EMPLOYMENT LAW UPDATE

William C. Mann, III
Chief Deputy City Attorney
Little Rock City Attorney's Office
Little Rock, Arkansas 72201
(501) 371-4815
bmann@littlerock.gov

I. RACE DISCRIMINATION

A. U.S. Courts of Appeal

***Jones v. City of Boston,* 845 F.3d 28 (1st Cir. 2017).**

In this case, eight African-American police officers, a cadet, and applicant for a 911 operator position brought a state action against the City of Boston, the police department, and commissioner of the department, alleging that a hair drug test caused disparate impact in violation of Title VII. Upon removal to federal court, the First Circuit held: (1) the hair drug testing was job related and consistent with business necessity; (2) a genuine issue of material fact existed as to whether alternative drug-testing method would have met department's legitimate needs; (3) a genuine issue of material fact existed as to whether alternative drug-testing method would have had less of a disparate impact; and (4) a genuine issue of material fact existed as to whether department refused to adopt alternative drug-testing method.

***Stone v. McGraw Hill Financial, Inc.*, 856 F.3d 1168 (8th Cir. 2017).**

The African American plaintiff applied for a promotion with the defendant company. During an interview, he claimed that he was offered the promotion along with a salary of $95,000. He sent an email confirming his understanding that he had been offered the job and the salary, but received a response that he should "not get ahead of himself" because there were two more interviews to be conducted. He was ultimately offered the job, but at a salary of $85,000. He asked the person who made the offer if the reduction was due to his race. He accepted the offer after being told to take it or leave it.

The plaintiff later claimed that he was required to perform the duties of his former position and new position for a period of time during the transition. He requested a bonus for the extra work but did not receive it. As time went on, his supervisor noted deficiencies in his performance in the new job. He received a warning that contained specifics of these deficiencies. He was subsequently discharged due to poor performance and brought suit under Title VII and 42 U.S.C. § 1981. He alleged that he was unfairly compensated,

subjected to a hostile work environment, and wrongfully discharged on account of his race and in retaliation for protesting his disparate treatment.

All claims were rejected by the Eighth Circuit. The unfair compensation claim was rejected because the other employees with whom the plaintiff compared himself had previous experience in the job that he did not possess. As to the hostile work environment claim, the Court found that he failed to show that any conduct was based on his race. The company provided a legitimate, non-discriminatory reason for discharging the plaintiff which he was unable to establish was a pretext for race discrimination. He abandoned his retaliation claim and it was not considered by the Court.

***Equal Employment Opportunity Commission v. Catastrophe Management Solutions,* 852 F.3d 1018 (11th Cir. 2017).**

The EEOC filed suit on behalf of an African American job applicant whose offer of employment was rescinded by the defendant company pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks. The EEOC claimed that the decision by the company constituted race discrimination under Title VII. The district court dismissed the complaint because it did not allege intentional discrimination.

The company maintained a race-neutral grooming policy which provided: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines....Hairstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable." In arguing against the policy, the EEOC alleged that the term dreadlock originated during the slave trade in the early history of the United States.

The EEOC also asserted the following arguments: (1) race "is a social construct and has no biological definition; (2) the concept of race is not limited to or defined by immutable physical characteristics; (3) according to the EEOC Compliance Manual, the "concept of race encompasses cultural characteristics related to race or ethnicity," including "grooming

practices; (4) although some non-black persons "have a hair texture that would allow the hair to lock, dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic."

At the oral argument, the EEOC maintained it was proceeding on a disparate treatment theory and not disparate impact, although the Eleventh Circuit noted that it made disparate impact arguments in support of a disparate treatment lawsuit. Because of this, the Court did not address the EEOC's arguments that the company's race-neutral grooming policy had a disproportionate effect on African American job applicants.

In considering the disparate treatment claim, the Court noted that Title VII did not define race: "Title VII does not define the term "race." And, in the more than 50 years since Title VII was enacted, the EEOC has not seen fit to issue a regulation defining the term. *See* EEOC Compliance Manual, § 15–II, at 4 (2006) ("Title VII does not contain a definition of 'race,' nor has the Commission adopted one."). This appeal requires us to consider, at least in part, what "race" encompasses under Title VII because the EEOC maintains that "if [ ] individual expression is tied to a protected trait, such as race, discrimination based on such expression is a violation of the law." 852 F.3d at 1026. After a lengthy discussion, the Court found that, in general, Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices.

Another interesting aspect of this case concerned the EEOC's change of position in regard to a provision in the agency's Compliance Manual. While admitting that the grooming policy was race-neutral, the EEOC argued that refusing to hire the plaintiff constituted race discrimination because dreadlocks are a racial characteristic, i.e., they "are a manner of wearing the hair that is physiologically and culturally associated with people of African descent." *Id.* at 1031. In support of this argument, the EEOC cited § 15–II of the Compliance Manual which states that Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech.

While recognizing that the EEOC's interpretation as contained in the Compliance Manual was entitled to some deference, the Court found that the manual provision cited above contradicted a position previously taken by the EEOC. In the earlier case, the EEOC argued that a grooming policy interpreted to prohibit dreadlocks and similar hairstyles lies "outside the scope of federal employment discrimination statutes even when the prohibition targets hairstyles generally associated with a particular race. Because the EEOC did not provide a reason for this change in position, the Court elected not to give the Compliance Manual much deference in determining the scope of Title VII's prohibition of race discrimination. In addition, the Court's review of the case law determined that every court to have considered the issue rejected the argument that Title VII protects hairstyles culturally associated with race.

***Wilson v. Arkansas Department of Human Services*, 850 F.3d 368 (8th Cir. 2017).**
African-American plaintiff brought suit against the Arkansas state department of human services alleging disparate treatment on account of race and retaliation under Title VII. The district court granted the defendant's motion to dismiss. On appeal the Eighth Circuit affirmed the race discrimination claim but reversed and remanded on the retaliation claim. Under the simplified notice pleading standard in federal court, the plaintiff met the standard for pursuing a retaliation claim.

The dissent raised a point that is still good law with respect to the ability of employers to address disciplinary issues, without fear of a retaliation claim, even when a charge of discrimination or lawsuit has been filed. "Employers need not suspend previously planned transfers [or discipline] upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not definitively determined, is no evidence whatever of causality." 850 F.3d at 376.

B. U.S. District Courts

***Davis v. District of Columbia*, 2017 WL 1208388 (D.D.C. March 31, 2017).**

Former employees of the District of Columbia Child and Family Services Agency brought a putative class action against the District of Columbia, alleging that their termination during a reduction in force, and the requirement of a bachelor's degree for a newly created position, were the result of race and age discrimination in violation of Title VII and the District of Columbia Human Rights Act (DCHRA). The plaintiffs moved for class certification and defendant moved for summary judgment. The district court denied class certification and granted summary judgment. These decisions are on appeal to the D.C. Circuit Court of Appeals.

The district court held: (1) employees who failed to list claims in bankruptcy petitions were judicially estopped from asserting claims against District; (2) employees with bachelor's degree lacked standing to challenge degree requirement as discriminatory; (3) employees who did not file administrative charges vicariously exhausted their administrative remedies; (4) employees failed to establish prima facie disparate impact case based on reduction in force; (5) employees failed to establish prima facie disparate impact case based on degree requirement; and (6) employees failed to establish prima facie disparate treatment case based on degree requirement.

The case contains an excellent discussion of the proof required in a disparate impact case. Citing U.S. Supreme Court precedent, the Court stated that "to establish a *prima facie* disparate impact case, "the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.' " The Supreme Court has cautioned that the failure to home [sic] in on a specific practice could "result in employers being potentially liable for the 'myriad of innocent causes that may lead to statistical imbalances.' *Id.* at *19 (emphasis in original) (internal citations omitted).

***Washington v. City of Nettleton,* 2017 WL 888351 (N.D. Miss. March 6, 2017).**

Plaintiff brought claims of race discrimination and retaliation against the City pursuant to Title VII, and a claim for denial of equal protection against the mayor based on his race in violation of the Fourteenth Amendment. The plaintiff argued that remarks accusing him of "messing with a white girl" and being the Sheriff's "boy" constituted direct evidence of discrimination. The court found that for the comments to constitute direct evidence, they must, among other things, be made by an individual with authority over the employment decision at issue and be "related to the employment decision at issue." *Id.* at *3. The Board of Aldermen had the ultimate authority to terminate the plaintiff, not the mayor. In order to consider these comments direct evidence, the trier of fact would have to infer that the defendant mayor could control the Board. Since this would be an improper inference, the plaintiff was required to pursue his claim under the *McDonnell Douglas* burden-shifting framework.

11. SEX DISCRIMINATION AND SEXUAL HARASSMENT

A. U.S. Courts of Appeal

***Heath v. Board of Supervisors for Southern University and Agricultural and Mechanical College,* 850 F.3d 731 (5th Cir. 2017).**

A female professor of Greek descent, who was practicing member of Greek Orthodox Church, brought suit against the defendant university and her supervisor, asserting claims of sex, national origin, and religious discrimination under Title VII and 42 U.S.C.§ 1983.

In reversing summary judgment granted to the university, the Court found that the continuing violation doctrine permitted the plaintiff to support her hostile work environment claims with conduct occurring more than 300 days before she filed her Equal Employment Opportunity Commission (EEOC) charge for Title VII claims based on sex, and with conduct occurring more than year before she filed complaint, for § 1983 claims based on sex, national origin, and religion, regardless of whether she should have been aware earlier of her duty to assert her rights.

