Office of Congressional Workplace Rights

Office of the General Counsel

FEDERAL CASE LAW UPDATE
SEPTEMBER 25, 2024

Introduction

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. 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 other decisions that may have implications for legislative branch employing offices and covered employees. We also include summaries of decisions issued by the OCWR Board of Directors over the past year.

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Applicable Laws

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

- **Genetic Information Nondiscrimination Act** – CAA section 102(c), 2 U.S.C. § 1302(c)
- **Title VII of the Civil Rights Act of 1964** – CAA section 201, 2 U.S.C. § 1311
- **Age Discrimination in Employment Act** – CAA section 201, 2 U.S.C. § 1311
- **Americans with Disabilities Act** – CAA sections 201 & 210, 2 U.S.C. §§ 1311 & 1331
- **Rehabilitation Act** – CAA section 201, 2 U.S.C. § 1311
- **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

Supreme Court Preview

So far, the Supreme Court has granted certiorari in three cases that might have implications for legislative branch employees and employing offices:

- On June 17, 2024, the Supreme Court granted certiorari in *E.M.D. Sales, Inc. v. Carrera* (docket no. 23-217) to resolve a circuit split over what burden of proof employers must meet to prove that an employee is exempt under the FLSA. In the decision below,

Carrera v. E.M.D. Sales, Inc., 75 F.4th 345 (4th Cir. 2023), the Fourth Circuit held that employers must prove that employees are exempt from the FLSA's requirements with "clear and convincing" evidence. This decision conflicts with precedent from the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, which hold that employers must meet the lesser "preponderance of the evidence" standard. The question presented is: "Whether the burden of proof that employers must satisfy to demonstrate the applicability of an FLSA exemption is a mere preponderance of the evidence – as six circuits hold – or clear and convincing evidence, as the Fourth Circuit alone holds."

- On June 24, 2024, the Court granted certiorari in an ADA case, *Stanley v. City of Sanford, Florida* (docket no. 23-997). The question presented is: "Under the Americans with Disabilities Act, does a former employee – who was qualified to perform her job and who earned post-employment benefits while employed – lose her right to sue over discrimination with respect to those benefits solely because she no longer holds her job?" The Eleventh Circuit's decision, which was issued in October 2023, is discussed in detail in the ADA section below.

- Also on June 24, 2024, the Court granted certiorari in *Feliciano v. Department of Transportation* (docket no. 23-861), in which it will review the Federal Circuit's affirmance of a Merit Systems Protection Board decision denying an FAA air traffic controller's request for differential pay for his military service in the United States Coast Guard. The differential pay statute, codified at 5 U.S.C. § 5538, requires that when a federal employee is called up for active duty military service at a lower rate of pay than what they would be making in their civilian employment, their employer must make up the difference. The Federal Circuit had previously held that in order to qualify for differential pay, an employee must be able to show that they "served pursuant to a call to active duty that meets the statutory definition of contingency operation." *Adams v. Dep't of Homeland Sec*., 3 F.4th 1375, 1378 (Fed. Cir. 2021). Because Feliciano could not make such a showing, he was deemed ineligible for differential pay. The question presented is: "Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency."

Recent Case Law

Americans with Disabilities Act (ADA)/Rehabilitation Act

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

Failure to Accommodate

- *Hampton v. Utah Dep't of Corr.,* 87 F.4th 1183 (10th Cir. 2023) – Hampton, a corrections officer, was born missing two fingers on each hand, causing difficulties grasping and pulling. He trained and qualified to use UDC-approved firearms, but still felt he could not get a solid grip on the approved Glock handgun, and made a reasonable accommodation request to be allowed to use a handgun that he felt more comfortable with. He did not receive a response to his accommodation request, and was later fired. He sued UDC for its failure to accommodate his disability, disparate treatment, and retaliation. The Tenth Circuit reversed the district court's grant of summary judgment as to the failure-to-accommodate claim and affirmed summary judgment for the remaining claims.

  Regarding his failure-to-accommodate claim, the district court relied solely on UDC's Firearms Policy in determining that Hampton's desired accommodation – permission to use a Springfield 1911 handgun – would remove an essential function of his job, and was therefore facially unreasonable. The Tenth Circuit acknowledged that it must heavily weigh an employer's judgment of the essential functions of a job, but that an employer may not turn every aspect of employment into a job function, let alone an essential one, merely by including it in a job description. Additionally, "The simple fact that an accommodation would permit the worker with a disability to violate a rule that others must obey cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'" *US Airways, Inc. v. Barnett,* 535 U.S. 391, 398 (2002) (cleaned up). Hampton argued that the real essential function of his job was the ability to use and carry a primary sidearm weapon, and the Tenth Circuit agreed, finding that he raised a genuine issue of material fact on the essential functions of his employment: "By the Policy's own terms, and UDC's own summary, the relevant essential function of Mr. Hampton's employment would seem to be his ability to safely carry and use a firearm—not just a Glock—when required."

- *Kelly v. Town of Abingdon, Va.,* 90 F.4th 158 (4th Cir. 2024) – Kelly worked as town manager. He alleged his employer was aware of his anxiety, depression, and high blood pressure, which deteriorated as hostility at work intensified. Through counsel, he sent a letter entitled "Accommodations Requests" that referenced the ADA in its opening line, but went on to describe the letter's aim as "to foster a well-running office" through respect and clear communication. The letter articulated 12 "requests," including compliance with the town's Code of Ethics, equal treatment for employees, and improved gender diversity in the workplace. The letter did not mention Kelly's disabilities or explain how the proposed changes related to them. The Fourth Circuit agreed with the district court that that the letter was not a request for accommodation under the ADA, as necessary for Kelly to make out failure-to-accommodate and retaliation claims. Merely labelling something a request for accommodation is not enough: "just as an employee need not formally invoke the magic words 'reasonable accommodation,' those magic words are not sufficient to trigger the employer's duty to pursue the ADA interactive process." (internal citation omitted). An adequate request must instead make a "logical bridge connecting the employee's disability to the workplace changes he requests[,]" though this bridge need not be explicit.

- *Cooper v. Dolgencorp, LLC*, 93 F.4th 360 (6th Cir. 2024) – Cooper, who had Tourette Syndrome, worked as a delivery driver for Coca-Cola ("CCCI"). His disability caused him to involuntarily utter racist and profane words, leading to complaints from customer stores he serviced. CCCI made various accommodations during his employment, the last of which was to offer him a transfer to a vacant, non-customer-facing warehouse position. He took this position, which came with a pay cut, and worked there for 4 months before resigning. After Cooper quit, he filed suit asserting several ADA claims. The Second Circuit affirmed summary judgment for CCCI on Cooper's failure-to-accommodate and constructive discharge claims.

  The Second Circuit disagreed with Cooper that he was qualified for the delivery position with or without reasonable accommodation. "Excellent customer service skills" were an essential function of the position, and CCCI customer complaints, plus Cooper's own doctor's note, established that he could not perform this essential function without an accommodation. However, there were no vacant non-customer-facing delivery positions, so CCCI's accommodation of transfer to the warehouse position was reasonable. Cooper's constructive discharge claim also failed. A complete failure to accommodate might show the deliberateness necessary for constructive discharge, but Cooper admitted CCCI provided the warehouse position as an accommodation, and he told his supervisor when he resigned that he held nothing against CCCI.

- *Bruno v. Wells-Armstrong*, 93 F.4th 1049 (7th Cir. 2024) – During Bruno's employment with the Kankakee Fire Department, he had a severe cardiac event that led to an ongoing heart condition. He was offered a new contract that would entitle him to additional compensation if he returned to college, which his doctor advised against. He requested that the education condition be removed as an accommodation under the ADA. When HR refused to waive the provision, Bruno signed the contract anyway, but retired soon after. The Seventh Circuit affirmed summary judgment for the city, stating, "Bruno's request to waive the education condition was not a request for a measure that would enable him to do his essential job functions and thus not a request for reasonable accommodation. Rather, it was just a request for an increase in pay that was not earned."

- *Crispell v. FCA US, LLC*, No. 23-1114, 2024 WL 3045224 (6th Cir. June 18, 2024) – Crispell, a 23-year employee of FCA, worked as a floater in the truck assembly plant. She had major depression and anxiety, which qualified her for intermittent leave under the FMLA. FCA had a 30-minute call-in rule, requiring employees to notify their supervisors of any absence at least 30 minutes before their shift, or later with a statement explaining the missed call-in. Crispell struggled to comply with this rule during severe flare-ups of her condition, which she argued made it impossible for her to call in on time and made her absent or late 15 times in three months. Despite submitting explanations and a doctor's note about how her illness made it impossible for her to comply with the 30-minute rule during flare-ups, she was disciplined and ultimately terminated. The Sixth Circuit reversed the district court's grant of summary judgment to FCA.

  With respect to Crispell's ADA failure-to-accommodate claim, the Sixth Circuit first disagreed with the district court that Crispell was not qualified for her position because of her periodic inability to work, noting that FCA did not present any evidence that a certain

attendance rate was essential to the floater role. Then, the Sixth Circuit held that her request to be exempted from the call-in rule when her symptoms prevented compliance could have been a reasonable accommodation request, and that FCA's familiarity with her medical condition and history of leave meant that it should have proceeded to engage in the interactive process. (This case is also discussed in the FMLA section below.)

- *Davis v. PHK Staffing LLC*, No. 22-3246, 2023 WL 8757073 (10th Cir. Dec. 19, 2023) – Davis worked as a table-games dealer and supervisor at Hollywood Casino. She sued for failure to accommodate and disparate treatment when she was fired under the casino's "no-fault" attendance policy for accumulating too many points for unscheduled absences, which she incurred due to severe asthma. The Tenth Circuit affirmed the district court's grant of summary judgment to the casino. It held that Davis's accommodation request that the casino allow her to leave early, arrive late, and miss work on an unscheduled, as-needed basis, without assigning her unscheduled-absence points, was not reasonable because: 1) regular attendance was an essential function of her job (and the fact that Hollywood Casino made limited exceptions to its attendance policy for bereavement or workplace injuries did not change this); and 2) her request amounted to a request for an open-ended, indefinite amount of time off, "which effectively sought an exemption from the essential job function of regularly and reliably attending work[.]"

- *Tartaro-McGowan v. Inova Home Health, LLC*, 91 F.4th 158 (4th Cir. 2024) – A clinical manager for a home healthcare agency developed chronic arthritis in her knees following bilateral knee replacement surgeries. She requested to be exempt from performing any patient care field visits to allow her to avoid stress to her knees. Inova responded that this could not be accommodated, but that it would support her pre-screening and selecting field visits, as well as spreading them out during the week, to minimize stress on her knees. She was ultimately terminated for not performing the field visits.

  The Fourth Circuit affirmed the district court's grant of summary judgment to the employer on Tartaro-McGowan's subsequent ADA claims. Assuming without deciding that the performance of direct patient care field visits was *not* an essential function of her position, the Fourth Circuit held that Inova's proposed accommodation, which did not totally eliminate such visits from her position, was reasonable, in light of staff shortages and other challenges posed by COVID-19. The court disagreed with the plaintiff's suggestion "that an employer must *always* reallocate nonessential job functions in order for a given accommodation to be reasonable" and held that given the exceptional challenges of COVID-19, "coupled with the ultimate discretion that employers enjoy in selecting between potential accommodation alternatives … a rational jury could not conclude that Defendants acted unreasonably in denying Tartaro-McGowan's request to be totally exempt from performing direct patient care field visits." (cleaned up) "At bottom, the reallocation of nonessential duties *may* be necessary to effect a reasonable accommodation in certain cases, but this is not one of them."

- *Porter v. Dartmouth-Hitchcock Med. Ctr.,* 92 F.4th 129 (2d Cir. 2024) – Porter developed a cerebral spinal fluid leak that caused severe neurological problems. She was granted two medical leaves of absence and periods of reduced work schedule. Following her termination, she brought ADA and Rehabilitation Act claims against the medical

center, alleging she was terminated because of her disability. The First Circuit affirmed in part and vacated in part the district court's entry of summary judgment in the medical center's favor.

The First Circuit held that Porter presented direct evidence of discrimination. When asked by another doctor why she was being terminated, the supervisor's sole response was that she was "on disability." "When the decisionmaker was asked 'why' an employee was not being retained, his answer that she was 'on disability' virtually precludes a ruling as a matter of law that disability has played no role." This comment, combined with evidence including her department being short-staffed, her recognized skill, and her expressed interest in reassignment (since her location was closing), could allow a jury to infer that reassigning her instead of terminating her would have been a reasonable accommodation, in that she would have been reassigned but for her disability.

- *Ali v. Regan,* 111 F.4th 1264 (D.C. Cir. 2024) – Ali, an economist with the EPA, had severe environmental allergies. After accommodating him in the workplace for many years, the EPA placed an employee known for wearing heavy perfume in the cubicle next to his and offered him a "take-it-or-leave-it" accommodation of 100% telework. He rejected this because, among other things, he would get an allergic reaction if he printed at home; he then tried to engage the EPA in further accommodations discussions. When those efforts failed, he sued under the Rehabilitation Act for failure to accommodate. The district court, concluding that Ali caused the discussions about accommodations to break down, granted summary judgment for the EPA.

  The D.C. Circuit reversed. In its view, Ali never withheld any information that the EPA requested or otherwise interfered with the EPA's ability to accommodate him; the relevant question was whether the EPA's proffered accommodation was reasonable, which depended on factual disputes that must be decided by a jury. The EPA did not ask Ali about all his reasons for rejecting telework. The district court held, and the dissenting opinion in the D.C. Circuit argued, that this failure was irrelevant because "it is the party who fails to communicate and does not share information who bears the blame for breaking down the interactive process," but, the D.C. Circuit majority wrote, "we have never previously affirmed summary judgment for the employer on interactive-process grounds where an employee failed to *volunteer* information, rather than provide requested information."

  In its analysis of the EPA's alternative argument that its offer of 100% telework was "plainly reasonable," the D.C. Circuit reminded that "whether proposed by the employer or requested by the employee, the reasonableness of telework cannot be presumed."

- *Smithson v. Austin*, 86 F.4th 815 (7th Cir. 2023) – Smithson, a science teacher for a Department of Defense (DODEA) high school in Germany, had a number of medical conditions, including migraines, intracranial hypertension, affective disorder, vertigo, and attention deficit hyperactivity disorder. Since 2010, her employer had granted numerous accommodation requests, including up to 15 minutes of flexibility in duty reporting time. In 2018, she requested this be extended to allow her to frequently report for work up to two hours late. DODEA approved this, barring any undue hardship to the

school schedule, and required her to use sick leave for this time. Its policy of requiring that sick leave be taken in half-day increments (since a teacher's absence generally required the school to retain a substitute) meant that Smithson would be required to use half-day increments of sick leave even if she was delayed in arriving by only two hours.

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of DODEA on Smithson's Rehabilitation Act discrimination and failure-to-accommodate claims. It held she was not a qualified individual: DODEA was "allowed to designate in-person attendance as an essential function, Plaintiff had conceded that in-person attendance was necessary for teachers, and she was regularly unable to attend for up to a quarter of the designated school day, a significant part of the workday." Additionally, the court wrote that "requiring an employee to use sick leave for an absence due to illness for a job where in-person attendance is required is not prohibited under the Rehabilitation Act or the ADA."

The court noted that "[i]n the post-COVID pandemic economy and with the advent of new technologies making working from home more feasible, we must now assess whether in-person attendance is essential on a context-specific basis." However, it held that DODEA adequately accommodated Plaintiff at the time she made her two-hour late duty time request: today's remote work technologies were not yet in wide use, and students and teachers both regularly attended in person.

Disparate Treatment

- *Maxson v. Baldwin*, No. 23-3702, 2024 WL 1282458 (6th Cir. Mar. 26, 2024) – Maxson, a former deputy sheriff, sued his employer alleging he was fired based on his addictions to prescription drugs and alcohol in violation of the ADA. The Sixth Circuit disagreed, holding that Maxson was engaged in illegal drug use when he was fired, excluding him from the ADA's protections, and affirmed the district court's dismissal of his complaint. It wrote that "courts have repeatedly found that persons who have used drugs in the weeks and months prior to their termination were current drug users under the ADA[,]" (internal quotations and citation omitted), and cited decisions in which employers could reasonably have believed employees were currently using substances when those employees were terminated between five weeks and four months after a positive drug test.

