Office of Congressional Workplace Rights

Office of the General Counsel

FEDERAL CASE LAW UPDATE
DECEMBER 17, 2025

The Congressional Accountability Act (CAA) applies more than a dozen 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.[1] In this outline we round up some significant and interesting recent federal appellate opinions from the past year involving many of the statutes applied by the CAA, as well as some First Amendment cases and federal district court decisions that may have implications for legislative branch employing offices and covered employees.

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[1] The Board's decisions are available on the OCWR web site at https://www.ocwr.gov/board-decisions/.

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
- **Family and Medical Leave Act** – CAA section 202, 2 U.S.C. § 1312
- **Fair Labor Standards Act** – CAA section 203, 2 U.S.C. § 1313
- **Employee Polygraph Protection Act** – CAA section 204, 2 U.S.C. § 1314
- **Worker Adjustment and Retraining Notification Act** – CAA section 205, 2 U.S.C. § 1315
- **Uniformed Services Employment and Reemployment Rights Act** – CAA section 206, 2 U.S.C. § 1316
- **Veterans Employment Opportunity Act** – Pub. L. 105-339 § 4(c), 2 U.S.C. § 1316a
- **Fair Chance to Compete for Jobs Act** – CAA section 207, 2 U.S.C. § 1316b
- **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
- **Pregnant Workers Fairness Act** – Pub. L. 117-328, 42 U.S.C. § 2000gg

Recent Case Law

Genetic Information Nondiscrimination Act (GINA)

GINA by its terms it applies directly to covered employees in the legislative branch. 42 U.S.C. § 2000ff–6(c). In 2018 the CAA Reform Act amended the CAA to include GINA among its list of applicable laws. 2 U.S.C. § 1302(c).

- *Russo v. Patchogue-Medford Sch. Dist.*, 129 F.4th 182 (2d Cir. 2025) – A school district employee sued for violations of several laws in connection with her unsuccessful efforts to secure a religious exemption from the COVID-19 vaccine. Among other things, she alleged that the school district violated GINA because inquiring about her and her child's vaccination histories as part of its review of her religious exemption request constituted impermissible solicitation and use of her genetic information. The district court granted summary judgment for the employer, and the Second Circuit agreed, holding that a family member's vaccine history does not qualify as genetic information within the meaning of GINA. (This case is also discussed in the Title VII section of this outline.)

Americans with Disabilities Act (ADA)/Rehabilitation Act (RA)

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.

Failure to Accommodate, Discrimination, and Other Disability Cases

- *Tudor v. Whitehall Cent. Sch. Dist*., 132 F.4th 242 (2d Cir. 2025) – In 2008, Angel Tudor, a teacher with PTSD, received permission to leave campus for two 15-minute breaks per day as an accommodation. These breaks helped her compose herself away from the workplace, an environment that frequently triggered her symptoms. During the 2019-2020 school year, no employee was available to cover Tudor's classroom during the afternoon, so she was not permitted take the afternoon break. She sued and, during discovery, acknowledged that she was able to perform the essential functions of her job even without the afternoon break accommodation, though "under great duress and harm." The district court granted summary judgment to the school district.

  The Second Circuit vacated and remanded, holding that "A straightforward reading of the ADA confirms that an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation." All circuits which had previously considered this issue held the same.

  The court noted that "We may share in the blame for the district court's error here." Although the statute refers to "an individual who, *with or without reasonable accommodation*," can perform the essential functions of the job (42 U.S.C. § 12111(8)

(emphasis added)), the Second Circuit has sometimes omitted "or without" when articulating the third element of a prima facie failure to accommodate claim (e.g., "with reasonable accommodation, plaintiff could perform the essential functions of the job at issue." *Natofsky v. City of New York*, 921 F.3d 337, 352 (2d Cir. 2019)). Nonetheless, "'with or without' means with *or* without[.]"

- *Smith v. Newport Utils*, 129 F.4th 944 (6th Cir. 2025) – Larry Smith worked as a bucket foreman for a utility company, an "inherently dangerous" role fixing live power lines, often in extreme weather, when he developed seizures triggered by sleep deprivation and exhaustion. He sued under the ADA when, after he had two on-the-job seizure-related incidents within months of each other, Newport put him on leave and forced him to retire. Newport contended that Smith posed a direct threat, "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). Two of Smith's own doctors and Newport's medical review officer suggested that he could safely perform the job only if Newport capped his hours or eliminated the position's standby and overtime requirements. Smith argued Newport should have accommodated him by eliminating the requirement that he perform standby work and limiting his work schedule to 40 hours per week.

  The Sixth Circuit disagreed. A modified work schedule may be a reasonable accommodation under the ADA, but not if it would eliminate an essential function of the job. The court reasoned that many factors indicated that overtime and standby work were essential functions of the bucket foreman position: because utility companies cannot predict storms or other emergencies, the employees who repair downed power lines must be able to work overtime on short notice, a requirement identified in the written job description, the VP of HR's deposition, and the deposition of Smith himself.

  Smith responded that Newport allowed employees to have coworkers cover their overtime and standby work. However, the ADA does not force employers to shift work onto other employees: "the company's decision to allow coworkers to *voluntarily* 'take care' of each other does not mean that the company must *compel* Smith's coworkers to take on this extra work." The Sixth Circuit thus affirmed summary judgment for Newport.

- *Schoper v. Bd. of Trs. of W. Ill. Univ*., 119 F.4th 527 (7th Cir. 2024) – Western Illinois University's tenure-track faculty could apply for tenure in year six of employment; if not recommended for tenure, they were issued a terminal contract for their seventh year. A "stop-the-clock" provision allowed faculty to request an extra year to apply for tenure due to significant illness, as long as the request was made before their tenure application due date in year six. During her fifth year as a tenure-track professor, Sarah Schoper experienced a brain injury caused by a pulmonary embolism, and developed disabilities including aphasia (difficulty retrieving words). She returned to teaching within a few months on her neurologist's recommendation, and did not take advantage of the stop-the-clock provision. Her teaching was affected by her disability, and students began to complain. In student evaluations, which were a component of a tenure decision, students described her as a "weed that needed to be plucked," compared her abilities to those of a preschooler, and suggested that she was "not the teacher [she] used to be and that [she]

needed more time to recover." When she was not recommended for tenure, she requested reconsideration and more time to achieve tenure, raising her disability for the first time, but was ultimately issued a terminal contract.

The Seventh Circuit affirmed the district court's grant of summary judgment to the University on Schoper's failure-to-accommodate and disability discrimination claims. First, it held that she was not a qualified individual since her student evaluation scores post-injury slipped below the minimum recommended threshold for tenure. Even had she been qualified, the University was not obligated to accommodate her with reconsideration: "a second chance is not a reasonable accommodation when it does not request that the employer change anything, but rather simply requests an opportunity for the employee to change their behavior."

The Seventh Circuit held that Schoper's disability discrimination claim also failed regardless of her status as a qualified individual because she could not show that her traumatic brain injury was the "determinative factor" in the University's decision to deny her tenure. None of the student comments highlighted by the tenure reviewers in their negative recommendations concerned Schoper's disability. The Second Circuit disagreed that student comments comparing Schoper to a weed that should be plucked from a garden and to a preschooler were plainly discriminatory, as they could just as easily have been directed toward nondisabled professors.

- *Jenny v. L3Harris Techs., Inc.*, 144 F.4th 1194 (10th Cir. 2025) – Three months after he was granted an accommodation for his disability, David Jenny was denied permission to travel for business, reorganized out of his leadership role, and ultimately terminated. When he sued for discriminatory and retaliatory discharge under the ADA and Rehab Act, the district court noted that he had likely established a prima facie case and had proffered evidence that L3Harris's stated reason for termination was pretextual, but nonetheless granted summary judgment to L3Harris on the grounds that Jenny presented insufficient evidence tying his discharge to the fact of his disability or his request for accommodation.

  The Tenth Circuit rejected the district court's application to Jenny's case of the narrow *Reeves* exception. The primary holding of *Reeves* clarified that a plaintiff who has shown pretext under the *McDonnell Douglas* framework generally need not do anything further to avoid summary judgment, rejecting the "pretext plus" standard that required plaintiffs to show both pretext and additional evidence of discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48 (2000). However, the Supreme Court acknowledged that "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory" – the "*Reeves* exception." *Reeves*, 530 U.S. at 148. One such instance it named was "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision[.]" *Id.* The district court relied on this scenario to justify its order, speculating that there might have been a nondiscriminatory reason for L3Harris's decision. The Tenth Circuit rejected this speculation as antithetical to *Reeves*. Since Jenny satisfied the

McDonnell Douglas framework and the *Reeves* exception did not apply, it reversed and remanded.

- *Everson v. Coca-Cola Co.*, No. 24-11058, 2024 WL 5116429 (11th Cir. Dec. 16, 2024), *cert. denied*, No. 24-1164 (U.S. Oct. 6, 2025) – Jacqueline Everson worked as a senior financial analyst at Coca-Cola and began receiving long-term disability benefits in 2003. These benefits were terminated in 2005 when it was determined that she no longer met the criteria. In 2023, she sued alleging ongoing discrimination under the ADA, claiming she had just discovered a document proving her former employer violated its own policy by terminating her benefits prematurely. The Eleventh Circuit affirmed the district court's dismissal of her claims. It reasoned that the continuing violations doctrine does not apply to discrete acts, even if the effects of those acts persist over time, so she could not revive her claims nearly 20 years after her benefits termination.

Medical Exams/Inquiries

- *Nawara v. Cook Cnty.*, 132 F.4th 1031 (7th Cir. 2025), *cert. denied*, No. 25-303 (U.S. Dec. 15, 2025) – John Nawara worked as a correctional officer. After he initiated several altercations with other employees, the Sheriff's office placed him on leave and required him to undergo a fitness-for-duty examination before returning to work. He sued, alleging the examination requirement and related requests for medical records violated the ADA's prohibition on medical examinations and inquiries (42 U.S.C. § 12112(d)(4)). The jury agreed, but awarded no damages. The district court denied his post-trial motion for back pay. It determined that a plaintiff must have a disability or perceived disability for a violation of § 12112(d)(4) to constitute discrimination on account of disability. Since the applicable remedy provision bars a court from awarding back pay where an employee suffers an adverse employment action "for any reason other than discrimination" on account of disability, the district court denied his request.

  The Seventh Circuit reversed. It analyzed the statute's language and concluded that "[42 U.S.C.] § 12112(a)'s prohibition on discriminating against a qualified individual on the basis of disability 'shall include' § 12112(d)'s prohibition on requiring a medical examination or inquiry…. Put another way, to prove a violation of § 12112(d)(4) is to prove discrimination on the basis of disability under § 12112(a)." It thus held that Nawara, even in the absence of evidence that he was (or was regarded as) disabled, experienced discrimination on the basis of disability when the Sheriff violated § 12112(d)(4), and could thus recover back pay.

- *Baker v. All. for Sustainable Energy, LLC*, No. 24-1143, 2025 WL 400743 (10th Cir. Feb. 4, 2025) – Donald Baker, who had PTSD, worked as a research technician for Alliance. His job involved performing potentially hazardous fieldwork, including training coworkers to operate heavy machinery. Baker sent multiple emails to coworkers sharing his growing frustrations with his supervisor. One of these emails prompted HR to consult the legal department, which advised putting Baker on leave pending a fitness-for-duty examination with an independent clinical psychologist. This exam concluded that Baker was experiencing "significant psychological distress" and was not fit for duty. Alliance thus told Baker he would remain on leave pending satisfaction of the fitness-for-duty

requirements set forth in the exam report. Baker and HR went back and forth regarding his efforts to comply with the requirements. Baker ultimately resigned, claiming constructive discharge.

The Tenth Circuit concluded that Baker could not establish a prima facie case of discrimination under the ADA and RA because he was not qualified to perform the essential functions of the job. Baker argued the fitness-for-duty exam was unlawful under the ADA and RA for two reasons. First, he argued the exam was unjustified because he did not pose a danger to the workplace. The Tenth Circuit disagreed and held that Alliance showed that its request for the exam was job related and consistent with business necessity: ability to handle necessary stress and work well with others are essential functions of any position (and especially important in a potentially hazardous job), and it had been clear that Baker was suffering a mental toll from the feud with his supervisor.

Second, Baker argued the exam was unreliable because Alliance did not provide the doctor with a list of his job's essential functions. The Tenth Circuit concluded that it was not unreasonable for Alliance to rely on the exam report or adopt its recommendations since the case did not involve an esoteric essential function unique to a particular job, but rather whether Baker was mentally fit to be in the workplace given the hazardous nature of his job, the required level of concentration, and the stress he was experiencing.

- *Mullin v. Sec'y, U.S. Dep't of Veterans Affs.*, 149 F.4th 1244 (11th Cir. 2025) – When Aileen Mullin was diagnosed with breast cancer, she submitted an FMLA form to the VA's HR department with her oncologist's certification that she would need to be absent for cancer treatment. She only told one work friend about her diagnosis, so she was surprised when, two months later, her union steward mentioned in an email to her that he heard about her diagnosis from an HR manager. She sued, alleging that the VA failed to protect and unlawfully disclosed her confidential and sensitive medical information in violation of the Rehab Act. The district court granted summary judgment to the VA.

  On appeal, the VA argued that Mullin's claim should fail because the VA did not make an "inquiry" under the Rehab Act when it requested medical documentation for FMLA leave; rather, Mullin's disclosure of her cancer diagnosis on the FMLA form was a voluntary disclosure, which does not trigger an employer's confidentiality obligations under the Act.

  The Eleventh Circuit disagreed, reasoning that when an employee must share medical information to receive benefits guaranteed by law, "That kind of disclosure is not 'voluntary' in any meaningful sense." It held that "when an employer conditions an employee's access to statutorily protected leave on the submission of medical information, that is an 'inquiry' under [the Rehab Act]….[the restriction on employer medical inquiries] cannot be avoided simply because the employer's demand for information is embedded in the mechanics of leave approval."

  The Eleventh Circuit noted that its holding was consistent with a D.C. Circuit case, *Doe v. United States Postal Service*, 317 F.3d 339 (D.C. Cir. 2003), in which a USPS employee was out of work for several weeks with an AIDS-related illness, disclosed his

HIV status on an FMLA form, and sued when he learned that several coworkers had learned of his status from a supervisor. The D.C. Circuit held that because USPS conditioned eligibility for FMLA leave on Doe disclosing medical information, the FMLA form constituted an "inquiry" under the Rehab Act; to hold otherwise would lead to employees being forced "to choose between waiving their right to avoid being publicly identified as having a disability and exercising their statutory rights ...."

The Eleventh Circuit reversed and remanded because there were genuine issues of material fact regarding the specifics of the disclosure and whether Mullin suffered a tangible injury as a result.

Application of Muldrow

- *Herkert v. Bisignano*, 151 F.4th 157 (4th Cir. 2025) – As a Branch Chief for the Social Security Administration's Office of Building Management, Mary Herkert served in a supervisory capacity and oversaw building management services. She sued after she was reassigned to a non-supervisory position shortly after her Rehab Act request for accommodation was denied and she had informed supervisors of her intent to pursue the EEO process. The district court granted summary judgment to the SSA, reasoning in part that Herkert's reassignment was not a "significant" change in her employment status. Soon after, the Supreme Court issued its decision in *Muldrow v. St. Louis, Missouri*, holding that an employment action is adverse if a plaintiff can demonstrate that she experienced "some harm respecting an identifiable term or condition of employment" as a result of that action. *Muldrow v. St. Louis, Mo.,* 601 U.S. 346, 355 (2024).

  On appeal, the SSA argued that Herkert could not even satisfy the *Muldrow* standard since her reassignment entailed no change in pay grade, salary, or benefits. Herkert argued that the reassignment was disadvantageous primarily because it took away her supervisory authority and duties. Addressing her discrimination and retaliation claims together, the Fourth Circuit noted that, per *Muldrow,* a loss of supervisory authority may be highly relevant to the new analysis of what is "disadvantageous," but it declined to hold that *any* loss of supervisory authority suffices as a matter of law to show an actionable "disadvantageous change" in employment status ("we can imagine circumstances in which, say, the removal of burdensome supervisory duties could be a welcome development that improves the terms and conditions of employment."). It vacated and remanded Herkert's claims for a jury to assess whether her reassignment to a non-supervisory role was adverse and a disadvantageous change that left her worse off for purposes of her discrimination claim, and whether her reassignment might dissuade a reasonable worker from protected activity so as to form the basis for a retaliation claim.

- *Strife v. Aldine Indep. Sch. Dist.*, 138 F.4th 237 (5th Cir. 2025) – HR employee Alisha Strife applied for and received a service dog that helped her maintain balance and gait, prevented falls, and mitigated acute PTSD symptoms. Her employer delayed granting her accommodation request to allow the dog to accompany her at work for six months, doing so only after the district court, in a TRO hearing related to her ADA and Rehab Act claims, directed the parties to complete the interactive process as soon as possible.

The district court dismissed her failure-to-accommodate claim, concluding that Strife failed to allege she suffered an injury while her accommodation request was pending, and that she did not experience any changes in the terms and conditions of her employment. The Fifth Circuit reversed, noting that the relevant question is not whether she experienced severe injuries while waiting for the accommodation, but whether the employer failed to make reasonable accommodations after being informed of her limitations. In rejecting an additional element of harm for failure-to-accommodate claim, the Fifth Circuit aligned with eight other circuits; three have held otherwise.

However, the Fifth Circuit held that the district's delay in accommodating her did not constitute disability discrimination, as the district "did not literally alter the terms, conditions, or privileges of her employment during the six-month interactive process." Other elements were involved in its affirmance of summary judgment for the employer on this claim, but notably, it rejected Strife's reference to *Muldrow* as support for her argument that the district did in fact alter the terms, conditions, or privileges of her employment by noting that "*Muldrow* concerns *Title VII* discrimination cases, not ADA violations." (emphasis in original) This puts the Fifth Circuit at odds with other circuits (at least the First, Fourth, Tenth, and Eleventh) which have applied *Muldrow* to disability discrimination claims.

- *Scheer v. Sisters of Charity of Leavenworth Health Sys., Inc.*, 144 F.4th 1212 (10th Cir. 2025) – Bethany Scheer was working as a billing department representative when her employer, as part of a PIP, conditioned her employment on participation in employee assistance program (EAP) counseling. After she refused and was fired, she sued under the ADA and Rehab Act, alleging her employer fired her based on its perception that she had mental illness. The district court concluded that the mandatory referral to EAP counseling was not an adverse employment action because it did not cause a significant change to her employment status. As a result, it granted summary judgment to the employer, concluding it fired Scheer because she refused to fulfill a condition of the PIP, and not because of a perceived disability.

  Soon after, the Supreme Court issued its decision in *Muldrow*, holding that an employment action is adverse if a plaintiff can demonstrate that she experienced "some harm respecting an identifiable term or condition of employment" as a result of that action. *Muldrow v. St. Louis, Mo*., 601 U.S. 346, 355 (2024). The Tenth Circuit vacated and remanded the case to the district court for it to reevaluate Scheer's claims under *Muldrow*, joining other circuits (two, at the time) in holding that *Muldrow's* some-harm standard applies not only to Title VII claims but also to ADA claims.

Definition of Disability; Qualified; "Regarded As"

- *Dixon v. Bessent*, No. 24-5110, 2025 WL 1720742 (D.C. Cir. June 20, 2025), *cert. denied*, No. 25-471 (U.S. Dec. 15, 2025) – Per agency policy, when ordered back to the office in Spring 2022, Tami Dixon was required to comply with masking/social distancing rules and regularly test for COVID-19 since she had opted not to receive a COVID-19 vaccine. Dixon made an accommodation request under the Rehab Act to continue to work from home. When her request was denied, she resigned and sued,

arguing that she was covered by the Rehab Act because the agency regarded her as having a communicable disease.

The D.C. Circuit affirmed dismissal of her Rehab Act claim, noting, "The fact that an employer in the midst of a global pandemic treats employees who refuse public-health precautions against contagion as posing elevated health risks to others in the workplace does not mean the employer perceives those employees as disabled." Even if she had plausibly alleged that the agency treated her as though she had COVID, the court pointed out that "federal courts have generally treated COVID-19 infection as too 'transitory and minor' to qualify as an impairment under the ADA."

