In reversing the district court's grant of summary judgment in favor of the defendants, the Second Circuit held that conduct not directly targeted at a plaintiff (e.g., discriminatory remarks made in the plaintiff's presence though not directly aimed at such employee) can contribute to an actionable hostile work environment.

- *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020) – A firefighter sought a religious accommodation relating to mandatory flu and TDAP vaccinations. He previously sought and received exemptions for mandated flu vaccines but was denied an exemption for the mandated TDAP vaccine. As an accommodation, the employer offered to reassign him to a new role with the same pay and benefits or allow him to remain in his current role but be required to wear personal protective equipment, including a respirator, at all times. Because the employer offered him several reasonable alternatives to receiving the vaccination, the court held that Title VII was not violated.

- *Small v. Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020) (per curiam), *cert. denied,* 141 S. Ct. 1227 (2021) – The plaintiff, a Jehovah's Witness, was reassigned after an on-the-job injury, but the new position interfered with his attendance at religious services. The company denied him a requested accommodation, and he alleged a violation of Title VII. The district court granted summary judgment for the employer, and the Sixth Circuit affirmed, holding that the employer had satisfied its burden to show that accommodating the plaintiff's religious beliefs would cause "undue hardship" – which, under *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), means "anything more than a 'de minimis cost.'" This case is notable because of Justice Gorsuch's dissent from the Supreme Court's denial of certiorari, in which Justice Alito joined. Justice Gorsuch questioned the continued viability of the *Hardison* standard, not only disagreeing with the Court's holding in *Hardison* and lamenting its effects, but also pointing out that since that decision was issued, Congress has passed several other civil rights statutes including the "undue hardship" language (he lists the ADA, USERRA, and the Affordable Care Act) but the courts have applied a much more demanding standard in all of them. As a result, "With these developments, Title VII's right to religious exercise has become the odd man out. Alone among comparable statutorily protected civil rights, an employer may dispense with it nearly at whim."

- *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021), *reh'g en banc denied*, 4 F.4th 910 (9th Cir. 2021), *petition for cert. filed*, docket no. No. 21-418 (U.S. Sept. 16, 2021) – Public school district did not violate Title VII by ordering a high school football coach to stop kneeling and praying at the 50-yard-line after games, placing him on administrative leave when he did so anyway, and ultimately recommending that he not be rehired. The coach's discrimination claim failed because he could not point to any similarly situated employee outside his protected class who was treated differently. Although the coach made out a prima facie case of failure to accommodate his religious beliefs, that claim failed as well, because the school district showed both that it made a good-faith effort to work with him to find an accommodation (which he rejected) and that to allow him to continue praying on the field in full view of students and spectators (the only outcome he found acceptable) would result in the school violating the Establishment Clause of the U.S. Constitution, which would have been an undue hardship. Avoiding an Establishment Clause violation was also a legitimate nondiscriminatory reason for the school district's actions, sufficient to defeat the coach's retaliation claim.

Retaliation

- *Menoken v. Dhillon*, 975 F.3d 1 (D.C. Cir. 2020) – An EEOC employee sued the agency, alleging among other things that she was subjected to a hostile work environment in retaliation for having filed previous discrimination and retaliation complaints against various agencies over the years. In support of her hostile work environment claim, the plaintiff alleged that her supervisor engaged in conduct that resulted in anomalies in her payroll account, and that both her supervisor and an HR director ignored her attempts to communicate about the anomalies, resulting in the denial of compensation and the threatened loss of health insurance. Because these actions took place while the plaintiff was on leave, the district court concluded that they were not severe enough to support a hostile work environment claim, but the D.C. Circuit disagreed, explaining that incidents alleged to have occurred while an employee was physically absent from the workplace can be considered, and courts should consider any negative actions the employer takes during the employee's absence when assessing whether a plaintiff has plausibly alleged a hostile work environment. The D.C. Circuit therefore reversed the lower court's dismissal of the retaliatory hostile work environment claim, noting that an employer's deliberate attempts to affect an employee's finances and access to healthcare seem like the sort of conduct that could dissuade a reasonable worker from engaging in protected activity.

- *Simmons v. UBS Fin. Servs*., 972 F.3d 664 (5th Cir. 2020) – The plaintiff worked for a company that was a client of UBS, and he frequently worked at the UBS's offices. The plaintiff's daughter was employed by UBS. After the daughter filed a Title VII charge with the EEOC against UBS, UBS revoked the plaintiff's right of access to the UBS offices and forbade him from working on UBS accounts. The plaintiff alleged that UBS's actions constituted retaliation under Title VII because of his daughter's protected activity. Relying on the Supreme Court case of *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), the Fifth Circuit determined that the plaintiff lacked Title VII standing because he was not and never had been an employee of the company he sued, and was therefore not within the "zone of interests sought to be protected" by the statute. The court assumed without deciding that the plaintiff's *daughter* would have been able to sue for retaliation based on the actions taken against her father, but stated that allowing the plaintiff himself to sue under Title VII would be "a remarkable extension" of Title VII, since its purpose is to protect employees from their employers' unlawful actions, and it therefore follows that "The zone of interests that Title VII protects is limited to those in employment relationships with the defendant."

- *Jackson v. Genesee Cty. Rd. Comm'n*, 999 F.3d 333 (6th Cir. 2021) – Title VII's retaliation clause (which has the same language as section 208 of the CAA) does not exclude from the category of "protected activity" actions that are part of one's regular job duties. The plaintiff in this case, an HR director, alleged that she was fired in retaliation for her investigations of employees' claims of racial discrimination and her attempts to ensure that the employer's contracts with vendors complied with equal employment opportunity regulations. The district court rejected her retaliation claim on the basis that she did not engage in protected activity under Title VII because her conduct did not go beyond her regular job duties as an HR director and because her supervisor supported her efforts. The Sixth Circuit reversed, holding that activity may still be protected under Title

VII even though it falls within the scope of an employee's regular job duties. The court also declined to extend to Title VII cases the FLSA manager rule, which provides that conduct undertaken while performing assigned human resource jobs and for the purpose of protecting the employer's interests is not protected activity under that statute, citing differences in the two statutes (in particular the FLSA's lack of an opposition clause) as well as Title VII case law precedent. Finally, the fact that her supervisor did not disapprove of her conduct was irrelevant to whether that conduct was protected activity.

- *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855 (11th Cir. 2020) (per curiam) – In reversing and remanding the lower court's decision, the Eleventh Circuit clarified that the proper standard for evaluating retaliatory hostile work environment claims is that "the retaliation is material if it 'well might have dissuade[d] a reasonable worker from making or supporting a charge of discrimination.'" (quoting *Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006)). The district court had improperly applied the more stringent "severe or pervasive" standard for discriminatory hostile work environment claim.

