Office of Congressional Workplace Rights

Office of the General Counsel

SUPREME COURT PREVIEW AND FEDERAL CASE LAW UPDATE
SEPTEMBER 20, 2023

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 summarize several relevant cases that will come before the Supreme Court in the upcoming term.

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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
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- **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 – October Term 2023

The Supreme Court has granted certiorari in several cases whose outcome will directly or indirectly affect how the federal courts, the OCWR Board of Directors, and OCWR Hearing Officers analyze claims and complaints filed by legislative branch employees. Below is a preview of the most relevant cases to be decided in the upcoming term.

Muldrow v. City of St. Louis, Mo., Docket No. 22-193

Question Presented: **Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?**

Lower court decision: *Muldrow v. City of St. Louis, Mo*., 30 F.4th 680 (8th Cir. 2022)

Sergeant Muldrow worked in the Intelligence Division of the St. Louis Police Department. She held a number of different positions, eventually becoming deputized as a Task Force Officer (TFO) for

the FBI's Human Trafficking Unit. When a new Commander was hired, Muldrow and three colleagues were transferred out of the division. Muldrow went to the Fifth District, where she lost privileges associated with her previous position such as schedule regularity, the ability to work in plain clothes, and use of an unmarked police vehicle. Her salary stayed the same but she was no longer eligible for FBI-specific overtime pay. During her eight months at the Fifth District, Muldrow requested a transfer to the Second District, applied for a different role in the Second District, then applied and re-applied for a role within Internal Affairs. While her applications and requests were pending, she was transferred back to the Intelligence Division. She filed claims of gender discrimination and retaliation under both Title VII and Missouri state law. The Eighth Circuit addressed only the Title VII claims, affirming the district court's decision that Muldrow had failed to establish a prima facie case because the transfers were not adverse employment actions.

Muldrow argued that her transfer out of the Intelligence Division was an adverse employment action because the work was less prestigious. However, the Court placed emphasis on the fact that her pay and rank did not change, she was still in a supervisory role, she did not think the transfer harmed her long-term career prospects, and even though she lost the FBI-related overtime pay, she had other opportunities for overtime in the Fifth District. The Court held that reassignment alone does not constitute an adverse action, absent "proof of harm resulting from that reassignment."

Muldrow also argued that failing to transfer her from the Fifth District to the Second when she requested it was an adverse action. The Court acknowledged that the denial of a transfer can be an adverse action, but analyzed it using the same factors it did for a transfer: whether the failure to transfer caused a change in supervisory duties, prestige, schedule and hours, or promotion potential. Muldrow argued that the role in the Second District was more high-profile and came with perks such as laptops and iPads. The Court held that Muldrow could not show that transfer would have provided a material benefit, and therefore denial of the transfer was not an adverse action.

The Supreme Court will address the issue of whether transfer decisions, absent a separate court determination that the transfer decision caused a significant disadvantage, are grounds for Title VII claims. Interestingly, Muldrow's petition for a writ of certiorari included a broader question presented: "Does Title VII prohibit discrimination as to all 'terms, conditions, or privileges of employment,' or is its reach limited to discriminatory employer conduct that courts determine causes materially significant disadvantages for employees?" In granting the petition, the Supreme Court explicitly limited the question presented to decisions regarding transfers.

Acheson Hotels, LLC v. Laufer, Docket No. 22-429

Question Presented: **Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation?**

Lower court decision: *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259 (1st Cir. 2022)

Deborah Laufer is a wheelchair and cane user. She requires accommodation to access hotels, such

as passageways that are wide enough and graded for her wheelchair, lowered surfaces, and grab bars in bathrooms. Laufer visited Acheson Hotels' website for The Coast Village Inn and Cottages in Maine and saw that it did not identify accessible rooms or provide information about the accessibility features of the hotel facilities. She also had no option to request an accessible room. Acheson Hotels also did not provide this information on any third-party booking sites. Laufer filed a claim against the hotel under the ADA, alleging it violated the "reservation rule" – the DOJ's ADA regulation requiring, with regard to reservations made by any means, a hotel to identify and describe its accessible features in enough detail so people with disabilities can assess whether a given hotel or guest room meets their accessibility needs.

Acheson Hotels argued that Laufer lacked Article III standing because, as a self-proclaimed ADA "tester" who had filed hundreds of ADA suits and did not actually intend to book a room, any injury she suffered was not concrete enough. The district court agreed and dismissed for lack of standing. The First Circuit reversed, reasoning that the lack of information on room accessibility on the hotel's reservation website does discriminate against a person with a disability, and Ms. Laufer's injury was her feelings of frustration, humiliation, and being treated as a second-class citizen.

The Supreme Court will address the issue of whether an self-appointed ADA "tester" has Article III standing to challenge the failure of a place of public accommodation to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation. Although the OCWR's enforcement of the ADA public accommodation provisions does not depend on Article III standing, the Supreme Court's decision in this case could be informative in the event that "testers" raise issues of accessibility with regard to legislative branch facilities, services, programs, or activities.

In an interesting twist, Laufer filed a Suggestion of Mootness in July, apprising the Court that she had dismissed her underlying claims with prejudice due to issues that recently came to light with her legal representation, and requesting the Court find the case moot as a result. The Supreme Court denied the motion, stating that the mootness question would be subject to consideration at oral argument.

Lindke v. Freed, Docket No. 22-611

Question Presented: **Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.**

Lower court decision: *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022)

O'Connor-Ratcliff v. Garnier, Docket No. 22-324

Question Presented: **Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.**

Lower court decision: *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022)

Lindke and *O'Connor-Ratcliff* both involve questions of whether a government official's use of social media is a state action.

In the first case, James Freed converted his private Facebook profile into a "public figure page" and was later appointed city manager of Port Huron, Michigan. He listed his role and official email and phone number on the page, and posted news about his actions as a public official to the page, which was followed by members of the public. He continued to use the page to also share updates about his personal life, as the account was what he used to keep up with family and friends. One member of the public, Kevin Lindke, commented on Freed's posts frequently, criticizing Port Huron's reaction to the COVID-19 pandemic. Freed deleted the comments and eventually blocked Lindke, who sued him in federal court for violating his First Amendment rights. The district court granted Freed summary judgment, and the Sixth Circuit affirmed. The Court held that social media accounts should be looked at as a whole, and that using a social media account is "fairly attributable" to the state as a state action if the account holder is doing so (1) pursuant to his actual or apparent duties or (2) using his state authority. The court found that Freed's use of his social media account was not fairly attributable to the state under this test.

In the second case, Michelle O'Connor-Ratcliff and T.J. Zane were elected to the Poway Unified School District Board of Trustees in 2014. They both created social media accounts to promote their campaigns and continued to use the accounts after winning election to inform and communicate with the public about the Board. Two parents, the Garniers, frequently posted long, repetitive criticisms as comments to the two members' posts. The two members often deleted the comments, until finally they decided to block the Garniers. The Garniers claimed that the deletion of their comments and the blocking of their profiles was a state action in violation of the First Amendment. The Ninth Circuit held that the Board members' Facebook pages were public fora and that the restrictions placed on the Garniers were not appropriately tailored to serve a governmental interest and therefore violated the First Amendment.

The Supreme Court will address two issues through these cases: (1) in *Lindke*, whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office; and 2) in *O'Connor-Ratcliff*, whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.

Murray v. UBS Securities, LLC, Docket No. 22-660

Question Presented: **Under the burden-shifting framework that governs Sarbanes-Oxley cases, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof?**

Lower court decision: *Murray v. UBS Securities*, *LLC*, 43 F.4th 254 (2d Cir. 2022)

Murray worked at UBS Securities as a commercial mortgage-backed securities strategist. He performed research and prepared reports for clients and was required to certify to the SEC the accuracy and independence of his reports. He reported to his supervisors several times over the course of three months that two trading desk leaders were improperly influencing Murray to skew his research to be more favorable and supportive of the firm's business plans. Murray's supervisor, Shumacher, asked his supervisor, Hatheway, to reassign Murray to a desk analyst role (which was not regulated by the SEC) or to include him in a round of layoffs. Murray was terminated that month as part of a reduction in force.

Murray's claims of Sarbanes-Oxley whistleblower retaliation went to trial before a jury. The district court instructed the jury that the plaintiff had to prove that the protected activity was a contributing factor in the termination of employment, but that the plaintiff was not required to prove that the protected activity was the primary motivating factor. The jury found UBS liable.

The Second Circuit vacated and remanded, holding that the language of the statute clearly makes retaliatory intent an element of a retaliation claim, and that the plaintiff therefore bears the burden to demonstrate such intent. The Sarbanes-Oxley whistleblower protection provision makes it unlawful for a covered employer to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment ***because of*** any lawful act done by the employee" and goes on to specify certain categories of protected activities. 18 U.S.C. § 1514A(a) (emphasis added). The Second Circuit therefore held that to prevail on the "contributing factor" element of a Sarbanes-Oxley claim, a whistleblower must prove that the employer took adverse action with retaliatory intent. Because the district court failed to instruct the jury on retaliatory intent, the Court ordered a new trial.

The Supreme Court will address the issue of whether, in a Sarbanes-Oxley case, a whistleblower must prove his employer acted with a "retaliatory intent" as part of his case in chief, or whether the lack of "retaliatory intent" is part of an affirmative defense on which the employer bears the burden of proof. Although the question presented is limited to the Sarbanes-Oxley Act, this case is of interest because the "because of" language in the Sarbanes-Oxley whistleblower provision is similar enough to the language in section 208 of the CAA – which prohibits employing offices from intimidating, taking reprisal against, or otherwise discriminating against a covered employee "because the covered employee has" engaged in certain enumerated protected activities – that the Court's decision may guide the OCWR Board and federal courts in analyzing retaliation claims under the CAA as well.

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.

- *Tillman v. New York City Dep't of Hum. Res. Admin.*, No. 22-872-CV, 2023 WL 2770218 (2d Cir. Apr. 4, 2023) – As a reasonable accommodation for her back spasms, sciatica, fibromyalgia, and pinched nerves, Plaintiff requested that her employer provide an ergonomic chair and footrest. It provided a "dilapidated" chair and a footrest which agitated her physical impairments. The Second Circuit affirmed the district court's dismissal of her failure-to-accommodate claim, because Plaintiff conceded that she was able to perform the essential functions of her job and did not identify benefits or privileges of employment that she was not able to enjoy because of the equipment she was provided.

- *Graham v. Sec'y U.S. Dep't of Veterans Affs.*, No. 22-2633, 2023 WL 2388355 (3d Cir. Mar. 7, 2023), *petition for cert. filed*, No. 23-5382 (U.S. July 31, 2023) – While employed by the VA as a licensed practical nurse, Plaintiff was charged with aggravated assault, sexual assault, simple assault, and recklessly endangering another person. The charges concerned her alleged failure to disclose her HIV-positive status to a sexual partner. The VA suspended her without pay during the law enforcement investigation and related judicial proceedings. After the charges were resolved, the VA lifted the suspension and directed Plaintiff to return to work, denying her request for backpay and other benefits missed during her suspension. Plaintiff's subsequent disability discrimination complaint failed. The Third Circuit agreed with the district court that she did not show that the VA's proffered explanation for its actions (that it denied back pay and benefits because she had been suspended pending the resolution of serious criminal charges) was pretextual. The court reasoned that the VA had, in written communications, consistently identified the criminal charges as the reason for its actions, and written references to Plaintiff's disability did not reflect animus, but simply that, due to the nature of the charges, it would have been nearly impossible to discuss them without mentioning her HIV status.

- *Hannah v. United Parcel Serv., Inc.*, 72 F.4th 630 (4th Cir. 2023) – Plaintiff, a UPS package delivery driver, injured his hip and buttocks and requested that he be allowed to drive his route with a smaller truck that would have a softer suspension or, alternatively, that he be assigned to an "inside job." Because UPS had determined that Plaintiff's route required a larger truck and there were no openings for inside work at the time, UPS instead accommodated him by allowing him to take an unpaid leave of absence until he healed and could return to work. The Fourth Circuit affirmed summary judgment to UPS on Plaintiff's subsequent failure-to-accommodate claim. His requested accommodation was not reasonable: using the smaller truck would require him to make multiple trips or give part of his route to another driver, both of which would violate the governing collective bargaining agreement, and he did not show that his requested smaller truck accommodation would allow him to perform the essential functions of his job. Regarding UPS's chosen accommodation, the court held, "While a period of unpaid leave might not always be a reasonable accommodation, such leave may be reasonable where the disability that interferes with an employee's capacity to complete assigned tasks is temporary and there is reason to believe that a leave of absence will provide a period during which the employee will be able to recover and return to work," as was the case with Plaintiff's disability.

- *Lashley v. Spartanburg Methodist Coll.*, 66 F.4th 168 (4th Cir. 2023) – In addition to other claims, a former professor with disabling gastrointestinal issues alleged that her former employer made an unlawful health inquiry in violation of the ADA. Plaintiff alleged that her department chair said, in an angry and threatening tone, "tell me about your health issues." The Fourth Circuit held that this was not an unlawful health inquiry under the ADA. First, "whether a medical inquiry is job-related and consistent with business necessity is an objective inquiry[,]" (internal alterations and citations omitted), so Plaintiff's subjective perception of the chair's tone was immaterial. Plaintiff had told faculty, staff, and students about her health issues, usually in the context of missing or rescheduling classes, and she had complained of unhealthy conditions in the building that housed her office and classes. The Court held that the chair's inquiry was necessary in order to figure out how he could accommodate her so that she could continue working. Finally, the Court held that there was no evidence that the inquiry was broader or more intrusive than necessary.

- *Montague v. U.S. Postal Serv.*, No. 22-20113, 2023 WL 4235552 (5th Cir. June 28, 2023) – Plaintiff had peripheral neuropathy, a nerve condition which often flared up in the morning, impairing her ability to drive. She asked USPS, where she worked in public relations, to let her to work from home as needed in the mornings and report to the office each afternoon. USPS denied her request, and she sued for failure to accommodate in violation of the Rehabilitation Act. Reversing the district court's grant of summary judgment to USPS, the Fifth Circuit found genuine issues of material fact as to whether travel and mornings at the office were essential to Plaintiff's job. At the outset, the court noted that "the circuits are split on whether the commute to and from the workplace is subject to federal disability statutes," but that it would not weigh in on that question since USPS forfeited that argument. Regarding the essential nature of travel, the record showed that Plaintiff's time spent on travel in the past was minimal, her written job description did not mention travel as an essential part of her job, and there was no evidence that she was required to travel to events in the morning specifically. Regarding the essential nature of mornings at the office, Plaintiff presented statements of two colleagues performing her job at other USPS locations who regularly telecommuted for many years. The court also found a genuine fact dispute as to the reasonableness of USPS's suggested alternative accommodations: Plaintiff arranging a ride through her husband or a taxi service (at her expense).

- *Mueck v. La Grange Acquisitions, L.P.*, 75 F.4th 469 (5th Cir. 2023) – Plaintiff, an operator at a natural gas processing plant, asserted several ADA claims against his former employer after he was terminated due to the conflict between his scheduled shifts and the court-ordered substance abuse classes he was required to attend as a term of his probation for his most recent driving while intoxicated (DWI) citation. The district court granted summary judgment to the employer. The Fifth Circuit held that a triable issue of fact existed as to whether Plaintiff's alcohol use disorder involving binge drinking amounted to a disability, which precluded summary judgment on the basis that he was not qualified individual with a disability, but agreed with the district court that his claims failed in any event, and so it affirmed.

  Relying primarily on pre-ADA Amendments Act (ADAAA) case law, the district court

had held that Plaintiff failed to establish that his alcoholism was an impairment which substantially limited a major life activity, in large part because the impairments he suffered during a drinking binge were short-term and not permanent. The Fifth Circuit examined the ADAAA and other circuits' post-ADAAA case law and held that "following the ADAAA's passage, an impairment need not be 'permanent or long-term' to qualify as a disability" and the district court erred in granting summary judgment to the employer on the basis that Plaintiff was not a qualified individual with a disability under the ADA. However, Plaintiff's claims still failed. He could not show intentional discrimination: his employer's legitimate, non-discriminatory reason for his termination – the shift conflict – could not have been found to be pretextual since the employer did attempt to coordinate coverage for Plaintiff. Nor could he show a failure to accommodate: he could not show that his employer was aware that his request for time off was due to a disability, as opposed to time off to deal with the legal consequences of his DWI (which he would have needed regardless of whether he had a disability).

- *EEOC v. Methodist Hosps. of Dallas*, 62 F.4th 938 (5th Cir. 2023) – Adrianna Cook could no longer work as a patient care technician after an injury, and applied for a vacant scheduling coordinator position for which she met the minimum qualifications. After the hiring manager selected another candidate pursuant to Methodist's policy of hiring the most qualified candidate for a vacancy, the EEOC sued, alleging that Methodist's most-qualified-applicant policy violates the ADA because Methodist cannot categorically refuse to reassign disabled employees to a vacant position for which they are qualified. The EEOC argued that the Supreme Court's ruling in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), requires Methodist to make exceptions to its most-qualified-applicant policy and that Cook was entitled to a reasonable accommodation under the ADA.

  In *Barnett*, the Supreme Court held that reassignment is not a reasonable accommodation when an employer has an established seniority system, and set out a two-step test for determining whether an accommodation is reasonable. Step one requires a plaintiff to show that an accommodation seems reasonable on its face; if the plaintiff cannot do so, step two allows them to show that "special circumstances warrant a finding that although the ADA may not trump in the run of cases, the requested accommodation is reasonable on the particular facts." (internal quotations omitted).

  The Fifth Circuit examined *Barnett* and agreed with the district court that, under the first step of *Barnett*, mandatory reassignment in violation of Methodist's most-qualified-applicant policy is not reasonable in the run of cases. The policy was disability-neutral and, similarly to a seniority system, stabilized employee expectations. The Fifth Circuit additionally noted that in a healthcare setting, safety concerns weigh in favor of such a policy. However, the district court failed to address the second step of *Barnett.* The Fifth Circuit vacated and remanded as to the practice or pattern claim, instructing the district court to focus on the second step and determine whether the EEOC could raise a genuine dispute of material fact as to whether there are special circumstances such that in this particular case, an exception to Methodist's most-qualified-applicant policy could constitute a reasonable accommodation even though in the ordinary case it could not. As for Cook's individual claim. the Fifth Circuit held that she caused a breakdown in the interactive process, so the EEOC could not prevail on that claim.

