Office of Congressional Workplace Rights

Office of the General Counsel

RECENT CASES DECIDING POTENTIAL CAA ISSUES
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Introduction

The Congressional Accountability Act (CAA) applies 14 employee protection statutes 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 significant and interesting recent federal appellate opinions from the past year involving most of the statutes applied by the CAA, as well as some First Amendment cases and other decisions that may have implications for legislative branch employing offices and covered employees.

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Applicable Laws

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

- **Genetic Information Nondiscrimination Act** – CAA section 102(c), 2 U.S.C. § 1302(c)
- **Title VII of the Civil Rights Act of 1964** – CAA section 201, 2 U.S.C. § 1311
- **Age Discrimination in Employment Act** – CAA section 201, 2 U.S.C. § 1311
- **Americans with Disabilities Act** – CAA sections 201 & 210, 2 U.S.C. § 1311 & 1331
- **Rehabilitation Act** – CAA section 201, 2 U.S.C. § 1311
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- **Occupational Safety and Health Act** – CAA section 215, 2 U.S.C. § 1341
- **Federal Service Labor-Management Relations Statute** – CAA section 220, 2 U.S.C. § 1351

Recent Cases

Americans with Disabilities Act (ADA)/Rehabilitation Act

The employment discrimination provisions of the ADA (Title I) and the Rehabilitation Act 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/Accommodation in Employment

- *Together Emps. v. Mass. Gen. Brigham Inc.,* 32 F.4th 82 (1st Cir. 2022) – The First Circuit affirmed the district court's denial of a preliminary injunction sought by hospital system employees to stop their employer's application of its mandatory COVID-19 vaccination policy to them. The employees were denied medical or religious exemptions from the policy and were terminated or placed on unpaid leave status. The Court held that they would not suffer irreparable harm absent a preliminary injunction requiring the employer to reinstate them; if the employer's actions violated the ADA or Title VII, as the employees alleged, money damages would provide an appropriate remedy for loss of income, loss of benefits, and emotional distress.

- *Laguerre v. Nat'l Grid USA,* No. 20-3901-CV, 2022 WL 728819 (2d Cir. Mar. 11, 2022) – Plaintiff Laguerre worked as a Customer Service Representative receiving inbound calls, and alleged that her employer unlawfully discriminated against her on the basis of her disability when it failed to accommodate her work-from-home request. The Second

Circuit found a genuine issue of material fact as to whether Laguerre's requested accommodation would impose an undue hardship on the employer. The record evidence supported Laguerre's position that an effective accommodation (remote work) existed, it was plausible for CSRs to work from home, and the technology to enable a work-from-home arrangement was not, on its face, unobtainable for the employer. The only evidence that the employer provided to satisfy its burden was conclusory testimony that Laguerre could not work from home because the company did not possess the requisite technology at the time of her request.

- *Williams v. MTA Bus Co.*, 44 F.4th 115 (2d Cir. 2022) – MTA's failure to provide an ASL interpreter to a deaf job applicant for a pre-employment exam did not violate the Rehabilitation Act or ADA, because the applicant couldn't show that he was otherwise qualified for the position for which he applied. The applicant argued that at the pre-employment stage he needed to show only that he was qualified to take the test, not that he was qualified for the position he sought. After a lengthy discussion of statutory interpretation, the court rejected the plaintiff's argument, because the statutory text says that only a "qualified individual" can establish an ADA claim, and "qualified individual" means the person can perform the essential functions *of the employment position*. In this case, the employment position was as an assistant stockworker, not as a "test-taker" as the plaintiff argued, and the plaintiff could not show he was otherwise qualified for the position of assistant stockworker.

- *Greenbaum v. New York City Transit Auth.*, No. 21-1777, 2022 WL 3347893 (2d Cir. Aug. 15, 2022) – Plaintiff's permanent wrist tendonitis might constitute a disability within the meaning of the ADA because there was sufficient evidence from which a reasonable jury could conclude that he was substantially limited in the major life activity of working. Tendonitis limited his ability to perform not just a particular computer programming job, but rather a class of jobs involving the use of a keyboard or mouse for periods of time beyond the limitations he experienced.

- *Frilando v. New York City Transit Auth*., No. 21-169-CV, 2022 WL 3569551 (2d Cir. Aug. 19, 2022) – The Second Circuit affirmed the District Court's dismissal of Frilando's ADA and Rehabilitation Act claims. Defendants partially denied his requested accommodation of ASL interpretation of the pre-employment exams required as part of the job applications for three jobs (train operator, track worker, and bus operator) he applied for. On appeal, Frilando first argued that the District Court erred in concluding that he was not "otherwise qualified" for the positions, pointing to evidence showing that a handful of track workers may not have worked on tracks and may have performed administrative or other tasks instead, but the Second Circuit did not think this was enough to overturn the District Court's conclusion. Frilando further argued that, even if he was not otherwise qualified for the three positions, the Court need only consider whether he is "otherwise qualified" to take the pre-employment test. The Second Circuit cited its recent decision in *Williams v. MTA Bus Co.,* 44 F.4th 115 (2d Cir. 2022), in rejecting this argument and finding that, to successfully raise a failure-to-accommodate claim under these circumstances, Frilando needed to be "otherwise qualified" to serve as a train operator, track worker, or bus operator, and not merely as a test-taker.

- *Fowler v. AT&T, Inc.,* 19 F.4th 292 (3d Cir. 2021) – The Third Circuit affirmed summary judgment for the employer, AT&T, on Fowler's ADA and ADEA claims. As matter of first impression, the Court held that placement on "surplus status," during which she needed either to find other employment within the company or be terminated at the end of the 60-day period, was an "adverse employment action," as required to establish a prima facie employment discrimination claim under the ADA and the ADEA. Although Fowler was not terminated by her selection for "surplus status," it materially altered the terms and conditions of her employment because her continued employment became conditional and depended on her finding another position. The Court noted that reaching the opposite conclusion – that a prima facie case may only be satisfied after an employee actually loses her job – could produce an absurd result where a plaintiff's limitations period expires before she is actually terminated, and thus before her substantive claim even accrues. However, Fowler did not provide sufficient evidence that AT&T's facially neutral surplus selection was pretext for discrimination, or that she was qualified for her position.

- *Anderson v. Norfolk S. Ry. Co.,* No. 21-1735, 2022 WL 1073581 (3d Cir. Apr. 11, 2022) – Anderson, who was diagnosed with a heart condition causing periodic loss of consciousness, was not qualified to work as a locomotive engineer or conductor because he would pose a direct threat to himself and others in either role. The risk was imminent since he could lose consciousness at any time, the duration of the risk was indefinite, and the work of a train conductor or engineer – managing freight trains, which may be traveling through densely populated areas at speed while carrying hazardous materials – entails "a severe risk of stunning harm." Although the likelihood that Anderson would experience acute cardiac problems at any given moment may have been small, the high stakes involved meant that the District Court was right to regard the risk as significant.

- *Coffey v. Norfolk S. Ry. Co.,* 23 F.4th 332 (4th Cir. 2022) – Norfolk Southern's request for certain medical records, and discharge of Coffey for failure to comply, was proper under the ADA. Coffey was employed as a locomotive engineer, a position subject to Federal Railroad Administration regulations regarding alcohol and drug use. When drug tests revealed the presence of codeine and amphetamines in Coffey's system, Norfolk Southern was under an obligation to make further inquiries to ensure that Coffey's use of them complied with applicable safety regulations. Not only were these inquiries related to Coffey's job, but they were required by federal regulation.

- *Gosby v. Apache Indus. Servs., Inc*., 30 F.4th 523 (5th Cir. 2022) – A temporary employee on a construction job suffered a diabetic attack at work. Six days later, she was terminated along with several others, then sued her employer, alleging disability discrimination. The Fifth Circuit reversed the district court's grant of summary judgment for the employer, finding that the temporary nature of Gosby's employment did not prevent her from establishing a prima facie case of discrimination. The district court believed that if temporal proximity alone were sufficient to establish a prima facie showing in a case with only brief employment, Apache would only be able to terminate Gosby during a small portion of her employment without being at risk of a temporal proximity argument. The Fifth Circuit, however, found that the evidence showed that Gosby was terminated immediately after an event that highlighted her ADA-protected

disability. If in fact her short-term position was to end for other reasons at the same time, that could be shown by the employer as part of its response, and the proximity of her diabetic episode on the job and her termination was sufficient to constitute a prima facie case that she was included in the group to be terminated for ADA-violative reasons.

Additionally, Gosby presented evidence sufficient to rebut Apache's nondiscriminatory reason for termination and show that a fact question existed as to whether that explanation was pretextual. Witnesses gave different rationales for inclusion in the reduction in force at different times, and there was no evidence that Apache evaluated both terminated and retained employees against any fixed criteria.

- *Harkey v. NextGen Healthcare, Inc.*, No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022) – The employer did not violate the ADA when it fired an employee who had sleepwalked into a coworker's hotel room during a business trip. Even if somnambulism is a disability under the ADA, the employee was not fired because of her disability, but because of what she did while she was sleepwalking. As the Court noted, "the ADA does not give employees license to act with impunity."

- *King v. Steward Trumbull Mem'l Hosp., Inc.,* 30 F.4th 551 (6th Cir. 2022) – The Sixth Circuit reversed summary judgment for the employer on a nurse's ADA claims, filed after she was fired for requesting leave due to her asthma. The Court held that under the ADA, approved medical leave may be a reasonable accommodation, and an inability to work while on such leave does not mean that an individual is automatically unqualified. In medical leave cases, courts must focus on the reasonableness of the leave request, considering (1) the amount of leave sought; (2) whether the requested leave generally complies with the employer's leave policies; and (3) the nature of the employee's prognosis, treatment, and likelihood of recovery. Here, hospital policy allowed her to seek up to twelve weeks of FMLA leave and up to one year of non-FMLA leave. King requested five weeks of leave – a reasonable amount of leave according to the hospital's own leave policies.

- *Blanchet v. Charter Commc'ns, LLC,* 27 F.4th 1221 (6th Cir. 2022), *reh'g denied*, 2022 WL 1519183 (6th Cir. May 5, 2022) – The Sixth Circuit reversed summary judgment for the employer on Blanchet's failure-to-accommodate claim. She was terminated after seven months of paid disability leave for postpartum depression. The Court found that a fact issue remained as to whether Blanchet would be "otherwise qualified" for her position after her medical leave accommodation: when an employee's proposed accommodation is medical leave, examining her qualifications on the date of her termination does not indicate whether she is otherwise qualified with an accommodation under the ADA. For the same reason, the Court rejected Charter's argument that Blanchet was not qualified because attendance was an essential function of her work. Blanchet was not requesting an accommodation that would permanently remove attendance as a requirement for her position, by, for example, allowing her to telework or work part-time. In asking for an extension of medical leave, Blanchet requested a temporary accommodation in the hopes that she could fully fulfill the attendance requirement once her medical leave was over. Because a reasonable jury could find that Blanchet could have returned to work and attended her job after she recovered from her illness, a genuine

dispute of material fact existed as to whether she was "otherwise qualified" for her position.

- *Simpson v. DeJoy*, No. 21-1547, 2021 WL 6124885 (7th Cir. Dec. 28, 2021) – Plaintiff Simpson developed anxiety after she was robbed at gunpoint while working at a USPS branch. After the robbery, USPS accommodated her by allowing her to work temporarily at a window equipped with protective glass, installing protective glass at her usual station, and always scheduling a coworker to work with her. She did not cite any added measure USPS could have taken to make the workplace more accessible, other than further altering her coworkers' jobs. Because USPS supplied the precise accommodations requested – even if they did not altogether ease Simpson's mind – a reasonable jury could not find in her favor on her Rehabilitation Act failure-to-accommodate claim.

- *Swain v. Wormuth*, 41 F.4th 892 (7th Cir. 2022) – To answer the question of whether a delay in accommodating an employee's disability was reasonable under the Rehabilitation Act and the ADA, courts look to the totality of the circumstances, including such factors as the employer's good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations. Here, a 20-month delay in getting door openers installed for a civilian employee, Swain, was not a failure to accommodate under the Rehabilitation Act. Swain needed to fill out paperwork, that paperwork needed to be reviewed, the doors needed to be inspected, parts needed to be ordered, and installation needed to be scheduled, and each step took a few months. Given the long list of other accommodations the Army promptly provided for Swain, a reasonable juror could not attribute the delay to bad faith. While the Army could have moved more quickly, given the steps necessary to initiate and then install automatic openers on these doors, a reasonable juror could not say the duration was unreasonable.

  Swain's disparate treatment claim also failed, because he could not persuade a reasonable juror that the Army denied him overtime work solely because he was disabled. The Rehabilitation Act's "solely by reason of" causation standard is stricter than the causation standard in Title I of the ADA, which the Rehabilitation Act otherwise incorporates for its liability standard.

- *Ehlers v. Univ. of Minn.*, 34 F.4th 655 (8th Cir. 2022) – The Eighth Circuit affirmed summary judgment for the employer university on Ehlers' ADA claims, filed after she requested multiple periods of leave and extensive accommodations for TMJ pain exacerbated by speaking and other aspects of her customer-service position. Her identification of eight jobs for which she claimed she was qualified, but not reassigned to, was insufficient to state a prima facie failure-to-accommodate claim: given her extensive work restrictions and new diagnoses, to make a facial showing that she possessed the requisite skill, education, experience, and training for the position and could perform the positions' essential duties with or without a reasonable accommodation, Ehlers needed to do more than provide job numbers, testimony that the identified jobs were clerical or administrative jobs, and her unsupported testimony that she qualified for them.