  Although the question of whether a plaintiff's drug use is effectively ongoing is generally a fact inquiry to be assessed at summary judgment, the court held that the allegations in Maxson's complaint that he consistently used marijuana, prescription medication, and alcohol as pain management tools, combined with the fact that his performance was impacted by drug use within a week of his termination (when he came to work unable to communicate due to withdrawal symptoms), prevented him from plausibly alleging ADA coverage.

  He also argued his collective bargaining agreement should save his ADA claim, as it provided that employees in his circumstance "shall be placed on an employee assistance program." The court wrote that "[w]hatever remedies Maxson may have been entitled to

pursue under the collective bargaining agreement, the agreement does not alter the fact that he is excluded from coverage under the ADA."

- *Fisher v. Airgas USA, LLC*, No. 23-3286, 2024 WL 366246 (6th Cir. Jan. 31, 2024) – Fisher worked as an operations technician for Airgas, a role in which he used power tools, worked with combustible gases, and drove a company vehicle. Following treatment for liver cancer, he began taking a legal hemp product called Free Hemp to treat his pain. When he was randomly selected for a drug test, the third-party drug screening company reported that he tested positive for cannabis, despite the test actually detecting a substance from Free Hemp. He denied using marijuana and asked for a retest, explaining to Airgas that his use of Free Hemp might have caused a false positive. He was fired after a retest, which used the same sample, also came back positive. He filed a state law disability discrimination claim which Airgas removed to federal district court.

  The district court granted summary judgment for Airgas based on the "honest-belief rule," which shields employers from liability for allegedly discriminatory employment actions if they offer legitimate reasons based on incorrect information that they reasonably trusted at the time. The Sixth Circuit reversed, holding that Airgas did not establish that it made a "reasonably informed and considered decision." Fisher had expressly raised with Airgas – specifically for purposes of his retest – the question of whether his Free Hemp usage had caused his sample to test positive for marijuana, yet Airgas did nothing to investigate that possibility. "The employer need not show that it left no stone unturned. But if the employer conducts no meaningful investigation, it cannot show the requisite honest belief." (cleaned up).

"Qualified"

- *Cyrilien v. Tex. Dep't of Crim. Just.*, No. 23-20145, 2023 WL 8434054 (5th Cir. Dec. 5, 2023) – The Fifth Circuit held that an administrative assistant with breast cancer who was terminated after her Leave Without Pay time expired did not create a genuine dispute of material fact that she was a qualified individual with a disability under the Rehabilitation Act. The court held that her claim for long-term disability benefits, including her doctor's supporting statement that she was totally impaired from working, cast doubt on whether she could perform any job: "A plaintiff who has submitted a sworn assertion in an application for disability benefits that she is ... 'unable to work' will appear to negate an essential element of her ADA case—namely, that she can perform the essential functions of her employment position—and as such, must proffer a sufficient explanation to account for the apparent contradiction." (internal quotations and citations omitted).

- *Cline v. Clinical Perfusion Sys., Inc.*, 92 F.4th 926 (10th Cir. 2024) – Cline worked as a perfusionist (a heart-lung machine operator during cardiovascular surgery) when he experienced a severe medical emergency requiring months of ICU treatment and inpatient rehabilitation. One month after the emergency, his employer notified his wife that he was being terminated. Three months after that, his doctor cleared him to return to work, but his employer refused to reinstate him. He filed several claims, including one under the Rehabilitation Act, which the district court dismissed for failure to state a claim.

Cline argued on appeal that, because leave for a "reasonable period of time" was an accommodation his employer could have made, and the Tenth Circuit had previously held that leave for over six months is per se unreasonable (*Hwang v. Kan. State Univ.,* 753 F.3d 1159, 1162 (10th Cir. 2014)), he sufficiently alleged, by implication, that less than six months of leave was available to him as a "reasonable accommodation." But he did not allege any specific facts to support his argument that the expected duration of his disability was under six months. The Tenth Circuit held that Cline did not plausibly allege that he could perform the essential functions of his job with or without a reasonable accommodation, and thus affirmed the district court's holding that Cline failed to state a claim under the Rehabilitation Act.

- *Leibas v. Dart,* 108 F.4th 1021 (7th Cir. 2024) – Leibas, a correctional officer, was diagnosed with scleroderma, irritable bowel syndrome, lupus, and Reynaud's syndrome. She sought accommodations from the Department of Corrections to address flareups of her conditions. The DOC initially accommodated her with a modified duty assignment. After it rescinded this due to budget cuts and denied her request for more frequent rest and bathroom breaks as accommodations, she sued for failure to accommodate. The district court granted the DOC's summary judgment motion on the basis that Leibas was not a qualified individual under the ADA, and the Seventh Circuit affirmed.

  There was no question that maintaining the safety and security of the DOC was an essential function of Leibas's position. There was some discrepancy between the accommodations Leibas's doctor wrote that she needed, and how she herself described the accommodations (which was less restrictive). The Seventh Circuit noted that "an employer is not required to let an employee exceed the treating doctor's restrictions[,]" and accordingly looked at what the doctor concluded about her restrictions and required accommodations. Since the additional breaks, particularly in the way that they were described by her doctor, would have created staffing issues, they were not a reasonable accommodation. Leibas argued she could wait to take breaks until coverage was available, but the Seventh Circuit wrote that "an individual seeking a reasonable ADA accommodation cannot both insist that she requires an accommodation and maintain that she can forgo the same accommodation if necessary."

Title II

- *Bennett v. Hurley Med. Ctr.,* 86 F.4th 314 (6th Cir. 2023) – Bennett, a nursing student, was initially permitted to have her service dog, Pistol, accompany her during her rotation at the defendant hospital. After a staff member and a patient experienced allergic reactions, the hospital revoked this permission and offered the alternative accommodation of a space to crate Pistol and the opportunity for the plaintiff to take breaks to be with him as needed. She sued the hospital under the Rehabilitation Act and Title II of the ADA. The Sixth Circuit affirmed the district court's grant of summary judgment to the hospital. Bennett's intentional discrimination claim failed because she did not show that the hospital's actions were motivated by her disability: "By contrast, the record evidence clearly shows that the decision was motivated by staff and patient complaints of allergic reactions. But these concerns are all related to Pistol, rather than Plaintiff's panic

disorder."

Bennett's failure to accommodate claim failed as well. The Sixth Circuit held that the hospital reasonably determined that Pistol posed a "direct threat" to the health and safety of patients and staff, and that the modifications necessary to ameliorate this risk, relocating allergic patients and staff, were not reasonable as they would have compromised patient care. Therefore, the hospital did not fail to reasonably accommodate her.

- *Haulmark v. City of Wichita*, No. 22-3243, 2024 WL 3219677 (10th Cir. June 28, 2024) – Chris Haulmark, who is deaf, sued the City of Wichita and its mayor under Title II of the ADA, alleging they had deprived him of the benefits of services, programs, and activities provided to the public through the City's official social media pages and the mayor's personal campaign Facebook page. He alleged that some of the City's online videos lacked captions, and that the captioning the City did provide was inadequate. Regarding the mayor's campaign page, he alleged it was inaccessible to deaf and hard-of-hearing individuals and that the mayor banned him from the page for raising accessibility issues. The district court granted summary judgment to the defendants, in part because the mayor's campaign page was not a service, program, or activity of the City under the ADA. After Haulmark appealed, the Supreme Court decided *Lindke v. Freed,* 601 U.S. 187 (2024) (discussed in detail in our July 17, 2024 Supreme Court Recap Brown Bag), where it laid out a test to determine whether a public official's social media activity constitutes state action.

  The Tenth Circuit reversed summary judgment concerning the City's social media pages. In addition to holding that there was a genuine dispute of material fact over whether the City posted some social media videos without any captioning, the Tenth Circuit held that there was a dispute over whether the captioning the City did provide reasonably accommodated the needs of deaf and hard-of-hearing people: Mr. Haulmark submitted examples of City videos with automatic, machine-generated captions that were ambiguously worded and did not indicate who was speaking or whether a question was being asked.

  In light of *Lindke*, the Tenth Circuit vacated and remanded summary judgment concerning the mayor's campaign Facebook page. Haulmark alleged the mayor performed official duties on his campaign page through live video streams providing information about City police department reforms, transportation issues, and COVID-19. The issue was whether the mayor's use of this page to conduct official business "excluded" Haulmark "from participation in or ... denied the benefits of" the City's "services, programs, or activities" within the meaning of 42 U.S.C. § 12132 (Title II). The mayor's page, like that of the city manager in *Lindke,* included both private and official features. "Without the benefit of *Lindke*," the Tenth Circuit wrote, "the district court focused on the ownership and control of Mayor Whipple's campaign page rather than the mayor's possible exercise of a governmental function on that page."

Other ADA/Rehabilitation Act Cases

- *Stanley v. City of Sanford, Fla.*, 83 F.4th 1333 (11th Cir. 2023), *cert. granted sub nom. Stanley v. City of Sanford*, 144 S. Ct. 2680 (2024) – While working as a firefighter for the City of Sanford, Karyn Stanley was diagnosed with Parkinson's disease. She worked for two more years before taking disability retirement in 2018. When she first joined the fire department in 1999, disability retirees received free health insurance until age 65. In 2003, unbeknownst to Stanley, the City changed its benefits plan to only subsidize disability retirees' health insurance for two years. In April 2020, eight months before she was set to become responsible for her own health insurance premiums, she sued, alleging that the City's decision to trim the health insurance subsidy violated the ADA and Rehabilitation Act, in addition to Constitutional and state law claims. The district court dismissed her ADA and RA claims, reasoning that she could not state a plausible disability discrimination claim because the discriminatory act alleged – the cessation of health insurance premium payments – would occur while she was no longer employed by the city.

  The Eleventh Circuit affirmed, holding that a former employee cannot bring a Title I claim regarding post-employment fringe benefits, so Stanley's claim failed. This reaffirmed its decision in *Gonzales v. Garner Food Services,* 89 F.3d 1523 (11th Cir. 1996), in which it held that the estate of a man with AIDS, who was fired from his job but kept receiving health insurance through his former employer, did not have a viable Title I claim against the employer regarding a post-employment insurance plan amendment that capped AIDS-related coverage.

  Stanley argued that after the Supreme Court held in *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), that an individual could sue his or her former employer under Title VII for a post-employment retaliatory act, former employees could sue under Title I of the ADA for post-employment discrimination. The Eleventh Circuit disagreed with Stanley, reasoning that Title I has a "clear temporal qualifier… Only someone 'who, with or without reasonable accommodation, *can* perform the essential functions of the employment position that such individual *holds* or *desires*' is protected from disability discrimination. 'Can,' 'holds,' and 'desires are in the present tense." (internal citations omitted). The *Robinson* holding turned on the definition of and usage of "employees" in Title VII's anti-retaliation provision, which is more ambiguous and does not provide such a "temporal qualifier."

  On June 24, 2024, the Supreme Court granted certiorari to resolve the circuit split on this issue (the Sixth, Seventh, and Ninth Circuits agree with the Eleventh; the Second and Third disagree).

- *Howard v. City of Sedalia, Mo.*, 103 F.4th 536 (8th Cir. 2024) – Howard had Type I diabetes and hypoglycemic unawareness. While employed as a pharmacist at defendant's Bothwell Regional Medical Center, she acquired a diabetic-alert service dog that could detect an impending blood sugar drop to help prevent and mitigate hypoglycemic emergencies. When she requested to be allowed to bring the dog into the main pharmacy, but not the sterile "clean room," Bothwell analyzed her request and concluded that it

would be a risk to patient safety. Bothwell expressed intent to work with Howard to find a different accommodation, but she resigned and filed suit for failure to accommodate. At trial, the jury returned a verdict for Howard, and Bothwell appealed the district court's denial of its motion for judgment as a matter of law.

First, the Eighth Circuit noted that EEOC implementing regulations require employers to provide "benefits or privileges accommodations" to enable a disabled employee to enjoy equal benefits and privileges of enjoyment, even if they can perform the essential functions of the job without the accommodation. *See* 29 C.F.R. § 1630.2(o)(1)(iii).

Then, the Eighth Circuit relied heavily on its decision from the year prior in *Hopman v. Union Pac. R.R.*, 68 F.4th 394 (8th Cir. 2023), *cert. denied,* 144 S. Ct. 1003 (2024), in reversing the district court. There, it "agreed with the district court that '"benefits and privileges of employment" (1) refers only to employer-provided services; (2) must be offered to non-disabled individuals in addition to disabled ones; and (3) does not include freedom from mental or psychological pain[.]'" It held that Hopman's employer did not violate the ADA by denying his request to bring his service dog (which mitigated his PTSD and migraines) to work, because mitigation of his symptoms was not an employer-sponsored program or service, and allowing the dog was not a benefit or privilege of employment.

Bothwell argued that Howard, like Hopman, presented no evidence that she needed her service animal to obtain a privilege or benefit of employment. She argued that the benefit or privilege enjoyed by other employees that the dog allowed her to have access to was the ability to manage her condition how she saw fit and the right to feel safe at work. The Eighth Circuit sided with Bothwell, concluding that Howard's argument that the dog assisted her in the management of her chronic disease was no different than Hopman's argument that he should not have to endure disability-related pain at work.

- *Sanders v. Union Pac. R.R. Co.*, 108 F.4th 1055 (8th Cir. 2024) – As a foreman general, Sanders oversaw train mechanics and sometimes assumed their responsibilities, which could require significant physical exertion such as lifting 86-pound train "knuckles." This only became an issue when Union Pacific required him to undergo a fitness-for-duty evaluation to return to work after a cardiac arrest. Due to knee arthritis, he requested to perform part of the evaluation on a bicycle instead of a treadmill. After Union Pacific refused to allow the bicycle test, his results indicated he lacked sufficient aerobic capacity to perform strenuous labor, and he was prevented from returning to work. A jury returned a verdict for Sanders on his disparate treatment and failure-to-accommodate claims, and the district court denied Union Pacific's motion for judgment as a matter of law. The Eighth Circuit affirmed.

  Disparate treatment: Sanders alleged that Union Pacific discriminated against him by imposing work restrictions on the basis of a perceived disability. Union Pacific argued that it did not "regard" him as disabled because it relied on a medical evaluation. The Eighth Circuit held that under the ADA Amendments Act of 2008, a doctor's recommendation does not insulate an employer from liability.

Union Pacific argued that the jury did not reasonably find that it acted because of Sanders's disability, because Sanders presented no evidence that his employer was hostile toward disabled persons. However, the Eighth Circuit pointed out, "while our cases have spoken in terms of 'discriminatory animus,' the ADA does not require evidence of prejudice toward the disabled. Rather, 'animus' in this context means simply that the employer was motivated by the employee's disability." This element was thus satisfied by Union Pacific's acknowledgment that it relied on the disability that it regarded Sanders as having – diminished cardiovascular health – in reaching its decision to stop him from working as a foreman general.

Failure to accommodate: The Eighth Circuit held that the jury reasonably concluded that Union Pacific failed to accommodate Sanders. Union Pacific failed to engage in an interactive process to identify an accommodation that would have allowed Sanders to complete the cardiovascular test, instead simply informing him that only results from a treadmill test would be acceptable. Union Pacific next argued that Sanders did not show that he would have passed the test on a bicycle. The Eighth Circuit held that he had done so, based on his doctors clearing him for work without restrictions and evidence that he regularly performed similarly strenuous activities, but noted it was only *"[a]ssuming* that the employee must prove not only that a reasonable alternative test was available, but also that he would have performed satisfactorily on that test[.]" (emphasis added).