- *Hrdlicka v. Gen. Motors, LLC*, 63 F.4th 555 (6th Cir. 2023), *reh'g en banc denied*, 2023 WL 4112647 (6th Cir. June 1, 2023) – Plaintiff was employed by General Motors for over 30 years before she was terminated due to excessive absenteeism. After her termination, she was diagnosed with a brain tumor. When she subsequently brought an employment discrimination lawsuit, the Sixth Circuit affirmed summary judgment in favor of General Motors, holding that Plaintiff failed to establish a prima facie case of disability discrimination because her purported disability was unknown to either herself or General Motors until well after her employment was terminated.

  The court rejected Plaintiff's argument that General Motors was on notice that she was disabled because of texts to her supervisor referencing generalized ailments (her "head ... really hurting," dealing with "a mental thing," or simply being "sick"), concluding that these text messages were not sufficient to apprise her supervisor of a disability, especially when Plaintiff herself was unaware of any disability. Plaintiff also argued she put General Motors on notice of a disability when she mentioned during an HR meeting shortly before her termination that she had felt depressed since her transition to a new department. The court disagreed: this was, like the text messages, a "vague or conclusory statement[] revealing an unspecified incapacity … not sufficient to put an employer on notice of its obligations under the ADA." (citations omitted). Additionally, Plaintiff consistently attributed her depression and attendance issues to the work environment, leaving General Motors to speculate as to the existence of a disability.

  The court also disagreed that General Motors failed to accommodate Plaintiff's purported disability when it did not honor her request for a transfer back to her previous department. She did not link her request to a disability when she made it, and the court concluded it was linked to her distaste for her current work environment. Further, even if it had been premised on disability, the request was untimely: "When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.'" (citations omitted). (This case is also summarized in the FMLA section.)

- *Tomlinson v. Krauss-Maffei Corp*., No. 21-6245, 2023 WL 1777389 (6th Cir. Feb. 6, 2023) – While a change of supervisor is generally not considered "reasonable" for purposes of an ADA accommodation claim, presumptions regarding the reasonableness of a particular accommodation "eviscerate[] the individualized attention that the Supreme Court has deemed 'essential' in each disability claim." (citations omitted). Here, the Sixth Circuit held that a reasonable juror could conclude that the Plaintiff's request for a change of supervisor to accommodate his PTSD was reasonable because the employer, KMC, was considering changing its supervisory structure – the very change that the Plaintiff requested for himself – even before his request was denied, and made and implemented that change the following year. However, because the Plaintiff failed to engage in the interactive process required by the ADA to reach a mutually agreeable reasonable accommodation (by becoming largely unresponsive to KMC), his failure-to-accommodate claim could not survive, and the Sixth Circuit affirmed summary judgment for KMC.

- *Tate v. Dart*, 51 F.4th 789 (7th Cir. 2022) – Tate, a Cook County Department of Corrections officer with a back injury that required him to "avoid situations in which there is a significant chance of violence or conflict," sued under the ADA when his employer failed to promote him from sergeant to lieutenant. The Seventh Circuit affirmed the district court's grant of summary judgment for the employer, holding that the ability to manage and respond to violent emergencies involving inmates was an essential function of the lieutenant position. The EEOC's ADA regulations identify seven non-exclusive categories of evidence to consider when determining whether a job function is essential. The Court examined all seven, but two were particularly interesting. Concerning "time spent performing the function," the Court noted, "As a general rule, the more time an employee spends performing a function, the more essential the function is likely to be … but there are exceptions, particularly where the job includes emergency response duties[,]" such as law enforcement officers handling weapons or firefighters carrying unconscious people from burning buildings.

  As to the "consequences of not requiring performance of the function" factor, the Court noted that the general rule that not every employee must always be able to perform every job function was established in cases that did not involve jobs with public safety emergency duties. For instance, where employees work as a team, each member of the team might not have to be able to do every task required of the entire team, especially if team members routinely switch between tasks (as in a case concerning a highway bridge crew), and the nature of the work is such that waiting for backup is not disruptive (as in a case concerning bus supervisors who only occasionally drove, and could secure backup in ten minutes). In the context of the Cook County Department of Corrections, however, "while the correctional staff surely work as a team in a larger sense, they cannot share the responsibility of responding to violent emergencies and sudden physical altercations by stepping aside and calling others." If Tate were unable to respond as needed to a violent emergency, the consequences could be grave.

- *EEOC v. Charter Commc'ns, LLC,* 75 F.4th 729 (7th Cir. 2023) – Further entrenching the circuit split regarding employers' obligations to accommodate an employee's commute, the Seventh Circuit held that a disabled employee may have been entitled to a modified work schedule as an accommodation to make his commute safer. Plaintiff worked a noon to 9:00 PM shift at a call center an hour from his home when he developed cataracts in both eyes, making his vision blurry and nighttime driving unsafe. To avoid highway driving at night, he requested an earlier work schedule (10:00 AM to 7:00 PM), which his employer approved for 30 days. Before the 30 days ended, Plaintiff asked to extend his modified schedule for another 30 days while he tried to move closer to the workplace, but his employer denied this extension. The EEOC sued for failure to accommodate.

  Reversing and remanding the district court's grant of summary judgment for the employer, the Seventh Circuit wrote, "We have no doubt that getting to and from work is in most cases the responsibility of an employee, not the employer. But if a qualified employee's disability interferes with his ability to get to work, the employee may be entitled to a work-schedule accommodation if commuting to work is a prerequisite to an essential job function, such as attendance in the workplace, and if the accommodation is reasonable under all the circumstances." Like any accommodation, an employee's

proposed commute-related accommodation must ameliorate the effects of their disability, not merely serve personal preferences or convenience, and the employee must still show how an obstacle or risk of harm could affect an essential function – but in the case of disability-related difficulties getting to and from the workplace, that may include workplace attendance. The court recognized that many commute-related factors are within the employee's control: "An employee who has chosen to live far from the workplace or failed to take advantage of other reasonable options, including public transportation, will rarely if ever be entitled to an employer's help in remedying the problems [for which the employee is seeking accommodation]."

The court noted that it was not "address[ing] here issues about whether and when physical presence is an essential job function."

- *Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635 (7th Cir. 2023) – As director of imaging services at a hospital, Plaintiff was responsible for planning, administering, monitoring, and evaluating the delivery of imaging services to patients. She began working remotely in March 2020 because of the COVID-19 pandemic, but when her coworkers returned to work at the hospital once safety protocols were developed, she refused, contending she was unable to wear a mask (as was required for on-site employees) because it exacerbated her anxiety. Her request to work solely from home as an accommodation was denied and she eventually resigned. She sued for failure to accommodate and constructive discharge (in addition to Title VII claims). The Seventh Circuit affirmed summary judgment for the employer, holding that a jury could not find that Plaintiff could perform certain essential functions of her job without being present in the radiology department that she oversaw. She thus was not a qualified individual for the job under the ADA, and even if she had been, the accommodation she requested was not reasonable. Her resignation also was not a constructive discharge.

  The court wrote that "considering whether working in person is an 'essential function' can invite too much reliance on generalities about the obvious benefits of physical presence in a workplace, losing sight of a specific job and specific arrangements and accommodations. It may be helpful to frame the issue as whether essential functions of the job must be performed in person, such that allowing the employee to perform those functions from home would not be a reasonable accommodation. The analysis needs to focus on the specific job and its essential functions and specific possible accommodations." By Plaintiff's own admission, remotely performing her required tasks of evaluating staff, serving as a department liaison, and overseeing equipment and facilities would require another staff person to perform on-site monitoring (but "accommodations" that would allow the employee to avoid an essential function, rather than help them accomplish it, are not reasonable). She argued she should have been allowed to work remotely because she and many coworkers began doing so in March 2020. The court disagreed: "The fact that many employees were able to work remotely temporarily when forced to do so by a global health crisis does not mean that those jobs do not have essential functions that require in-person work over the medium to long term."

- *Mobley v. St. Luke's Health Sys., Inc.,* 53 F.4th 452 (8th Cir. 2022) – Plaintiff Mobley, a managerial customer service employee of St. Luke's, was diagnosed with multiple sclerosis (MS) and made a blanket request to telecommute whenever his condition flared, which was denied. Notably, Mobley and most other employees in his department telecommuted for part of each week. The Eighth Circuit concluded that a genuine dispute of material fact existed as to whether Mobley was able to perform the essential functions of his job through his proposed accommodation. By allowing Mobley to consistently work remotely aside from his medical condition, the employer implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time. Moreover, Mobley continued to receive positive performance reviews while working remotely, reflecting that he was able to effectively supervise his employees despite not being on site. None of the decisions referenced by the employer in support of its argument involved a case in which telework by most employees was a regular occurrence, like it was in Mobley's department.

  However, agreeing with the district court that employer engaged in the interactive process in good faith, the Eighth Circuit affirmed summary judgment for the employer. The record demonstrates several steps that the employer took in response to Mobley's request for accommodation, including approving him to work from home on a case-by-case basis, offering that he could follow up with any questions or concerns (which he did not), and only denying one of his requests to work from home (and on that day he used paid time off).

- *Norwood v. United Parcel Serv., Inc.*, 57 F.4th 779 (10th Cir. 2023) – Plaintiff worked as a division manager for UPS, a position which required her to remember daily conversations and record them later, when her mental health declined, causing memory problems. When UPS did not grant her desired accommodation to be allowed to tape-record meetings (due in part to her access to its proprietary and confidential information), she brought an action challenging its good faith during the interactive process. She argued that UPS acted in bad faith by "concealing" the possibility of a note taker (which HR staff identified as a possibility, but did not immediately offer to her, in part because they needed more information from her as to which meetings she needed accommodations for). She also argued that the way HR offered accommodations – not by formally offering them to her, but instead asking her whether they were acceptable – was unacceptable in that it placed the onus on her.

  The Tenth Circuit disagreed with Plaintiff and affirmed the district court's grant of summary judgment for UPS. UPS engaged in regular communication with Plaintiff to find a reasonable accommodation until she expressed her intent to retire. Nothing in the statute or case law requires that an employer frame possible reasonable accommodations during the interactive process in declarative sentences rather than questions. And Plaintiff cited no law supporting the premise of her argument – that an employer may act in bad faith by concealing alternative accommodations it already considered reasonable, especially where, like here, the employer engaged with the employee, discussed reasonable accommodations, and suggested possible accommodations.

- *Brigham v. Frontier Airlines, Inc.*, 57 F.4th 1194 (10th Cir. 2023) – Plaintiff was a flight attendant and recovering alcoholic who wanted to avoid overnight layovers because they tempted her to drink. To minimize overnight layovers, she asked Frontier (1) to excuse her from the airline's bidding system for flight schedules (a system that, per the collective bargaining agreement (CBA), gave more flexibility as employees gained seniority) or (2) to reassign her to the General Office. Frontier rejected both requests. The Plaintiff filed an ADA claim after she was fired for missing too many assigned flights. The Tenth Circuit concluded that neither accommodation was plausibly reasonable. Frontier was not required to violate the CBA by allowing Plaintiff to take options away from flight attendants with greater seniority. And reassignment to the General Office was not plausibly reasonable because no vacancy existed for similarly situated employees. Under the CBA, Frontier allowed flight attendants with on-the-job injuries to perform light-duty work in the General Office. Having previously held that "a position is 'vacant' with respect to a disabled employee for the purposes of the [ADA] if it would be available for a similarly-situated non-disabled employee to apply for and obtain[,]" (citations omitted), the court concluded that Frontier had no vacancy in the General Office: a position in the General Office was available only for employees injured on-the-job. Ms. Brigham had no on-the-job injury, so she was not similarly situated to the flight attendants eligible for reassignment to the General Office.

- *Johnson v. Walt Disney Parks & Resorts U.S., Inc*., No. 21-12696, 2022 WL 16915741 (11th Cir. Nov. 14, 2022) – In this unreported decision, the Eleventh Circuit agreed with the employer, Disney, that a collective bargaining agreement that restricted Disney from placing Plaintiff into a seasonal position was one reason she was not qualified for a position to which she sought reassignment as an accommodation for her disability.

- *Owens v. Governor's Off. of Student Achievement,* 52 F.4th 1327 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2465 (2023) – The Eleventh Circuit addressed, as a matter of first impression, what information a disabled employee must provide to her employer to trigger the employer's duty to accommodate her disability, holding that "[v]ague or conclusory statements revealing an unspecified incapacity" are not enough to trigger an employer's duties under the Rehabilitation Act (quoting *Morisky v. Broward Cnty.,* 80 F.3d 445, 448 (11th Cir. 1996)). Following her c-section childbirth in July 2018, Plaintiff Owens informed her employer, GOSA, that she would need to work remotely for several months, providing two notes from her physician stating that she was "doing well" and concluding that she "may" telework until November 2018. Owens separately informed GOSA that she was seeking to telework due to childbirth-related "complications" but provided no detail about the nature of these complications or how they would be accommodated by teleworking. GOSA fired her when she failed to submit additional documentation supporting her request or to return to the office.

  The Eleventh Circuit held that Owens failed to establish a prima facie case of failure to accommodate because she never notified GOSA of her disability or connected that disability with her requested accommodation. As part of her initial burden to establish that a requested accommodation is reasonable under the Rehabilitation Act, an employee must put her employer on notice of the disability for which she seeks an accommodation and provide enough information to allow her employer to understand how the

accommodation she requests would assist her. Neither childbirth nor pregnancy qualifies as a disability under the Rehabilitation Act or ADA, and although Owens's unspecified "childbirth-related complications" may have caused a disability, Owens never identified what that disability was.

- *Cooke v. Carpenter Tech. Corp.,* No. 20-14604, 2022 WL 17730393 (11th Cir. Dec. 16, 2022) – The Eleventh Circuit held that the district court erred when it found that Cooke could not prevail on his ADA claim because he caused the breakdown in the interactive process. Cooke, who worked in a unit where all employees worked on a "swing shift" schedule alternating between days and nights, was diagnosed with severe depression, anorexia, and anxiety. After periods of FMLA and short-term disability leave, he provided documentation from two of his healthcare providers stating he could return to work, but would benefit from a consistent schedule. The employer offered to put Cooke on a consistent schedule for a period of 30 days with no possibility of reevaluation thereafter, and refused to discuss permanent accommodations. Cooke alleged that he made repeated attempts to continue conversations about a reasonable accommodation, but his employer failed to engage in any meaningful manner or show that an accommodation beyond the 30-day period would have been unreasonable or unduly burdensome. Out of leave time, Cooke ultimately had to resign and find a new job. The Eleventh Circuit found that, viewing the evidence in light most favorable to Cooke, a reasonable jury could conclude that the employer – not Cooke – disrupted the interactive process. Summary judgment on Cooke's ADA claim was therefore improper.

- *Beasley v. O'Reilly Auto Parts*, 69 F.4th 744 (11th Cir. 2023) – Plaintiff, who was deaf and communicated primarily through American Sign Language (ASL), worked as an inbound materials handler. He requested text message summaries of nightly pre-shift meetings (which were mandatory and included safety information), but those were not regularly sent to him, and the ones that he was sent were incomplete. He eventually requested an ASL interpreter to discuss with management his exclusion from the nightly meetings, but none was provided. The employer also did not provide an ASL interpreter to resolve a disputed disciplinary matter, adversely affecting his pay, or for forklift training and a company picnic. After he quit, he sued for failure to provide reasonable accommodations. The district court granted summary judgment to the employer, but the Eleventh Circuit held that genuine issues of material fact existed as to whether some of Plaintiff's requested accommodations related to his essential job functions and whether the failure to provide those two accommodations led to an adverse employment decision.

  The court held that a factfinder could reasonably determine that Plaintiff's inability to understand or participate in the pre-shift meetings did adversely affect the terms, conditions, and privileges of his employment, since important safety information was disseminated at these mandatory meetings and "[s]afety is self-evidently a condition of employment in a warehouse[.]" It further held that attending and understanding these meetings were essential components of Plaintiff's employment, even though they were not in the written job description. Additionally, the court held that his ability to participate meaningfully in disciplinary meetings about his attendance was essential component of his employment, even though such meetings were not part of his day-to-day functions. With respect to his claims regarding the forklift training and picnic,

Plaintiff failed to show any adverse consequence from the failure to provide an interpreter to the forklift training (which he completed anyway, and was not actually necessary for his job) or picnic (where his wife interpreted).

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.

- *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52 (4th Cir. 2023) – An art professor who was in her 70s did not qualify to teach digital art courses, despite the university's recommendations that she become qualified and the professor's promises to do so. The university decided not to renew her contract, and she sued for age discrimination. As a matter of first impression, the Fourth Circuit held – consistent with holdings from the Fifth and Sixth Circuits – that remarks about retirement, without more, do not constitute direct evidence of age discrimination. Neither did the court consider a comment about the plaintiff being "resistant to change" to be direct evidence of age discrimination, since the comment was not connected to the plaintiff's age. Moving on to the *McDonnell Douglas* analysis, the court held that because the plaintiff was not meeting the university's performance expectations for her position, she could not establish a prima facie case of age discrimination. The record contained ample evidence that the university had repeatedly tried to get the professor to develop her technology and digital art skill set, but she had failed to do so. (Note: the court also discussed the professor's failure to establish age as the but-for cause of her termination, but that standard differs from the one that applies to federal ADEA cases since the Supreme Court's decision in *Babb*.)

- *Spears v. La. Coll.*, No. 20-30522, 2023 WL 2810057 (5th Cir. Apr. 6, 2023) – A former professor sued Louisiana College, alleging among other things that the college engaged in unlawful age discrimination when it told her it had decided to "move in a different direction" and would not be renewing her contract. The district court granted summary judgment for the college, but the Fifth Circuit reversed on the age discrimination claim and an associated retaliation claim. The district court had held that Spears failed to establish a *prima facie* case because she could not show that she was replaced by someone younger: it found that her former courses had been spread among several teachers and concluded that such an action does not constitute replacement. The Fifth Circuit disagreed, explaining that just because her duties were divided among multiple younger individuals doesn't mean she wasn't "replaced," warning that "Employers may not circumvent [the law's] protections by 'fractioning' an employee's job." There was also a genuine issue of material fact as to whether Spears had told anyone she wasn't returning to work, which was the college's proffered reason for not renewing her contract, and this precluded summary judgment because it would be possible for a factfinder to conclude that the reason was pretextual. The court pointed out that it made

no sense for the college to terminate her if they thought she was not coming back anyway; it also pointed to evidence in the record suggesting that she had indicated that she *did* intend to return. The same issues regarding pretext also precluded summary judgment on her sex discrimination, disability discrimination, and retaliation claims.