The Court also held that the University satisfied its obligation to engage in an interactive process with respect to reasonable accommodations by offering to help Ehlers find a new job many times, taking numerous steps to assist her with identifying a vacant position for reassignment, and considering adopting technologies to help her perform her job duties. Based on these actions, no reasonable jury could find that the University did not make good-faith efforts to make reasonable accommodations for Ehlers.

- *LeBlanc v. McDonough*, 39 F.4th 1071 (8th Cir. 2022) – LeBlanc, a federal employee diagnosed with vestibular dysfunction, was reassigned after his requested accommodations, including working only day shifts in his original position, were found to have the potential to cause the employer to violate a collective bargaining agreement by altering his coworkers' hours. The Eighth Circuit concluded that LeBlanc's requested accommodations were not required under the Rehabilitation Act because they would impose an undue hardship on the employer: since those accommodations would have violated the employer's CBA, they were presumptively unreasonable. Beyond CBA-related implications, the fact that the accommodations would require LeBlanc's colleagues to work more nights, more weekends, and more irregular hours was, in itself, an undue hardship. The employer was therefore not obligated to provide LeBlanc routine day shifts.

  LeBlanc argued his reassignment was not reasonable because it constituted an adverse employment action. While reassignment to another position can constitute an adverse employment action in some circumstances under the Rehabilitation Act, reassignment can be a reasonable accommodation when the employee cannot be accommodated in their existing position. A demotion that qualifies as a reasonable accommodation required by the Rehabilitation Act cannot, at the same time, constitute disability discrimination or retaliation prohibited by the Rehabilitation Act.

- *Shields v. Credit One Bank, N.A.,* 32 F.4th 1218 (9th Cir. 2022) – As a matter of apparent first impression, the Ninth Circuit held that establishing that an impairment was substantially limiting under the ADA did not require showing of long-term effects of the impairment. Shields underwent an invasive bone biopsy surgery, resulting in her inability to fully use her right shoulder, arm, and hand and to care for herself, perform certain manual tasks, or perform some of the core physical tasks included in her job descriptions for several months. While she was on a medical leave of absence following the surgery, her employment was terminated. The Ninth Circuit discussed the ADA Amendments Act's express rejection of the narrow definition of "substantially limits" in the then-existing EEOC regulations and in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), *overturned due to legislative action* (2009). Because the ADA and its regulations make clear that the actual-impairment prong of the definition of "disability" is not subject to any categorical temporal limitation, the district court committed legal error in holding, based on the pre-ADAAA regulations, that a claim of such an actual impairment requires a showing of long-term effects. The duration of an impairment is one factor that is relevant in determining whether an impairment substantially limits a major life activity, as will support a finding of "disability" under the ADA.

- *Kannan v. Apple, Inc.*, No. 20-17211, 2022 WL 3973918 (9th Cir. Aug. 31, 2022) – Kannan could not show he was discriminated against because of a disability perceived by his manager, Kotni, or his son's disability, as required for his ADA claims. The employment actions at issue were subject to final approval by Kotni's manager, who did not know that Kannan had a disabled son and did not perceive Kannan as disabled.

- *Herrmann v. Salt Lake City Corp.*, 21 F.4th 666 (10th Cir. 2021) – In chronic impairment cases, ongoing exchanges between employers and employees are likely to start with discussion of FMLA leave and morph into discussion of ADA accommodations. It is also likely that an estimate of when symptoms will subside and allow return to work is the best an employee or medical provider can offer, given that chronic conditions can last a lifetime. Moreover, an employee on leave due to a chronic condition may have limited ability to respond to an employer, and an employer will have to consider multiple communications from the employee and the employee's medical providers together when determining whether a request for leave is unreasonable or indefinite. Here, an employee's request for leave to afford her time to recover from PTSD symptoms was plausibly reasonable as accommodation under ADA. In requesting FMLA leave for the employee, her health care professional estimated that the probable duration of her condition was 3-6 months, and with weekly treatments for 8 weeks, it was his hope that she would be able to return to work at some point after treatment; a subsequent request in ADA paperwork referred to "enough time off" so that her PTSD symptoms could subside before returning to work.

- *Brown v. Austin*, 13 F.4th 1079 (10th Cir. 2021) – The Eleventh Circuit held that three rejected accommodations requested by a former federal employee with PTSD were not plausibly reasonable: telework twice a week, weekend work, and reassignment to another supervisor. Granting Brown's telework and weekend-work requests would have eliminated essential functions of his job (in part, being present in the office during standard work hours to review physical case files and collaborate with law enforcement partners who worked a standard schedule), making those requests unreasonable as a matter of law. His reassignment request was also unreasonable since he did not allege the limited circumstances in which the Agency would need to consider reassigning him despite the fact that he performed the essential functions of his position with other accommodations.

- *Edmonds-Radford v. Sw. Airlines Co.,* 17 F.4th 975 (10th Cir. 2021) – Among other reasons, Plaintiff's claim for disparate treatment failed because she could not refute the employer's evidence that the individuals involved in the decision to terminate her were unaware of her disability, so she could not show that her disability was a determinative factor in her termination. Additionally, she could not show that the non-discriminatory reason the employer offered for her termination (i.e., that her job performance failed to meet expectations even after she was provided additional training) was pretextual; as the court noted, "In assessing pretext, this Court examines the facts as they appeared to the decisionmakers, and we cannot second-guess Southwest's business judgment—it matters not if Southwest's reasoning was correct, just whether it honestly believed in the reason for the termination." Finally, her failure-to-accommodate claim failed, because even though she had requested additional training, she did not inform her employer that this

request was in connection with a disability, and even if she had, she was provided with the additional training she asked for; she continued to struggle even after the training, but that does not mean her employer did not provide a reasonable accommodation.

- *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280 (10th Cir. 2022) – The Tenth Circuit affirmed summary judgment for the employer on Litzsinger's FMLA and ADA retaliation claims because Litzsinger failed to demonstrate that the reason for her termination was pretextual. Other than temporal proximity between Litzsinger's FMLA leave and her termination – which, absent more, does not establish pretext – Litzsinger presented no evidence to show that the employer's proffered reason for terminating her was false or unworthy of belief. And the employer's changing justifications for terminating her could not establish pretext; providing additional justifications for termination without abandoning the primary reason for termination does not, without more, establish pretext. Inconsistent evidence is only helpful to a plaintiff if the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.

- *Dansie v. Union Pac. R.R. Co.*, 42 F.4th 1184 (10th Cir. 2022) – The Tenth Circuit reversed summary judgment for the employer on Dansie's ADA claim because a reasonable jury could find that the employer failed to engage in the interactive process when assessing whether a reasonable accommodation existed that would have enabled Dansie to perform the essential functions of his job. A jury could conclude that the employer made no effort to discover exactly what Dansie's limitations were or to explore with him whether any accommodations were available to him. Dansie admits he did not immediately come up with an accommodation that the employer was willing to implement, but he testified about and produced emails showing breakdowns in communication caused by his employer.

- *Bosarge v. Mobile Area Water & Sewer Serv.*, No. 20-14298, 2022 WL 203020 (11th Cir. Jan. 24, 2022) – An employer reasonably concluded that allowing the plaintiff to drive at work would pose a direct threat to the plaintiff himself or others in the workplace. The plaintiff argued that the HR officers' assessment that he was unable to drive was based on their assumptions about his MS diagnosis rather than objective medical evidence. But they made their determination based on his doctor's description of his symptoms – in particular, loss of vision, dizziness, and extremity weakness with spasticity – rather than on the plaintiff's MS diagnosis. This description of the plaintiff's symptoms was the "best ... objective evidence" of his symptoms and their frequency available to the HR officers at the relevant time, as EEOC's ADA regulations require for a direct threat assessment.

  Among other additional claims, the plaintiff asserted a retaliatory hostile work environment claim against the employer under the ADA. The district court and the parties below analyzed the plaintiff's retaliatory hostile work environment claim under the "severe or pervasive" standard that typically applies to discriminatory hostile work environment claims. However, the Eleventh Circuit clarified that retaliatory hostile work environment claims under the ADA should be analyzed under the same standard as retaliatory hostile work environment claims under Title VII – i.e., a plaintiff must show that the alleged retaliatory conduct "well might have dissuaded a reasonable worker from

making or supporting a charge of discrimination." The Eleventh Circuit therefore remanded to the district court to give the parties an opportunity to brief, and that court the opportunity to consider in the first instance, the claim under the correct legal standard.

- *Sugg v. City of Sunrise*, No. 20-13884, 2022 WL 4296992 (11th Cir. Sept. 19, 2022) – A plaintiff's own testimony is sufficient to establish disability where it would allow a jury to reasonably determine that the plaintiff was disabled under the ADA. Here, the district court erred by ignoring Sugg's own testimony about his disability. His doctors' declarations were conclusory, but Sugg testified about his heart disease, heart attack requiring surgery and hospitalization, and how his heart disease and corresponding heart attack limited his daily activities. This was sufficient to create a genuine dispute as to whether Sugg was disabled within the meaning of the ADA.

- *Jones v. Ga. Dep't of Cmty. Health,* No. 21-12498, 2022 WL 4462036 (11th Cir. Sept. 26, 2022) – The Eleventh Circuit reversed dismissal of Jones's Rehabilitation Act claim. Her broken knee, requiring surgery and an 8- to 10-week recovery period during which her doctor told her not to place any weight on her injured leg, was a physical impairment that substantially limited the major life activity listed in the ADA of walking. The parties disputed whether the "solely by reason of disability" causation standard for a Rehabilitation Act claim is the same as, or different from, the "on the basis of" causation standard applicable to disability discrimination claims under the ADA and other federal employment discrimination statutes. The Court did not reach that question because Jones's factual allegations were sufficient to satisfy either standard at the motion-to-dismiss stage.

Public Access

- *Cummings v. Premier Rehab Keller, P.L.L.C.,* 142 S. Ct. 1562, *reh'g denied*, 142 S. Ct. 2853 (2022) – The plaintiff, who is deaf and legally blind, alleged that a physical therapy provider failed to accommodate her because it did not provide an ASL interpreter. She filed claims under the Rehabilitation Act and the Patient Protection and Affordable Care Act (ACA), alleging the provider discriminated against her on the basis of disability, and seeking injunctive relief and damages. After the district court granted the provider's motion to dismiss and the Fifth Circuit affirmed, the Supreme Court 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 and the ACA.

  In a 6-3 majority opinion authored by Chief Justice Roberts, the Court held that emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act or the ACA. These statutes are Spending Clause legislation prohibiting recipients of federal funds from discriminating on the basis of certain protected characteristics. The Supreme Court has recognized implied rights of action for private individuals seeking enforcement of those statutes, but because the rights of action are implied, the remedies available under the statutes are unclear.

The Supreme Court uses the analogy of contract law to decide whether a remedy is available in these situations. Under this approach, a particular remedy is available only if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature. Because damages for emotional distress are not usually available under contract law and serious emotional disturbance is not a particularly likely result of violation of these statutes, federal funding recipients have not consented to be subject to such damages.

Justice Kavanaugh filed a concurring opinion, in which Justice Gorsuch joined, briefly stating that the contract law analogy to determine the remedies available for this implied right of action is flawed; it was up to Congress, rather than the Supreme Court, to decide whether these damages are available in the law.

Justice Breyer filed a dissenting opinion, in which Justice Sotomayor and Justice Kagan joined. The dissent argued that the contracts most analogous to these anti-discrimination statutes do allow for recovery of emotional distress damages, as emotional disturbance is the likely result of invidious discrimination.

- *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *reh'g denied,* 2022 WL 5434541 (4th Cir. Oct. 7, 2022) – Although this was not an employment case, but rather a § 1983 action by a formerly incarcerated individual against the Sheriff and others, it is significant in that a Fourth Circuit majority held, as a matter of first impression in the federal appellate courts, that gender dysphoria resulting from physical impairment is a disability under the ADA and Rehabilitation Act. Because gender dysphoria is distinct from, and narrower than, gender identity disorders as originally defined by the ADA (42 U.S.C. § 12211(b)), it does not fall under the ADA's exception for gender identity disorders. At the time of the ADA's enactment, the medical community had not acknowledged gender dysphoria, for which a diagnosis is concerned primarily with clinically significant distress and other disabling symptoms, while the now-obsolete diagnosis of gender identity disorder focused on cross-gender identification.

  Additionally, the majority pointed to constitutional avoidance principles to support its interpretation of the ADA. Because laws that discriminate against transgender people are subject to intermediate scrutiny, and because "[o]ne need not look too closely to find evidence of discriminatory animus toward transgender people in the enactment of § 12211(b)," constitutional avoidance principles supported rejecting a reading of § 12211(b) that would exclude gender dysphoria from the ADA's protections.