- *Hopple v. Joint Comm'n on Accreditation of Healthcare Orgs.*, No. 22-11922, 2024 WL 3507687 (11th Cir. July 23, 2024) – Due to the way Parkinson's disease caused her body to stiffen after prolonged periods of sitting, Hopple sometimes had difficulty walking. Her employer argued that she needed to provide evidence regarding the severity, frequency, and duration of her impairments to permit a finding that she was substantially limited in a major life activity. It relied on precedent where there was no evidence that an activity or situation triggered or exacerbated those plaintiffs' conditions. In that context, the court needed evidence regarding the severity, frequency, and duration of the impairments in order to assess whether the impairments were substantially limiting. Here, Hopple did provide evidence about the frequency, severity, and duration of her limitation in walking: her doctor's note and her deposition testimony established that she experienced difficulties walking *whenever she sat for prolonged periods of time.* Thus, the frequency of her impairments depended on how often she sat for a prolonged period of time. The Eleventh Circuit held that she presented sufficient evidence for a reasonable jury to find that she had a disability.

- *Mattioda v. Nelson*, 98 F.4th 1164 (9th Cir. 2024) – Mattioda, a NASA scientist, had hip- and spine-related disabilities that required him to purchase premium-class plane tickets for work travel. He sued his employer under the Rehabilitation Act alleging, among other things, that he suffered a hostile work environment after disclosing his disabilities to his supervisors and requesting upgraded airline tickets as a reasonable accommodation. The district court dismissed his hostile work environment claim for failure to state a claim, and the Ninth Circuit reversed. It joined all other circuits to have addressed the issue by holding that hostile work environment claims are cognizable under the ADA and Rehabilitation Act. It reversed the district court's holding that Mattioda failed to plausibly allege that the harassing conduct occurred *because of* his disability, reasoning

that this holding conflicts with the district court's conclusion that he plausibly alleged disability-based discrimination. In addition, the Ninth Circuit held he plausibly alleged a nexus between the harassment and his disabilities: a series of harassing comments began after he disclosed his disabilities, and he was accused of using his disabilities to avoid work. The Ninth Circuit also affirmed summary judgment for NASA on Mattioda's disability discrimination claim based on a denied promotion.

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.

- *Katz v. Wormuth*, No. 22-30756, 2023 WL 7001391 (5th Cir. Oct. 24, 2023) – A seventy-three year old civilian army doctor was removed from his position as Chief of Surgery and replaced by a military officer half his age. He sued, alleging age discrimination. The Fifth Circuit found that he had established a prima facie case with direct evidence of age-based discrimination, evidenced by a memo articulating a hospital-wide decision to "put uniformed personnel in leadership roles as career development opportunities for young Officers." However, the Army was able to satisfy its burden that Katz would have been replaced regardless of age because he is a civilian. Because his status as a civilian and not a military officer meant that he would have been replaced regardless of his age, the Army met its burden and the court affirmed the dismissal of the ADEA discrimination allegation.

- *Milczak v. Gen. Motors, LLC*, 102 F.4th 772 (6th Cir. 2024), *reh'g denied*, 2024 WL 3205990 (6th Cir. June 17, 2024) – The Sixth Circuit affirmed summary judgment in favor of General Motors, finding that the plaintiff failed to offer any evidence that younger employees were treated more favorably. In 2018, GM announced that it was "retooling" a manufacturing plant to produce electric vehicles. The plaintiff, a long-time employee at the plant, was in his early sixties when GM started the transition. After GM announced the retooling, managers called the plaintiff an "old fart," among other ageist names, and told him that the company was "getting rid of the older guys." GM transferred the plaintiff twice around this time. One of the transfers was to a later 2:00 pm – 10:30 pm shift, which reduced his opportunities to work overtime. The new position also required him to supervise a group of difficult employees. Even though the plaintiff's salary remained the same, the Sixth Circuit found that this transfer amounted to "some harm" per the recent Supreme Court decision in *Muldrow*. However, because the plaintiff did not offer sufficient comparator evidence, the court affirmed the district court's grant of summary judgment in favor of GM.

- *Lightner v. Catalent CTS, LLC*, 89 F.4th 648 (8th Cir. 2023) – The Eighth Circuit affirmed summary judgment in favor of the employer. The plaintiff alleged that a

manager told her that she did not think plaintiff was the "long-term solution" for the role and then terminated her for poor performance. The plaintiff also alleged that managers mentioned "retirement" and "an exit plan" when discussing the plaintiff. The court affirmed the district court's decision that these minimal references to retirement were not so "unnecessary and excessive" as to raise an inference of age discrimination. The court found that the plaintiff did not establish a prima facie case of age discrimination and affirmed the lower court's summary judgment finding.

- *Van Horn v. Del Toro*, No. 23-5169, 2024 WL 3083365 (D.C. Cir. June 21, 2024) – In analyzing an ADEA claim by an employee of the Naval Criminal Investigative Service (NCIS) who alleged that three involuntary transfers were discriminatory based on her age, the D.C. Circuit applied the adverse employment action standard articulated by the Supreme Court in its recent *Muldrow v. City of St. Louis* decision. The court held that "All three transfers at issue here constitute adverse employment actions under *Muldrow*. An employee who is forced to take an unwanted transfer to a new job in another state or across the world suffers a 'disadvantageous change' to a term or condition of her employment." Further, the court noted that "It is of no consequence that *Muldrow* was a private-sector Title VII case whereas this is a federal-sector ADEA case. We have always interpreted Title VII and the ADEA identically as far as adverse actions go, and we have likewise always treated the private-sector and federal-sector provisions of those statutes alike in that respect." Finally, the court explained that for purposes of the adverse action analysis it does not matter that some of the transfers never happened, because "an adverse employment action becomes cognizable when the employer provides notice of the action to the employee, regardless of whether the employer follows through." (internal quotations and citations omitted).

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.

In its last term the Supreme Court issued its decision in *Muldrow v. City of St. Louis*, in which it held that a plaintiff alleging that an involuntary transfer was discriminatory under Title VII need only show that she suffered "some harm" as a result of the transfer, rather than a "significant," "serious," or "substantial" harm, or "any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar." The Circuit Courts of Appeals have already applied the *Muldrow* standard in many cases, including some that involved employment actions other than transfers. We summarize several of these below, along with a sample of other recent Title VII decisions covering a wide variety of fact patterns, which involve interesting legal issues or types of allegations that may arise in claims brought under the CAA.

Adverse Employment Actions – Cases Citing Muldrow

- *Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868 (6th Cir. 2024) – The plaintiff, a school principal, was suspended with pay during an investigation. She alleged, among other

things, that the school district discriminated against her based on race in violation of Title VII. Prior to *Muldrow*, the Sixth Circuit and many other federal appellate courts had "long held that an employer does not take a materially adverse action when it temporarily suspends an employee with *full pay* while 'timely' investigating the employee's potential misconduct." (emphasis in original) However, the court in *Blick* explained that the *Muldrow* decision "calls this rationale (and our precedent) into doubt" because "one might reasonably argue that a temporary suspension (even with pay) causes 'some harm' and also concerns a 'term or condition' of the job—all that *Muldrow* now requires under Title VII."

- *Peifer v. Bd. of Prob. & Parole*, 106 F.4th 270 (3d Cir. 2024) – The plaintiff, a parole board agent, alleged that her employer violated Title VII and the Pregnancy Discrimination Act when it refused to grant her requested pregnancy accommodations. She proceeded under two theories: a discrimination theory alleging that her employer subjected her to an adverse employment action because she was pregnant, and a failure-to-accommodate theory. The discrimination claim was based on her allegation that as a result of the denial of her requested accommodations, she suffered forced leave and a corresponding temporary loss of pay and benefits, uncertainty, revocation of state-issued equipment, a less flexible work schedule, and an unsafe work environment during a modified-duty assignment. The district court, which granted summary judgment for the employer prior to the *Muldrow* decision, found that these alleged harms did not rise to the level of an adverse employment action. However, the Third Circuit remanded with instructions to apply the *Muldrow* "some harm" standard to determine whether the plaintiff had established a prima facie case under her discrimination theory.

- *Yates v. Spring Indep. Sch. Dist.*, — F.4th —, No. 23-20441, 2024 WL 3928095 (5th Cir. Aug. 26, 2024) – The plaintiff began work as a middle school math teacher but within a few weeks was placed on the first of several "support plans" based on alleged concerns with his performance and preparation, and was later removed from his position as a lead teacher and placed in a "push-in" role providing support services for another teacher. He was briefly reassigned as a lead teacher but then replaced by a younger female, and moved back to a push-in role. He requested and was granted a transfer to another school, but exhibited planning and organization issues there as well, and became the subject of parent complaints. He was placed on paid administrative leave for about four months while the school district conducted an investigation, during which time he could not visit any school district facilities, participate in any school district activities, or have any contact with students, parents, or colleagues. Yates was ultimately cleared to return to work following the investigation. He sued under Title VII as well as the ADA and ADEA, alleging that the school district discriminated and retaliated against him by reassigning him to the push-in position, putting him on support plans, and placing him on administrative leave.

  The district court granted summary judgment for the school district, based on its finding that Yates did not suffer an adverse employment action, and Yates appealed. The Fifth Circuit cited both its own precedent in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc) and the Supreme Court's subsequent holding in *Muldrow* to explain that the district court erred in applying the "ultimate employment decision" standard; a

plaintiff need only show that he was discriminated against on the basis of a protected characteristic with respect to the terms, conditions, or privileges of employment, as the text of Title VII says. However, the court still affirmed summary judgment for the school district, because even if its conduct rose to the level of an adverse employment action under the appropriate standard, the school district articulated a legitimate non-discriminatory reason for its actions – i.e., ongoing concerns about Yates's preparation and performance – and Yates failed to demonstrate that those reasons were pretextual.

- *Cole v. Grp. Health Plan, Inc.*, 105 F.4th 1110 (8th Cir. 2024) – A physical therapist alleged that her employer treated her in a discriminatory manner and failed to accommodate her religious beliefs regarding the COVID-19 vaccine. She was granted a religious exemption to the vaccine mandate, but as with other unvaccinated employees, she had to disclose her unvaccinated status to her superiors and wear a mask at all times, she was reassigned to different patient care areas or work settings, and she was not provided with a "badge lock" that allowed her vaccinated colleagues to remove their masks in administrative facilities and non-patient care areas. She claimed that being subject to these conditions singled her out and made her a target for scorn, ridicule, embarrassment, criticism, and blame. The district court granted the employer's motion to dismiss, but the Eighth Circuit reversed and remanded. The court explained that in *Muldrow* "The Supreme Court recently obviated the requirement—replete in our case law—that the claimed injury be 'significant,' 'material,' or 'serious.' After *Muldrow*, Cole is only required to plead 'some harm respecting an identifiable term or condition of employment.'" (citations omitted). In this case, the court held that whether or not the plaintiff had suffered "some harm" required further factual development, and remanded to the district court for further proceedings.

- *Staple v. Sch. Bd. of Broward Cnty., Fla.*, No. 21-11832, 2024 WL 3263357 (11th Cir. July 2, 2024) – The plaintiff, a Seventh Day Adventist, requested a modified work schedule that would allow him to observe his Sabbath beginning at sundown on Friday. The school board required him to use accrued paid leave while his accommodation request was pending, and eventually denied the request, again requiring him to use paid leave in order to observe the Sabbath. The district court dismissed Staple's failure-to-accommodate claim, concluding that Staple had to plead that he was discharged or disciplined for failing to work during the Sabbath, which he had not done. The Eleventh Circuit reversed, holding that under *Muldrow* all the plaintiff had to allege was some harm respecting an identifiable term or condition of his employment, and that he had done so by alleging that the school board denied him a reasonable accommodation and forced him to use his paid leave to meet his religious observance. The court also noted that the standard is the same regardless of whether a plaintiff suing for religious discrimination alleges disparate treatment or failure to accommodate: "Employment practices that are actionable under a religious accommodation claim are the same as the ones actionable for any other claim under Title VII's disparate treatment provision."

Religious Discrimination

- *Hebrew v. Tex. Dep't of Crim. Just.*, 80 F.4th 717 (5th Cir. 2023) – The plaintiff, a follower of the Hebrew Nation religion, had taken a Nazarite vow to keep his hair and

beard long, and had maintained that vow for over two decades. He was hired by the Texas Department of Criminal Justice and reported to their training academy, where he was told he would have to cut his hair and shave his beard in compliance with the employer's grooming policy. He requested a religious accommodation, but was forced to leave the training academy without pay for two months while that request was pending, and the employer ultimately denied the request.

The district court found in favor of the employer on Hebrew's failure-to-accommodate and religious discrimination claims under Title VII, but the Fifth Circuit reversed. With respect to the failure-to-accommodate claim, the court applied the standard recently established by the Supreme Court in *Groff v. DeJoy*, 600 U.S. 447 (2023), and held that the employer was unable to show that undue hardship would result from accommodating Hebrew's long hair and beard. The employer could not demonstrate any cost it would incur, let alone substantial costs; its reference to possible additional work for Hebrew's coworkers was insufficient to show an undue hardship; and it did not present any evidence that it had considered other possible accommodations. As for the religious discrimination claim, because the only reason leading to Hebrew's termination was his religious practice, there was no question that he was fired "because of" his religion in violation of Title VII; the court rejected the employer's argument that it did not violate Title VII because the reason for its discrimination was neutral and based on legitimate safety concerns, citing *EEOC v. Abercrombie & Fitch Stores, Inc.,* 575 U.S. 768, 775 (2015), in which the Supreme Court held that Title VII does not merely require neutrality with respect to religious practices, but actually accords them "favored treatment."

- *EEOC v. Ctr. One, LLC*, No. 22-2943, 2024 WL 379956 (3d Cir. Feb. 1, 2024) – A customer care specialist, Demetrius Ford, who is an adherent of Messianic Judaism, was assigned negative attendance points for missing work to attend Rosh Hashanah Services. The Human Resources department refused to remove the points without an official clergy letter, which he could not provide because he was in the process of changing congregations; they then required him to attend a meeting with the company's Employment Review Committee, which they scheduled on Yom Kippur – a day the company knew was a High Holy Day in his religion. Ford resigned, and then sued for constructive discharge in violation of Title VII's protection against religious discrimination.

  The Third Circuit reversed district court's grant of summary judgment for the employer on plaintiff's constructive discharge claim, because genuine issues of material fact existed as to whether a reasonable person in Ford's position would have found the conditions of his employment had become "intolerable" and felt compelled to resign. The court stated that "it is undisputed that scheduling a mandatory meeting on an employee's religious holiday itself delivers the message that the religious observer is not welcome at the place of employment, and that Ford left the meeting with the understanding that he would be terminated if he missed work again without an official clergy letter." (internal quotations and citations omitted). "The doctrine of constructive discharge does not require an employee who is seeking religious accommodation to either violate the tenets of his faith or suffer the indignity and emotional discomfort of awaiting his inevitable termination."

- *Amos v. Lampo Grp., LLC*, No. 24-5011, 2024 WL 3675601 (6th Cir. Aug. 6, 2024) – In a case of "reverse religious discrimination" – or, as the Sixth Circuit phrases it, a "religious nonconformity claim" – the employer was accused of discriminating against the plaintiff not only because of the plaintiff's own religion, but because he did not adhere to the employer's religious beliefs. The crux of the claim is that management discriminated against Amos for wanting to take precautions against COVID-19: the company would not allow him or other employees to work from home and actively discouraged any preventative measures including social distancing and masking, because the company's policy was allegedly that "prayer was the 'exclusive way to prevent COVID infection,' and that anything else showed a 'weakness of spirit' and was 'against the will of God.'" Amos believed that social distancing and masking were consistent with his own sincerely held religious beliefs, "including the 'golden rule' of doing no harm to others and promoting the safety of his own family"; however, he claimed that management mocked and derided employees for taking precautions, and that ultimately he was terminated because of his failure to submit to the company's religious practices and his expression of his own religious beliefs with regard to COVID measures.