- *Johnson v. Maximus Servs. LLC*, No. 23-7672, 2025 WL 1561819 (2d Cir. June 3, 2025) – Johnson sued her former employer, alleging that her employment was wrongfully terminated because of a perceived disability based on her refusal to comply with its COVID-19 testing and vaccination policies. In affirming dismissal, the Second Circuit relied on cases explaining that this theory of a perceived disability stemming from noncompliance with an employer's vaccination requirement fails, as a neutral vaccination mandate that does not single out employees for different treatment does not fulfill either of the ADA's alternative definitions of disability.

- *Evans v. New York City Dep't of Educ.,* No. 23-8119-CV, 2024 WL 4501963 (2d Cir. Oct. 16, 2024) – Evans could not state a claim under the ADA in connection with his employer's COVID-19 policies and vaccination mandate: "[A] plaintiff is not 'regarded as being disabled' or subject to a 'record of' a disability by the application of a company-wide COVID-19 mitigation policy because the neutral application of a company-wide policy does not single out any employee for discriminatory treatment."

- *Morgan v. Allison Crane & Rigging LLC*, 114 F.4th 214 (3d Cir. 2024) – During his shift at Allison Crane & Rigging, millwright laborer Andrew Morgan injured his lower back, resulting in pain when he sat, walked, or turned. His chiropractor diagnosed him with a bulged or herniated disc and placed him on bending and lifting restrictions. Allison placed him on light duty for a month, until terminating him for alleged failure to follow time-off request procedures. The Third Circuit reversed the district court's grant of summary judgment for Allison on Morgan's claim that he was discriminated against due to his back pain.

  The district court had held that Morgan could not establish that he was actually disabled, erroneously relying on a pre-ADAAA case which held that temporary, non-chronic impairments of short duration were not disabilities within the meaning of the ADA. The Third Circuit clarified that the analysis of Morgan's back pain under the ADA must instead focus on whether it substantially limited his ability to perform a major life activity. It held that a reasonable jury could find that his back pain, although it was temporary, constituted a disability because it substantially limited his ability to lift and bend, two of the examples of "major life activities" enumerated in the ADA regulations.

  The Third Circuit additionally held that the district court reached the wrong result in holding that Morgan could not establish a "regarded as" claim. It explained that the

ADAAA precludes relief where impairment is both transitory and minor, but back pain, such as Morgan's, that causes difficulty bending, lifting, walking, and turning is "undoubtedly" more than minor. It explained that "the not minor requirement is only intended to exclude impairments at the lowest end of the spectrum of severity, such as common ailments like the cold or flu." (internal quotations omitted)

- *Meza v. Union Pac. R.R. Co.*, 144 F.4th 1115 (8th Cir. 2025) – After David Meza sustained a traumatic brain injury (TBI) in a motorcycle accident, his neurologist cleared him to return to his regular work activities at Union Pacific. UP's medical examiner, however, fearing that Meza's TBI could cause unpredictable seizures around heavy machinery, recommended restricting his work activities for five years, ruling out a return to his old position. He sued, arguing that UP had suspended him because it regarded him as disabled. The district court granted summary judgment for UP, concluding that it had not regarded him as *currently* disabled, but instead had placed restrictions on him out of concern for how the injury would affect him in the future.

  The Eighth Circuit disagreed, concluding that restrictions placed on an employee out of concern about how his disability would affect him in the future could in fact constitute regarding him as currently disabled. UP's medical examiner's report identified "a chemical alteration and injury to Meza's brain that would result in an ongoing, unacceptably increased risk for seizures and other neurologic events." (cleaned up) The Eighth Circuit concluded that a reasonable jury could interpret this passage as creating a perception among UP's decisionmakers that Meza's brain had become "impaired." It vacated and remanded, concluding that there was a genuine issue of material fact as to whether the chemical alteration the medical examiner identified in Meza's brain was itself an impairment (even if it would only be clear to others if he began having seizures).

- *Pajer v. Walt Disney Co.*, No. 24-11146, 2025 WL 1826050 (11th Cir. July 2, 2025), *cert. denied*, No. 25-388 (U.S. Nov. 10, 2025) – When Disney required that employees report their COVID-19 vaccination status, employees who failed to do so were treated as unvaccinated and required to follow isolation, social distancing, and masking procedures. The plaintiffs, four Disney employees who were terminated for their unwillingness to comply with these procedures, alleged discrimination under the ADA. They contended that they were discriminated against based on their perceived disability as unvaccinated employees – i.e., that their unvaccinated status was regarded as a disability by Disney. They argued that Disney exhibited a perception that they were "currently diseased and dangerous on a permanent basis." The Eleventh Circuit looked to its decision in *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019), a case involving an employee who was terminated because of her employer's concern that she would contract Ebola while traveling abroad. It held that she could not have been regarded as disabled under the ADA because the ADA does not extend to employer's belief that an employee might contract an impairment in the future – i.e., the ADA does not cover potential future disability. Since the plaintiffs' unvaccinated status in this case "firmly suggests a potential future impairment," and since the masking and social distancing protocols in fact applied to *all* employees, the court held that the employees did not state an ADA claim.

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.

- *Babb v. Sec'y, Dep't of Vet's Affs.*, No. 23-10383, 2025 WL 1767957 (11th Cir. June 26, 2025) – On remand from the Supreme Court's decision in *Babb v. Wilkie*, 589 U.S. 399 (2020), the Eleventh Circuit held that the causation standard from that Supreme Court decision – i.e., employers violate the law when age discrimination "plays any part in the way a decision is made" – applies to retaliation cases under the ADEA as well as discrimination cases. On the merits here, the court held that Babb did not demonstrate a violation for either her discrimination or retaliation claims.

  Noris Babb was a VA pharmacist in the Geriatrics Clinic. In 2011, the VA implemented a new patient care system in which pharmacists who practiced "disease state management" at least 25% of the time would be eligible for a promotion to GS-13. Babb sought the promotion. Around the same time, two of Babb's colleagues filed EEOC complaints alleging that the VA was discriminating based on sex and age when it made the promotion decisions. Babb gave supportive testimony in the coworkers' lawsuit. Around the time of her participation in the lawsuit, Babb was offered a GS-13 position in Module B, a different department, which she declined. In 2013, Babb applied to a position in the anticoagulation clinic. There were two positions open in the clinic and the VA chose younger applicants for both. Around the time Babb applied for the anticoagulation positions, a manager at the hospital received an anonymous letter critical of the promotion practices at the hospital. The hospital tried to determine the author of the letter but that was unsuccessful. Also around that time in 2013, Babb requested a transfer to the Module B position which she previously declined. This request was rejected. Babb sued in 2014, alleging that the VA discriminated against her based on age and sex by rejecting her for the anticoagulation and Module B positions, and creating a hostile work environment and a retaliatory hostile work environment.

  Babb sued, lost, and appealed to the Supreme Court. The Supreme Court held that the lower courts applied the wrong standard to Babb's ADEA claim. Because the text of the ADEA states that "personnel actions . . . shall be made free from any discrimination based on age," the Supreme Court held that plaintiffs only have to show that age discrimination played any part in the way the decision was made. On remand from the Supreme Court, the district court again granted summary judgment to the VA, finding that Babb had not shown that a reasonable jury could conclude that Babb's age or sex played any role at all in the employment decisions at issue. However, the case proceeded to trial on Babb's retaliation claims. The jury returned a verdict for the VA on both retaliation allegations: Babb was not treated differently because of her EEO activity, and

she was not harassed or subjected to a hostile work environment because of her EEO activity. Babb appealed to the Eleventh Circuit, arguing that the summary judgment findings were incorrect and that the jury instructions improperly articulated the standard for retaliation.

The court affirmed the summary judgment decision in favor of the VA on Babb's non-selection for the anticoagulation position. Babb failed to tie allegations made by other employees to her own case, and the rest of her allegations were purely speculative. The court rejected Babb's argument that the jury instructions misstated the causation standard for retaliation claims. The district court had instructed the jury that Babb had the burden to prove "Defendant treated Plaintiff differently during the process of making the adverse employment actions *based on* Plaintiff's EEO activity." Babb's proposed instructions were "Plaintiff's protected activity was considered by the Defendant or that it played any role or part in the process of making the personnel action or actions." The Eleventh Circuit affirmed the court's instruction because it accurately described the causation framework. The phrase "based on" sufficiently articulates that Babb's protected activity must be a but-for cause of the differential treatment, whereas Babb's proposed "considered" phrase does not.

- *Kean v. Brinker Int'l, Inc.*, 140 F.4th 759 (6th Cir. 2025) – Jeff Kean was a 59-year-old General Manager at a Chili's restaurant which was one of the most profitable in the Nashville, Tennessee market. Chili's regional managers chose Kean's store as a training location for new employees because of Kean's managerial skills and the success of the store. After Chili's received several complaints about Kean, he was fired and replaced with a 33-year-old with no managerial experience. Chili's told Kean that he was fired for "concerns with not living the Chili's way and [not] living our culture." Kean never learned of any complaints made against him and had never received a disciplinary action or warning. After terminating Kean, a regional manager created a Team Member Relations (TMR) Report which, according to Chili's, provided sufficient evidence to demonstrate that Kean created a toxic culture at the restaurant. Other than that report, Chili's had deleted all original emails, notes, and alleged complaints against Kean. Before the EEOC and district court, Chili's was not able to offer a single witness who could testify about any relevant details relating to Kean's termination, including the creation of the TMR Report. The district court found that Kean had established a prima facie case, but credited the TMR Report as evidence that Kean had created a toxic culture at the restaurant and that that was the motivation for his firing.

  On appeal, the Sixth Circuit held that the admissible evidence created a genuine issue of material fact as to whether Chili's' reason for terminating Kean was pretextual. Because no employer witness was able to recall creating the TMR Report, it was not properly authenticated and the district court erred by relying on it. Moreover, Chili's did not rely on any objective metrics for evaluating "culture." Kean was fired in November 2018, but in October 2018 his store was the third highest performing store in his market, which was determined by "employee turnover, sales, guest experience, and cost." The company conducted employee reviews of Kean and he generally scored well. Thus, to the extent "culture" means employee experiences, guest experience, and sales, Kean appeared to be

doing well. Chili's also did not follow its own policy and procedures during the termination, which is an additional indicator of pretext.

- *Rosado v. Sec'y, Dep't of the Navy*, 127 F.4th 858 (11th Cir. 2025) – Jose Rosado is a Hispanic man who had been working as a civilian IT employee for the Navy for over twenty-five years. By 2014, when he started applying for a series of promotions, he was over the age of 60. From 2014 until 2018 he applied for five promotions and was rejected for all of them. He sued the Navy, arguing that the Navy discriminated against him based on race, national origin, and age when they did not select him for the promotions. He argued that he was the "best qualified candidate based on his background, experience, knowledge, skills, and ability" but did not present evidence showing that the Navy discriminated against him because of a protected trait. The district court granted the Navy's motion for summary judgment because Rosado did not present a prima facie case.

  The Eleventh Circuit affirmed the grant of summary judgment for the Navy. To establish a prima facie case, Rosado needed to either provide comparator evidence showing that he was treated differently or evidence to show that discrimination "played any part" in the decision-making process. He offered neither. For each of the five promotion decisions, the Navy was able to demonstrate that the applicants were more qualified than Rosado. Without any evidence that discrimination "played any part" in the decision, summary judgment was appropriate. Because Rosado did not establish a prima facie case, the Eleventh Circuit declined to decide whether a federal employee may choose to rely solely on a prima facie case to survive summary judgment.

- *Murphy v. Caterpillar Inc.*, 140 F.4th 900 (7th Cir. 2025) – Caterpillar put Murphy, a 58-year-old employee with significant experience working for the company, on a performance action plan even though he met or exceeded expectations in his most recent performance review. Murphy objected to the plan because, at the time Caterpillar presented it, the deadline to achieve one item had already passed and a supervisor said that Murphy had already failed to achieve a different item. Caterpillar refused to amend the plan and Murphy retired. He then filed suit, alleging that he was constructively discharged because of his age, demonstrated in part by the impossible-to-meet performance action plan. The District Court granted summary judgment for Caterpillar, finding that Murphy was constructively discharged but no reasonable jury could find that age was the but-for cause of the discharge.

  The Seventh Circuit reversed. Because "evidence of pretext does not require but does permit an inference of unlawful motive," if there is evidence of pretext then summary judgment must be denied. Here, the court found that the various unusual circumstances around the performance action plan likely showed pretext. First, Caterpillar claimed that it put Murphy on the plan because of poor performance, but his recent reviews were good. Second, Caterpillar's refusal to amend the plan even though one deadline had already passed, and one item was already failed, showed likely pretext.

- *Arnold v. United Airlines, Inc.*, 142 F.4th 460 (7th Cir. 2025) – United Airlines put Arnold, a long-tenured employee, on a performance improvement plan (PIP). Before Arnold completed the PIP, she resigned. She sued, claiming that the PIP and the

resignation constituted adverse actions post-*Muldrow*. The district court granted summary judgment for United, and the Seventh Circuit affirmed. Arnold's pay, benefits, vacation time, and work hours stayed the same while she was on the PIP. There was no evidence that the PIP was impossible to complete or that assignments changed because of the PIP. Arnold also was unable to show that anything about the PIP forced her to resign or made the work so intolerable that she had to leave. United's actions therefore did not amount to an adverse action under *Muldrow*

- *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796 (N.D. Cal. 2024) – Derek Mobley, a Black man over the age of 40 who has anxiety and depression, applied to over 100 positions with companies that use Workday's screening tools. He was not hired for any of them. In one instance, he applied for the same job that he was working and was rejected. Instead of suing the employers, he sued Workday, alleging that its algorithmic decision-making tools discriminated against applicants who are Black, over 40, and disabled. Workday moved to dismiss, alleging that Workday cannot be liable because it is not an employer or agent of any employer and that Mobley did not sufficiently allege a claim of disparate impact or intentional discrimination.

  The court found that Mobley sufficiently alleged that Workday is an agent of the employers. Mobley alleged that Workday embeds artificial intelligence and machine learning tools to "make hiring decisions," which can "automatically move candidates forward in the recruiting process." The court found that the complaint sufficiently alleged that Workday provides a "crucial role in deciding which applicants can get their foot in the door for an interview" and this role "is no less significant because it allegedly happens through artificial intelligence rather than a live human being."

  The court determined that Mobley sufficiently alleged a disparate impact claim. A prima facie case of disparate impact contains: (1) a specific employment practice; (2) a disparate impact on a protected class; and (3) a causal relationship between the practice and the disparate impact. Here, the specific employment practice was the use of algorithmic decision-making tools to screen applicants. The fact that Mobley applied to 100 different jobs, he alleged he was qualified for all of them, and he was rejected for all of them, showed disparate impact and was analogous to one hundred qualified applicants striking out for one job at one employer. Mobley also sufficiently pled that the algorithm was causing the disparate impact. This was shown in part by the timing of the rejections: many occurred early in the morning within hours of him submitting the application, indicating that a human had not reviewed them.

  However, the court agreed with Workday that Mobley's complaint did not sufficiently allege an intentional discrimination claim. Mobley's only statement in the complaint showing Workday's intent was that "Workday is aware of the discriminatory effects of its applicant screening tools," and the Ninth Circuit has held that alleging an employer's awareness of adverse consequences is not enough to show their intent.

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.

Pretext

- *Ripoli v. Dep't of Hum. Servs., Off. of Veterans Servs.*, 123 F.4th 565 (1st Cir. 2024) – Plaintiff Kimberly Ripoli alleged that her termination from the role of Associate Director of the Rhode Island Office of Veterans Affairs (OVA) was the result of gender and sexual orientation discrimination under Title VII. There was no dispute that Ripoli was qualified for her position and had performed it well; the agency argued that she was let go as part of a reorganization of the OVA, but Ripoli produced ample evidence to enable a jury to find that this proffered reason was pretextual. Ripoli was the only woman and the only gay employee on the OVA executive team, and she was the only one who was fired; moreover, soon after she was let go, a heterosexual male who was arguably less qualified was hired into a newly created position that was nearly identical to the role Ripoli had filled. She also produced evidence casting doubt on the agency's arguments that budgetary and efficiency considerations were behind her termination. Because genuine issues of material fact existed regarding the OVA's justification for terminating Ripoli, the First Circuit reversed the district court's grant of summary judgment for the employer and remanded the case.

- *Wannamaker-Amos v. Purem Novi, Inc.*, 126 F.4th 244 (4th Cir. 2025) – A Black female quality engineer at a manufacturing plant alleged that her termination was the result of race and sex discrimination. The Fourth Circuit reversed the district court's grant of summary judgment for the employer and remanded, holding that genuine issues of material fact existed as to whether the employer's proffered reason for the plaintiff's termination was pretextual. This case is noteworthy mainly because of the variety of different ways in which the plaintiff's evidence cast doubt upon the employer's rationale:

    - The veracity of the explanation was in doubt, as the plaintiff was allegedly fired for failing to respond to a customer complaint email, but there was a dispute as to whether responding to that email was actually her responsibility;

    - The employer provided shifting and conflicting reasons for firing her, making different assertions before the EEOC than it had given at the time of her termination, and "Although an employer may have multiple legitimate reasons for firing an employee, its effort to retract certain reasons initially offered by the decisionmaker may suggest that none of those reasons were ever the true reasons and instead were pretext for discrimination.";

    - Witnesses testified that the plaintiff's supervisor treated her worse and held her to a higher standard than similarly situated employees outside of her protected class, unfairly blamed her for others' performance failings, and at one point while

discussing her supposed poor performance, he commented "You know how these black people are" – all of which was evidence of discriminatory animus; and

- In terminating the plaintiff – who had never before been disciplined in her seven years at the company – her supervisor did not follow the employer's performance improvement policy; a jury could conclude that she should have received only verbal coaching under that policy, and moreover, a jury could reasonably have questioned whether firing her for one infraction that did not require termination was such an extreme overreaction as to be pretextual.

The court also rejected the employer's argument that the plaintiff's claim must fail because she refused to speculate as to whether the supervisor was discriminating against her because of her sex, her race, or both; there is no requirement for an employee to affirmatively proclaim the reason why her employer engaged in unlawful discrimination in order to survive summary judgment, and in fact, "We have repeatedly held that plaintiffs cannot rely solely on their own speculation or conjecture to support a cause of action of discrimination. … It would be anomalous to hold that a plaintiff cannot sustain a discrimination claim without engaging in precisely the type of speculation we have repeatedly disavowed. Just as speculation is insufficient to prove a discrimination claim, a plaintiff need not speculate as to the alleged discriminator's motive to survive summary judgment."

- *Parker v. Children's Nat'l Med. Ctr., Inc.*, No. 24-1207, 2025 WL 1540954 (4th Cir. May 30, 2025) – Children's National Medical Center fired the plaintiff for poor work performance, but she claimed that this was pretext for pregnancy discrimination under Title VII as well as retaliation and failure to accommodate under the ADA. In affirming summary judgment for the employer, the Fourth Circuit provided a detailed analysis of a plaintiff's burden to demonstrate pretext. The court distinguished the now-defunct "pretext-plus" requirement – i.e., the requirement that some courts previously imposed on plaintiffs to not only show that the employer's proffered reason for its action was false, but also to produce additional evidence separate from her prima facie case that not only undercut the employer's justification but also showed a specific and discriminatory motive, until it was rejected by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) – from the principle that the plaintiff always bears the ultimate burden of establishing that her employer discriminated against her "because of" her protected status or activity. Under *Reeves*, a plaintiff can establish pretext in one of two ways: either by offering evidence that the employer's reason for its action is unworthy of credence, or by adducing other forms of circumstantial evidence sufficiently probative of discrimination. In this case, the plaintiff failed to carry her burden to demonstrate that the employer's reason for terminating her was false, or that discrimination or retaliation were the real reason for her termination.

- *Bashaw v. Majestic Care of Whitehall, LLC*, 130 F.4th 542 (6th Cir. 2025) – The plaintiff was terminated after four months of employment at a nursing home. She had complained to HR about one of her colleagues being racially insensitive and about what she perceived as a hostile work environment, and after her termination she alleged that the employer had fired her in retaliation for those complaints, in violation of Title VII and state law.