- *Luke v. Texas*, 46 F.4th 301 (5th Cir. 2022) – In this Title II action brought after Luke, who is deaf, was not given an ASL interpreter during his arrest for marijuana possession, court proceedings, or meetings with probation officers, the Fifth Circuit held that denying a deaf individual the services of an ASL interpreter during criminal proceedings violated the ADA. Not being able to understand a court hearing or meeting with a probation officer is, by definition, a lack of meaningful access to those public services, for purposes of an ADA claim. Though Luke successfully participated in, availed himself of, and completed the terms of his probation, his injury was not being able to understand the

judges and probation officers in the same way as a non-deaf defendant. The positive outcome of Luke's criminal case does not allow courts to escape their ADA obligations.

- *Lange v. City of Oconto*, 28 F.4th 825 (7th Cir. 2022), *reh'g denied*, 2022 WL 1119894 (7th Cir. Apr. 14, 2022) – The Seventh Circuit held that there was evidentiary support for a jury's conclusion that Defendant cities' police officers did not intentionally discriminate against Lange, who is deaf, when officers relied on Lange's children for ASL interpretation instead of a qualified ASL interpreter on four occasions. The jury heard from police officers present during the incidents that Lange could and did effectively communicate through means other than an interpreter, and other testimony indicated that Lange's own uncooperative behavior resulted in any inability to communicate. This evidence provided a reasonable basis for the jury's conclusion that the cities' police officers did not make a deliberate choice to deprive Lange of her ADA and Rehabilitation Act rights.

- *Bax v. Drs. Med. Ctr. of Modesto, Inc.*, 48 F.4th 1008 (9th Cir. 2022) – In this Rehabilitation Act case concerning effectiveness of auxiliary aids in communicating with deaf hospital patients, the Ninth Circuit affirmed the district court's judgment for the hospital, DMC. It found no error in the district court's evaluation of the effectiveness of DMC's communication methods based on a day-by-day factual context and conducting an exhaustive, totality-of-the-circumstances review of the communications between the Baxes and DMC. Indeed, this was precisely the sort of fact-intensive exercise that precedent required. Additionally, the hospital's use of a video remote interpreter (VRI) system with occasional technical glitches did not violate the Rehabilitation Act: while the relevant regulation requires that VRI systems generally produce clear, high-quality, real-time images, the Court rejected the notion that isolated technical glitches necessarily establish ineffective communication.

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 (including sexual orientation and gender identity), or national origin.

The Circuit Courts of Appeal decided hundreds of Title VII cases over the past year. Many of these cases turn on questions such as whether the personnel action that gave rise to the lawsuit was an "adverse employment action" or whether the comparators identified by the plaintiff are sufficiently "similarly situated" to establish a prima facie case of discrimination. We discuss a sample of decisions addressing those two issues below, followed by a selection of cases that involve other interesting issues or fact patterns.

Adverse Employment Actions

- *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc) – A female investigator for the D.C. Attorney General's office was repeatedly denied requests for a lateral transfer. She alleged sex discrimination, pointing to evidence that similarly-

situated male colleagues were granted similar requests. The district court rejected her claim, citing D.C. Circuit precedent requiring that a plaintiff demonstrate "objectively tangible harm" in order to establish a prima facie case of discrimination under Title VII. On appeal, a panel of the D.C. Circuit affirmed, but the full court granted an en banc rehearing and reversed, overturning its precedent from over 20 years ago and holding that "an employer that transfers an employee or denies an employee's transfer request because of the employee's race, color, religion, sex, or national origin violates Title VII by discriminating against the employee with respect to the terms, conditions, or privileges of employment."

The en banc court held that Title VII does not contain a requirement to show "objectively tangible harm"; rather, the clear language of the statute prohibits discriminatory treatment with respect to the "terms, conditions, or privileges of employment," and as the court explained, "Although the phrase is not without limits—not everything that happens at the workplace affects an employee's 'terms, conditions, or privileges of employment'—the transfer of an employee to a new role, unit, or location… undoubtedly is included." Moreover, "The meaning of the term 'discriminate' is also straightforward. 'Discrimination' refers to 'differential treatment.' The unadorned wording of the statute admits of no distinction between 'economic' and 'non-economic' discrimination or 'tangible' and 'intangible' discrimination. Nor does the statute distinguish between 'subtle' or 'overt' discrimination. Rather, Title VII prohibits all discrimination with respect to terms and conditions of employment." (internal citations omitted). Ultimately, "Once it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete. The plain text of Title VII requires no more." The court declined to consider whether Title VII contains a *de minimis* exception, "because the discriminatory denial of a job transfer request, which deprives an employee of an employment opportunity offered to a similarly situated colleague, easily surmounts this bar."

- *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 2022 WL 6943167 (5th Cir. Oct. 12, 2022) – Bound by Circuit precedent, the Fifth Circuit affirmed the district court's holding that the Sheriff's Department's gender-based scheduling policy did not violate Title VII because it did not involve an adverse employment action. All guards were allowed two days off per week, but male guards were allowed to take off both weekend days whereas female guards were only allowed to take off one weekend day, with their other day off required to be during the week, ostensibly for safety reasons. Even though the employer did not dispute that the policy was intentionally discriminatory, and even though the courts found it plausible that denial of full weekends off made the female employees' jobs worse, Fifth Circuit precedent defines adverse employment actions as "ultimate employment decisions," and the scheduling policy at issue here did not fit into that category. Other Circuits have held otherwise, and the panel found their reasoning persuasive, but it was bound to follow its own Circuit's precedent. Therefore, the panel reluctantly affirmed dismissal of the plaintiffs' claims, while noting that "The strength of the allegations here—direct evidence of a workforce-wide policy denying full weekends off to women in favor of men—coupled with the persuasiveness of [decisions of the Sixth, D.C., and Fourth Circuits],

make this case an ideal vehicle for the en banc court to reexamine our ultimate-employment-decision requirement and harmonize our case law with our sister circuits' to achieve fidelity to the text of Title VII." Indeed, the full Fifth Circuit recently granted rehearing en banc, and vacated the panel's opinion.

- *Boshaw v. Midland Brewing Co.,* 32 F.4th 598 (6th Cir. 2022), *reh'g denied,* 2022 WL 2286411 (6th Cir. May 31, 2022) – The plaintiff, an openly gay man, sued his former employer, alleging that it delayed or denied him a promotion because of his sexual orientation. He alleged that his supervisor told him he needed to act more masculine before he would be recommended for a promotion, in violation of Title VII's prohibition on discriminating against an employee due to a failure to conform to traditional sex stereotypes; he also alleged that the supervisor conditioned his promotion on his removal of his relationship status on Facebook, which he argued constituted sexual orientation discrimination. The court held that, even if the plaintiff subjectively believed his promotion was delayed because of discriminatory animus by his supervisor, the objective evidence showed that he was in fact promoted not long after he spoke with her, and that he was actually promoted multiple times "despite his open and obvious noncompliance with the supposed condition on his social media postings," which continued to depict him with his male partner and their children, and contained hashtags referencing his sexual orientation. Therefore, even if the supervisor did harbor discriminatory animus, it did not cause an adverse employment action and thus did not constitute sex discrimination in violation of Title VII.

- *Reives v. Ill. State Police*, 29 F.4th 887 (7th Cir. 2022) – A former police special agent alleged race discrimination based on, among other things, a downgrade in the department's promotion rankings. The parties disagreed as to whether this downgrade constituted an adverse employment action for Title VII purposes. The court explained that only materially adverse employment actions can give rise to discrimination claims – i.e., ones where the plaintiff suffers a significant change in employment status, rather than minor or trivial actions. The court set forth three categories into which such adverse employment actions generally fall: (1) termination or reduction in compensation, benefits, or other financial terms of employment; (2) transfers or changes in job duties that cause the employee's skill to atrophy and reduce the employee's further career prospects; and (3) hostile work environments or conditions amounting to constructive discharge. Negative performance evaluations, unaccompanied by some tangible job consequence, do not fall into any of these categories and are not considered adverse employment actions under Title VII. The plaintiff in this case argued that the downgrade in promotion rankings reduced his future career prospects, but the court rejected this argument, because he was still certified for promotion the first year he was downgraded, and although he was not certified the following year, he did not point to any evidence demonstrating that his negative evaluation in any way affected his non-certification for promotion that year. Therefore the court affirmed summary judgment in favor of the employer.

- *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022), *petition for cert. filed*, No. 22-193 (U.S. Aug 31, 2022) – The Eighth circuit affirmed the district court's grant of summary judgment to the employer on the plaintiff police officer's claims of

discrimination and retaliation under Title VII. The court held that reassignment to a new position did not constitute an adverse action where it did not result in a diminution to the employee's title, salary, or benefits, and she offered no evidence that she suffered a significant change in working conditions or responsibilities, but at most expressed a mere preference for one position over the other, because "This Court has repeatedly found that an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action." The court also refused to apply a cat's paw theory where the decisionmaker (here, the FBI, which revoked plaintiff's Task Force Officer status) was not part of the same entity as the defendant (the city of St. Louis). Finally, the court rejected the plaintiff's argument that denial of a transfer she sought constituted unlawful discrimination, because she could not show that the sought-after transfer would have resulted in a material, beneficial change to her employment, and absent such showing, the employer's failure to transfer her was not an adverse employment action.

- *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202 (10th Cir. 2022) – A Black female former employee alleged that the employer had, among other things, discriminated against her in the terms and conditions of her employment because of her race and sex, based on allegations that (1) her supervisors continually reassigned territories she had cultivated to her White male coworkers while giving her less productive territories, and required her to train her colleagues, which took away from her ability to grow her business and thus lowered her earning potential; and (2) her supervisors treated her unfairly by giving her untimely or missed quarterly evaluations. The court held that the plaintiff had not produced sufficient evidence that the realignment of her territories amounted to an adverse employment action, because she did not have "objective evidence of material disadvantage" – her evidence consisted mainly of her own testimony regarding her impressions of the relative financial impact to her White male colleagues and herself. As for her contention that her White male coworkers received timely performance evaluations while she did not, which she argued allowed her coworkers to get a head start on what they needed to improve upon while she fell behind, the court held that even if she had sufficient evidence to support that allegation, she failed to explain how her coworkers being given quarterly evaluations before her amounted to anything more than a mere inconvenience or caused a significant change in her employment status.

- *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261 (11th Cir. 2021), *petition for cert. filed*, No. 22-231 (U.S. Sep 13, 2022) – The plaintiff, a Black male director of a non-profit legal services firm, was suspended with pay while his employer investigated complaints that had been filed against him. He alleged, among other things, that the suspension constituted race discrimination under Title VII because White employees were not suspended pending investigations of even worse alleged misconduct. In a matter of first impression, the Eleventh Circuit examined whether paid suspensions can be considered adverse employment actions for Title VII purposes. Citing decisions from its sister Circuits – including the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Federal Circuit Courts of Appeals – the Eleventh Circuit concluded that "No Circuit has held that a simple paid suspension, in and of itself, constitutes an adverse employment action." The court allowed for the possibility that the circumstances of a particular case could

potentially escalate a paid suspension to an adverse employment action, but held that the evidence in this case did not support such a conclusion.

Similarly Situated Comparators

- *Nigro v. Ind. Univ. Health Care Assocs., Inc.*, 40 F.4th 488 (7th Cir. 2022) – The court affirmed summary judgment for the employer on a nurse anesthetist's sex discrimination claim, holding that she failed to identify similarly situated male comparators who were treated more favorably. The hospital had received multiple complaints about the plaintiff, mostly regarding her attitude and ability to work on a team, and eventually she was terminated after the hospital determined she had engaged in timekeeping fraud. She identified two male coworkers who she claimed engaged in comparable misconduct but were not fired. However, the court agreed with the hospital that the male comparators' misconduct was not as serious as the plaintiff's. One comparator struggled with substance abuse and was the center of one unsubstantiated complaint alleging that he was not "appropriately alert" in an operating room, and the other displayed insubordination by expressing resistance to new department protocols. But neither comparator "received several grievances for a lack of professionalism or an inability to work well with others" as the plaintiff did. Without evidence of a comparator who engaged in similar conduct – i.e., "someone who likewise received repeated complaints for inattentiveness, unprofessionalism, and belligerence at a time when the department sought to increase teamwork and collegiality" – the plaintiff "had no way to isolate the critical independent variable – discriminatory animus." (internal quotation marks omitted)

- *Abebe v. Health & Hosp. Corp. of Marion Cnty.*, 35 F.4th 601 (7th Cir. 2022) – A dental assistant received a low performance rating that resulted in her not receiving a merit-based raise. She alleged race and national origin discrimination, claiming that others in her office outside of her protected class were given higher ratings despite engaging in similar conduct. The court affirmed a grant of summary judgment for the employer, holding that the plaintiff had failed to identify a suitable comparator and thus could not establish a prima facie case. Although the plaintiff and one of the comparators had both gotten into physical altercations with the same dentist, the comparator did not receive as low a performance rating; however, the employer argued that the comparator had not addressed the situation in as confrontational a manner as the plaintiff, and the court agreed that the plaintiff was "focus[ing] on the wrong features, precluding a *meaningful* comparison. Abebe received low scores on her performance review not because she was involved in these incidents, but because she addressed them in a confrontational way. Abebe adduces no evidence that either proposed comparator was similarly disrespectful or aggressive in communicating with their colleagues or with management."