- *Babb v. Sec'y, Dep't of Veterans Affairs*., 992 F.3d 1193 (11th Cir. 2021) – Upon remand from the Supreme Court, the Eleventh Circuit had reversed and remanded its prior decision on Babb's ADEA claim, but it had once again affirmed the district court's decision regarding Babb's Title VII retaliation claim. Babb petitioned for rehearing, arguing that (1) the Supreme Court's holding in her case, which clarified the standard of causation for federal-sector ADEA claims, also changed the standard for federal-sector Title VII claims because the two statutory provisions share essentially the same language, and (2) an intervening Eleventh Circuit decision, *Monaghan* (see above), undermined the court's prior ruling on Babb's retaliatory hostile work environment claim. The Eleventh Circuit granted her rehearing request, and ultimately agreed with her on both counts. First, because the language of Title VII's federal-sector provision – "All personnel actions… shall be made free from any discrimination based on race, color, religion, sex, or national origin" – is "nearly identical" to the language in the ADEA's federal-sector provision, the same standard of causation should apply to both, namely that employment decisions cannot be "tainted by" discrimination based on protected characteristics. Second, the court remanded Babb's retaliatory hostile work environment claim, because in light of *Monaghan*, "Babb's claim should be evaluated under the 'might have dissuaded a reasonable worker' standard, rather than the 'severe or pervasive' standard that we applied on her first appeal." *See also Tonkyro v. Sec'y, Dep't of Veterans Affairs*, 995 F.3d 828 (11th Cir. 2021) (following *Babb* and *Monaghan*, the court *sua sponte* vacated its previous opinion remanded for the lower court to apply the correct standard to plaintiffs' discrete retaliation claims and retaliatory hostile work environment claims).

- *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121 (11th Cir. 2020) (en banc) – Title VII's protection against retaliation is not absolute, and the Eleventh Circuit has recognized that "some otherwise protected oppositional conduct can fall outside Title VII's protection if the conduct so interferes with an employee's performance of her job duties that it renders her ineffective in the position in which she is employed." In this case, the plaintiff, a Team Relations manager, surreptitiously recruited another employee to sue the company, encouraging her and even giving her the name of an attorney. The

court determined that in so doing, she "acted in direct conflict with her job responsibilities and was thereby rendered ineffective in the Team Relations manager position, as Kia could no longer trust [the plaintiff] to do the job for which she was hired." Indeed, a big part of the plaintiff's role as Team Relations manager was to try to resolve EEO-type conflicts in order to *avoid* litigation, which is the exact opposite of what the plaintiff attempted to do in this case. Therefore she lost Title VII's protection against retaliation, not because she opposed unlawful practices, but because of the method she chose to use for that opposition.

- *Knox v. Roper Pump Co.*, 957 F.3d 1237 (11th Cir. 2020) – Black plaintiff alleged he was fired in retaliation for complaining about racial discrimination. He had been suspended from his job, and then complained to the employee ethics hotline that he believed he was being discriminated against on account of his race, because White employees had been allowed to continue working after engaging in similar conduct. He was then offered a last chance agreement (LCA), which included a release of all claims against the employer, including Title VII claims. The plaintiff refused to sign the LCA with the release in it and asked for it to be removed; management refused, and the plaintiff was terminated. The district court had granted summary judgment in favor of the employer, holding that the plaintiff had failed to establish a causal link between his complaint and his termination. However, the Eleventh Circuit reversed, explaining that "an employer may not respond to a claim of race discrimination by conditioning continued employment on a release of claims and firing the employee for refusing. To do so constitutes unlawful retaliation." The plaintiff had come forward with enough evidence from which a reasonable juror could find that his complaint of race discrimination (the protected activity) was a but-for cause of his termination, because the release was added to the LCA only *after* he made his discrimination complaint.

Age Discrimination in Employment Act (ADEA)

Discrimination against employees age 40 and over is prohibited by the ADEA, applied by section 201 of the CAA, 2 U.S.C. § 1311. In April 2020 the Supreme Court issued its decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), clarifying that the standard of causation under the Age Discrimination in Employment Act (ADEA) is much more favorable to federal sector plaintiffs than the private sector's "but-for" causation standard. In an 8-1 opinion authored by Justice Alito, the Court held that the plain language of the statute "demands that personnel actions be untainted by any consideration of age." *Id*. at 1171. For more on the *Babb* decision and its implications for the legislative branch, please see our May 20, 2020 Brown Bag outline: https://www.ocwr.gov/sites/default/files/CAA%20Causation%20After%20Babb%20v%20Wilkie.pdf

- *Zabala-De Jesus v. Sanofi-Aventis P.R., Inc.,* 959 F.3d 423 (1st Cir. 2020) – Defendant pharmaceutical company selected a younger candidate for a new, consolidated position and discharged the plaintiff employee, who was 55 years old. Plaintiff sued under ADEA, asserting that the decision makers selected the criteria for the new position in order to favor the younger candidate. The court disagreed, finding that the employer's proffered reason for selecting the younger candidate (that she had expertise in the relevant product

market and better recent performance reviews) was not pretext for age discrimination in violation of ADEA; those criteria were relevant to position, not chosen to favor the younger candidate because of her age.

- *Zampierollo-Rheinfeldt v. Ingersoll-Rand de P.R., Inc*., 999 F.3d 37 (1st Cir. 2021) – Employee, a district general manager, was terminated after 33 years of employment by the defendant. He sued under the ADEA and Puerto Rico law. The court, in affirming the district court's denial of the employer's summary judgment motion, held that a supervisor's comments that the plaintiff was being terminated because employer was "rejuvenating the management team" qualified as direct evidence of age discrimination. Defendant contended that the "rejuvenation" statement was inherently ambiguous, pointing to a definition of "rejuvenation" as "to make an organization or system more effective by introducing new methods, ideas, or people" and arguing that this definition is wholly benign and unrelated to age, making the word inherently ambiguous. The court disagreed and noted that even the usage example given for this alternate definition of "rejuvenation" was aged-based ("He has decided to rejuvenate the team by bringing in a lot of new, young players.").

- *Martinez v. UPMC Susquehanna,* 986 F.3d 261 (3d Cir. 2021) – A 70-year-old orthopedic surgeon was fired without much explanation (though he was told it had nothing to do with his performance) and replaced by two significantly younger surgeons. The court held that he plausibly stated an ADEA claim by alleging his replacements were "significantly younger," instead of stating their ages, since that was a factual allegation the court must take as true. The court noted that an age-discrimination plaintiff can plead a substantial age gap without knowing dates of birth; this is a commonsense description of a subsidiary fact, not the ultimate issue the plaintiff must prove.