- *Allen v. U.S. Postal Serv.*, 63 F.4th 292 (5th Cir. 2023) – A postal service worker in her 50s alleged, among other things, that she was terminated because of her age and retaliated against for protected activity. The district court granted summary judgment for the USPS, but the Fifth Circuit reversed and remanded on several of her claims. The court analyzed her discrimination claim under the federal-sector provision of the ADEA, which "demands personnel actions be untainted by *any* consideration of age" (quoting *Babb v. Wilkie*, 140 S. Ct. 1168, 1171 (2020)), and concluded that genuine issues of fact precluded summary judgment. The court pointed to evidence in the record that Allen's 26-year-old coworker was treated more favorably, including examples of the younger employee being given many privileges that Allen was denied, along with testimony about two age-related remarks from her superiors: one, upon reinstating her after a prior termination, said that he does not like to hire older workers because they "tend to get hurt and go on restriction until they retire" and that he "did not need another carrier with restrictions on his clock"; another supervisor purportedly once told Allen to get her "old ass" back to work. There was also sufficient evidence to create a genuine issue of fact as to pretext: in a 12-page sworn affidavit, Allen detailed "multiple specific incidents suggesting, at best, innocence of poor performance and, at worst, sabotage. … These facts, if ultimately found credible at trial, would permit a reasonable factfinder to conclude that USPS's proffered explanation for Allen's termination is false or unworthy of credence." There was also a lack of documentation of Allen's purported job deficiencies, which "is germane to Allen's theory of pretext in this case: that management's claims of poor performance were artificial." Genuine issues of material fact also existed with respect to her retaliation claims, including whether the supervisor who fired her had knowledge of her EEO complaint.

- *Hoang v. Microsemi Corp.*, No. 22-20004, 2023 WL 2346244 (5th Cir. Mar. 3, 2023) – After working for his employer for 27 years with no history of discipline, the plaintiff, a systems development manager, was placed under a new supervisor with whom he developed a tension-filled relationship. He alleged that during his time working for that supervisor, he was treated less favorably than his younger fellow managers; the supervisor then decided to reduce the number of managers in the group by one, and after setting up reduction-in-force procedures, he decided to terminate Hoang's employment. The Fifth Circuit reversed the district court's grant of summary judgment for employer, because a reasonable factfinder could conclude that the subjective criteria made up by the supervisor determining which employees to lay off as part of a RIF were designed to give older employees low scores based on stereotypes that they are "inflexible"; additionally, Hoang offered an expert who testified regarding the statistics involved in the RIF, from which a reasonable factfinder could conclude that the employer laid off Hoang because of his age.

- *Duncan v. Sam's Club*, No. 22-3210, 2022 WL 17489104 (6th Cir. Dec. 7, 2022) – A 62-year-old store manager was fired by his supervisor based on his handling of a racist

incident involving an employee and customer at his store. The manager alleged an ADEA violation under a cat's paw theory of discrimination, claiming that his former supervisor, who had allegedly exhibited age-based animus toward him, influenced the decision to terminate him. Duncan testified about comments previously made by the former supervisor, such as that some of the older assistant managers were too set in their ways and not tech-savvy enough. The court examined the former supervisor's past statements and concluded that they were too vague and ambiguous, and too remote in time, to establish that she acted out of age-based animus when she participated in the decision to terminate the plaintiff. The court therefore affirmed summary judgment in favor of the employer on the ADEA claim.

- *Merlo v. McDonough*, No. 22-55503, 2023 WL 4364409 (9th Cir. July 6, 2023) – The Ninth Circuit reversed the district court's grant of summary judgment for the employer on the plaintiff's ADEA claim because there was direct evidence of age discrimination – specifically, evidence in the record that that the plaintiff's supervisor told him he was getting older and needed to retire to make room for two younger residents – and direct evidence is enough to defeat summary judgment without the need to conduct a *McDonnell Douglas* burden-shifting analysis. The court also reversed the grant of summary judgment for the employer on the plaintiff's retaliation claim, because a reasonable factfinder could find a causal link between the adverse actions he suffered and his protected conduct, including temporal proximity, and because the plaintiff put forth enough evidence that those reasons were pretextual to survive summary judgment, including his uniformly positive performance reviews, the VA's departure from standard hiring practice, and evidence that contradicted their stated reasons.

- *Waggoner v. Frito-Lay, Inc.*, No. 22-3111, 2023 WL 2967693 (10th Cir. Apr. 17, 2023) – A 40-year-old manager was denied a promotion, for which the company instead selected a 27-year-old employee. The district court granted summary judgment on his failure-to-promote claim, holding that he had not satisfied his burden to show that the company's proffered reason for selecting the younger candidate was pretextual, but the Tenth Circuit reversed. Waggoner had provided four types of evidence in support of his pretext argument: age-related marks made to him by the hiring official; evidence regarding Waggoner's performance and the interview process that called into question the company's proffered reason for his non-selection; the hiring official's reliance solely on subjective criteria; and Frito-Lay's policy and practice with respect to older employees. Viewing this evidence in its totality, the court held that Waggoner had produced sufficient evidence of pretext to survive summary judgment, with respect to all categories except the company's general practices.

- *Markley v. U.S. Bank Nat'l Ass'n*, 59 F.4th 1072 (10th Cir. 2023) – The plaintiff, a 55-year-old Vice President and Managing Director of Private Wealth Management, was fired after an investigation into alleged misconduct. He sued under the ADEA, claiming that the employer conducted a "sham" investigation and that his age was the real reason for his termination. The district court granted summary judgment for the employer and the Tenth Circuit affirmed, holding that Markley failed to carry his burden to demonstrate that the employer's proffered reason for his termination was pretextual. The court cautioned at the outset of its analysis that even if an employer fails to follow its own

policies or commits other flaws in the course of an investigation, that is not necessarily sufficient evidence of pretext, because "flaws in an investigation could be attributable to many factors, including a less than diligent investigator or a nondiscriminatory ulterior motivation an employer may have for terminating an employee. Thus, without some other indicia of pretext, a jury would be left to speculate that the investigatory flaws were attributable to a discriminatory motivation. But a jury cannot render a verdict based on speculation; thus, an employment discrimination plaintiff cannot survive summary judgment where the evidence he produces permits nothing more than a speculative basis for believing discrimination was a motivating factor." In this case, the plaintiff's evidence was insufficient to establish deficiencies in the investigation that would tend to suggest pretext.

There was also insufficient evidence to support the plaintiff's cat's paw theory – i.e., that one of his supervisors tainted the investigation by telling the investigator early on that he believed the allegations against Markely and wanted to terminate him, and that the investigator subsequently conducted a shoddy investigation and the disciplinary oversight committee merely rubber-stamped the termination recommendation. Additionally, the record evidence contradicted his argument that he did not have a reasonable opportunity to respond to the charges against him, but even if that were true, under the court's precedent that would not be considered evidence of pretext.

- *Dobbs v. Martin Marietta Materials, Inc.*, No. 21-13533, 2022 WL 4232792 (11th Cir. Sept. 14, 2022) – Martin Marietta was forced to sell a plant to a competitor, Midsouth Paving, and refused to rehire the plaintiff, who had worked at that plant, at a different location. The employee instead was forced to accept a demotion to work at Midsouth. He alleged age discrimination and retaliation for protected activity under the ADEA. The district court dismissed his discrimination claim as untimely, because he had not filed his EEOC charge within 180 days of receiving notice of his termination from Martin Marietta; he argued that he was entitled to equitable estoppel, because he did not realize at the time that the employer would not make him whole because taking the job at Midsouth would cause him to lose pension benefits, but the district court disagreed, and the Eleventh Circuit affirmed, because "the alleged discriminatory act occurred when Martin Marietta expressed its intention to terminate his employment, *not* when Dobbs realized its effects." The plaintiff also failed to show that any extraordinary circumstances prevented him from timely filing his EEOC charge. His ADEA retaliation claim failed because the decision not to rehire him was made before he first complained about age discrimination; he subsequently filed several applications for rehire, which were denied, but he had already been told that he would not be rehired at the time he was terminated, so those later denials were not separate adverse employment actions.

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 decided a significant Title VII case involving the "undue hardship" defense to allegations of religious discrimination. The Circuit Courts of Appeal decided hundreds of Title VII cases over the past year, covering a wide variety of fact patterns. Below we discuss a sample of these cases, which involve interesting legal issues or types of allegations that may arise in claims brought under the CAA.

Adverse Employment Actions

- *Rodriguez-Severino v. UTC Aerospace Sys.*, 52 F.4th 448 (1st Cir. 2022) – Among other claims, the plaintiff alleged that he was transferred to a different department, where he believed his professional growth was stymied, in retaliation for having filed an EEOC charge against his employer. Quoting the Supreme Court's landmark *Burlington Northern* case, the First Circuit emphasized that "The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)). Here, the plaintiff "failed to establish the requisite material harm needed for an adverse employment action. … Rodríguez-Severino did not establish any material harm or tangible consequences from Cariño's alleged treatment of him or his transfer to OPEX. Indeed, his transfer to OPEX led to a new supervisor, as well as the ability to work the first rather than the third shift. Rodríguez-Severino claims, without tangible proof, that his transfer to OPEX affected his ability to progress as an EH&S professional."

- *Buon v. Spindler*, 65 F.4th 64 (2d Cir. 2023) – The plaintiff, an African-American elementary school principal of West Indian descent, sued the school district for race and national origin discrimination, alleging that she suffered numerous instances of less favorable treatment than others outside of her protected class, was denied two additional positions for which she applied (administrative positions for the district's RISE and summer school programs), and was ultimately removed from her position as principal. The district court dismissed her claims for various reasons, one of which was that it did not consider the school district's denials of Buon's applications for additional employment to be adverse employment actions. In affirming in part and reversing in part, the Second Circuit disagreed with the district court's view of those denials. The court engaged in a lengthy discussion of what constitutes an adverse employment action, explaining that "adverse employment actions involving denial of employment opportunities to current employees are not limited to those opportunities that involve a material increase in pay." Citing its previous holding in *Beyer v. County of Nassau*, 524 F.3d 160, 164-65 (2d Cir. 2008), the court listed factors that may determine whether the denial of a transfer was an adverse employment action, including "prestige, modernity, training opportunity, job security, or some other objective indicator of desirability." The court concluded, "In short, under our precedent, the denial of a lateral transfer or an additional assignment can qualify as an adverse employment action if that transfer or additional assignment would have materially changed the terms and conditions of employment, such as by materially increasing the employee's pay or materially increasing the employee's opportunity for advancement."

- *Hamilton v. Dallas Cnty.*, — F.4th —, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023) (en banc) – The en banc Fifth Circuit reversed the panel's decision – which the

panel had essentially requested it to do – and held that a plaintiff does not need to show that she suffered an "ultimate employment decision" in order to successfully make out a prima facie claim of disparate treatment under Title VII.

The plaintiffs, female guards at the Dallas County Sheriff's Department jail, had alleged that their employer's gender-based scheduling policy violated Title VII. Under that policy, all guards were allowed two days off per week, but male guards were allowed to take off both weekend days whereas female guards were only allowed to take off one weekend day, with their other day off required to be during the week, ostensibly for safety reasons. Even though the employer did not dispute that the policy was intentionally discriminatory, and even though the courts found it plausible that denial of full weekends off made the female employees' jobs worse, the panel had been bound by prior Fifth Circuit precedent that defined "adverse employment actions" under Title VII as "ultimate employment decisions," and the scheduling policy at issue here did not fit into that category. Other Circuits have held otherwise, and the panel found their reasoning persuasive, but it was bound to follow its own Circuit's precedent. Therefore, the panel reluctantly affirmed dismissal of the plaintiffs' claims, while noting that "The strength of the allegations here—direct evidence of a workforce-wide policy denying full weekends off to women in favor of men— coupled with the persuasiveness of [decisions of the Sixth, D.C., and Fourth Circuits], make this case an ideal vehicle for the en banc court to reexamine our ultimate employment-decision requirement and harmonize our case law with our sister circuits' to achieve fidelity to the text of Title VII."

Upon rehearing, the en banc court did exactly that: "Today we hold that a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the 'terms, conditions, or privileges' of her employment. She need not also show an 'ultimate employment decision,' a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias. Here, giving men full weekends off while denying the same to women—a scheduling policy that the County admits is sex-based—states a plausible claim of discrimination under Title VII."

To reach this conclusion the court examined Title VII's anti-discrimination provision, which provides in relevant part that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, ***or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,*** because of such individual's race, color, religion, sex, or national origin" (emphasis added). The court pointed out that "Nowhere does Title VII say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions." Although the first part of the provision prohibits discrimination in ultimate decisions such as hiring, firing, and compensation, to limit the prohibition to those types of decisions ignores the second part of the provision, which prohibits discrimination with respect to "terms, conditions, or privileges of employment." As the court explained, "Our ultimate-employment-decision test ignores this key language" and to limit the prohibition to ultimate employment decisions "renders the statute's catchall provision all but superfluous. This we cannot do." Under applicable canons of statutory interpretation, because "Congress did not say that Title VII liability is limited to ultimate employment

decisions" it is inappropriate for the courts to interpret the statute that way. Indeed, the en banc court cited the Supreme Court as holding that the Title VII anti-discrimination provision "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986) (citations and internal quotation marks omitted)).

Turning to the plaintiffs' claims, the court held that the female guards had plausibly alleged sex-based discrimination in the terms, conditions, and privileges of their employment: "The days and hours that one works are quintessential 'terms or conditions' of one's employment. Indeed, these details go to the very heart of the work-for-pay arrangement. Additionally, the complaint's allegations support a plausible inference that the right to pick work shifts based on seniority is a 'privilege' of employment with the County. … Here, by switching from a seniority-based scheduling system to one based on sex, the County plausibly denied the Officers the 'privilege' of seniority because of their sex." (internal citations omitted). Even if the court were to apply a limitation on what constitutes actionable conduct – such as reading in a requirement for the alleged harm to be a "materially adverse employment action," a "tangible employment action," or an "objective material harm" as other courts have done, or imposing a "more than *de minimis*" threshold – so as not to transform Title VII into a general civility code, the plaintiffs' claims would still survive dismissal here, because "whatever standard we might apply, it is eminently clear that the Officers' allegations would satisfy it at the pleading stage." The court concluded that "To adequately plead an adverse employment action, plaintiffs need not allege discrimination with respect to an 'ultimate employment decision.' Instead, a plaintiff need only show that she was discriminated against, because of a protected characteristic, with respect to hiring, firing, compensation, or the 'terms, conditions, or privileges of employment'—just as the statute says. The Officers here have done so."

- *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023) – The plaintiff, a female construction worker, alleged that was denied the opportunity to work "at elevation" (rather than on the ground) because of her sex, and that she was also sexually harassed and ultimately fired in retaliation for complaining about it. The district court granted summary judgment for the employer, but the Fifth Circuit reversed and remanded on all of Wallace's claims.

  With regard to her sex discrimination claim, the court held that a genuine issue of fact existed as to whether the refusal to allow Wallace to work at elevation, while all of the male employees with her job title were allowed to do so, constituted an adverse employment action. Even though she was not officially demoted, "a change in or loss of job responsibilities may still amount to the equivalent of a demotion if it is so significant and material that it rises to the level of an adverse employment action. To be equivalent to a demotion, the action need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement." (internal quotations and citations omitted). "Wallace produced evidence to show that, to advance in this industry,

she needed the experience of working at elevation, which provides the most hands-on experience she could attain in this role. Working at elevation was the most beneficial and important aspect of the helper position. Working only on the ground made Wallace less 'useful' and a less-valuable 'asset' than if she worked at elevation. And it made it less likely that Wallace would be able to be promoted and advance in her career down the line. Even though Wallace's pay was no different while working on the ground, the opportunities she was afforded while working on the ground were significantly less than if she were working at elevation." The court went on to hold that Wallace had produced direct evidence that the refusal to allow her to work at elevation was because of her sex, in the form of statements by her supervisor to that effect.

The court went on to hold that Wallace had produced enough evidence for a jury to find that she suffered both *quid pro quo* harassment and a hostile work environment, and also that the employer had failed to establish a *Faragher/Ellerth* defense, because there was a material fact issue about whether it effectively implemented its anti-harassment policy. Finally, the district court had held that Wallace had only raised "general gripes" that did not constitute protected activity for purposes of a retaliation claim, but the Fifth Circuit held that Wallace had in fact produced evidence that she engaged in protected activity – i.e., complaining to her supervisors about not being afforded the opportunity to work at elevation based on her sex, and complaining about the unwanted sexual advances of her coworkers, such as sending her obscene pictures, making sexual remarks, and massaging her.

- *Rahman v. Exxon Mobil Corp.*, 56 F.4th 1041 (5th Cir. 2023) – A Black trainee at a production plant alleged that he was provided inadequate training because of his race, resulting in his failure to pass the final exam of his training program, after which he was terminated. The district court granted summary judgment in favor of the employer, and the Fifth Circuit affirmed, but on different grounds. The Fifth Circuit explained that inadequate training, even though it is not an "ultimate employment decision," may satisfy *McDonnell Douglas* if it is significant and material enough to rise to the level of an adverse employment action. Specifically, the court held that "an inadequate training theory *can* satisfy the adverse action prong of *McDonnell Douglas* if the training is directly tied to the worker's job duties, compensation, or benefits." (emphasis in original). In this case, adequate training was clearly tied to the plaintiff's job, because passing the final test of the training program was a prerequisite for continued employment. However, his race discrimination claim still failed, because the record evidence showed that Exxon had provided him with four months of extensive training, and that a White fellow trainee had received the same training. The court explained that "providing people with a similar *opportunity* to *access* a training program cannot be discrimination. So, intentionally 'giv[ing] one race X amount of training and another race only half that'—and other instances of dissimilar or unequal training—remains actionable. But, because we cannot say Rahman wasn't given a similar opportunity to train or that Exxon never gave him a chance, we cannot hold that his inadequate training claim passes muster." (emphasis in original).