***Seibert v. Jackson County, Mississippi*, 851 F.3d 430 (5th Cir. 2017).**

Detective sued county and former sheriff under § 1983, Title VII, and state law asserting claims for sex discrimination, hostile work environment, sexual harassment, retaliation, and intentional infliction of emotional distress. Sufficient evidence to support jury's verdict finding former supervisor liable to employee for intentional infliction of emotional distress, even though jury had rejected employee's Title VII hostile work environment claim.

***Liles v. C.S. McCrossan, Inc.*, 851 F.3d 810 (8th Cir. 2018).**

Female employee failed to establish, under a "cat's paw" theory, her claims of Title VII retaliation or Minnesota Human Rights Act.

***Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274 (9th Cir. 2017).**

The Ninth Circuit reversed the grant of summary judgment in this sex discrimination case. The female plaintiff supervised employees on the night-shift freight crew. She was fired for taking a stale cake from the store bakery to the break room to share with fellow employees and telling a loss prevention investigator that management had given her permission to do so. The defendant company deemed these actions to be theft and dishonesty. In her lawsuit pursuant to Title VII the plaintiff argued, in part, that the company fired her not for theft and dishonesty but in order to put a man in charge of the freight crew.

The Court agreed with the plaintiff that she had provided the following examples of direct evidence of discriminatory animus: (1) the general manager's alleged comment that a man "would be better" leading the safety committee; (2) another alleged comment that she did not like "a girl" running the freight crew; and (3) alleged criticism of the plaintiff, but not her male counterpart, for leaving work early to care for her children. In remanding the case, the Court rejected the company's argument that these remarks could not constitute discriminatory animus since the general manager was also a woman.

***Zetwick v. County of Yolo*, 850 F.3d 436 (9th Cir. 2017).**

The Ninth Circuit reversed a grant of summary judgment in favor of the employer in this sexual harassment case. The Court found that it improper for the district court to disregard evidence that her supervisor hugged and kissed other women. Sexual harassment of others, if shown to have occurred, is relevant and probative of a general attitude of disrespect toward female employees, and sexual objectification of them.

***Hansen v. SkyWest Airlines*, 844 F.3d 914 (10th Cir. 2016).**

A man who was a former employee sued under Title VII, alleging sex-based hostile work environment, disparate treatment, quid pro quo harassment and retaliation. With respect to the hostile work environment case, the district court excluded from consideration numerous instances of conduct that occurred more outside the 300-day limitations period (the state of Wyoming also prohibited discrimination under state law, thus, the 300-day requirement).

While observing that Title VII is not intended to allow someone to bring up old allegations, the Court remanded the case with instructions to the district court to consider, taking into account all related acts of sexual harassment, a reasonable jury could conclude that the workplace was permeated with discriminatory intimidation, ridicule, and insult, that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment.

***Jones v. Needham,* 856 F.3d 1284 (10th Cir. 2017).**

The Plaintiff filled out an EEOC questionnaire in which he alleged sex discrimination, sexual harassment and retaliation. He provided a comparator (another employee who was treated better because of agreeing to have sexual relations with the owner of the company) and listed two witnesses who would support his claim. The EEOC asked for more detailed information and the Plaintiff wrote "see attached" to the questionnaire, but the multi-paragraph attachment did not make it to the EEOC. In the statement, the Plaintiff made clear that his sex discrimination claim was based on both a hostile work environment and quid pro quo discrimination that resulted in a tangible employment action.

After receiving a right to sue, the lawsuit was filed and the employer moved to dismiss some of the claims. The district court held that the Plaintiff failed to exhaust his administrative remedies for his quid pro quo sexual harassment claim.

The Tenth Circuit discussed the history of the exhaustion requirement and what is required. The Court said: "[t]he purpose of administrative exhaustion is two-fold: '1) to give notice of the alleged violation to the charged party; and 2) to give the EEOC an opportunity to conciliate the claim.' Given these goals, the charge document must contain the general facts concerning the discriminatory actions later alleged in the legal claim. Thus, a plaintiff's claim in federal court 'is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC.'" *Id.* at*3.

The Court concluded the charge of discrimination was adequate.

***Furcron v. Mail Centers Plus, LLC,* 843 F.3d 1295 (11th Cir. 2017).**

A female employee brought suit in state court against employer, alleging sexual harassment and retaliation in violation of Title VII. Summary judgment on the retaliation claim was affirmed on appeal, but reversed and remanded in regard to the sexual harassment claim.

The coworker who the plaintiff alleged harassed her suffered from Asperger's syndrome. Behaviors associated with the disorder, including staring, brushing up against employees and talking in people's faces created issues for him with respect to those with whom he worked. Some of his acts led to counseling by the employer, but never any disciplinary action.

When the plaintiff began working with this individual after he was transferred into her area, she initially attempted to befriend him. Shortly thereafter, he began to behave inappropriately toward her. He exhibited an erect penis while staring at her and would deliberately bump into her and rub his erection against her. A co-worker witnessed this

behavior and also observed the plaintiff crying because she had to work with the individual. She did not initially complain to any manager about his behavior and thought it might be related to the Asperger's. However, she did advise him that his behavior was inappropriate.

As the inappropriate behavior continued, the plaintiff complained to her supervisor. She told her supervisor of her discomfort working around the coworker and his alleged response was that he did not mean anything and that his conduct should be tolerated due to his disability. In response to subsequent complaints, the supervisor said that he could not do anything and that the coworker had friends in high places at the company.

After several more complaints did not receive a response, the plaintiff told her supervisor that she wanted to file a complaint with the Human Resources Department. The supervisor indicated he would do so on her behalf. An investigation ensued, but she never received a response from Human Resources. Plaintiff then met with other managers who laughed off her complaint. She then emailed Human Resources and two other managers, stating that she feared for her safety and needed to speak with someone as soon as possible. At one point during the course of events, the plaintiff took a photograph of the coworker from the waist down in order to provide proof of her coworker's behavior.

The Eleventh Circuit reversed the district court, in part, due to the exclusion of the Plaintiff's declaration. The basis for the exclusion of portions of her declaration was the application of the "sham affidavit" rule. The Court noted that, in limited circumstances, the rule allows a court to disregard an affidavit as a matter of law when, without explanation, it flatly contradicts his or her own prior deposition testimony for the transparent purpose of creating a genuine issue of fact where none existed previously. 843 F.3d at 1306. However, the rule only operates in a limited manner to exclude unexplained discrepancies and inconsistencies, as opposed to those "which create an issue of credibility or go to the weight of the evidence." *Id.* at 1307.

B. U.S. District Courts

***Baker v, Northwestern Medicine Lake Forest Hospital,* 2017 WL 2908766 (N.D. Ill. July 7, 2017).**

Plaintiff alleged that a co-worker made sexual comments to her (once saying "because you like it that way" while leaning within two inches of her face, another time by suggesting they "meet outside the hospital and discuss this" in a sexual tone). These were the only two incidents cited in the complaint. Defendant moved to dismiss, arguing that there was insufficient evidence to support the claim that the co-worker's conduct was motivated by sexist animus. The second ground for dismissal was that the plaintiff failed to provide notice that the co-worker was harassing her based on her gender.

The court rejected the first defense, opining that sexual harassment can include "unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature" but it can include other behaviors as well. The other behaviors need not be explicitly discriminatory, as long as there is "a reasonable inference tying the harassment to the plaintiff's protected status." Motion to dismiss denied based on the allegations in the complaint that must be accepted as true.

***Briggs v. City of Portland,* 2017 WL 1745377 (D. Maine May 4, 2017).**

The City of Portland, Maine moved to dismiss all claims in this lawsuit, including gender discrimination and harassment. In this decision, the U.S. Magistrate recommended denial of the motion which was accepted by the district court. *See, Briggs v. City of Portland,* 2017 WL 2265059 (D. Maine May 23, 2017).

The fact that the Plaintiff was not promoted to two different positions does not mean that she cannot show that on at least one of those occasions, where a less-qualified man was hired, she was discriminated against on the basis of sex. Additionally, her *prima facie* burden is sustained because she has alleged that her repeated complaints were ignored; whereas similar complaints from male workers were promptly investigated and addressed.

With respect to the harassment claim, the basis of the City's motion to dismiss was based on whether the harassment was based upon sex. This case involved a transgender plaintiff. The magistrate found this made no difference based on Supreme Court precedent:

"The Supreme Court's decision in *Oncale v. Sundowner*, 523 U.S. 75 (1998), helped establish the contours of this field. There, the Court stated that in employer liability claims based on a hostile work environment sexual harassment claim, "Title VII does not prohibit all verbal ... harassment in the workplace; it is directed only at discrimination because of ... sex."

The Magistrate also noted: "[e]ven though a transgendered party, the principle remains the same, because as *Oncale* went on to state, the Court has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* Rather, under Title VII, "[t]he critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."' *Id.* at *8.

***Cowan v. City of Mount Vernon*, 2017 WL 1169667 (S.D. N.Y. March 28, 2017).**
Plaintiff filed suit alleging sexual discrimination, harassment and retaliation in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VII and New York state law. The City moved to dismiss.

The Court found that the evidence showed that another employee engaged in sexual harassment of the Plaintiff through conduct that included making comments about her body, requesting sex and demanding money from her if she was unwilling to sleep with him. Plaintiff filed several harassment complaints with the police department. The employee then threatened to spread rumors about her and that he would make sure that her superiors in the department viewed her as a problem. Plaintiff overheard the employee tell someone else that she was a problem and needed to be stopped. In the presence of other officers, he called her a bitch and told her that her days were numbered. Plaintiff was later

transferred to another police substation where she said she was ostracized, segregated and cut off from other officers.