- *Said v. Mayo Clinic*, 44 F.4th 1142 (8th Cir. 2022) – A surgeon, who was a Muslim African-American and an Egyptian national, was investigated for misconduct including sexual harassment and unwanted romantic advances toward coworkers; he was recommended for termination, and quit just before his termination hearing. In alleging discrimination on the basis of race, religion, and national origin, the surgeon claimed that he had been treated more harshly than a White atheist colleague who had been accused of

similar misconduct. However, the court rejected his claim, holding that he failed to show that his proffered comparator was similarly situated in all relevant respects. Even though the comparator received poor reviews for interpersonal conduct and the employer had received multiple complaints about him – including that he had an inappropriate romantic relationship, displayed anger management issues, and had pornographic images on his phone – the comparator had not been specifically accused of unwelcomed romantic advances or sexual harassment as the plaintiff had been. The court declined to sit as a "super-personnel department" to review the business judgment of the hospital: "Mayo has judged sexual harassment to be a unique and severe offense, and it is not our place, nor a jury's, to review the fairness of this judgment because it does not involve intentional discrimination."

- *Breiterman v. U.S. Capitol Police*, 15 F.4th 1166 (D.C. Cir. 2021) – A Capitol Police officer alleged that her suspension, administrative leave, and ultimate demotion from the rank of Sergeant were the result of sex discrimination and retaliation under Title VII as applied by the CAA. The district court granted the USCP's motion for summary judgment and the D.C. Circuit affirmed. The USCP offered legitimate non-discriminatory reasons for its actions – namely, that the officer admittedly made improper remarks and leaked to the media a photograph that was part of an ongoing investigation – and the officer was unable to demonstrate that these reasons were pretextual. She also failed to show that she was treated differently from similarly-situated comparators, because the other employees were not proper comparators: most were "non-supervisory officers with different ranks, titles, and job duties from Breiterman," which is significant because the court credited the USCP's explanation that "supervisors are entrusted with greater authority than officers, held to a higher standard, and disciplined more severely than officers for similar violations." Moreover, the other supervisory officials she cited were not appropriate comparators because the plaintiff had a more substantial disciplinary history at the time of her infractions than those would-be comparators did when they committed theirs.

- *Lee v. Belvac Prod. Mach., Inc.*, No. 20-1805, 2022 WL 4996507 (4th Cir. Oct. 4, 2022) – The fact that a plaintiff alleging sex discrimination under Title VII had the same job title and job description as her proposed comparator was not dispositive. The record evidence showed that the job description was not controlling, and that the comparator actually performed different duties than the plaintiff did. The court explained that "a plaintiff proceeding under Title VII is required to show only that her job and the proposed comparators' jobs are 'similar rather than equal'; however, she still must show that 'the proposed comparators are not just similar in some respects, but similarly-situated in all respects.'" (quoting *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019)).

Title VII Retaliation

Understanding the legal framework for analyzing Title VII retaliation claims is important for legislative branch employing offices and covered employees, because the Board applies this framework to retaliation claims brought under both Title VII and section 208 of the CAA, 2

U.S.C. § 1317, even if the section 208 claims allege retaliation for protected activity in connection with other CAA-applied statutes.

A key difference between Title VII discrimination and retaliation claims is that retaliation claims do not require a showing of an adverse employment action, as discussed above with respect to discrimination claims. Instead, a claimant alleging retaliation must show that the employer engaged in conduct that would dissuade a reasonable worker from engaging in protected conduct.

- *Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340 (3d Cir. 2022) – A Black employee who suffered from serious back problems alleged that the company fired him in retaliation for protected activity under Title VII, the ADA, and the FMLA. The company argued that it fired the employee because of text messages it found on his personal cell phone – which it found by removing his personal lock from the locker where he stored his personal effects – suggesting that he had solicited a prostitute while at work. The employee countered that this excuse was pretext for unlawful retaliation, because the company's search of the locker and his personal cell phone were motivated by retaliatory animus. The district court granted summary judgment for the employer, focusing only on the company's proffered reason for the termination, not the motivation for the search. However, the Third Circuit reversed and remanded, holding that the company's motivation was relevant to the issue of pretext. There was sufficient evidence to support a conclusion "that the company was looking for something that would justify terminating Canada and that it undertook that search because of Canada's complaints of discrimination." The reason given for opening the locker was that the locker needed to be moved because it was blocking a surveillance camera; however, not only did the court find that to be a weak reason for searching the locker – especially since a forklift was used to move it – but the company also did not reasonably explain its search of the contents of the plaintiff's cell phone, which included combing through over a year's worth of text messages before it found the supposed solicitations. The company tried to justify the search by claiming that it was trying to determine whether the phone was a company phone, but the court opined that "A jury is much more likely to view that kind of search as indicative of looking for something that would justify firing Canada rather than trying to figure out if it was a company phone." Ultimately, to ignore retaliatory conduct that leads an employer to discover a reason for terminating an employee "would not only immunize employers who retaliate against employees only after they stumble upon something that would justify their termination; it would also incentivize such retaliatory foray."

- *Huff v. Buttigieg*, 42 F.4th 638 (7th Cir. 2022) – An employee of the FAA was ostensibly terminated for non-compliance with her agency-supervised alcohol rehabilitation program, but she alleged that the termination was really in retaliation for filing of a religious discrimination complaint against the agency. Before turning to the merits of her claim, the Seventh Circuit clarified that the appropriate standard of causation in federal-sector Title VII retaliation claims is not "but-for" causation, but rather the same standard of causation established in the Supreme Court's recent decision in the ADEA case of *Babb v. Wilkie*, 140 S.Ct. 1168 (2020): personnel decisions must be made "free from any discrimination based on" the employee's membership in a protected class, and therefore

"we conclude that [42 U.S.C.] § 2000e-16 prohibits retaliation when it 'plays a part in a federal employment decision.'" However, the court pointed out that although but-for causation is not required for liability in federal-sector retaliation cases, it remains important in determining the appropriate remedy: a plaintiff seeking reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision must show that but for the retaliation, the employment action would not have occurred. As for the plaintiff's claims in this case, the Seventh Circuit reversed the district court's grant of summary judgment for the FAA on her Title VII retaliation claim, holding that she had produced enough evidence to allow a reasonable jury to conclude that the employer was liable under a cat's paw theory of retaliation.

- *Lesiv v. Ill. Cent. R.R. Co.*, 39 F.4th 903 (7th Cir. 2022) – The plaintiff testified in his brother's discrimination and retaliation lawsuit against their employer, and within three months the company gave the plaintiff a dangerous assignment and suspended him when he refused to complete it. The plaintiff alleged that these actions constituted both direct retaliation against him for testifying and third-party retaliation against his brother for filing the lawsuit. The Seventh Circuit affirmed summary judgment in favor of the employer, holding that although the dangerous assignment and suspension could be considered materially adverse actions for retaliation purposes – i.e., having to choose between insubordination and an unreasonably dangerous assignment could dissuade a reasonable worker from asserting rights under Title VII – the plaintiff did not provide enough evidence of retaliatory motive against either himself or his brother. With respect to the direct retaliation claim, the plaintiff failed to show that the supervisors responsible for the adverse actions were aware that he had testified in his brother's lawsuit; as for the third-party retaliation claim, the court held that although individual and third-party retaliation claims are not mutually exclusive, in this case the third-party claim failed because the plaintiff could not satisfy one of the required elements of the "zone of interest" test – specifically, he could not show that harming the plaintiff, an employee, was the employer's intended means of retaliating against the plaintiff's brother, who by then was no longer employed by the company.

- *Jokich v. Rush Univ. Med. Ctr.*, 42 F.4th 626 (7th Cir. 2022), *reh'g denied*, 2022 WL 4132067 (7th Cir. Sept. 12, 2022) – After two decades of successful practice, a radiologist was stripped of his role as a division director, had his pay cut, and did not have his contract renewed by the hospital. He alleged that these actions were taken in retaliation for his participation in a colleague's Title VII lawsuit against the employer and for his own opposition to the hospital's allegedly discriminatory practices. The Seventh Circuit affirmed the district court's grant of summary judgment for the hospital, holding that the plaintiff had failed to establish a causal connection between protected activity and the hospital's actions against him. Temporal proximity between protected activity and an adverse action can support an inference of retaliatory motive, but suspicious timing alone is not enough to establish causation for purposes of a retaliation claim, and here the hospital had plenty of evidence to support a competing explanation: that several of the radiologist's colleagues found him difficult to work with and that he had been involved in several conflicts at work. Moreover, the hospital produced evidence that it had decided to take the adverse actions *before* the plaintiff expressed opposition to the hospital's allegedly discriminatory practices. The court also noted that the plaintiff's

supposed participation in a Title VII lawsuit consisted of simply having his name appear on a list of 111 potential witnesses, which did not qualify as protected activity for Title VII purposes.

- *Reznik v. inContact, Inc.*, 18 F.4th 1257 (10th Cir. 2021) – In a Title VII retaliation case, the conduct complained of by the plaintiff does not necessarily have to be an actual Title VII violation in order for the employee's conduct to be protected, the employee only needs to reasonably believe that the conduct violated Title VII. The test for reasonableness includes both subjective and objective components. Here, there were genuine issues of material fact as to whether the plaintiff reasonably believed that the treatment of her coworkers violated Title VII (even though it did not, because the coworkers in this case fell under the exemption for certain aliens contained in 42 U.S.C. § 2000e-1), so the Tenth Circuit reversed the district court's grant of summary judgment for the employer and remanded the case.

- *Patterson v. Georgia Pac., LLC*, 38 F.4th 1336 (11th Cir. 2022) – A Human Resources manager alleged that she was fired one week after the plant manager learned she had testified in a Title VII case against her former employer. The district court granted summary judgment for the employer, holding that the anti-retaliation provision did not apply for two reasons: first, the district court applied a "manager exception" theory – i.e., that the provision does not apply to HR managers acting in the course of their employment duties, even if their actions would otherwise be protected activity – and also held that testifying against a *former* employer is not protected activity for purposes of retaliation claims against a *current* employer. The Eleventh Circuit reversed the district court on both grounds, rejecting the "manager exception" and holding that retaliation against an employee for testifying against a former employer is still unlawful under Title VII. With respect to the supposed exception for HR managers, the court held that such a rule, which originated in the context of the FLSA, "has no basis in the text of Title VII's opposition clause and actually contradicts the text of it." Indeed, "HR managers fall into the category of 'all employees,' and the statutory definition of 'employee' does not have any carveout or exclusion of HR managers that would remove them from the protection of the opposition clause. *See* 42 U.S.C. § 2000e(f). The clause applies to HR managers just as it does to other employees." Likewise, the text of Title VII contains no qualification that limits its anti-retaliation protection to opposing practices of current employers: "A former employer's unlawful employment practice is just as much an unlawful employment practice as one of a current employer. The statutory text makes no distinction between the two. Opposition is opposition, and *any* unlawful employment practice is *any* unlawful employment practice."

- *Alkins v. Sheriff of Gwinnett Cnty.*, No. 21-13746, 2022 WL 3582128 (11th Cir. Aug. 22, 2022) – In reversing the district court's grant of summary judgment for the employer on a Title VII retaliation claim, the Eleventh Circuit held that there was a genuine issue of material fact as to whether the employee reasonably believed that a single open-mouthed kiss by her supervisor could have constituted sexual harassment, such that reporting the kiss constituted protected activity. Although a single kiss obviously does not qualify as "pervasive," the court pointed out that, "applying the second factor, the conduct was severe; few types of physical contact are more invasive than an open-mouthed kiss. We

have recognized that less severe conduct can nonetheless support a sexual harassment claim… Further, our precedent does not foreclose the possibility that being subjected to an isolated, unwanted kiss by a supervisor can establish a claim." Weighing the other factors and construing the facts in the plaintiff's favor, the court concluded that "the conduct she alleged is close enough to give rise to a reasonable belief that she was sexually harassed by [her supervisor]. A reasonable person in Alkins's shoes could believe that receiving an unwanted, open-mouthed kiss from a supervisor was sexual harassment. For that reason, a jury could find that she engaged in protected activity by reporting the kiss[.]"

Racial Epithets

Several recent cases demonstrate how different courts analyze hostile work environment claims based on the use of racial epithets in the workplace.

- *Chapman v. Oakland Living Ctr., Inc.,* 48 F.4th 222 (4th Cir. 2022) – An employee of an assisted living center alleged that she was subjected to a hostile work environment and ultimately constructively discharged. The employee was called the n-word on three different occasions by a 6-year-old boy, who was the son of a supervisor and grandson of the center's owners, and who was frequently present at the facility. The district court found that the use of the n-word was "atrocious language that is entirely unacceptable in society" but granted summary judgment for the employer because the incidents were not imputable to the employer. The Fourth Circuit reversed, holding that genuine issues of material fact existed as to whether the employer knew or should have known of all of the incidents and whether the supervisor's response to the incident he knew about was reasonably calculated to prevent further harassment. The court also rejected the employer's argument that the three uses of the racial slur were not severe or pervasive enough to support a hostile work environment claim because they were uttered by a young child; considering the circumstances, including the fact that the child was the son of the plaintiff's supervisor and the grandson of the business's owners, the court stated that "the fact that the three n-word incidents were perpetrated by a six-year-old boy does not preclude a finding that those incidents are sufficiently severe or pervasive to alter Chapman's conditions of employment and create an abusive work environment."