- *Terry v. Fed. Bureau of Prisons*, No. 23-50130, 2023 WL 4196865 (5th Cir. June 27, 2023) – The plaintiff alleged that he was subjected to race discrimination when he was

denied several transfers for which he applied within the Bureau of Prisons. The court explained that there are certain circumstances under which the denial of a lateral transfer could be considered an adverse employment action for Title VII purposes even if the salary of the sought-after position is not higher. The factors to consider in determining whether the sought-after position is "objectively better" include whether it "entails an increase in compensation or other tangible benefits; provides greater responsibility or better job duties; provides greater opportunities for career advancement; requires greater skill, education, or experience; is obtained through a complex competitive selection process; or is otherwise objectively more prestigious." (internal citation omitted). Because those criteria were not satisfied in this case, summary judgment for the employer was upheld.

- *Naes v. City of St. Louis, Mo.*, No. 22-2021, 2023 WL 3991638 (8th Cir. June 14, 2023) – A heterosexual police officer alleged that he had been transferred to a less desirable job and replaced by a gay officer, in violation of Title VII's prohibition on sexual orientation discrimination. Bound by prior panel precedent in *Muldrow v. City of St. Louis, Mo.*, 30 F.4th 680 (8th Cir. 2022), the court held that because there had been no change in his salary, rank, or potential for promotion, Naes had not suffered an adverse employment action and therefore could not establish a violation of Title VII.

  Notably, in a concurrence, Judge David Stras – who had been on the panel in *Muldrow* and joined in that opinion – admitted that, although bound to follow *Muldrow*, "I now have my doubts about whether [*Muldrow*] was correctly decided." Pointing out that nothing in the text of Title VII requires an "adverse employment action" or a change that is "material" in nature, Stras wrote, "[T]ransferring an employee from a plum assignment with regular hours to a job with worse hours and less-important responsibilities alters the 'terms, conditions, or privileges of employment,' whether or not it involves a change in rank or salary."

  The Supreme Court has granted certiorari in *Muldrow* and will hear the case during the upcoming term. (See the Supreme Court preview section of this outline.) If a majority of Justices share Judge Stras's reservations, the decision in that case could significantly alter the courts' analysis of what constitutes a violation of Title VII moving forward.

Similarly Situated Comparators

- *Diaz v. City of Somerville*, 59 F.4th 24 (1st Cir. 2023) – A Hispanic police officer alleged that he was discharged because of his race. The evidence showed that he had engaged in a violent altercation with a civilian while he was off-duty, and subsequently lied about it during an internal investigation. In support of his discrimination claim he offered would-be comparators who were outside of his protected class and had supposedly been treated more leniently for similar offenses; however, each of those comparators had either committed violent assaults *or* had lied during investigations, but not both. The court affirmed summary judgment in favor of the City, holding that the comparators were not similarly situated to Diaz. The court explained that "The egregiousness of Diaz's conduct

and the City's stated reasons for his dismissal hinged on the combined force of both his assaultive conduct and his subsequent prevarication. In other words, it was the combustible mixture of unrestrained aggression and unmitigated mendacity that separated this case from Diaz's proffered comparators. Removing an important ingredient of that mixture (say, untruthfulness about what happened or the presence of violence) renders any proposed comparison inappropriate."

- *Dunlevy v. Langfelder*, 52 F.4th 349 (7th Cir. 2022) – A utility water meter reader, who is White, alleged that he was treated less favorably than a Black coworker, when he was fired for inaccurately reporting homeowners' water meters. The district court granted summary judgment for the employer on the basis that the two employees were not similarly situated. The Seventh Circuit reversed, holding that the district court's analysis was too narrow. The two men were hired during the same month, received the same pay, had to go through the same 12-month probationary period, reported to the same supervisor, and had the same supervisory structure, with 5 levels of supervision between themselves and the mayor. Both were accused of misconduct and investigated, and both were recommended for termination; the mayor fired the White employee but retained the Black employee and extended his probationary period by 6 months

  The misconduct of which the two employees were accused was different: Dunlevy, the White employee, was accused of "curbing meters" – i.e., inaccurately recording them – at 7 different homes, whereas his Black coworker, Murray, arrived late to work, left early, walked off the job for hours at a time, and was found to have lied about his criminal history on his job application. However, the court found that this did not prevent the two from being "similarly situated" for Title VII purposes. The court explained that even if the employees did not commit the same offense, "If a comparator engaged in equivalent or more egregious conduct than the plaintiff but received a lighter punishment, or none at all, that satisfies the inquiry." It went on to summarize the relative seriousness of the two offenses in this case: "Here, the utility's core business is providing utilities to the residents of Springfield, and the core function of a meter reader is to accurately read and report customers' usage. … [A]n employee who simply fails to show up to work undermines the utility's core mission just as much as an employee who shows up but periodically does a poor job."

- *Drerup v. NetJets Aviation Inc.*, No. 22-3475, 2023 WL 4204551 (6th Cir. June 27, 2023) – The plaintiff, a female pilot and part-time professor of aviation, alleged that she was treated less favorably than similarly situated male pilots when NetJets terminated her employment. She had been hired to fly a specific aircraft, the Phenom, but at 5'2" she had difficulty pushing the plane's rudder pedal to the floor, which was part of a critical "engine out maneuver" designed to prevent the plane from rolling and crashing if one of its engines stops working. This resulted in unsatisfactory evaluations of her flight simulator sessions and a failed "check ride," and at the end of her one-year probationary period, having failed to attain the necessary qualification to fly the Phenom, Drerup was fired. Before she was hired by NetJets, Drerup was already certified to fly two other aircrafts that were part of NetJets' fleet, for which her height was not an issue; she requested to switch to one of those aircraft, but those requests were denied. However, three male pilots who had been assigned to the Phenom at the same time as Drerup were

transferred to other aircraft because they were too *tall* to fly the Phenom.

The district court granted summary judgment for NetJets, but the Sixth Circuit reversed, holding that the lower court had adopted too narrow a view of what constitutes a "similarly situated comparator." The district court focused on the fact that the male pilots had been reassigned early in the probationary period after failing the "fit test" because of their tall stature, whereas Drerup had asked for reassignment after struggling in the flight simulations due to her short stature; however, the Sixth Circuit held that Drerup did not need to demonstrate an exact correlation with the comparators, only that she was similar in all relevant aspects, and that she had produced enough evidence to satisfy that burden. "The three male pilots were similar to Drerup in all relevant aspects. They were: (1) hired to fly the Phenom; (2) in Drerup's hiring class; (3) subject to the same probation period; (4) subject to the same 'fit test'; and, most importantly, (5) precluded from flying the Phenom because of their stature. NetJets provided a 'fit test' and reassignment for the three men so they could comfortably fly, but neglected to provide the same accommodation for Drerup, even though Drerup was type-rated for the same plane to which the three male pilots were reassigned. Thus, although NetJets accommodated *men* whose height made flying the Phenom unsafe and impractical by reassigning them to a more appropriate plane, they did not provide the same accommodation to Drerup."

Importantly, the Sixth Circuit also held that the district court had "missed the point" when it focused on evidence that other 5'2" female pilots were able to fly the Phenom. For one thing, NetJets had not provided evidence regarding those pilots' body measurements, so that, for example, there was no way to know whether their legs were longer than Drerup's, which would allow them to press the rudder pedal to the floor while Drerup could not. Moreover, "Title VII does not require that *every member* of the suspect class face discrimination for a plaintiff to have a viable claim. The fact that two women with the same height as Drerup may have been able to fly the Phenom is not enough to invalidate her claims that *she* was treated differently based on her sex."

Religious Discrimination

- *Groff v. DeJoy*, 600 U.S. 447 (2023) – Gerald Groff worked as a Rural Carrier Associate in a small U.S. Postal Service office beginning in 2012. He took the job in part because it did not require him to work on Sundays, which is prohibited by his religious beliefs as an Evangelical Christian. Subsequently, however, the USPS signed an agreement with Amazon to begin deliveries of Amazon packages on Sundays. Groff refused to work Sunday shifts, and his work had to be redistributed to his coworkers or managed by the regional hub. Groff was regularly disciplined for failing to work on Sundays, until he resigned in 2019. He sued under Title VII, claiming that USPS could have accommodated his religious beliefs without undue hardship. The district court granted summary judgment to USPS, and the Sixth Circuit affirmed, holding that the impact to Groff's coworkers constituted more than a *de minimis* burden on the employer.

  The Supreme Court evaluated the undue hardship standard that had been applied in Title

VII religious discrimination cases since the Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The precedent in *Hardison* was understood to define undue hardship as "more than a *de minimis* cost." In *Groff* the Court explained that this is not a proper interpretation of its *Hardison* decision, and clarified that to meet the undue hardship standard, an employer must show that the burden of accommodating a religious belief "is substantial in the overall context of an employer's business." The court noted that this analysis is a "fact-specific inquiry." The Court did not rule out increased burdens on coworkers as an element of this burden, but did clarify that (1) the employer must take the extra step to link the increased burdens to coworkers to the context of the business, and (2) certain impacts on coworkers, such as the impact to a coworker with bias or hostility towards another's religion, is not part of undue hardship.

The Court also emphasized the importance of exploring a range of possible reasonable accommodations: "Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. This distinction matters. Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary." (internal citations omitted).

The Court vacated the Third Circuit's decision and remanded the case to be analyzed under the clarified standard for undue hardship.

- *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. 2023), *vacated on denial of reh'g,* No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023) – In a case decided prior to the Supreme Court's decision in *Groff v. DeJoy*, the plaintiff, a public high school music teacher, objected on religious grounds to following the school's policy of addressing transgender students by the first names registered in the school's official database. The school initially accommodated him by allowing him to call all students by their last names, but withdrew the accommodation after determining that this practice was harming the students and negatively impacting the learning environment more broadly. After being given a choice between complying with the policy or resigning, Kluge resigned, and then sued the school district for religious discrimination and retaliation under Title VII, among other claims.

  The district court granted summary judgment in favor of the school district, and the Seventh Circuit affirmed. While accepting at the summary judgment stage that Kluge had a sincerely held religious belief that calling transgender students by their chosen first names was encouraging sin, and that his forced resignation was an adverse action, the court found that the school district could not grant his requested accommodation without incurring an undue hardship. Specifically, the court found that the last-names-only practice made transgender students feel "disrespected, targeted, and dehumanized," and made other students feel uncomfortable, all of which disrupted the learning environment and was unduly burdensome on the school's "mission to educate all of its students, and its desire to treat all students with respect and affirmation for their identity in the service of that mission." Moreover, because Kluge was the only music and orchestra teacher in

the school, there was no other available accommodation, such as transferring the transgender students to another teacher for music or orchestra classes. The court concluded that, "Because no reasonable jury could conclude that a practice that emotionally harms students and disrupts the learning environment is only a slight burden to a school, and because no other accommodations were available… Brownsburg has proved undue hardship as a matter of law," and therefore withdrawing the accommodation did not violate Title VII.

Subsequently, in light of the Supreme Court's decision in *Groff v. DeJoy*, the Seventh Circuit denied Kluge's petition for a rehearing en banc and instead remanded to the district court for further proceedings consistent with the Supreme Court's holding. That case is currently pending before the U.S. District Court for the Southern District of Indiana.

- *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023), *petition for cert. filed*, No. 23-152 (U.S. Aug. 15, 2023) – A group of healthcare workers challenged Maine's COVID-19 vaccination mandate on the grounds that it violated their sincerely held religious beliefs, in violation of Title VII and their First Amendment rights. The employees had all been fired because they refused to comply with the mandate despite their employers denying their requests for religious exemptions. Although the First Circuit held that the plaintiffs' First Amendment claims could proceed, as discussed in the First Amendment section below, it affirmed the lower court's dismissal of their Title VII religious discrimination claims. Based on the plaintiffs' complaint, it was clear that the only accommodation they would have accepted was an exemption from the vaccination requirement; the employers argued that this would have constituted an undue hardship, and the court agreed. In a press release announcing the mandate, the Governor's office had warned that any health care employer that failed to enforce the mandate would be subject to having its license revoked. The court held that granting a religious exemption that was not contained in the state's mandate would therefore have exposed the defendant employers to "a substantial risk of license suspension, as well as monetary penalties," which "would have constituted an 'undue hardship on the conduct of the [Providers'] business' under any plausible interpretation of that phrase."

  This case was decided before the Supreme Court issued its decision in *Groff v. DeJoy* (see above), but the First Circuit preemptively explained that regardless of whatever formulation of the "undue hardship" defense the Supreme Court might reach in that case, "we hold that the plaintiffs' requested accommodation would have constituted an undue hardship under any plausible interpretation of the statutory text." The First Circuit's decision on the plaintiffs' Title VII claims has been appealed to the Supreme Court, and the petition for certiorari is pending.

- *Hittle v. City of Stockton, Cal.*, 76 F.4th 877 (9th Cir. 2023) – Hittle, the city's Fire Chief, was removed after an independent investigation sustained numerous accusations of misconduct that had been made against him. He sued, alleging that he was fired for attending a religious leadership event in violation of Title VII's prohibition on religious discrimination. Hittle's supervisor, the Deputy City Manager, had received a complaint that Hittle was giving favorable treatment to members of an alleged "Christian coalition"

within the Fire Department; however, she became concerned about Hittle's performance as Fire Chief in ways unrelated to religion, including ineffective leadership and poor judgment, potential financial conflicts of interest, failure to report time off, and policy violations, among others. Those concerns led to his termination. The court first rejected Hittle's argument that he had produced direct evidence of discrimination, because although the City Manager and Deputy City Manager did mention the allegations others had made about Hittle's religious favoritism, they "did not use derogatory terms to express their own views, or focus on the religious aspect of Hittle's misconduct to express their own animus, but rather referenced other legitimate constitutional and business concerns[.]" Nor did the investigator's finding of misconduct based on Hittle's use of city resources to attend a church-sponsored leadership summit constitute direct evidence of religious discrimination. Finally, Hittle was unable to show that the investigator's report was pretext for religious discrimination.

Sex Discrimination/Sexual Harassment

- *Willford v. United Airlines, Inc.*, No. 21-2483, 2023 WL 309787 (2d Cir. Jan. 19, 2023) – A female flight attendant alleged that her termination was the result of sex discrimination. She was initially denied a transfer, which she had requested because she was undergoing IVF, and in denying the transfer her supervisor allegedly told her that if she "wanted to take time off to be a mother, then this wasn't the job for [her] and [she] should quit." That supervisor, however, was not involved in the later decision to terminate her, which resulted from an independent investigation conducted by another individual into the plaintiff's misuse of medical leave. The plaintiff failed to point to any link between her supervisor's alleged bias and the ultimate decision to fire her; on the contrary, the evidence showed that the investigation was independent, thorough, and unbiased, which severed any link between the supervisor's allegedly biased investigation and the ultimate decision to fire the plaintiff.

- *O'Brien v. Middle East Forum*, 57 F.4th 110 (3d Cir. 2023) – The *Faragher/Ellerth* affirmative defense to sexual harassment allegations is not available where the harasser was the "proxy" of the company, and the district court erred in failing to give the jury that instruction. The Third Circuit explained that "In cases where no tangible employment action has been taken, the *Faragher/Ellerth* defense allows an employer to escape vicarious liability if: (1) the employer exercised reasonable care to prevent and correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities provided." But that defense is unavailable if the harasser is in a position of significant authority that essentially allows him to speak for the company, in which case liability is automatically imputed to the employer. However, in this particular case the plaintiff failed to show that she was subjected to sexual harassment, so the error was deemed harmless even though the alleged harasser was found to be a proxy for the company, given his role as Chief Operating Officer, Director, and Secretary of the Board.

- *Paugh v. Lockheed Martin Corp.*, No. 21-50472, 2023 WL 417648 (5th Cir. Jan. 26, 2023) – After the employer transitioned to a new contract, the female plaintiff's eight

male coworkers were hired into new positions, but the plaintiff was not. The plaintiff alleged three counts of sex discrimination based on the company's failure to hire her under the new contract; the district court granted summary judgment on all three claims, but the Fifth Circuit affirmed summary judgment as to only two of them. The court held that genuine issues of material facts existed as to whether the hiring process was discriminatory – specifically, whether the plaintiff's male coworkers had been told which positions would be eliminated under the new contract, whereas the plaintiff had not been so informed, resulting in her applying only for positions that were ultimately cancelled.

- *Trahanas v. Nw. Univ.*, 64 F.4th 842 (7th Cir. 2023) – A lab technician alleged, among other things, that she was subjected to a hostile work environment based on the conduct of her supervisor as well as some of her coworkers. The Seventh Circuit affirmed summary judgment for the employer. The court analyzed the claims against the supervisor and coworkers differently, because different standards apply with regard to employer liability. In the case of supervisor harassment, the employer is strictly liable if the hostile work environment culminates in a tangible employment action; if it does not, then the employer may assert the *Faragher/Ellerth* defense – i.e., that (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. The court found that no tangible employment action resulted from the supervisor's alleged conduct, and that despite having received the employee handbook that detailed the procedures for reporting sexual harassment, Trahanas did not report her supervisor's comments to HR or any other administrative employee, so the employer was not liable for the supervisor's conduct. As for the alleged harassment by her coworkers, not only were the alleged comments unrelated to Trahanas's membership in a protected class under Title VII, but the university had no knowledge of the alleged harassment. "Northwestern took reasonable steps to discover employee acts of harassment by implementing an anti-harassment policy and establishing complaint mechanisms. As with [her supervisor], Trahanas admitted in her deposition that she did not report her coworkers' comments or conduct to Northwestern. Without knowledge of what Trahanas's coworkers were doing, Northwestern cannot be held liable for failing to rectify the problem."

- *Giese v. City of Kankakee*, 71 F.4th 582 (7th Cir. 2023) – After being attacked by a male coworker, resulting in physical and mental harm, a female firefighter alleged retaliation under Title VII, claiming that the city retaliated against her for filing a workers' compensation claim, complaining to human resources, and filing an EEOC complaint. Joining several of its sister circuits, the Seventh Circuit held that filing a workers' compensation claim is not, by itself, protected activity under Title VII. The court also held that Giese's complaint to human resources did not indicate that she felt she was being discriminated against on the basis of her sex, and therefore it was not protected activity under Title VII. Finally, the court held that the employer's alleged actions following Giese's EEOC complaint were not adverse employment actions for Title VII retaliation purposes – i.e., they were not the types of actions that would dissuade a reasonable worker from making or supporting a charge of discrimination.