In analyzing the evidence, the Court stated that the record was entirely devoid of any allegations regarding the frequency or severity of the incidents of harassment. Plaintiff did not state how many comments or requests were made and when, or what was said. The Court found these "amorphous allegations" to be insufficient even to "clear the low bar of plausibility." *Id.* at *5. This is despite the fact that comments about Plaintiff's body and requests for sex are the type of allegations that routinely support a hostile work environment claim. The Complaint was dismissed against the individuals.

The claim against the City was also dismissed. For an employer to be held liable for a hostile work environment, the plaintiff must demonstrate either that "a supervisor used his or her authority to further the creation of a discriminatorily abusive working environment, or that the employer knew or reasonably should have known about harassment by non-supervisory co-workers, yet failed to take appropriate remedial action." *Id.* When, as here, the alleged harasser is a coworker a co-worker "the employer is liable only if it was negligent in controlling working conditions such as where it did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed," *Id.*

It was undisputed that the harassment stopped after the Plaintiff was transferred. Although she was not happy with the transfer, Title VII does not guarantee an employee the right to demand that a workplace dispute be resolved in a way that is most attractive to her.

***Duplan v. City of New York*, 2017 WL 1232473 (E.D.N.Y. March 30, 2017).**

This case involved a lawsuit against the City of New York alleging race and national origin discrimination, retaliation, and hostile work environment in violation of Title VII and 42 U.S.C. § 1981. The City moved to dismiss for failure to state a claim and the district court granted the motion.

The Plaintiff is a black male from Haiti who is gay. For many years, he was employed with the City's Department of Health and Mental Hygiene. He sought a promotion, but did not receive it despite his belief that he was the most qualified candidate. The man whose position he applied for allegedly told him that black people who worked with the agency were lazy and that Haitians were troublemakers. He related other incidents that allegedly proved negative feelings towards other black, gay, and Haitian employees. The Plaintiff filed complaints with the agency, the EEOC and the New York State Division of Human Rights. He alleged discrimination on the basis of race, national origin, and sexual orientation.

The Court quickly disposed of the § 1981 claim, holding that 42 U.S.C. § 1983 is the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units. The Title VII claims were dismissed as untimely. The Plaintiff failed to file suit within 90 days of receiving the EEOC right to sue letter. In addition, many claims asserted were outside the 300-day limitation period.

***Bogaski v. County of Allegheny, Pennsylvania,* 2017 WL 1080084 (W.D. Pa. March 22, 2017).**

The Court denied summary judgment motions filed by both parties. In the summary judgment record, the Plaintiff stated that during her hiring, as the sole female laborer in the County's Public Works Department, she was warned of likely sexually explicit and offensive speech, but "provided no guidance for reporting or redress of sexual harassment." However, she acknowledged receipt of an Employee Handbook that contained a provision that prohibited sexual discrimination, harassment, or retaliation and identified by title those to whom violations should be reported. Plaintiff was also shown an instructive video that dealt with sexual harassment.

Important points made by the Court:

The County did not supply any authority that following the handbook remedies was a prerequisite to this action.

A reasonable jury could find the continued presence, and sanctioned routine use, of an open urinal in the garage to which Plaintiff, when hired as the sole-female laborer, reported to receive daily work assignments and was otherwise present for job-related materials and duties during the work day met the elements comprising violation of Title VII.

There was evidence that the County knew or should have known that it was in violation of Plaintiff's rights under Title VII and there is a correspondent absence of evidence that it took any action whatsoever to remediate that violation.

***Vandegrift v. City of Philadelphia,* 228 F.Supp.3d 464 (E.D. Pa. January 11, 2017).**

A female police detective brought suit against the City of Philadelphia, alleging gender discrimination, hostile work environment, and retaliation under Title VII, the Pennsylvania Human Relations Act, the Philadelphia Fair Practices Ordinance, and under § 1983 for having an unconstitutional custom of treating female employees in the police department less favorably than male employees. The City moved for summary judgment, but the district court denied the motion.

The findings of the court included:

Plaintiff's dual-filing of her charges of gender discrimination with the EEOC and Pennsylvania Human Relations Commission satisfied exhaustion requirement for claim under partially ambiguous Philadelphia Fair Practices Ordinance.

Sexual assault of Plaintiff that occurred before Title VII limitations period could be considered under continuing violation doctrine as severe form of harassment, even if it was individually actionable.

Fact issue existed as to whether detective experienced severe or pervasive harassment.

Fact issue existed as to whether the City responded appropriately to Plaintiff's allegations of sexual harassment and whether it exercised reasonable care to correct alleged harassment.

Fact issue existed as to whether the City created an atmosphere where coworkers apt to distrust Plaintiff, and whether that atmosphere could have dissuaded a reasonable worker from making a charge of discrimination.

Fact issue existed as to whether the transfer of Plaintiff to extremely busy and hectic workplace could have dissuaded a reasonable person from making charge of discrimination.

Fact issue existed as to whether the City's act of charging Plaintiff with misconduct, even if charge was consistent with its policies, could have dissuaded a reasonable person from making charge of discrimination.

Fact issue existed as to whether the police commissioner acquiesced in a custom of sexual harassment in the police department by not addressing sexual assault and harassment.

III. SEXUAL ORIENTATION DISCRIMINATION

A. U.S. Courts of Appeal

***Christiansen v. Omnicom Group, Incorporated*, 852 F.3d 195 (2d Cir. 2017).**

Plaintiff brought suit against his employer, supervisor, and others affiliated with the employer, alleging discrimination due to HIV-positive status and the failure to conform to gender stereotypes. The district court dismissed the complaint.

The plaintiff was an openly gay man who was HIV–positive. He worked as an associate creative director and later creative director at an international advertising agency and subsidiary of the defendant. His complaint alleged that his direct supervisor engaged in a pattern of humiliating harassment targeting his effeminacy and sexual orientation. The acts committed by the supervisor included drawing multiple sexually suggestive and explicit drawings of plaintiff on an office whiteboard. The most graphic of the images depicted a naked, muscular plaintiff with an erect penis, holding a manual air pump and accompanied by a text bubble reading, "I'm so pumped for marriage equality." Another depicted plaintiff in tights and a low–cut shirt "prancing around." A third depicted plaintiff's torso on the body of "a four legged animal with a tail and penis, urinating and defecating."

The supervisor circulated at work and posted to Facebook a "Muscle Beach Party" poster that depicted various employees' heads on the bodies of people in beach attire. Plaintiff's head was attached to a female body clad in a bikini, lying on the ground with her legs upright in the air in a manner that one coworker thought depicted the plaintiff as "a submissive sissy." The supervisor also made remarks about the connection between effeminacy, sexual orientation, and HIV status. He allegedly told other employees that the plaintiff was effeminate and gay so he must have AIDS. In a meeting with other people, the supervisor allegedly told everyone in the room that he felt sick and then said to Christiansen, "It feels like I have AIDS. Sorry, you know what that's like." As an aside, the plaintiff kept private the fact that he was HIV-positive.

The plaintiff complained to the EEOC about the harassment described above and filed suit under Title VII after receiving his right to sue letter. The employer moved to dismiss arguing, *inter alia*, that the claim under Title VII was a sexual orientation discrimination claim rather than a gender stereotyping claim and was thus not cognizable under Second Circuit precedent. The district court the district court attempted, without apparent success to distinguish sexual orientation discrimination claims from gender stereotyping claims, "specifically noting that negative views people hold of those with certain sexual orientations may be based on stereotypes about appropriate romantic associations between men and women."

The district court considered several references to effeminacy in the complaint, but decided that the plaintiff did not allege that he was discriminated against because he did not conform to gender stereotypes, but because he was gay. As a result, the district court held the claim was a sexual orientation discrimination claim that was not cognizable under Title VII as noted above.

The Second Circuit disagreed and ruled that plaintiff had stated a claim.

***Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).**

A part-time adjunct professor brought suit against the defendant community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. The district court dismissed the complaint on the ground that sexual orientation was not a protected class under Title VII and the Seventh Circuit affirmed on appeal. Rehearing en banc was granted and the Court reversed and remanded the case.

The plaintiff is this case was openly gay. She began teaching as a part-time, adjunct professor at the defendant's South Bend campus in 2000. She applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful. In July 2014 her part-time contract was not renewed. She believed she was denied the positions and ultimately denied the part-time position because of her sexual orientation. She filed a charge of discrimination with the EEOC.

The Seventh Circuit stated the issue in the case as follows: "The question before us is not whether this court can, or should, "amend" Title VII to add a new protected category to the familiar list of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex. This is a pure question

of statutory interpretation and thus well within the judiciary's competence." 853 F.3d at 343.

In its analysis, the Court recognized that Congress had frequently considered amending Title VII to add the words "sexual orientation" to the list of prohibited characteristics, yet had never done so. On the other hand, the EEOC announced in 2015 had decided to take the position that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation. *Id.* at 344.

Plaintiff advanced two arguments in support of her contention that "sex discrimination" includes discrimination on the basis of sexual orientation. The first was the typical comparative method which the courts attempt to isolate the fact of the plaintiff's sex to the employer's decision. In other words, whether she has described a situation in which, "holding all other things constant and changing only her sex, she would have been treated the same way?" The second is based on the *Loving v. Virginia*, 388 U.S. 1 (1967) line of cases, in which she attempted to protect her right to associate intimately with a person of the same sex. The court opined that "[a]lthough the analysis differs somewhat, both avenues end up in the same place: sex discrimination."

After an exhausting analysis of the case law underpinning the two arguments, the Court held "that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." *Id.* at 350. The district court therefore erred in dismissing the complaint for failure to state a claim. In reaching this decision, the Seventh Circuit overruled four of its previous decisions.

***Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017).**

A former employee brought action against employer, alleging discrimination based on sexual orientation and gender non-conformity and retaliation in violation of Title VII. Her claims were dismissed *sua sponte.* The following facts were accepted as true on appeal:

Plaintiff worked as a security officer until she left the position voluntarily. During her employment, she was denied equal pay or work, harassed, and physically assaulted or battered. She was discriminated against on the basis of her sex and targeted for termination for failing to carry herself in a "traditional woman[ly] manner." Although she is a gay woman, she did not broadcast her sexuality. However, it was "evident" that she identified with the male gender, because of how she presented herself—"(male uniform, low male haircut, shoes, etc."). *Id.* at 1250.

The court reversed the lower court's order prohibiting the plaintiff from amending her complaint and noted that a gender non-conformity claim is not "just another way to claim discrimination based on sexual orientation," but instead, constitutes a separate, distinct avenue for relief under Title VII. *Id.* at 1255, 1266.

The court affirmed the dismissal of the sexual orientation claim finding that it was not an actionable claim under Title VII.

B. U.S. District Courts.

***Burnett v. Union Railroad Company*, 2017 WL 2731284 (W.D. Pa. June 26, 2017).**
The court cited the most recent cases dealing with whether sexual orientation discrimination is a cognizable claim under Title VII:

Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) ("we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination"); *Philpott v. N.Y., No. 16-6778, 2017 WL 1750398*, at *2 (S.D.N.Y. May 3, 2017) ("plaintiff's sexual orientation discrimination claim is cognizable under Title VII"); *Somers v. Express Scripts Holdings, No. 1:15-1424,* 2017 WL 1332145, at *14 n.8 (S.D. Ind. Apr. 11, 2017) ("if Mr. Somers were to raise a claim based on sexual orientation, such a claim would be cognizable under Title VII); *Boutillier v. Hartford Pub. Sch., No. 3:13-1303*, —— F. Supp. 3d ——, 2016 WL 6818348, at *9 (D. Conn. Nov. 17, 2016) ("the Court finds that Title VII protects individuals who are discriminated against on the basis

of sex because of their sexual orientation"); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs,* 197 F. Supp. 3d 1334, 1346 (N.D. Fla. 2016) ("[t]his view—that discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination—is persuasive to this Court, as it has been to numerous other courts and the EEOC"); *U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality.... [D]iscrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two"); *Isaacs v. Felder Services, LLC,* 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (holding that claims of sexual orientation-based discrimination cognizable under Title VII*); Baldwin v. Anthony Foxx, Sec'y, Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (EEOC July 16, 2015) (holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex"); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding that the plaintiff's allegations that he is a homosexual male whose sexual orientation is not consistent with the defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the defendant's gender stereotypes associated with men, and that his orientation as homosexual was removed him from the defendant's preconceived definition of male, was sufficient to state a claim of sex discrimination); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002) ("[n]othing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone"). See also *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009) ("the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (recognizing that "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices"); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (finding that sex discrimination necessarily includes sexual orientation discrimination under Title IX and that "the line between sex discrimination and sexual orientation discrimination is "difficult to draw" because that line does not exist, save as a lingering and faulty judicial construct"). *Id.* at *3.

IV. AGE DISCRIMINATION

A. U.S. Courts of Appeal

***Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3rd Cir. 2017).**

A group of employees brought a putative collective action against their former employer under the ADEA, alleging that they were terminated as part of reduction in force (RIF) because of their age. The class was conditionally certified, but the district court later granted a motion to decertify the class, granted a motion to exclude the plaintiffs' expert witnesses and their motion for summary judgment. On appeal, the Third Circuit affirmed in part, vacated in part and remanded. The Court ruled that plaintiffs' disparate-impact claims were cognizable under the ADEA. Summary judgment on this point was vacated as was the order excluding the statistics-related testimony of plaintiffs' expert. The district court was affirmed on all other matters.

The district court initially ruled that ADEA subgroups are cognizable, and conditionally certified a collective action to be comprised of employees terminated by the RIF who were at least fifty years old at the time. The case was transferred to another district judge and the company filed a motion to decertify the collective action. The second judge granted the motion, concluding that the collective action should be decertified because the opt-in plaintiffs' claims were factually dissimilar from those of the named plaintiffs.

On the certification issue, the Court identified the central question as whether so-called "subgroup" disparate-impact claims are cognizable under the ADEA. The Court noted that disparate-impact claims in ADEA cases ordinarily evaluate the effect of a facially neutral policy on all employees who are at least forty years old. In this case, plaintiffs claimed to have identified a policy that disproportionately impacted a subgroup of that population: employees older than fifty. In finding that subgroup claims could be brought under the ADEA, the Court stated: "Plaintiffs can demonstrate such impact with various forms of evidence, including forty-and-older comparisons, subgroup comparisons, or more sophisticated statistical modeling, so long as that evidence meets the usual standards for

admissibility. A contrary rule would ignore significant age-based disparities. Where such disparities exist, they must be justified pursuant to the ADEA's relatively broad defenses." *Id.* at *68.

Note: The Court's holding contradicts the views of three other circuits. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989); *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059, 1991 WL 11271 (6th Cir. 1991) (table opinion); *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999).

The company also filed motions to exclude plaintiffs' experts in three areas of expert testimony - statistical evidence in favor of plaintiffs' disparate-impact claim; "reasonable" human-resources practices during a RIF; and age-related implicit-bias studies. The district court granted the motions after performing the gatekeeping function required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). The Third Circuit reversed.

On the first area of expert testimony, plaintiffs' expert proposed to offer statistical evidence in support of the disparate-impact claims. He would have testified that employees older than forty-five, fifty, and fifty-five years old were likelier to be fired in the RIF than were younger employees. The Court remanded with directions that the district revisit the issue in light of the fact that the court did not provide justification for its analysis. The Court also found that the trial court imposed a higher standard that what is required by Fed. R. Evid. 702. Finally, the district court determined that the expert's statistics did not fit the case. This decision was made in light of the district court's view that the subgroup claim was not cognizable. Since the Third Circuit reversed this decision, this ground for exclusion was likewise overturned.

The Court upheld the district court's ruling on the other two areas of expert testimony.

***Lauth v. Covance, Inc.*, 2017 WL 2979868 (7th Cir. July 13, 2017).**

Employee brought action against employer alleging discrimination and retaliation in violation of the ADEA. Summary judgment granted for defendant on both claims. In its analysis of the age discrimination claim, the court noted that it had recently "discarded the distinction between direct and indirect methods of proof in employment discrimination cases, and clarified that all evidence must be evaluated as a whole." *Id.* at 5. The proper was whether a reasonable jury could determine, based on all of the record evidence, that the plaintiff's age was the cause of his termination.

***David v. Board of Trustees of Community College District No. 508*, 846 F.3d 216 (7th Cir. 2017).**

An African-American female employee of the defendant community college brought suit alleging that she was denied a pay increase on basis of her race, sex, and age, in violation of the ADEA, Title VII, and Equal Pay Act. Her Title VII and ADEA claims were disparate pay claims. She argued that employees who were younger, non-African–American, or male were paid more than she was paid for equivalent work, or were compensated for taking on additional work when she had not been so compensated.

The Court found that the age claim could not be sustained becase the other employees with whom the plaintiff compared herself were not similarly situated to her. Factors the Seventh Circuit considers in determining whether employees are similarly situated include whether the employees (1) held the same job description, (2) were subject to the same standards, (3) were subordinate to the same supervisor, and (4) had comparable experience, education, and other qualifications—provided the employer considered these latter factors in making the personnel decision.

***Santillan v. USA Waste of California, Inc.*, 853 F.3d 1035 (9th Cir. 2017).**

Plaintiff brought suit in state court against former employer, alleging wrongful termination based on age discrimination and retaliation. The case was removed to federal court in the Central District of California. The district court granted summary judgment for the employer, but the Ninth Circuit affirmed and part, and reversed in part and remanded.

Plaintiff sued under the California Fair Employment and Housing Act. Under the provisions of that law, plaintiff was required to establish that: (1) he was a member of a protected class (i.e., 40 years of age or older); (2) he was performing competently in the position he held; (3) he suffered an adverse employment action, such as termination; and (4) some other circumstance that suggests discriminatory motive. Under this law, a plaintiff is not required to produce much evidence in order to overcome a motion for summary judgment. Even the plaintiff's own uncorroborated testimony can suffice. In this instance, the plaintiff produced sufficient evidence to merit a trial.

B. U.S. District Courts

***Dixon v. City of Birmingham*, 2017 WL 2378116 (S.D. Ala. June 7, 2017).**

The "but for" element in ADEA actions does not prohibit a plaintiff from pleading alternative theories of liability. At the pleading stage of a case, Rule 8(d)(3) of the Federal Rules of Civil Procedure provides that a "party may state as many separate claims or defenses as it has, regardless of consistency." Simply because an ADEA claim and a race, disability or age-based discrimination claim may ultimately be inconsistent with one another because of the "but for" requirement of an ADEA claim, this does not mean that a plaintiff must choose between them at the pleading stage of the case. The plaintiff may plead them alternatively and then determine through discovery which is better supported by the evidence and consistent with the true motivation for the employment decisions taken against her.