- *Main v. Ozark Health, Inc.*, 959 F.3d 319 (8th Cir. 2020) – A 61-year-old radiology manager was fired and replaced by a colleague 22 years younger than she was. She filed a complaint alleging, among other things, that her termination violated the ADEA. The employer proffered a legitimate nondiscriminatory reason for the termination – namely, the plaintiff's history of rude and insubordinate behavior, culminating with a meeting in which the plaintiff acted rudely and inappropriately. The plaintiff argued that this reason was pretextual, offering testimony from herself and other meeting attendees that she had behaved professionally. The district court granted summary judgment in favor of the employer, and the Eighth Circuit affirmed, because the key inquiry was not whether plaintiff *actually* behaved rudely, but whether her supervisor *believed* that she did, and decided to fire her based on that belief. The court explained that simply showing an employer's explanation to be wrong is insufficient to show pretext; what is important is whether the employer actually believed its justification for the adverse action, even if it was incorrect. In other words, the plaintiff must show that the employer's proffered reason was false, not just that its honest belief was mistaken, and the plaintiff in this case failed to show that the supervisor who fired her didn't really believe she was rude in the meeting. The court further held that the plaintiff had failed to present evidence that would permit a reasonable inference to be drawn that the real reason for the adverse employment action was the plaintiff's age.

- *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038 (10th Cir. 2020) – Casino employees alleged that they were fired on the basis of age and sex, bringing both disparate treatment and disparate impact claims under the ADEA and Title VII. With respect to the ADEA claims, the district court had dismissed the disparate impact claim and granted summary judgment for the employer on the disparate treatment claim, but the Tenth Circuit reversed and remanded on both counts. Analyzing the data in the complaint, the court held that the plaintiffs sufficiently alleged that a disproportionate number of the terminated employees were over 40 and that a large percentage of the employees subsequently hired by the casino were in their 20s. The court concluded that these allegations made it "plausible that Affinity's termination policies resulted in a significant disparate impact on workers forty or older" and the claim therefore should have survived the employer's motion to dismiss. As for the disparate treatment claim, the court applied the *McDonnell Douglas* framework in determining that the lower court erred in granting summary judgment. The evidence showed that the difference in median age between the terminated employees and the subsequent new hires ranged from 12 to 29 years depending on job title, and concluded that this was enough to establish a prima facie case. Moreover, the court reviewed the evidence offered by the casino in support of its proffered legitimate nondiscriminatory reasons for terminating the plaintiffs, and determined that there was a genuine issue of material fact as to whether those reasons were pretextual, because "The inconsistencies between Affinity's contemporaneous stated reasons and its detailed post-hoc explanations for terminating plaintiffs could support a jury's finding that Affinity lacks credibility." (This case is summarized in the Title VII section of this outline as well.)

- *Barnes v. Saul*, 840 F. App'x 943, 946–47 (9th Cir. 2020) – In a disparate-impact hiring case, the plaintiff stated a plausible claim by showing that, for reasons not apparent from the record, the Social Security Administration limited public notice of certain attorney-advisor job listings by notifying only the University of Nevada's law school and the local office of outgoing Peace Corps volunteers about the openings. The plaintiff alleged that the average age of the populations of both the law school and the Peace Corps are "well below 40," and as a result, 25 out of 27 applicants for the positions were under the age of 40. The court held that the plaintiff had satisfied the *Iqbal/Twombly* pleading standard, because "Our experience and common sense tell us that notifying only some populations about the posting but not others could lead to an overrepresentation of the notified population in the applicant pool. Thus, Barnes's disparate-impact claim rises 'above the speculative level' and is plausible."

Fair Labor Standards Act (FLSA)

The FLSA, applied by section 203 of the CAA, 2 U.S.C. § 1313, outlaws child labor, provides for a minimum wage and overtime for non-exempt employees, and prohibits wage discrimination based on sex. *Note* – Congress approved the OCWR Board's regulations implementing the FLSA for the legislative branch in 1996, but the Department of Labor has issued more recent regulations that differ in some significant respects from the OCWR regulations, so to the extent that a court's analysis relies upon DOL regulations, it is important to note whether those

provisions of the DOL regulations differ from the OCWR's. However, the OCWR is planning to revise its FLSA regulations in the near future to bring them more in line with the current DOL regulations, so cases that might not currently be applicable to the legislative branch could potentially be more relevant once the OCWR's new regulations are approved by Congress.

- *Whiteside v. Hover-Davis, Inc.,* 995 F.3d 315 (2d Cir. 2021) – Plaintiff, whose job title was "quality engineer," a position classified as exempt from FLSA overtime pay requirements, was asked to instead perform the work of a "repair organization technician," normally a nonexempt position. Defendant employer continued to treat him as a salaried, exempt employee and did not pay him overtime though he worked 45- to 50- hour weeks for several years. Nearly 3 years after he returned to "quality engineer" work, he filed FLSA and other federal and state law claims against the employer, alleging that it willfully violated the FLSA – i.e., with knowledge that, or reckless disregard as to whether, the FLSA prohibited its conduct – as required for a 3-year limitations period, rather than a 2-year limitations period, to apply to a FLSA claim for overtime compensation. The appeal addressed whether a plaintiff at the pleadings stage must allege facts that give rise to a plausible inference of willfulness for the 3-year exception to the statute of limitations to apply. The court concluded, in a matter of apparent first impression, that a plaintiff must do so, and that the plaintiff failed to do so here. He did not allege that his employer changed his salary to that of a non-exempt employee, that he ever complained about the situation to his managers, or any details about who asked him to change roles or whether that manager, or any other manager, said anything to him suggesting an awareness of impropriety. Overall, these allegations did not permit a plausible inference that the employer willfully violated the FLSA, whether by actual knowledge or by reckless disregard.

- *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020) – Fire Department Battalion Chiefs sued their employer for non-compliance with the FLSA's overtime pay requirement. Plaintiffs' day-to-day duties included staffing, which consisted of apportioning work and deciding how to allocate personnel, and supervising firefighters, which required training and disciplining them. Though they participated in responding to certain fires and other emergencies, their role in doing so was to strategize and command. The court held that the plaintiffs were not categorically excepted from the FLSA's system of exemptions, because their primary duty was management, rather than frontline firefighting (so the first responder regulation, pursuant to which first responder employees could not be exempted from the FLSA's overtime compensation requirement, did not apply to plaintiffs' claim).