- *Woods v. Cantrell*, 29 F.4th 284 (5th Cir. 2022) – A Black employee alleged that his supervisor called him a "Lazy monkey a** n*****" in front of his coworkers. The Fifth Circuit reversed the district court's grant of summary judgment to the employer on the plaintiff's race-based hostile work environment claim. Surveying other federal appellate decisions addressing the use of the n-word in the workplace – including citations from the First, Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits – the Fifth Circuit panel agreed with those other courts that a single use of an unambiguously racial epithet such as the n-word by a supervisor in the presence of his subordinates can state an actionable claim of a hostile work environment.

- *Fisher v. Bilfinger Indus. Servs. Inc.,* No. 20-30265, 2021 WL 5272214 (5th Cir. Nov. 11, 2021) – The court affirmed summary judgment for the employer, holding that the alleged

conduct of the plaintiff's boss was not severe enough to constitute a race-based hostile work environment. The plaintiff, who is Black, provided an affidavit from a coworker who had heard the plaintiff's boss use the n-word, but the plaintiff himself had not heard the boss use that racial slur. Moreover, the plaintiff alleged that his boss repeatedly called him and another Black employee "boy," but the court deemed this the sort of "sporadic use of abusive language" that falls outside of Title VII's purview. The court further rejected the plaintiff's claim that he was retaliated against for complaining about the boss calling him "boy," because in the court's view, the plaintiff "could not have reasonably believed the 'boy' comment itself created a hostile work environment in violation of Title VII" and therefore his complaint was not protected activity.

- *Paschall v. Tube Processing Corp.*, 28 F.4th 805 (7th Cir. 2022) – Two Black employees alleged a race-based hostile work environment based in part on two coworkers' use of the n-word in the workplace. Although the court acknowledged that even a single use of that slur could support a hostile work environment claim, it held that the plaintiffs' claim failed in this case because the employer took prompt and effective remedial action against the coworkers who uttered it. The court explained that "In analyzing whether the use of racial epithets create a hostile work environment, our case law has distinguished between supervisors and coworkers." After learning of the coworkers' behavior, the employer reprimanded one of them and suspended the other for three days, with warnings to both about the consequences of any such conduct in the future. The court held that these actions were reasonably likely to prevent future harassment, and so the employer was not liable.

- *Scaife v. U.S. Dep't of Veterans Affs.*, 49 F.4th 1109 (7th Cir. 2022) – A Black employee alleged a race-based hostile work environment based on a department head referring to her as a "stupid f****** n*****" in a meeting at which the plaintiff was not present. The court acknowledged that "Because the N-word is egregious, we are not concerned with the number of times the epithet is used" and that "A one-time use of the epithet can in some circumstances warrant Title VII liability." However, the totality of the circumstances in this particular case did not rise to the level of a hostile work environment, because "Although racial epithets do not always have to be stated directly to a plaintiff to create an objectively hostile work environment, remarks that are stated directly to the plaintiff weigh heavier than when a plaintiff hears them secondhand." (internal citations omitted). Further, in this case, the individual who use the slur did not have direct supervisory authority over the plaintiff, and the plaintiff did not actually learn of the use of the epithet until almost eight months after it happened, both of which factors weakened her claim. Therefore, the court held that she failed to show that the incident was severe enough to constitute a hostile work environment.

  NOTE: This case also includes a brief but interesting discussion of when it is appropriate to "aggregate" different types of harassment for purposes of a hostile work environment claim. The plaintiff had alleged not only a race-based hostile work environment based on the use of a racial epithet by a department head, but also sexual harassment by her immediate supervisor. The court explained that "when a plaintiff claims that he or she is suffering a hostile work environment based on the conduct of supervisors and coworkers, all instances of harassment by all parties are relevant to proving that an environment is

sufficiently severe or pervasive." However, "this does not mean that courts automatically lump into the analysis the behavior of one type of harasser (here, [the department head]) with the behavior of a different type of harasser (here, [the immediate supervisor])." In this case, even viewing the plaintiff's case in the aggregate, the court held that the harassment was not severe or pervasive enough to rise to the level of a hostile work environment, nor could she demonstrate that her supervisor's harassing conduct was based on her gender.

Sexual Harassment/Hostile Work Environment

- *Sowash v. Marshalls of MA, Inc.*, No. 21-1656, 2022 WL 2256312 (4th Cir. June 23, 2022) – The Fourth Circuit affirmed the district court's grant of summary judgment to the employer on the plaintiff's hostile work environment claim. Although the manager's hugs, touching of the plaintiff's arm, kiss on the cheek, and occasional compliments about her appearance were unprofessional and inappropriate work behaviors, "neither the number nor the nature of those contacts is sufficient to meet the 'severe or pervasive' threshold." The court also rejected the plaintiff's arguments based on the manager's treatment of other employees, because the plaintiff was unaware of those incidents when they occurred, or at any time while she and the manager worked together at the store.

- *Webster v. Chesterfield Cnty. Sch. Bd*., 38 F.4th 404 (4th Cir. 2022) – A special education instructional assistant at an elementary school brought a claim of sexual harassment against the school, alleging that an 8-year-old boy with Down syndrome and ADHD inappropriately touched her on a near-daily basis. The district court granted summary judgment to the school, and the Fourth Circuit affirmed. Although the conduct involved touching of her private parts, the plaintiff failed to show that the child's conduct was *because of* sex, because the evidence showed that the child was not capable of distinguishing between the sexes or forming sexual intent. The court also held that although the plaintiff undoubtedly felt *subjectively* that the conduct was severe and pervasive, she could not provide sufficient *objective* evidence of severity or pervasiveness, because "Without any expert testimony to rebut the School Board's evidence that [the student's] behavior was consistent with the behavior of a child his age and with his disabilities, Webster fails to cite to anything in the record suggesting that a reasonable person in her position—an experienced instructional assistant working in special education—would find [the student's] conduct to be severe or pervasive. Absent such evidence, we cannot find that Webster satisfied this element's objective prong." Finally, based on a fact-intensive and context-specific analysis, the court held that the student's conduct could not be imputed to the school because appropriate remedial action was taken in response to the plaintiff's concerns.

- *Abbt v. City of Houston,* 28 F.4th 601 (5th Cir. 2022) – A female firefighter alleged, among other things, that she was subjected to a hostile work environment based on sexual harassment. The allegations were based on several male firefighters, including a junior captain at her station and the district chief, repeatedly viewing a nude video of the plaintiff which she had made privately for her husband and which had been stolen, anonymously emailed, and forwarded to an unknown number of others within the

department. The Fifth Circuit reversed the district court's grant of summary judgment for the city, holding that genuine issues of material fact existed as to each element of the plaintiff's claim. The repeated viewing of the intimate video was based on sex, as "a jury could surely find that the decision of two men to repeatedly watch a nude video of their female coworker was motivated by the fact that she was a woman," and it was unwelcome, as the plaintiff had not granted her colleagues permission to view it. The court had no trouble holding that the conduct met the objective "severe or pervasive" prong of a prime facie case: "a reasonable person could consider the repeated viewing of her intimate, nude video by her coworkers to be sufficiently severe to constitute sexual harassment. Such invasive and violative conduct goes well beyond a 'mere offensive utterance' and rendering it actionable under Title VII does not risk turning the statute into a 'general civility code.'" Additionally, given that the plaintiff suffered PTSD and was unable to return to work after learning that her coworkers had viewed the video, it was clear that her employment was subjectively affected. Finally, the court noted that knowledge of the harassment could be imputed to the city based on the fact that the district chief not only had notice of the harassment, he actually viewed the video multiple times himself and failed to pass the information up the chain of command.

- *Bye v. MGM Resorts Int'l, Inc.*, 49 F.4th 918 (5th Cir. 2022) – The plaintiff, a server at a restaurant, alleged sex and pregnancy discrimination, a hostile work environment, and constructive discharge in violation of Title VII based on inadequate lactation breaks and harassment from coworkers due to her lactation breaks. The district court granted summary judgment in favor of the employer; the plaintiff appealed that ruling with respect to the hostile work environment and constructive discharge claims, and the Fifth Circuit affirmed summary judgment for the employer. The plaintiff's hostile work environment claim failed because she "provided no evidence regarding who said what or how often, or how this treatment was related to her needing to take lactation breaks" and thus could not demonstrate that the conduct was objectively severe or pervasive; she offered only her subjective belief that her coworkers were unkind to her because they were unhappy with her for taking lactation breaks, and she "failed to demonstrate that the alleged hostility was more than 'mere offensive utterances,' which are not sufficient to establish a claim under Title VII." For the same reason, she could not establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign, and so summary judgment was also appropriate on her constructive discharge claim.

- *Paschall v. Tube Processing Corp.*, 28 F.4th 805 (7th Cir. 2022) – An employee's sexual harassment claim failed because, regardless of whether a hostile work environment may have existed, the evidence showed that the employer took prompt disciplinary action against the coworker who harassed the plaintiff. Where the harasser is a supervisor, the employer is strictly liable, subject to any affirmative defenses; however, when the harasser is a coworker rather than a supervisor, an employer is liable only if it has been negligent in discovering or remedying the harassment. Here, after the plaintiff reported her coworker's lewd comments, her supervisor reassigned her to a different job for the rest of the day, and management subsequently provided the harasser with a written reprimand and warning about further disciplinary actions that could result if the behavior continued.

- *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643 (9th Cir. 2021) – A manicurist in a resort salon complained to his manager that a pedicure customer was sexually harassing him. Rather than taking appropriate steps to prevent the harassment, the manager sent the employee back to finish the pedicure, resulting in another 20 minutes of harassment by the customer, during which the employee felt "uncomfortable" and "absolutely horrible." Rather than seeking to hold the employer vicariously liable for the customer's harassing behavior, the plaintiff's allegations focused on the *manager's* conduct in tolerating that behavior and subjecting the plaintiff to further harassment. The district court granted summary judgment in favor of the resort, but the Ninth Circuit reversed, holding that a manager requiring the employee to continue giving a customer a pedicure after the customer sexually propositioned him was sufficiently severe to create a hostile work environment. "Reasonable jurors could decide that Fried's manager condoned the customer's conduct and conveyed that sexual harassment would be tolerated in the salon because she took no action to stop it—such as requiring the customer to leave the premises immediately. To the contrary, [the manager] directed Fried to re-subject himself to the harasser for an extended period of time."

Other Title VII Cases

- *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263 (1st Cir. 2022) – The First Circuit affirmed dismissal of plaintiff's Title VII claims, in which they had argued that Whole Foods' disciplining of workers for wearing "Black Lives Matter" masks constituted race discrimination and retaliation. Applying the reasoning from the Supreme Court's *Bostock* decision, the court explained that "when assessing a Title VII discrimination claim, the proper focus is on the protected characteristic of the individual plaintiff. In other words, to constitute unlawful racial discrimination under Title VII, an employment action must have been taken 'because of' the race of the individual plaintiff." The court declined to adopt the plaintiffs' theory of "advocacy" discrimination (i.e., discrimination against non-Black employees who were advocating on behalf of Black coworkers); on the plaintiffs' other theories – race discrimination against Black employees, and associational race discrimination against White employees – the court held that although those theories were conceptually viable, the plaintiffs' allegations in this case were conclusory and did not raise a plausible inference of discrimination. The plaintiffs also failed to plead a causal link between protected activity and adverse conduct by Whole Foods.

- *Groff v. DeJoy,* 35 F.4th 162 (3d Cir. 2022), *petition for cert. filed*, No. 22-174 (U.S. Aug. 25, 2022) – A postal carrier sued the U.S. Postal Service for religious discrimination under Title VII, alleging that the Postal Service failed to accommodate his religious belief that Sunday was meant for worship and rest and that he therefore could not work on Sundays. The USPS had offered the plaintiff the option to swap shifts with colleagues, but he frequently could not find anyone willing to swap with him, and because he repeatedly did not show up on Sundays and did not have anyone replace him, he was progressively disciplined. The court first held that "even though shift swapping can be a reasonable means of accommodating a conflicting religious practice, here it did not constitute an 'accommodation' as contemplated by Title VII because it did not

successfully eliminate the conflict." The court nevertheless affirmed summary judgment for the Postal Service, because the accommodation that would eliminate the conflict – i.e., for the plaintiff to be exempted from Sunday work – would cause undue hardship to the Postal Service's business. The plaintiff's absences imposed on his co-workers, disrupted workplace and workflow, made timely delivery more difficult, and diminished employee morale, creating more than a de minimis impact on operations.

- *EEOC v. Wal-Mart Stores E., L.P.*, 46 F.4th 587 (7th Cir. 2022), *reh'g denied*, 2022 WL 10964871 (Oct. 18, 2022) – Light-duty policy that applied to employees injured on the job but not to pregnant workers with similar restrictions did not violate Title VII. Walmart provided a legitimate nondiscriminatory reason for its policy – primarily based on cost savings related to worker's compensation – and the EEOC failed to show that such reason did not justify the burden placed on pregnant workers. The Seventh Circuit distinguished this case from the Supreme Court case of *Young v. UPS*, noting that in the *Young* case UPS allowed light duty for almost every category of restricted workers except for pregnant women, whereas Walmart's policy at issue in the present case only applied to workers injured on the job, so pregnant women were not singled out for discrimination.