  The district court dismissed Amos's complaint, for reasons including its apparent unwillingness to recognize the religious nonconformity theory, but the Sixth Circuit reversed. The court explained that there is no distinction under Title VII between discrimination based on an employee's faith and discrimination based on the employee's nonconformance to the employer's beliefs; both are unlawful: "The employer is still the one allegedly doing the discriminating. The only difference is the alleged motivation—who holds the relevant religious beliefs. … Accordingly, the focus of the claim is on the religious beliefs of the employer, and the fact that the employee does not share them—not on the specific religious beliefs of the employee himself." (cleaned up). The court held that Amos had stated plausible claims for both religious discrimination on the basis of his own deeply held religious beliefs and religious nonconformity discrimination based on his failure to adhere to the employer's religious beliefs, and remanded his Title VII claim to the district court.

Sex Discrimination

- *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822 (6th Cir. 2023), *petition for cert. docketed*, No. 23-1039 (U.S. Mar. 20, 2024) – The plaintiff, a heterosexual female, alleged that she was denied a promotion and later demoted because of her sexual orientation. Her allegations were based on the facts that her supervisor was a gay man, the position for which she had applied was filled by a gay man, and the position from which she was demoted was filled by a lesbian. The Sixth Circuit held that she failed to establish a prima facie case, however, because when a plaintiff claims discrimination on the basis of her membership in the majority (in this case, her heterosexuality), "she must make a showing in addition to the usual ones for establishing a prima-facie case. Specifically, Ames must show background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." (cleaned up). This can typically be done by showing that the decisionmaker behind the adverse employment action is a member of the minority group, or by presenting statistical evidence of a pattern of discrimination by the employer against members of the majority

group. In this case, although Ames's supervisor was gay, he was not the decisionmaker responsible for either her demotion or her failure to obtain a promotion; both of the individuals who made those decisions were heterosexual. Moreover, Ames could not point to any evidence of a pattern of discrimination against heterosexual employees: she relied only on her own demotion and denial of promotion, and the court noted that "a plaintiff cannot point to her own experience to establish a pattern of discrimination."

- *Erdman v. City of Madison*, 91 F.4th 465 (7th Cir. 2024) – A female firefighter was eliminated from the recruitment process for failing the fire department's Physical Abilities Test, and sued under Title VII alleging that the test had an unlawful disparate impact on women. The district court found in favor of the city, and the Seventh Circuit affirmed.

  To prove disparate impact, a plaintiff must show that a particular hiring practice had an adverse impact on applicants with a protected characteristic, and that the challenged hiring practice causes the discriminatory impact, typically by offering statistical evidence. If a job applicant makes a prima facie showing of disparate impact, the employer can then show that either the challenged practice does not cause the disparate impact, or the practice is job-related for the position and consistent with business necessity. The burden then shifts back to the applicant to prove that the employer refuses to adopt an alternative hiring practice that would result in less disparate impact and still serve the employer's legitimate needs.

  Although Erdman made out a prima facie case showing that the test did indeed have a disparate impact on women, the city demonstrated that test was job-related and served the city's legitimate needs, and Erdman failed to prove that her proposed alternative hiring practice – a different physical abilities test used by many other fire departments across the country, which undisputably had less of a disparate impact on women – would still serve the city's legitimate needs. Certain elements of the test used by the Madison fire department were designed specifically for Madison, in light of characteristics of the city, the Department's equipment, or other considerations, including safety. Using the alternative test also would have caused the city to incur significant costs and overtime expenses.

Hostile Work Environment

- *King v. Aramark Servs. Inc.*, 96 F.4th 546 (2d Cir. 2024) – The plaintiff, a general manager at Aramark, alleged that she suffered a two-year-long steady course of mistreatment at the hands of her supervisor, Griffith Thomas, including disparagement, undermining, interference, fabrication of performance-related complaints, and body shaming, culminating in her termination, ostensibly over an alleged mileage reimbursement violation following a sham HR investigation influenced by Thomas. King sued under Title VII, alleging both discrimination based on sex in connection with her termination and a sex-based hostile work environment.

  The district court dismissed King's hostile work environment claim, concluding that all of the actions making up the claim took place more than 300 days before she filed with

the EEOC and that her claim was therefore untimely. The Second Circuit reversed the district court on this claim, holding that "a reasonable factfinder could find that at least one act furthering the discriminatory pattern or practice of hostile treatment occurred within the limitations period, the continuing violation doctrine thus applies, and King's harassment claim was timely." The court explained the distinction between discrete discriminatory acts on the one hand, and the continuing nature of hostile work environment claims on the other. "In light of these differences, an untimely discrete act claim cannot be pulled into the limitations period by a claim premised on a continuing course of conduct, even if the course of conduct includes that discrete act. For example, if a Title VII plaintiff lodges a timely hostile work environment claim against an employer, the plaintiff cannot also lodge a separate claim for a discrete failure to promote if the promotion denial fell outside the limitations period. The plaintiff can use the promotion denial as evidence to support *the hostile work environment claim*, but the continuing violation doctrine does not render timely a distinct *discrete act claim* for damages based on the promotion denial." (emphasis in original).

However, the court noted that the reverse would *not* be true: "Discrete acts like a promotion denial, though untimely for purposes of a separate discrete act claim for damages, can nevertheless help a plaintiff prove a hostile environment claim. That's because a hostile environment is formed and shaped by an assemblage of discriminatory acts—*including* acts that might *also* support a discrete-act discrimination claim if timely filed. That's true whether the discrete acts that are part of a discriminatory course of conduct occur within the limitations period or without." (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)).

Because King had identified two acts within the limitations period – an HR investigation and her termination – which could reasonably be seen as part of Thomas's continuing pattern of discriminatory behavior, the court held that King's hostile work environment claim was timely under the continuing violation doctrine.

The court also reversed and remanded the district court's dismissal of King's disparate treatment claim based upon her termination, finding that although the male comparators she identified were not identically situated to her, "they nevertheless had similar titles to King, had similar responsibilities, and directly reported to Thomas. We conclude that these male direct reports shared enough commonalities with King that they can serve as adequate comparators. True, King managed a larger institution with more sites of service than some of her male peers. But this difference and the others pointed out by Aramark are not so significant that they would preclude a jury from viewing her differential treatment as evidence of sex-based animus." King had also produced enough evidence to create a genuine dispute as to whether the purported reimbursement infraction was a pretext to terminate her for discriminatory reasons.

- *Ogbonna-McGruder v. Austin Peay State Univ.*, 91 F.4th 833 (6th Cir. 2024), *cert. denied,* 144 S. Ct. 2689 (2024) – In affirming the district court's dismissal of the plaintiff's complaint for failure to state a claim, the Sixth Circuit distinguished between the types of discrete acts that could support a race-based discrimination claim on the one hand, and incidents that could be used to show severe or pervasive conduct in support of

a hostile work environment on the other hand. The court explained that "most of Ogbonna-McGruder's allegations do not constitute 'harassment' contributing to the hostile work environment claim. Her allegations that she was denied the opportunity to draft a grant proposal and teach summer courses, received low evaluations, was replaced by a white adjunct professor, and was reassigned to teach public management courses represent discrete acts that could perhaps support separate claims of discrimination or retaliation under Title VII" but could not be properly characterized as part of a continuing hostile work environment.

Additionally, contrary to the holdings of several other federal appellate courts, the Sixth Circuit relied on its precedent requiring that to demonstrate a retaliatory hostile work environment – just like a discriminatory hostile work environment – a plaintiff must show severe or pervasive conduct, rather than the formulation used by other courts that requires only a showing that the conduct would dissuade a reasonable worker from engaging in protected conduct.

- *Schlosser v. VRHabilis, LLC*, 113 F.4th 674 (6th Cir. 2024) – The plaintiff, Ariel Schlosser, was hired as a UXO technician – a certified diver tasked with performing unexploded ordnance remediation – for a project at Cape Poge, an island adjacent to Martha's Vineyard. She was the lone female diver on the project team. She alleged that during the duration of the project she was singled out for unfair treatment, repeatedly ostracized from participation in activities that all of her male counterparts got to do, and subjected on a daily basis to being called "bitch" and other verbal harassment. A jury found for the plaintiff; the district court denied the employer's motion for judgment notwithstanding the verdict, and the Sixth Circuit affirmed. The court held that a reasonable jury could find that the harassment of the plaintiff was gender-based and that it was pervasive enough to support the jury's verdict in favor of the plaintiff on her sexual harassment claim. "The jury fairly concluded that Schlosser did not endure 'simple teasing' or 'isolated incidents.' Instead, as the lone female diver, Schlosser faced daily threats to her employment, derogatory comments, verbal harassment, foul language, and constant changes to her pay and position to which members of the opposite sex were not exposed. And this harassment occurred daily throughout a compressed period of ten weeks. For these reasons, a reasonable juror could find that a hostile work environment existed." The court emphasized the case-by-case, fact-specific, credibility-oriented nature of sexual harassment claims, particularly with respect to the "severe or pervasive" prong. Further, the court held that a reasonable jury could have found both that Schlosser suffered a tangible employment action as a result of the harassment (which would make the employer strictly liable) and that her supervisor knew of the harassment but did not attempt to take any corrective action (which would make the employer vicariously liable).

- *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024) – The plaintiff, a female prison psychologist, became aware that a lieutenant was posting offensive and threatening content targeting her on an Instagram account followed by over one hundred employees of the prison. The lieutenant also made other posts that did not target the plaintiff specifically, but which were sexist, racist, anti-Semitic, homophobic, and transphobic, and which explicitly or implicitly referenced other members of the prison staff. When she

complained, she was transferred to another facility within the prison, but the harassment continued and even escalated once the lieutenant was made aware of her complaint. One safety manager told her he found the posts "funny," and an investigator told her he didn't see a problem with the Instagram account. She raised the issue several times with the warden and assistant warden but either did not receive a reply or was told that no action was warranted. Eventually a new warden was assigned to the prison, who convened a Threat Assessment Team that investigated the Instagram account and, among other things, recommended that a cease-and-desist letter be issued to the lieutenant. Despite that letter, the posts continued for several weeks, until the lieutenant finally took down the page.

The district court considered only five posts that clearly targeted Okonowsky and were sexual in nature, all of which were made prior to the cease-and-desist letter, and granted summary judgment for the employer. Among its stated reasons for that decision were the fact that the offensive conduct occurred outside of the workplace. The Ninth Circuit reversed, holding that the district court had erred in limiting its analysis to just those five posts, and explaining that it was of no consequence that the posts were made outside of the workplace: "We take this occasion to reaffirm that the totality of the circumstances in a Title VII sexually hostile work environment claim includes evidence of sexually harassing conduct, even if it does not expressly target the plaintiff, as well as evidence of non-sexual conduct directed at the plaintiff that a jury could find retaliatory or intimidating. We also reject the notion that only conduct that occurs inside the physical workplace can be actionable, especially in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace." With respect to the latter point, the court explained that "offsite and third-party conduct can have the effect of altering the working environment in an objectively severe or pervasive manner. … Thus, even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."

The court also held that "a reasonable juror could also conclude that the Bureau's response to Okonowsky's harassment was neither reasonably immediate nor effective, triggering liability under Title VII." It pointed to the evidence that several individuals failed to take her complaints seriously, that the investigation was "slow-walked," and that the harassment continued for three weeks even after the issuance of the cease-and-desist letter. Moreover, there was no evidence that any of the employer's actions were actually the reason that the lieutenant ultimately took down the Instagram page.

- *Young v. Colo. Dep't of Corr.*, 94 F.4th 1242 (10th Cir. 2024) – The Department of Corrections instituted mandatory Equity, Diversity, and Inclusion (EDI) training, which led the plaintiff to resign and then sue the Department, claiming that the training subjected him to a hostile work environment. He alleged that the training, consisting of several online modules that employees viewed on their own computers, contained many negative stereotypes of White people, and that not only did he feel harassed by the training, but knowing that his coworkers were taking the same training exacerbated the hostile work environment for him, to the point where he no longer felt comfortable working for the Department.

The court acknowledged that "Mr. Young's objections to the contents of the EDI training are not unreasonable: the racial subject matter and ideological messaging in the training is troubling on many levels. As other courts have recognized, race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment." Among other things, the training discussed concepts such as "white fragility," advised trainees to be careful of exclusionary "white norms," critiqued "white exceptionalism," and made other generalizations about White people that could reasonably be viewed as racist; the court agreed that "If not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging. Taken seriously by managers and co-workers, the messaging could promote racial discrimination and stereotypes within the workplace."

However, in this case, Young could not show that the training constituted "severe or pervasive" treatment that rose to the level of a hostile work environment. Although the online training could be viewed as offensive, it was only given once, and Young did not allege that his coworkers treated him with hostility as a result of the training: "While Mr. Young asserts that he experienced severe and pervasive harassment… he does not allege specific facts that demonstrate how the training related to his actual workplace experience. For example, he does not allege that the training occurred more than once, that his supervisors threatened to punish or otherwise discipline employees who failed to complete or agree with the materials, or that co-workers engaged in specific acts of insult or ridicule aimed at him because of the training. To be sure, Mr. Young contends the training could lead to safety or security concerns because of the nature of the workplace—a state prison. But at this point, his concern is speculative." In short, there was no claim of "racial animus manifesting itself in Mr. Young's day-to-day *work environment*" (emphasis in original). The Tenth Circuit therefore affirmed the dismissal of Young's hostile work environment claim.

- *Copeland v. Ga. Dep't of Corr.*, 97 F.4th 766 (11th Cir. 2024) – A transgender prison guard alleged that from the time he came out as transgender he suffered constant and humiliating harassment from supervisors, subordinates, and peers. He sued under Title VII, bringing claims for hostile work environment, disparate treatment based on failure to promote, and retaliation. The district court granted summary judgment on all three claims, including a finding that the alleged harassment amounted only to "simple rudeness and discourtesy" that was not "severe or pervasive" to sustain a hostile work environment claim. The Eleventh Circuit affirmed on the failure to promote claim because Copeland had not provided evidence regarding similarly-situated cisgender comparators, and also affirmed with respect to retaliation because he could not establish a causal connection between any of his alleged protected activity – complaining about the harassment, filing an EEOC complaint, and filing this lawsuit – and the employer's refusal to transfer or promote him.

  However, the Eleventh Circuit reversed and remanded on Copeland's hostile work environment claim. The court explained that it considers four factors to determine whether conduct is sufficiently "severe or pervasive" to support a hostile work environment claim – (1) its frequency, (2) its severity, (3) whether it is physically

threatening or humiliating, and (4) whether it unreasonably interferes with job performance – but that although these factors guide their inquiry, "they are neither elements nor requirements." Instead, the court considers the totality of the circumstances to determine whether the harassment altered the terms or conditions of the plaintiff's employment. In this case, Copeland had identified 34 individuals who engaged in the harassment, and produced evidence that certain types of harassment occurred on a daily basis, which clearly made the conduct frequent. The court also considered the evidence to show severity, based on the fact that it continued despite Copeland's repeated complaints to HR and his superiors, along with the fact that some of his supervisors participated in the harassment themselves. A reasonable jury could have found, based on Copeland's testimony, that the harassment was physically threatening and humiliating, and the record also contained evidence that could support a reasonable finding that it interfered with Copeland's job performance, despite the fact that he eventually got a promotion. Thus the Eleventh Circuit disagreed with the lower court's largely unexplained finding that the record evidence showed only "simple rudeness and discourtesy" toward Copeland.

Retaliation

- *Stratton v. Bentley Univ.*, 113 F.4th 25 (1st Cir. 2024) – The plaintiff, a program coordinator at a university, alleged that she had been constructively discharged from her position, claiming that she was forced to resign because she suffered an intolerably hostile work environment based on her gender, race, national origin, and disability, and that she had been retaliated against for complaining about discrimination. The First Circuit affirmed the district court's grant of summary judgment for the employer, but devoted some of its opinion to a discussion of the different legal standards for *discriminatory* hostile work environment claims and *retaliatory* hostile work environment claims. Although a plaintiff must show "severe or pervasive" harassment to establish a claim of a discriminatory hostile work environment, for a retaliation claim she need only show that the employer's conduct might have dissuaded a reasonable person from engaging in protected activity under Title VII. This standard, established in *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006), applies to all Title VII retaliation claims, including those alleging a retaliatory hostile work environment.