- *Tyger v. Precision Drilling Corp.,* 832 F. App'x 108 (3d Cir. 2020) – Pursuant to the employer's policies and OSHA regulations, employees who worked on oil and gas drilling rigs were required to wear various forms of personal protective equipment (PPE) while operating oil rigs, including flame-retardant coveralls, steel-toed boots, gloves, goggles, hardhats, and earplugs. Employees brought a collective action against the employer under the FLSA, seeking compensation for time spent donning and doffing, and for time spent walking between donning and doffing PPE and pre- and post-shift safety meeting locations. The court held that expert testimony was not necessary to prove that donning and doffing the PPE was integral and indispensable to their work drilling oil and

gas wells (as would be required for donning and doffing to be compensable under FLSA) – a plaintiff may attempt to satisfy the integral and indispensable requirement with lay witness testimony and documentary evidence concerning worksite safety risks and the nature of the job and PPE at issue.

- *Isett v. Aetna Life Ins. Co*., 947 F.3d 122 (2d Cir. 2020) – The Second Circuit concluded that a nurse who did not work in a clinical setting, but who reviewed files to make medical necessity determinations for her medical insurance company employer, was nonetheless performing exempt professional work. Although the plaintiff was not actually treating patients, the court concluded that she was in fact using her education and nursing skills to review medical records and claims, with minimal oversight, and although claim denials required further physician involvement, plaintiff could approve claims without further review.

- *Fisher v. SD Prot. Inc*., 948 F.3d 593 (2d Cir. 2020) – A professional chaperone who worked security at a hotel filed suit against his employer, claiming overtime violations of the FLSA. The Second Circuit rejected a rule of proportionality between a prevailing FLSA plaintiff's recovered amount and the amount of reasonable attorney's fees to be awarded, rejecting the district court's rule capping fees at one-third of the settlement amount. The district court approved the overall amount of the settlement as fair and reasonable, but significantly modified the distribution of the settlement funds as between the plaintiff and his counsel. The Second Circuit held that the district court abused its discretion in rewriting the settlement agreement by modifying the allotment of the settlement funds. In addition to finding error in the district court's one-third fee cap, the Second Circuit noted that when a district court concludes that a proposed settlement in a FLSA case is unreasonable in whole or in part, it cannot simply rewrite the agreement, but it must instead reject the agreement or provide the parties an opportunity to revise it.

- *Thomas v. Bed Bath & Beyond Inc.,* 961 F.3d 598 (2d Cir. 2020) – Employees, who worked as department managers, alleged that their employer was not entitled to apply the fluctuating workweek (FWW) method to calculate overtime, and thus failed to pay overtime owed to them in violation of the FLSA. The court held that the employees' weekly wages were fixed (as required for application of the FWW method) where there were only six occasions out of over 1,500 combined paid weeks where a plaintiff's fixed salary was not paid, five of which had plausible reasons. Additionally, the court found no FWW violation for providing additional paid time off for later weeks when an employee works a holiday or previously scheduled day off, confirming that giving additional paid time off is not inconsistent with a valid FWW pay plan as long as the salary is not docked.

- *Hewitt v. Helix Energy Sols. Grp., Inc.*, No. 19-20023, 2021 WL 4099598 (5th Cir. Sept. 9, 2021) (en banc) – Employee sued for unpaid overtime, alleging he was paid a day rate – i.e., a set amount for each day he worked regardless of the number of hours worked. The employer argued that this was a "salary" and thus no overtime payment was required. The Fifth Circuit addressed whether a day rate could qualify as a salary. Initially a three-judge panel of the court created a new two-factor test for determining whether a daily-rate employee can be regarded as being paid on a salary basis and

therefore exempt from overtime pay under the FLSA. However, after a rehearing en banc, on September 9, 2021 the full Fifth Circuit explained that "[t]his appeal requires us to do nothing more than apply the plain text of the [Department of Labor FLSA] regulations." Applying 29 C.F.R. § 541.604(b), the court held that a daily-rate worker can only be exempt if the employee is paid a minimum guaranteed amount and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The court concluded that "respect for text forbids us from ignoring text." In so doing, the Fifth Circuit rejected the employer's argument that a highly paid employee in the energy industry is always exempt.

- *Briggs v. Univ. of Cincinnati*, No. 20-4133, 2021 WL 3782657 (6th Cir. Aug. 26, 2021) – Plaintiff, a Black male, alleged that his employer violated both Title VII and the Equal Pay Act by paying him less than a White female colleague for doing the same work. In a succinct summary of the different analysis required under each of the two laws, the Sixth Circuit explained that once the plaintiff established a prima facie case of disparate treatment, "[W]ith respect to the EPA, we ask whether [the employer] has proven that the wage differential was based on a factor other than sex that was applied for a legitimate business reason; with respect to Title VII, we ask only whether [the employer] has produced evidence from which a reasonable jury could infer it had a legitimate, non-discriminatory reason for its actions." In this case, the district court had granted summary judgment in favor of the employer on both counts, but the Sixth Circuit reversed, holding that genuine issues of fact remained as to whether "factors other than sex" were the reason for the pay disparity between the two employees, and that although the employer had "satisfied its lower Title VII burden of articulating a legitimate business explanation for the disparity," the plaintiff had produced sufficient evidence to create a genuine issue of material fact as to whether the employer's proffered reason was pretextual. (This case is summarized in the Title VII section of this outline as well.)

- *Kellogg v. Ball State Univ.*, 984 F.3d 525 (7th Cir. 2021) – The plaintiff was hired as a teacher in 2006, and when she tried to negotiate a higher starting salary, the school's director told her she didn't need it because her husband worked. Twelve years later, in 2018, she filed a complaint alleging Title VII and Equal Pay Act violations, based on her allegation that similarly situated male colleagues were receiving higher salaries. The school offered gender-neutral explanations such as "salary compression" to justify the disparity, but the plaintiff argued that those explanations were pretextual, citing the director's 2006 comment as evidence that the real reason for her lower pay was discriminatory. The Seventh Circuit rejected the employer's attempt to characterize the director's statement as "offhand" or a "stray remark," finding instead that "It was a straightforward explanation by the [school's] director, who had control over setting salaries, during salary negotiations that Kellogg did not need any more money "because" her husband worked at the University. Few statements could more directly reveal the [school's] motivations." Importantly, the Seventh Circuit also rejected the school's argument that the director's statement could not be considered because it occurred outside the statute of limitations. In its opinion, the Seventh Circuit clarified that the "paycheck accrual rule" applies not only to wage discrimination claims under Title VII, but also to Equal Pay Act claims; this rule, as codified by the Lilly Ledbetter Fair Pay Act of 2009 (which amended Title VII and other statutes), provides that a new cause of action

for pay discrimination arises every time an employee receives a paycheck resulting from an earlier discriminatory compensation practice, even if that earlier practice occurred outside of the limitations period. Despite the fact that the Ledbetter Act did not amend the FLSA, the Seventh Circuit held that "the paycheck accrual rule applies to 'allegations of unlawful discrimination in employee compensation' under the EPA" and therefore that the 2006 statement regarding the plaintiff's starting salary could be used to support her claims under both statutes.