Cases Related to Title VII

- *West v. Radtke*, 48 F.4th 836 (7th Cir. 2022) – Although this case did not arise under Title VII, it includes an interesting discussion of multiple Title VII issues. In evaluating the civil rights claims of a Muslim prison inmate who was forced to undergo a strip search by a transgender male, which he alleged violated his sincerely-held religious beliefs, the Seventh Circuit addressed the prison's assertion that restricting transgender prison guards from performing strip-searches in order to accommodate the inmate's beliefs would cause the prison to violate the guard's rights under Title VII. The court held that this would not constitute an adverse employment action and so the employer would not violate Title VII in granting the accommodation, but even if it did count as an adverse action, it would still qualify as a bona fide occupational qualification (BFOQ) and therefore not violate Title VII.

- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) – In a case involving the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964, with potential implications for Title VII, the First Circuit held that Harvard's undergraduate admissions policy did not unlawfully discriminate against Asian-American applicants. Applying strict scrutiny, the court held that Harvard carried its burden to show that it had: demonstrated a compelling interest in student body diversity and identified specific, measurable goals it seeks to achieve by considering race in admissions; narrowly tailored its policy to achieve those goals; considered race-neutral alternatives and legitimately concluded that they were not workable; and not intentionally discriminated against Asian-Americans in its admissions policy.

NOTE: Although this case arises in the context of education rather than employment, the outcome could have implications for employers' diversity programs and initiatives.

- *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 S. Ct. 896 (2022) – In assessing Title VI and Equal Protection Clause challenges to UNC's admissions policy, which considered race as one among over 40 factors, the court concluded that the policy withstood strict scrutiny, finding that "UNC has met its burden in demonstrating that it has a genuine and compelling interest in achieving the educational benefits of diversity; that the University has offered a reasoned explanation for its decision to pursue these benefits; that the educational benefits sought by the University are concrete and measurable and are not elusory and amorphous; that these benefits are being regularly assessed; and further that the University's decision to pursue such benefits by, among other things, enrolling students that are both academically gifted and broadly diverse is entitled to 'judicial deference.'" (quoting *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 376 (2016)).

  NOTE: As with the Harvard case above, the outcome here could have implications in the employment context.

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.

- *Vanhook v. Cooper Health Sys*., No. 21-2213, 2022 WL 990220 (3d Cir. Mar. 31, 2022) – The district court correctly held that an employer offered a legitimate, non-pretextual, nondiscriminatory reason for an employee's termination: its belief, based on surveillance, that she abused her FMLA leave. The Third Circuit was not persuaded by the employee's argument that the employer initiated surveillance without a reasonable suspicion that she abused her FMLA leave, noting that even had the employer not provided evidence of its basis for suspicion, nothing in the FMLA prevents employers from monitoring employees' activities while on FMLA leave to ensure that they do not abuse their leave.

- *Snyder v. DowDuPont, Inc.*, No. 21-1235, 2022 WL 1467439 (3d Cir. May 10, 2022) – The Third Circuit held that an employer did not commit unlawful FMLA retaliation by surveilling and ultimately firing an employee who was suspected of abusing her FMLA leave. The employer credibly thought that the employee was abusing her many leaves (her pattern of high absences that seemed to max out FMLA leave time; coworkers seeing her out and about during medical leave), so it surveilled and then fired her when the surveillance revealed ample evidence of abuse. Because she did not show that the employer's reasons were pretexts for punishing her, the Court affirmed summary judgment for the employer.

- *Roberts v. Gestamp W.V., LLC*, 45 F.4th 726 (4th Cir. 2022) – The Fourth Circuit reversed the district court's grant of summary judgment for the employer, holding that the

employee had raised a genuine issue of material fact as to whether notifying his employer of his absence via Facebook Messenger satisfied the requirement in the FMLA regulations to use the company's "usual and customary" absentee notice procedures. "Usual and customary" procedures include any method that an employer has, by informal practice or course of dealing with the employee, regularly accepted, along with those in the employer's written attendance policy. Roberts's Facebook messages with his group leader, Slater, showed that they routinely discussed Roberts's appendicitis and resulting hospital stays over that medium; Slater responded via the app with follow-up questions about Roberts's status and expected return dates; and Roberts was properly credited with FMLA on the basis of certain Facebook Messenger exchanges.

- *Houston v. Texas Dep't of Agric.,* 17 F.4th 576 (5th Cir. 2021) – The Tenth Circuit affirmed summary judgment for the employer on an FMLA retaliation claim. The employee argued that her firing, via a termination memo that did not include any reasons for termination, was pretext for retaliation for taking disability-based FMLA leave. The court concluded that she failed to raise a dispute of material fact, since the reasons for her termination were contemporaneously documented and aligned with her supervisor's testimony about performance-related reasons for her termination.

- *Carter v. St. Tammany Par. Sch. Bd*., No. 21-30237, 2022 WL 485197 (5th Cir. Feb. 17, 2022), *petition for cert. filed*, No. 22-5791 (U.S. Oct. 7, 2022) – A school board did not violate the FMLA when it did not tell its employee that the statute was the source of the leave offered to her. When Carter sought paid extended sick leave for migraines, the school board told her she was eligible for unpaid leave and twice provided her with the application. Yet she never requested the leave, and instead stopped showing up for work. Since nothing in the record indicated Carter was prejudiced by the school board's failure to explain that the leave offered was an FMLA benefit (she did not submit evidence explaining why she would have been more inclined to complete the form and convert to unpaid status had she known the requirement came from the FMLA), the Fifth Circuit affirmed summary judgment for the school board.

- *Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022), *cert. denied*, No. 22-195, 2022 WL 6572203 (U.S. Oct. 11, 2022) – The Seventh Circuit held that the text of the FMLA (29 U.S.C.A. § 2615(a)(1)) makes clear that denial of FMLA benefits is not required to demonstrate an FMLA interference violation. Interference or restraint alone is enough to establish a violation, and a remedy is available if the plaintiff can show prejudice from the violation. Here, the Court found there was a genuine issue of material fact as to whether a sheriff's office's FMLA manager discouraged an employee from taking FMLA leave by threatening to discipline him for using it, and whether these actions prejudiced him by affecting his decisions about FMLA leave.

- *Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602 (7th Cir. 2022) – A teacher alleged FMLA interference based on her employer's failure to return her to an equivalent lead teacher position following FMLA-qualifying leave. Though Simon received the same salary and benefits in her new role, it involved significantly less responsibility, independence, discretion, and management than her previous Lead Teacher position. The district court had found that she suffered prejudice because the employer "parked her in a

backwater position with materially fewer responsibilities until her contract ran out" and assigned her a new position resembling that of a paraprofessional, which was "below her professional capacity." The Seventh Circuit affirmed, noting that an employee who must give up her fulfilling job for one in which she is overqualified suffers a real impairment of her rights and resulting prejudice, as required by the FMLA; like any professional who spends time away from their area of expertise, she would likely have to explain away that wasted period to future prospective employers.

- *Anderson v. Nations Lending Corp.*, 27 F.4th 1300 (7th Cir. 2022) – The Tenth Circuit affirmed summary judgment for the employer, NLC, on Anderson's FMLA interference and retaliation claims. Under the FMLA, an employee is not entitled to return to her former position if she would have been fired regardless of whether she took leave, and Anderson was unable to establish that she had a right to reinstatement despite numerous severe work performance deficiencies discovered while she was on FMLA leave. She was also unable to demonstrate that NLC terminated her due to her taking FMLA leave rather than due to the deficiencies it discovered while she was out; NLC began tracking her errors and deficiencies well before she requested FMLA leave, and then learned of several additional errors while she was on leave.

- *Brandt v. City of Cedar Falls*, 37 F.4th 470 (8th Cir. 2022) – In an action against her former employer for FMLA interference and retaliation, Brandt failed to demonstrate that she sustained recoverable damages for interference with her rights under the FMLA. The Eighth Circuit held, as matter of first impression, that nominal damages are not recoverable for interference with FMLA rights; they are not included in the specific, statutorily prescribed damages under the FMLA. The Court also noted that the *McDonnell Douglas* burden-shifting framework applies to FMLA retaliation claims, but not claims of FMLA interference. A retaliation claim requires proof of an impermissible discriminatory animus; by contrast, when an employee asserts an FMLA interference claim, the employer's intent in denying the benefit is immaterial.

- *Whittington v. Tyson Foods, Inc.*, 21 F.4th 997 (8th Cir. 2021) – The Eighth Circuit held that an employer's request for physician recertification of employee's leave was reasonable even though it was before the end of the minimum duration of the plaintiff's condition, because there had been a significant change in the plaintiff's absences; the employer therefore did not interfere with his FMLA rights.

- *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280 (10th Cir. 2022) – The Tenth Circuit affirmed summary judgment for the employer on Litzsinger's FMLA and ADA retaliation claims because Litzsinger failed to demonstrate that the reason for her termination was pretextual. Other than temporal proximity between Litzsinger's FMLA leave and her termination – which, absent more, does not establish pretext – Litzsinger presented no evidence to show that the employer's proffered reason for terminating her was false or unworthy of belief. And the employer's changing justifications for terminating her could not establish pretext; providing additional justifications for termination without abandoning the primary reason for termination does not, without more, establish pretext. Inconsistent evidence is only helpful to a plaintiff if the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.

- *Parker v. United Airlines, Inc.,* 49 F.4th 1331 (10th Cir. 2022) – The Tenth Circuit affirmed summary judgment for United Airlines on an FMLA retaliation claim because the decision to fire Parker was made by an independent decision maker. Parker argued that her supervisor's alleged retaliatory motive should be imputed to United. The Tenth circuit disagreed, finding that United broke the retaliatory causal chain by directing other managers to independently investigate and decide whether to adopt the supervisor's recommendation.

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. Since the 2020 Supreme Court decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), courts have applied a less stringent standard of causation to federal sector ADEA plaintiffs than the private sector's "but-for" causation standard; however, cases involving private sector employees can still be instructive regarding other aspects of ADEA claims.

- *Stamey v. Forest River, Inc*., 37 F.4th 1220 (7th Cir. 2022), *reh'g denied*, 2022 WL 3007621 (7th Cir. July 28, 2022) – The Seventh Circuit reversed the district court's grant of summary judgment for the employer, holding that a jury could find that the age-based harassment of the plaintiff – which included constant age-based taunts from dozens of coworkers (an estimated 1,000 incidents over the course of a year), humiliating graffiti in the workplace, and regular interference with plaintiff's workspace and tools – was egregious enough to reach the level of constructive discharge under the ADEA. The court also noted the company's "minimal response" to the plaintiff's complaints: nobody stopped the misconduct, threatened penalties, or monitored the situation to ensure that there was no recurrence, and in fact the manager "trivialized the daily harassment, interference, and vulgar graffiti as mere 'horseplay'[.]" Finally, "A jury could also find that Stamey's 'last straw' reaction of quitting when a manager told him in front of coworkers that he had 'one foot in the grave and the other on a banana peel' was reasonable. Because a supervisor was now contributing to the harassment, and doing so in front of Stamey's coworkers, a factfinder could conclude that management remained unlikely to intervene to stop the harassment and that any future complaints would simply 'f[all] on deaf ears.'" (quoting *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 790 (7th Cir. 2007)).

- *Brooks v. Avancez*, 39 F.4th 424 (7th Cir. 2022) – In rejecting an older employee's appeal of the district court's grant of summary judgment for the employer, the Seventh Circuit held that the relevant inquiry was not whether the employee actually made threats against her coworkers – which was the employer's stated basis for the employee's termination – but rather whether the employer honestly believed that she did. The belief that the employee threatened coworkers formed the legitimate non-discriminatory reason for her termination, and she failed to demonstrate that this reason was pretextual.

- *Gruttemeyer v. Transit Auth.*, 31 F.4th 638 (8th Cir. 2022) – After a jury verdict in the plaintiff's favor, the district court denied the employer's motion for judgment as a matter

of law, and the Eighth Circuit affirmed. There was sufficient evidence for the jury's verdict that the plaintiff was fired because of his disabilities under the ADA and in retaliation for filing a complaint on behalf of a coworker for an alleged ADEA violation. Among other things, the employer argued that no reasonable jury could conclude that the plaintiff engaged in any protected activity under the ADEA that caused his termination. The court disagreed, holding that the jury could reasonably have believed, based on the evidence adduced at trial, that the plaintiff engaged in protected activity – i.e., opposing conduct against his coworker that he reasonably and in good faith believed violated the ADEA – and that the employer was aware of that protected activity when it fired him soon afterward.

- *Smith v. AT&T Mobility Servs., L.L.C.,* No. 21-20366, 2022 WL 1551838 (5th Cir. May 17, 2022) – A 60-year-old customer service representative alleged that his employer violated the ADEA when it denied him a promotion to customer service manager, based on certain comments his supervisor had made. The Fifth Circuit agreed with the district court that most of the comments, such as referring to employees over forty years of age as "old heads," were stray remarks that could not constitute direct evidence of age discrimination. The one comment that was a closer call involved the supervisor telling the plaintiff, in response to his question about openings for customer service manager positions, that she was "not going to hire any tenured employees because" the new facility in which they worked was "state of the art ... with the highest technology and equipment," and she needed customer service managers who were "innovative" and capable of leading the facility "in the right direction." In order to constitute direct evidence of discrimination, rather than stray remarks, comments must be (1) related to the plaintiff's protected class, (2) proximate in time to the complained-of adverse employment decision, (3) made by an individual with authority over the employment decision at issue, and (4) related to that employment decision at issue. In this case, the second, third, and fourth elements were satisfied, but the court determined that the first element was not, because "tenured employees" could not be proven to relate to age. Although it could be viewed as a euphemism for age, and the idea that these employees would not be sufficiently "innovative" to lead a "state of the art" facility seemed to relate to stereotypes about age rather than seniority, a comment can only be considered direct evidence if proves the fact for which it is offered without inference or presumption. Absent evidence that "tenure" was commonly understood to be code for "age" within the company, or some other evidence that the supervisor intended "tenured" to refer to older employees, the comment did not qualify as direct evidence.