***Contreras v. Mee*, 2017 WL 2955748 (N.D. Cal. July 11, 2017).**

This case contains a collection of decisions in the Ninth Circuit on the issue of stray remarks in support of an age discrimination claim:

Merrick v. Farmers Ins. Grp., 892 F.2d 1434, 1438–39 (9th Cir. 1990) (holding that hiring supervisor's statement that he hired a younger employee over plaintiff because he was "bright, intelligent, knowledgeable young man" was a stray remark insufficient to create

an inference of age discrimination); *see also Coleman*, 232 F.3d at 1271, 1284–85 (summarizing remarks that did not support an inference of discrimination, such as "we don't necessarily like grey hair," "old timers," "old-boy network," and "overqualified"; holding that employer's statement that plaintiff was not "young and promotable" did not give rise to suspicions of age discrimination); *Nesbit v. Pepisco, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (holding that employer's statement that "[w]e don't necessarily like grey hair" did not support inference of discriminatory motive). Moreover, most of the alleged statements were made at least six months prior to his termination, and are thus too attenuated to be considered direct evidence particularly where there is no allegation that the remarks were connected to Contreras' termination.[4] *See Nesbit*, 994 F.2d at 705; *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989) (noting that stray "remarks, ... when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decisionmaker in issue") (cited with approval in *Merrick*, 892 F.2d at 1438). *Id.* at 7.

***Frankel v. TJX Companies, Inc.*, 2017 WL 2938194 (D. Conn. July 10, 2017).**

Statements that Plaintiff was a "dinosaur" and "old school," and any disparate treatment whereby he received greater criticism than his younger counterparts in maintaining his merchandise department, were all made by a person who did not recommend terminating Plaintiff and was not involved in the decision to terminate him. Also, the context of the statements reveals no age discrimination. Courts consider the context in which a statement is made to determine whether the remark provides "a basis on which a reasonable jury could determine that the adverse employment decisions at issue were motivated" by the alleged discrimination. *Id.* at *11.

***Williams v. Nex-Tech Wireless, LLC*, 2017 WL 1354864 (D. Kan. April 13, 2017).**

A stray remarks case. The court examines whether the comments were directed at plaintiff or at his position, whether the comments were made by decisionmakers involved in the adverse employment action, when the comments were made, and whether the comments were pertinent to a policy of the defendant. The comments in this instance were made by the Chairman of the Board, the President/CEO, and the plaintiff's supervisor when he was

terminated. The remarks appeared to have been made within months or a year of the termination, and some of the remarks appeared to suggest a policy or goal of replacing older employees with younger employees. This evidence created disputed material facts rendering summary judgment in appropriate.

***Stack v. Speer*, 2017 WL 2462496 (E.D. Mo. June 7, 2017).**

If the comparison of plaintiff and selected candidate reveals that plaintiff was only similarly qualified or not as qualified as selected candidate, then no inference of age discrimination arises

***Schlosserv. Time Warner Cable, Inc.*, 2017 WL 2468975 (S.D.N.Y. June 7, 2017).**

The ADEA "prohibits discrimination on the basis of age and not class membership[;] the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). Courts have inferred age discrimination in cases where the age gap between a plaintiff and his replacement, or others hired by the defendant, is as little as three years to as many as twenty-three years. See *D'Cunha v. Genovese/Eckerd Corp.*, 479 F.3d 193 (2d Cir. 2007) (hiring a 47-year old applicant and 42-year old applicant over a 50-year old applicant); *Balut v. Loral Elec. Sys.*, 166 F.3d 1199 (2d Cir. 1998) (replacing 57-year old employee with a 47-year old employee); *Framularo v. Bd. of Educ. of the City of Bridgeport*, 549 F. Supp. 2d 181 (D. Conn. 2008) (plaintiff was between seven and twenty-three years older than selected applicants). *Id.* at 3.

***Larison v. Fedex Corporate Services, Inc.*, 2017 WL 2569206 (E.D. Pa. June 13, 2017).**

Anonymous complaints of age discrimination against a supervisor that contain only conclusory allegations that the supervisor replaces older workers with younger workers and harasses older workers do not demonstrate age bias.

***Buckner v. Lynchburg Redevelopment and Housing Authority,* 2017 WL 2601898 (W.D. Va. June 15, 2017).**

The standard for proving age discrimination is "high," in that a plaintiff must prove the discrimination was "the but-for cause" of the failure to be hired. In attempting to prove pretext labeling someone as "overqualified" is not a legitimate reason to fail to hire them.

V. NATIONAL ORIGIN DISCRIMINATON

A. U.S. Courts of Appeal

***Reynaga v. Roseburg Forest Products,* 847 F.3d 678 (9th Cir. 2017).**

Among the claims asserted by the plaintiff, who was of Mexican descent, was harassment by a coworker based on national origin. Some of the evidence presented was quite graphic. There were repeated instances in which the coworker allegedly made explicit racial and national origin comments in the workplace, including: (1) referring to black people as "ni….s" and Arabs as "rugheads;" (2) That the borders should be closed in order to keep motherf* * * ers like plaintiff from entering the country and killing elk; (3) stating that minorities are taking over the country;" (4) asking the plaintiff if all Mexican women are fat?" (5) knowing that the plaintiff's wife was Native American, referring to Native American women as "nasty fat squaws;" and (6) leaving an email in the break room that contained an article claiming that President Obama was an illegal alien and that "our borders are like sieves."

The court found that a reasonable jury could find that the alleged conduct outlined above would be highly offensive and demeaning to anyone, especially a person from Mexico. On this claim, the court reversed the grant of summary judgment and remanded the case.

B. U.S. District Courts

***Dyer v. Wal-Mart Stores, Inc.*, 2017 WL 2213570 (E.D. Mich. May 19, 2017).**

Plaintiff, who was born and raised in the Philippines, alleged that she was terminated from her position because of her national origin. According to plaintiff, her supervisor told her she could not understand her because of her accent and told her to slow down when she spoke because the supervisor could not understand her.

In considering a motion for summary judgment on this claim, the court noted that "national origin" refers to "the country where a person was born, or more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). The remarks by the supervisor were determined not to be direct evidence of national origin discrimination. The supervisor had a legitimate interest in being able to communicate in English. Furthermore, because plaintiff worked in customer service, the company had a legitimate interest in ensuring that customers could also understand the plaintiff. Because a non-discriminatory explanation for Ms. Ortega's remarks exists, the remarks do not constitute direct evidence of discrimination.

***Rao v. Gondi*, 2017 WL 2445131 (N.D. Ill. June 5, 2017).**

Plaintiff claimed that he was constructively discharged because of his Indian national origin. The court recognized that in the Seventh Circuit the distinction between "direct" and "indirect" evidence in employment discrimination claims was no longer applicable and cited decisions that overruled lower courts to the extent that opinions required the use of the direct-and-indirect framework." *Ortiz v. Werner Enter.*, 834 F.3d 760, 765-66 (7th Cir. 2016). The court stated that the "critical question is not the type of evidence presented but rather from examining the evidence as a whole, "whether a reasonable jury could infer the existence of discrimination or retaliation."' *Malekpour v. Chao*, No. 16-3440, 2017 WL 1166872, at *3 (7th Cir. Mar. 29, 2017) (quoting *Cole*, 838 F.3d at 899–901). *Id.* at 16.

VI. FIRST AMENDMENT

A. U.S. Courts of Appeal

***Crouse v. Town of Moncks Corner,* 848 F.3d 576 (4th Cir. 2017).**

Two police officers brought a § 1983 action against the police chief and others alleging that their dismissal from police force was in retaliation for exercising their First Amendment free speech rights. Summary judgment was granted to the chief on the defense of qualified immunity. The plaintiff appealed and the Fourth Circuit affirmed.

One plaintiff was a corporal who reported to a lieutenant in his chain of command. He complained about his lieutenant's management style, his treatment of criminal suspects, and his showing the officers inappropriate pictures. He discussed his complaints with a captain and the chief.

At one point, the plaintiff learned of an incident in which the lieutenant had arguably employed excessive force during the course of making an arrest. Along with a fellow officer, the plaintiff visited the person against whom the force had been used and encouraged him to file a complaint about the lieutenant. They told him that other officers supported his version of the story, and the fellow officer suggested that the victim get an attorney. Plaintiff also handed the person a form that the police department prepared for citizens to submit complaints about police officers. These forms were freely available in the police station and were distributed by clerical staff and police officers. Both the plaintiff and his fellow officer attempted to conceal the visit with the citizen.

The citizen later told another officer about the plaintiff's visit and the information was brought to the attention of the chief, although he was not informed of the identities of the plaintiff or his fellow officer. The chief directed another lieutenant to investigate both the allegation of use of excessive force and the visit by the unidentified officers.

The investigating lieutenant interviewed the citizen about both his arrest and the officers who had come by his house. Based on the physical description of the two officers, he suspected that they were the plaintiff and his fellow officer.

After reporting his suspicions to the chief, he interviewed the plaintiff and his fellow officer separately. Both admitted to speaking with the citizen and gave written statements describing what they had done. The chief was informed and was "was absolutely outraged" and instructed a captain to give them the opportunity to resign. They were told that if they did not resign, they would be terminated. Both officers resigned.

The investigation into the citizen's accusation of excessive force continued. After the investigation was finished, the chief requested that the South Carolina Law Enforcement Division investigate the incident. That investigation ended when the local prosecutor determined that the evidence did not support seeking criminal charges against the plaintiff's lieutenant for excessive use of force.

Plaintiff filed suit arguing that the forced resignation constituted unconstitutional retaliation for the exercise of his First Amendment rights. At a hearing, the district court held that the chief was entitled to qualified immunity on the First Amendment claim. The court found that it was not clearly established law that the plaintiff was acting as a private citizen when he spoke to the citizen and that, under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), acting as a private citizen was a necessary element of a First Amendment retaliation claim.