- *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020), *cert. denied,* 141 S. Ct. 189 (2020) – The Ninth Circuit joined the majority of its sister Circuits in holding that under the Equal Pay Act, prior pay does not qualify as "any other factor other than sex" that could defeat a prima facie EPA claim. The court first determined that the "other factors" must be related to the job itself, and then reasoned that "Prior pay—pay received for a different job—is necessarily not a factor related to the job for which an EPA plaintiff must demonstrate unequal pay for equal work." The court went on to explain: "[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities. We acknowledge that prior pay could be viewed as a *proxy* for job-related factors such as education, skills, or experience related to an employee's prior job, and that prior pay can be a *function* of factors related to an employee's prior job. But prior pay itself is not a factor related to the work an employee is currently performing, nor is it probative of whether sex played any role in establishing an employee's pay."

- *Freyd v. Univ. of Ore.*, 990 F.3d 1211 (9th Cir. 2021) – A female psychology professor sued the university on several bases including Equal Pay Act violations, because her pay was lower than that of four male colleagues of equal rank and seniority. The district court granted summary judgment in favor of the university, but the Ninth Circuit reversed with respect to the Equal Pay Act claims, holding that the district court erred in analyzing whether the plaintiff's job was "substantially equal" to those of the male professors. Noting that "substantially equal" does not necessarily mean "identical," the court explained that the relevant inquiry is whether the jobs share a "common core" of tasks, and then whether any additional tasks incumbent upon one job but not the other make them substantially different. The court held that, viewed in the light most favorable to the plaintiff, a reasonable jury could find that her job was substantially equal to those of the comparators. Although they supervised different laboratories or projects, a reasonable jury could find that they shared the same "overall job," as they were all full professors who conducted research, taught classes, advised students, and served actively on committees and in other roles in service to the university.

- *Clarke v. AMN Servs., LLC*, 987 F.3d 848 (9th Cir. 2021), *petition for cert. filed*, No. 21-296 (U.S. Aug. 30, 2021) – Clinicians' per diem pay functioned as wages – i.e., remuneration for hours worked – rather than as reimbursement for work-related expenses, and was therefore improperly excluded from their regular rate of pay, which in turn improperly decreased their wage rate for overtime hours.

- *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020) – The court held that detention officers were entitled to overtime pay for pre- and post-shift activities. The security screening which began the day, and the checking in of specialized keys and equipment at the end of the day, were deemed to be integral and indispensable to the officers' principal duties and greater than de minimis, and therefore compensable under the FLSA. Because the pre- and post-shift activities that occured in between – including a pre-shift briefing, walking to and from the officers' posts, and a post-shift passdown briefing – were part of the officers' continuous workday, those were also deemed compensable.

- *Akpeneye v. United States*, 990 F.3d 1373 (Fed. Cir. 2021) – Pentagon security and law enforcement officers asserted an entitlement to overtime pay because, they alleged, neither of their two daily breaks was a bona fide meal break, as they were required to work during both breaks. The court applied the "predominant benefit test" – i.e., whether the break is predominantly for the employer's or employee's benefit. Examining the totality of the circumstances, the court rejected the employees' argument that they were on "standby status" during their breaks, an argument based on the fact that they were required to remain vigilant, carry a radio, remain in a state of readiness, and respond to emergencies and contingencies as necessary. The court found that because they were not required to remain at their post (instead being relieved by other employees known as "breakers") or to carry out their regular job duties, and because if one break period got interrupted they could use the other break period as their meal period, they were not entitled to overtime under the FLSA.

Uniformed Services Employment and Reemployment Rights Act (USERRA)/Veterans Employment Opportunity Act (VEOA)

USERRA, applied through section 206 of the CAA, 2 U.S.C. § 1316, prohibits discrimination and retaliation against employees who serve, have served, or have applied to serve in the uniformed services. It also provides returning service members with certain reemployment rights. The VEOA, which was enacted in 1998, amended the CAA to apply certain veterans' preference rules to covered employees, *see* 2 U.S.C. § 1316a.

- *Martinez v. Sun Life Assurance Co. of Can.*, 948 F.3d 62 (1st Cir. 2020) – The plaintiff, a disabled veteran, challenged an ERISA plan administrator's decision to offset benefits he received under its employer-sponsored long-term disability insurance policy by the amount of service-connected disability compensation he received pursuant to the Veterans' Benefits Act. Finding that the only role that his military status allegedly played in Sun Life's decision to offset the plaintiff's Plan benefits was that the source of his other benefit was the VA, which was not enough to plausibly allege motivation by participant's status as a service member, the court held that the administrator did not violate USERRA's anti-discrimination provision.

- *Travers v. Fed. Express Corp.*, 8 F.4th 198 (3d Cir. 2021) – The plaintiff, a FedEx employee who had served in the Navy and the Navy Reserve, took leaves from FedEx while performing his reserve duty. He was not compensated for those leaves, and alleged

that the company therefore violated USERRA because it compensated employees for other types of leave, such as for jury duty, bereavement, and illness. The court examined the text of the statute, in particular 38 U.S.C. § 4316(b)(1), which entitles employees taking military leave to the "other rights and benefits" their employers give to employees taking similar kinds of leave, and 38 U.S.C. § 4303(2), which defines those "other rights and benefits." The court agreed with Travers that "paid leave" was a right and benefit that should not be withheld from employees who took leaves of absence for military service while being paid to employees who took comparable leaves of absence for other reasons, and remanded to the district court to determine whether the other types of leave were "comparable."

- *Harwood v. Am. Airlines, Inc.,* 963 F.3d 408 (4th Cir. 2020) – The plaintiff, an airline pilot who had served in the Air Force and Air Force reserve, alleged that his employer violated USERRA by not rehiring him promptly after he completed a tour of duty. The court held that the airline breached its obligation to promptly rehire Harwood when it took two months to offer him an alternative position, which he required due to his inability to acquire the medical clearance necessary to return to his former position as a pilot. However, he was not entitled to liquidated damages because the airline's failure to promptly rehire him was not willful: it immediately agreed to rehire him when notified of his intent to return, offered him an alternate position with same seniority, status, and pay as the pilot position, and rehired him as a pilot the day after he received a Federal Aviation Administration waiver allowing him to serve as a pilot despite his medical issue.