Fair Labor Standards Act (FLSA)/Equal Pay Act (EPA)

The Fair Labor Standards Act applies through section 203 of the CAA, 2 U.S.C. § 1313. This section also includes decisions issued under the Equal Pay Act, which amended the FLSA to prohibit sex-based discrimination in wages.

- *Black v. Buffalo Meat Serv., Inc*., No. 21-1468, 2022 WL 2902693 (2d Cir. July 22, 2022) – The Second Circuit affirmed summary judgment for the employer on the plaintiff's wage discrimination claims because she did not adduce evidence that she and her alleged

male comparators had substantially similar job duties. The employer testified that its employees would do "whatever needs to be done" and that it "hire[s] employees to do work" and is "not specific when they are hired." This did not persuade the court that all employees were comparable.

- *Holick v. Cellular Sales of N.Y., LLC*, 48 F.4th 101 (2d Cir. 2022) – The district court did not abuse its discretion by finding that the plaintiffs' unsuccessful and successful claims were intertwined. Attorneys' fees may be awarded to a prevailing party under the FLSA for unsuccessful claims as well as successful ones where they are inextricably intertwined and involve a common core of facts or are based on related legal theories. Here, the plaintiffs' claims all arose from a common set of facts: the conditions of employment between the plaintiffs and the employer.

- *Simmons v. Trans Express Inc.,* 16 F.4th 357 (2d Cir. 2021) – Simmons sued Trans Express Inc. under the FLSA, alleging that she was entitled to unpaid overtime wages, liquidated damages, and attorneys' fees. Because Simmons had already won a judgment against Trans Express in small claims court, the district court dismissed her subsequent federal action. In a case of first impression, the Second Circuit held that claim preclusion is a valid defense to an action brought under the FLSA.

- *Conner v. Cleveland Cnty., N.C*., 22 F.4th 412 (4th Cir. 2022), *petition for cert. filed*, No. 21-1538 (U.S. June 8, 2022) – Plaintiff, an emergency medical services provider, alleged that the County underpaid her for straight (i.e., non-overtime) hours worked during weeks in which she also worked overtime. The Fourth Circuit held, as a matter of apparent first impression, that "overtime gap time" claims were cognizable under the FLSA. As the Court noted, there is no cause of action under the FLSA for pure gap time, which seeks to recover unpaid straight time in a week in which the employee worked no overtime, when there is no evidence of a minimum wage or maximum hour violation by the employer. But the FLSA ensures employees are adequately paid for all overtime hours; to do this, courts must ensure employees are paid all of their straight time wages first under the relevant employment agreement, before overtime is counted. An overtime gap time violation under the FLSA is thus a species of overtime violation: an employee who has not been paid all the straight time compensation she is owed before the overtime compensation is calculated has not been properly paid her overtime

- *Sempowich v. Tactile Sys. Tech., Inc*., 19 F.4th 643 (4th Cir. 2021) – The Fourth Circuit agreed with Sempowich that wage rate, not total wages received, is the proper metric for determining wage discrimination under the Equal Pay Act. The district court incorrectly stated that total wages is the proper metric under the regulations, an error that apparently arose from a misreading of the EEOC's definition of the term "wages." The Fourth Circuit clarified that the term "wages" includes commissions because, just as with salary, an employer could not pay commissions to a female employee at a lower *rate* than a similarly situated male employee.

- *Lee v. Belvac Prod. Mach., Inc.,* No. 20-1805, 2022 WL 4996507 (4th Cir. Oct. 4, 2022) – The fact that a plaintiff alleging sex discrimination under the EPA had the same job title and job description as her proposed comparator was not dispositive. The record evidence

showed that the job description was not controlling, and that the comparator actually performed different duties than the plaintiff did. The court explained that under the EPA, a plaintiff must show that she and her comparators had virtually identical jobs, which requires more than a showing that they held the same title and the same general responsibilities.

- *Schottel v. Neb. State Coll. Sys.*, 42 F.4th 976 (8th Cir. 2022) – An employer met its burden of proving that the pay differential between a female employee and a male employee, who were hired as criminal justice instructors, was based on a factor other than sex. The male employee had more experience than the female employee, both as an adjunct professor and in the criminal justice field, precluding her Equal Pay Act claim.

Occupational Safety and Health Act (OSHAct)

The OSHAct applies to the legislative branch through section 215 of the CAA, 2 U.S.C. § 1341. The OSHAct requires that every employer "shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." 29 U.S.C. § 654(a)(1). Employers are also required to "comply with occupational safety and health standards promulgated under this chapter." 29 U.S.C. § 654(a)(2). The OCWR General Counsel is granted much of the same investigative and prosecutorial authority as the Secretary of Labor, and can issue citations and file complaints if hazards identified by the OGC staff are not abated promptly and appropriately.

- *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) – In January 2022 the Supreme Court re-imposed a stay on OSHA's COVID-19 emergency temporary standard (ETS), which had mandated that employers with at least 100 employees require covered workers to receive a COVID-19 vaccine or else wear a mask and be subject to weekly testing. In an unsigned per curiam opinion, the Court concluded that the petitioners challenging the ETS were likely to succeed on the merits of their claim that the ETS exceeded OSHA's statutory authority, because the Secretary of Labor is authorized to set workplace safety standards rather than general public health measures, and although COVID-19 poses a risk to people in the workplace, it does not constitute an *occupational* hazard in most workplaces. The Court noted that where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations would be permissible; the ETS, however, applied to all employers of 100+ employees regardless of whether the workplace or the nature of the work presented an increased risk. In a concurrence, Justice Gorsuch (joined by Justices Alito and Thomas) explained that the ETS did not pass muster under the "major questions doctrine" – i.e., where Congress expects an agency to make a decision of vast economic and political significance, it must clearly indicate its intention to do so.

  Justices Breyer, Sotomayor, and Kagan dissented, expressing the view that OSHA's rule perfectly fit the language of the applicable statutory provision, which commands OSHA to issue an ETS whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect

employees from such danger." 29 U.S.C. § 655(c)(1). The dissenting Justices wrote that nothing in the statutory text supports the majority's limitation on OSHA's regulatory authority; the OSHAct authorizes regulations to protect employees from all hazards present in the workplace, and "does not require that employees are exposed to those dangers only while on the workplace clock."

- *Walsh v. Walmart, Inc.*, 49 F.4th 821 (2d Cir. 2022) – In a case involving an employee injured by falling merchandise, the Second Circuit emphasized that substantial deference is owed to the Secretary of Labor's interpretation of an OSHA standard, " 'so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations'" (quoting *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991)), and that " '[A] reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary[.]'" (quoting *Martin*, 499 U.S. at 158). In this case, OSHA cited Walmart under the standard involving secure storage, 29 C.F.R. § 1910.176(b), and the Secretary argued that the wording of the standard applied to the conditions that led to the employee's injury, but Walmart disagreed. The dispute centered on whether merchandise stored on racks qualified as being "stored in tiers"; OSHA said yes, and Walmart said no. OSHRC found in favor of Walmart, but the Second Circuit vacated the Commission's decision, holding that the Secretary's interpretation was reasonable and entitled to deference.

- *C&W Facility Servs., Inc. v. Sec'y of Lab., OSHRC*, 22 F.4th 1284 (11th Cir. 2022) – The Occupational Safety and Health Review Commission (OSHRC) upheld a citation for violation of the general personal protective equipment (PPE) standard, 29 C.F.R. § 1910.132(a), for failure to provide and require the use of a personal flotation device for an employee pressure washing a boat dock. The employer appealed, and the Eleventh Circuit set aside OSHRC's decision and vacated the citation. The court explained that because section 1910.132(a) is a "performance standard" – i.e., a standard that "identifies its objective but does not prescribe the means for or the specific obligations of the employer to comply with the objective" – due process requires a heightened knowledge requirement: in this case, the Secretary of Labor had the burden to show either that industry custom required the use of personal flotation devices for pressure washing boat docks, or that the employer had actual knowledge that pressure washing its boat dock required the use of such PPE. No evidence was offered for the existence of an industry custom, and the Secretary's evidence regarding the employer's awareness of a drowning hazard was not enough to establish actual knowledge of the necessity of personal flotation devices.

- *Angel Bros. Enters., Ltd. v. Walsh*, 18 F.4th 827 (5th Cir. 2021) – A company was cited for inadequate cave-in protections at an excavation site, after a foreman allowed a subordinate employee to enter and work in the excavation without a trench box to guard against cave-ins. In challenging the citation, the employer argued that it could not be held liable because the violation resulted from the supervisor's malfeasance, and thus the supervisor's knowledge could not be imputed to the company. The court disagreed, drawing a distinction between a supervisor's awareness of a subordinate's misconduct (which would subject the employer to vicarious liability) and a supervisor's own wrongdoing (which, under a narrow exception, subjects the employer to vicarious

liability only if the supervisor's misconduct was foreseeable). In this case, the violation was the subordinate employee's presence in the unguarded excavation – not the supervisor's failure to prevent it – and the court held that the supervisor's knowledge of the violation flowed to the employer. The company also failed to support its affirmative defense of unpreventable employee misconduct, because it did not produce adequate evidence that it effectively enforces its safety rules upon discovering violations.

- *NDC Constr. Co. v. Sec'y of Lab., U.S. Dep't of Lab.*, No. 20-14484, 2022 WL 2373402 (11th Cir. June 30, 2022) – Although this decision is unpublished, it serves as a good example of how courts analyze the question of whether an employer exercised reasonable diligence to prevent, detect, and abate safety hazards in the workplace.

Labor-Management Relations

Section 220 of the CAA, 2 U.S.C. § 1351, applies the protections of certain sections of the Federal Service Labor-Management Relations Statute (FSLMRS) to some employing offices in the legislative branch. The OCWR Board usually looks to FSLMRS decisions issued by the Federal Labor Relations Authority or the federal courts, but may also consider cases involving the National Labor Relations Act, to the extent that the NLRA has provisions equivalent to those in the FSLMRS.

- *AFGE v. FLRA*, 24 F.4th 666 (D.C. Cir. 2022), *reh'g denied*, 2022 WL 1500891 (D.C. Cir. May 12, 2022) – Some collective bargaining agreements (CBAs) contain provisions commonly known as "zipper clauses" that foreclose or limit midterm bargaining. In September 2020, the FLRA issued a policy statement announcing for the first time that zipper clauses were mandatory subjects of bargaining. That statement reversed a decades-old position that the FSLMRS conferred a statutory right to midterm bargaining, as the Authority declared that, "Instead, the Statute leaves midterm-bargaining obligations to the parties to resolve as part of their term negotiations." By deeming zipper clauses mandatory subjects of bargaining, the Authority created the possibility that an impasses panel could impose zipper clauses on labor unions against their will, thereby limiting their midterm bargaining ability. Three labor unions challenged the policy statement, and the D.C. Circuit vacated the Authority's decision, holding that it was arbitrary and capricious, as "The Authority failed to offer a reasoned explanation for its decision that the Statute does not require midterm bargaining."

- *Constellium Rolled Prods. Ravenswood, LLC v. NLRB*, 45 F.4th 234 (D.C. Cir. 2022) – This case arose under the NLRA, but could potentially have implications for cases involving allegations of retaliation for protected union activity under the FSLMRS. An employer unilaterally changed its system for assigning overtime, prompting the union to file an unfair labor practice charge with the NLRB and leading some employees to protest the change by refusing to sign up for overtime and calling the new overtime sign-up sheet a "whore board." One of those employees, Andrew Williams, wrote "Whore Board" at the top of two sign-up sheets, and was suspended and ultimately terminated. The NLRB determined that Williams' activity was protected, as it was "part of a continuing course of protected activity" in protest of the overtime procedures, and that the employer had

disciplined and fired him out of anti-union animus. The employer argued that instead it fired him for its rules of conduct and anti-harassment policy, based on the sexually offensive term he wrote, but the NLRB rejected that argument, pointing to evidence that the employer otherwise tolerated extensive vulgarity, profanity, and graffiti in the workplace, and had failed to enforce its anti-harassment policy and code of conduct prior to firing Williams. According the NLRB a high degree of deference, the D.C. Circuit affirmed its decision against the employer.

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.

- *Easom v. US Well Servs., Inc.*, 37 F.4th 238 (5th Cir. 2022), *petition for cert. filed*, No. 22-333 (U.S. Oct. 11, 2022) – The Fifth Circuit held that COVID-19 did not qualify as a natural disaster under the WARN Act's natural disaster exception. The appearance of "natural disaster" in a list with "flood, earthquake, or drought" in the statute suggested that Congress intended to limit the term to hydrological, geological, and meteorological events. Additionally, the general principle of narrow construction of exceptions justified not expanding the definition beyond what was justified by the Act's statutory language, context, and purpose.