- *Harris v. FedEx Corp. Servs., Inc.*, 92 F.4th 286 (5th Cir. 2024), *petition for cert. docketed*, No. 23-1314 (U.S. June 17, 2024) – In reviewing several issues related to a jury verdict and damages award, the Fifth Circuit affirmed in part and reversed in part. Most relevant for our purposes, although the jury found that FedEx had not discriminated against the plaintiff on the basis of race, it did find that FedEx had retaliated against her for filing complaints about race discrimination, and the Fifth Circuit held that there was enough evidence in the record to support such a finding. In addition to the temporal proximity between her protected activities and the adverse actions (each of which occurred less than a month after an internal investigation into her discrimination complaints), there was evidence that similarly situated employees outside her protected class were treated more favorably – i.e., White district sales managers who performed similarly were not given warnings or terminated – and that the only other employee who was terminated for poor performance had also filed a discrimination complaint. The court

noted that FedEx had provided "substantial evidence" that Harris was fired because of her poor performance, and that the temporal proximity could have been "self-generated" in that Harris could have filed a discrimination complaint each time she believed she was about to be disciplined. However, the court could not make credibility determinations on appeal, and there was enough evidence to support a jury finding that the reason given for the termination was pretext for retaliation against the plaintiff due to her protected activity.

- *Vavra v. Honeywell Int'l, Inc.*, 106 F.4th 702 (7th Cir. 2024) – An employee was terminated after he refused to take his employer's mandatory unconscious bias training, and sued for retaliation under Title VII. The district court granted summary judgment for the employer, and the Seventh Circuit affirmed. To establish a retaliation claim, a plaintiff must demonstrate that he had a reasonable belief that the conduct he was opposing was unlawful; here, the plaintiff had never clicked the link for the online training and did not know what its contents were, and the Seventh Circuit held that "an employee must have some knowledge of the conduct he is opposing for his belief to be objectively reasonable." Moreover, he was not fired for opposing the training, but for failing to comply with company policy: "Honeywell earnestly and repeatedly sought Vavra's compliance with the training requirement, and it was only upon his final, absolute refusal to take the training that it decided to terminate him."

Similarly Situated Comparators

- *Cosby v. S.C. Prob., Parole & Pardon Servs.*, 93 F.4th 707 (4th Cir. 2024) – Kristin Cosby, a state agency employee, was forced to resign after failing a polygraph test and admitting to making false statements during an investigation into her sexual relationship with a subordinate. Among other things, she alleged discrimination based on sex, claiming that similarly-situated male comparators were not investigated or given a polygraph test like Cosby was. However, only one of the proffered comparators had also been suspected of having an improper relationship with a subordinate, and the court identified two distinctions between their respective circumstances that it deemed fatal to the plaintiff's claim. First, the subordinate with whom Cosby had the relationship told a supervisor about it, and asserted that after the relationship turned hostile Cosby removed the subordinate from her team, which affected the subordinate's pay and job performance; by contrast, the subordinate with whom the male comparator was rumored to have had a relationship did not make any such allegations. "In light of these critical distinctions, no reasonable jury could conclude that Cosby's and [the comparator]'s respective alleged misconduct was sufficiently similar as to be 'comparable in seriousness.'" Second, although the person who investigated Cosby was the same individual who declined to investigate the male comparator, the supervisors who initiated and directed the investigation into Cosby were not involved in the decision not to investigate the comparator, and there was no evidence that they were even aware of the rumors involving him. The Fourth Circuit therefore affirmed the district court's grant of summary judgment for the employer.

- *Goodwin v. Newcomb Oil Co., LLC*, No. 23-5594, 2024 WL 1828304 (6th Cir. Apr. 26, 2024) – Plaintiff Anthony Goodwin, a tanker truck driver, was terminated after two

incidents, one of which involved an uncorroborated complaint about reckless driving, and the other of which was based on a coworker's observation of him making an allegedly reckless turn onto a highway, which Goodwin disputed. Goodwin sued under Title VII, alleging that his termination was the result of unlawful race-based discrimination. Goodwin produced evidence that similarly situated employees outside of his protected class were treated more favorably, but the district court concluded that there was a "differentiating circumstance" separating him from any allegedly similarly situated Caucasian employees. The district court granted summary judgment for the company.

The Sixth Circuit reversed, holding that a reasonable jury could find that the misconduct of the proposed comparators was at least as bad as what the plaintiff did. One driver, who had multiple disciplinary notices, rear-ended another vehicle, damaging the truck badly enough that it had to be put out of commission for some time, but the driver was not disciplined; a second driver was caught smoking in his truck, and because his job involved transporting highly flammable substances, smoking inside the truck was highly dangerous and violated federal law, yet he was only issued a written reprimand; and a third driver was not terminated despite numerous disciplinary notices and allegedly reckless behavior, including hitting a pole with her truck at one of Newcomb Oil's gas stations, damaging her employer's vehicle and property – an incident for which she was not disciplined. All of these drivers were White, and engaged in arguably more dangerous behavior than that which led to Goodwin's termination, but they faced little or no discipline. The employer argued that none of those drivers had engaged in two incidents of reckless driving within three days of each other, but the court said that this argument did not "clear the bar for summary judgment" because "when viewing the facts in the light most favorable to Goodwin, a reasonable jury could determine that Goodwin's incidents were not sufficiently numerous to distinguish the severity of his conduct from that of his comparators." Nor would the other distinguishing factors put forth by the employer necessarily render the comparators inappropriate. The court explained that a plaintiff does not need to demonstrate an exact correlation with an employee receiving more favorable treatment, only that the comparator is similar in all of the relevant aspects; moreover, the misconduct does not have to be identical in order for a comparator to be appropriate – "a plaintiff must show that the comparators engaged in acts of 'comparable seriousness,' but not necessarily identical conduct."

- *Ferrara v. Mayorkas*, No. 22-55766, 2024 WL 1947134 (9th Cir. May 3, 2024) – In a retaliation case involving a TSA employee, the Ninth Circuit reversed and remanded the district court's grant of summary judgment for the TSA, because the plaintiff had established a genuine issue of material fact as to whether a similarly situated comparator who did not file an EEOC complaint was treated more favorably than she was. The fact that she had a Last Chance Agreement while the other employee didn't, did not mean that he was not a similarly situated comparator, because the LCA affected only the *severity* of discipline, not whether the employee should be disciplined at all. Since both the plaintiff and comparator had committed similar misconduct (failing to safeguard a binder containing security sensitive information), a genuine issue of fact existed as to whether the TSA's proffered reason for her termination was pretextual.

- *Moore v. Coca-Cola Bottling Co. Consol.*, 113 F.4th 608 (6th Cir. 2024) – The plaintiff, a Coca-Cola Bottling Company (CCBC) employee, was placed on a Second Chance Agreement (SCA) after testing positive for marijuana following a forklift accident, although the amount of marijuana in his system was within permissible limits pursuant to the applicable collective bargaining agreement. He was later fired for insubordination for allegedly attempting to instigate a work stoppage, but was brought back under a Last Chance Agreement (LCA). He was subsequently drug tested six times and eventually tested above the permissible limit, and was terminated. Moore, who is Black, sued for race discrimination and retaliation, claiming that he never should have been drug tested in the first place because he was not over the limit when he was drug tested after the forklift accident, and that he was being discriminated against because of his race and retaliated against for filing complaints with the company's HR department.

  The district court granted summary judgment for CCBC, and Moore appealed. The Sixth Circuit focused on the question of pretext – specifically, whether Moore had raised a genuine dispute that he was treated differently than similarly situated White employees with regards to CCBC's drug-testing policy, which would call into doubt CCBC's justification for terminating him. He identified two comparators, both White men, one of whom had also failed a drug test while subject to an SCA but was not terminated until he failed a second drug test, and the other of whom had not been tested for drugs or alcohol after a workplace accident. With respect to the first comparator, Voss, the court held that both employees "engaged in substantially similar conduct—failed drug tests while on SCAs—and yet Moore was fired immediately whereas Voss was allowed to keep his job for nearly eighteen more months and until he failed a second drug test. To state the facts is effectively to show different treatment despite identical conduct. A two-strikes policy for firing Black employees and a three-strikes policy for firing white employees would plainly constitute disparate treatment and raise pretext concerns."

  As to the second comparator, Wermeling, witnesses stated that he was stumbling around smelling of alcohol before he passed out in the path of an automated vehicle, causing an accident, but that he was not tested for alcohol or drugs after his accident like Moore was. Moore's accident was different in nature – he was operating a forklift and inadvertently parked it in the path of an automated vehicle, causing a crash – but the court explained that although Moore and Wermeling were not "identical in every way," Moore was not required to make such a showing. "The record shows that (1) Wermeling and Moore were both forklift drivers; (2) both employees were involved in accidents involving AGVs, which were considered workplace incidents; and (3) both men should have been drug and alcohol tested, per company policy." Indeed, there was evidence that Wermeling had engaged in chronic misconduct, and his accident was arguably worse than Moore's because it forced production to halt. The court therefore held that Moore had sufficiently shown that there was a genuine dispute of material fact as to whether CCBC treated him less favorably than similarly situated White employees.

Other Title VII Cases

- *Banks v. Gen. Motors, LLC*, 81 F.4th 242 (2d Cir. 2023) – The plaintiff, a site safety supervisor at a GM plant, brought race- and sex-based discrimination, hostile work

environment, and retaliation claims against her employer. She presented evidence of, among other things, the use of the N-word, sexist comments directed at her, displays of racist and sexist words or materials and the Confederate flag around the plant, and the placement of nooses near the workstations of Black employees on three separate occasions. She also presented evidence that after her return to work following a leave of absence, she was placed in a different role where she did not have supervisory responsibilities and was assigned to work a less desirable shift.

The district court granted summary judgment for GM, but the Second Circuit reversed on all three counts. With respect to the hostile work environment claim, in finding that a reasonable jury could deem Banks's evidence as severe or pervasive, the court explained that even if racial epithets were directed at a plaintiff's coworkers rather than at the plaintiff herself, they still may have probative value; likewise, incidents for which the plaintiff was not present may still contribute to her experience of a hostile work environment if she learns about them second-hand. The court also cautioned that "concrete physiological harm" is not required to establish a hostile work environment claim: "All that is required is that 'the environment ... reasonably be perceived, and is perceived, as hostile or abusive.'" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)).

With respect to the disparate treatment claim, the court noted that economic harm is not required for an employment decision to be actionable under Title VII, and held that the district court erred when it concluded that GM's decisions to delay Banks's return to work from disability leave and to reassign her to a different position upon her return were not adverse employment actions. "A reasonable jury could find that Banks's transfer to a non-supervisory role upon returning from disability leave constituted a demotion because it curtailed her responsibilities, reduced her chances for promotion, reduced her rank within the safety department, and put her in a less desirable shift. … The fact that Banks did not undergo a salary cut does not preclude the possibility that a reasonable jury could find that the reassignment – considering its impact on Banks's work hours, title, responsibilities, and opportunities to interact with management – was adverse." Finally, the court held that Banks presented sufficient direct and indirect evidence to support a claim of that the termination of her benefits, her delayed return to work, and her reassignment were retaliation for her filing of internal and EEOC complaints.

- *Harrison v. Brookhaven Sch. Dist.,* 82 F.4th 427 (5th Cir. 2023) – A Black female employee of the school district who aspired to be a school superintendent alleged that the district superintendent reneged on a promise to pay for her to attend a Prospective Superintendent Leadership Academy, but paid for similarly situated White males to attend. The district court dismissed the complaint because Harrison had not alleged an "ultimate employment action," but following the August 2023 en banc decision in *Hamilton v. Dallas County* – in which the Fifth Circuit did away with its "ultimate employment decision" test – the appellate panel reversed and remanded. Although mindful that Title VII is not meant to be a "general civility code" and that alleged harms arising from discrimination must therefore be more than *de minimis*, the court held that Harrison's complaint plausibly alleged a material harm: she was forced to pay

approximately $2,000 out of pocket for the Leadership Academy, after relying on the school district's promise to pay the fees for her, which cleared the *de minimis* threshold.

- *Barnes-Staples v. Carnahan*, 88 F.4th 712 (7th Cir. 2023) – The plaintiff applied for a job with the General Services Administration (GSA) but was passed over in favor of another candidate, and she filed this lawsuit alleging that the GSA's interview process discriminated against her based on her race and sex. The district court granted summary judgment in favor of GSA, and the Seventh Circuit affirmed.

  The GSA's hiring process involved panelists asking the same questions of all candidates and independently scoring them on a scale of 1 to 5, then comparing notes to reach a single consensus score for each candidate, with all candidates who scored above a certain cutoff advancing to a second round interview in front of a different panel, which did not use a ranked scoring system. Both panels in this instance agreed that the eventual hiree was the strongest candidate. Barnes-Staples argued, among other things, that the GSA's failure to use a ranked scoring system in the second round violated its internal hiring guidelines, and that the use of subjective criteria allowed the GSA to "manipulate the process" to her disadvantage and in favor of the hiree.

  First, the Seventh Circuit noted that non-objective criteria do not necessarily violate Title VII, as long as they are not applied in a discriminatory manner. The court had never held that a job interview must be scored according to some sort of objective criteria to avoid triggering Title VII liability, and nothing in Title VII bans outright the use of subjective evaluation criteria. Second, although an employer's divergence from its standard hiring practices can be used as evidence of pretext, that is typically relevant "when an employer has applied its policies differently between protected-class and non-protected-class members"; this was not such a case, because "[t]he lack of a scoring system affected all candidates equally." Moreover, Barnes-Staples failed to show that she was clearly better qualified for the position than the hiree, and she was unable to produce sufficient evidence of systemic discrimination to bolster her individual claims.

- *Bart v. Golub Corp.*, 96 F.4th 566 (2d Cir. 2024), *petition for cert. docketed*, No. 23-1346 (U.S. June 26, 2024) – The plaintiff, a team leader at a supermarket, alleged that she was fired based on her sex in violation of Title VII. She had admitted to the misconduct that her employer had cited as the reason for her termination, so the district court granted summary judgment for the employer, concluding that she could not show that the employer's stated reason was false and therefore pretextual. The Second Circuit reversed, discussing in detail the difference between what a plaintiff must show in a single-motive case versus a mixed-motive case. The court explained that the key difference comes into play at the third step of the *McDonnell Douglas* burden-shifting analysis: "To satisfy the third-stage burden under *McDonnell Douglas* and survive summary judgment in a Title VII disparate treatment case, a plaintiff may, but need not, show that the employer's stated reason was false, and merely a pretext for discrimination; a plaintiff may also satisfy this burden by producing other evidence indicating that the employer's adverse action was motivated at least in part by the plaintiff's membership in a protected class." In this case, although Bart's misconduct may have been one of the motives for the employer to fire her, there was also evidence of sex-based animus on the part of her

supervisor – i.e., multiple sexist remarks he had made about women not being qualified to be managers. Therefore the district court should have considered whether Bart could satisfy the third step of *McDonnell Douglas* by demonstrating that her termination was based at least partly on unlawful sex discrimination.

- *Buckley v. Sec'y of Army*, 97 F.4th 784 (11th Cir. 2024) – Erika Buckley, a Black speech pathologist, alleged that she suffered discrimination based on race, a race-based hostile work environment, and retaliation at an Army hospital, which she left after being advised she would be dismissed, ostensibly for committing a HIPAA violation. She sued under the federal-sector provision of Title VII. The district court granted the employer's motion for summary judgment on all counts, but the Eleventh Circuit reversed on the hostile work environment claim – holding that Buckley had created a genuine issue as to whether she was subjected to severe or pervasive harassment based on her race – and reversed in part on the discrimination claim. The court explained that in the wake of *Babb v. Wilkie*, 589 U.S. 399 (2020) – in which the Supreme Court held that the language in the ADEA requiring personnel decisions to be made "free from any discrimination" means that a plaintiff need only demonstrate that the process leading to an employment action was "tainted by" discrimination based on a protected characteristic, not that discrimination was the but-for cause of the action – courts no longer apply a but-for causation standard in cases brought under Title VII's federal-sector provision, which contains the same "free from any discrimination" language.