- *Bell v. Baptist Health*, 60 F.4th 1198 (8th Cir. 2023) – A hospital worker's claims for sex discrimination and retaliation failed because she showed neither an adverse employment action nor any conduct that would have dissuaded a reasonable employee from reporting discrimination. The employer had offered to transfer her to a different location or a different department to get away from the doctor she alleged was harassing and discriminating against her, and she failed to show that such a transfer would produce a material employment disadvantage. Her hostile work environment claim also failed, because she could not demonstrate that the allegedly hostile treatment to which she was subjected by one of the doctors was because of her sex.

- *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974 (9th Cir. 2023) – Eight former employees of S&S Activewear – seven women and one man – sued their former employer under Title VII, alleging that the constant and public playing of music with sexually derogatory and violent lyrics throughout the workplace created a hostile work environment. Not only was the music blasted through commercial-grade speakers throughout the warehouse, but sometimes the speakers would be placed on forklifts and driven around the warehouse while the music played, and the music encouraged some of the male employees to pantomime sexually graphic gestures, yell obscenities, make sexually explicit remarks, and openly share pornographic videos. Despite numerous complaints, management allowed this conduct to continue daily for almost two years, until the employees sued. The district court dismissed the complaint, holding that because the music offended both male and female employees, it was not discriminatory and therefore could not violate Title VII. The Ninth Circuit disagreed and reversed, rejecting the employer's "equal opportunity harasser" argument and instructing the district court to reconsider the sufficiency of the pleadings "in light of two key principles: First, harassment, whether aural or visual, need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim. Second, the challenged conduct's offensiveness to multiple genders is not a certain bar to stating a Title VII claim."

  The court made clear that a plaintiff may establish a hostile work environment if the offensive conduct is sufficiently severe or pervasive to alter the conditions of employment, whether or not the conduct is directed specifically at the plaintiff. It warned that "a boorish and generally hostile workplace does not shield against Title VII liability" and quoted the Supreme Court's decision in *Bostock v. Clayton County*, in which it cautioned that it is no defense "for an employer to say it discriminates against both men and women because of sex. … Instead of avoiding Title VII exposure, this employer doubles it." 140 S. Ct. 1731, 1741 (2020). With regard to the allegations in this case, the court held that sexually derogatory music that is audible throughout the workplace is "one form of harassment that can pollute a workplace and give rise to a Title VII claim." The court went on to explain that "Because S&S's management was unreceptive to complaints, [the plaintiffs were] forced to tolerate the music and the toxic environment as a condition of continued employment. … Whether sung, shouted, or whispered, blasted over speakers or relayed face-to-face, sexist epithets can offend and may transform a workplace into a hostile environment that violates Title VII." The court added that, generally speaking, "a male employee may bring a hostile work environment claim alongside female colleagues. … An employer cannot find a safe haven by embracing intolerable, harassing conduct that pervades the workplace. Crediting such an approach

would leave a gaping hole in Title VII's coverage." Therefore, the inclusion of a male plaintiff in this case and the allegation that both male and female employees were offended by the music were not obstacles to the lawsuit.

- *Frank v. Heartland Rehab. Hosp. LLC*, No. 22-3031, 2023 WL 4444655 (10th Cir. July 11, 2023) – An executive assistant at a hospital alleged that she was sexually harassed by a coworker. Although the hospital terminated the harasser's employment the day after receiving Frank's complaint, she argued that the employer should nonetheless be held liable, because it was aware of prior complaints by other women against the same individual but failed to monitor his behavior. The district court granted summary judgment for the hospital, finding that Frank had failed to show that the alleged harassment was severe or pervasive, or that the hospital had notice of it and failed to address it. The Tenth Circuit affirmed; assuming without deciding that the harassment was pervasive, it held that Frank had nevertheless failed to show that the hospital had actual or constructive notice of the harassment prior to Frank reporting it. The first complaint of sexual harassment had been made over a year earlier and had been addressed at the time, so it was not close enough in time to put the hospital on notice that sexual harassment by that individual was an ongoing problem. The more recent complaints involved conduct that was rude, insensitive, and inappropriate, but not sexual in nature and therefore not sufficiently related to the conduct of which Frank complained. "In short, even viewing these events collectively and in a light most favorable to Frank, no reasonable jury could find Heartland should have known [the coworker] posed a risk of sexually harassing her." Frank argued that because an EEOC complaint had been filed against the coworker, the employer had a duty to check in with female employees to make sure he was not harassing them, even after they had addressed the EEOC complaint with him, but the court disagreed: "We have never imposed an affirmative duty on employers to monitor their employees to make sure they are behaving appropriately unless the employer knows or should have known that the employee poses a risk to others."

Race/National Origin Discrimination

- *Hernandez v. Off. of Comm'r of Baseball*, No. 22-343, 2023 WL 5217876 (2d Cir. Aug. 15, 2023) – Angel Hernandez, an umpire for Major League Baseball, alleged that he was passed over multiple times for a promotion to crew chief because of his race. He alleged both disparate impact and disparate treatment. In support of his disparate impact theory, he produced evidence that between 2011 (when Joe Torre became MLB's Executive Vice President of Baseball Operations) and 2017 (when Hernandez filed his lawsuit) there were 12 openings for the position of crew chief, and all 12 positions went to White umpires. However, the court held that this evidence was not enough to show disparate impact; Hernandez would have had to produce evidence that a specific employment practice *caused* the racial disparity, and he failed to do so. He claimed that Torre used subjective criteria such as "leadership skills" and "situation management" in making promotion decisions, but did not show how those subjective criteria led to a racial imbalance. As for his disparate treatment claim, Hernandez failed to show that MLB's

legitime reasons for not promoting him – including blown calls and improper autograph seeking from players – were pretextual.

- *EEOC v. Ryan's Pointe Houston, L.L.C.*, No. 19-20656, 2022 WL 4494148 (5th Cir. Sept. 27, 2022) – In a case alleging national origin and sex discrimination based on the termination of a pregnant Mexican-American property manager, Magali Villalobos, the Fifth Circuit reversed the district court's grant of summary judgment for the employer, holding that the EEOC had produced sufficient evidence to survive summary judgment. With respect to the national origin claim, the EEOC provided direct evidence of discriminatory motive: The property owners had expressed dismay at the fact that the office staff were "all Mexicans," expressed a desire to "change the demographic[s]" of the staff, made their preference for a "white" staff known on multiple occasions, and told the supervisor to hire a "higher class of individual with the look of Ken and Barbie" to replace Villalobos. As for the sex discrimination claim, the EEOC established a prima facie case, demonstrated genuine issues of material fact as to whether the employer's rationale was pretextual, and presented evidence indicating that the real reason for the termination was Villalobos's pregnancy, which was enough to get past the summary judgment stage.

- *Levine v. DeJoy*, 64 F.4th 789 (6th Cir. 2023) – An African-American postal worker alleged that USPS failed to promote her to a supervisory customer service position because of her race. The district court granted summary judgment for the employer, but the Sixth Circuit reversed, holding that although the employer had provided a legitimate non-discriminatory reason for the decision to hire a White candidate instead of Levine, she had produced enough evidence to create a genuine issue of material fact as to whether that reason was pretextual. Specifically, the USPS argued that the selectee had more relevant supervisory experience than Levine and that she interviewed better, but Levine put forth several pieces of evidence that she was a clearly superior candidate, including her higher level of education, seven awards from USPS compared to the selectee's none, a 100% "mystery shopper" score while she was a lead clerk in a USPS retail unit, and the fact that she was asked to train the selectee after the decision was made, among others. The district court erred when it failed to afford any weight to that evidence; contrary to the district court's view, much of Levine's evidence was empirically verifiable, not just her own subjective opinion about her own qualifications. The court held that Levine carried her burden to produce enough evidence to call into question the honesty of USPS's explanation for its decision, and therefore summary judgment was inappropriate.

- *Bragg v. Munster Med. Rsch. Found. Inc.*, 58 F.4th 265 (7th Cir. 2023) – After completing a training program, a newly-licensed nurse was denied a full-time position at the hospital center, and was transferred to a different facility with lower pay. She claimed that this transfer was racially discriminatory and retaliatory. The district court granted summary judgment to the employer, and the Seventh Circuit affirmed, holding that the nurse failed to show that the hospital's proffered reason for the job denial and transfer – i.e., deficiencies in her performance – were pretext for discrimination or retaliation. During the 90-day program, the nurse alleged that the three experienced RNs who evaluated her all engaged in racially insensitive or discriminatory behavior, such as race-matching patients, referencing lynching, mentioning Black patients' skin color, and

playing different genres of music depending on the race of those present at the nurses' station. She also alleged that she complained about the racially derogatory behavior she witnessed, and that the actions taken against her were in retaliation for those complaints. The plaintiff failed to support her argument that she was not informed about her performance-related issues, as the record contained plenty of evidence to the contrary, and she produced no evidence that the evaluators were lying about her performance during the training program. She also failed to produce a similarly-situated comparator who was treated more favorably, and her cat's paw theory of liability was not supported by the record evidence. Finally, her retaliation claim failed because there was a break in the causal chain: after she complained about the first evaluator's conduct, she was assigned to other evaluators, and there was no evidence that the first evaluator's low scores were fatal to her job prospects.

- *Crain v. McDonough*, 63 F.4th 585 (7th Cir. 2023) – A Black female VA employee alleged several violations of Title VII, and ultimately appealed the district court's grant of summary judgment for her employer on two counts: race-based pay disparity and retaliatory removal from her position as Chief of EMS. She alleged that her position was kept at the GS-12 level while other service chiefs who were White and male were elevated to GS-13 or GS-14, but the court held that those White males were not appropriate comparators because they were not similarly situated to the plaintiff in all material respects. Although they each led a service at the VA Center, were on the same managerial level, and reported to VA Center executive management, the other service chiefs performed different work and were subject to a different set of standards, and as such, their pay grades were not directly comparable. As to the plaintiff's retaliation claim, although she alleged she was removed from her Chief of EMS position at the conclusion of her one-year probationary period in retaliation for her filing of an EEOC complaint, the VA produced evidence of several performance-based deficiencies that factored into its decision, and the plaintiff failed to demonstrate that any of those reasons was pretextual. She argued that the VA was wrong in its assessment of her performance, but she produced no evidence that management did not honestly believe that her performance was inadequate. The court explained that the fact that an employee disagrees with her supervisor's assessment of a situation does not establish pretext, and in this case the plaintiff had failed to identify any weaknesses, implausibilities, inconsistencies, or contradictions in the VA's stated reasons for her removal from the Chief position that would permit a reasonable person to conclude that those stated reasons were unworthy of credence.

- *Runkel v. City of Springfield*, 51 F.4th 736 (7th Cir. 2022) – The Seventh Circuit reversed and remanded the district court's grant of summary judgment for the employer on the plaintiff's race and retaliation claims under Title VII. Plaintiff, who is White, was passed over for a promotion in favor of one of her Black subordinates, and she filed an EEOC charge alleging race discrimination. The City offered multiple and incompatible explanations for why it promoted the plaintiff's colleague instead of the Plaintiff, raising a genuine issue of material fact as to pretext, and there was also enough evidence for a jury to conclude that the Plaintiff subsequently had a promised raise revoked in retaliation for filing the EEOC charge.

Beyond the facts of this particular case, the Seventh Circuit's analysis is interesting for at least two reasons. First, rather than applying a "but-for" causation standard, the court explains that the plaintiff need only show that race was a motivating factor in the decision not to promote her. Second, in cases such as this one that involve "reverse discrimination" – i.e., allegations of discrimination against a "majority employee" – the Seventh Circuit tweaks the first element of the prima facie case, requiring the plaintiff to show that an employer had "reason or inclination to discriminate invidiously" against White people, or there were "fishy" circumstances. In this case, the plaintiff made that showing by producing evidence that the Mayor wanted to fill the position with a Black employee for political or policy reasons, including a remark by the Mayor referring to his hiring of the plaintiff's subordinate as an example of how his administration was "moving toward reflecting the city's demographics."

- *Groves v. S. Bend Cmty. Sch. Corp.*, 51 F.4th 766 (7th Cir. 2022) – The White plaintiff was turned down for two athletic administration positions, which went to a Black applicant, and he alleged race discrimination in violation of Title VII. The district court granted summary judgment for the employer, and the Seventh Circuit affirmed, holding that he had failed to establish that the school district's proffered reasons were pretextual. First, the court rejected the plaintiff's argument that the school's failure to run a background check on the Black applicant – which would have revealed past felony convictions – was evidence of pretext; although an employer's failure to follow its own policies can be evidence of pretext, in this case the school provided evidence that it only ran such background checks on outside applicants, not existing employees such as the one to whom it offered the positions in question, and the plaintiff failed to produce any evidence to the contrary. Second, although the plaintiff may have been a more qualified candidate on paper, the court credited the school district's evidence that interviews were an important component of the hiring process and that the successful applicant performed better in his interviews than the plaintiff.

- *Hudson v. Lincare, Inc.*, 58 F.4th 222 (5th Cir. 2023) – A Black employee alleged a race-based hostile work environment and retaliation. The hostile work environment claim was based on allegations that the plaintiff's coworkers used racially charged language and made racially insensitive comments, including use of the n-word; the court found that "The record amply demonstrates that as soon Lincare knew about Hudson's harassment, it intervened" – incidents were reported promptly, investigations were launched immediately, and the individuals who used inappropriate language were issued formal written warnings. Because the company took prompt remedial action, the court held that it was not liable under Title VII. In support of her retaliation claim, the plaintiff contended that the two coworkers she reported for inappropriate conduct refused to work with her, that the company did not take action in response to a tip that those coworkers were conspiring to sabotage the plaintiff's work, and that the company put her on a formal action plan, the precursor to termination. The court held that none of these actions rose to the level of being materially adverse, such that a reasonable employee would be dissuaded from engaging in protected activity, and in any case the company demonstrated a legitimate non-retaliatory reason for putting the plaintiff on an action plan – namely, that she failed to meet sales targets – which the plaintiff could not rebut. Therefore

summary judgment in favor of the employer was affirmed on both the hostile work environment and retaliation claims.

- *Watson v. Sch. Bd. of Franklin Par.*, No. 22-30038, 2023 WL 2054308 (5th Cir. Feb. 16, 2023) – The plaintiff, a Black female with over 40 years of experience as an educator – including seven years as a principal in another district – as well as a Master of Education degree and ten education certifications, applied for the open position of principal at the school where she worked as an assistant principal, but was passed over in favor of a White male who had less than a decade of teaching experience and no prior experience in any administrative position, and who had received a lower score from the interview committee than the plaintiff did. The district court granted summary judgment for the school board on Watson's race discrimination claim, but the Fifth Circuit reversed and remanded, holding that although the School Board had arguably provided a legitimate non-discriminatory reason for hiring the other candidate – i.e., that because Watson was a retiree who did not live in Franklin Parish, he did not believe she would stay in the position for long – "Watson produced evidence from which a jury could find that she was clearly better qualified for the principal position and that therefore the School Board's proffered reasons for selecting [the White male candidate] over her were pretextual."

Retaliation

- *Carr v. New York City Transit Auth.*, 76 F.4th 172 (2d Cir. 2023) – An employee of the NYC Transit Authority's Capital Programs Department alleged that her rejections for two promotions were discriminatory and that she was retaliated against for complaining about the alleged discrimination. The district court granted summary judgment for the employer on both the discrimination and retaliation claims. In affirming the district court's decision, the Second Circuit gave a good explanation of the different standards for showing harm in Title VII discrimination cases as compared to Title VII retaliation cases: the harms covered by Title VII's retaliation provision are "broader" than those covered by its discrimination provision and so the two types of claims must be analyzed differently. For retaliation claims – whether based on discrete actions or a hostile work environment – a plaintiff need only show that the retaliatory conduct would "dissuade a reasonable worker from making or supporting a charge of discrimination" in order to establish that the conduct was "materially adverse." By contrast, the court explained that the anti-discrimination provision "prohibits only actions affecting certain enumerated aspects of employment" and is therefore narrower in scope. Therefore, "there are adverse actions that would suffice to make out a prima facie case for retaliation because they are 'materially adverse' but would be insufficient to make out a prima facie case for discrimination because they did not alter the terms and conditions of employment." The same concept applies when the allegation is of a retaliatory hostile work environment: the plaintiff does not need to establish that the conduct was "severe or pervasive" as she would in a discriminatory hostile work environment case, only that the conduct considered in the aggregate would dissuade a reasonable employee from engaging in protected conduct. However, the court cautioned that even the broader "materially adverse" standard for retaliation claims still does not immunize employees from trivial

harms, petty slights, or minor annoyances that all employees experience in the workplace.

Applying the law to the facts of Carr's case, the court held that her discrimination claims failed because she could not show that the reasons given by the employer for selecting other candidates were pretextual, and her retaliation claim failed because "the alleged retaliatory actions were the result of generally applicable workplace policies and Carr has not adduced evidence that these policies were applied to her and not others. … [A]bsent allegations of more direct hostile conduct, a reasonable employee would not be dissuaded from taking protected action simply because they are subject to the same policies as other employees."

- *Laurent-Workman v. Wormuth*, 54 F.4th 201 (4th Cir. 2022) – The plaintiff, a Black career civilian Army employee, raised a variety of allegations against her former employer, including race-based and retaliatory hostile work environment claims. The district court dismissed her complaint, but the Fourth Circuit reversed on several of her claims.

  With regard to her race-based hostile work environment claim, the lower court had found the alleged incidents to be too infrequent and spread out, but the Fourth Circuit disagreed, holding that the plaintiff's allegations "demonstrate a series of hateful workplace encounters that consistently targeted her racial identity. … [her] allegations describe just the sort of workplace behaviors that Title VII serves to root out—repeated invectives of an overtly racial tenor." She had endured a series of publicly humiliating comments from a coworker, some of which were accompanied by an element of physical intimidation, and her supervisor not only knew about these incidents but actually made a racist remark to her as well. These allegations constituted a plausible claim for a race-based hostile work environment over and above mere speculation.

