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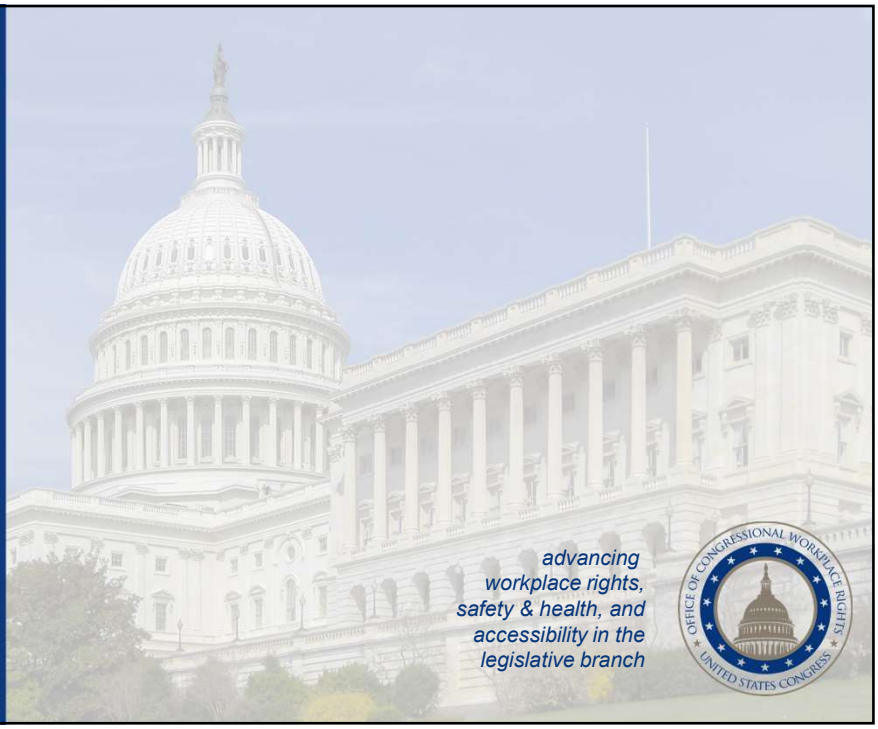
Recent Cases Involving Potential CAA Issues



advancing workplace rights, safety & health, and accessibility in the legislative branch

Office of Congressional Workplace Rights

Office of the General Counsel

October 26, 2022

Welcome

Presenters

- Hillary Benson, Deputy General Counsel
- Dynah Haubert, Senior Attorney

Recent Case Law

- Sample of significant or interesting decisions from 2021-22 regarding most of the statutes applied by the CAA
- Focus is on decisions by U.S. Courts of Appeals
- OCWR Board and Hearing Officers are not bound by these decisions but look to them for guidance
- Today we will highlight just a few of the cases we find particularly interesting, but the outline contains many more

Americans with Disabilities Act / Rehabilitation Act

"Qualified" Job Applicants

To be "qualified" for purposes of establishing an ADA claim, a job applicant must be qualified for the employment position itself, not merely as a test-taker.

- *Williams v. MTA Bus Co.*, 44 F.4th 115 (2d Cir. 2022) – Denial of ASL interpreter for job applicant did not violate ADA/Rehab Act, because the plaintiff showed only that he was qualified to take the test, not that he could otherwise perform the essential functions of the job.
- *Frilando v. New York City Transit Auth.*, No. 21-169-CV, 2022 WL 3569551 (2d Cir. Aug. 19, 2022) – Following *Williams*, the court held that denial of ASL interpreter for pre-employment exams did not violate the ADA/Rehab Act because the applicant didn't show he was otherwise qualified to perform the jobs for which he was applying.

Direct Threat

Employers can show that an individual is not "qualified" to perform the essential function of a job if he would pose a direct threat to himself and others.