The district court granted summary judgment for the nursing home, and the Sixth Circuit affirmed. The employer had offered four legitimate non-discriminatory reasons for her termination, including frequent absence or tardiness, surreptitious recordings of work meetings, telling HR that she did not want to return to work, and violation of company policy regarding safe discharge of a resident. Bashaw challenged all four reasons as pretextual; the court held that no reasonable jury could conclude that the first three reasons were pretextual, and even if genuine issues of material fact existed regarding the violation of company policy, summary judgment was still appropriate because the company demonstrated other independent non-pretextual reasons for Bashaw's termination, which was enough to defeat her retaliation claim.

- *Walkingstick Dixon v. Oklahoma ex rel. Reg'l Univ. Sys. of Okla. Bd. of Regents*, 125 F.4th 1321 (10th Cir. 2025) – Marci Walkingstick Dixon (referred to by the parties as Ms. Walkingstick), a Native American woman and member of the Cherokee Nation, was terminated from her position in a university IT department, supposedly for poor job performance and improper timekeeping. She sued under Title VII, alleging race and sex discrimination as well as retaliation. A magistrate judge granted summary judgment for the employer, declaring that Walkingstick had not established a prima facie case of discrimination or retaliation, but the Tenth Circuit reversed.

  With respect to the discrimination claim, the court held that Walkingstick had satisfied her burden of showing prima facie cases of sex and race discrimination based on evidence that she was a Native American woman who was qualified for her job, discharged, and replaced. The court summarized the elements of a prima facie case of discrimination under *McDonnell Douglas* – "a plaintiff alleging wrongful termination may raise an inference of unlawful discrimination by showing that (1) she is a member of a protected class, (2) she was qualified for her job, (3) she was fired, and (4) the job was not eliminated" – and explained that the purpose of the prima facie requirement is to eliminate the two most common reasons for a termination: lack of qualifications and elimination of a position. Although poor job performance and improper timekeeping are legitimate, nondiscriminatory reasons to terminate an employee, Walkingstick had produced enough evidence of pretext to survive summary judgment, including positive performance reviews, inconsistencies in the characterization of her timekeeping issues, and notes from meetings that made it sound as if the university "was grasping for reasons to fire Ms. Walkingstick."

  As for her retaliation claim, Walkingstick had engaged in protected activity by repeatedly complaining to the university about her supervisor's race and sex discrimination, and less than a month had passed between her last complaint and her termination. The same evidence of pretext supporting her discrimination claim could also show that the nonretaliatory reasons proffered by the employer – poor performance and improper timekeeping – were pretext for retaliation.

Procedural Issues

- *Garcia-Gesualdo v. Honeywell Aerospace of P.R., Inc.*, 135 F.4th 10 (1st Cir. 2025) – The plaintiff filed a Title VII complaint, which the district court dismissed as untimely

because it was filed more than 90 days after her attorney received emails from the EEOC indicating that a document (which turned out to be her right-to-sue letter) had been added to the EEOC's online portal. Neither email had indicated what the document was, and when the attorney tried to access the online portal he repeatedly received an error message and was unable to access the docket for the plaintiff's case, which the EEOC later said was a known issue on its end. The attorney contacted the EEOC, which eventually sent him a copy of the right-to-sue letter as a PDF attachment to an email, and he filed the complaint on the plaintiff's behalf 87 days after receiving the letter.

The First Circuit reversed the district court's dismissal and remanded, holding that the emails sent by the EEOC did not constitute notice of the right-to-sue letter and that the filing was timely because it was filed within 90 days of receipt of the PDF. The first email only stated that a document had been added to the portal, and although the second email stated that the EEOC had reached a decision, it did not specifically state that the decision was to issue a right-to-sue letter rather than some other action that might not necessarily have started the 90-day clock.

- *Nguyen v. Bessent*, No. 23-1220, 2025 WL 502073 (4th Cir. Feb. 14, 2025) – The plaintiff challenged an involuntary reassignment on grounds of race, sex, national origin, and age discrimination. The district court held that she had failed to timely exhaust her administrative remedies because she did not contact the EEOC within 45 days of the allegedly discriminatory act as required by Title VII, and the Fourth Circuit affirmed. Nguyen argued that she had filed within 45 days of when she first suspected that the adverse action was discriminatory, and that she had no reason to think the reassignment was discriminatory before that date, but the Fourth Circuit explained that for purposes of administrative exhaustion it is the date an employee receives notice of the adverse action – not the date the plaintiff begins to suspect that the adverse action was discriminatory – that starts the clock.

- *Weathers v. Houston Methodist Hosp.*, 116 F.4th 324 (5th Cir. 2024) – The plaintiff alleged that she was harassed, placed on a performance improvement plan, and ultimately fired because of her race. She inquired with the EEOC about filing a charge, but the EEOC's online system wouldn't allow her to schedule an interview, and she was unsuccessful in reaching anyone at the EEOC by phone. By the time she eventually managed to schedule a phone interview and get the information required to file a charge of discrimination, she was two days past the deadline. When the EEOC requested additional information from Weathers, she responded within hours, and she signed the charge of discrimination the same day the EEOC sent it to her. Calling it "one of the rare circumstances when the doctrine of equitable tolling applies," the Fifth Circuit reversed the district court's dismissal of Weathers's complaint for untimeliness. The court considered three factors: first, the delays were attributable to the EEOC rather than to the plaintiff herself, which the court said should be accorded significant weight; second, the plaintiff had diligently pursued her claim by making almost daily attempts to schedule an interview and by promptly responding to the EEOC's information request and signing the charge; and third, the two-day delay did not prejudice the employer, because the EEOC notified the employer of Weathers's charge within 10 days of when the statute of

limitations expired, such that its notice still would have been timely if she had filed within the 300-day period.

- *Dent v. Charles Schwab & Co.*, 121 F.4th 1352 (7th Cir. 2024) – When attempting to file the plaintiff's Title VII complaint, her attorney failed to complete the last step of the court's electronic filing process by clicking "next" after submitting the filing fee, which would have submitted the complaint and generated a notice of electronic filing. After the court reached out to the attorney to let him know that the process had not been completed, he successfully filed the complaint, but it was five days after the filing deadline had expired (i.e., 95 days after receipt of the EEOC's right-to-sue notice). The court rejected the plaintiff's argument that equitable tolling should apply, holding that the attorney's "unfortunate mistake" was "a garden variety claim of excusable neglect" that did not warrant the "extraordinary remedy" of equitable tolling. "Equitable tolling must be predicated on a showing that the litigant seeking such relief has been pursuing his rights diligently and that an extraordinary circumstance stood in his way and prevented timely filing." (internal quotations and citations omitted)

- *Kinder v. Marion Cnty. Prosecutor's Off.*, 132 F.4th 1005 (7th Cir. 2025) – The plaintiff alleged that her involuntary reassignment was the result of race discrimination. She filed a charge with the EEOC, which issued her a right-to-sue letter by posting the letter to its online portal and notifying her attorney by email that a new document was available to view in the portal. The attorney had trouble accessing the document and communicated back and forth with the EEOC to get a copy of the letter, and eventually received a copy via email. The attorney did not file Kinder's complaint in district court until well after 90 days had passed since the document was uploaded to the portal, and the district court granted summary judgment to the employer on the basis that the complaint was untimely. The Seventh Circuit affirmed, holding that the 90-day window for filing a claim begins when the plaintiff receives notice that the EEOC's right-to-sue letter has been issued, not when the plaintiff actually reads the letter, regardless of the fact that the attorney in this case was unable to read the letter on that date through no fault of his own. At a minimum, the window would have started on the date that he spoke to the EEOC and was informed that the investigation into his client's charge had closed. Finally, although the plaintiff did not argue that equitable tolling should apply, the court noted that in this case it would be a losing argument because the attorney still had three weeks to file the complaint within the 90-day window after he finally read the right-to-sue letter.

- *Hogan v. Sec'y, U.S. Dep't of Veterans Affs.*, 121 F.4th 172 (11th Cir. 2024) – A party seeking equitable tolling must prove (1) that she has been pursuing her rights diligently, and (2) that some extraordinary circumstance prevented timely filing. In this case, the plaintiff mistakenly believed that her counsel had timely emailed the VA her administrative complaint; however, they never received written confirmation of receipt, nor did they receive a decision from the VA within 180 days, both of which were required by the regulations, and that should have alerted them to the fact that the complaint had not been submitted. But they waited nine months after supposedly filing the complaint before they followed up, which led the court to hold that the plaintiff had not diligently pursued her rights and therefore was not entitled to equitable tolling.

- *Jimenez v. U.S. Att'y Gen.*, 146 F.4th 972 (11th Cir. 2025) – The plaintiff, a medical officer for the Bureau of Prisons, alleged disparate treatment based on race and national origin, as well as retaliation. The district court dismissed the Title VII claims based on certain employment actions – specifically, denial of incentive pay and failure to promote – because he had not administratively exhausted them. Jimenez argued that even though he had not raised the incentive pay and non-promotion issues in his EEO charges, the continuing violation doctrine should allow him to include those actions as part of his claim, as that doctrine allows a plaintiff to include untimely filed events in a timely claim in situations where the defendant's actions violate the plaintiff's rights on a repeated or ongoing basis. In affirming the district court's ruling, the Eleventh Circuit provided a detailed overview of the continuing violation doctrine, and rejected Jimenez's argument that it should apply to his untimely claims. "Despite Dr. Jimenez's attempts to characterize the failure to promote him to medical director and the denial of incentive and bonus pay as part of an ongoing 'unlawful employment practice,' only actionable due to their 'cumulative effect,' he cannot convert 'related discrete acts into a single unlawful practice for the purposes of timely filing.'" (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002)). Both the denial of incentive pay and the failure to promote were separate employment actions with immediate consequences, and thus easy to identify as discrete acts; therefore, each decision occurred on the day it happened, and started a new clock for filing charges alleging that the action was unlawful. The court also distinguished Jimenez's allegations from a hostile work environment claim, because they did not depend upon proof of repeated conduct extending over a period of time.

Denial of Promotion

- *Warner v. DeJoy*, 153 F.4th 109 (1st Cir. 2025) – The plaintiff, a postmaster with the U.S. Postal Service, applied for a promotion to a higher-level position in Somersworth, New Hampshire. She was passed over in favor of a male employee, and alleged that the denial of a promotion was based on her sex. The Postal Service argued that the male employee had better experience and performed better during his interview. In an attempt to show that these reasons were pretextual, Warner produced evidence that the decision maker, her supervisor Kathleen Hayes, had promoted nearly twice as many men as women during her career; the court noted that, standing alone, this statistical evidence was insufficient to show pretext, because there was no evidence regarding how many men and women had *applied* for promotions to begin with. Likewise, the supervisor's reference to a group of young male employees as her "smoking hot" officers did not show that she had discriminated against the plaintiff for being female. However, the supervisor had made a statement during the plaintiff's interview that she wasn't sure they had ever had a woman in the Somersworth location before and she wondered how that would work out; the court found that this remark could lead a jury to find that the decision maker harbored doubts about whether a woman could do the job, which "could, when combined with the other, otherwise insufficient evidence, support a jury conclusion that Hayes elected not to promote Warner because of Warner's sex." Therefore, summary judgment was inappropriate.

- *Glaesener v. Port Auth. of N.Y. & N.J.*, 121 F.4th 465 (3d Cir. 2024) – The plaintiff, a longtime Port Authority employee, alleged that she was passed over for promotions

because of her race and then out of retaliation for having filed a discrimination complaint. The district court granted summary judgment, finding that the plaintiff failed to show that the employer's proffered reasons for declining to promote her – i.e., other candidates' more relevant qualifications and the plaintiff's own poor interview performance – were pretextual. The Third Circuit affirmed, rejecting the plaintiff's argument that the interview questions were "subjective" and explaining that "poor interview performance is a legitimate, non-discriminatory reason for employment decisions" and therefore "employers may use interviews so long as they assess relevant criteria and are not entirely subjective." (internal quotations and citations omitted) Here, the applicants were all asked the same questions – which assessed the candidates' technical knowledge, general competency, and communications skills – and their responses were ranked using predetermined criteria. There was no evidence of any manipulation or abuse with respect to the interview process. The standardized questions and focus on job-related criteria reduced the subjectivity in the hiring process and undermined the plaintiff's claims of bias.

- *Stelly v. Dep't of Pub. Safety & Corr. La. State*, 149 F.4th 516 (5th Cir. 2025) – John Stelly, a White police lieutenant, was passed over for promotion to the rank of Captain 31 times, and sued for race discrimination under Title VII, alleging that on at least two occasions he was the most qualified applicant but was passed over because the department wanted to hire a non-White individual for the position. Stelly established a prima facie case for those two non-promotions, and the department produced evidence of a legitimate nondiscriminatory reason for selecting other candidates – namely, that each of them had prior experience in the divisions where the captaincies were located, whereas Stelly did not. Stelly argued that he was more qualified than the selected candidates because he had higher promotional exam results, more education and training, better interpersonal skills, and more years in service. The court was not persuaded by these arguments, noting that the evidence showed the department took a holistic approach to candidates' qualifications and looked at numerous factors outside of the statistical evidence Stelly highlighted. Although Stelly did score higher on the promotional exam, the evidence showed that exam scores were only considered in determining which candidates would move on to the interview stage, and did not factor into the ultimate hiring decision, so this did not undermine the department's proffered reason for its decision. Stelly's mixed-motive theory was also unavailing, because he produced no evidence whatsoever that race played a role in the selection process, and "A mixed motive analysis requires *some* showing that the protected characteristic was at least partially a motivating factor[.]" (emphasis in original)

- *Solis v. The Ohio State Univ. Wexner Med. Ctr.,* No. 24-3230, 2024 WL 4579501 (6th Cir. Oct. 25, 2024) – The plaintiff, an African-American nurse, alleged that she had been denied a promotion because of her race, as the position was given to a Caucasian male. Among other things, the plaintiff pointed to the hospital's use of subjective evaluation criteria in the hiring process as evidence of discrimination. The Sixth Circuit noted that subjective criteria may be used in making hiring and promotion decisions, and are not illegal per se; although they may open employers up to allegations of discrimination, "Proof an employer used subjective criteria does not, without more, establish pretext." On the contrary, "An employer may consider subjective factors like attitude, self-

confidence, teamwork, and other nondiscriminatory criteria in its evaluation process." In this case, two factors helped the employer: the subjective criteria were of "secondary value" rather than the main reasons upon which the hiring decision rested, and the job description put applicants on notice that these factors would be considered.

- *Cunningham v. Austin*, 125 F.4th 783 (7th Cir. 2025) – A Black female employee of the Department of Defense's Defense Finance Accounting Service (DFAS) alleged that the employer's failure to promote her was because of her race and sex in violation of Title VII. She was one of the top two candidates for an open position – the other candidate being a White male – and she believed that she had more subject matter expertise than the other candidate, who was eventually hired. The employer produced evidence that it genuinely believed the hiree was a better fit for the job, based in part on the two candidates' interview performance, particularly their responses to standardized interview questions, and the hiree's more extensive education and experience. The court explained that "An employer's genuine belief that another candidate's vision for the organization or skillset makes them better suited for the job is a legitimate, nondiscriminatory hiring rationale. … That [the decision maker] relied on subjective assessments to reach this conclusion does not render DFAS's explanation illegitimate. … Nor does DFAS's decision to ask behavioral interview questions, rather than substantive ones, render its reliance on interview performance illegitimate. Our court is not 'a superpersonnel department that reexamines an entity's business decisions.' … When hiring for the GS-13 position, DFAS encountered a common HR dilemma: whether to prioritize subject matter expertise or difficult-to-measure intangibles, such as skilled customer service, familiarity with process improvement, and passion for the position evinced by thorough interview preparation. DFAS chose the intangibles, and we will not second guess its decision." (citations omitted) Because she produced no evidence of pretext, including no evidence "that [the decision maker's] subjective evaluation of her, based on her responses to standardized interview questions, masked a discriminatory intent[,]" the court affirmed summary judgment for the employer.

- *Mauldin v. Driscoll*, 136 F.4th 984 (10th Cir. 2025) – In a non-selection case involving allegations of sex and age discrimination and retaliation under Title VII and the ADEA, the plaintiff established a prima facie case and the employer demonstrated legitimate nondiscriminatory and nonretaliatory reasons for choosing another candidate – a significantly younger male – for the promotion sought by the plaintiff. The interviews were conducted by a three-person panel that asked the same questions of all candidates; all three individuals on the interview panel independently assigned Mauldin the lowest interview scores of any candidate, writing that she didn't answer the questions very thoroughly, didn't have the same quality of experience as the selectee, and didn't seem to care whether she got the job or not. The plaintiff argued that these reasons were pretextual, offering as evidence the fact that some of the interview questions were subjective in nature – in particular, questions regarding leadership and communication skills and technology proficiency – but the court explained that some subjectivity is allowed in the interview process, and does not by itself indicate pretext. Some of the questions were not subjective, and the court noted that pretext is typically inferred only when *all* of the selection criteria are subjective, which was not Mauldin's argument here*;*

there was no dispute that panel asked each applicant the same questions and used predetermined criteria and scores to determine their ranking. Moreover, the panel consisted of one man and two women, and two of the three panelists were over the age of forty, which cast further doubt on Mauldin's contention that her non-selection was based on sex and age discrimination. The court concluded that the hiring process was neutral and devoid of unlawful motive, and therefore affirmed summary judgment for the employer.

Retaliation

- *Qorrolli v. Metro. Dental Assocs.*, 124 F.4th 115 (2d Cir. 2024) – Fortessa Qorrolli, a dental hygienist, alleged that she was sexually harassed by her supervisor, office manager Mark Orantes, and was ultimately constructively discharged after her complaints to the business's owner were not taken seriously. The district court granted summary judgment to the employer on Qorrolli's retaliation claim; the other claims went to trial and the jury found in favor of Qorrolli under Title VII and the New York City Human Rights Law (NYCHRL), but the district court ordered a new trial because it found that Qorrolli had introduced inadmissible and prejudicial hearsay evidence leading to an excessive jury award. At the second trial the jury found in Qorrolli's favor under the NYCHRL but awarded her only nominal damages of $1, so Qorrolli appealed.

  The Second Circuit affirmed the district court's grant of summary judgment to the employer on the plaintiff's retaliation claim, holding that she had not engaged in protected activity, because "In each asserted instance of protected activity, Qorrolli's complaints were overly generic and insufficiently specific and particularized such that [the employer] could not reasonably have understood that [Qorrolli] was complaining of conduct prohibited by Title VII" or the applicable state and local laws. It agreed with the district court that the letter she submitted to the business's owner contained "only Qorrolli's generalized complaints about oppressive working conditions such as excessive hours and the use of abusive language. The [l]etter is not reasonably understood as describing conduct prohibited by Title VII." Moreover, although she had also complained orally to the owner, the evidence in the record showed that she complained not about Orantes's sexual harassment of her, but rather about her perception that she was treated poorly compared to other women in the practice who were romantically or sexually involved with Orantes; as the court explained, the Second Circuit "has long since rejected 'paramour preference' claims, wherein employees are treated disparately based not on their gender, but rather on a romantic relationship between an employer [or supervisor] and a person preferentially treated. Thus, Qorrolli's complaint could not have been reasonably understood as opposing conduct that violated the laws forbidding employment discrimination." (internal quotation and citation omitted).

  Finally, the court rejected Qorrolli's argument that her rebuffing of Orantes's advances constituted protected activity, because although she repeatedly told him in general terms to "back off" and leave her alone, she did not specifically tell him to stop sexually harassing her. The Second Circuit noted that "district courts have disagreed" on whether rejecting a workplace harasser's sexual advances can qualify as a protected activity under Title VII, but in this case, "since we find that Qorrolli's purported rejections of Orantes'

advances were not sufficiently clear to communicate an opposition to sexual harassment, and therefore do not constitute protected activity, we need not address the broader questions of whether the verbal rejection of a sexual advance could constitute protected activity… or whether a purely non-verbal rejection of a sexual advance could constitute protected activity[.]"

- *Campbell-Jackson v. State Farm Ins.,* No. 23-1834, 2024 WL 4903807 (6th Cir. Nov. 27, 2024) – The plaintiff, a Black woman and longtime State Farm employee, was terminated two weeks after raising concerns about a racist letter that she and other minority employees had received. She asserted various claims under Title VII; the district court dismissed most of them, and granted summary judgment to the employer on the plaintiff's retaliation claim. State Farm asserted that Campbell-Jackson was fired because she had transferred a vendor's sensitive data and other confidential information to her personal email address in violation of the company's email policy, and the district court found that the plaintiff had failed to show that this proffered reason was pretext for retaliation.