  The court then went on to discuss why it no longer makes sense to apply the *McDonnell Douglas* framework in federal-sector Title VII cases: "[A]s we've explained, Title VII's federal-sector provision does not require a showing of but-for causation to make out a violation. Rather, a federal-sector employee must show only that a protected characteristic played *any* part in her employer's process in reaching an adverse employment decision. So using the *McDonnell Douglas* framework for § 2000e-16(a) claims is like requiring the plaintiff to move a boulder when she need only push a pebble—in other words, the burden under *McDonnell Douglas* is heavier than Title VII imposes on a plaintiff in a federal-sector case." Instead, a plaintiff must only produce enough evidence for a reasonable factfinder to conclude that a protected characteristic played a part in the decision. Here, "Considering Major Zhu's stated intent to 'get' Buckley, her allegedly race-based remark, and her failure to take more action to end the allegedly race-based patient-diversion scheme, we conclude that a reasonable jury could find that Major Zhu pursued Buckley's HIPAA violation so vigilantly at least in part because of Buckley's race. If a jury so found, then race tainted the decision-making process (though it was not a but-for cause of Buckley's proposed dismissal), and the Secretary violated § 2000e-16(a)."

  Importantly, the court noted that whether or not unlawful discrimination was the but-for cause of an employment action is still relevant to the availability of remedies: "When discrimination is the but-for cause of an employee's firing, that employee may have a right to reinstatement, backpay, compensatory damages, and other forms of relief to address the wrongful firing. But when the federal employer discriminates in the decision-making process but the employee would have been fired, anyway, for a nondiscriminatory reason, the employee is not entitled to remedies like reinstatement and

backpay. After all, the court cannot place the plaintiff in a better position than she would have been in had the employer not discriminated against her. Rather, the court must match any remedy to the specific injury. So we've said that when discrimination is not the but-for cause of a personnel action, a court 'should begin by considering injunctive or other forward-looking relief.'" (quoting *Babb*, 589 U.S. at 406) (internal citations omitted).

Finally, the court held that the same standard should apply to federal-sector Title VII retaliation claims that applies to federal-sector Title VII discrimination claims – i.e., retaliation for protected activity may not play any part in an employment action – but in this case Buckley had not produced evidence that retaliation tainted her proposed termination, so the Eleventh Circuit affirmed summary judgment for the employer on this count.

- *Qin v. Vertex, Inc.*, 100 F.4th 458 (3d Cir. 2024) – A software architect who was originally from China did not receive the promotion he sought, was placed on a PIP, and was ultimately terminated. He alleged discrimination and hostile work environment on the basis of his race and national origin, as well as retaliation for complaining about the alleged discrimination. The district court granted summary judgment for the employer on all of Qin's claims, but the Third Circuit reversed and remanded on all but the hostile work environment claim. The court agreed that three offensive comments over the course of 19 years – being called "China Man," told to "go back to China," and informed that a negative review was based on "cultural differences" – did not establish the requisite severity or pervasiveness to establish a hostile work environment. However, the district court erroneously applied the *McDonnell Douglas* burden-shifting analysis: it failed to consider whether the allegedly discriminatory actions, taken together with the circumstances, could give rise to an inference of intentional discrimination.

  With respect to the failure to promote Qin, there was evidence that "on average, entry-level architects were promoted to senior architects after about eight years, and then promoted again after about six more years. Qin, the only Chinese employee in the architecture group, was never promoted in his nearly nineteen-year tenure. Qin also presented evidence that he was on track for promotion in 2018, and that supervisors at Vertex had expressed a need for senior architects and senior-level work. And he presented evidence from which a jury could reasonably infer that part of the reason Qin was not promoted in 2018 was [a] negative review" which, according to the reviewer, was based on "cultural differences." The court held that this was enough to establish a prima facie case. The lower court also erred with respect to Qin's termination claim, because it failed to consider his evidence regarding a similarly situated comparator who was not Chinese, who was similar in all material respects, and who received similar evaluations to Qin's, but who was not put on a PIP or terminated. Moreover, Qin presented enough evidence to raise a factual question regarding whether the employer's justification for his negative reviews were pretextual.

  Finally, with respect to his retaliation claim, Qin engaged in protected activity when he raised concerns to HR about race and national origin discrimination, and the six-week time frame between his complaint and his termination was well within the 3-month range

that the Third Circuit usually considers to be sufficiently close in time to be suggestive of retaliatory motive, such that a reasonable juror could have found causation

- *Hayes v. N.J. Dep't of Hum. Servs.*, 108 F.4th 219 (3d Cir. 2024) – The plaintiff sued her employer for sexual harassment and retaliation under Title VII. The district court dismissed the complaint as time-barred because it was filed more than 90 days after she became aware that the EEOC was not pursuing her complaint. An EEOC staffer had emailed the plaintiff's lawyer to tell him that they would be sending a right-to-sue letter, and that same day the staffer posted the letter in the agency's online portal. However, the plaintiff's lawyer claimed he never received the EEOC's right-to-sue letter, and argued that an email informing him that the EEOC would be issuing it was insufficient to start the 90-day clock, as was the online posting. The Third Circuit noted that the 90-day deadline is not jurisdictional and is subject to equitable exceptions, and explained that it only considers the clock to start if the notice received by a would-be plaintiff is "equivalent" to a right-to-sue letter – i.e., that it is as comprehensive as the letter and explains the 90-day limitation period. Because the staffer's email was not the equivalent of the letter, the court held that the clock did not start to run until the lawyer actually received the right-to-sue letter, which only happened after he contacted the EEOC to find out when it would be sent.

- *White v. Patriot Erectors, L.L.C.*, No. 23-50444, 2024 WL 3935444 (5th Cir. Aug. 26, 2024) – A jury found in favor of the plaintiff on his race discrimination claim and awarded damages. The district court judge denied the employer's post-verdict motion for judgment as a matter of law, and the employer appealed, focusing on the *McDonnell Douglas* factors and arguing among other things that the plaintiff could not establish a *prima facie* case of discrimination and did not prove that the company's asserted nondiscriminatory reasons for removing him were pretextual. The Fifth Circuit affirmed, explaining that once a case has been fully tried on the merits, the *McDonnell Douglas* burden-shifting framework no longer applies, and a reviewing court must focus only on whether the record contained sufficient evidence to support the jury's ultimate findings. In this case, "Reviewing the evidence in the light most favorable to the verdict, we conclude there is sufficient (even ample) evidence to support the jury's verdict. Specifically, sufficient evidence was presented that could lead a reasonable jury to conclude that Patriot's reasons for terminating White were pretextual. Then, because White was able to refute or eliminate Patriot's professed justification for removing him, the jury could reasonably infer discrimination."

- *Cobbin v. U.S. Capitol Police*, No. 21-CB-10, 2023 WL 8471328 (OCWR Sept. 27, 2023) – Cobbin, an African American K-9 Sergeant, complained to his supervisors about racially-tinged emails authored by White K-9 officers. The emails included complaints about Cobbin's competence as a supervisor, particularly during the Black Lives Matter protests in 2020 and during the January 6th insurrection. After Cobbin complained to his supervisors, the USCP transferred him out of the K-9 division and replaced him with a White officer. Cobbin filed a claim with the OCWR, alleging that the transfer and replacement constituted retaliation for his complaints and discrimination against him because of his race. The Hearing Officer found that the transfer was unlawful: all the evidence showed that Cobbin was far more qualified and experienced than his White

replacement, and the USCP offered shifting, inconsistent reasons for reassigning Cobbin, which led the Hearing Officer to credit Cobbin and discredit the USCP's witnesses. The Board affirmed, rejecting the USCP's arguments that the decisionmaker was concerned about morale in Cobbin's department. The Board agreed with the Hearing Officer that the morale issues may have been caused by racial animus toward Cobbin.

- *Waddy v. Libr. of Cong.*, No. 22-LC-23, 2023 WL 8471329 (OCWR Sept. 15, 2023) – Waddy, a Library of Congress employee, refused to comply with the Library's COVID19 safety protocols for unvaccinated employees. The Library required all unvaccinated employees to take COVID-19 tests. Waddy refused to take the tests, claiming they violated her religious beliefs. The Library then offered her an accommodation: wear a Library-issued N95 mask to the office. She refused to wear the Library-issued mask and asked to wear her own mask, but did not claim that the Library-issued mask violated her religious beliefs. The library terminated her for failing to follow protocol. Waddy filed a complaint alleging that the Library violated Title VII when it failed to accommodate her religious beliefs, harassed her because of her beliefs, and terminated her.

  In affirming the Hearing Officer's grant of summary judgment for the Library, the OCWR Board explained that the Library's accommodation offer "effectively eliminated the religious conflict." Regarding religious harassment, Waddy argued that each instance in which the Library raised Waddy's failure to comply with COVID-19 protocols amounted to unlawful religious harassment. The Board rejected this theory, agreeing with the Hearing Officer's determination that these were "nothing more than personnel notices." Finally, the Board found that Waddy's termination was appropriate under the standard articulated by the Supreme Court in *Groff v. DeJoy*, 600 U.S. 447 (2023), where the Court held that employers denying a religious accommodation must show that the burden of granting it would result in substantial increased costs in relation to the conduct of its particular business. The Board found that the Library's "legitimate concerns about its ability to protect the health of library employees" supported a finding that Waddy's accommodation would have resulted in a substantial burden on the Library's business.

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.

- *Murillo v. City of Granbury*, No. 22-11163, 2023 WL 6393191 (5th Cir. Oct. 2, 2023) – Murillo, a city public works employee, took twelve weeks of FMLA leave when she lost childcare due to COVID, to expire on June 23, 2020. On June 24, when she was not at work minutes after her shift was scheduled to start, she was fired for "job abandonment," in contravention of city policy (the personnel manual defined "job abandonment" as failing to report to work for three consecutive days, and included a progressive discipline policy) and practice (a head of department testified that, in the case of such an unexpected absence, he would ordinarily try to contact the employee or her emergency contacts). The district court granted the city's motion for summary judgment on Murillo's

FMLA retaliation claim, reasoning that her claim failed because she was no longer on FMLA leave when she was terminated. The Fifth Circuit disagreed, explaining that "an employee can still establish an FMLA retaliation claim even if the adverse employment action takes place *after* the end of FMLA leave. … This is made clear by the fact that temporal proximity between the end of FMLA leave and an adverse employment action can substantiate a causal connection for purposes of establishing a prima facie case." Further, Murillo sufficiently raised a factual issue regarding whether the city's legitimate, nonretaliatory reason for her termination was pretextual: its deviations from policies could be evidence of pretext.

- *Kadribasic v. Wal-Mart, Inc.*, No. 21-14177, 2023 WL 6457250 (11th Cir. Oct. 4, 2023) – Kadribasic's supervisor failed to refer her to Wal-Mart's third-party FMLA administrator after she sustained an injury on the job. Affirming the district court's entry of summary judgment in favor of Wal-Mart on her FMLA interference claim, the Eleventh Circuit was not persuaded that this was an unusual circumstance excusing Kadribasic's failure to comply with the store's requirement for requesting leave. She had properly submitted at least four leave requests previously, which were all granted, so she could not now argue that the supervisor's actions led her astray.

- *Wayland v. OSF Healthcare Sys.*, 94 F.4th 654 (7th Cir. 2024) – Wayland managed 30 employees at OSF's Institute of Learning. As OSF expanded significantly, leading to more work on shorter deadlines, OSF approved her request for both continuous and intermittent FMLA, but maintained that she had to meet its accelerated goals. She was unable to do so due to her time away on leave. When she was later terminated, she sued, alleging that OSF violated her FMLA rights by not adjusting its performance expectations to reflect her reduced hours when she was on leave. The Seventh Circuit vacated and remanded the district court's grant of summary judgment for OSF. It held that there was a genuine issue of material fact as to whether OSF interfered with or retaliated against Wayland's use of leave. The FMLA can require that performance standards be adjusted to avoid penalizing an employee for being absent during approved leave, and Wayland presented evidence that OSF did not do so. The court explained that "Interference would exist if, despite nominally granting her request for FMLA leave, it deprived her of the benefits of that leave by insisting on 100% of the workload to be performed in only 80% of the time. Retaliation would exist if the jury concluded that she lost her job because of her use of FMLA leave." OSF argued it relied on other events to fire her, but the court held that there was a genuine issue of material fact as to whether these reasons were pretext for retaliation.

- *Tanner v. Stryker Corp. of Mich.*, 104 F.4th 1278 (11th Cir. 2024) – Tanner, a material handler at a medical technology company, traveled to Connecticut to be with his former girlfriend for the birth of their child. He requested FMLA leave to attend the birth, but was notified shortly after the birth that he had been terminated for excess unexcused absences, counting four days he was not working and was in Connecticut waiting for the birth. The district court entered summary judgment for the employer on Tanner's FMLA interference and retaliation claims.

  The Eleventh Circuit affirmed. It first noted, "The question in this case is quite narrow:

does the FMLA provide an expectant parent who is neither pregnant nor married to a pregnant spouse with pre-birth leave so that he may await the child's birth away from work?" and answered that question "no." It reasoned that, while the FMLA provides for pre-birth leave in some circumstances, "we presume based on the regulations' express inclusion of exceptions for pre-birth leave under certain specified circumstances that other circumstances—like Tanner's—are not so excepted." It went on to reject his retaliation and interference claims because he was not denied a benefit to which he was entitled under FMLA. It noted, "We have little doubt that some people and families who would benefit from FMLA leave are denied its benefits because its reach and scope is limited. … And we are sensitive to the hardship Tanner faced in trying to guess when his child would be born and manage his remaining leave in the meantime." Still, "The days he spent in Connecticut waiting for his child to be born were not covered under FMLA."

- *Perez v. Barrick Goldstrike Mines, Inc.*, 105 F.4th 1222 (9th Cir. 2024) – Perez claimed he was injured at work when his truck collided with a mine wall. He did not report the collision until the end of his shift, in violation of company policy, and exhibited no outward signs of injury. Nevertheless, based on his reported pain, a doctor diagnosed him with a chest wall contusion and muscle spasms and certified him for a total of 16 days off of work. Barrick, finding no physical evidence of the accident and receiving a report that Perez was faking his injury, hired a private investigator, who captured video evidence of Perez engaging in various physical activities without difficulty. Barrick fired Perez and he sued, claiming FMLA interference and retaliation.

  The Ninth Circuit affirmed the district court's judgment for Barrick, holding that FMLA does not require an employer to provide contrary medical evidence before contesting the validity of the original certification from a health care provider that an employee has a serious health condition. Here, Barrick never requested recertification or a second opinion. Perez argued that doing so would have been the only proper way for Barrick to challenge his doctor's certification. The Ninth Circuit looked to FMLA's permissive language, which states that an employer who doubts the validity of an FMLA medical certification *may* require that the employee, at the employer's expense, obtain the opinion of a second or third health care provider or seek recertifications. *See* 29 U.S.C. § 2613(c)–(e). The Ninth Circuit concluded: "The plain language of the FMLA … merely provides an employer with the option to require a second or third opinion and seek recertification. It does not require an employer to provide contrary medical evidence if it doubts the validity of the original certification, let alone mandate that an employer must do so in order to challenge the sufficiency of that original certification in court."

- *Crispell v. FCA US, LLC*, No. 23-1114, 2024 WL 3045224 (6th Cir. June 18, 2024) – Crispell, a 23-year employee of FCA, worked as a floater in the truck assembly plant. She had major depression and anxiety, which qualified her for intermittent leave under the FMLA. FCA had a 30-minute call-in rule, requiring employees to notify their supervisors of any absence at least 30 minutes before their shift, or later with a statement explaining the missed call-in. Crispell struggled to comply with this rule during severe flare-ups of her condition, which she argued made it impossible for her to call in on time and made her absent or late 15 times in three months. Despite submitting explanations and a doctor's note about how her illness made it impossible for her to comply with the 30-

minute rule during flare-ups, she was disciplined and ultimately terminated. The Sixth Circuit reversed the district court's grant of summary judgment to FCA.