- *Gause v. Shanahan*, 801 F. App'x 247 (5th Cir. 2020) – Plaintiff's tentative job offer was withdrawn, and he filed a series of lawsuits alleging violations of various statutes. The plaintiff failed to exhaust his administrative remedies by presenting his VEOA claim (and others) to an administrative agency before filing in federal court, and the claim was therefore dismissed. However, in a footnote, the Fifth Circuit explained that his VEOA claim would have failed anyway because he did not plausibly allege that he was denied an opportunity to compete for the position. The VEOA guarantees the veteran only a right to apply and an opportunity to compete under the merit promotion process; the plaintiff acknowledged in his complaint that he not only applied and interviewed for the position, but also that he received a tentative job offer – which was later withdrawn because the employer discovered that he had made false statements on his application – and so the employer had complied with the VEOA.

- *White v. United Airlines Inc.*, 987 F.3d 616 (7th Cir. 2021), *reh'g & reh'g en banc denied* (March 10, 2021) – The issue, one of first impression, was whether an employer's failure to provide paid time off for military leave, while providing it for other purposes such as jury duty and illness, could violate USERRA's guarantee that absent service members are entitled to the same "rights and benefits" provided to other employees. The Seventh Circuit held that it could. Although USERRA itself does not mandate paid leave, the court emphasized that the statute defines "rights and benefits" broadly, to include: "any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) . . . [and] rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours

or location of employment." 38 U.S.C. § 4303(2). The court determined that this broad language encompasses paid leave. The court remanded the case so the lower court could determine whether other types of paid leave available to the employees were "comparable" to military leave, and pointed to the Department of Labor's guidance on this issue, which entails considering factors such as the duration and frequency of leave.

- *Hackett v. City of S. Bend*, 956 F.3d 504 (7th Cir. 2020) – Among other claims, plaintiff alleged that he was subjected to a hostile work environment because of his military service. Addressing those allegations, the Seventh Circuit did not definitively decide whether USERRA permits hostile work environment claims, but it came close: "We have not decided whether hostile work environment claims are cognizable under the Act, but we assume for the purpose of this appeal that they are. … [USERRA] states that a 'benefit of employment' includes 'the terms, conditions, or privileges of employment.' This is the same language used in Title VII and the Americans with Disabilities Act of 1990 that provides the textual basis for hostile work environment claims under those statutes. Congress specifically added this language to the Act [in 2011] just months after the Fifth Circuit had held that hostile work environment claims were not cognizable precisely because the Act lacked this exact term." (citations omitted). *See also Annarumma v. City of High Springs Fla.*, 846 F. App'x 776 (11th Cir. 2021) (Eleventh Circuit assumed without deciding that hostile work environment claims are cognizable under USERRA).

Employee Polygraph Protection Act (EPPA)

The EPPA applies through section 204 of the CAA, 2 U.S.C. § 1314. With limited exceptions, the statute generally prohibits employing offices from requiring covered employees to take polygraph tests or from taking adverse actions against covered employees based on the results of such tests or the refusal to take such a test.

- *Estate of Accurso v. Infra-Red Servs., Inc.,* 805 F. App'x 95 (3d Cir. 2020) – The plaintiff brought several federal and state claims against roofing businesses and their owners for which he performed work. The court found that the evidence was sufficient to support a jury verdict that the businesses were not liable to the plaintiff under the EPPA, despite the plaintiff's contention that the "ongoing investigations exception" did not apply to allow the businesses to require the worker to take a polygraph test. A defendant business owner testified that he did not believe the plaintiff actually took the polygraph test; since the plaintiff never became an "examinee" under the EPPA, the EPPA's safeguards did not apply.

Worker Adjustment and Retraining Notification Act (WARN Act)

The WARN Act applies through section 205 of the CAA, 2 U.S.C. § 1315, and requires that employees be given advance notice of office closings or mass layoffs under certain circumstances.

- *Schmidt v. FCI Enters. LLC,* 3 F.4th 95 (4th Cir. 2021) – Employees brought action against employer FCI, a government contractor providing financial, management, cybersecurity, and other services throughout the U.S., alleging WARN Act and FLSA violations arising from a sudden shutdown that left employees unemployed and unpaid for work over the preceding three weeks. The Fourth Circuit held that FCI was not an "employer" covered by the WARN Act – despite having 130 employees on its list of employees terminated as result of the shutdown, there were fewer than 100 employees, excluding part-time employees, on the date that was 60 days before the shutdown (as would be required for WARN to apply), since 48 employees who were employed for fewer than six months before that date were considered part-time. Thus, FCI was not required to provide 60-day notice to employees before shutting down and terminating employees.

Federal Service Labor-Management Relations Statute (FSLMRS)

Section 220 of the CAA, 2 U.S.C. § 1351, applies the protections of certain sections of the FSLMRS to some employing offices in the legislative branch. The OCWR Board and Hearing Officers typically follow the precedents of the Federal Labor Relations Authority (FLRA), although not bound to do so. To the extent that the FLRA is aligned with the National Labor Relations Board (NLRB) on labor-management issues common to both the federal government and the private sector, NLRB decisions may also be persuasive.

Appellate Court Decisions

- *NTEU v. FLRA,* 1 F.4th 1120 (D.C. Cir. 2021) – During negotiations over a new collective bargaining agreement, the agency argued that a proposal relating to the number of days that an employee was permitted to telework was non-negotiable. The proposal included eligibility standards for telework and required supervisory approval for telework. However, the agency claimed that determining the frequency of telework was a management right – specifically, management's right to assign work and management's right to direct employees. The FLRA agreed with the agency and determined that: (1) "the frequency of telework—the 'when' an eligible employee may perform his or her duties away from the duty station and 'when' that eligible employee must report to the duty station—is inherent to management's right to assign work"; and (2) the frequency of telework imposed a substantive restraint on management's right to determine the methods used to evaluate and supervise its employees, which put it outside the duty to bargain because it affects management's right to direct employees. However, the D.C. Circuit overturned and remanded the FLRA's decision, holding that the FLRA "did not reasonably explain" how it interpreted the proposal to infringe on a management right when the proposal maintained management discretion to deny a telework request.

- *AFGE Local 1929 v. FLRA,* 961 F.3d 452 (D.C. Cir. 2020) – The agency issued a memorandum changing vehicle inspection procedures without bargaining, arguing that the memorandum was not a change of a condition of employment. An arbitrator ruled that the agency violated the FSLMRS, which requires an agency to provide notice and the opportunity to bargain before changing conditions of employment. The Authority set

aside the arbitrator's award, and in doing so attempted to distinguish between the terms "working conditions" and "conditions of employment," which constituted a departure from previous Authority decisions that had found no substantive difference between those two terms as they were practically applied. The D.C. Circuit determined that the Authority's decision was arbitrary and capricious, because the Authority failed to provide sufficient reasoning for departing from its precedent, to properly explain how the two terms differed, or to justify why the memo in this particular case did not give rise to a bargaining obligation. The court therefore vacated the decision and remanded. On remand, in *U.S. DHHS, Customs & Border Protection, El Paso, Texas*, 72 F.L.R.A. 7 (2021), the FLRA, based on the D.C. Circuit decision, was "constrained to conclude that the Agency was required to bargain." Accordingly, the FLRA upheld the arbitrator's award and denied the agency's exceptions.