  The Sixth Circuit reversed and remanded with respect to Campbell-Jackson's retaliation claim. Although State Farm asserted that it fired the employee for violating the company's email policy, the court noted that the company took no action for two months after the conclusion of its investigation into the plaintiff's conduct: it did not notify her of its findings, admonish her to refrain from such activity, or issue any discipline. "Then, months later and only two weeks after Campbell-Jackson spoke out about the racist letter, the company fired her. A juror could reasonably determine State Farm's failure to issue any corrective action sooner, combined with the 'suspicious timing' of Campbell-Jackson's termination, is sufficient to conclude that the company's stated reason for terminating her position is pretextual." (citations omitted) State Farm argued that it had been "contemplating" firing Campbell-Jackson since before her protected activity, but it failed to produce any evidence to support that argument.

- *Culp v. Remington of Montrose Golf Club, LLC*, 133 F.4th 968 (10th Cir. 2025) – Two female servers sued their employer under Title VII based on, among other things, allegations that the restaurant retaliated against them for reporting sexual harassment by a bartender. The district court granted summary judgment on the retaliation claim of one of the plaintiffs, Stephanie Peters, and she appealed. The Tenth Circuit affirmed, holding that Peters had failed to show that the employer took a materially adverse action against her. Her retaliation claim was based on two allegations: (1) management conducted an inadequate investigation into her sexual harassment claims, and (2) she was assigned to work the same shifts as the bartender after he returned from his suspension.

  The court held that an inadequate investigation is not a materially adverse action because it does not leave the employee worse off than they were before they complained, and therefore would not dissuade a reasonable worker from engaging in protected activity. Under Circuit precedent, even a complete failure to investigate a complaint, without any demonstrable harm arising from that failure, does not constitute a materially adverse action; even less so, then, would an inadequate investigation qualify, if the plaintiff could not show that it left her any worse off. Simply arguing that management was

"dismissive" of her complaint did not support a claim of retaliation under Title VII.

The court described the scheduling issue as "a closer question" but ultimately affirmed summary judgment for the employer on this basis as well. Both employees regularly worked evenings before the bartender's suspension, and the restaurant did not change its scheduling practices afterward, but simply had a "limited ability" to keep the two employees on separate shifts. In order to keep them from working together, the restaurant would have had to fire the bartender or greatly reduce his hours, but the court noted that he had already been suspended without pay, demoted, and put on probation as a result of the investigation into the sexual harassment allegations. The court explained that "requiring employers to impose the harshest possible punishment as an initial sanction for an employee's misconduct would be inconsistent with the Supreme Court's pragmatic approach to Title VII, which counsels against unnecessary burdens on employers." The court went on to add that "The significant sanctions imposed on [the bartender] were a reasonable response to his harassment. And a reasonable employee would not be deterred from reporting discriminatory conduct when the employer takes reasonable action in response."

Religious Discrimination

- *Russo v. Patchogue-Medford Sch. Dist.*, 129 F.4th 182 (2d Cir. 2025) – A school district employee was denied a religious exemption from the COVID-19 vaccine, and was subsequently denied a remote work accommodation. She sued under several laws, including Title VII. The district court granted summary judgment for the school district, and the Second Circuit affirmed. The school district did not violate Title VII by denying the exemption, because granting such an exemption or accommodation would have resulted in undue hardship. Granting an exemption would have been a violation of New York's vaccine-or-testing mandate, which would have exposed the school district to potential penalties, and the district carried its burden to show that hiring someone to cover the plaintiff's in-person duties would have caused it to incur significant expenses. (This case is also discussed in the GINA section of this outline.)

- *Gardner-Alfred v. Fed. Rsrv. Bank of N.Y.*, 143 F.4th 51 (2d Cir. 2025) – Two employees of the Federal Reserve, Lori Gardner-Alfred and Jeanette Diaz, were denied religious accommodations from their employer's COVID-19 vaccination policy, and were subsequently fired for refusing to comply with the policy. They sued, alleging among other things that the Federal Reserve discriminated against them based on their religious beliefs in violation of Title VII. Diaz claimed that as a Catholic she could not receive a vaccine derived from, manufactured with, or produced with aborted fetal cell lines; Gardner-Alfred asserted that as a member of the Temple of the Healing Spirit, whose services she claimed to attend virtually, she opposes Western medicine and prefers a "holistic" and "organic" approach to healing. The district court granted summary judgment to the employer, finding that neither plaintiff had established that their objection to the vaccine was based on a sincerely held religious belief.

  The Second Circuit upheld summary judgment with respect to Gardner-Alfred, whose deposition testimony and other evidence regarding her alleged religious participation was

"so wholly contradictory, incomplete, and incredible that no reasonable jury could accept her professed beliefs as sincerely held." However, the court held that genuine issues of material fact existed with respect to Diaz's claims. First it noted that, although the vaccines at issue did not contain stem cells, the district court "impermissibly narrowed the scope of Diaz's religious objection" because, "[d]rawing all permissible inferences in her favor, as the court must at summary judgment, her objection could easily be construed to include vaccines that were tested or developed using aborted fetal cells, even if such cells were not present in, or used to manufacture, the particular dose with which Diaz would be injected. … A jury could quite plausibly conclude that such a view comports with an ordinary person's understanding of what it means to manufacture, produce, or derive a vaccine." Moreover, the district court "assessed the objective validity of Diaz's belief that her religious objections extended to receiving the Covid-19 vaccine" even though courts are not allowed to ask whether a particular belief is appropriate or true, only whether it is a sincerely held religious belief.

- *Carter v. Loc. 556, Transp. Workers Union of Am.*, 156 F.4th 459 (5th Cir. 2025) – Charlene Carter, a Southwest Airlines flight attendant and a Christian who opposed abortion on religious grounds, was fired after sending graphic photos of aborted fetuses and women dressed as genitalia to the union president and posting them on her own Facebook page, in opposition to the union's support of the Women's March on Washington. She sued Southwest and the union for, among other things, religious discrimination under Title VII. At trial the judge denied the defendants' motions for judgment as a matter of law, and the jury ruled in Carter's favor. In addition to reinstatement and backpay, the district court imposed injunctive relief prohibiting Southwest from discriminating against its employees based on religion or failing to accommodate its employees' religious beliefs, and ordered Southwest to post the verdict on company bulletin boards and email all flight attendants about it. Southwest did so, but Carter objected to the way the company worded its communications and asked the court to hold Southwest in contempt, which it did. In addition to requiring specific wording in its communication to employees, the court required three of Southwest's in-house lawyers to attend religious-liberty training. Southwest and the union appealed various parts of the judgment to the Fifth Circuit, which issued a panel decision in May 2025 that was later withdrawn and superseded on rehearing by the same panel in October 2025.

  With respect to Carter's Title VII claims against Southwest, the company and union appealed the district court's denial of their motions for judgment as a matter of law, and also challenged some of the jury instructions. The Fifth Circuit first distinguished between claims based on religious *beliefs* and those based on religious *practices*, noting that discrimination claims can be based on either beliefs or practices, but the concepts of reasonable accommodation and undue hardship apply only to an employee's religious practices or observances, and the plain text of Title VII requires that claims based on beliefs and practices be analyzed separately.

  Beginning with Carter's religious belief-based discrimination claim, the court held that Southwest's termination of Carter was based on Carter's *practices* in furtherance of her religious beliefs – i.e., sending the messages and posting on Facebook – rather than on her religious beliefs themselves. The court noted that other employees were known to the

company to be pro-life Christians, and there was no evidence that the company held any hostility towards those beliefs. Nor did Carter present any evidence that similarly situated employees with different religious beliefs were treated more favorably. The court therefore reversed the district court's denial of Southwest's motion for judgment as a matter of law and remanded with instructions to enter judgment for Southwest on Carter's belief-based discrimination claim.

Turning to Carter's practice-based claims, in which the jury had not been persuaded by Southwest's evidence supporting its undue hardship defense, the Fifth Circuit rejected Southwest's arguments regarding jury instructions, and denied Southwest's request for a new trial in light of the intervening Supreme Court case of *Groff v. DeJoy*, 600 U.S. 447 (2023). The court pointed out that if the jury had already found in favor of the employee under the pre-*Groff* standard, there would be no reason to conduct a new trial based on the standard in *Groff*, which sets a *higher* bar for employers to demonstrate undue hardship.

As for the district court's post-verdict actions regarding Southwest, the Fifth Circuit agreed with Carter and the district court that Southwest's communication to its employees (that the court "ordered us to inform you that Southwest does not discriminate against our Employees for their religious practices and beliefs") was not in keeping with what the court had ordered (for Southwest to inform employees of their rights – i.e., that it was legally obligated not to discriminate based on religion), and therefore the company had not "substantially complied" with the order and was rightfully held in contempt. However, the Fifth Circuit went on to discuss the contempt sanction imposed by the district court – religious-liberty training for Southwest's attorneys – and agreed with Southwest that this sanction was inappropriate. Civil contempt sanctions are meant to be remedial and coercive, not punitive; in other words, they should be aimed at coercing the defendant to do what the court had already ordered it to do, and the beneficiary of the sanctions should be the party who was meant to benefit from the court's previous order; in this case, the religious-liberty training "would do little to compel compliance with the order or to compensate Carter" and "was plainly not the least-restrictive means of remedying Southwest's non-compliance," but was rather overbroad in scope and clearly meant as a punitive measure against Southwest, and therefore exceeded the district court's civil contempt authority. The Fifth Circuit thus vacated that portion of the district court's contempt order and remanded for the district court to impose a new sanction, with the admonishment that it "must be remedial in nature and narrowly tailored so that it is the least restrictive means of achieving substantial compliance with the district court's order."

- *Kluge v. Brownsburg Cmty. Sch. Corp.*, 150 F.4th 792 (7th Cir. 2025), *reh'g denied*, No. 24-1942, 2025 WL 2848017 (7th Cir. Oct. 7, 2025) – In a case we previously discussed during our 2023 Federal Case Law Update presentation, the Seventh Circuit held that accommodating a music teacher's religious beliefs by allowing him to violate the school's policy for addressing transgender students would be an undue hardship, but subsequently vacated and remanded in light of the Supreme Court's decision in *Groff v. DeJoy*, 600 U.S. 447 (2023), which clarified the undue hardship standard. On remand, the district court again granted summary judgment to the school district even under *Groff*'s

heightened standard, concluding that the school district's business was to educate all students, which required fostering a safe and inclusive environment for all students, and that allowing Kluge to violate the policy caused harm to the transgender students in his class, upset others, and was likely to lead to further harm as other transgender students entered his class. The district court also referenced the risk of the school district being found in violation of Title IX if it allowed Kluge's accommodation.

This time the Seventh Circuit reversed the district court's grant of summary judgment for the school district. Noting that "The legal landscape has changed markedly under *Groff*" – from the previous standard that anything causing more than a *de minimis* cost to the employer constituted an undue hardship, to the clarification in *Groff* that to establish an undue hardship the employer must show that a religious accommodation would result in "substantial increased costs in relation to the conduct of its particular business" – the court reassessed the evidence regarding the alleged harm to the school district's business of fostering a safe and inclusive environment for students. It determined that genuine issues of material fact existed as to whether the students' distress was caused by the religious accommodation at issue – namely, that Kluge be allowed to call all students by their last names – and that this would be a question for a jury to decide. Fact questions also existed as to whether any such distress was objectively reasonable and whether the accommodation disrupted the learning environment – i.e., that it affected students' ability to learn or teachers' ability to teach. Finally, the evidence in the record did not support a conclusion that transgender students were being treated worse than cisgender students, such that the school could be subjected to Title IX liability.

Notably, the court distinguished between religious accommodation claims and other types of claims under Title VII, explaining that, unlike other types of discrimination claims where the plaintiff bears the burden of showing discriminatory intent, such that an employer's mistaken but good-faith belief in its reason for taking an employment action may defeat a plaintiff's claim, in a religious accommodation claim the burden is on the *employer* to demonstrate undue hardship resulting from an accommodation. In other words, in a religious accommodation case it is not enough for an employer to show that it had a mistaken but good-faith belief that the religious accommodation would cause undue hardship.

Additionally, the court considered the district court's denial of Kluge's cross-motion for summary judgment on the grounds that he failed to establish a sincerely held religious belief that was violated by the school district's policy. Citing conflicting evidence regarding Kluge's use of transgender students' chosen names, the court concluded that enough of a dispute remained as to the sincerity of his belief that it would be premature to take this question away from a jury, and affirmed the district court's denial of summary judgment for Kluge.

- *Naylor v. Cnty. of Muscatine, Iowa*, 151 F.4th 973 (8th Cir. 2025) – Dean Naylor, a jail administrator for the county sheriff's office, posted a document and several videos to a public YouTube channel, sharing what the court described as "his post-tribulation Rapture beliefs, including his predictions for an impending world war that he asserted the Muslim people would perpetrate against Christian and Jewish people." A local newspaper

printed an article about Naylor's posts, and after community leaders expressed concerns, Naylor was placed on administrative leave and subsequently terminated on the basis that his continued employment would be contrary to order and discipline at the jail and that he lacked credibility to function effectively in a management role. Naylor sued, alleging religious discrimination under Title VII. The district court focused on the county's undue hardship defense, concluded that Naylor's online commentary could not be accommodated without undue hardship, and granted summary judgment for the county.

On appeal, the Eighth Circuit applied the Supreme Court's holding in *Groff v. DeJoy*, 600 U.S. 447 (2023), and determined that genuine issues of material fact existed as to whether Naylor's posts would cause undue hardship to the operation of the jail. The county argued that Naylor's Islamophobic and homophobic views had harmed its image by spurring public concern that the county discriminated against detainees or visitors who were members of those communities; the court assumed, without deciding, that "public image effects can present issues for an organization sufficient to rise to the level of an undue hardship under Title VII" but concluded that the county had not provided sufficient evidence in this case to warrant summary judgment. While the record contained evidence of some public concern that could potentially lead to reputational harm, there was no evidence of "an actual negative impact on the jail's public image." The county also argued that accommodating Naylor's posts would cause harm to its business relationships, pointing to two entities that considered ending their agreements to send their overflow detainees to the jail after Naylor's commentary became public. The district court had agreed that this constituted undue hardship, but the Eighth Circuit was less certain, concluding that "While a reasonable jury could find this evidence sufficient to establish an undue hardship, the evidence is insufficient to support the grant of summary judgment." The loss of contractual relationships had been speculative, and the amount of money the county would have lost was not sufficiently established to be substantial in relation to the conduct of the jail's particular business as required under *Groff*. The court therefore reversed and remanded.

- *Bordeaux v. Lions Gate Ent., Inc.*, No. 23-4340, 2025 WL 655065 (9th Cir. Feb. 28, 2025) – Plaintiff Andrea Bordeaux was an actress on the TV series *Run the World*. During the filming of the show's second season in the spring of 2022, the production company had certain COVID-19 protocols in place, in accordance with union agreements and federal, state, and local health guidelines. One of those was a vaccination requirement, for which Bordeaux requested a blanket exemption on religious grounds. That exemption was denied, and she sued for religious discrimination, but the district court granted summary judgment for the employer, which demonstrated that if Bordeaux tested positive for the virus it would cause undue hardship: a positive test would require a 10-day production shutdown, costing an estimated $1.5 to $3 million, and multiple shutdowns could lead to a permanent shutdown of production. On appeal, Bordeaux argued that the risk of a shutdown was too speculative to constitute an undue hardship under Title VII, but the Ninth Circuit rejected this argument, explaining that "an employer need not establish that an adverse health or safety event is *certain* to result from an accommodation to establish undue hardship under Title VII." The evidence showed that New York City was seeing a large number of cases of the Omicron variant at the time, and "Given the prevalence of COVID-19 in New York City over the relevant time

period, the risk of Bordeaux coming into 'close contact' with an individual testing positive was a real, not a hypothetical, risk."

- *Smith v. City of Atl. City*, 138 F.4th 759 (3d Cir. 2025) – Alexander Smith, an Atlantic City firefighter, requested a religious accommodation to grow a beard, which the fire department denied out of concern that the self-contained breathing apparatus (SCBA) masks firefighters wear do not seal properly if the wearer has a beard or goatee. Smith sued for religious discrimination and retaliation under Title VII, as well as for violations of the free exercise and equal protection clauses of the First Amendment. The district court granted summary judgment on all of Smith's claims. The Third Circuit affirmed as to the Equal Protection and Title VII retaliation claims, but reversed and remanded as to the First Amendment and Title VII religious discrimination claims.

  With respect to Smith's Title VII claims, the court held that the city had failed to demonstrate that allowing him to grow a beard as a religious accommodation would impose an undue hardship: given that Smith's position in the department very rarely required him to engage in actual firefighting, there was a "vanishingly small risk" he would ever need to wear an SCBA mask, and no other employees were requesting similar accommodations, so it was very unlikely the fire department would be unable to respond safely to an emergency. Therefore the Third Circuit vacated the district court's judgment with respect to Smith's religious accommodation claim.

  However, the court affirmed summary judgment in favor of the city with respect to Smith's Title VII retaliation claim, because he could not show a connection between his protected activity and any adverse employment action. The denial of his accommodation request is not in itself an adverse action, and the only other adverse action he alleged was a suspension for refusing to respond to an emergency, which took place 18 months after the accommodation request – too distant in time to suggest a causal connection. Even if he had been able to establish a prima facie case of retaliation, the city articulated a legitimate non-retaliatory reason for suspending him – i.e., his refusal to comply with a direct order to respond to a tropical storm emergency – and he failed to show that this reason was pretextual. (This case is also discussed in the First Amendment section of this outline.)

- *McNellis v. Douglas Cnty. Sch. Dist.*, 116 F.4th 1122 (10th Cir. 2024) – The plaintiff, a high school athletic director and assistant principal, was investigated and fired after he expressed his disagreement with – and then offered to add a Christian perspective to – a school production of the play *The Laramie Project*, which involved the aftermath of an anti-gay hate crime. He sued for discrimination and retaliation under Title VII, as well as for violation of his First Amendment rights. The district court granted the school district's motion to dismiss. The Tenth Circuit reversed the district court's dismissal of McNellis's Title VII discrimination claim, holding that "Here, Mr. McNellis's allegations that DCSD repeatedly invoked his 'religious comments' before investigating and terminating him provide a plausible link between his termination and a discriminatory motive. Under these circumstances, and at this procedural stage, that is sufficient to nudge his claims across the line from conceivable to plausible." (cleaned up) However, because McNellis repeatedly alleged that he was fired because of religion, rather than because of his

complaints about the investigation, he failed to raise a plausible claim of retaliation under Title VII, and the Tenth Circuit affirmed the district court's dismissal of that claim. (This case is also discussed in the First Amendment section of this outline.)

Sexual Harassment

- *Cain v. McDonough*, No. 23-7302, 2024 WL 5165548 (2d Cir. Dec. 19, 2024) – A police officer with the VA alleged that her employer failed to adequately respond to her complaint of sexual harassment by a coworker in violation of Title VII. The district court granted summary judgment for the employer, and the Second Circuit affirmed. The employer had conducted an investigation into Cain's complaint beginning the business day after she filed it, and after the investigation it took several steps to address her concerns, including changing her shift so she would not have to work with her alleged harasser, removing his access to weapons, relocating him to an office in another wing of the building, and instructing him to stay in that wing and not come near Cain. The alleged harasser violated the stay-away order by coming into Cain's work area on three occasions; she reported these violations, and the police chief then spoke to the alleged harasser about staying away from Cain. The court explained that, in a sexual harassment case, "an employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in ... correcting sexually harassing conduct. … True, we have recognized that where harassment continues after an employer receives complaints, that may create an issue for the jury as to whether the employer's response was adequate. But we do not read those cases as holding as a matter of law that any time a harassing co-worker violates an order to stay away from the complainant a jury could conclude that the employer's response was inadequate." (internal quotations and citations omitted)

- *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025), *reh'g denied*, No. 24-2109, 2025 WL 3145708 (6th Cir. Nov. 5, 2025) – A Black female sales representative sued her former employer for sexual harassment committed by the company's client, and also alleged she was fired either in retaliation for complaining about the harassment or because of her race. The sexual harassment claim was based on a single incident during which Bivens visited a motel that was a client of her employer and the motel manager asked her out. The district court granted summary judgment for the employer, holding that Bivens had failed to establish that her employer was liable for the third party's conduct, and the Sixth Circuit affirmed. Applying principles of agency law, the court explained that although a negligence standard may be applied in situations of coworker harassment (i.e., harassment of an employee by non-supervisory coworkers), as set forth in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), such a standard is not applicable to third-party harassment situations because the perpetrator is not an agent of the employer. Therefore, according to the court, in order for Bivens to prevail on her claim, she would have to establish that her employer was *directly* liable for the harassment – i.e., that it intentionally created the allegedly hostile work environment. The Sixth Circuit formulated this intent requirement as when the employer "desires" an unlawful consequence or is "substantially certain" that it will occur. Because the plaintiff's evidence did not establish such intent, the employer was entitled to summary judgment on her sexual harassment claim.