- *Anderson v. Norfolk S. Ry. Co.*, No. 21-1735, 2022 WL 1073581 (3d Cir. Apr. 11, 2022) – A small likelihood of severe harm can equal significant risk for direct threat purposes.
- *Bosarge v. Mobile Area Water & Sewer Serv.*, No. 20-14298, 2022 WL 203020 (11th Cir. Jan. 24, 2022) – The plaintiff's doctor's description of his symptoms was the "best available objective evidence" as required for an employer's direct threat assessment.

Pretext

Evidence of inconsistent reasons given for employer's actions is only helpful to a plaintiff if the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.

- *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280 (10th Cir. 2022) – Employer's changing justifications for terminating employee could not establish pretext; providing additional justifications for termination without abandoning the primary reason for termination does not, without more, establish pretext.
- *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523 (5th Cir. 2022) – Plaintiff presented evidence sufficient to rebut her employer'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 the employer evaluated both terminated and retained employees against any fixed criteria.

Leave as a Reasonable Accommodation

Under the ADA, leave may be a reasonable accommodation, and a temporary inability to work while on such leave does not mean that an individual is not otherwise qualified for her position.

- *King v. Steward Trumbull Mem'l Hosp., Inc.*, 30 F.4th 551 (6th Cir. 2022) – Medical leave that would allow a nurse to return to her job may be an ADA reasonable accommodation. Her inability to work while on such leave did not mean she was not otherwise qualified for her position.
- *Blanchet v. Charter Commc'ns, LLC*, 27 F.4th 1221 (6th Cir. 2022), *reh'g denied*, 2022 WL 1519183 (6th Cir. May 5, 2022) – 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.

Other Disability Cases

- *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, *reh'g denied*, 142 S. Ct. 2853 (2022) – A deaf and legally blind plaintiff 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. A 6-3 majority of the Supreme Court held that emotional distress damages are not recoverable under Title VI of the Civil Rights Act and the statutes that incorporate its remedies, including the Rehabilitation Act and ACA.
- *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *reh'g denied*, 50 F.4th 429 (4th Cir. 2022) – In this § 1983 action by a formerly incarcerated individual, a Fourth Circuit majority held that gender dysphoria resulting from physical impairment is a disability under the ADA and Rehabilitation Act.

Title VII

Adverse Employment Action – Transfer/Denial of Transfer

- *Muldrow v. City of St. Louis, Mo.*, 30 F.4th 680 (8th Cir. 2022), *petition for cert. filed*, No. 22-193 (U.S. Aug 31, 2022) – Transfers that do not result in materially significant employment disadvantages are not materially adverse employment actions for Title VII purposes; employee's claim failed because her transfer did not result in lower pay or rank, or harm her future career prospects.
- *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (en banc) – 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 Title VII antidiscrimination provision contains no requirement of "objectively tangible harm."

Adverse Employment Action – Other Cases

- *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, No. 21-10133, 2022 WL 6943167 (5th Cir. Oct. 12, 2022) – Panel of Fifth Circuit judges reluctantly held that gender-based scheduling policy allowing male but not female officers to take full weekends off did not violate Title VII because, although the policy intentionally discriminated because on sex, adverse employment actions are defined by Circuit precedent as "ultimate employment decisions," and the scheduling policy at issue here did not fit into that category; the panel urged the full court to reconsider the case, and rehearing en banc has been granted.
- *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202 (10th Cir. 2022) – Realignment of sales representative's territories was not an adverse employment action because she did not produce sufficient objective evidence of material disadvantage; delay in performance evaluations also was not an adverse employment action because she did not show how it caused more than a mere inconvenience or cause a significant change in her employment status.

Similarly-Situated Comparators

- *Said v. Mayo Clinic*, 44 F.4th 1142 (8th Cir. 2022) – Plaintiff alleging race, religion, and national origin discrimination 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 the comparator, 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.
- *Abebe v. Health & Hosp. Corp. of Marion Cnty.*, 35 F.4th 601 (7th Cir. 2022) – Although plaintiff's comparators had been involved in similar incidents – including a physical altercation – the comparison was not meaningful because the plaintiff addressed those incidents "in a confrontational way," which led to her low performance reviews.