- *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875 (D.C. Cir. 2020) – With respect to the union's claim that the agency breached the collective bargaining agreement (CBA), the court granted the union's petition for review because the FLRA applied the wrong standard of review in evaluating the arbitrator's decision. When reviewing an arbitrator's award, the FLRA must apply a very deferential standard; it should not inquire as to whether the arbitrator correctly interpreted the CBA, but only whether the arbitrator was "arguably construing or applying" the CBA, and whether the award "draws its essence from the collective bargaining agreement." Here, the court determined that the Authority exceeded the scope of its authority by conducting an in-depth inquiry into whether the arbitrator correctly interpreted the CBA. However, the court affirmed the FLRA's determination that the agency did not repudiate the contract, under the principle that even if a party breaches a collective bargaining agreement, the breach does not constitute a repudiation if the party acted in accordance with a reasonable interpretation of an unclear contractual term.

- *Napleton 1050 v. NLRB*, 976 F.3d 30 (D.C. Cir. 2020) – This case involved allegations of "scapegoating," which the court described as a practice in which employers take adverse actions against a few employees "to send a message of anti-union hostility and anger over collective action to the larger workforce." In this case, two employees were terminated after a successful unionization drive, which management had opposed. The D.C. Circuit affirmed the NLRB's holding that the employees were discharged in retaliation for the workforce voting to unionize, constituting an unfair labor practice: "Substantial evidence supports the Board's factual finding that anti-union animus and a desire to strike back at employees motivated [the employer's] actions." As the court explained, "Intentional discrimination against the statutorily protected collective actions of employees remains discrimination even when it takes the form of scapegoating."

- *WM Crittenden Operations, LLC v. United Food & Commercial Workers, Local Union 1529 on behalf of Brooks*, 9 F.4th 732 (8th Cir. 2021) – An arbitrator ordered reinstatement of a discharged employee, and the employer challenged the arbitrator's award. In construing the undefined "just cause" provision of the collective bargaining agreement, the arbitrator had found that there was no fixed meaning of "just cause." Rather, a different level of cause could be required before the employer disciplined with a suspension or a discharge. The arbitrator had determined that just cause to *discipline* was

present in this case, but just cause to *discharge* was not. The district court granted summary judgment for the union, and the Eighth Circuit affirmed. The court distinguished this case from cases where courts vacated awards because the arbitrator found just cause for termination but nevertheless fashioned a less severe remedy; here, the arbitrator found that there was just cause for discipline but not for termination. The court therefore held that the arbitrator did not exceed his authority.

Agency Decisions

- *NTEU*, 72 F.L.R.A. 423 (2021) – During contract negotiations, the union filed an unfair labor practice (ULP) charge, asserting that the agency was bargaining in bad faith; the agency had rejected an order of the Federal Service Impasses Panel (FSIP) regarding ground rules for negotiating a new contract. After the ULP was filed, bargaining eventually began. However, as negotiations continued, the union filed four additional and separate grievances asserting that the department committed ULPs in various ways during those talks. The FLRA majority vacated all of the arbitration decisions and held that section 7116(d) prohibits a union from litigating bad-faith bargaining as both a ULP charge and through the negotiated grievance procedure. Specifically, the FLRA majority stated that "[a ULP charge] bars a later-filed grievance if the ULP charge and the grievance involve the same issue." Even though each grievance alleged a different specific and discrete act, the FLRA barred the grievances because the ULP and the grievances "arose while the parties were bargaining the same agreement… [and]… advance substantially similar legal theories."

- *Soc. Sec. Admin.*, 71 F.L.R.A. 798 (2020) – The union challenged in arbitration the agency's performance ratings of employees in 2015 and 2016. The arbitrator granted the grievance and ordered the agency both to correct the previous performance ratings and to change its behavior in the future by setting forth clearer expectations and documenting poor performance involving the employee moving forward. The agency filed exceptions. The FLRA found that the issue at arbitration was limited to a two-year period. The FLRA explained that "the issues submitted for arbitration—whether stipulated by the parties or framed by the arbitrator—constrain an arbitrator's remedial authority." Thus, the FLRA struck the arbitrator's order granting relief in the form of future compliance: "Where an arbitrator expressly limits the issues before him to an employee's performance assessments for two specific years, we find that the arbitrator exceeds his authority by directing an agency to take additional actions when conducting *future* assessments of the employee. Further, we overrule previous Authority precedent to the contrary." Note: then-Member DuBester, who is now the Chairman, dissented in part from the FLRA's decision in this case.

- *Int'l Union of Operating Eng'rs, Local 150*, 371 N.L.R.B. No. 8 (2021) – In the latest chapter of Scabby the Rat rulings, the NLRB ruled that unions may continue using Scabby the Rat and similar inflatables in demonstrations at businesses that do not employ those unions' workers. In dismissing this unfair labor practice charge, the NLRB reversed its position that asserted Scabby's presence at protests was an unlawful attempt to threaten and coerce "neutral" parties – i.e., those not directly involved in a labor dispute.

- *U.S. Postal Serv.*, 371 N.L.R.B. No. 7 (2021) – The union made an information request after learning that the employer had scheduled an investigatory interview with a represented employee for alleged misconduct. Among other things, the union requested the questions to be asked in the interview, and asked the employer to provide them in advance of the interview. The employer refused the request to disclose the interview questions in advance, and did not in fact provide the information until four weeks after the interview. The NLRB upheld the ALJ's decision that the employer committed a ULP, holding that the union was entitled to the information and that the employer failed to provide it in a timely manner. However, the NLRB rejected the ALJ's finding that the employee's *Weingarten* rights entitled the union to receive this information before the interview: "Where an employer announces that it will conduct an investigatory interview of an employee alleged to have committed misconduct and a union, prior to that interview, requests relevant information concerning the interview, the employer may refuse to disclose such information while the investigation is ongoing, but must provide it at the conclusion of the investigation."

FLRA Policy Statements

In a departure from the Authority's commitment not to issue advisory opinions (*see* 5 C.F.R. § 2429.10), the FLRA issued policy statements throughout 2020, including:

- *U.S. Dep't of Veterans Affairs,* 71 F.L.R.A. 1183 (Dec. 11, 2020) – The FLRA denied the agency's request to expand the "scope of coverage for the term 'management official' under 5 U.S.C. § 7103(a)(11) in the context of bargaining unit determinations." *But see U.S. Dep't of Veterans Affairs, Kansas City VA Med. Ctr., Kansas City, Mo.*, 70 F.L.R.A. 465 (2018).