Further, the court held that Bivens' claims that her termination was retaliatory or discriminatory failed because the evidence showed she was terminated as part of a RIF in which the head of the company eliminated Bivens' sales territory; the decision maker did not even know who Bivens was, let alone that she had engaged in protected activity, and 19 of the 23 employees who lost their jobs in the RIF were White.

Notably, the Sixth Circuit acknowledged that its holding regarding intent in third-party harassment cases "departs from the conclusion reached by most circuit courts to have addressed the issue as well as the EEOC's reading of Title VII." Most other federal appellate courts have analyzed third-party harassment claims under a negligence theory, which is consistent with the EEOC's interpretation that an employer should be liable for third-party harassment under Title VII if the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- *Est. of Harris v. City of Milwaukee*, 141 F.4th 858 (7th Cir. 2025) – Santoasha Harris, an employee of the Department of Public Works, alleged that she had been sexually harassed by her supervisor in violation of Title VII. The district court granted summary judgment for the city, and the Seventh Circuit affirmed. There was no question that the advances were sexual in nature and unwelcome, but Harris failed to show that the conduct affected a tangible aspect of her employment. There was no argument that the supervisor took any tangible employment action against her; rather, she asserted that he threatened to reassign her to outdoor work if she did not go along with his advances. But most of the job duties for her position involved outdoor work anyway, and the court opined that "The threat of an assignment to duties so clearly outlined in Harris's job description cannot constitute a tangible employment action."

  Even in the absence of a tangible employment action, the city still could have been held liable for the supervisor's conduct, unless it could successfully establish the *Faragher-Ellerth* defense – i.e., that (1) it exercised reasonable care to prevent and correct promptly the sexually harassing behavior, and (2) Harris unreasonably failed to take advantage of any preventive or corrective opportunities the city provided to her or to otherwise avoid harm. In this case the city successfully established both elements of this defense: it showed that it had an effective formal anti-harassment policy, which included several ways for employees to seek assistance, and that Harris had received copies of the policy multiple times but failed to take advantage of any of the available resources or methods for reporting her supervisor's harassment. When she finally did file a formal complaint, the city responded promptly and appropriately by separating Harris from her supervisor, initiating an investigation, and ultimately instigating the supervisor's resignation, all within about one month. Harris argued that the supervisor had been harassing her for five years prior to her formal complaint, and that she had told a coworker (who was not a supervisor at the time) and also sent anonymous letters to certain individuals in the hope of triggering an investigation, but the court did not consider those actions sufficient to defeat the city's defense because they did not comply with the clear requirements of the policy, and in any event there was no evidence in the record that the anonymous letter was ever received by anyone who could have assisted Harris.

Other Title VII Cases

- *Shahrashoob v. Tex. A&M Univ.*, 125 F.4th 641 (5th Cir. 2025) – The plaintiff taught at Texas A&M University under a series of appointments, the last one of which was offered to her for a shorter term than the previous ones and was not renewed. She sued the university for discrimination under Title VII, alleging she was treated less favorably than a male colleague, as well as for retaliation. The district court granted summary judgment for the university, concluding that Shahrashoob had failed to show that her proffered male comparator was similarly situated to her or that the university's legitimate nondiscriminatory reasons were pretextual, and the Fifth Circuit affirmed.

  First, the court rejected the plaintiff's arguments based on an argument that the university had hired a male professor to replace her, because although this was mentioned in her complaint and in attachments to her motion for summary judgment, she did not discuss it at all in her summary judgment briefing, and therefore forfeited the argument. As the Fifth Circuit explained, "An argument raised in a complaint alone, but not in subsequent briefing, is forfeited. And burying an argument in an exhibit attached to a summary judgment response, without briefing it, does not fairly raise that argument to the district court, either." (internal citation omitted) Even if she had not forfeited that argument, however, she did not provide sufficient evidence that the professor who allegedly replaced her was similarly situated in all material respects: the record was devoid of evidence concerning his job title, responsibilities, supervisor, research responsibilities, prior performance, or other relevant details. "When a plaintiff gives only a conclusory explanation about why an individual is an appropriate comparator, the plaintiff's discrimination claim fails."

  As for the retaliation claim, the court held that Shahrashoob had made out a prima facie case but failed to demonstrate that the university's legitimate nondiscriminatory reasons for not renewing her appointments were pretextual. She argued that the university hiring two new professors undermined its assertion that budgetary constraints and teaching needs led to the non-renewal of her teaching appointment. Although the events happened close in time, "a plaintiff fails to establish pretext when there is not significant record evidence beyond temporal proximity." In this case, the plaintiff failed to show that the newly hired professors served the same teaching needs that she had, and therefore did not create a genuine issue of material fact with regard to pretext.

- *Hayes v. Clariant Plastics & Coatings USA, Inc.*, 144 F.4th 850 (6th Cir. 2025) – In reversing the district court's grant of summary judgment to the employer on the plaintiff's sex discrimination claim, the Sixth Circuit explained that a coworker need not be identical in all respects to the plaintiff in order to be a valid similarly situated comparator for purposes of establishing a prima facie case under Title VII. Here, although their skill sets were different in some respects, the plaintiff and her proffered male comparator had similar job duties, their positions were in the same "job family," they reported to the same manager, and they were subject to the same work standards, so a reasonable jury could conclude that they were similarly situated in all relevant aspects of their jobs.

Additionally, the court noted that in cases such as this one where the plaintiff was terminated as part of a reduction in force, she must meet a heightened standard to prove her prima facie case by presenting additional direct, circumstantial, or statistical evidence tending to indicate that her employer singled her out for discharge for an unlawful reason. The court held that Hayes had done so, both by producing evidence from which a jury could conclude that she had superior qualifications to her male coworkers who were not included in the RIF, and by presenting evidence of "a climate of pervasive sexual harassment" in her workplace, which, though not conclusive, tends to add color to the employer's decision making process and the influences behind its actions with respect to the plaintiff.

- *Jones v. Fluor Facility & Plant Servs.,* No. 24-5249, 2025 WL 707869 (6th Cir. Mar. 5, 2025) – The Sixth Circuit reversed the district court's grant of summary judgment for the employer on plaintiff Jones's claim of a race-based hostile work environment, explaining that even facially neutral incidents may be considered toward the "severe or pervasive" analysis in such a claim if circumstantial evidence could lead a reasonable jury to infer that they would not have occurred but for the person's race. Here, the plaintiff alleged two kinds of harassing incidents: some were explicitly race-based, like the use of the n-word and other racist language or jokes, while others were not explicitly race-related, such as ostracism by coworkers. The district court concluded that only the explicitly race-based incidents could be considered when determining whether the harassment was sufficiently severe or pervasive, but the Sixth Circuit disagreed. There were multiple instances of Jones, the only Black worker on the night crew, being isolated and ignored by the others; this ostracism was led by the same coworkers who engaged in explicitly racist harassment of him; and the timing of the ostracism coincided with the explicitly race-based harassment. "This provides sufficient evidence for a reasonable factfinder to conclude that Jones' complained-of ostracization was based on race." Additionally, comments based on racial stereotypes, such as coworkers calling Jones a rapper or repeatedly saying he must be good at basketball, likely would not have been made but for Jones's race, and it was therefore proper to consider those comments in the hostile work environment analysis. Taking all of the incidents into account, a question of fact existed as to whether the harassment was severe or pervasive enough to constitute a hostile work environment.

- *Patterson v. Kent State Univ.*, 155 F.4th 635 (6th Cir. 2025), *reh'g denied*, No. 24-3940, 2025 WL 3079346 (6th Cir. Oct. 30, 2025) – The plaintiff, a transgender tenured English professor, engaged in what the court described as a "weeks-long, profanity-laden Twitter tirade insulting colleagues and the university," expressing dissatisfaction related to the revamping of the school's Center for the Study of Gender and Sexuality and the rollout of a new Gender Studies major. The Dean subsequently rescinded an offer to reduce Patterson's teaching load, which would have allowed Patterson to devote more time to the creation of the new major, and two university committees also denied Patterson's request to transfer to a different campus. Patterson sued for, among other things, discrimination and retaliation under Title VII and a First Amendment violation.

  With respect to the Title VII claims, the court held that Patterson failed to rebut the university's legitimate nondiscriminatory reasons for rescinding the course load

allocation – i.e., Patterson's series of rude, profane, and disparaging messages regarding certain colleagues, which created "a toxic work environment" and made those in charge of creating the new major not want to work with Patterson. Moreover, there was no evidence that the denial of a transfer was motivated by Patterson's gender identity; in fact, the same English department that denied the transfer had voted unanimously to grant Patterson tenure less than a year earlier, which undermined Patterson's claim of anti-transgender bias. Patterson's retaliation claims failed as well, both for failure to show that certain actions constituted protected activity and lack of evidence that the decision makers knew about any purported protected activity. (This case is also discussed in the First Amendment section of this outline.)

- *Thomas v. JBS Green Bay, Inc.*, 120 F.4th 1335 (7th Cir. 2024) – The district court granted the employer's motion to dismiss the plaintiff's complaint of discrimination on the basis of color, but the Seventh Circuit reversed. Contrary to the district court's reasoning, the allegations in a complaint need not lay out every element that the plaintiff would eventually need to prove; that is an evidentiary requirement at the summary judgment stage. Also, the district court did not consider the alleged events sufficiently serious to be cognizable under Title VII, but the Seventh Circuit held that the harms alleged in the complaint – delayed training, denied vacation requests, and a transfer to a less convenient shift that interfered with the plaintiff's child care – would be enough, if supported by sufficient evidence, to satisfy the standard of "some harm" established in *Muldrow*.

- *Woods v. Collins*, 150 F.4th 967 (8th Cir. 2025) – A Black employee of the VA alleged race discrimination, hostile work environment, and retaliation under Title VII. The Eighth Circuit affirmed the district court's grant of summary judgment for the VA for a variety of reasons, including failure to identify similarly situated comparators, failure to tie certain actions to his race, lack of evidence to refute the VA's legitimate nondiscriminatory reasons for its actions, and insufficient severity or pervasiveness to support a hostile work environment claim. Of interest, the court held that a negative performance review, by itself, was not an adverse action even under the *Muldrow* "some harm" standard, because the plaintiff did not produce any evidence that the appraisal was used as a basis for a reduction in pay, transfer, or other change to a term or condition of his employment.

- *Lui v. DeJoy*, 129 F.4th 770 (9th Cir. 2025) – The plaintiff, a female Postal Service employee of Chinese ethnicity, alleged that her demotion was discriminatory based on her race, national origin, and sex, among others. She also alleged a hostile work environment and retaliation under Title VII. The district court granted summary judgment for the Postal Service, but the Ninth Circuit reversed on Lui's discrimination claim, holding that the district court had incorrectly analyzed the fourth element of the *McDonnell Douglas* prima facie case.

  Acknowledging that different courts have articulated a variety of formulations of the fourth element – including that the position remained open and was eventually filled by someone outside the plaintiff's protected class, the position remained open and the employer continued to seek candidates with the plaintiff's qualifications, or that similarly

situated individuals outside of the plaintiff's protected class were treated more favorably – and that some formulations would seem to draw a distinction between terminations and demotions, the court decided that the best way to view the fourth element is as "a catch-all requiring only that the adverse action 'occurred under circumstances giving rise to an inference of [ ] discrimination.' This overarching description of the standard captures the essence of the various formulations of the test we have been applying in our cases, and we adopt it here." (citations omitted)

Applying this formulation to Lui's case, the court held because she showed that she was removed from her position of Postmaster at one post office and reassigned as Postmaster of a smaller office with a lower salary, and that her old position was filled by a White male, "Those circumstances give rise to an inference of discrimination, and that is all she needs to show to satisfy the fourth element." The court also held that the district court erred in holding that the decision to demote Lui was an "independent adverse action," because there was a genuine dispute of material fact as to whether that decision maker was influenced by biased subordinates.

- *Iweha v. Kansas*, 121 F.4th 1208 (10th Cir. 2024) – The plaintiff, a Black woman from Nigeria, worked as a pharmacist at a state-run hospital. She alleged that her coworkers excluded her from meetings and made insensitive and disparaging comments based on her race and national origin. Meanwhile, her coworkers complained to management about the plaintiff's performance and other issues, such as her use of office resources for personal purposes, which she denied. After a confrontation with a coworker, management interviewed Iweha, placed her on administrative leave, investigated her, and eventually terminated her. She sued for hostile work environment, disparate treatment, and retaliation in violation of Title VII. The district court granted summary judgment for the employer, holding that the evidence did not show conduct "severe or pervasive" enough to rise to the level of a hostile work environment, her discrimination claim failed because she did not show that the employer's legitimate nondiscriminatory reason for firing her was pretextual, and she did not establish that she engaged in any protected activity that would form the basis of a retaliation claim.

  The Tenth Circuit affirmed. Notably, the court rejected Iweha's "cat's paw" theory that even though the individual who made the ultimate decision to terminate her did not harbor any discriminatory animus, that individual relied uncritically on an investigation that was supposedly tainted by discriminatorily biased allegations of Iweha's coworkers. The court explained the "cat's paw" concept, and emphasized that "The key element of a successful cat's paw theory of pretext is an unbroken causal chain connecting the biased employee's action to the unbiased decisionmaker's adverse decision. … A cat's paw theory can be defeated by showing a break in the causal chain, or a lack of uncritical reliance by the unbiased decisionmaker. The most common way to make this showing is by establishing that the employer conducted an independent investigation of the allegations against an employee to verify the biased employee's claims." (internal quotations and citations omitted) In this case, the evidence suggested that the employer conducted an independent, unbiased investigation involving not only numerous interviews (including with the plaintiff herself) but also "documentary factchecking" that included an examination of three forms of empirical data, namely records of the

plaintiff's phone calls, internet browsing on her work computer, and key card swipes into and out of the pharmacy.

Pregnant Workers Fairness Act (PWFA)

The Pregnant Workers Fairness Act, which went into effect on June 27, 2023, by its terms applies directly to covered employees in the legislative branch. 42 U.S.C. § 2000gg(3)(B). The PWFA requires employers to provide reasonable accommodations for a covered employee's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause an undue hardship. By increasing pregnant workers' access to reasonable accommodations, the PWFA fills gaps left by the Pregnancy Discrimination Act and the ADA.

- *Lightfoot v. Wellstar Health Sys., Inc.*, No. 1:24-CV-01837-JPB-RDC, 2024 WL 6081827 (N.D. Ga. Dec. 6, 2024) – As a result of the traumatic birth of her son in 2022, Amy Lightfoot had PTSD, anxiety, and postpartum depression. Returning to work at the hospital where she gave birth was triggering for her, so she requested a remote work arrangement in April 2023 and renewed that request in July and October, remaining on leave when her employer denied her requests. Her employer moved to dismiss her subsequent PWFA claims as untimely, arguing that renewals were not separate, actionable employment practices, but merely requests to reconsider the request made before the effective date of the PWFA. The district court disagreed and found that Lightfoot could state a PWFA claim regarding the July and October requests. It noted that "when Plaintiff requested a remote-work accommodation in July 2023, she was not requesting that accommodation for previous months already gone by, but rather, for future months. Plaintiff's accommodations requests were inherently prospective in nature, as opposed to retroactive…. As such, the Court finds that each denial of Plaintiff's requested accommodations presented a discrete act."

- *Keiper v. CNN Am., Inc*., No. 24-CV-875, 2024 WL 5119353 (E.D. Wis. Dec. 16, 2024) – The U.S. District Court for the Eastern District of Wisconsin dismissed Raquel Keiper's PWFA failure-to-accommodate and retaliatory discharge claims. Keiper worked as a freelance graphic artist for CNN. She learned she was pregnant in April 2023 and immediately informed her supervisor and coworkers. In May, she experienced subchorionic hemorrhaging, which she informed her supervisor of, and requested the day off work. On July 31, an ultrasound revealed two potential complications. In August, she requested two months of unpaid maternity leave, to begin in December, but she was terminated a week later.

  CNN argued that Keiper did not state a failure-to-accommodate claim because she did not communicate to her manager that her maternity leave request was connected to a limitation or medical condition. The court agreed. The only limitation known to CNN was Keiper's subchorionic hemorrhaging, and the only accommodation she requested in connection with the hemorrhaging was the day off, which was granted. "CNN had no reason to suspect that hemorrhaging early in Keiper's pregnancy indicated a need for an accommodation after the birth of the child seven months later." Keiper tried to link the

complications she learned of on July 31 to her maternity leave request, but she never communicated these complications to CNN. Her retaliation claim was dismissed for the same reason: "[she did] not sufficiently allege that CNN failed to accommodate a *known* limitation."

- *Underwood v. Baldwin Cnty. Bd. of Comm'rs*, No. 5:25-CV-40 (MTT), 2025 WL 1361746 (M.D. Ga. May 9, 2025) – When Faith Underwood experienced a medical emergency, her OB/GYN issued a note stating that she should be allowed to work from home due to pregnancy complications. Her supervisors sent her home for five days (for which she took paid leave) while they decided whether to grant her accommodation request. Her request was ultimately granted, but when she requested an extension on her assignments due to the leave of absence she had been forced to take, she was denied and received disciplinary notices relating to failure to perform work. The U.S. District Court for the Middle District of Georgia held that she stated a claim under the PWFA, since she requested a reasonable accommodation due to pregnancy complications and was denied accommodation in the form of an extension of her assignment deadlines.

- *Spry v. Wayne Mem'l Hosp.*, No. 3:24-CV-00988, 2025 WL 1710240 (M.D. Pa. June 18, 2025) – Airelle Spry was a travel nurse under contract to work at Wayne Memorial Hospital when she learned she was pregnant. On May 9, 2023, she provided the hospital with a doctor's note stating that, due to the high-risk nature of her pregnancy, she should not work in the hospital's "isolation rooms" for the remainder of her pregnancy. The hospital refused to grant this request and terminated her and worked to rescind her contract, which ran until September 9, 2023. When she sued under the PWFA, the hospital argued her claims should be dismissed because the alleged discrimination occurred before the PWFA's effective date. It relied on *Beddingfield v. United Parcel Serv., Inc.*, No. 23-CV-05896-EMC, 2024 WL 1521238 (N.D. Cal. Apr. 8, 2024), which held that the PWFA does not apply to conduct which occurred prior to its effective date of June 27, 2023. The district court denied the hospital's motion to dismiss: since the employment contract was meant to be in effect through September 9, it could infer that the alleged discrimination extended through that date.

- *Pankonin v. Se. Cmty. Coll. Area*, No. 4:2-CV-3229, 2025 WL 1898086 (D. Neb. July 9, 2025) – Amber Pankonin's employer ignored her request not to be scheduled to teach any night classes during the Spring 2024 semester. She sued under the PWFA, alleging that she requested this as an accommodation related to pregnancy. However, she also alleged the request was related to childcare ("I asked ... not to work night classes in the January 2024 quarter because I needed to be home by 5:15pm to care for my child"). The district court dismissed her claim because she did not allege that the requested accommodation was for "known limitations" related to pregnancy, and EEOC interpretive guidance on the PWFA states, "Time for bonding or time for childcare ... is not covered by the PWFA." 29 C.F.R. § 1636 app. A § 3.

- *Bellotte v. Austin*, No. 5:24-CV-0876-JKP, 2025 WL 2109962 (W.D. Tex. July 28, 2025) – The Department of Defense moved to dismiss Erica Belotte's claim that it violated the PWFA when it did not provide her with a space to breastfeed, arguing that the PWFA applies to *pregnant* workers and does not mention lactation or breastfeeding. The district

court disagreed, reasoning that lactation (and the pumping and breastfeeding that accompany it) is a condition arising out of childbirth, as required for PWFA coverage. It noted that to the extent the statute itself leaves any ambiguity on whether it covers breastfeeding, EEOC guidance and regulations are explicit regarding the PWFA's application to it.