With respect to Crispell's FMLA interference claim, the Sixth Circuit found that her severe flare-ups constituted "unusual circumstances" under 29 C.F.R. § 825.303(c), which can excuse an employee from the usual notice requirements for unforeseeable FMLA leave. Although Crispell did not call in 30 minutes before her shift, she provided detailed letters and a doctor's statement explaining her medical condition and its impact on her ability to meet the call-in requirement. The court held that a jury could reasonably find that this information was sufficient for FCA to understand and excuse her tardiness under the FMLA. (This case is also discussed in the ADA section above.)

- *Lapham v. Walgreen Co.*, 88 F.4th 879 (11th Cir. 2023), *petition for cert. docketed*, No. 23-1283 (U.S. June 7, 2024) – For five years, Lapham requested and received intermittent FMLA leave to care for her disabled son while she worked in various roles at Walgreens. She had disciplinary and performance issues throughout her employment, ultimately leading to her termination. The district court first denied Walgreens' motion for summary judgment on Lapham's FMLA interference and retaliation claims, but granted the motion after Walgreens, via a motion for reconsideration, asked the district court to apply a but-for causation standard to the retaliation claim.

  The Eleventh Circuit affirmed. It relied on *University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338 (2013), in which the Supreme Court held that Title VII retaliation claims are subject to but-for causation. The Eleventh Circuit reasoned that the FMLA's retaliation provision was similar enough to Title VII's (both provisions use "because [of]" language or equivalent) for *Nassar* to be instructive.

  Lapham argued that the Department of Labor has endorsed a "negative factor" causation standard for retaliation claims ("employers cannot use the taking of FMLA leave as a negative factor in employment actions," 29 C.F.R. § 825.220(c)), but the Eleventh Circuit wrote that "Applying the reasoning of *Nassar*, by writing the FMLA's retaliation provision to include the equivalent of "because [of]" language (and no other causation language), Congress clearly chose to embrace the default but-for causation standard. And because Congress did so, we cannot defer to the DOL's contrary interpretation." After determining the proper causation standard, the Eleventh Circuit held that Lapham failed to show that Walgreens' stated reasons for her termination were pretext for retaliation, but for which it would not have fired her.

  The Eleventh Circuit affirmed summary judgment for Walgreens on Lapham's interference claim for related reasons: Walgreens met its burden to show that she truly was terminated for insubordination.

  In holding that the "but-for" standard applies to FMLA retaliation claims, the Eleventh Circuit deepened a circuit split on this issue: the Fourth has applied "but-for," while the Second and Third have used "motivating factor," and other circuits have expressed uncertainty.

- *Black v. Swift Pork Co.*, 113 F.4th 1028 (8th Cir. 2024) – Black worked as a mechanic at a pork processing plant. He was fired after leaving work one day. The company's position was that Black stormed off after a supervisor gave him a different assignment than usual, abandoning his shift; Black claimed he went home to care for his wife, who had severe cardiovascular disease. The district court granted summary judgment for the company on Black's subsequent FMLA interference and retaliation claims. The Eighth Circuit reversed and remanded on the interference claim, but otherwise affirmed.

  Interference: The parties disputed whether it was "medically necessary" for Black to be at home to care for his wife. Black's FMLA paperwork from his wife's doctor indicated it may have been. Swift argued that it was not, and that Black had invoked FMLA to hide his true motivation for leaving. Since an employer has the burden to prove the reason for termination was unrelated, the Eighth Circuit wrote that, "given the evidence suggesting a causal connection between the FMLA and his decision to leave that day, a jury must ultimately decide whether Swift denied a benefit to him." (cleaned up).

  Retaliation: Black's history of taking FMLA leave many times without repercussions (158 times in three years) undercut any inference that Swift suddenly decided to discriminate against him. His supervisors' negative comments about FMLA leave did not create a genuine issue of material fact since they did not make the decision to fire him, and the managers who did acted independently.

- *George-Winkler v. Off. of Congressman Bobby Scott*, Nos. 19-HS-30, 19-HS-74, 2023 WL 8788936 (OCWR Dec. 8, 2023) – George-Winkler filed a complaint against her employer, the Office of Congressman Bobby Scott, alleging that the Office retaliated against her after she invoked her rights under the ADA and FMLA. The Hearing Officer dismissed the complaint, crediting the Office's witnesses over the employee. The Board issued a short opinion affirming the Hearing Officer and explaining its desire not to reverse a Hearing Officer's credibility determinations.

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.

- *Perry v. City of New York*, 78 F.4th 502 (2nd Cir. 2023) – EMTs and paramedics sued NYC for unpaid overtime, alleging that the City required them to perform tasks before and after their shifts and only compensated them if the employees requested overtime pay for the time spent on those tasks. Jury found for plaintiffs. The City appealed, arguing that it should not be held liable because the City allows employees to request the overtime and the plaintiffs did not make the request. The Second Circuit rejected that argument, holding that "an employer must pay for all work it knows about or requires, even if the employee does not specifically request compensation for it." In addition, the court held that "whether an employer knows an employee is not being paid is irrelevant to FLSA liability."

This sets up a circuit split. The Sixth Circuit held in *White v. Baptist Memorial*, 699 F.3d 869 (2012) that the employer was not liable for unpaid overtime when an employee worked through her meal breaks because "she never told her supervisors that she was not being compensated for missing her meal breaks." The Fifth Circuit has also held that employers have no obligation to compensate employees when the employees do not comply with the employer's stated requirements to record overtime. *Meadows v. NCR Corp.,* 83 F.4th 649 (5th Cir. 2023).

- *Adams v. Palm Beach Cnty.*, 94 F.4th 1334 (11th Cir. 2024) – Volunteers at a public golf course sued the county, alleging that they were employees and entitled to minimum wage and other protections under the Fair Labor Standards Act. The court analyzed the posting for the position and the volunteers' duties on the job and upheld the district court's finding that the volunteers fell under the "public agency volunteer" exemption of the DOL's FLSA regulations. The advertisement solicited "volunteers [who] enjoy being outdoors, getting to know others with similar interests and reduced fees to play and practice golf." The volunteers greeted customers, carried and loaded their clubs, cleaned carts, collected trash, and retrieved balls from the driving range. The regulations exempt from the FLSA volunteers who "perform hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered." The court held that the volunteers' work on the golf course met the regulatory definition because they provided area residents with "civic" benefits by maintaining and improving the publicly-owned course. Moreover, the FLSA allows public agencies to pay volunteers "expenses, reasonable benefits, or a nominal fee" as long as they receive no compensation. Here, the court rejected the volunteers' argument that their reduced fees on the golf course were "wages in another form." The volunteer who golfed the most at the course saved $559 per month with the reduced fees, which the court framed as "minimal." While in-kind benefits can amount to wages in some cases, under the "economic reality" test of compensation the court was unwilling to find that lower prices on golf constituted compensation under the FLSA.

- *Boyer v. United States*, 97 F.4th 834 (Fed. Cir. 2024), *reh'g en banc denied*, 98 F.4th 1073 (Fed. Cir. 2024) – The plaintiff, a female pharmacist, was hired by the VA in 2015 and started as a GS-12, Step 7, with a starting salary of $115,364. Part of the VA's reason for starting her at GS-12, Step 7, was her $115,003 salary at her prior position. Six months after hiring the plaintiff, the VA hired a male pharmacist at the same location at GS-12, Step 10, with a starting salary of $126,223. His prior salary was $130,000. The plaintiff sued, alleging that the pay discrepancy violated the Equal Pay Act. The VA argued that the two pharmacists' prior salaries were factors "other than sex" and therefore lawful bases for the discrepancy.

  There is a circuit split over how to treat prior salary in Equal Pay Act cases. The Fourth and Seventh Circuits hold that prior pay is a factor "other than sex" which, on its own, justifies differential treatment. The Ninth Circuit, relying on the long history of pervasive pay discrimination against women, holds that prior salary is not a factor "other than sex" and an employer relying solely on that to justify a discrepancy would violate the Equal Pay Act. The Sixth, Tenth, and Eleventh Circuits use a middle ground approach, holding

that prior pay can be a factor other than sex when an employer considers it with another non-sex factor, like education or experience.

The Federal Circuit adopted a modified version of the middle ground approach, holding that employers can "only rely on prior pay if either (1) the employer can demonstrate that the prior pay is unaffected by sex-based pay differentials or (2) prior pay is considered with other, non-sex-based factors." Regarding the first path, the court explained that the employer has the burden to prove that the employee's pay at their previous job was not based on sex. In either path, the court emphasized that "this exception (consideration of prior pay with other non-sex-based factors) is permissible only if that consideration was in fact the basis for the decision, but not if it is offered as an after the fact justification." (emphasis in original). The court reversed the grant of summary judgment and remanded for proceedings consistent with this opinion.

- *Baker v. Upson Reg'l Med. Ctr.*, 94 F.4th 1312 (11th Cir. 2024) – The plaintiff, a female OB-GYN, was hired by a hospital in 2015, after working for three years after medical school. She was not board certified. The hospital paid her a starting salary of $260,000 with annual raises plus a bonus structure in which she would receive escalating amounts if she performed procedures past a certain threshold. The hospital hired a male OB-GYN around the same time as the plaintiff. He had been working for fifteen years before the hospital hired him and he was board certified. His starting salary was $305,000 per year but his contract offered no raises. The hospital structured his bonus similarly, but gave him a higher threshold to pass before he could receive a bonus and higher payouts if he reached that threshold. The plaintiff sued, alleging that the different bonus structure was discriminatory. The district court granted the hospital's motion for summary judgment, holding that sex played no factor in the decision to offer the male OB-GYN a potentially more lucrative bonus structure than the plaintiff's. The Eleventh Circuit affirmed, holding that the plaintiff's bonus structure was based on her work experience and prior production. Because she was less experienced than the male OB-GYN, she was less likely to perform as many procedures. Therefore, offering the lower threshold was beneficial to her because it made her more likely to receive a bonus.

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.

- *Scanlan v. Am. Airlines Grp., Inc.*, 102 F.4th 164 (3d Cir. 2024) – The Third Circuit reversed the district court's grant of summary judgment to an airline on USERRA claims brought by a class of pilots. The pilots argued the airline violated USERRA by failing to pay them for periods of short-term military leave and by not crediting them under its profit-sharing plan for imputed earnings during those periods. The pilots argued that short-term military leave was comparable to bereavement or jury duty leave. The district court held that the types of leave were not comparable when comparing duration,

frequency (which it held it must consider alongside duration), control, and purpose. The Third Circuit reversed and remanded. First, it noted that nothing in the statute or regulation requires a jury to consider non-enumerated comparability factors such as frequency, and so it could not discount duration (which the parties agreed was similar between leave types) on its own. It went on to hold that a jury could reasonably conclude that military and jury duty leave have the common purpose of civic duty. It also held that a jury could conclude that, as with jury duty or bereavement leave, pilots generally lack the ability to control when they will take military leave (though it did not analyze this factor further).

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.

- *Darling Ingredients, Inc. v. Occupational Safety & Health Rev. Comm'n*, 84 F.4th 253 (5th Cir. 2023) – Two employees were killed by a release of over 2,000 pounds of pressurized steam from the hydrolyzer on which they were performing maintenance. OSHA cited the company for two violations of the lockout/tagout standard, and the violations were upheld by the ALJ, the OSHRC, and the Fifth Circuit. It was uncontested that the employees were exposed to a severe burn hazard; however, the parties disputed whether the company's procedures for performing maintenance on the hydrolyzer complied with the requirement in the lockout/tagout standard that an employer "clearly and specifically outline" the methods for controlling hazardous energy. The company's procedures stated only that to make the machine safe workers must "relieve internal pressure," but did not specify how this was to be done. The company argued that the employees should have read the procedures in conjunction with the machine's operating manual, but the Fifth Circuit disagreed. Explaining that lockout/tagout procedures themselves must guide an employee through the specific steps required to shut down and lock out a piece of equipment, the court held that the instruction to "relieve internal pressure" was insufficient, because it did not set forth the specific steps required to do that. Even if the appropriate action was to do nothing and wait for the pressure to dissipate on its own – or to find a supervisor for further assistance – the lockout/tagout procedure should have said so explicitly.

- *J.D. Abrams, L.P. v. OSHRC*, No. 22-60610, 2024 WL 1618354 (5th Cir. Apr. 15, 2024) – OSHA cited the employer, a construction company, for failing to use cave-in protection for employees working in a trench that was more than 5 feet deep, as required by the OSHA standard governing excavations, and also for using ladders shorter than what that standard required. The company asserted the "unpreventable employee misconduct"

defense, which puts the burden on the employer "to prove that it: 1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered." (citation omitted). The ALJ upheld the citation, finding that the company had satisfied the first two elements of the defense – that it had a rule about using trench boxes for trenches more than 5 feet deep, and that it had communicated that rule to its employees – but that it had not shown that it took steps to discover violations or that it effectively enforced the rules when such violations were discovered. The OSH Review Commission declined to review the ALJ's decision, so the company appealed to the Fifth Circuit, which affirmed. Substantial evidence supported the ALJ's findings that the company lacked "a meaningful program to detect and to discourage safety violations" and that it "provided no evidence of any discipline or enforcement action that had been implemented as a result of its discovery of violations at a worksite," only evidence of discipline imposed *after* the OSHA inspection giving rise to the citations in this case.

- *Eustis Cable Enterprises, Ltd. v. Su*, No. 23-6151-AG, 2024 WL 3264144 (2d Cir. July 2, 2024) – A telecommunications worker was killed on the job, and OSHA cited the employer for failing to train its employees in accordance with the training requirements of the telecommunications standard, 29 U.S.C. § 1910.268(c). That section requires that "Employers shall provide training in the various precautions and safe practices described in this section" unless "the employer can demonstrate that an employee is already trained in the precautions and safe practices required by this section prior to his employment[.]" The employer, ECE, failed to demonstrate that it had trained its employees on the precautions and safe practices for the work activity that resulted in the worker's death, and argued unsuccessfully that it was entitled to rely on the worker's "long history of working in Jamaica in the telecommunications construction industry around utility poles." There was no evidence that anyone at ECE had verified the worker's prior training or that it had procedures in place to do so, so it had not ensured that he was properly trained on the precautions and safe practices required for the type of work that led to his death.

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.

Relevant Circuit Court Decisions

- *U.S. Capitol Police v. Off. of Cong. Workplace Rights*, 110 F.4th 1265 (Fed. Cir. 2024) – The OCWR Board had affirmed a Hearing Officer's decision, on summary judgment, that the USCP unlawfully failed to provide the Fraternal Order of Police with notice and an

opportunity to bargain before making changes to conditions of employment at the onset of the COVID-19 pandemic. The USCP appealed to the Federal Circuit. The Federal Circuit reversed and remanded the case, finding that genuine issues of fact existed as to which changes, if any, triggered the USCP's duty to bargain, and also as to whether the USCP provided the FOP with adequate notice of the changes it intended to make, and therefore summary judgment was inappropriate.

Two decisions gave the first hints of how courts may review NLRB decisions after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024):

- *United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536 (5th Cir. 2023), *vacated and remanded by United Nat. Foods, Inc. v. NLRB*, 144 S. Ct. 2708 (2024) – The Acting General Counsel of the NLRB, Peter Sung Ohr, withdrew a complaint against a union previously issued by his predecessor, Peter Robb. The employer, which had filed the original charge that led to Robb's complaint, challenged Ohr's ability to withdraw the complaint, arguing that this was not a decision that fell within Ohr's prosecutorial discretion because the employer had already filed a motion for summary judgment at the time Ohr withdrew the complaint. The NLRB found that this was a prosecutorial decision which was not subject to review. The Fifth Circuit accorded *Chevron* deference to the Board's interpretation of the NLRA's ambiguous "prosecutorial discretion" phrase and upheld it. The Supreme Court vacated the decision and remanded for a decision consistent with *Loper Bright*.