Title VII Retaliation

- *Huff v. Buttigieg*, 42 F.4th 638 (7th Cir. 2022) – Applies *Babb* causation standard to Title VII retaliation claim: personnel actions must be made "free from any" retaliatory motive; however, whether or not retaliation was the but-for cause of the personnel action is still relevant in determining the appropriate remedy.
- *Patterson v. Georgia Pac., LLC*, 38 F.4th 1336 (11th Cir. 2022) – Rejects the "manager exception" theory for HR personnel; also holds that retaliation against an employee for testifying against her *former* employer is still unlawful under Title VII.
- *Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340 (3d Cir. 2022) – Where the employer's investigation led to discovery of cell phone messages that resulted in his termination, the employer's motivation for investigating the employee was relevant to the issue of pretext.

Other Title VII Cases

- *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263 (1st Cir. 2022) – Rejected plaintiffs' theory of "advocacy discrimination"; discrimination requires differential treatment of employees based on their own membership in a protected class.
- *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643 (9th Cir. 2021) – Employer can be liable for creating a hostile work environment if it does not take steps to protect employees from third-party harassment.

Related Issues

- *West v. Radtke*, 48 F.4th 836 (7th Cir. 2022) – In an inmate's civil rights lawsuit based on a strip search performed by a transgender guard, which the inmate opposed on religious grounds, the court rejected the prison's defense that prohibiting the guard from conducting the search would violate Title VII.
- Harvard/UNC admissions cases – The SCOTUS will hear two cases involving challenges to race-conscious undergraduate admissions policies under Title VI of the Civil Rights Act of 1964. The outcomes could potentially have implications in the employment context.
  - *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)
  - *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)

  Both admissions policies withstood strict scrutiny; schools have compelling interest in educational benefits of diversity, race is only one of many factors considered in admissions, the policies are narrowly tailored, and schools made good faith efforts to consider race-neutral alternatives.

Family and Medical Leave Act

Abuse of FMLA leave

As the Third Circuit opened its opinion in Snyder, "Employers may not punish employees for taking medical leave, but they need not abide abuse." Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave.

- *Snyder v. DowDuPont, Inc.*, No. 21-1235, 2022 WL 1467439 (3d Cir. May 10, 2022) – An employer did not commit unlawful FMLA retaliation by surveilling and ultimately firing an employee who was suspected of abusing her FMLA leave.
- *Vanhook v. Cooper Health Sys.*, No. 21-2213, 2022 WL 990220 (3d Cir. Mar. 31, 2022) – An employer's belief, based on surveillance, that an employee abused her FMLA leave was a legitimate, non-pretextual, nondiscriminatory reason for its termination of her employment.

Other FMLA Cases

- *Roberts v. Gestamp W.V., LLC*, 45 F.4th 726 (4th Cir. 2022) – Employee 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.
- *Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022), *cert. denied*, No. 22-195, 2022 WL 6572203 (U.S. Oct. 11, 2022) – 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.

Age Discrimination in Employment Act

ADEA Cases

- *Stamey v. Forest River, Inc.*, 37 F.4th 1220 (7th Cir. 2022), *reh'g denied*, 2022 WL 3007621 (7th Cir. July 28, 2022) – Plaintiff produced enough evidence of age-based harassment to survive summary judgment on his constructive discharge claim, including frequent taunting, humiliating graffiti, and interference with his workspace and tools; participation of supervisor in the harassment indicated that management was not likely to intervene.
- *Gruttemeyer v. Transit Auth.*, 31 F.4th 638 (8th Cir. 2022) – Advocating for coworker whose ADEA rights were allegedly violated is protected activity under the ADEA.
- *Smith v. AT&T Mobility Servs., L.L.C.*, No. 21-20366, 2022 WL 1551838 (5th Cir. May 17, 2022) – Supervisor's comment that she did not want to promote "tenured employees" because she wanted to hire "innovative" managers for the "state of the art" facility did not constitute direct evidence of age discrimination, because plaintiff could not show that supervisor intended "tenured" to refer to age.