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.

- *Kemp v. Regeneron Pharms., Inc.*, 117 F.4th 63 (2d Cir. 2024) – Denise Kemp, a Senior Manager in Regeneron's Quality Assurance Department, worked remotely from a hospital for 15 days while her daughter recovered from surgery. When she returned to the office, supervisors told her she needed to be more visible in the office and limited her to one day of remote work per week, though others with similar duties worked remotely regularly or full-time. A few months later, Regeneron approved her request for intermittent FMLA leave to continue caring for her daughter. Around the same time, her supervisors began discussing transitioning her to a role with fewer managerial responsibilities. When she retired a few months later, she alleged Regeneron interfered with her FMLA rights by attempting to discourage her from taking FMLA leave and by limiting her remote work. The district court granted summary judgment for Regeneron, holding that Kemp failed to prove that Regeneron violated the FMLA because it did not deny her request for FMLA leave, but merely discouraged her from taking it.

  The Second Circuit held that an employer who discourages, but does not deny, an employee's request for FMLA leave can "interfere with" the employee's rights in violation of the FMLA, so the district court erred to the extent it held otherwise. According to the statute's plain, unambiguous text, it is unlawful for an employer to "*interfere* with, restrain, *or* deny" FMLA rights. 29 U.S.C. § 2615(a)(1) (emphases added). The court nevertheless affirmed dismissal of Kemp's FMLA claim, rejecting her argument that Regeneron substantially limited her remote work days and punished her for working remotely. It noted that remote work is not "leave" withing the meaning of the FMLA: the FMLA "does not entitle employees to work remotely or make it unlawful for an employer to punish an employee who works remotely."

- *Rodriquez v. Se. Pa. Transp. Auth.,* 119 F.4th 296 (3d Cir. 2024) – Ephriam Rodriquez, a SEPTA bus operator, was fired for excessive absences. His final absence, on June 8, 2018, was related to a migraine headache; most prior absences were not. After a meeting in which his discharge was recommended, he requested FMLA leave for migraines and visited a physician on July 3, 2018 to obtain supporting documentation. When his termination was formally approved, he sued SEPTA for FMLA retaliation and interference.

  The Third Circuit held that Rodriquez did not have a "serious health condition," as

necessary for him to be entitled to FMLA leave, at the time of his final absence. One of the FMLA regulations' criteria for such a condition is that it requires at least twice-yearly treatment visits to a healthcare provider, but Rodriquez's first and only such visit for migraines was his appointment to get FMLA documentation. The Third Circuit held that it did not make a difference that his healthcare provider, on July 3, checked a box indicating Rodriquez would need twice-yearly visits: "the operative time for determining whether a particular condition qualifies as a serious health condition is the time that leave is requested or taken[,]" which in this case was nearly a month prior. "A patient does not have a 'serious health condition' under [FMLA regulations] if he waits to see a healthcare provider until after the relevant absences."

- *Chapman v. Brentlinger Enters.*, 124 F.4th 382 (6th Cir. 2024), *reh'g denied*, Nos. 23-3582/3613, 2025 WL 444106 (6th Cir. Jan. 27, 2025) – Celestia Chapman worked as a finance manager at MAG, a car dealership. MAG denied her request for FMLA leave to care for her terminally ill adult sister, telling her that the statute did not provide leave to care for an adult sibling, and subsequently terminated her. Central to Chapman's FMLA interference claim was the matter of whether she was an "in loco parentis" parent to her sister, such that she was entitled to FMLA leave.

  The Sixth Circuit held that "the FMLA recognizes the kind of in loco parentis relationship alleged here, which formed when the dependent was over eighteen, her condition developed in adulthood, and the purported parental relationship originated after the onset of the disabling condition" – all factors which the district court had held meant Chapman could not be in loco parentis to her sister. The Sixth Circuit analyzed common law for guidance on how to determine whether such a relationship has indeed formed between two adults. It concluded "The touchstone of this inquiry is *intention*" – not just whether someone has assumed obligations of a parental nature, but whether they have done so with the intention of serving as a parent. Courts in the past have determined intention by examining direct evidence of how the two adults regard one another, and indirect evidence such as whether the in loco parentis parent "(1) is in close physical proximity to the adult loco parentis child; (2) assumes responsibility to support them; (3) exercises control or has rights over them; (4) and has a close emotional or familial bond with them, akin to that of an adult child." The court remanded for the district court to decide in the first instance whether Chapman's relationship with her sister was in fact in loco parentis.

  Additionally, as part of its analysis of Chapman's FMLA retaliation claims, the Sixth Circuit held that an employer's false statements to an unemployment authority can constitute an adverse action for purposes of a prima facie case.

- *Jackson v. U.S. Postal Serv.*, 149 F.4th 656 (6th Cir. 2025) – Mail clerk Kristopher Jackson was certified by his healthcare provider for FMLA due to twice-monthly flare-ups of sickle cell anemia. USPS fired him when he accumulated unexcused absences in violation of a Last Chance Agreement. He sued, claiming that several of those absences were covered by the FMLA. At issue was whether his medical certification created an exact cap or limit on his monthly intermittent leave.

The Sixth Circuit reversed the grant of summary judgment to the USPS on the relevant portion of Jackson's FMLA interference claim, holding that a medical certification form providing an estimate for intermittent *unforeseeable* leave cannot create an exact limitation of the total amount of FMLA days an employee can take. It reasoned that the law clearly contemplates an estimate, not a hard bar (e.g., implementing regulations set out that an "estimate of the frequency and duration of the episodes of incapacity" is sufficient for a medical certification, 29 C.F.R. § 825.306(a)(7)), and that this comports with common sense ("The nature of conditions involving unforeseeable intermittent leave means that a medical certification will almost always have to be an estimate.")

The court noted that a medical certification could create a cap on the number of days of FMLA leave if the intermittent leave was *foreseeable*; district courts must first find that the intermittent leave is foreseeable before determining that a particular number on a medical certificate creates an exact cap or limit. It also noted that just because a medical certification cannot precisely pinpoint the number of days of leave does not mean that the employee can take leave in whatever increment they choose, because that would not "balance the demands of the workplace with the needs of families," 29 U.S.C. § 2601(b)(1).

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 of the outline also includes decisions issued under the Equal Pay Act, which amended the FLSA to prohibit sex-based discrimination in wages.

- *Hollis v. Morgan State Univ.*, 153 F.4th 369 (4th Cir. 2025) – A university professor alleged that, among other things, the university paid her less than her male colleagues in violation of the Equal Pay Act. The district court granted summary judgment to the university on this claim, and Dr. Hollis appealed. It was undisputed that she had established a prima facie case – i.e., she showed that she was paid less than male colleagues who performed equal work on jobs that required equal skills, effort, and responsibility and were performed under similar working conditions – and therefore the burden shifted to the university to demonstrate a "factor other than sex" to explain the difference in wages. The Fourth Circuit explained that it is not enough for an employer to offer a reason that *could* explain the differential; rather, it carries its burden only if it shows that the proffered reason *does in fact* explain the disparity. Here, "We do not doubt that a jury could conclude that the defendants believed in the stronger qualifications of those candidates, and set Dr. Hollis's lower salary accordingly. But we think a jury also could doubt whether MSU in fact objectively weighed the comparators' qualifications in the way it now posits." (internal quotations and citations omitted) Fact issues remained regarding the weight given to prior experience in different types of educational settings, and whether the school discounted Dr. Hollis's research and leadership experience. Moreover, the use of a "facially neutral" salary schedule did not foreclose an EPA claim where the employer had room for discretion in assigning starting salaries to new hires based on its assessment of their qualifications and experience, leaving open the possibility for discrimination in wages based on the employees' sex.

- *Micone v. Levering Reg'l Health Care Ctr., LLC*., 132 F.4th 1074 (8th Cir. 2025) – A nursing home had a written policy of automatically deducting thirty minutes from employees' time sheets every day to account for an unpaid lunch break. The nursing home had an unwritten policy that employees who worked through lunch must submit a temporary time sheet to their supervisor describing how much time they worked. The Department of Labor investigated and determined that several employees who worked through their lunch break did not know about the unwritten policy to submit temporary time sheets and were not paid for that time. After discovery, the nursing home moved for summary judgment, arguing that it did not have actual or constructive knowledge that its employees worked through their lunch breaks and, even if they did know about the unpaid work, the Department of Labor did not establish how much was owed. The district court agreed with the nursing home on both points and the Secretary of Labor appealed.

  The Eighth Circuit reversed and remanded. The evidence showed that the nursing home established a policy for how employees could report working through lunch, but the record did not show that the employees knew about that policy or how to use it. If the nursing home could show that employees knew about the process and did not follow it, it would likely be able to show that it did not have constructive knowledge of the work. But without that, there was a genuine issue of fact whether the employer's due diligence (or lack thereof) gave it constructive knowledge that the employees worked through lunch, and the case had to proceed to resolve it.

- *Doe No. 1 v. United States*, 129 F.4th 1362 (Fed. Cir. 2025) – An intelligence analyst employed by the FBI sued after the FBI forced him to conduct mandatory training without pay outside of work time. OPM regulations, issued after the notice-and-comment process, exempt entry-level training for federal employees from the definition of "hours of work" in the FLSA, permitting that time to go unpaid. DOL regulations, on the other hand, contain no such exemption. The DOL regulations, unlike the OPM ones, are interpretive rules designed to inform the public on how DOL will apply the FLSA. The Court of Federal Claims found the OPM regulations to be invalid because they did not conform with the DOL's. The government appealed.

  The Federal Circuit reversed and remanded, finding that the OPM regulations "pursuant to the FLSA are valid if they are consistent with the statute and, to the extent they differ from DOL regulations, any differences are justified by legitimate reasons." The court distinguished between legislative rules, which are promulgated through the notice-and-comment rulemaking procedure and have the force of law, and interpretive rules, which do not go through notice and comment and only serve to inform the public on the DOL's reading of the law. Moreover, Congress granted OPM authority to administer the FLSA as necessary for federal employees in ways that may be different than how DOL administers the law for non-federal employees. OPM exercised that authority when it issued these regulations. Finally, OPM's regulations were a legitimate policy choice. Sixteen years before the FLSA was extended to cover federal employees, Congress passed the Government Employees Training Act, which prohibited employees from receiving premium pay for training. So, the logic of the regulations prohibiting pay for training outside of work time is supported by Congressional intent.

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.

- *Knox v. Dep't of Just*., 125 F.4th 1059 (Fed. Cir. 2025) – When Anthony Knox, a member of the U.S. Air Force Reserves, returned to work as a DEA special agent following deployment, he filed USERRA claims to retroactively correct the timing of a pay increase and promotion. The Administrative Judge denied his promotion reemployment claim, reasoning that because the promotion he sought was discretionary, not automatic, he could not show that the promotion was a right of employment to which he otherwise would have been entitled. The MSPB affirmed. The Federal Circuit, however, found that the MSPB applied the incorrect legal standard: "the promotion did not have to be automatic for Mr. Knox to prevail. Rather, the correct question is whether Mr. Knox 'may have been entitled to' the promotion." Remanding the claim to the MSPB, the court clarified that this is to be determined by considering the three factors enumerated in the regulation, including whether the promotion was generally granted to all employees and whether it was reasonably certain that the benefit would have accrued to the employee but for their absence for military service. 5 C.F.R. § 353.106(c).

Occupational Safety and Health Act (OSH Act)

The OSH Act applies to the legislative branch through section 215 of the CAA, 2 U.S.C. § 1341. The OSH Act 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.

- *UHS of Del., Inc. v. Sec'y of Lab.*, 140 F.4th 1329 (11th Cir. 2025) – OSHA cited a psychiatric hospital and its management company under the General Duty Clause for failing to protect its employees from the known hazard of workplace violence, after an investigation revealed dozens of instances of patients behaving violently or aggressively toward the staff. The citation alleged that eight "feasible and acceptable means of abatement" existed, two of which would require the hospital to hire specially trained staff to monitor patients for potential violence, to assist in preventing or responding to violent events, and to be present for intake on all shifts.

  The ALJ found that the hospital's existing methods for addressing workplace violence were inadequate, and that OSHA's suggested abatement methods were feasible. The OSH

Review Commission upheld the ALJ's decision. On appeal to the Eleventh Circuit, the employers did not dispute the existence of a recognized hazard that was likely to cause death or serious physical harm, nor did they challenge the feasibility of six of the eight abatement measures listed in the citation. Rather, they challenged the feasibility of two of the staffing measures that would require hiring round-the-clock security staff. The court agreed that the record was "devoid of any evidence from the Secretary or his expert witnesses that Suncoast hiring round-the-clock security staff would be economically feasible" and therefore set aside the part of the ALJ's decision that would require the hospital to implement those two measures.

However, the court noted that the Secretary needed to prove only that at least *one* feasible and effective means existed to eliminate or materially reduce the hazard, and that he had in fact established six undisputed such methods, so there was no basis to vacate the Commission's decision affirming the citation. Moreover, an employer is not obligated to adopt any of OSHA's suggested methods for abating a hazard, but may use any feasible method as long as it abates the hazard and brings the employer into compliance with the OSH Act. In this case, the employers were free to develop and implement their own abatement methods, as long as they met their obligation to provide employees with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees" under the General Duty Clause.

- *Mar-Jac Poultry MS, LLC, v. Sec'y, U.S. Dep't of Lab.*, No. 24-60026, 2025 WL 1904565 (5th Cir. July 10, 2025) – After a fatality involving an eviscerator machine at a poultry processing facility, OSHA issued a citation against the employer for violations of two standards: the general requirements for machine guarding, 29 C.F.R. § 1910.212(a)(1), and specifications for safety instruction signs, 29 C.F.R. § 1910.145(c)(3). The ALJ upheld the citation and the OSH Review Commission affirmed. After holding that the Secretary had carried his burden to show that Mar-Jac violated both standards, the Fifth Circuit went on to reject the employer's affirmative defense of employee misconduct. First, although the company had a work rule preventing employees from reaching into the machine while it was in operation, the evidence showed that it did not adequately communicate its work rule to relevant employees, take reasonable steps to discover violations of the rule, or effectively enforce the rule; rather, the record showed that employees and supervisors "regularly and openly violated this rule."

  Second, although a post-mortem toxicology report on the employee who was killed, identified as B.B., showed that he had drugs and alcohol in his system, this was not enough to establish an employee misconduct defense. None of his coworkers reported "any impaired or otherwise out-of-the ordinary conduct" by the employee, and "even if we assume that intoxication was a contributing cause of B.B.'s accident, Mar-Jac has not argued, much less shown, that putting one's unprotected hand in close proximity to the eviscerator's unguarded, fast-moving carousels is safe *unless* that person is under the influence of the drugs and alcohol to the same extent as B.B." Because numerous other employees engaged in the same practice of reaching into the machine while it was in operation, the company was still in violation of the standard: "In any event, Mar-Jac's

violations are determined, in this instance, by its departure from OSHA safety standards addressing machine guarding and safety signage requirements, not regulations prohibiting workers from undertaking certain duties while under the influence of alcohol and/or illegal drugs. … In other words, even if B.B.'s reach into the Line 2 eviscerator on the night of his death had *not* resulted in bodily injury, the cited violations still would exist, and the affirmative defense still would not apply, because the Line 2 eviscerator's carousels lacked effective safeguards and safety warning signs *and* Mar-Jac failed to enforce its workplace safety rule purporting to prohibit such hazardous employee conduct. Indeed, as the ALJ determined, Mar-Jac's floor persons and supervisors 'flagrantly ignored' and 'pervasively' violated its rule prohibiting employees from reaching into the eviscerator while it was operating."

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.

FLRA

Since 2017, the FLRA has been without a General Counsel and therefore unable to issue unfair labor practice complaints. Without the ability to decide ULP cases directly, the FLRA's decisions this year were limited to appeals of arbitrator decisions to which the Authority mostly deferred, and none are included here. However, the *Lucas* decision, discussed below, represents a novel effort by the D.C. Circuit to preserve employee rights when the typical administrative relief is not available because of the FLRA's inability to prosecute ULPs.

- *Lucas v. AFGE*, 151 F.4th 370 (D.C. Cir. 2025) – In this case, the D.C. Circuit allowed a Title VII and ADA lawsuit against a union to proceed even though the employee had filed duty of fair representation charges over the same conduct. While not explicitly articulated, the court heavily implied that the fact the FLRA has not issued an unfair labor practice complaint since 2017 because it has not had a General Counsel for that entire period motivated the decision to allow the case to survive the motion to dismiss stage.

  The employee, Nia Lucas, filed two discrimination lawsuits against her union. The first alleged that the union violated Title VII and the ADA. The second alleged that the union, the local, the local's president, and the union's regional vice president violated the anti-retaliation provisions of the FLSA. In both lawsuits, the district court granted the defendants' motions to dismiss for lack of jurisdiction because these allegations were essentially claims that the union violated its duty of fair representation, and the FSLMRS precludes employees from repackaging unfair labor practices as lawsuits or claims or in other forums.

The D.C. Circuit reversed, holding that the Title VII and ADA claims against the union could proceed. First, the court recognized Congress' intent to provide multiple overlapping venues and remedies for discrimination throughout the various anti-discrimination laws. Looking at how these laws work together, the court determined that "a more natural reading of the FSLMRS" is that it offers a faster and cheaper means to obtain relief for a Title VII or ADA claim, but it is not the exclusive path for those claims. Moreover, the standard for a duty of fair representation claim is higher and affords fewer remedies than a Title VII or ADA lawsuit against a union. With these different schemes available, it is not clear that Congress intended to prohibit this type of lawsuit against a union. Second, the court looked to the language of the ADA and Title VII and determined that they both address "the specific evils of invidious discrimination by labor organizations." Therefore, there is no concern that allowing lawsuits like Lucas' would swallow the FSLMRS whole. Unlike Title VII and ADA, however, the FLSA anti-retaliation prohibition does not expressly apply to unions. As such, the D.C. Circuit held that this claim was solely within the FLRA's purview, and the motion to dismiss the FLSA lawsuit was affirmed.

Judge Pan dissented, arguing that the majority's decision was an effort by the court to expand its jurisdiction in a manner that may be good public policy (i.e., providing Lucas relief where she has none), but is not appropriate under the law. He opined that the plain language of the FSLMRS and the Civil Service Reform Act afford the FLRA the sole authority to resolve discrimination cases by unions against federal employees, and the court should respect that choice.

*Circuit Court Deference to NLRB post-*Loper Bright

- *United Nat. Foods, Inc. v. NLRB*, 138 F.4th 937 (5th Cir. 2025), *petition for cert. filed*, No. 25-369 (U.S. Sept. 29, 2025) – In this case, a majority of the Fifth Circuit panel made the same decision on remand after *Loper Bright* as it had under *Chevron.* The dissenting judge argued that the panel was simply "recycling" its earlier *Chevron* analysis.

  The employer filed an unfair labor practice charge on October 28, 2019, alleging that two unions violated the NLRA by attempting to cause the employer to discriminate against employees and refusing to bargain. On July 29, 2020, an NLRB Regional Director issued a complaint alleging that the unions violated the NLRA as alleged in the charge. In January 2021, President Biden removed NLRB General Counsel Peter Robb and appointed Peter Ohr as Acting General Counsel. On February 1, 2021, the employer filed a motion for summary judgment with the NLRB against the unions. Before the NLRB ruled on the motion, the Regional Director issued an order which stated that the Acting General Counsel had reviewed the allegations and decided to exercise his prosecutorial discretion to dismiss the charges against the unions and withdraw the complaint. The employer then appealed to the NLRB, arguing that the Acting General Counsel could not dismiss the charges while a summary judgement motion was pending and that the Acting General Counsel's appointment was unlawful. The Board denied the appeal, citing the Regional Director's prosecutorial discretion. The employer appealed to the Fifth Circuit, but the appeal was denied based on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

On June 28, 2024, the Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), in which it overturned *Chevron*. The Supreme Court then granted certiorari in the United Natural Foods case, vacated the judgment, and remanded the case to the Fifth Circuit for a decision consistent with *Loper Bright*.

