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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sells nothing at retail is not required to have such a license. *See* Littleton City Code, sec. 3-9-2-1.
5. 21 U.S.C.A. § 801 *et seq.* (West 2009).
6. Crime in Colorado 2008, Colorado Bureau of Investigation, at http://cbi.state.co.us/dr/cic2k8/incident%20based%20reports/Property%20Crimes/burglary.html.
7. *See* http://www.cml.org/new.aspx. ML

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of that water to the cows. "These two difficulties suggest an unexplained reason, unrelated to the chemicals in the buried waste, for the cows' unwillingness to drink the Berendsens' well water." Secondly, on foreseeability, "despite the voluminous amount of expert evidence called by the Berendsens, not one of their many experts testified about the known or likely harmful effects of buried waste material in the 1960s…No evidence was led that in the 1960s soil geologists understood chemicals in buried waste material could migrate to well water 60 feet away." Absent such evidence, the finding that Ontario breached the standard of care was an error of law. Lastly, and flowing from the previous finding, there was no duty to remediate. Ontario made a "deliberate decision" not to exercise its power to remove the contaminants, and it "did so for a legitimate reason: the water met existing standards." ML

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and agreed to call her drug dealer, Smith. As she arranged for a purchase at her residence, police recorded the call. When Smith arrived, he was arrested and his cell phone was seized. The arresting officer put the cell phone (one with phone, text messaging, and camera capabilities) in his pocket and placed Smith in a cruiser, then searched the scene for evidence. Police later confirmed that Smith's phone had been the one used to arrange for the drug purchase, but the officers did not have either a warrant or Smith's consent to search the phone data. Smith filed a pretrial motion to suppress evidence, objecting in part to the warrantless search of his cell phone. The trial court ruled that it would permit testimony regarding the cell phone's call records and phone numbers, but not the use of photographs that had been discovered in the phone. Smith appealed.

Pointing out that neither the United States Supreme Court nor any state supreme court had ruled on the warrantless cell phone search, the Supreme Court of Ohio began by contrasting the two approaches to characterizing a cell phone for Fourth Amendment search purposes. A phone could be treated as akin to a closed container found on an arrestee's person, which may be searched; or, alternatively, as an object more like a laptop computer, in which arrestees had a significant privacy interest and which required consent or a warrant. The court adopted the second approach, finding that objects "falling under the banner of 'closed container' [had] traditionally been physical objects capable of holding other physical objects." A cell phone was "wholly unlike any physical object found within a closed container," and its ability to store large amounts of private data gave its user "a reasonable and justifiable expectation of a higher level of privacy in the information" it contained. Once the cell phone was in police custody, the police were required to obtain a warrant before intruding into the phone's contents. In this case, a search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction. "We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant." *State v. Smith*, No. 2008-1781, 2009 WL 4826991 (Ohio Dec. 15, 2009). ML

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