The court upheld the grant of qualified immunity. It found that the chief could reasonably have viewed the officers' conversation with the citizen as "surreptitious conduct designed to foment complaints and litigation against a supervisor with whom they did not get along." He stated that saw this behavior as a serious threat to the smooth running of the police department and to his own ability to maintain operational control. The court agreed that "it would be difficult for any institution to function when subordinates are engaged in secretive efforts to foment litigation against supervisors with whom they have, for whatever reason,

an unfortunate personal chemistry." The court, citing *Garcetti,* observed that the First Amendment does not protect speech made pursuant to a government employee's official duties, even when that speech is upon a matter of public concern.

Determining whether speech was made in the course of an employee's job requires courts "to engage in a 'practical' inquiry into the employee's 'daily professional activities.'" Whether the employee spoke at his workplace or away from it is not dispositive. Even though the plaintiff was in plain clothes and driving an unmarked car when he spoke to the citizen, the chief was reasonable in believing that the citizen could have known that the plaintiff was speaking in his capacity as a police officer due to his gun and badge.

***Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017).**

A former county paramedic brought a § 1983 action against the county and county officials, alleging that he was discharged in retaliation for exercising his First Amendment free speech rights, and that the fire department's social media policy, which played a role in the employee's termination, was facially violative of the First Amendment.

Plaintiff was discharged for violating the social media policy based on the following posts he put on Facebook in response to news coverage on the gun control debate:

> My aide had an outstanding idea … lets all kill someone with a liberal ... then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal ... its almost poetic …
>
> But.... was it an "assult liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh ... pick a black one, those are more "scary". Sorry had to perfect on a cool idea!

The Fourth Circuit upheld summary judgment for the defendants, holding that the fire department's interest in workplace efficiency and preventing disruption outweighed the public interest commentary contained in Plaintiff's Facebook activity.

***Gillis v. Miller*, 845 F.3d 677 (6th Cir. 2017).**

Former correctional officers brought § 1983 action against county sheriff and sheriff's department, alleging retaliatory termination in violation of the First Amendment for posting memorandum notifying fellow officers of right to union representation during investigation into prescription drug trafficking at jail. The memorandum contained description of rights under the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Plaintiffs argued that Defendants were required to submit evidence that the *Weingarten* memorandum caused actual disruption to the jail's operations, and because Defendants failed to submit such evidence, Plaintiffs must prevail under the *Pickering* balancing test.

The court noted that it had never addressed whether employers must show evidence of actual disruption in order to prevail under the *Pickering* test. The Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have each held that evidence of actual disruption is not required. On the other hand, the Tenth Circuit has held that under the *Pickering* test, the "government must produce evidence of an actual disruption of services which results from the employee's speech."

The Sixth Circuit agreed with those circuits that do not require a showing of actual disruption. And, in this case, the defendants could reasonably have predicted that the *Weingarten* memorandum might disrupt legitimate law enforcement interests in the jail. "The memorandum expressly counseled the correctional officers not to speak with management without first having a union representative present. The memorandum went so far as to provide a script for correctional officers to use in case they were questioned by management. Defendants could have legitimately predicted that this advice would hinder their ability to conduct a timely and efficient investigation, and halt the flow of illegal

contraband into the prison. 'Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence' in prisons and such contraband poses 'serious security dangers' to jail personnel and the inmates themselves." *Id.* at 687.

***Mayhew v. Town of Smyrna, Tennessee,* 856 F.3d 456 (6th Cir. 2017).**

Plaintiff alleged that the Town of Smyrna, Tennessee, and its city manager terminated his employment in retaliation for engaging in two distinct acts protected by the First Amendment: (1) reporting violations of federal and state regulatory requirements at the town's wastewater-treatment plant; and (2) voicing concerns regarding Smyrna's hiring practices.

The Court recited the burden of proof the plaintiff had to meet. A public employee alleging First Amendment retaliation must satisfy three requirements. The employee must speak on matters of public concern. He or she must speak as a private citizen and not as an employee pursuant to his official duties. Finally, the employee must show that his speech interest outweighs the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

***McGreal v. Village of Orland Park,* 850 F.3d 308 (7th Cir. 2017).**

A former village police officer brought a § 1983 action against the village and three village police department officials, alleging that he was terminated in retaliation for his exercise of protected speech. He alleged that he was fired because of his exercise of protected speech at a village board meeting. The purpose of the meeting was discuss options to address an anticipated budgetary shortfall. One of the cost-saving options that the village proposed involved laying off as many as seven full-time police officers.

The plaintiff was the secretary of the police union. He claimed he attended the meeting on behalf of the union and allegedly presented three alternative solutions, none of which required the laying off of any full-time officers.

The defendants denied knowing that the plaintiff had engaged in any protected speech or even attended the board meeting. Instead, they argued that he was legitimately fired because of a series of incidents, none of which involved any protected speech.

"To show that his firing was motivated by his protected speech, [plaintiff] must first demonstrate that the defendants knew of the protected speech. 'Allegedly protected speech cannot be proven to motivate retaliation, if there is no evidence that the defendants knew of the protected speech.'" *Id.* at 313. In this case, the plaintiff failed to meet this burden.

***Roake v. Forest Preserve District of Cook County*, 849 F.3d 342 (7th Cir. 2017).**

A former police officer for county forest preserve district disciplined for drinking alcohol at work filed suit pursuant to 42 U.S.C. § 1983 alleging unlawful retaliation and due process violation based on reputational harm. The officer claimed that he was off duty at the time he consumed champagne and that he had obtained permission from a sergeant to bring the champagne to the station to celebrate New Year's Eve. He also said that other employees drank champagne. In the midst of a disciplinary proceeding, the officer resigned in lieu of what he believed was his inevitable termination.

The plaintiff claimed that the real reason he was disciplined was because he had previously reported to his employer two instances of official misconduct within the police department. One incident involved an allegation that a fellow officer had engaged in racial profiling. Roake mentioned the matter again during his disciplinary proceedings. The second report involved a fellow officer the plaintiff believed had been unjustly disciplined.

After he left his position, the plaintiff applied for other jobs. He alleged in his complaint that officials of his former employer told certain prospective employers that he had consumed alcohol while on duty and was not welcome to reapply there. He claimed that this damaged his professional reputation and made it more difficult for him to find work. The plaintiff alleged that his former employer retaliated against him for complaining about racial profiling and unlawful disciplinary action within the police force. The Court rejected this claim and held:

> As a police officer, Roake had a duty to protect the public from harm, including harm resulting from illegal activity by law enforcement. So when Roake internally reported that his fellow officers were abusing the public trust by acting illegally on the job, he was speaking as a public employee pursuant to his official responsibilities, and not 'as a citizen contributing to the civic discourse.' Consequently, even assuming Roake was disciplined in retaliation for his speech, he has failed to state a plausible claim under the First Amendment because he has not shown that his speech was constitutionally protected. The district court properly dismissed Roake's First Amendment retaliation claim under Rule 12(b)(6). *Id.* at 346-347.

***Thompson v. Shock*, 852 F.3d 786 (8th Cir. 2017).**

A former sheriff's deputy brought a § 1983 action against sheriff alleging that he was discharged in violation of his First Amendment right of free association. The plaintiff was a fellow employee of the defendant sheriff who, when employed as a deputy, sought election in the sheriff's race. The plaintiff did not support the defendant's candidacy and actively campaigned for his opponent while off duty. The plaintiff met privately prior to the election and explained to the defendant that he supported his opponent because he was a personal friend, but that he would be willing to work for him he if prevailed. The plaintiff alleged that he heard that the defendant told others that if he won, he would terminate current employees who did not support him.

When he won the election, the defendant notified the plaintiff that he not been selected for continued employment and informed him of a grievance procedure should he wish to pursue it. The plaintiff did so and during the hearing the defendant said that the chose not to retain the plaintiff because of the lack of a good work ethic. The plaintiff's work record did not contain anything negative.

After his termination, the plaintiff and three other employees brought suit alleging violations of their rights under the Arkansas Political Freedom Act, the Arkansas Constitution, and the First Amendment to the United States Constitution. The district court

granted summary judgment for the defendant sheriff in his individual and official capacities.

In its decision, the Eighth Circuit provided an excellent discussion of the law in this area. The Court noted that the Supreme Court had developed two lines of cases that assess how to balance the First Amendment rights of government employees with the need of government employers to operate efficiently. For "overt expressive conduct," federal courts apply the balancing test as found in a line of cases that followed the decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). The typical fact situation involves a government employee causing workplace disruption by speaking as a citizen on a matter of public concern, followed by government action adversely affecting the employee's job. In considering a claim by an employee in this situation, a court's analysis considers: (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

For pure patronage dismissals federal courts apply the narrow-justification test outlined in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). The typical lawsuit under these case involves the dismissal of an employee because of his or her political affiliations or support for certain candidates. Citing precedent from the Eighth Circuit, the Court said that a dismissal solely on account of an employee's political affiliation violates the First Amendment unless the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

The Court also recognized that there are certain mixed scenarios in which a policymaking employee receives an adverse employment action based on specific instances of the employee's speech or expression.

The Court summarized the three situations: (1) if an employee is discharged because of his or her expressive conduct, the *Pickering–Connick* test is applied; (2) if an employee is discharged because of his or her political affiliation, the *Elrod–Branti* test is applied; and (3) when a political-affiliation employee gets discharged for his or her expressive conduct, the *Pickering–Connick* test applies. In this case, the plaintiff was not fired because of his overt expressive conduct but because of his affiliation with the "wrong" candidate. When the constitutional right at issue involves "joining, working for or contributing to the political party and candidates of [the employee's] choice," we apply the *Elrod–Branti* test. Because the district court did not apply this test, the case was remanded.

