age discrimination. On the political affiliation claim, the court found that Smith's testimony regarding the "political enemy" comment constituted inadmissible hearsay that could not be considered on summary judgment, and because Smith could not identify an alternate source of Pawlowski's alleged political enmity toward him, Smith lacked admissible evidence that Pawlowski considered Smith a political adversary. Smith appealed.

The U.S. Court of Appeals for the Third Circuit affirmed. After the district court had ruled in this matter, the U.S. Supreme Court decided *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009), which considered whether the burden-shifting framework established by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was available to plaintiffs in age discrimination cases, noting that it had never definitively applied the *McDonnell Douglas* framework to ADEA claims. The Third Circuit interpreted the case thusly: "[W]e may not depart from our prior decisions applying *McDonnell Douglas* to age discrimination cases unless those decisions are irreconcilable with *Gross*.…While we recognize that *Gross* expressed significant doubt about any burden-shifting under the ADEA, we conclude that the but-for causation standard required by *Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases." Evaluating Smith's age discrimination claim pursuant to *McDonnell Douglas* to see whether he produced sufficient evidence to establish that the employer's proffered rationale for terminating him was a pretext for age-based discrimination, the Third Circuit concluded he had failed to meet this burden. His performance was of concern for several years before the termination, and he clearly received notice of his deficient performance when the performance plan was established. "Under these circumstances, no reasonable jury could agree that appellees terminated Smith on the basis of age discrimination." Likewise, on the discrimination claim based on political affiliation, the court held that Smith failed to show that his political affiliation was a substantial or motivating factor in the termination. Smith could not show that Pawlowski knew of his yard sign or of his "reputation" as a supporter of his opponent (Pawlowski testified that he did not know where Smith lived). Because the campaign worker disavowed the "political enemy" statement, the district court properly refused to consider the comment for summary judgment purposes. *Smith v. City of Allentown*, 589 F. 3d 684 (3d Cir. 2009).

ADA Retaliation and Damages

Alvarado, a 65-year-old employee, had called an employee hotline to complain that his manager, M., had made inappropriate comments about his age. M. denied any inappropriate comments but three days later, Alvarado received his first "Performance Counseling Record," followed by several more. The assistant manager subsequently stated that Alvarado did not deserve the counseling records and she only wrote the counseling records because M. told her to do so. Alvarado called the hotline again, this time complaining of the retaliation and of pain in his hands. He was found to have arthritis, but was cleared for work. After Alvarado was terminated, he filed a lawsuit alleging, among other things, employment discrimination in violation of Title I of the ADA, 42 U.S.C. § 12112, and that his employer had retaliated against him for complaining that his manager had discriminated against him based on his disability. The employer filed a motion in limine to bar Alvarado from seeking punitive and compensatory damages for the ADA retaliation claim, and also asserted that, because only equitable relief was available, Alvarado did not have a right to a jury trial on his retaliation claim. The district court granted the employer's motion in limine, concluding that the plain language of 42 U.S.C. § 1981a(a)(2) precluded compensatory damages, punitive damages, and trial by jury. Alvarado appealed, arguing that, because compensatory and punitive damages were available under the Civil Rights Acts, compensatory and punitive damages were available for ADA retaliation claims.

The U.S. Court of Appeals for the Ninth Circuit affirmed. "Although we have not resolved whether compensatory and punitive damages are available for ADA retaliation claims, other courts have applied divergent approaches to interpret the ADA's remedial provisions," and referred to the Seventh Circuit's ruling in *Kramer v. Banc of Am. Sec.*, 355 F.3d 961 (7th Cir. 2004) (the 1991 Civil Rights Act did not expand the remedies available to a party bringing an ADA retaliation claim against an employer and, therefore, compensatory and punitive damages were not available). The retaliation provision of the ADA contained no remedy of its own, and it was "clear that the remedies and procedures available to aggrieved persons for violations of § 12203 [were] the same as the remedies and procedures available under Title I of the ADA." Further, 42 U.S.C. § 1981a limited its remedial reach to ADA discrimination claims, and did not incorporate ADA retaliation claims brought pursuant to 42 U.S.C. § 12203. "Being persuaded by the Seventh Circuit's reasoning, we hold, as did the Seventh Circuit in *Kramer*, that the plain and unambiguous provisions of 42 U.S.C. § 1981a limit the availability of compensatory and punitive damages to those specific ADA claims listed. ADA retaliation is not on the list. Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available." *Alvarado v. Cajun Operating Co.*, 588 F. 3d 1261 (9th Cir. 2009).

Search and Seizure

Warrantless Search of Cell Phone Data

In a ruling of apparent first impression for any Supreme Court in the United States, the Supreme Court of Ohio recently ruled that a warrantless search of data within a cell phone, seized incident to a lawful arrest, was prohibited by the Fourth Amendment when the search was unnecessary for the safety of law enforcement officers and there were no exigent circumstances. The facts of the case are as follows: after a woman was taken to hospital for a drug overdose, she spoke with police officers

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