- *U.S. Dep't of Educ. & U.S. Dep't of Agric.*, 71 F.L.R.A. 968 (Sept. 30, 2020) – The FLRA replaced the "de minimis" standard for a management-initiated change with a substantial-impact test for determining whether a change to a condition of employment is significant enough to trigger a duty to bargain. This decision has been challenged in the D.C. Circuit as *AFGE v. FLRA*, docket no. 20-1396.

- *U.S. Office of Personnel Mgmt.*, 71 F.L.R.A. 977 (Sept. 30, 2020) – Zipper clauses are a mandatory topic of bargaining, and therefore parties may bargain to impasse regarding both reopener and zipper clauses. This decision has been challenged in the D.C. Circuit as *AFGE v. FLRA*, docket no. 20-1398.

- *U.S. Dep't of Agric, Office of the Gen. Counsel*, 71 F.L.R.A. 986 (Sept. 30, 2020) – When parties have a continuance provision extending the agreement's operation, on the first day of the extension period (1) all government-wide regulations that became effective during the previous term of the agreement will, where applicable, govern the parties immediately by operation of law, and (2) the thirty-day period for agency-head review will begin. This decision has been challenged in the D.C. Circuit as *NTEU v. FLRA*, docket no. 20-1400.

- *Nat'l Right to Work Legal Def. Found., Inc*., 71 F.L.R.A. 923 (Aug. 19, 2020) – The FLRA reversed precedent and concluded that while the FSLMRS allows direct lobbying

during official time, it does not authorize indirect lobbying – for example, urging its members and the public to personally contact members of Congress in support of the union's positions – during official time.

- *Office of Personnel Mgmt.*, 71 F.L.R.A. 571 (Feb. 14, 2020) – When a bargaining unit employee authorizes dues deduction for union membership dues, the employee can make changes to union dues withdrawals at any point following a year of membership. *See* 5 C.F.R. Part 2429.

Note: then-Member DuBester, who is now the Chairman of the FLRA, dissented from all but the first of the above-listed policy statements.

Miscellaneous Cases

- *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021) – Applying *Bostock* to a case involving restroom use by a transgender student under Title IX, the court held that it was a violation of the statute to forbid a transgender boy from using the boys' restroom. Although not a Title VII case, the court makes clear that the analysis is similar under the two statutes: "After the Supreme Court's recent decision in *Bostock*... we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.' Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX." The court also held that the policy violated the Equal Protection Clause, applying heightened scrutiny to hold that "the Board's policy is not substantially related to its important interest in protecting students' privacy."

- *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020) – Students' parents challenged an Oregon public school district's policy that allowed transgender students to use the restrooms, locker rooms, and showers in accordance with their gender identity. The district court dismissed the case and the Ninth Circuit affirmed, holding that the policy applied to all students equally, was rationally related to a legitimate state purpose, and did not infringe on the cisgender students' right to privacy or the free exercise of religion. The court emphasized the school district's interests in "creating a safe, non-discriminatory school environment for transgender students that avoids the detrimental physical and mental health effects that have been shown to result from transgender students' exclusion from privacy facilities that match their gender identities," and "foster[ing] a safe and productive learning environment, free from discrimination, that accommodates the needs of all students."

- *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) – The district court held, and a panel of the Eleventh Circuit affirmed, that a school policy prohibiting a transgender boy from using the boys' restroom violated the Equal Protection Clause. The court held that the school board had not met its constitutional burden to show a substantial relationship between its policy for excluding transgender students from certain restrooms and student privacy.

(The student had also sued under Title IX but the court did not reach that argument, disposing of the matter under the Equal Protection Clause.) However, the Eleventh Circuit has granted rehearing en banc and vacated the panel's decision, so the outcome of this case is still in doubt, and it is possible that the full court will reach a conclusion that differs from that of the Fourth Circuit in *Grimm* (see above), creating a circuit split. Regardless of the ultimate holding in this matter, the issue of restroom use by transgender individuals – whether in the context of education or employment, or both – may well come before the Supreme Court eventually.

- *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021) – This Supreme Court case, though not arising in the employment context, could potentially have implications for how employers may respond to certain types of employee speech that takes place outside of work. The student, a high school cheerleader, had been suspended from the cheerleading squad for a year violating team rules that prohibited foul language and inappropriate gestures as well as "any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet," after she made a post on Snapchat that was critical of the cheer program and the school, and which included vulgarity and a crude hand gesture. The student sued under the First Amendment, the lower court ruled in her favor, and the Third Circuit affirmed, focusing on the fact that the comments were made off-campus, outside of school hours, and on a social media platform unaffiliated with the school. The Supreme Court affirmed, although it did not adopt the Third Circuit's reasoning. Specifically, the Court stated that "the special characteristics that give schools additional license to regulate student speech do not always disappear when a school regulates speech that takes place off-campus." It mentioned – without necessarily establishing an exclusive list – "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway." Those factors are: (1) schools typically do not stand *in loco parentis* with respect to off-campus speech, but rather "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."; (2) "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."; and (3) "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy… Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" The Court provided several examples of "off-campus behavior" that "may" call for school regulation, such as "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security, including material maintained within school computers." However, B.L.'s Snapchat post did not fall within any of these categories, and the Court held that the school violated her First Amendment free speech rights. (For more on

employment issues related to social media, please see our June 20, 2018 Brown Bag outline: https://www.ocwr.gov/sites/default/files/brown-bags/Social%20Media%20and%20the%20CAA%20Brown%20Bag%20Outline.pdf)

- *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*, No. 20-804, 2021 WL 1602636 (U.S. Apr. 26, 2021) – The court held that a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under 42 U.S.C. § 1983. The plaintiff in this case was a publicly-elected trustee of the Board of Trustees of the Houston Community College System, who was publicly censured by the Board of Trustees after voicing concerns about other trustees violating the Board's bylaws and not acting in the best interests of the HCC System. The district court dismissed the claim, but the Fifth Circuit reversed and remanded. The Supreme Court granted certiorari and will hear this case in its upcoming term, with the Question Presented: "Does the First Amendment restrict the authority of an elected body to issue a censure resolution in response to a member's speech?"

Guidance

- EEOC guidance re LGBTQ workers: https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination

- EEOC guidance re COVID and worker protection laws: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

- DOJ/DHHS guidance re "long COVID" as a disability: https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html (note: on September 9, 2021 the EEOC issued a notice agreeing with this guidance)

- OSHA guidance re COVID: https://www.osha.gov/coronavirus