  The Fifth Circuit also held, as a matter of first impression, that the WARN Act's natural-disaster exception incorporates proximate causation. The court agreed with appellants' argument that deference to the DOL regulation requiring an employer to "demonstrate that its plant closing or mass layoff is a direct result of a natural disaster" (20 C.F.R. § 639.9(c)(2)) was appropriate.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

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.

- *Harwood v. Am. Airlines, Inc.*, 37 F.4th 954 (4th Cir. 2022) – The Fourth Circuit rejected airline pilot Harwood's argument that he should be restored to the same position after military leave rather than an equivalent one, even when relocation was required. The Fourth Circuit held that USERRA allows an employer to reinstate an employee to a similar job in a different location, as long as the position offered has equivalent seniority, status, and pay.

- *Jones v. Town of Spring Lake, N.C.*, No. 20-1957, 2022 WL 1467709 (4th Cir. May 10, 2022) – There was not a sufficient connection between some Town board members' negative feelings about Town employees who had previously served in the military and Jones's termination to defeat summary judgment for the Town on Jones's USERRA claim. Even if he could have established such a connection, the evidence showed that the Town would have fired him even in the absence of his military status.

- *Moss v. United Airlines, Inc.*, 20 F.4th 375 (7th Cir. 2021) – The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the employer, holding that sick-time accrual was not a seniority-based benefit within the meaning of USERRA, and thus denying sick-time accrual in excess of ninety days to military reservist employees did not violate the statute. For a benefit to be seniority-based, the Seventh Circuit held, the benefit must be a reward for length of service. The sick leave in question was not such a reward, as there was no discretion involved in sick time accrual, the accrual policy had no vesting period, employees did not accrue more sick time the longer they were employed by carrier, and the sick leave policy contained a legitimate work requirement.

- *Belaustegui v. Int'l Longshore & Warehouse Union*, 36 F.4th 919 (9th Cir. 2022) – The plaintiff in this case left his job as an entry-level longshore worker to enlist in the U.S. Air Force. After nine years of active duty, he returned to work as a longshoreman and requested a promotion to the position he claims he likely would have attained had he not served in the military. When his request was denied, he filed suit alleging discrimination under USERRA. The district court granted the employer's motion for summary judgment, but the Ninth Circuit reversed, holding that hours credits and elevation rights set forth in a collective bargaining agreement qualify as "benefits of employment" protected under USERRA.

- *Faris v. Dep't of the Air Force,* No. 2022-1561, 2022 WL 4376408 (Fed. Cir. Sept. 22, 2022) – The Federal Circuit affirmed MSPB's denial of corrective action for a civilian Air Force employee. Faris argued that he was denied a benefit of employment because he was required to make deposits to obtain FERS credit during the times he was on leave without pay status for military service. The Federal Circuit found that his arguments were defeated by the clear language of both the FERS statute (which requires that an employee seeking credit for a period of military service must make a deposit in order to have such a credit allowed) and USERRA (which explicitly contemplates that an employee absent for military service "may be required to pay the employee cost, if any, of any funded benefit continued").

  Faris also argued that he was denied a benefit of employment when the agency did not allow him to make a deposit and receive FERS service credit during his week of inactive duty National Guard training. Because the FERS statute expressly defines "military service" as "active service," his inactive duty training was not eligible for FERS credit, and he was not denied an employment benefit under USERRA.

First Amendment

Because legislative branch employing offices are government actors, personnel actions can sometimes implicate employees' First Amendment rights. Although the CAA does not address First Amendment issues, it is important to be aware of how courts analyze these cases.

- *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) – A public high school football coach was placed on administrative leave, and ultimately not rehired, because he disobeyed the school district's instruction to stop his practice of praying at midfield at the end of each football game and in the locker room prior to games. The school district asserted that it would be violating the Establishment Clause by allowing the coach to pray in view of students or the public, while the coach argued that the district was burdening his right to free speech and the free exercise of religion. The district court sided with the school district, holding that the coach's speech was made in his capacity as a government employee and therefore unprotected; alternatively, the district court reasoned that even if the coach was speaking as a private citizen, the school district had a compelling interest in avoiding an Establishment Clause violation. The Ninth Circuit affirmed, using similar reasoning.

  The Supreme Court reversed. In the majority opinion, Justice Gorsuch explained that nobody disputed the fact that the coach had engaged in a sincerely motivated religious exercise, or that the school district's discipline was not pursuant to a neutral and generally applicable rule, but was specifically aimed at the religious nature of the coach's conduct. Thus the school district violated the coach's rights under the Free Exercise Clause. The Court also held that the coach's free speech rights were violated, because he was speaking in his capacity as a private citizen rather than as a government employee: he was not engaged in speech that was ordinarily within the scope of his duties as a coach; he was not speaking pursuant to government policy or seeking to convey a government-created message; nor was he performing the football coaching duties that the school district paid him to carry out. The Court noted that during the postgame period when the coach offered his midfield prayers, "coaches were free to attend briefly to personal matters – everything from checking sports scores on their phones to greeting friends and family in the stands… That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech." Finally, applying strict scrutiny, the Court rejected the school district's argument that allowing the prayers to continue would have led it to violate the Establishment Clause, holding that the school district failed to carry its burden to show that its restrictions on the coach's protected rights served a compelling government interest and were narrowly tailored to that end. Citing the Court's "traditional understanding that permitting private speech is not the same thing as coercing others to participate in it," the majority cautioned that restricting the coach's activity would be akin to forbidding the wearing of yarmulkes, praying quietly over lunch, or any other expressions of religion.

  Justice Sotomayor dissented, joined by Justices Breyer and Kagan, and essentially adopted the reasoning of the district court and the Ninth Circuit: "Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its

employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so."

- *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253 (2022) – The Supreme Court unanimously rejected the First Amendment claims of a member of the publicly-elected Board of Trustees of the Houston Community College System (HCC), whom the Board had publicly censured after years of clashes with his fellow trustees. Addressing the question of whether a purely verbal censure can support an actionable First Amendment claim under 42 U.S.C. § 1983, the Court began by stating the unchallenged premise that, "[a]s a general matter, the First Amendment prohibits government officials from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech." 142 S. Ct. 1253, 1259 (internal quotations and citations omitted). However, the Court went on to note that, dating back to colonial times, "elected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment." *Id*. The Court described censures of Members of the U.S. Senate and U.S. House of Representatives, and stated that such censures are even more common at the state and local level. The Court found this history significant because, "When faced with a dispute about the Constitution's meaning or application, '[l]ong settled and established practice is a consideration of great weight.'" *Id*. (quoting The Pocket Veto Case, 279 U. S. 655, 689, 49 S.Ct. 463 (1929)). "Often, 'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases.'" *Id*. (quoting Letter from J. Madison to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)).

  Turning to more contemporary precedents, the Court explained that "a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.'" 142 S. Ct. at 1260 (quoting *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722 (2019)). The Court noted that it is imperative to distinguish between material and immaterial adverse actions, and in analyzing the question of materiality, it focused in on two primary aspects of this particular case: "First, Mr. Wilson was an elected official. In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes. … Second, the only adverse action at issue before us is itself a form of speech from Mr. Wilson's colleagues that concerns the conduct of public office. The First Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same." *Id*. at 1261.

  However, the Court cautioned that "In rejecting Mr. Wilson's claim, we do not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim." *Id*. at 1262. On the contrary, "Our case is a narrow one. It involves a

censure of one member of an elected body by other members of the same body. It does not involve expulsion, exclusion, or any other form of punishment. It entails only a First Amendment retaliation claim, not any other claim or any other source of law. The Board's censure spoke to the conduct of official business, and it was issued by individuals seeking to discharge their public duties." *Id*. at 1263-64.

- *O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045 (11th Cir. 2022) – Two fire department captains were disciplined for violating the fire department's Social Media Policy, after they criticized a union official on an invitation-only Facebook page dedicated to one of the captains' campaign for the union presidency. The district court rejected the fire captains' free speech and free association claims, holding that they were not speaking on matters of public concern and didn't allege any associational conduct that the County had inhibited, but the Eleventh Circuit reversed and remanded. Examining the three sub-factors that determine whether speech is on a matter of public concern – the "content, form, and context" of the employees' statements – the Court held that the plaintiffs' speech was intended to expose what they perceived to be corruption within the union and the fire department (content), the speech was still protected even though made privately rather than publicly (form), and that airing their grievances in the run-up to a union election did not remove that protection, because issues of union organization can be matters of public concern (context). The Eleventh Circuit affirmed dismissal of the free association claims, because the plaintiffs complained "that they were unfairly disciplined for their social-media posts—that is, for their speech—*not* that they were punished for joining the union, collectively bargaining, or otherwise hanging around with people who share their beliefs. At its core, this is a speech case, not an association case." Finally, although it affirmed the district court's grant of summary judgment for the County on the plaintiffs' claim that the fire department's Social Media Policy was unconstitutionally vague, it reversed and remanded the grant of summary judgment on the plaintiffs' claim that the policy – which prohibited "content that could be reasonably interpreted as having an adverse effect upon Fire Rescue morale, discipline, operations, the safety of staff, or perception of the public" – was unconstitutionally overbroad.

- *Myers v. City of Centerville, Ohio*, 41 F.4th 746 (6th Cir. 2022), *reh'g denied*, 2022 WL 10220168 (6th Cir. Oct. 5, 2022) – A detective sergeant in the city's police department claimed his First Amendment rights were violated, alleging that he was suspended and then fired in retaliation for writing a letter that was critical of the city's public works department. The letter had been written at the request of the plaintiff's acquaintance who had recently been fired from the public works department, and in addition to praising the acquaintance's character, the plaintiff also devoted a paragraph to describing his observations of the culture of the public works department, which he described as "a culture where grown men were accustomed to behaving as adolescents, sometimes using crude jokes or inappropriate language during their social interactions," and stating that this type of conduct was "systemic" and "part of the everyday norm" in the department. He also stated his view that the firing of his acquaintance was unfair, and that "the City would have been better served" if an alternative to termination had been found. The district court denied the defendant's motion for judgment on the pleadings, and the Sixth Circuit affirmed. Among other things, the Sixth Circuit held that the statements in the plaintiff's letter qualified as speech on matters of public concern. Using the balancing test

established in the landmark *Pickering* Supreme Court case, the court then evaluated whether the plaintiff's interest in speaking on the matter of public concern at issue outweighed the city's interest in promoting the efficiency of the public services it performs through its employees. *See Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563 (1968). Drawing inferences in the plaintiff's favor, the court held that he had stated a plausible claim under the First Amendment.

- *Cotriss v. City of Roswell*, No. 19-12747, 2022 WL 2345729 (11th Cir. June 29, 2022) – A police officer had been fired for displaying a Confederate battle flag in front of her private home, sometimes with her police cruiser present. The Eleventh Circuit affirmed a grant of summary judgment to the City on the officer's First Amendment free speech claim, holding that the city's interest in efficiently and effectively running its police department – including "a clear interest in maintaining a favorable reputation with the public and in ensuring there are no disruptions within the Police Department" – outweighed the officer's interest in flying the Confederate battle flag, especially in a way that could implicitly associate the flag with the Department, and therefore the discipline based on her speech was permissible.

- *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty*., 39 F.4th 95 (3d Cir. 2022) – County Port Authority employees were disciplined for wearing Black Lives Matter face masks to work, in violation of the employer's policy prohibiting political or social-protest messages on face masks. The employees sued, along with their union, alleging that their First Amendment rights were violated. The district court imposed a preliminary injunction rescinding the discipline, and the Port Authority appealed. The Third Circuit upheld the preliminary injunction, concluding that the employees and union had demonstrated a likelihood of success on the merits of their First Amendment claim. First, the court found that the employees wearing political or social-protest masks were speaking as private citizens rather than pursuant to their duties as government employees, and that they were speaking on matters of public concern – thus satisfying the two prerequisites that qualified them for the interest-balancing test. Turning to that balancing exercise, the court found that while the employees' masks "bore messages relating to matters of public concern on which they had a strong interest in commenting," the Port Authority had not established that disruption to its operations was likely to occur if the employees were allowed to wear the masks. The court also assessed the employees' likelihood of success on their challenge to the policy itself, and likewise held that the Port Authority failed to show that the "broad range of present and future expression" the policy forbids would disrupt operations, and thus did not demonstrate that the policy was narrowly tailored to a "real, not merely conjectural" harm.

- *Breiterman v. U.S. Capitol Police*, 15 F.4th 1166 (D.C. Cir. 2021) – A Capitol Police officer who had been demoted from the rank of Sergeant after leaking a photo of an unsecured firearm in a bathroom argued that her First Amendment rights were violated because she was speaking on a matter of public concern. The D.C. Circuit noted that there may be a stronger governmental interest in regulating the speech of police officers than that of other governmental employees, because of the special degree of trust and discipline required in a police force. The court assumed that Breiterman was speaking on a matter of public concern and that she spoke as a citizen rather than in her official

capacity, but concluded that the USCP's interests against Breiterman's speech – i.e., protecting sensitive information in furtherance of the agency's mission, and employing officers and supervisors who can keep confidences, especially with respect to internal investigations and security – outweighed Breiterman's interest in speaking on a matter of public concern and the public's interest in obtaining the information she leaked to the media. Her First Amendment claim therefore failed, and summary judgment for the USCP was affirmed.