  Next the court clarified the requirements for a plaintiff to demonstrate a retaliatory hostile work environment. It explained that in *Burlington Northern* "the Supreme Court held that the phrase 'discriminate against' in the anti-retaliation provision does not confine actionable retaliation to adverse actions that alter the terms and conditions of employment. … Comparing the linguistic differences between the anti-retaliation provision and the substantive discrimination provision, the Court concluded that the terms of the anti-retaliation provision include a wider variety of conduct within its scope." Following at least five of its sister circuits, the Fourth Circuit held that the "materially adverse" standard for Title VII retaliation claims articulated in *Burlington Northern* applies to federal employees as well as private-sector workers. It then went on to hold that to constitute a retaliatory hostile work environment, the conduct "must be so severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination. This standard retains the 'middle path' set out in *Harris [v. Forklift Systems, Inc.]* between accepting 'any conduct that is merely offensive' and requiring plaintiffs to show a 'tangible' injury, 510 U.S. at 21–22, 114 S. Ct. 367. But it also harmonizes that compromise with the goal of the anti-retaliation provision 'to provide broad protection from retaliation.' *DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015) (quoting *Burlington N.*, 548 U.S. at 67, 126 S. Ct. 2405) (internal quotation omitted)." Under that standard, the court held that "the

consistent (even if not constant) conduct Laurent-Workman alleges plausibly qualifies as materially adverse. … Although any one of these allegations does not amount to much when considered in isolation, … Together, the allegations tell a multi-act story of undermining, gaslighting, and disruption. She has adequately pled that a reasonable employee may have been dissuaded from following through with her complaints due to [her supervisor]'s conduct." Therefore, the court reversed the dismissal of her complaint and remanded.

- *Alley v. Penguin Random House*, 62 F.4th 358 (7th Cir. 2023), *reh'g & reh'g en banc denied*, 2023 WL 3045541 (7th Cir. Apr. 21, 2023) – The plaintiff, a Group Leader at a publisher's shipping warehouse, alleged that she was demoted in retaliation for reporting sexual harassment. However, the record evidence showed that she had been demoted not because she reported the harassment, but because she failed to do so in accordance with company policy. Managers were required to communicate any employee complaints (formal or informal) to HR, and were subject to discipline for failing to report suspected harassment, but Alley chose to conduct her own investigation of a coworker's sexual harassment complaint rather than forwarding it to supervisors. It was only after other employees reported the harassment to HR that Alley shared her information with the proper personnel, and when the company learned what she had done, it demoted her from Group Leader to forklift operator. The district court therefore held that the plaintiff had not engaged in protected activity, and granted summary judgment for the employer. The Seventh Circuit affirmed, explaining: "Sexual harassment is indisputably an unlawful employment practice and thus, reporting allegations is a recognized protected activity under Title VII. But Alley did not actually report harassment; she *failed* to report harassment. Failing to report is not a protected activity under Title VII. Whatever her motivation in undertaking her own investigation instead of taking the report to HR, her conduct simply is not statutorily protected activity. Thus, Alley cannot satisfy the first requirement of a retaliation claim." (internal citations omitted).

- *Xiong v. Bd. of Regents of Univ. of Wisconsin Sys.*, 62 F.4th 350 (7th Cir. 2023) – A university employee of Hmong ethnicity was terminated, and filed a complaint alleging race discrimination and retaliation. The district court granted summary judgment in favor of the university on both counts. Although it affirmed the district court's decision on the discrimination claim, the Seventh Circuit reversed and remanded with respect to the retaliation claim, holding that a reasonable jury could find that the close proximity between the employee's protected activity and the decision to terminate him – a single day – demonstrated causation. The fact that there could have been multiple bases for his termination did not matter at the summary judgment stage; it would be up to a jury to determine whether the employee's whistleblowing – i.e., raising concerns to the university that his boss and the HR department were violating Title VII in their hiring and promotion practices – was the but-for cause of his termination.

- *Burton v. Bd. of Regents of Univ. of Wis. Sys.*, No. 20-2910, 2022 WL 16948602 (7th Cir. Nov. 15, 2022) – A professor alleged that her termination was motivated by unlawful retaliation for her complaints about sexual misconduct and other purported Title VII violations by other faculty members. The court found in favor of the university, because although the conduct that led to her firing was connected to protected activity, she was

disciplined not because she raised Title VII grievances but because of the *manner* in which she expressed those grievances. She had secretly recorded faculty meetings and then posted the recordings or transcripts online, thereby disclosing private and confidential information including discussions of tenure, salary, and professor reviews; she had also refused to follow letters of direction from the dean warning her to desist from disrespectful, harassing, and intimidating behavior toward colleagues. As the court explained, "The anti-retaliation provision of Title VII prevents employers from discriminating against employees for opposing an unlawful practice. 42 U.S.C. § 2000e-3. But as the district court said, it does not 'immunize[ ] Burton from the consequences of her grossly unprofessional conduct.' Put differently, the University can lawfully discipline her for expressing a Title VII grievance in a way that egregiously violates neutral professional rules or norms."

- *Ramos v. Garland*, 77 F.4th 932 (D.C. Cir. 2023) – An FBI employee alleged that she was retaliated against after reporting discrimination to the Bureau's EEO office. The district court granted summary judgment for the FBI, but the D.C. Circuit reversed in part, holding that there was a genuine issue of material fact as to whether the rescission of a transfer offer was "materially adverse" and taken with retaliatory intent. Ramos had requested a transfer to a different unit, and through email correspondence with the Assistant Section Chief, Finnegan, she was offered and accepted a transfer. However, after Finnegan learned that Ramos had filed an EEO complaint for race discrimination, he withdrew the transfer offer, telling Ramos that he did not want to interfere with the EEO process. Relying on the *Burlington Northern* standard, which defines a materially adverse action in a retaliation claim to be one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," the court held that "there is sufficient evidence for a reasonable jury to conclude that Ramos accepted the offer and that Finnegan's rescission had retaliatory motive because it was the direct result of Ramos's formal EEO complaint. There is also sufficient evidence for a reasonable juror to conclude that Finnegan ceased searching for other transfer opportunities for Ramos because of the same. Additionally, Ramos presented evidence that the transfer to Unit 1B would have broadened her 'career opportunities[,] [ ] enhance[d her] skill sets as an agent,' and provided her with a better and more positive work environment." Therefore the D.C. Circuit held that a genuine fact issue existed, and summary judgment on that claim was inappropriate

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.

- *Fanor v. Univ. Hosp.-UMDNJ*, No. 20-3611, 2022 WL 3754524 (3d Cir. Aug. 30, 2022) – Fanor, a patient representative at University Hospital, was fired after he suffered a serious injury, but before he made a formal request for FMLA leave. The Third Circuit found that while the district court correctly determined that he could not establish a claim

that the Hospital interfered with an actual exercise of FMLA rights – insofar as he failed to formally invoke those rights between his accident and termination – it should have also determined whether he could establish a claim of interference with an attempted exercise of FMLA rights. The Third Circuit found that not only did Fanor adequately present a claim for FMLA interference, he also adduced evidence sufficient to withstand summary judgment on the Hospital's liability defense. A trier of fact could find that he provided sufficient notice of his intent to take FMLA leave: after his accident, he was admitted to the very emergency room in which he was employed; he testified that he regularly communicated with his employer about ongoing rehabilitation; and there was evidence indicating that, before the Hospital made any decision to terminate, his doctor told his supervisor that he "would likely be out of work for approximately three months." And the Hospital's decision to terminate could have deprived Fanor of the FMLA benefits he was entitled, and attempted, to take.

- *Milman v. Fieger & Fieger, P.C.*, 58 F.4th 860 (6th Cir. 2023) – Plaintiff, an attorney, was terminated immediately after making a request for unpaid leave to care for her son, who had a history of respiratory illness and was experiencing symptoms resembling COVID-19. The district court dismissed her subsequent FMLA claim. The Sixth Circuit reversed and remanded, holding, as a matter of first impression, that Plaintiff's leave request was FMLA-protected activity, even if she was not ultimately entitled to FMLA leave. It wrote, "for the Act to protect the 'exercise or attempt to exercise' FMLA rights, the procedural framework the statute established—including its first step—must fall within the scope of protected activity, without regard to ultimate entitlement." Holdings from other circuits and FMLA regulations supported this holding.

- *Hrdlicka v. Gen. Motors, LLC*, 63 F.4th 555 (6th Cir. 2023), *reh'g en banc denied*, 2023 WL 4112647 (6th Cir. June 1, 2023) – Plaintiff was employed by General Motors for over 30 years before she was terminated due to excessive absenteeism. After her termination, she was diagnosed with a brain tumor. The Sixth Circuit held that her subsequent FMLA interference claim failed because she did not provide adequate notice of her intention to take FMLA leave. Texts to her supervisor regarding reasons for her absences and tardiness referenced generalized ailments (her "head ... really hurting," dealing with "a mental thing," or simply being "sick") that did not rise to the level of "serious health conditions" within the meaning of the FMLA. Neither did her statement to HR officials that she had felt depressed since her transition to a new department provide her employer with sufficient notice of her intention to take FMLA leave: she did not make the statement in the context of requesting time off, but as a justification for her desire to transfer back to the department where she had previously worked. (This case is also summarized in the ADA section).

- *Render v. FCA US, LLC,* 53 F.4th 905 (6th Cir. 2022), *reh'g en banc denied*, 2022 WL 18431480 (6th Cir. Dec. 28, 2022) – The Sixth Circuit reversed summary judgment for the employer on Plaintiff Render's FMLA interference and retaliation claims, holding that he had provided sufficient notice for his need for intermittent FMLA leave due to flare-ups of recurrent depression, even though he had only provided that notice the first time he sought approval for the leave. The lead opinion analyzed FMLA regulations and determined that intermittent leave falls within the "foreseeable leave" provision,

reasoning that in intermittent leave cases, the qualifying reason is known in advance, even if it is unclear when the condition will flare up and require time off. In this case, Render's depression and anxiety were known, and flare-ups were foreseeable, even if Render could not predict precisely when he would need to take FMLA leave days. Render was therefore required to comply with the foreseeable leave regulation and did not need to give formal notice each and every time he called in to use his FMLA leave (only when he first sought approval for intermittent leave). Even if the notice requirement had applied to his subsequent calls, Render's reference to "flare-ups" would be sufficient because his FMLA medical documentation repeatedly referenced his flare-ups of depression and anxiety as the basis for his FMLA request. Referencing symptoms and language identical to those found in his FMLA certification forms was sufficient to meet any notice burden under FMLA regulations.

A concurring opinion determined that intermittent leave, at least with respect to the flare-ups, was properly categorized as unforeseeable leave. Analogizing Render to an employee with chronic migraines, the concurrence wrote, "Render's mental-health issues meant that he was likely to miss at least several days of work a month … When these absences would occur, however, was unpredictable. That makes the leave unforeseeable." However, the concurrence reached the same conclusion that a reasonable jury could find that Render's communications regarding his absences amounted to sufficient notice under the unforeseeable leave provision.

- *Parker v. United Airlines, Inc.,* 49 F.4th 1331 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1087 (2023) – Parker, who worked booking flight reservations over the phone for United, took FMLA leave in connection with a vision disorder and to care for her father who had cancer. Five months after approving Parker's FMLA leave, her supervisor recommended firing her for engaging in "call avoidance." Pursuant to United's policies, a manager conducted a meeting with Parker, her supervisor, and a union representative, all of whom presented arguments and evidence. The manager agreed with the supervisor's recommendation of firing, as did the senior manager who decided Parker's appeal. In affirming summary judgment for United on Parker's FMLA retaliation claim, The Tenth Circuit found that United broke the causal chain between the supervisor's retaliatory motive (assumed for the sake of argument) and the firing by directing other managers to independently investigate and decide whether to adopt the supervisor's recommendation. Parker relied on a cat's paw theory, but, as the court noted, this theory does not apply when independent decisionmakers conduct their own investigations without relying on biased subordinates. Furthermore, United's appellate procedure would have broken the causal chain even if the first manager's decision hadn't.

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.

- *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39 (2023) – Hewitt was an oil rig worker paid on a daily-rate basis (a set amount for each day he worked regardless of the number of hours worked) with no overtime compensation. He earned over $200,000 annually. His employer asserted he was exempt from the FLSA because he qualified as a "bona fide executive" who received a "salary." In a 6-3 decision authored by Justice Kagan (joined by Chief Justice Roberts and Justices Thomas, Sotomayor, Barrett, and Jackson), the Supreme Court affirmed the Fifth Circuit's judgment for Hewitt. It considered "whether a high-earning employee is compensated on a 'salary basis' when his paycheck is based solely on a daily rate—so that he receives a certain amount if he works one day in a week, twice as much for two days, three times as much for three, and so on[,]" and held that the regulation setting forth the salary-basis test requiring preset weekly compensation for FLSA overtime exemption for bona fide executives applies solely to employees paid by the week or longer, and is not met when an employer pays an employee by the day. Therefore, Hewitt was entitled to overtime pay.

- *Perry v. City of New York*, 78 F.4th 502 (2d Cir. 2023) – 2,519 EMTs and paramedics brought a collective action against the city for unpaid overtime in violation of the FLSA. They alleged that the city required them to perform work tasks before and after their shifts, but only compensated them for that time if they requested overtime pay. A jury agreed, finding the city willfully violated FLSA, and awarding a multi-million-dollar verdict for the plaintiffs. The city appealed, arguing that since the plaintiffs had the opportunity to report overtime work, but did not do so, the city did not know that any plaintiff was being short-changed. The Second Circuit disagreed: "an employer must pay for all work it knows about or requires, even if the employee does not specifically request compensation for it. Whether an employee reports overtime work will often be relevant to an employer's knowledge of the work—but allowing, or even requiring, an employee to report overtime work does not absolve employers of the obligation to compensate for work they suffer or permit." EMTs had to perform a number of tasks before setting out with an ambulance, such as preparing and inspecting their equipment and vehicle, and had to do similar tasks at the end of a shift. Since evidence supported the jury's findings that the city had a policy or practice of requiring plaintiffs to perform these duties uncompensated, and that its failure to compensate them was willful, the Second Circuit upheld the jury verdict.

- *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755 (3d Cir. 2023) – Higgins, a registered nurse, and co-plaintiffs brought a collective and putative class action against their former employer, a home health care company, seeking unpaid overtime wages on the basis of the employer's deductions from accrued paid time off (PTO). These deductions were made pursuant to the employer's policy that full-time salaried employees had to meet a weekly "productivity minimum" or deductions would be made from their PTO to supplement the difference between the "productivity points" they were expected to earn and what they actually earned (however, if an employee lacked sufficient PTO to cover a deficit, the employer did not deduct from their guaranteed base salary). Plaintiffs alleged these deductions were reductions in salary in violation of the FLSA. As a matter of first impression, the Third Circuit held that PTO is not part of an employee's salary for purposes of the FLSA's prohibition on actual and improper deductions from salary, so the employer did not make improper salary deductions. In

reaching this conclusion, the Third Circuit examined the relevant statutory and regulatory language. Though "salary" is not explicitly defined, the regulations clearly distinguish between salary and fringe benefits like PTO, and the meaning and historical usage of "salary" and "fringe benefit" further supported the conclusion that the terms are mutually exclusive.

- *Koch v. Jerry W. Bailey Trucking, Inc.,* 51 F.4th 748 (7th Cir. 2022) – Following court approval of settlements of employees' actions alleging that their employer's policy of not paying employees for work they performed before and after truck driving jobs violated the FLSA, the employees petitioned for an award of more than $200,000 in attorney fees pursuant to the FLSA's fee-shifting provision. The district court gave several reasons for limiting the award. The Seventh Circuit affirmed, holding that the district court's ruling fell well within its discretion to fashion an appropriate award. Two aspects of the district court's reasoning are of most interest to the CAA-covered community (others are related to class certification). First, the employees argued that the large amount of time the firm spent preparing spreadsheets of each employee's lost wages was reasonable given the large number of paystubs and the complicated formula used to calculate overtime pay. However, the billing records for this time were vague and duplicative, and an attorney performed paralegal tasks but billed at his regular rate. Second, the employees obtained only a partial victory: cumulatively, the employees recovered about $60,600 of the $103,500 they claimed in damages, with each individual plaintiff receiving between 17% and 73% of their claim. A court assessing a plaintiff's degree of success may consider how the size of the final recovery stacks up against the amount plaintiff originally sought, and "a fee request that dwarfs the damages award might raise a red flag" (quoting *Montanez v. Simon*, 755 F.3d 547, 577 (7th Cir. 2014)).

- *Houston v. Saint Luke's Health Sys., Inc.*, 76 F.4th 1145 (8th Cir. 2023) – Employees alleged they were underpaid over several years due to their employer's timekeeping policy, which rounded off time if they clocked in up to six minutes before or after their scheduled shifts. The district court granted summary judgment to the employer on the employees' FLSA collective action, but the Eighth Circuit vacated and remanded. Expert reports analyzing the effect of the rounding policy on compensation showed that the policy benefitted the employer more often than not. FLSA regulations permit rounding, "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b). Here, however, the data showed that "most employees and the employees as a whole fared worse under the rounding policy than had they been paid according to their exact time worked." The employer, instead of pointing to different analyses of the data to support its position, argued about policy and the negative effects to employers if the court were to find for the employees. The Eighth Circuit concluded that the employees raised a genuine dispute that the rounding policy, as applied, did not average out over time.

- *Cadena v. Customer Connexx LLC*, 51 F.4th 831 (9th Cir. 2022) – Customer call center workers who provided service through their employer-provided computers brought an FLSA action against their employer, Connexx, alleging that the time they spent booting up and shutting down their computers was compensable as part of their hourly wages.

The district court granted summary judgment for the employer, holding that starting and turning off computers were not FLSA-compensable principal activities because Connexx did not hire employees for that purpose, but to answer customer phone calls and perform scheduling tasks. The Ninth Circuit reversed, holding that time spent by the employees booting up their computers was compensable under the FLSA as integral and indispensable to their principal job duties. The key question, the Court said, "is whether turning on and off the computers is integral and indispensable to the employees' principal activities of receiving customer phone calls and scheduling appliance pickups. If it is, turning on the computer itself is a principal activity … and the time spent waiting for the boot up process is a part of the continuous workday[.]" Here, the employees' duties could not be performed without turning on and booting up their work computers, and having a functioning computer was necessary before employees could receive calls and schedule appointments.