Fair Labor Standards Act

Equal Pay Act Comparators

Under the Equal Pay Act – which amended the FLSA to prohibit sex-based wage discrimination – a plaintiff must show that she and her comparators had virtually identical jobs, which is a stricter standard than in Title VII sex discrimination cases.

- *Lee v. Belvac Prod. Mach., Inc.*, No. 20-1805, 2022 WL 4996507 (4th Cir. Oct. 4, 2022) – The fact that a plaintiff had the same job title and job description as her proposed comparator was not sufficient to establish a prima facie case under the EPA, which requires a showing that a plaintiff and comparators had virtually identical jobs.
- *Black v. Buffalo Meat Serv., Inc.*, No. 21-1468, 2022 WL 2902693 (2d Cir. July 22, 2022) – An employer's testimony that employees all did whatever needed to be done and that they weren't hired for specific work did not persuade the court that all employees were comparable.

Occupational Safety & Health Act

OSH Cases

- *Walsh v. Walmart, Inc.*, 49 F.4th 821(2d Cir. 2022) – In vacating a decision of the OSHRC, the court afforded a high level of deference to the Secretary of Labor's reasonable interpretation of the standard for secure storage.
- *C&W Facility Servs., Inc. v. Sec'y of Lab., OSHRC*, 22 F.4th 1284 (11th Cir. 2022) – The court vacated a citation for violation of the general PPE standard against an employer who failed to provide and require the use of personal flotation devices by employees cleaning a boat dock, because the Secretary failed to demonstrate either that industry custom required the use of personal flotation devices for such work or that the employer had actual knowledge that personal flotation devices were required.
- *Angel Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827 (5th Cir. 2021) – The court rejected the employer's defense of supervisor malfeasance, because for purposes of vicarious liability, a supervisor's knowledge of a subordinate's misconduct is not the same as the supervisor's own wrongdoing; the employer's defense of unpreventable employee misconduct failed because it did not demonstrate that it effectively enforced its own safety rules upon discovering violations.

Labor-Management Relations

Labor-Management Cases

- *AFGE v. FLRA*, 24 F.4th 666 (D.C. Cir. 2022), *reh'g denied*, 2022 WL 1500891 (D.C. Cir. May 12, 2022) – The FLRA issued a policy statement in 2020 declaring that zipper clauses were mandatory subjects of bargaining, but the D.C. Circuit vacated that decision as arbitrary and capricious.
- *Constellium Rolled Prods. Ravenswood, LLC v. NLRB*, 45 F.4th 234 (D.C. Cir. 2022) – Employer unlawfully retaliated against employee for protected union activity when it terminated him for writing an offensive term on an overtime sign-up sheet, which he did as part of an ongoing protest against the employer's unilateral change to its overtime procedures.

WARN Act

Natural Disasters

An employer can avoid WARN Act liability for failing to provide the required notice by demonstrating that the closing or layoff was the result of a natural disaster.

- *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) – COVID-19 did not qualify as a natural disaster under the WARN Act's natural disaster exception.

Uniformed Services Employment and Reemployment Rights Act

Denial of Benefit of Employment

USERRA prohibits employers from denying employment benefits to employees on the basis of their military service.

- *Faris v. Dep't of the Air Force*, No. 2022-1561, 2022 WL 4376408 (Fed. Cir. Sept. 22, 2022) – Requiring the plaintiff to make deposits to obtain FERS credit during the times he was on LWOP status for military service did not deny him a benefit of employment and therefore did not violate USERRA.

Questions?

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