***Brandon v. Maricopa County,* 849 F.3d 837 (9th Cir. 2017).**

An attorney employed in the County Attorney's Office sued the county and certain individuals claiming he was terminated from his position in retaliation for exercising his right to free speech under the First Amendment.

At the conclusion of a lawsuit, she received a call at her office from a newspaper reporter about the case which she had handled for the Maricopa County Sheriff's Department. One of her comments to the reporter about the case was later published in an article in that newspaper. This article suggested that the county substantially increased settlement offers to avoid having key county officials testify. This was viewed as unprofessional by county officials. She was ultimately terminated. A jury found for the plaintiff and the county appealed.

The county argued on appeal that the comments by the plaintiff were made in her official capacity and were therefore not protected by the First Amendment. They cited the following three reasons in support of this argument: 1) the comment involved a case she worked on as a county employee, 2) the comment discussed her work product, and 3) the comment was made on her county office phone in response to a call during normal business hours. The Ninth Circuit agreed and reversed the jury's verdict. The court stated that the plaintiff's comments to the reporter which were ultimately published fell under the broad

set of official duties she owed Maricopa County as its attorney, and so was not constitutionally protected citizen speech.

B. U.S. District Courts

***Addison v. City of Baker City,* 2017 WL 2821942 (D. Ore. June 29, 2017).**

Plaintiff was employed by a local newspaper. He wrote an editorial that implied the police department was using the canine unit to violate the Fourth Amendment rights of the citizens. The police chief complained to the newspaper and the plaintiff was ultimately terminated.

The issue was whether a First Amendment retaliation claim could ever be based upon the adverse consequence of a plaintiff's employment being terminated by a *private* employer. The court cited Ninth Circuit precedent, *Coszalter v. City of Salem,* 320 F.3d 968 (9th Cir. 2003), holding there is not "an exclusive, category-based limitation on the kind of retaliatory action that is actionable under the First Amendment," and that case does not allow the government "to take severe retaliatory actions—such as ... engaging in campaigns of harassment and humiliation—because those actions do not result in the loss of a valuable governmental benefit or privilege.". Indeed, the Ninth Circuit has recognized that "[i]nformal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment also." *White*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

The court declined to grant the defendants' motion for summary judgment.

***Cannon v. Village of Bald Head Island,* 2017 WL 2712958 (E.D.N.C. June 22, 2017).**

Plaintiffs were terminated from their positions as police officers based on their participation in a series of text messages in violation of the police department's internal policies. The letters of termination made reference to discourteous treatment of other employees and inappropriate electronic communications. References to harassment and

sexual harassment were also included. The court described the subject matter of the text messages as follows:

In the instant case all four plaintiffs' speech occurred during the period of July 25, 2014 to August 15, 2014 in the form of a series of text messages. As to context, the text messages were sent from all four plaintiffs' personal cellphones to fellow officers while Plaintiff Terrell and Plaintiff Koons were off-duty when they sent their text messages. The text messages were not published by plaintiffs to the public via news media or through personal social media. Plaintiffs were not acting in the course of ordinary employment or pursuant to their official duties when they were communicating with co-workers via text messages. Plaintiffs have introduced sufficient evidence for a reasonable juror to conclude that plaintiffs were speaking as private citizens, not as government employees.

The amount, specific date of occurrence, and content of the text messages varied. Plaintiff Terrell sent twenty-three text messages on four days during the relevant period: Wednesday, August 6, 2014; Thursday, August 7, 2014; Sunday, August 10, 2014; and Friday, August 15, 2014. Plaintiff Conner sent twenty-five text messages on five days during the relevant period: Friday, July 25, 2014; Wednesday, August 6, 2014; Thursday, August 7, 2014; Sunday, August 10, 2014; and Friday, August 15, 2014. Plaintiff Koon's sent sixteen text messages on four days during the relevant period: Wednesday, August 6, 2014; Thursday, August 7, 2014; Friday, August 8, 2014; and Friday, August 15, 2014. Two of Plaintiff Terrell and Plaintiff Conner's messages and three of Plaintiff Koons' were related to their concerns with an article posted in which they doubted the sufficiency of training of officers within the department of public safety. [D.E. #58-3 at 5, 6-7, 9]. In particular, the text message thread refers to a news article regarding the department with its implied source of information being Defendant Mitchell, that the department had all but two of the twenty on staff certified in law enforcement, firefighting, emergency medical, and water rescue. *Id.* at 13.

The court concluded that the plaintiffs were speaking as citizens on a matter of public concern since the news article was already accessible to the public via a common news

source and the assertion that officers were certified who were allegedly not certified came to bear on the truthfulness, credibility, and strength of the Department to "carry out its vital public mission effectively." The court also found that the interest of the employees speaking as private citizens on a matter of public concern outweighed the interest of the government because the speech raised serious concerns regarding officer training and supervision," which overcame the showing of the defendants as to government's interest in preventing workplace disruption."

***Drake v. Town of New Boston,* 2017 WL 2455045 (D. New Hampshire, June 6, 2017).** Plaintiff was a police officer who was terminated from her employment. Shortly after being hired, she began training under a field training officer ("FTO"). She noticed the FTO was engaging in inappropriate behavior. On one occasion after he had stopped a female driver, he told the plaintiff that, rather than issue a citation, he wanted to take female drivers out and rape them. He also made comments about female drivers that he believed found him attractive, and developed what he called a "rapability" scale. After a traffic stop, he would test the plaintiff on whether a particular female driver was "rapable." He made inappropriate comments about fellow female officers such as saying they cried all the time and were full of drama.

On another occasion, the plaintiff brought a report concerning a DWI arrest she had conducted to the FTO for review. After reviewing the report, the FTO ordered the plaintiff to add certain information into the report "for the benefit of the defense attorneys." The requested modification was not factually correct, but plaintiff complied with the order and modified the report. The FTO's misconduct continued to the point that plaintiff spoke with another officer and said that she needed to report him. She then reported the misconduct to a sergeant.

The FTO engaged in other inappropriate conduct both on and off duty. Examples included inappropriate sexual comments and negative comments about other officers. Plaintiff was also asked to lie by the FTO and invited on multiple occasions to visit the FTO at his Florida home on the weekends. No other officers were invited. On one occasion, while on

duty in uniform and driving a police cruiser, he came to the plaintiff's home, uninvited, while she was off duty. When she opened the door, he asked if she was naked. When she responded that she was not, he joked he would come back later. He then let himself into her house, and began to discuss his new car.

About a month after the visit to her home, the plaintiff applied for a job with another police department and disclosed on a polygraph test that she had falsified a report at the direction of the FTO. She also reported that she felt she was being wrongfully targeted.

Numerous allegations were raised in the complaint, including an interesting First Amendment claim. Plaintiff alleged that she has a constitutional right to engage in free speech "without being ordered to lie," and a right to "report violations of the law. The Town argued that she did not establish that she was speaking as a citizen and that her statements were made in her official capacity as a police officer. The court concluded that the complaints made by the plaintiff were made in her capacity as a private citizen.

***Mote v. Walthall,* 2017 WL 2651705 (E.D. Tex. June 20, 2017).**

Plaintiff was a former police officer who had been disciplined twelve (12) times in his career, including his termination. He claimed he was terminated for his involvement with a local police officers association which was a local chapter of the Texas Municipal Police Association. He claimed, in part, that the chief of police retaliated against him for exercising his First Amendment right to freedom of association with the police union. In order to prevail, he was required to show that (1) he suffered an adverse employment action, (2) his interest in associating outweighed his employer's interest in efficiency, and (3) his protected activity was a substantial or motivating factor in the adverse employment action.

The court found that the plaintiff had the right under Texas law to express support for a labor union. Based on the evidence presented, material facts existed as to whether the plaintiff would have been terminated in the absence of his association with the union.

VII. RETALIATION

A. U.S. Courts of Appeal

***Carvalho-Grevious v. Delaware State University*, 851 F.3d 249 (3rd Cir. 2017).**

An associate professor at the university claimed he was subjected to retaliation for complaining about discriminatory employment practices based on race and gender. The court articulated the issue before it as follows:

> In this appeal, we consider whether a plaintiff asserting a Title VII retaliation claim must establish but-for causation as part of her prima facie case pursuant to *University of Texas Southwestern Medical Center v. Nassar*, —— U.S. ——, 133 S.Ct. 2517 (2013). We hold that, at the prima facie stage, a plaintiff need only proffer evidence sufficient to raise the inference that her engagement in a protected activity was the *likely reason* for the adverse employment action, not the but-for reason. *Id.* at 252.

The case was remanded to the district court to the existence of material facts in dispute as to whether the proffered reason for the university's action in revising the professor's contract.

***Gracia v. SigmaTron International, Inc.*, 842 F.3d 1010 (7th Cir. 2017).**

Former employee brought action for retaliatory discharge. A jury found in favor of the employee and the verdict was upheld by the Seventh Circuit. The employer complained about sexual harassment and filed a charge of discrimination with the EEOC. She was subsequently terminated allegedly because of her record of tardiness and because she allowed an employee to use unleaded solder on a leaded circuit board. The court stated that a retaliatory motive may be established through circumstantial evidence such as suspicious timing, ambiguous statements, evidence that the stated reason for the employment decision is pretextual and other evidence from which an inference of discriminatory intent might be

drawn. Based on the evidence presented at trial, the court refused to disturb the jury's decision.