- *Thompson v. Regions Sec. Servs., Inc.*, 67 F.4th 1301 (11th Cir. 2023) – Plaintiff, a security guard, initially earned a $13.00 non-overtime hourly rate and worked a 40-hour workweek. Soon after his employer started scheduling him for 60-hour workweeks, it cut his non-overtime hourly rate to $11.15. After scheduling him to work overtime and paying him a reduced rate for nearly a year, his employer abruptly returned him to a 40-hour workweek and restored his non-overtime hourly rate to $13.00. Plaintiff sued, alleging that his employer reduced his hourly rate to an artificially low rate to avoid the FLSA's overtime provisions during the year that it paid him a non-overtime hourly rate of $11.15. The district court granted the employer's motion for judgment on the pleadings. The Eleventh Circuit vacated and remanded, holding that Plaintiff's allegations plausibly supported his claim that his employer reduced his regular rate to avoid paying him overtime compensation. Under 29 C.F.R. § 778.327(b), an employer may not play with an employee's hours and rates to effectively avoid paying time-and-a-half for overtime hours. The court calculated that at $11.15 per hour non-overtime, Plaintiff would make $780.50 for a 60-hour workweek – only $.50 more than he would have earned if he were paid his former $13.00 non-overtime hourly rate for all sixty hours of work. It held that this arithmetic, together with Plaintiff's allegations that he was paid $13.00 per hour before and after the period during which his employer scheduled him for overtime, supported the reasonable inference that his employer cut his non-overtime hourly rate to avoid paying him an overtime rate equal to one-and-a-half times his established $13.00 rate.

- *Moore v. United States*, 66 F.4th 991 (Fed. Cir. 2023) – Plaintiff, a male employee of the Securities and Exchange Commission (SEC), brought an action alleging two female coworkers with the same jobs were paid more for the same work, in violation of the EPA. The female coworkers' pay was elevated in response to their applications to the employer's Pay Transition Program, under which employees could receive credit for years of relevant work experience regardless of their SEC hire date. Plaintiff did not apply to the program due to family-related issues then occupying his attention. The Court of Federal Claims dismissed his complaint, but the Federal Circuit reversed, overturning en banc its decision in *Yant v. United States*, 588 F.3d 1369 (Fed. Cir. 2009), in which it had "added an extra element to the claimant's prima facie case—namely, a showing that the pay differential is either historically or presently based on sex." (internal quotations

omitted). Here, the court reasoned that this extra element was extraneous, violated the principle that the EPA does not require proof of intentional discrimination, and misallocated the EPA's burdens. (Only this portion of the decision was considered en banc.) Because the lower court's dismissal relied on *Yant*, the Circuit court vacated and remanded.

- *Bridges v. United States*, 54 F.4th 703 (Fed. Cir. 2022) – In this collective action against a federal employer, the Federal Circuit affirmed summary judgment for the government, holding that travel time between a back-to-back prison shift and voluntary overtime hospital shift was not compensable time under the FLSA. Plaintiffs were correctional officers at a federal prison who sometimes worked voluntary overtime hospital shifts when inmates were in a local hospital for care. The Federal Circuit reasoned that since the Portal-to-Portal Act clarifies that travel to and from the actual place of performance of the principal activities is not time for which FLSA mandates pay, and the officers performed their principal activities at the prison and at local hospitals, the officers' travel in between could not be part and parcel of their principal activities. The Federal Circuit further concluded that the shifts were not part of a "continuous workday" during which travel must be compensated under FLSA, since the travel was not part of the officers' principal activities.

- *Avalos v. United States*, 54 F.4th 1343 (Fed. Cir. 2022) – Plaintiffs were "excepted employees" of the federal government who continued to work during a December 2018 – January 2019 partial government shutdown due to a lapse in appropriations. The government could require them to work during this shutdown period because of the nature of their work, but was barred by the Anti-Deficiency Act from paying wages to them until after the lapse in appropriations was resolved. The Court of Federal Claims determined that the employees had established a prima facie case of an FLSA violation, but the Federal Circuit reversed on an interlocutory appeal, determining that the government did not violate the FLSA's timely payment obligation as a matter of law. It concluded that Congress did not intend for the FLSA to overturn, conflict with, or supersede the Anti-Deficiency Act's prohibition on making expenditures during a lapse in appropriations, and that the federal government timely pays wages, per the FLSA, when it pays its employees at the earliest date possible after a lapse in appropriations ends.

Worker Adjustment and Retraining Notification Act (WARN Act)

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

- *Roberts v. Genting N.Y. LLC,* 68 F.4th 81 (2d Cir. 2023) – Defendant casino operator closed a restaurant, where Plaintiffs worked, located inside its casino. It gave Plaintiffs no notice of the closure, which took effect the same day and resulted in 177 employees being laid off. Plaintiffs filed a claim for WARN Act violations, and on cross-motions for summary judgment, the district court denied Plaintiffs' motion and granted the

employer's. The Second Circuit affirmed the denial of Plaintiffs' summary judgment motion, but vacated the grant of summary judgment to the employer, holding that genuine issues of material fact existed as to whether the restaurant "was organizationally and operationally distinct enough from the rest of the Casino to merit being designated an operating unit for WARN Act purposes." It held that whether the restaurant could operate independently of the casino was not dispositive: "To read the term 'operating unit' to encompass only entities that could exist independently would drastically limit the protections of the WARN Act, contravening the statute's purpose[.]" The restaurant's reliance on casino-provided centralized services, including purchasing, warehousing, HR management, and cleaning, was not, as a matter of law, fatal to a determination that it was an operating unit.

- *Messer v. Bristol Compressors Int'l, LLC*, No. 21-2363, 2023 WL 2759052 (4th Cir. Apr. 3, 2023) – The Fourth Circuit concluded that the district court erred in finding that the employer, BCI, was entitled to summary judgment on the WARN Act claims of four employees ("The Four"). On August 1, 2018, BCI notified its employees "that the facility will close and that [their] last day of employment will be on or before September 30, 2018." The Four were not terminated until October 19, 2018, and BCI's manufacturing facility did not close until November. Because BCI postponed the termination of the Four's employment past September 30, WARN Act regulations entitled them to additional notice. The district court found that BCI was not liable for its regulatory violation because the Four remained employed for more than 60 days after the initial notice, there was "no evidence that they suffered any prejudice from the lack of additional notice," and the notice they received "served the purpose of the WARN Act: to allow them adequate time to prepare for losing their jobs." The Fourth Circuit found that BCI's regulatory violation was enough for liability, declining to read an additional requirement into the statute or regulations that Plaintiffs were required to establish that they were prejudiced by BCI's failure to provide the requisite notice.

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.

- *Garcia-Ascanio v. Spring Indep. Sch. Dist.,* 74 F.4th 305 (5th Cir. 2023) – A jury found that Plaintiff's military status as an Army Reservist and his engaging in USERRA-protected activity was a motivating factor in his constructive discharge. But the jury also found that his employer, a school district, would have constructively discharged him even if it had not taken his military service and protected activity into account, due to his behavior during a student discipline incident that violated school policy and ethical standards. On appeal, Plaintiff argued that USERRA's mixed-motive defense – an employer's affirmative defense that it would have taken the same action in the absence of an employee's military status or protected activity – is not applicable to a constructive discharge claim, reasoning that whether an employer had a

mixed motive is not relevant because an employer cannot "intend" to constructively discharge an employee. The Fifth Circuit disagreed, noting that the text of USERRA clearly provides employers with a mixed-motive defense with "no carve-out for constructive discharge claims." It held that USERRA's mixed-motive defense was applicable to constructive discharge claims.

- *Kelly v. Omaha Pub. Power Dist.*, 75 F.4th 877 (8th Cir. 2023) – The employer did not violate USERRA when it denied tuition assistance to Plaintiff based on his receipt of G.I. Bill benefits. The record indicated that his request was denied not because of his prior military service, but because he was receiving duplicative tuition assistance from another source, which, in Plaintiff's case, happened to be the military. The Eighth Circuit held that "denying an employment benefit based on an employee's receipt of duplicative military benefits does not, standing alone, violate USERRA."

- *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424 (9th Cir. 2023) – Clarkson, on behalf of a class of pilots, challenged defendant airlines' compliance with the USERRA regulation that explains how to determine whether types of leave are comparable, for the purposes of determining which non-seniority rights and benefits an employee is entitled to during a period of military service. He alleged the airlines violated USERRA by failing to pay pilots who took short-term military leave while paying pilots who took short-term non-military leave (for jury duty, bereavement, and illness). The district court concluded that military leave is not comparable to any other leave as a matter of law and granted summary judgment to the airlines.

  The Ninth Circuit reversed, concluding that the district court erred by comparing *all* military leaves, rather than just the short-term military leaves at issue, with the comparator non-military leaves. It held that courts must consider the length of leave at issue: because military leaves vary greatly in length, with some lasting years, treating all types of military leave categorically would "render USERRA's protections meaningless," because "no other type of leave would look similar." It also reaffirmed that when determining whether a non-military leave is comparable, an employer should consider the duration, purpose, and employee's control over the timing of each leave, with duration being the most important factor. It did not decide the case on the merits, concluding that the question of comparability is a matter of fact that should be presented to a jury to decide.

- *Myrick v. City of Hoover, Ala.*, 69 F.4th 1309 (11th Cir. 2023) – Four city employees worked as police officers while also serving as military reservists. Over a two-decade span, they were summoned to active-duty service a combined thirteen times (ranging from a 14-day training period to a 1,752-day deployment). While away, the city did not provide them the same holiday pay and accrued benefits that it gave employees on paid administrative leave (including three officers under internal investigation who were placed on such leave for an average of 16 months each). When Plaintiffs sued the city under USERRA, the district court granted their summary judgment motion, and the Eleventh Circuit subsequently affirmed.

  First, the city argued that Plaintiffs were not similar to employees placed on paid

administrative leave, since the city placed Plaintiffs on unpaid status and did not pay them during their leaves. Holding that Plaintiffs did in fact have a similar "status" and "pay" as City employees on paid administrative leave, the court wrote that "[i]t is evident … that the DOL considers an employee's pay status during leave to have no legal significance under [the USERRA regulation granting military employees the same benefits provided 'to employees having similar seniority, status, and pay who are on ... leave of absence']," and that it owed deference to the DOL's interpretation.

Then, holding that Plaintiffs' military leave was comparable to paid administrative leave, the court concluded that military leave and paid administrative leave served similar ends, such as shielding employees from unnecessary hardship; neither military employees nor non-military employees under investigation controlled when they went on leave; and the city provided paid administrative leave for up to 16 months, the same average length as the longest instances of military leave. Differing from the district court on the "duration" factor of comparability, the Eleventh Circuit wrote that it did not view the instances of investigative administrative leave as outliers, but as "set[ting] the upper strata of paid administrative leave that Hoover was willing to provide its employees."

- *Lentz v. Dep't of the Interior*, No. 2022-2007, 2022 WL 16705007 (Fed. Cir. Nov. 4, 2022) – In this unreported decision, the Federal Circuit affirmed the MSPB's denial of relief to Plaintiff Lentz, who alleged that his employer had retaliated against him for exercising his USERRA rights. Specifically, he alleged that his supervisors at the Bureau of Land Management (BLM) provided negative references to prospective employers in retaliation for a USERRA complaint he had filed with the Department of Labor while he was working at BLM, asserting that he had not been selected for various BLM vacancies because he was a veteran. The Federal Circuit affirmed the MSPB's finding that mere temporal proximity of the references to his protected USERRA activity was insufficient to establish an improper motive, especially since the supervisors wrote the references in response to inquiries from third parties.

Veterans Employment Opportunities Act (VEOA)

The VEOA gives veterans improved access to federal job opportunities and establishes a redress system for preference eligibles in the event that their veterans' preference rights are violated. Section 4(c) of the VEOA applies those rights and protections afforded to veterans in the executive branch to certain veterans covered by the CAA.

- *Williams v. Dep't of Def.*, No. 2022-2246, 2023 WL 3575987 (Fed. Cir. May 22, 2023) – The Federal Circuit reversed the decision of the Merit Systems Protection Board denying Plaintiff's request for corrective action under the VEOA. Plaintiff, a preference-eligible veteran, applied for a contract specialist position with the Defense Logistics Agency (DLA). He submitted several documents with his application, which detailed his previous federal service as a contract specialist. However, in response to a question on a required assessment questionnaire asking for "the highest level of education and/or experience that you fully possess in order to minimally qualify for

this position," he selected, "I do not possess the required level of specialized experience and/or education to qualify for this position." The online staffing system automatically deemed him ineligible for the position and the DLA did not consider the remainder of his application materials. VEOA implementing regulations require an agency to "credit a preference eligible … with all valuable experience." 5 C.F.R. § 302.302(d). The court reasoned that "at the very least, 'credited' must mean 'considered,'" so the VEOA required the DLA to consider all of Plaintiff's material experience, even if he erred in not considering this experience himself in his answer on the questionnaire. It held that "[t]he DLA may not abdicate its statutory and regulatory duty to credit a preference-eligible veteran for all his relevant experience by shifting the burden to [Plaintiff] to assess his qualifications."

Occupational Safety and Health Act (OSHAct)

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

- *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773 (11th Cir. 2023) – After two "under-ride" accidents, one of them fatal, Chewy was cited for violating the OSHAct's General Duty Clause, which requires every employer to "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). An ALJ upheld the citation, the Occupational Safety and Health Review Commission (OSHRC) declined discretionary review, and Chewy appealed to the Eleventh Circuit. Chewy argued that because it had complied with the specific standard governing forklifts – the powered industrial trucks standard, located at 29 C.F.R. § 1910.178 – it could not be held liable under the General Duty Clause.

  The OSHA regulations provide that "An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard." 29 C.F.R. § 1910.5. Moreover, OSHRC precedent holds that the General Duty Clause is inapplicable for a failure to prevent a hazard "if a standard specifically addresses the hazard cited." *Active Oil Serv., Inc.*, 21 O.S.H. Cas. (BNA) 1184 (No. 00-0553, 2005), 2005 WL 3934873, at *2. The Eleventh Circuit found that the powered industrial truck standard requires employers to address under-ride hazards, in terms of both the safe operation of forklifts and operator training. OSHA did not cite Chewy for violating any part of the specific standard, and the record showed that Chewy provided its forklift operators with the training required to prevent under-ride hazards. Therefore, because Chewy was in compliance with the specific

standard addressing under-ride hazards, OSHA could not cite it under the General Duty Clause for the under-ride accidents, and the Eleventh Circuit vacated the citation.

- *TNT Crane & Rigging, Inc. v. Occupational Safety & Health Rev. Comm'n*, 74 F.4th 347 (5th Cir. 2023) – An employee was seriously injured while breaking down a large mobile crane, as a result of the crane's hoist line coming into contact with an energized power line. OSHA cited the company for violating two subsections of the Cranes and Derricks in Construction Standard, 29 C.F.R. § 1926.1407. OSHRC reversed the ALJ's initial decision, holding that the regulations applied to the work performed, and after remand, the OSHRC reversed the ALJ's second decision, finding that the violation was foreseeable. TNT then petitioned the Fifth Circuit for review of the OSHRC decisions.

  After analyzing the text and determining that the specific activities being conducted at the time of the accident constituted "disassembly," such that the cited standard applied, the court went on to analyze whether TNT could be held liable for the violations. TNT cited the exception for supervisor malfeasance established in *W.G. Yates & Sons Construction Company Inc. v. Occupational Safety & Health Review Commission*, 459 F.3d 604 (5th Cir. 2006), and argued that because a supervisor was participating in the violation, the misconduct was not foreseeable and therefore the company could not be liable. The court disagreed, holding that the *Yates* exception did not apply, because "all the TNT crew members were engaged in the violative conduct under each citation item, and, accordingly, [the supervisor]'s knowledge of his crew's misconduct was automatically imputed to TNT."

  Finally, the court agreed with the OSHRC that the company's affirmative defense of employee misconduct failed, holding that substantial evidence supported the Commission's findings that TNT did not have a work rule designed to prevent violations of the applicable standard, did not adequately monitor employee compliance with its power line safety rules, and did not effectively enforce its power line safety rules when it discovered violations.

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

- *Tesla v. N.L.R.B.*, 63 F.4th 981 (5th Cir. 2023), *reh'g en banc granted*, 73 F.4th 96 (5th Cir. 2023) – In May 2018, Tesla CEO Elon Musk tweeted, "Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant

was UAW & everybody already gets healthcare." The NLRB issued a complaint, alleging that the tweet could reasonably be understood as a threat to unilaterally rescind stock options if employees unionized. The NLRB ALJ and the Board found violations. The Fifth Circuit affirmed the Board's decision, finding that the tweet was an unlawful threat. Because stock options are part of Tesla employees' compensation, and because nothing in the tweet suggests that unionizing would be the cause of removing the stock options, employees could reasonably understand the tweet as a threat. The Fifth Circuit rejected Tesla's argument that a Tesla press release issued the day after the tweet explaining that UAW members at other companies do not receive stock options could cure the threatening nature of the tweet. Finally, the Court noted that Tesla's history of labor violations further supports the NLRB's finding that employees would understand the tweet as a threat. On July 21, 2023, the Fifth Circuit agreed to hear the case en banc.

- Compare with *FDRLST Media, LLC v. N.L.R.B.*, 35 F.4th 108 (3rd Cir. 2022), where the Third Circuit found that Federalist Media publisher Ben Domenech's tweet, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine" was not an unlawful threat. In that case, the Court analyzed the full context of the tweet and found that it was farcical, comical, facetious, and sarcastic, but not illegal. Because Federalist Media has only six employees, all of whom are writers and editors, the Court found that a *reasonable* employee would not view the tweet as a threat of reprisal. Because there is no other evidence of labor strife, and because the tweet came from the publisher's public twitter account where he has tens of thousands of followers, the Court interpreted the tweet as "commentary on a contemporary newsworthy and controversial topic," not a threat to the publisher's own employees.

Federal Service Impasses Panel

The panel has issued two recent decisions relating to negotiations over post-pandemic telework programs. In addition to weighing in on the return-to-office programs at the respective agencies, these decisions explore how much evidence parties must present to impasse panels to support their bargaining proposals.