On remand, the Fifth Circuit again agreed with the NLRB that the Acting General Counsel's decision to withdraw the complaint was not reviewable. Section 3(d) of the NLRA gives the General Counsel "final authority regarding the filing, investigation, and prosecution of unfair labor practice complaints." This dismissal was a prosecutorial decision, not an adjudicatory one that could be within the purview of the National Labor Relations Board. The fact that it came after the employer filed a motion for summary judgment with the Board is irrelevant. If the Board had transferred the case to itself or issued a Notice to Show Cause, withdrawing the complaint may have required some type of review or decision by the Board, but those actions had not happened yet. The dissent and the employer argued that Federal Rule of Civil Procedure 41(a)(1)(A)(i) prohibits withdrawing a complaint after a motion for summary judgment has been filed, but the FRCP are not strictly applied to administrative hearings like the NLRB's. Moreover, if that were the case, it would incentivize parties to race to file motions with the Board to avoid withdrawal.

Judge Oldham dissented, arguing that this decision was a cynical recycling of the court's earlier decision that deferred to the NLRB under *Chevron*. He had dissented in the earlier pre-*Loper* case, arguing that the FRCP should apply here. He argued that the court was not interpreting the law as written, but was cloaking its deferral to the agency with "more paragraphs of analysis to figure out the single, best meaning of the statute," i.e., the agency's.

- *Miller Plastic Prods. Inc v. NLRB,* 141 F.4th 492 (3d Cir. 2025) – In this case, the Third Circuit acknowledged and relied on the NLRB's interpretation of what constitutes "protected concerted activity," finding that the Board's expertise "forms a body of experience and informed judgment that can aid our analysis" in a notable use of *Skidmore* deference.

  Ronald Vincer worked at a plastic manufacturing plant. He had a reputation for being highly skilled but also very social. He generally received positive performance reviews but had also been counseled about talking to coworkers too much during his shift and excessive cell phone use. At a staff meeting on March 16, 2020, a manager announced that the company planned to stay open through the COVID-19 pandemic. Vincer complained that the company "did not have the proper precautions in place and that the employees should not be working." On March 23, Vincer learned that a coworker who was sent home after a potential COVID exposure had returned to work two days later. He complained again about the company's COVID protocols. On March 24, a supervisor witnessed Vincer on his phone at work. He was fired that day for "poor attitude, talking, and lack of profit." He filed an unfair labor practice charge, alleging that the company fired him because he engaged in protected concerted activity, i.e., complaining about the COVID safety protocols on behalf of himself and his coworkers. The NLRB agreed that

he was fired for protected concerted activity, finding that his comments at the March 16 meeting "sought to bring truly group complaints to the attention of management" and that his March 23 complaints were a logical outgrowth of the March 16 comments.

The Third Circuit agreed with the Board's decision that Vincer engaged in protected concerted activities. In so holding, the court "look[ed] to the Board's interpretations as a body of experience and informed judgment." The court explained that while it "must independently interpret statutory text" after *Loper Bright*, the Court "find[s] it helpful to begin by considering the evolution of the concept of concerted activity." That analysis revealed that the Board has found that an employee's solo advocacy can still be "concerted" if it inspires or otherwise contributes to group action for mutual aid or protection. Applying that to this case, Vincer's statements at the March 16 meeting and his advocacy on March 23 were an extension of his effort to raise a group concern, i.e., worries about the spread of COVID-19.

First Amendment

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

First Amendment cases involving government employee speech are typically analyzed under the framework established by the Supreme Court in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois.*, 391 U.S. 563 (1968) and *Garcetti v. Ceballos*, 547 U.S. 420 (2006). As discussed in many of the cases below, the courts must first determine whether an employee has spoken as a private citizen on a matter of public concern, and if so, it must then weigh the employee's right to that speech against the government employer's interests in restricting it.

Social Media

- *Hussey v. City of Cambridge*, 149 F.4th 57 (1st Cir. 2025) – Brian Hussey, a police officer in Cambridge, Massachusetts, posted on his personal Facebook page an objection to the naming of a federal police reform bill after George Floyd. The post was made from home on his personal phone, and restricted to his Facebook friends, but someone provided a screen shot to the local chapter of the NAACP, which shared it with the Commissioner of the police department. The department placed Hussey on leave, conducted an internal investigation, and eventually suspended him for four days without pay. He sued, alleging retaliation for exercising his First Amendment free speech rights. While there was no dispute that Hussey was speaking as a private citizen on a matter of public concern, the court held that his claim failed at the second step of the *Pickering* test – namely, that the government's interest in functioning efficiently outweighed Hussey's rights.

  First, the court found that Hussey's use of mocking, insulting, and disparaging language,

such as referring to George Floyd as a "druggie," meant his speech was not entitled to the "highest rung" of First Amendment protection, but was "modestly diminished" in value. Second, the court rejected Hussey's argument that he should prevail because the government did not produce evidence of actual disruption to police operations; citing precedent, the court stated that "We see no reason to depart from our past decisions by requiring government employers to wait for actual disruptions to their operations before disciplining employees for their speech." In this case, the record supported the reasonableness of the department's prediction of disruption: especially given the contentiousness of the time period, it was reasonable for the department to fear the impact that Hussey's post could have on its reputation within the community. Weighing these interests, in light of "the importance of that trusting relationship [with the community] to the Department's public service mission," the court affirmed summary judgment for the city.

- *Patterson v. Kent State Univ.*, 155 F.4th 635 (6th Cir. 2025), *reh'g denied*, No. 24-3940, 2025 WL 3079346 (6th Cir. Oct. 30, 2025) – The plaintiff, a transgender tenured English professor, engaged in what the court described as a "weeks-long, profanity-laden Twitter tirade insulting colleagues and the university," expressing dissatisfaction related to the revamping of the school's Center for the Study of Gender and Sexuality and the rollout of a new Gender Studies major. The Dean subsequently rescinded an offer to reduce Patterson's teaching load, which would have allowed Patterson to devote more time to the creation of the new major, and two university committees also denied Patterson's request to transfer to a different campus. Patterson sued for, among other things, discrimination and retaliation under Title VII and a First Amendment violation.

  With respect to the First Amendment claim, which on appeal was asserted against only one individual defendant, the court held that Patterson's tweets did not involve a matter of public concern. Rather, they were "complaints about other Kent State faculty members and their workplace decisions—'employee beef,' plain and simple. … The tweets are insulting, disparaging, and targeted. They use profanities, and they describe [Patterson's colleagues] in terms of their race and sex. Complaining about and insulting your coworkers simply doesn't implicate a matter of public concern." Although among all of the personal attacks were a few more generalized statements about homophobia and other bias in academia, which in isolation may have constituted protected speech, the court explained that "A public employee can't blend protected speech with 'caustic personal attacks against colleagues,' and then use the protected speech to immunize those attacks." (citation omitted) Moreover, even if the tweets could be viewed as protected speech, the court noted that they had caused "serious strife within the Kent State community" and led to a "dysfunctional work environment for several months," and held that "Kent State's interest as an employer in administering effective public services outweighs Patterson's interest in this kind of trash talk." The Sixth Circuit therefore affirmed the district court's grant of summary judgment to the university on the First Amendment claim. (This case is also discussed in the Title VII section of this outline.)

- *Krasno v. Mnookin*, 148 F.4th 465 (7th Cir. 2025) – While a student at the University of Wisconsin-Madison, Madeline Krasno had worked in the university's primate lab, which inspired her to become an animal rights advocate. She commented on some of the

school's Facebook and Instagram posts, exhorting the university to stop mistreating animals, but the university restricted her Instagram account, which resulted in her comments being hidden, and manually hid some of her Facebook comments as well. Some of the comments were also caught by the school's keyword filters. The school maintained a Social Media Policy allowing for the restriction of comments that are "off topic," and argued that Krasno's comments fit that description. Krasno sued under the First Amendment. The Seventh Circuit held that "the interactive comment threads attached to the University's posts are limited public forums, such that speech restrictions imposed by the University on the comment threads must be reasonable and viewpoint neutral. Because the University's ill-defined off-topic comment rule is neither reasonable nor viewpoint neutral, we find it unconstitutional under the First Amendment."

- *Schneiter v. Carr*, 148 F.4th 438 (7th Cir. 2025) – The plaintiff, the deputy warden of Wisconsin's minimum-security facilities, was fired after posting a series of racist, homophobic, Islamophobic, and anti-liberal memes on Facebook, which became the subject of a Milwaukee newspaper article. The corrections department based its decision to terminate Schneiter on concerns over security, diminished public trust in the department, and doubts about his ability to perform the duties of his leadership position respectfully and without bias. The district court granted summary judgment to the employer, and the Seventh Circuit affirmed, emphasizing that "law-enforcement and corrections agencies need substantial latitude to determine whether an employee's speech undermines the effective operation of governmental functions" and holding that the department's interest in maintaining security and discipline in state correctional facilities outweighed the employee's interest in posting the offensive memes.

  There was no dispute that the plaintiff spoke as a private citizen on matters of public concern when he made the Facebook posts, so only the interest-balancing prong of the *Pickering* test was at issue. The posts were made on a private page during nonwork hours, which favored the plaintiff; however, other factors weighed more heavily against him. Describing the employer as "a large state corrections agency that houses a diverse population and has a diverse workforce," the court determined that it was reasonable for the department to be concerned over workplace disruptions, harm to the public's confidence in the department's services, and risks to mission-critical operations. Giving "considerable deference to the agency's own assessment of the risks to security and discipline" – more so than to other types of government employers – the court held that the department's interests outweighed the plaintiff's.

- *Hedgepeth v. Britton*, 152 F.4th 789 (7th Cir. 2025) – High school teacher Jeanne Hedgepeth was fired for posting inflammatory messages on Facebook related to the death of George Floyd and the civil unrest that followed, which led to numerous complaints and media inquiries to the school district. She sued under the First Amendment; the district court granted summary judgment to the school district, and the Seventh Circuit affirmed. There was no question that in her Facebook posts Hedgepeth spoke as a private citizen on matters of public concern, but applying the *Pickering* balancing test the court concluded that the school district's interests in "addressing actual disruptions and averting future disruption" outweighed Hedgepeth's speech interests. This was not a situation where her role as a teacher gave her "special knowledge" that elevated the

importance of her speech, such as expressing concerns about the allocation of school funds. Nor did the fact that her Facebook page was set to "private" help her case, because approximately 80% of her Facebook friends were former students, and her decision to post the comments to that audience "carried a clear risk of amplification": "Even with minimal privacy settings, Hedgepeth's audience choice rendered any claim to private speech illusory. Her posts, though not technically public, functioned more like a stage whisper than a secret. Thus, even drawing inferences in her favor, the posts predictably and rapidly circulated within the [high school] community, including among current students and faculty, and shaped public perception of her as a teacher." Moreover, the court took into account the "context" of Hedgepeth's employment record, noting that she had been suspended twice before for serious incidents of workplace misconduct – namely, profane outbursts in the classroom.

- *Gustilo v. Hennepin Healthcare Sys., Inc.*, 122 F.4th 1012 (8th Cir. 2024) – Dr. Tara Gustilo, the Chair of a hospital OB/GYN department, made a series of posts on her public Facebook page about controversial subjects such as presidential candidates, racism, police killings, Black Lives Matter, critical race theory, and COVID. After several physicians in her department expressed concerns to hospital management about Gustilo's leadership – which included complaints about her Facebook posts – the hospital reviewed her performance, hired an independent company to survey the Department and assess the work environment under Gustilo, and ultimately demoted her from her position as Chair, which required a vote of the Medical Executive Committee and approval from the hospital's Board. She sued for, among other things, First Amendment retaliation, alleging that the hospital – which is a subsidiary of Hennepin County, Minnesota, and thus a government employer – demoted her because of her Facebook posts, which were constitutionally protected speech.

  The district court granted summary judgment for the hospital, finding that Gustilo failed to raise a genuine issue of material fact as to whether the Board ratified not just the demotion but also the *basis* for the demotion – i.e., the Facebook posts. The Eighth Circuit reversed and remanded, holding that a genuine issue did exist with respect to how the Facebook posts may have factored into the Board's ratification of the Medical Executive Committee's decision. Two Board members were also members of the Committee, and therefore knew that "media posts were a significant part of what was viewed as Dr. Gustilo's leadership failures," and the memo that was provided to the Board members outlining the basis for the Committee's decision stated that "As a Department Chair, Dr. Gustilo had raised issues at work that are not related to the job duties and ultimately negatively impacted the staff and created a poor environment in the department," which, the court said, "almost certainly referred to issues raised in Dr. Gustilo's Facebook posts."

  However, the Eighth Circuit also mentioned in its opinion that the district court had not addressed the question of whether Gustilo's Facebook posts were, in fact, protected speech. It advised the district court to consider this question on remand and to apply the *Pickering* test, and noted that although "there can be little doubt that the subjects addressed in Dr. Gustilo's media posts were matters of public concern," the district court

would need to analyze the other factors to see whether they weighed in favor of Gustilo or the hospital.

- *Melton v. City of Forrest City, Ark.*, 147 F.4th 896 (8th Cir. 2025), *reh'g denied*, No. 23-3398, 2025 WL 2787971 (8th Cir. Sept. 30, 2025) – Firefighter Steven Melton was fired after posting a provocative anti-abortion image on his personal Facebook page. He deleted the image after an acquaintance pointed out that it was potentially racially offensive, but it had already come to the attention of the mayor, who launched an investigation that led to Melton's termination. Melton sued, alleging retaliation for exercising his First Amendment right to free speech. The district court granted summary judgment for the city, but the Eighth Circuit reversed and remanded. There was no dispute that Melton was speaking as a private citizen, since he had made the post on his personal Facebook page while off duty, or that race and abortion are matters of public concern. The question therefore came down to whether his interest in this speech was outweighed by the government's interest in delivering its services efficiently, and the court held that genuine issues of material fact existed with respect to that prong of the *Pickering* balancing test. The court found the city's evidence of disruption to be "thin" at best, with the record showing a "tossup" as to whether there was a negative impact on the fire department. The city had argued that there was a "firestorm" of angry phone calls over Melton's post, but they did not show that this firestorm caused a disruption to the fire department itself: "No current firefighter complained or confronted him about it. Nor did any co-worker or supervisor refuse to work with him. Granting summary judgment based on such 'vague and conclusory' concerns, without more, runs the risk of constitutionalizing a heckler's veto." (citation omitted)

- *Garnier v. O'Connor-Ratcliff*, 136 F.4th 1181 (9th Cir. 2025) – Christopher and Kimberly Garnier posted numerous critical and often repetitive comments on the social media pages of two local school board Trustees, who hid or deleted their comments and eventually blocked them from commenting at all. The Garniers prevailed in a bench trial, the Ninth Circuit affirmed, and the Trustees appealed to the Supreme Court, which vacated the Ninth Circuit's decision pursuant to its simultaneous decision in the related case of *Lindke v. Freed*, 601 U.S. 187 (2024). In *Lindke* the Supreme Court held that "When a government official posts about job-related topics on social media… such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id*. at 191.

  On remand from the Supreme Court, applying the *Lindke* test, the Ninth Circuit held that Trustee Michelle O'Connor-Ratcliff's blocking of the Garniers on her social media accounts constituted state action. First, as the Supreme Court instructed under *Lindke*, the court looked to see whether "statute, ordinance, regulation, custom, or usage" gave O'Connor-Ratcliff the authority to speak on behalf of the state, and determined that the school board's bylaws did indeed authorize her to share information with the community on behalf of the school board, such as making official announcements about the board's activities. Although O'Connor-Ratcliff's Facebook page was not an official state social media platform, that did not mean that she lacked authority to speak on behalf of the state by making certain types of posts on her page: "There is no requirement that for an

official's use of her social media pages to constitute state action, the state must sanction or control those pages."

The court then explained that *Lindke*'s second step hinges on whether a public official uses their speech in furtherance of their official responsibilities or invokes their official authority when speaking on social media. In this case, O'Connor-Ratcliff identified herself on her Facebook page as a government official, listing her title and her government email, and she did not include a disclaimer saying the page's content was intended to be personal. In fact, she maintained a separate, private Facebook page for communicating with family and friends. "In all, then, the presentation of the social media accounts from which the Garniers were blocked signaled that they were clothed in the authority of O'Connor-Ratcliff's office." Moreover, the content of the page in question was almost entirely geared toward communicating official information about the board's activities and soliciting feedback from the community regarding the board's policies. Therefore, under *Lindke*, the court held that O'Connor-Ratcliff's blocking of the Garniers' comments constituted state action, and affirmed the district court's ruling in favor of the Garniers. (The case against the other Trustee, T.J. Zane, was deemed to be moot because Zane was no longer a member of the Board of Trustees.)

- *Brown v. City of Tulsa*, 124 F.4th 1251 (10th Cir. 2025) – Plaintiff Wayne Brown was terminated from his position as a Tulsa police officer after some of his old Facebook posts – which predated his employment as a Tulsa police officer – came to the attention of the city and the police department. Because the posts expressed anti-Islamic and anti-Black views, the department found that Brown was in violation of the department's social media policy, which prohibited employees from "posting speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, or protected class of individuals." Brown sued, alleging among other claims that the city violated his First Amendment rights by firing him for his protected speech. The district court granted the city's motion to dismiss, applying the *Pickering* analysis and concluding that the City's interest in maintaining a police force that instills public confidence and discourages partisanship in law enforcement outweighed Brown's free speech rights.

  However, the Tenth Circuit reversed, explaining that the *Pickering* balancing test is appropriate only after discovery has been conducted: "We require facts to make a complaint plausible, but we do not require a plaintiff to plead facts over which it has no personal knowledge. … Applied in this context, when a plaintiff pleads a First Amendment retaliation claim, they likely have no way of knowing the government's specific interest in taking adverse action against them or what internal governmental disruption – whether actual or anticipated – the speech caused. The information required to conduct *Pickering* balancing is generally accessible only to the employer. To overcome this 'asymmetry of information' the plaintiff must first conduct discovery. Without discovery to uncover facts beyond their personal knowledge, the plaintiff cannot allege facts addressing both sides of the scale for a *Pickering* balancing analysis."

(internal citations omitted) The district court therefore erred by applying *Pickering* at the motion to dismiss stage.

Citizen Speech or Official Duties?

- *Long v. Byrne*, 146 F.4th 282 (2d Cir. 2025) – Samantha Long was terminated from her position as the Clerk of the New Lebanon Town Justice Court after she cooperated in an investigation by the New York State Commission on Judicial Conduct regarding purported misconduct by a Town Justice, Jessica Byrne. Long alleged that her termination was unlawful retaliation for exercising her First Amendment rights, but the district court dismissed her complaint, concluding that in providing the Commission with case files it had requested, as well as declining to speak to Byrne about the investigation, Long was acting pursuant to her official duties as Clerk rather than as a private citizen.

  In its opinion vacating the district court's dismissal of Long's claims and remanding the case, the Second Circuit provided a lengthy and detailed description of the parameters and rationale of the citizen speech prong of the *Pickering/Garcetti* test – i.e., whether an employee is speaking as a private citizen rather than pursuant to her duties as a public employee – and determined that in this case Long had adequately alleged that her cooperation with the Commission was not pursuant to her official duties as a court clerk and would therefore satisfy the citizen speech test. She alleged that the Commission was an independent entity and that her job with the Town Justice Court did not require her to cooperate with the Commission's investigation, nor was it within her job duties to answer Byrne's inquiries about the Commission's activities. "Instead, the complaint supports an inference that Long cooperated out of her sense of civic duty. Long alleges that when she cooperated with the Commission, she 'was acting in the same manner as any private citizen to whom the Commission ... inquired.' … Her desire to be a law-abiding citizen is not an employment-related motivation."

- *Gotfryd v. City of Newburgh*, No. 24-1039-CV, 2025 WL 973040 (2d Cir. Apr. 1, 2025) – Elka Gotfryd, a city planner, alleged that she was fired in retaliation for opposing discriminatory housing and development policies, in violation of the First Amendment. The Second Circuit affirmed the district court's grant of summary judgment in favor of the city, holding that Gotfryd's speech was not protected because it was made pursuant to her job duties. She had raised her concerns in several ways connected to her role as a city planner, including commenting on the city's housing needs assessment, writing a letter on city letterhead that listed "working goals" for her "tenure as City Planner," emailing opinions to colleagues about code enforcement, preparing a grant application on behalf of the city, and participating in an unauthorized meeting with a state grant director. She argued that she was nevertheless speaking as a private citizen rather than pursuant to her official duties because her supervisor had instructed her to stop engaging in these efforts, telling her that they fell outside the scope of her responsibilities. However, the court was not persuaded by this argument, because the test was not whether the city hired her to make the speech, but rather whether the speech "owe[d] its existence" to her professional responsibilities; the fact she persisted after her supervisor told her to stop did not transform her objections into protected private citizen speech.