B. U.S. District Courts

***Pearson v. Augusta, Georgia*, 2017 WL 937945 (S.D. Ga. March 9, 2017).**

Plaintiff failed to establish retaliation under the Fair Labor Standards Act. She did establish a dispute of material fact with respect to a Title VII retaliation claim. There was only a gap of a few months between an adverse employment action of forced retirement and the filing of a charge of discrimination with the EEOC.

***Edralin v. Adventist GlenOaks Hospital*, 2017 WL 1493681 (N.D. Ill. April 26, 2017).**

Suspicious timing will only rarely be enough on its own to support an inference of retaliation. Timing is relevant, however, and it is not true that suspicious timing may never be sufficient on its own to allow a retaliation claim to proceed. Timing may be sufficient when an adverse employment action follows on the close heels of protected expression and the plaintiff can show the person who decided to impose the adverse action knew of the protected conduct. In this case, the district court found that there were material facts in dispute as to whether the employer's non-retaliatory reason for its action was a pretext.

***Mulvey v. Hugler*, 2017 WL 1737851 (M.D. Tenn. May 4, 2017).**

Plaintiff's filed a Title VII claim alleging that the defendant took various adverse actions against him, and created a hostile work environment, in retaliation for testifying against a supervisor in an internal DOL sexual harassment investigation. Plaintiff submitted a long list of adverse employment actions and instances of workplace harassment, which he believes were taken in retaliation for his testimony in the sexual harassment investigation.

"The legal standards governing Title VII retaliation claims have been articulated by the Sixth Circuit as follows: A plaintiff must now prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff

was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment."

The employer then must provide a non-retaliatory reason for its action which the plaintiff must show is a pretext.

The Court found that the vast majority of the instances identified by plaintiff as constituting retaliatory harassment and contributing to a hostile work environment were non-actionable "petty slights," "minor annoyances," and "trivial harms." Instances of this nature did not support a Title VII retaliation or hostile work environment claim. As to those instances of conduct that were not trivial, the defendant articulated a non-retaliatory explanation and the plaintiff could not demonstrate it was a pretext for retaliation.

VIII. EEOC SUBPOENA – ROLE OF DISTRICT COURT

A. U.S. Supreme Court

***McLane Co., Inc. v. E.E.O.C.*, 137 S.Ct. 1159 (2017).**

The question presented here is whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena *de novo* or for abuse of discretion. In this case the plaintiff was terminated from her position after she failed a physical evaluation upon returning from maternity leave. She filed a sex discrimination charge under Title VII of the Civil Rights Act of 1964 and the EEOC initiated an investigation. The employer denied a request to produce what is known as "pedigree information" such as the names, Social Security numbers, addresses, and telephone numbers of employees asked to take the physical evaluation the charging party failed. The EEOC then issued subpoenas pursuant to 42 U.S.C. § 2000e–9.

EEOC filed suit seeking to enforce the subpoenas. The district court refused to enforce the subpoenas because it found that the pedigree information was not relevant to the charges

of discrimination. The Ninth Circuit reviewed the district court's decision to quash the subpoena *de novo,* and court concluded that the lower court erred in finding the pedigree information irrelevant. On appeal to the Supreme Court, the issue was whether the district court's decision should have been reviewed for an abuse of discretion.

The Supreme Court found that abuse of discretion was the proper standard of review, vacated the decision of the Ninth Circuit and remanded the case for further proceedings. The Court reiterated prior decisions in which it held that "[a] district court is not to use an enforcement proceeding as an opportunity to test the strength of the underlying complaint. Rather, a district court should 'satisfy itself that the charge is valid and that the material requested is "relevant" to the charge.'" "). 137 S.Ct. at 1165. "If the charge is proper and the material requested is relevant, the district court should enforce the subpoena unless the employer establishes that the subpoena is "too indefinite," has been issued for an "illegitimate purpose," or is unduly burdensome." *Id.*

IX. AMERICANS WITH DISABILITIES ACT AND FAMILY MEDICAL LEAVE ACT

A. U.S. Courts of Appeal

***Audette v. Town of Plymouth,* 858 F.3d 13 (1st Cir. 2017).**

Plaintiff was unable to perform the duties of a police officer due to an injury. She claimed that she was denied a transfer to another position as a reasonable accommodation. The court held that she failed to meet her burden of proving the availability of a vacancy at the time she requested the transfer as a reasonable accommodation under the ADA. A position she cited as available was a higher rank with broader responsibilities.

***Echevarria v. AstraZeneca Pharmaceutical LP,* 856 F.3d 119 (1st Cir. 2017).**

Summary judgment for employer on ADA claim upheld. A plaintiff must show, even at the summary judgment stage, that a requested accommodation under the ADA is facially

reasonable; where plaintiff fails to show such reasonableness, summary judgment for the defendant is appropriate.

***Ortiz-Martinez v. Fresenius Health Partners, PR, LLC,* 853 F.3d 599 (1st Cir. 2017).**
Employee sustained a work related injury and claimed that the employer refused to provide a reasonable accommodation in violation of the ADA. Because the employee failed to cooperate in the interactive process, the employer could not be held liable. Summary judgment was upheld for the employer.

***Acker v. General Motors, L.L.C.,* 853 F.3d 784 (5th Cir. 2017).**
Employer suspended employee without pay on multiple occasions for violation of a call-in procedure for absences from work. Employee sued claiming that the suspensions were in retaliation for exercising FMLA rights and also violated the ADA. Summary judgment granted for the employer by the district court. The Fifth Circuit affirmed holding that a request for FMLA leave is not a request for a reasonable accommodation under the ADA.

***Caldwell v. KHOU-TV,* 850 F.3d 237 (5th Cir. 2017).**
The plaintiff in this case was a video editor who used crutches due to bone cancer that occurred during his childhood. A part of the video editor job involved working in an electronic digital recording room that plaintiff's supervisors believed would be difficult for him to navigate. Because of this he was not assigned to work there. Despite this fact, he worked in the room when others went on a break and tried to make sure he kept current on the work in the room.

The plaintiff advised his supervisor that he needed two surgeries for his condition and provided the date for one. The date of the second was dependent upon the outcome of the first. In that same time period, the owner of the defendant television station determined that a reduction in force was necessary. Plaintiff was ultimately terminated before his second surgery took place. He was given different explanations for his termination. He filed suit under the ADA and the FMLA. The district court granted summary judgment to the defendant and plaintiff appealed.

On appeal, it was accepted that a prima facie case was established and that defendant articulated a non-discriminatory reason for the termination. However, the plaintiff argued that the reason was a pretext for disability discrimination because the defendant: (1) gave false explanations for firing plaintiff; (2) changed their explanations for firing him; (3) limited and segregated him in a way that adversely impacted his performance; and (4) did not give him the same opportunities as other employees.

The Fifth Circuit reversed the decision and remanded the case to the district court. The court recognized that an employer's inconsistent explanations for an employment decision cast doubt on the truthfulness of those explanations.

***Marshall v. The Rawlings Company LLC,* 854 F.3d 368 (6th Cir. 2017).**

The plaintiff was demoted and later discharged when she took time off to deal with mental health problems. Claims brought under both FMLA and ADA. FMLA liability claimed under cat's paw theory. Court held that under this theory the honesty or sincerity of the decisionmaker's belief is irrelevant; what is relevant is that the belief is rooted in a biased recommendation.

***Equal Employment Opportunity Commission v. BNSF Railway Company,* 853 F.3d 1150 (10th Cir. 2017).**

EEOC sued employer for violation of ADA. Summary judgment for employer upheld on appeal. Employer did not did not regard the plaintiff as disabled in regard to the major life activities of working and performing manual tasks.

***United States Equal Employment Opportunity Commission v. St. Joseph's Hospital, Inc.,* 842 F.3d 1333 (11th Cir. 2016).**

Employee was a psychiatric ward nurse who requested a job reassignment as an accommodation for the fact that she was required to use a cane which was a hazard in her job. The defendant offered her the chance to apply for other jobs, but did not waive the

requirement that she compete for them. When she did not get another position, she was terminated.

Court affirmed in part and reversed in part a summary judgment in favor of employer. Held that a requirement to reassign plaintiff to another position without competition was not reasonable. However, whether defendant made a good faith effort to accommodate plaintiff and whether it did fail to accommodate her were issues for a jury.

B. U.S. District Courts

***Strand v. Charles Mix County*, 2017 WL 1854695 (D.S.D. May 5, 2017).**

Plaintiff was a road grader operator who was required to take off work for surgery due to late stage colon cancer. The surgery involved a removal of a portion of the colon. When he returned to work, he explained to his employer that one of the effects of his surgery was more frequent bathroom trips. Later, he was terminated for alleged poor work performance and failing to call in for sick leave.

He filed suit alleging that the county violated the ADA by refusing to provide reasonable accommodations for his disability, subjecting him to disciplinary actions and terminating his employment because of his disability. The county argued that it was entitled to summary judgment because the plaintiff did not establish that he had a disability and, even if he did so, he failed to show that his employment was terminated because of his disability.

The district court denied summary judgment and found evidence indicative of pretext for discrimination due to disability

***McIntyre v. San Antonio Water System*, 2017 WL 1532608 (W.D. Tex. April 26, 2017).**

Employee was an engineer who suffered from Crohn's disease, fibromyalgia, neuropathy, asthma, and high cholesterol. Due to his conditions, the employee reached a point where he was unable to perform the essential functions of his job and there was no reasonable accommodation available. Pursuant to company policy, the plaintiff was terminated.

Because the plaintiff could not identify any accommodations that the defendant could have made that would have allowed him to perform the essential duties of his position, his termination was upheld.