- *Hospital de la Concepcion v. NLRB*, 106 F.4th 69 (D.C. Cir. 2024) – The Board found that an employer violated the NLRA when it reduced employees' work hours without bargaining with the union and refused to provide information properly requested by the union. The court upheld the Board's decision, clarifying that it reviews NLRB decisions with a "very high degree of deference" and sets aside Board orders only when the Board "departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence." The court did not mention *Loper Bright*, but its restatement of this high-level deference even after the Supreme Court issued the *Loper Bright* decision indicates that the D.C. Circuit will continue to defer to the Board in run-of-the-mill unfair labor practice cases.

Federal Labor Relations Authority

On July 10, 2024, the Senate confirmed President Biden's nominee Anne Wagner to the Federal Labor Relations Authority. Before her confirmation to the Authority, the FLRA had two members of different ideological leanings and issued few precedent-shifting decisions. Moreover, the Senate has not confirmed a General Counsel to the FLRA for Biden's entire presidency, meaning that the FLRA cannot hear unfair labor practice decisions. The lack of General Counsel and full complement on the Authority has drastically reduced the noteworthy decisions from the FLRA in recent years.

- *CFPB*, 73 F.L.R.A. 670 (Sept. 26, 2023) In this case, the FLRA established a new test for assessing management-rights exceptions to arbitration awards in CBA violation cases:

1. Does the excepting party demonstrate that the arbitrator's interpretation and application of the CBA and/or the awarded remedy affects the cited management right(s)? If no, then deny the exception. If yes:

2. Did the arbitrator correctly find, or does the opposing party demonstrate, that the CBA provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b)?

   If no, then: (a) If the excepting party successfully challenges the underlying finding of a CBA violation, then the Authority will set aside both the finding of a violation and the remedy for the violation; (b) If the excepting party successfully challenges only the remedy, then the Authority will set aside only the remedy. If it is the sole remedy, then, absent unusual circumstances, the Authority will remand the matter to the parties for resubmission to arbitration, absent settlement, for an alternative remedy

   If the answer to question 2 is yes:

3. Does the excepting party challenge the remedy separate and apart from the underlying CBA violation? If no, then deny the exception. If yes:

4. Does the excepting party demonstrate that the remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the arbitrator? If no, then deny the exception. If yes, then set aside the remedy and, if it is the sole remedy for the CBA violation, then, absent unusual circumstances, remand for an alternative remedy.

This test, which the FLRA acknowledged to be "lengthy and detailed," attempts to determine "whether the arbitration award at issue affects a management right . . . and if so, whether the arbitrator was enforcing or providing a remedy for a contract provision that, as interpreted and applied, falls within § 7106(b)."

Federal Service Impasses Panel

- *NTEU & U.S. Dep't of Energy,* 23 F.S.I.P. 041 (Oct. 19, 2023) – The Agency proposed a "hoteling" policy where employees would share an office. The Agency proposed that employees would maintain a dedicated office if they were physically present 6 days per pay period. The union proposed that employees could maintain dedicated workspace if they were physically present for at least 5 days per pay period. The FSIP put the burden on the Agency to demonstrate the necessity for this number of days. The Panel found that the Agency failed to justify its economic argument because the Agency could not explain why one day less would break the bank. The Panel imposed the union's proposal.

National Labor Relations Board

The Biden NLRB has continued to issue decisions and regulations that make the labor-management landscape more favorable to workers and unions. Many of the precedent-shifting decisions issued this year involve issues that are not applicable to legislative branch employees

covered by the CAA, like issues relating to representation election procedure, joint employment, and protected concerted activities unrelated to unionization. However, the case below, which returned to a prior precedent for facial challenges of workplace rules, may be applicable to legislative branch employees:

- *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (Aug. 2, 2023) – The Board rescinded its prior *Boeing* case, which placed all workplace rules into categories of "always lawful," "warrants scrutiny," and "always unlawful." The Board returned to the pre-*Boeing* standard for analyzing workplace rules, holding that, "if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." Here, the Board implemented a case-by-case analysis of each rule's phrasing and rejected the *Boeing* precedent that certain rules are per se lawful.

First Amendment

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

- *MacRae v. Mattos*, 106 F.4th 122 (1st Cir. 2024) – A public high school teacher was fired after the school district learned that she had made some racist and anti-LGBTQ posts on TikTok. She sued under 42 U.S.C. § 1983 for violation of her First Amendment right to free speech. The district court granted summary judgment for the school district, and the First Circuit affirmed, holding that the school district's interest in preventing disruption to the learning environment outweighed MacRae's interests in making the posts. Among the court's considerations in balancing these interests was the fact that, although "some of her memes touched upon hot-button political issues, such as gender identity, racism, and immigration[,]" this did not weigh as heavily in her favor as it normally would because "some of her memes comment upon such hot-button political issues in a mocking, derogatory, and disparaging manner" and are therefore not in the "highest rung" of protected speech and "not accorded the highest value by the First Amendment."

  Interestingly, the plaintiff had argued that the framework for analyzing First Amendment claims by government employees, established by the Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should not have applied to her case, because she had made the TikTok posts prior to her employment by the school district. Instead, she believed she should be treated as a private individual whose rights were violated by the government, which would require her to show only that she engaged in constitutionally protected conduct and that there was a causal connection between the constitutionally protected conduct and the allegedly retaliatory response. The court rejected this argument, explaining that, besides the fact that the claim obviously arose out of an employment action taken by a government employer against its employee, "We see no

reason (and MacRae has provided none) why the government's interest in the efficient provision of public services would simply evaporate into thin air just because the speech in question occurred prior to the start of employment and the employer did not learn of the purported disruptive speech until after the employee began working for it."

- *Goldstein v. Pro. Staff Cong./CUNY*, 96 F.4th 345 (2d Cir. 2024), *petition for cert. docketed*, No. 24-71 (U.S. July 23, 2024) – The plaintiffs, six professors employed by the City University of New York (CUNY), belonged to the same bargaining unit composed of CUNY faculty and staff, of which the exclusive representative for collective bargaining purposes since 1972 has been the Professional Staff Congress/CUNY (PSC). Because PSC engaged in political advocacy on issues related to Israel and the Palestinians, taking stances with which the plaintiffs "vehemently disagree," and because the plaintiffs also disagreed with PSC's priorities when it came to negotiating bargaining unit members' terms and conditions of employment, the plaintiffs resigned their union membership and also filed a lawsuit challenging the New York law that governs union representation of public employees (the Taylor Law), claiming that the law violates their First Amendment rights because it compels them to associate with PSC and authorizes PSC to speak for them.

  The district court dismissed the complaint and the Second Circuit affirmed, holding that PSC's exclusive representation of the plaintiffs in collective bargaining with CUNY did not violate the First Amendment. The court explained that "Designating PSC as Plaintiffs' exclusive bargaining representative does not impermissibly burden Plaintiffs' ability to speak with, associate with, or not associate with whom they please, including CUNY and PSC. Plaintiffs are free to resign their membership from the union or to engage in public dissent against PSC's views." Nor does the Supreme Court's decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018), mandate a different result: *Janus* stands for the proposition that the First Amendment prohibits a public-sector union from assessing mandatory "agency fees" against non-union members of the collective bargaining unit, because the First Amendment prohibits compelling a person to subsidize the speech of other private speakers, but "that holding does not undermine the constitutionality of exclusive representation by public-sector unions that do *not* assess mandatory agency fees."

- *Noble v. Cincinnati & Hamilton Cnty. Pub. Libr.*, 112 F.4th 373 (6th Cir. 2024) – Plaintiff Eric Noble, a security guard for a public library, was fired after he shared an offensive meme on social media during the Black Lives Matter protest movement. Some of his coworkers saw the post – a cartoon of a vehicle running over protestors, with the words "ALL LIVES SPLATTER" above it and the words "NOBODY CARES ABOUT YOUR PROTEST" below it – and complained to library management. Despite the fact that only his Facebook friends (of which there were only between 50 and 100) could see the post, and that (on the advice of his mother) he took down the meme less than 24 hours after posting it, the library fired him. The termination letter stated that his Facebook post violated the Library's harassment policy, caused management and coworkers to lose confidence in his ability to fairly and appropriately exercise his authority as a library security guard, and expressed concern that he could "do significant harm to the Library's relationship with the diverse communities" that it serves.

Noble alleged that the termination violated his First Amendment right to free speech. The district court granted summary judgment for the library, but the Sixth Circuit reversed, holding that Noble had spoken on a matter of public concern (the Black Lives Matter protests), and applying the balancing test established by the Supreme Court in *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) to conclude that "Noble's interest in his speech outweighs the Library's claimed efficiency interest because no evidence indicates that Noble's speech significantly hindered Library operations." No member of the public complained about Noble's post, and there was no evidence that any library patrons ever saw the post or were likely to have seen it; nor was there any evidence that he ever brought his political views to work, or that his views on BLM or any other political matter ever interfered with how he performed his job. Moreover, the court pointed out that "the Library and some of its employees engaged in the same debate as Noble, although on the opposite side: they publicly supported the BLM movement and attended related protests after Noble shared the meme. That the Library fired Noble for speech expressing a view contrary to the powers-that-be at that institution casts doubt on its motive for firing him and undercuts its workplace harmony interest."

The court concluded that, although *Pickering* affords employers wide discretion, "still there are limits. Here, the only injuries that resulted from the speech were the alleged wounded feelings of certain co-workers who had lost trust in him. But, given Noble's spotless record as a security guard prior to the meme, there is strong indication that he would have again performed his duties appropriately had he been allowed to retain his job, thus restoring that trust. Absent evidence that Noble posed a threat or risk to fellow workers, his hyperbolic speech alone was not enough to fire him. Given the short time Noble kept the meme on his Facebook page, its limited viewership, and the lack of public response, the Library could not have reasonably expected that Noble's post would incite disruption. *Pickering* does not give the Library carte blanche to take away Noble's means of livelihood based on his speech. The balance favors Noble, not the Library."

- *Hicks v. Ill. Dep't of Corr.*, 109 F.4th 895 (7th Cir. 2024) – The plaintiff, Gary Hicks, a corrections sergeant employed by the Illinois Department of Corrections, posted several offensive messages on his Facebook page, which was publicly accessible and which clearly identified him as an employee of the Department. The posts contained homophobic, Islamophobic, and racist language, and one seemed to advocate the overthrow of the United States government. A newspaper article about the posts prompted an internal investigation into Hicks, resulting in a 10-day suspension for violating the Department's code of conduct. Hicks sued, alleging among other things that the suspension violated his free speech rights under the First Amendment.

  The district court granted summary judgment for the Department and the Seventh Circuit affirmed. The court first explained the parameters of public employees' free speech rights: "Public employees do not sign away their free speech rights when answering the call to public service; at the same time, public employees' rights to free speech are not absolute. … In contrast to the government's limited power to restrict the speech of private citizens, the government, as employer, has greater leeway to control the speech of its employees to ensure discipline and harmony in government operation. … The First

Amendment requires us to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)).

The court noted that the parties did not dispute that Hicks was speaking as a private citizen on a matter of public concern, and proceeded to apply the *Pickering* balancing test. Citing its own precedent, the court laid out the factors to consider: (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform their responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public. The court also noted that law enforcement agencies that run correctional facilities are "paramilitary organizations" charged with maintaining public safety and order, and as such have more latitude in their discipline decisions and personnel regulations than an ordinary government employer and are therefore entitled to more deference. Moreover, "A government employer need not prove that the employee's speech actually disrupted efficiency; rather, the employer's burden is to show the potential disruptiveness of the employee's speech. The employer is not required to wait until operations actually disintegrate if immediate action might prevent such disintegration." (cleaned up).

Taking all of these principles into account, the court held that the Department's interest outweighed Hicks's. In making the offensive posts, Hicks "espous[ed] disparaging views about groups that may be present in the prison or staff population"; "the adverse public exposure prompted by the news article threatened to erode community trust and impair its operations"; and "the Department has a reasonable, well-founded concern about legal exposure from derogatory social media posts by employees." Thus, "The record leaves us with no doubt that the Department reasonably found the posts harmed its reputation and threatened its operations. We therefore accord substantial weight to the Department's interest in preventing Hicks from causing further disruption." Considering the various factors, the court found that the employment relationship required loyalty and confidence, the speech conflicted with Hicks's responsibilities as a supervisor, and although Hicks posted the content in question while off duty, the messages were not private as he contended, because any member of the public – or the Department – could have seen his posts, and his profile listed him as an employee of the Department and included a picture of him in uniform. The court also pointed out that "even assuming—we think generously—that Hicks meant to communicate something of value to public discourse, the derogatory language and images Hicks used did more than necessary to contribute to the conversation." All of this evidence weighed in favor of the Department, and Hicks's First Amendment claim therefore failed.

- *Norgren v. Minn. Dep't of Hum. Servs.*, 96 F.4th 1048 (8th Cir. 2024) – Among other claims, the plaintiffs alleged that their free speech rights were violated when their

employer forced them to take trainings on race and gender identity, which contained some messages they disagreed with. Among other things, the plaintiffs alleged that the videos – "How to be Antiracist (CRT Training)" and "Understanding Gender Identity and Expression: Moving Beyond the Binary" – instructed employees to speak or refrain from speaking on certain political and ideological matters, including to observe a moment of silence for George Floyd, stop using "I am not a racist" as a defense, and refrain from telling others that their gender identities are wrong. The district court dismissed their First Amendment claim and the Eighth Circuit affirmed, holding that "while the pleadings alleged that the trainings advanced expressive messages that the Norgrens objected to, the Norgrens failed to plausibly allege that [the employer] compelled them to adopt those messages as their own speech. There was no allegation that the Norgrens were forced to affirmatively agree with any of the statements in the trainings. There was no allegation that they were threatened with any kind of penalty if they did not observe the minute of silence for George Floyd during the training, if they continued using the phrase 'I am not a racist' as a defense after the training, or if they expressed their countervailing viewpoints regarding racism or gender identity in the workplace. The email directing the Norgrens to complete the trainings only told them to watch the videos to the end and then click the exit button."

- *Bacon v. Woodward*, 104 F.4th 744 (9th Cir. 2024) – Firefighters in the city of Spokane, Washington alleged that the governor's proclamation mandating COVID-19 vaccines for state employees violated their rights under the Free Exercise Clause. The district court dismissed the complaint, but the Ninth Circuit reversed and remanded. As a preliminary matter, the court explained why the case was not moot even though the proclamation had been rescinded: some of the firefighters alleged that they had lost their jobs because of the fire department's refusal to grant them a religious accommodation, and they sought punitive damages for the harm this caused them; according to the court, "A request for damages keeps a case alive. … Here, the firefighters plausibly assert that the individual City Defendants applied the Proclamation arbitrarily and capriciously, and that they thereby showed callous disregard to the firefighters' Free Exercise rights. At this stage, that is enough to state a claim for punitive damages. Whether the firefighters will ultimately succeed is a separate question. By timely appealing the dismissal of their case, the firefighters have preserved their request for punitive damages, and it thus remains a live issue." The court held that the firefighters' request for injunctive relief also was not moot, because "the request for prospective relief requires a return to the pre-termination status quo between the firefighters and Spokane. Thus, the last legally relevant relationship between the parties is the firefighters' gainful employment for Spokane. The district court could require Spokane to reinstate terminated firefighters, and the claim for injunctive relief thus remains live as well."

  Turning to the merits of the firefighters' complaint, the court held that they had stated a plausible claim for a Free Exercise Clause violation, because when Spokane terminated firefighters for refusing to get vaccinated, it filled those positions with firefighters from other departments – even if those firefighters had been granted exemptions from the vaccine requirements by their own departments. "Had Spokane subjected unvaccinated out-of-department firefighters to the same standard, its implementation of the vaccine policy might well be generally applicable. But that is not this case. By continuing to work

with unvaccinated firefighters from surrounding departments, Spokane undermined its interest and destroyed any claim of general applicability." The firefighters also articulated in their complaint at least three less restrictive ways that the city could have accomplished the same compelling purpose of stopping the spread of COVID-19, and sufficiently alleged that the city's application of the vaccine mandate to the fire department was not narrowly tailored. Thus the complaint should not have been dismissed.