- *Thomas v. Marshall Pub. Schs.*, 152 F.4th 884 (8th Cir. 2025) – Mary Kay Thomas was removed as a middle school principal and reassigned to an administrative position, which she alleged was in retaliation for expressing support for the LGBTQ+ community. She had implemented an "inclusion project" at her school, which included displaying a Pride flag and helping students create a new organization called the Gay-Straight Alliance. The district contended that the adverse employment action was taken not because of her pro-LGBTQ+ advocacy but rather in response to staff complaints of a divided culture and accusations of unprofessional leadership. Thomas sued for, among other things, violation of her First Amendment right to free speech.

  The district court granted summary judgment to the school district, and the Eighth Circuit affirmed. Although there was no question that Thomas's speech was about a matter of public concern, the evidence showed that she was speaking pursuant to her official duties as a public school employee, not as a private citizen. The court explained that while a public employee's speech is made pursuant to her official duties if it owes its existence to her professional responsibilities, it may also be made pursuant to her official job duties even when it was neither required by her job description nor requested by her employer. In this case, among other actions, Thomas had emailed her staff to inform them that the inclusion project was part of her "professional" goal to ensure all students felt included, used the school district's funds to buy the Pride flag, directed custodial staff to arrange the flags, and confiscated a student petition seeking to remove the Pride flag – activities that "involved the expenditure of public funds or occurred during the performance of Thomas's school duties." She also exercised her authority as school principal in facilitating the creation of the new student organization, including enlisting school district resources and staff in the effort. "This conduct is indicative of acting in her role as middle school principal, rather than expressing an opinion as a private citizen. … Thomas's acknowledged responsibilities and her conduct show that she was engaging in speech in the performance of her official duties."

  The court also reviewed the record and determined that no reasonable jury could find that the district took its action against Thomas because of her pro-LGBTQ+ advocacy, but that instead "the record shows the grounds for the District's actions were to address staff complaints and to resolve ongoing leadership concerns" that were not tied specifically to that advocacy.

- *Burch v. City of Chubbuck*, 146 F.4th 822 (9th Cir. 2025) – The city's former public works director alleged that he suffered several adverse employment actions in retaliation for protected speech. His claims were based on two categories of speech: Burch had displayed a yard sign supporting the mayor's political opponent, and he had also criticized the mayor's policies and performance, including proposing the creation of a new city administrator position that would have weakened the mayor's authority. The court held that although Burch's display of the yard sign supporting the mayor's opponent was protected speech because he was speaking as a private citizen on a matter of public concern, the other speech that formed the basis of his First Amendment retaliation claim was made pursuant to his official duties and therefore not protected. In conducting this analysis, the court explained that when determining whether a public employee's speech is made pursuant to his official job duties, "we look beyond the four

corners of his formal job description and conduct a 'practical' and 'fact-intensive' inquiry" which involves three factors: (1) whether or not the employee confined his communications to his chain of command, (2) the subject matter of the communication, and (3) whether the employee spoke in direct contravention to his supervisor's orders." (internal quotations and citations omitted)

- *McNellis v. Douglas Cnty. Sch. Dist.*, 116 F.4th 1122 (10th Cir. 2024) – The plaintiff, a high school athletic director and assistant principal, was investigated and fired after he expressed his disagreement with – and then offered to add a Christian perspective to – a school production of the play *The Laramie Project*, which involved the aftermath of an anti-gay hate crime. He sued for discrimination and retaliation under Title VII, as well as for violation of his First Amendment rights. The district court granted the school district's motion to dismiss. The Tenth Circuit affirmed dismissal of the First Amendment claim because the allegations in the complaint showed that McNellis had made his comments about the play pursuant to his official duties as an employee: the comments were made as part of an email exchange among members of the school's Administrative Team regarding plans to stage the production. Therefore McNellis was not speaking as a private citizen, and under the *Garcetti* test his speech was not protected. (This case is also discussed in the Title VII section of this outline.)

- *Wood v. Fla. Dep't of Educ.*, 142 F.4th 1286 (11th Cir. 2025) – Katie Wood, a transgender public high school teacher, sought an injunction to stop the enforcement of a state statute that prohibited her from using female pronouns or calling herself "Ms. Wood" in the classroom. The district court granted her a preliminary injunction, concluding that she was likely to succeed on the merits of her First Amendment free speech claim, but the Eleventh Circuit vacated the injunction and remanded.

  The district court had based its decision on its determination that when Wood used female pronouns, she was speaking as a private citizen, not as a government employee, because those pronouns were part of her identity as a woman, both in and out of the classroom. The Ninth Circuit disagreed. It applied the *Pickering/Garcetti* test, the first step of which provides that in order for a government employee to establish that her speech is protected under the First Amendment, "the employee must show that in expressing herself she is (or was) speaking both (a) as a citizen—rather than in her capacity as a government employee—(b) about a matter of public—rather than private—concern." The court examined the text of the statute and explained that the prohibition on expressing Wood's gender identity was limited to those times when she was interacting with students in the classroom and within the scope of her employment duties – i.e., not in the faculty lounge, or in other circumstances when students were not present. Given this narrow scope, the court offered its opinion that this was "a straightforward case" because "When a public-school teacher addresses her students within the four walls of a classroom—whether orally or in writing—she is unquestionably acting 'pursuant to [her] official duties.'" (quoting *Garcetti*, 547 U.S. at 421). "The speech at issue here—in which Wood verbally provided her preferred honorific and pronouns, wrote them on her whiteboard and syllabi, and wore a 'she/her' pin—fits that description precisely." Thus, the court held, Wood was speaking as a government employee when expressing her

gender identity in the classroom, and the statute that prohibited her from doing so was therefore not unconstitutional.

Other First Amendment Cases

- *Cestaro v. Rodriguez*, No. 24-973-CV, 2025 WL 783636 (2d Cir. Mar. 12, 2025), *cert. denied*, No. 24-1274 (U.S. Oct. 6, 2025) – Cestaro, an Administrative Law Judge, had his promotion rescinded after his supervisors saw a TikTok video of him arguing with a New Jersey Transit conductor about the requirement for passengers to wear a mask on the train. The district court granted summary judgment for the employer, and the Second Circuit affirmed, holding that even if Cestaro established a prima facie case of First Amendment retaliation, his employer had successfully demonstrated an affirmative defense under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, even if there is evidence that an adverse employment action against a government employee was motivated in part by protected speech, the government can avoid liability if it shows that it would have taken the same adverse action in the absence of that protected speech. The Second Circuit explained that this principle prevents an employee who engages in unprotected conduct from escaping discipline for that conduct by the fact that it was related to protected conduct. In this case, the employer successfully showed that it would have rescinded promotion even in the absence of Cestaro's protected speech, based on his behavior toward the conductor, which was described as "aggressive," "unfair," "unprofessional," and "a poor way to treat workers."

- *Smith v. City of Atl. City*, 138 F.4th 759 (3d Cir. 2025) – Alexander Smith, an Atlantic City firefighter, requested a religious accommodation to grow a beard, which the fire department denied out of concern that the self-contained breathing apparatus (SCBA) masks firefighters wear do not seal properly if the wearer has a beard or goatee. Smith sued for religious discrimination and retaliation under Title VII, as well as for a violation of the free exercise clause of the First Amendment and an Equal Protection violation. The district court granted summary judgment on all of Smith's claims. The Third Circuit affirmed as to the Equal Protection and Title VII retaliation claims, but reversed and remanded as to the First Amendment and Title VII religious discrimination claims.

  With respect to Smith's First Amendment claim, the court explained that neutral laws of general applicability do not contravene the free exercise claim. However, a law will not be considered to be "of general applicability" if it invites the government to consider the particular reasons for a person's conduct, which can be done either by enumerating exceptions to the rule, establishing a mechanism for granting exceptions to the rule, or granting exceptions as a matter of practice. In this case, the city had long permitted administrative staff to forgo fit testing even though they might be called upon to wear SCBA masks, which undermined the city's interest in ensuring proper seals for its employees. Additionally, the policy had built-in discretion, allowing captains to deviate from the SCBA policy and permit any sort of conduct as long as they bear full responsibility for the results of any such deviation; this too undermined the city's interest and destroyed general applicability. The court thus proceeded to apply strict scrutiny to the city's grooming policy, and concluded that although firefighter safety is an interest of

the greatest importance, the city's policy was not narrowly tailored, because the city failed to show that measures less restrictive of the First Amendment could not address that government interest. Therefore, the Third Circuit vacated the district court's judgment on Smith's First Amendment claim. (This case is also discussed in the Title VII section of this outline.)

- *Jorjani v. N.J. Inst. of Tech.*, 151 F.4th 135 (3d Cir. 2025) – The plaintiff, a philosophy professor, spoke at conferences and posted online to share his views against racial equality and in favor of genetic engineering, and was subsequently quoted in the *New York Times* praising Hitler during what he believed was a private conversation but which was being secretly recorded. These activities took place outside of his employment at the university, but when the *Times* article was published the university received negative feedback about Jorjani and issued statements denouncing his views. He was placed on paid leave while an outside firm conducted an investigation, and ultimately his contract was not renewed. The investigation revealed that Jorjani had failed to disclose his outside activities as required by university policy and had engaged in other misconduct.

  Jorjani sued the university, alleging retaliation for exercising his First Amendment right to free speech. The district court granted summary judgment for the university, concluding that Jorjani's speech was not protected by the First Amendment because the university's interest in mitigating the disruption caused by that speech outweighed his interest in its expression. The Third Circuit reversed, however, because although it rejected the professor's argument that the *Pickering* balancing test should not apply to "extramural speech" or "speech lacking malice," in this case the university had not produced sufficient evidence to show that his speech caused a significant disruption to its operations. The university showed only that some students disapproved of Jorjani's speech, it created disagreement among other faculty members, and administrators had to field some complaints after the *Times* article was published. In First Amendment cases involving employees speaking as private citizens on matters of public concern, the court typically considers "whether the speech impairs discipline or employee harmony, has a detrimental impact on close working relationships requiring personal loyalty and confidence, impedes the performance of the speaker's duties, or interferes with the enterprise's regular operations." (citation omitted) The evidence showed that the supposed disruption arising from Jorjani's speech "differs little from the ordinary operation of a public university and therefore cannot outweigh interest in Jorjani's speech." The court also noted that while an employer may act to prevent future disruption to its operations, "it must ground predictions in reason, not speculation."

- *Wetherbe v. Texas Tech Univ. Sys.*, 138 F.4th 296 (5th Cir. 2025), *petition for cert. filed*, No. 25-530 (U.S. Oct. 31, 2025) – A Texas Tech professor claimed he was retaliated against by the then-Dean of the university's business school for expressing his anti-tenure views. The Fifth Circuit's opinion, in which it held that that the Dean had qualified immunity, includes a comprehensive discussion regarding what is required to show that a First Amendment right is "clearly established." The court summarized the legal principles (citations omitted):

> "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" "[Q]ualified immunity is inappropriate only where the officer had 'fair notice'—'in light of the specific context of the case, not as a broad general proposition'—that his *particular* conduct was unlawful." "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"
>
> Recitation of general legal principles is not sufficient to prove a violation of a clearly established right. We require a more specific analysis. The Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." Instead, "the clearly established law must be 'particularized' to the facts of the case." The Supreme Court has explained that "[a]lthough 'this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'" As a general proposition, "to show a violation of clearly established law, [a plaintiff] must identify a case that put [the defendant] on notice that his specific conduct was unlawful."

- *Darlingh v. Maddaleni*, 142 F.4th 558 (7th Cir. 2025) – Middle school counselor Marissa Darlingh spoke publicly at a "radical feminist" rally, identifying herself as a counselor with Milwaukee Public Schools and expressing with strong and profanity-laced language her anti-transgender views. Among other things, as the court put it, she "vowed—in expletive-punctuated terms—that 'not a single' student at her school 'will ever, ever transition' on her watch." After a video of her speech became public, the school district investigated her, the local paper published an article about her speech and the investigation, and she was suspended and ultimately fired. The termination letter cited several school district policies that Darlingh had violated, and "highlighted Darlingh's use of vulgar language and the fact that she began her speech by identifying herself as a school counselor in the Milwaukee Public Schools, which was 'the lens in which [her] comments were given and received.'" Darlingh sued, alleging violation of her First Amendment right to free speech, and moved for a preliminary injunction. A magistrate judge denied the injunction, finding that the school district's interests outweighed Darlingh's free speech rights.

  The Seventh Circuit affirmed. The court explained that "To win a preliminary injunction, Darlingh had the burden to establish that her First Amendment claim would likely succeed and that she would suffer irreparable harm without preliminary relief; if she satisfied these threshold requirements, she also needed to show that the balance of equities tips in her favor and that an injunction would be consistent with the public interest." In this case, Darlingh's profanity-laden speech was accorded less weight, while the nature of her role as a school guidance counselor made the school's interest more compelling. Her speech "was hardly compatible with her obligation to build student and parental trust when counseling children with gender dysphoria or who otherwise struggle with gender-identity concerns. Nor [was] it compatible with her responsibility as a school counselor to promote respect for and humane treatment of these children by other

students." The court concluded that the plaintiff did not carry her burden and was not entitled to an injunction: "Though Darlingh spoke on an issue of public concern in a traditional free-speech setting—a right she did not surrender when she accepted public employment—the school district reasonably concluded that her speech was incompatible with her role as a school counselor. It's not hard to see why: she made a strident public pledge to perform her counseling duties in an exceedingly rigid way that conflicted with the school district's obligation to ensure a supportive educational environment and promote student and parental trust. That took Darlingh's speech outside the scope of the First Amendment's protection as applied in the public-employment context."

- *Adams v. Cnty. Of Sacramento*, 143 F.4th 1027 (9th Cir. 2025), *petition for cert. filed*, No. 25-672 (Dec. 10, 2025) – Kate Adams, a police chief, was forced to resign over allegations that she had sent text messages forwarding racist images to two friends from work. The texts were sent after hours, and Adams stated that "some rude racist" had sent them to her and that she did not "encourage" the content of the images. According to the court, the record showed that "the messages were intended for a purely private audience of several friends in the context of private, social exchanges during 'a friendly, casual text message conversation.'" However, seven years later, after her friendships with those two coworkers deteriorated, the messages came to the attention of the police department, and she resigned her job; several months later the messages found their way into the local media, and she lost an adjunct teaching position and was no longer considered for two other prospective jobs. Adams sued for violation of her First Amendment right to free speech, but the district court dismissed her claim, finding that the text messages did not discuss "a matter of public concern" and were therefore not protected speech.

  The Ninth Circuit affirmed, explaining that "To determine whether an employee's speech addresses a matter of public concern, we consider the content, form, and context of a given statement, as revealed by the whole record. We assess whether an employee's speech involves a matter of public concern at the time of publication." (cleaned up) Although "Speech that addresses the topic of racism as relevant to the public can involve a matter of public concern… speech that complains of only private, out-of-work, offensive individual contact by unknown parties does not." Here, the court looked at the context surrounding Adams's transmission of the images – private text messages sent to two individuals in the middle of private, casual conversations, which were not intended to become public – and the language of the texts accompanying the images, in which Adams expressed exasperation at being sent the images but did not discuss the relevance of those images to her community, her job, or the public. The court stated that "Something more than discussing an offensive racial comment, communicated in a private text, is required for speech to involve a matter of public concern[,]" and concluded that "Adams's speech was one of personal interest, not public interest. Therefore, her text messages do not address a matter of public concern within the meaning of *Pickering*."

- *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117 (9th Cir. 2025) – Two employees of a public middle school, a teacher and an assistant principal, were fired after expressing views on gender identity, parental rights, and education policy, which were based in part on their religious beliefs. The school district had circulated a memorandum

setting forth its policy requiring employees to accept students' use of their preferred names and pronouns, in order to create a safe and supportive environment for transgender students. The memorandum also contained guidance for how to handle situations in which students' parents were unaware of their children's gender identity preferences. When the plaintiffs learned about the guidance, they privately expressed concerns to the school's principal and the district's human resources director; when the two women learned that they shared the same concerns, they decided to campaign publicly for alternatives to the district's guidance, which they did by drafting a resolution and filming a video that circulated on social media. The school and district subsequently received several formal complaints from students, district employees, and other citizens who were concerned about the impact this activity would have on transgender students and staff, and who identified multiple ways in which the plaintiffs' activities had violated district policies. The plaintiffs were placed on administrative leave, and after both internal and independent investigations, they were terminated for those policy violations, which were related to the use of district resources in connection with a political campaign, using time during the workday for campaign purposes, failing to include a viewpoint disclaimer, and using social media and public websites in a manner that disrupted the school environment.

The plaintiffs challenged their terminations under the First Amendment, along with other claims. The district court granted summary judgment for the school district on all counts. On appeal, the Ninth Circuit applied the *Pickering* balancing test to the First Amendment claim, explaining that "the ultimate question is whether the government's legitimate administrative interests outweigh the employee's right to engage in the expressive activity at issue." After explaining in detail the various considerations involved in the *Pickering* analysis – content, form, and context; manner, time, and place; and actual or reasonably predicted disruption – the court determined that the record evidence could point in either direction, such that there were genuine issues of material fact precluding summary judgment in this case. Although the individually named defendants were entitled to qualified immunity, the school district was not, so the Ninth Circuit vacated the grant of summary judgment with respect to the school district and remanded to the district court.

- *DeFrancesco v. Robbins*, 136 F.4th 933 (9th Cir. 2025) – To defeat an individual defendant's qualified immunity, a plaintiff must show not only that a First Amendment right was violated but also that it was a "clearly established" right. In this case, the plaintiff and his husband both worked for the same public university; the plaintiff sued certain university leaders, alleging that he was harassed and fired not because of his own protected speech but because of his husband's whistleblowing activity related to corruption in the school's process for hiring a new executive. The Ninth Circuit affirmed the district court's ruling that the defendants were entitled to qualified immunity, because it was not "clearly established" that the First Amendment's free speech clause protects public employees from retaliation for a family member's speech. Looking at Supreme Court and Ninth Circuit precedent, the court concluded that the law regarding this issue was not sufficiently clear at the time of the defendants' actions to put them on notice that what they were doing was unlawful, nor was there a "robust consensus of persuasive authority" from other jurisdictions.

- *Labriola v. Miami-Dade Cnty.*, 142 F.4th 1305 (11th Cir. 2025) – John Labriola, a media aide for the Miami-Dade Board of County Commissioners, published an opinion piece expressing homophobic views. The *Miami Herald* ran an article about it, and the county received what the court described as "a barrage of phone calls from concerned residents." Labriola was suspended and ordered to complete training on the county's anti-discrimination policy, but when he failed to do so, he was terminated. He sued for various violations of his First Amendment rights; the district court granted summary judgment for the county, and the Eleventh Circuit affirmed. Applying the *Pickering* test, the court held that although Labriola spoke on a matter of public concern, the government's interests outweighed his. The record showed that his speech impeded the county's ability to perform its duties by impairing harmony among coworkers, had a detrimental relationship on close working relationships requiring personal loyalty and confidence, and interfered with the regular operations of the county's enterprise because it resulted in the county being inundated with phone calls that diverted its resources away from other responsibilities. As far as the "time, place, and manner" of Labriola's speech, although the time and place favored Labriola – he wrote the piece while off duty and away from work – the manner of his speech weighed heavily against him, because "To put it mildly, the opinion piece was 'disrespectful, demeaning, rude, and insulting.' And, based on the shock and appall of his coworkers, it was clearly perceived that way at the office." (internal citation omitted) Finally, because he disseminated his opinion piece in a public, online newsletter, rather than in a private conversation, the context of his speech weighed in the county's favor. Therefore, the court held, "On balance, these factors make clear to us that the County's interest in effective and efficient fulfillment of its responsibilities outweighs Labriola's free-speech interests."

  Labriola also asserted a compelled-speech claim, alleging that being required to take anti-discrimination training would have forced him to recant his views or say things he disagreed with. In particular, he suggested "that the training would have compelled him to disavow his opposition to 'transgenderism, homosexual marriage, and Drag Queen Story Hours.'" Because this allegation was based on "rank speculation," not evidence, the court rejected his compelled-speech claim as well.