- *NFFE Local 476*, 23 FSIP 039 (2023) – As pandemic restrictions loosened, the Department of Defense and two unions reopened telework negotiations for communications employees at Aberdeen Proving Ground. During the pandemic, most bargaining unit employees teleworked every day. The Unions and the Agency agreed that employees should work in the office more, but disagreed over how much. The Unions proposed three days in-office per pay period, while the Agency proposed four days in-office per pay period. The Unions presented undisputed evidence demonstrating that bargaining unit productivity improved during the COVID-19 maximum telework posture. The Agency responded with philosophical objections, that the workforce must be "cohesive to meet any emerging and unforeseen conflicts across the globe," and that four days in-office per pay period "strikes the proper balance." The Impasses Panel found for the Union and imposed three days in-office per pay period. The Panel found that while the Agency's arguments were "important and weighty," they were supported with only conclusory assertions lacking in specifics. The Panel noted that the Agency could not

specify how one additional day in the office would allow the Agency to achieve its sweeping goals.

- *SEC,* 23 FSIP 3 (2023) – The SEC and one of its unions are negotiating the telework provisions in a successor collective bargaining agreement. During the pandemic, all bargaining unit employees teleworked 100% of their schedules. It is undisputed that full-time telework was highly successful and had no negative impact on work quality or productivity. During negotiations, the Union proposed a "Presence with a Purpose" program for employees who lived within 40 miles of their duty station. This program would allow employees to telework full-time unless they are required to be in the office for a specific purpose. Under this program, the Agency would be required to reimburse employees for travel between their home and their duty station or other work location during work hours. The Union also proposed that employees who live more than 40 miles from the office work in the office two days per pay period. The Agency responded by proposing that all employees be required to work in the office two days per pay period. The Impasses Panel found for the Agency and imposed two days in-office per pay period. The Panel found that the "Presence with a Purpose" program would have a significant impact on productivity because it would force employees to commute during work time, thereby reducing their work time. Moreover, the program's requirement that the Agency pay for commuting costs during work time created too much uncertainty.

National Labor Relations Board

- *McLaren Macomb* – 372 NLRB No. 58 (2023) – In this case, the NLRB found that broad confidentiality and non-disparagement provisions in severance agreements violate the National Labor Relations Act because they interfere with employees' right to engage in protected activity if the provisions are not narrowly tailored to the profession and circumstances of the of the employees' separation. The NLRB reaffirmed employees' right to "engage in communications with a wide range of third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection." The NLRB found that merely offering these provisions in a settlement agreement may violate the Act because of the reasonable tendency that reading these provisions would restrain the employees' future exercise of their rights.

    - Note for offices covered by the CAA: The CAA favors confidentiality more than the NLRA, particularly in cases that go through the OCWR's ADR process. However, particularly in the context of ongoing labor-management disputes, parties should be aware that overly-broad confidentiality provisions or non-disparagement clauses in a settlement agreement may be unenforceable or may independently violate the FSLMRS.

- *Lion Elastomers LLC* – 372 NLRB No. 83 (2023) – The NLRB returned to its longstanding *Atlantic Steel* analysis for cases in which employees are engaging in protected activity but then act so outrageously that they lose the protection of the National Labor Relations Act. Under *Atlantic Steel*, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair

labor practice. In its 2020 *General Motors* decision, the Board had overruled *Atlantic Steel* and held that the traditional *Wright-Line* analysis used in any mixed-motive discrimination allegation should apply to these types of allegations as well; *Lion Elastomers* overruled *General Motors* and returned to longstanding precedent.

- Note for offices covered by the CAA: the FLRA's decision on this issue, *Def. Mapping Aerospace Ctr., St. Louis, Mo.*, 17 F.L.R.A. 71 (1985), is substantially similar to the NLRB's *Atlantic Steel* test. The FLRA considers four factors to determine when employees lose the protection of the FSLMRS: (1) the place and subject matter of the discussion; (2) whether the outburst was impulsive or planned; (3) whether the employer's conduct provoked the employee; and (4) the nature of the language or conduct. If presented with this issue, the OCWR would follow FLRA precedent and supplement the analysis with *Atlantic Steel* and its progeny if appropriate.

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.

- *Peltz-Steele v. UMass Fac. Fed'n*, 60 F.4th 1 (1st Cir. 2023), *cert. denied*, 143 S. Ct. 2614 (2023) – A professor at the U. Mass. Dartmouth law school filed a § 1983 lawsuit alleging that his First Amendment free speech and free association rights were infringed when the university authorized a union to serve as the exclusive representative of a bargaining unit comprised of faculty members, including the plaintiff. The plaintiff did not join the union and did not wish to associate with it, and argued that being forced to have the union represent him amounted to compelled speech and association. The professor tried unsuccessfully to convince the First Circuit that it should depart from its prior precedent, in which it had held that state laws allowing exclusive representatives to represent bargaining units in the public sector did not violate the First Amendment. He pointed to the case of *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), in which the Supreme Court held that nonunion employees cannot be required to pay an agency fee to cover the costs of the union representing such employees in grievance proceedings. However, according to the First Circuit, the Supreme Court's reasoning in that case did not cast any doubt on the constitutionality of state laws allowing public employers to authorize an exclusive bargaining representative for employees within a designated bargaining unit. The First Circuit noted that all other Circuit Courts of Appeals to address this issue post-*Janus* had also held such state laws to be constitutional.

- *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023), *petition for cert. filed*, No. 23-152 (U.S. Aug. 15, 2023) – A group of healthcare workers challenged Maine's COVID-19 vaccination mandate on the grounds that it violated their sincerely held religious beliefs, in violation of Title VII and their First Amendment rights. The employees had all been fired because they refused to comply with the mandate despite their employers denying their requests for religious exemptions. The First Circuit affirmed the lower court's dismissal of the

religious discrimination claims, as described above in the section on Title VII. However, it reversed and remanded the district court's dismissal of the First Amendment free exercise and equal protection claims, holding that when all inferences were drawn in the plaintiffs' favor, they had stated a plausible claim for relief. Because the state's vaccination mandate allowed for medical exemptions but not religious exemptions – despite the fact that the state's interest in stopping the decline in vaccination rates among healthcare workers and reducing the risk of disease spread in healthcare facilities would be undermined by the medical exemptions too – the law was not generally applicable and therefore would be subject to strict scrutiny. The court held that development of the factual record would be required to determine whether the mandate was narrowly tailored to advance a compelling government interest, and to show whether the state could have used alternative means to achieve its goals.

- *Salmon v. Lang*, 57 F.4th 296 (1st Cir. 2022) – The plaintiff was a public school teacher and former president of her local teachers' union who alleged, among other things, First Amendment retaliation for union-related activities. She had complained about various working conditions at multiple schools in which she taught, including such issues as classroom temperature, staffing levels, and student monitoring; she also involved the union in discussions over safety concerns related to a specific special needs student. After a heated confrontation involving the plaintiff, a union representative, the school principal, and the school superintendent, an investigation was conducted and a letter of reprimand was placed in the plaintiff's personnel file. She took a leave of absence from the school and applied unsuccessfully for positions at other schools. She subsequently filed a First Amendment retaliation claim, alleging that she had been harassed, disciplined, and denied a transfer because of her union advocacy efforts.

  The district court granted summary judgment for the defendants, and the First Circuit affirmed. First, the record evidence supported the defendants' arguments that the teacher was disciplined not for union activity but for insubordination and improperly accessing student records, so she could not demonstrate causation. Second, the record was devoid of evidence that any retaliatory motive was "a substantial or motivating factor" in the denial of the plaintiff's transfer applications. Finally, the court held that there was no evidence that the principal had taken an adverse employment action against the plaintiff. After discussing the standard for demonstrating an adverse employment action in the context of a First Amendment retaliation claim, the court looked at the principal's alleged conduct and concluded that "no reasonable jury could find that the sum of these events would create a 'chilling' effect that would deter a reasonably hardy individual from exercising their union-advocacy rights."

- *Swartz v. Sylvester*, 53 F.4th 693 (1st Cir. 2022) – The Fire Chief of a local fire department arranged for all of the department's firefighters to have professional photographs taken in their dress uniforms for their identification badges, as well as for media, promotional, and accountability purposes. The plaintiff, a firefighter in the department, refused to have his picture taken, asserting that having his picture taken for promotional purposes would violate his religious beliefs. The Fire Chief ordered him to have his picture taken, and when he refused, he was disciplined with 24 hours of unpaid administrative leave and a 6-month period during which he would not be eligible for "out

of grade" opportunities that could provide higher pay. The firefighter sued, alleging that his First Amendment right to free exercise of religion was violated. The district court held, and the First Circuit affirmed, that the firefighter's First Amendment rights were not violated. The photograph policy was neutral and of general applicability, so it was subject to rational basis review, and the court was satisfied that the policy was rationally related to the legitimate governmental interest of publicizing the fire department and promoting the integrity of government institutions.

- *Connelly v. Cnty. of Rockland*, 61 F.4th 322 (2d Cir. 2023) – A group of Rockland County Probation Department employees sent a letter to the county legislature objecting to a proposal to relocate their department's office. In response, the department's Director of Probation issued each of the employees who signed the letter a Memorandum of Warning, and she also required all of the department's employees to attend one of two mandatory staff meetings. Some of the employees who had signed the letter sued, alleging First Amendment retaliation against the department and its director. They argued that the letter constituted protected speech because they were speaking as private citizens on a matter of public concern, and that the Memoranda of Warning and the mandatory meetings constituted adverse employment actions taken in retaliation for their speech.

  After the district court judge held as a matter of law that the employees had spoken as private citizens on a matter of public concern, the jury concluded that the Memoranda and meetings did not qualify as adverse employment actions, and entered a verdict in favor of the County. However, the district court judge vacated the jury's verdict, calling the Memoranda and meetings a "textbook example of adverse action" that would have dissuaded similarly situated employees from engaging in constitutionally protected speech. On appeal, the Second Circuit explained that, "In a First Amendment retaliation case, a government employer's response to speech constitutes an adverse action if it would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." (internal quotations and citation omitted). The Court went on to hold that a reasonable jury could conclude that the test for an adverse action was not met in this case; "Indeed, the evidence below could support a conclusion that the Memorandum and the meetings were no more than a 'petty slight,' 'minor annoyance,' or 'trivial' punishment." (internal quotations and citations omitted).

- *Porter v. Bd. of Trustees of N.C. State Univ.*, 72 F.4th 573 (4th Cir. 2023) – A tenured university professor alleged that his First Amendment free speech rights were violated when the school retaliated against him because of his history of being outspoken against the effect of certain social justice initiatives on the field of higher education study. He had challenged the addition of a question regarding diversity to student course evaluation surveys; sent a department faculty-wide email expressing negative sentiments regarding the hiring of a Black professor; and posted on his personal blog that an upcoming conference "Has Become a Woke Joke." The plaintiff was eventually removed from the Higher Education Program Area (HEPA) within his department, excluded from certain advising and recruitment activities, and not invited to join a newly created program area within the department.

  The court held that the survey question incident and the faculty hiring email were internal

communications made as an employee rather than a citizen, and therefore not protected by the First Amendment. Assuming without deciding that the "woke joke" blog post was protected speech, the Fourth Circuit held that the professor could not establish causation between that blog post and the alleged adverse employment actions, the first of which did not happen until 10 months after the post was published and nearly 8 months after the head of the department emailed him about it. Not only was temporal proximity therefore lacking, but it was clear that the professor "was removed from the HEPA because of his ongoing lack of collegiality – not because of the content of his blog post."

- *Marquardt v. Carlton*, No. 21-3832, 2023 WL 395027 (6th Cir. Jan. 25, 2023) – Marquardt, a Cleveland EMS Captain, was fired after making inflammatory Facebook posts about the police shooting of Tamir Rice. The court first held that Marquardt was speaking as a private citizen on a matter of public concern: the posts were made on his private Facebook page while he was at home and not working, and given the high-profile public nature of the incident, and the fact that the posts addressed whether the police's conduct was justified, the posts addressed a matter of public concern. However, the Sixth Circuit agreed with the district court that Marquardt's interest in making these posts was outweighed by the city's interests in effectively functioning as a public agency. The court assessed whether the speech: (1) impairs discipline by superiors or harmony among co-workers, (2) has a detrimental impact on close working relationships for which confidence and personal loyalty are necessary, (3) impedes the performance of Marquardt's duties or interferes with regular operations of the enterprise, or (4) undermines the City's mission. Considering these factors – and in light of the fact that the posts were made by an EMS Captain in Cleveland, "where public reaction to the shooting had been explosive," and were made "just days after the City came under fire for billing Rice's family for his ambulance transport" – the court concluded that "context and precedent leads us to the conclusion that the City's interest in preventing the disintegration of public trust in Cleveland EMS's ability to carry out its public service mission overrides Marquardt's interest." Therefore the court held that the EMS Captain's termination had not violated his First Amendment rights.

- *Kirkland v. City of Maryville, Tenn.*, 54 F.4th 901 (6th Cir. 2022) – A police officer alleged, among other things, that her First Amendment rights were violated when she was fired for posting negative comments about the County Sheriff on Facebook, contravening Police Department orders requiring officers to maintain good relations with the public and other law enforcement agencies. To begin with, the court held that the officer's Facebook comments were protected speech, despite the fact that she had a longstanding personal beef with the Sheriff, because speech by a government employee "is a matter of public concern so long as its content is something the public has an interest in hearing, no matter the motivation for her speech." The court nevertheless held in favor of the City, concluding that its interest in executing its public services efficiently outweighed the officer's interest in voicing her criticism of the Sheriff. The City argued that the officer's posts threatened to undermine the Police Department's working relationship with the Sheriff's Office, and the court – according a high level of deference to the City – agreed that the potential disruptiveness of her speech to government operations outweighed the officer's interests.

- *Fehlman v. Mankowski*, 74 F.4th 872 (7th Cir. 2023) – A police officer alleged that the chief of police retaliated against him for criticizing the chief's leadership, thereby violating his First Amendment right to free speech. Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in which the Supreme Court held that speech occurring in the course of an employee's official duties is not protected by the First Amendment, the Seventh Circuit held that the circumstances surrounding Fehlman's reporting to the Police & Fire Commission (PFC) indicated that his speech was made in his capacity as a police officer rather than as a private citizen. The court considered the PFC to be part of Fehlman's chain of command, and noted that the reports were made during a closed meeting which Fehlman attended with other police officers and which was not open to the public.

- *Bresnahan v. City of St. Peters*, 58 F.4th 381 (8th Cir. 2023) – A police officer shared a controversial video in a group text message with other officers, which he claimed was a parody of the Black Lives Matter movement, and one of the other officers complained. After the police chief threatened to investigate him and recommend termination, the officer resigned, then alleged retaliation for exercising his First Amendment right to free speech. The district court dismissed the officer's claim, but the Eighth Circuit reversed and remanded. The court held that the officer had plausibly alleged that the video involved a matter of public concern – i.e., the BLM movement and the media's portrayal of it – and although it was the officer's job to report information about local BLM protests, he had alleged that he shared the video to express his personal views of the BLM movement, not in connection with his job duties.

- *Roberts v. Springfield Util. Bd.*, 68 F.4th 470 (9th Cir. 2023) – During an internal investigation into a public employee's alleged misconduct – i.e., lying about the reason for his absence from work – the employer prohibited him from speaking to other employees or potential witnesses about the matter while it was being investigated, without prior written permission from the Director. The court held that this prohibition did not violate the employee's free speech rights, because the limited restriction placed upon his speech did not implicate a matter of public concern: "Where, as here, a public employer instructs an employee not to communicate with potential witnesses regarding a workplace misconduct investigation during the pendency of that investigation, the impacted speech generally is not on a matter of public concern under *Pickering.* Here, the communication restriction affected Roberts' personal ability to discuss only the investigation into his own alleged violation of [the employer's] personnel policies governing time off and employee dishonesty." The court characterized the speech impacted by the restriction as "a quintessential individual personnel dispute" with no relevance to the public's evaluation of the agency's performance.

- *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767 (9th Cir. 2022) – A teacher wore a MAGA hat to a 2-day teacher training session. On the first day the school principal told him the hat was inappropriate and advised him to exercise better judgment; when he wore the hat again on the second day, she called him a racist and a homophobe. The teacher sued the principal, an HR officer, and the school district, alleging that they retaliated against him for engaging in protected political speech in violation of the First Amendment. The district court granted summary judgment in favor of all defendants; the Ninth Circuit affirmed with respect to the HR officer and the school district, but reversed

with respect to the principal. The court concluded that by wearing the MAGA hat the teacher was speaking as a private citizen on a quintessential matter of public concern, and the fact that he wore it to a teacher training session that wasn't open to the public did not cause him to lose his free speech protection. The court went on to analyze the various allegedly retaliatory actions taken against him, and determined that while the HR officer's denial of the teacher's complaint did not constitute retaliation, the principal's actions did. Although the principal herself was entitled to express her opinions about the MAGA hat (because she too has First Amendment rights), in this case she went beyond criticizing the teacher's views and actually "suggested that disciplinary action could occur if she saw Dodge with his hat again by referencing the need for union representation: 'The next time I see you with that hat, you need to have your union rep. Bring your rep because I'll have my own.' It is hardly controversial that threatening a subordinate's employment if they do not stop engaging in protected speech is reasonably likely to deter that person from speaking." Therefore, "At a minimum, there is a genuine issue of fact regarding whether Dodge reasonably interpreted Principal Garrett's statement as a threat against his employment."

- *Green v. Finkelstein*, 73 F.4th 1258 (11th Cir. 2023) – An assistant public defender appeared on a podcast and made disparaging remarks about her boss, the retiring public defender of the county, whom she was campaigning to replace. The day after the plaintiff lost the primary election, the public defender fired her, and she sued for violation of her First Amendment rights. The district court held in favor of the employer, and the Eleventh Circuit affirmed, holding that although the comments qualified as remarks made by a private citizen on matters of public concern, her interest in making those comments – which related to, among other things, allegations of racially discriminatory hiring processes and the public defender's poor treatment of his employees – were outweighed by her employer's interest in "promoting the effective fulfillment of the public defender's responsibilities." Some of the comments were baseless, and her conduct undermined the trust the public defender had in her, which was important because of her role as a representative both of her clients and of the public defender's office itself. The race-based nature of several of her remarks also created or threatened to create disharmony in the workplace, and the government has an important interest in preventing the potential disruption of the services it provides to the public, which in this case outweighed Green's interest in making the remarks.