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# Employment Discrimination Legal Update

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## I. Procedural Issues

### A. Timeliness

Mandel v. M&Q Packaging Corp., 706 F.3d 157 (3d Cir. 2013). The district court granted summary judgment to the employer on the plaintiff's sexual harassment claim, concluding that most of the incidents were untimely and that the plaintiff could not rely on the continuing violation doctrine because she had failed to act diligently in pursuing her rights. On appeal, the Third Circuit clarified that, pursuant to the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, all of the acts forming part of a hostile work environment claim constitute a single unlawful employment practice. Therefore, as long as one act is timely, all related acts that are part of the same claim are also timely. The court remanded the claim for a determination of the scope of the incidents properly considered part of the claim. In addition, because the employer had raised the equitable defense of laches but the district court had not considered it, the employer would have the opportunity on remand to raise that defense.

Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012), cert. denied, 133 S. Ct. 1724 (2013). Concluding that the continuing violation doctrine did not apply, the court held that the plaintiffs could only recover for discriminatory promotion denials within the filing period. The plaintiffs contended that because the promotion denials had been pursuant to a discriminatory policy that had an unlawful disparate impact and that the employer continued to apply within the filing period, all promotion denials under the unlawful policy were timely. Rejecting this contention, the court explained that, pursuant to National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), discrete acts that fall outside the limitations period are not timely even when taken based on a general policy that results in other discrete acts within the limitations period. To prevail on a disparate impact claim, a plaintiff must demonstrate that the defendant "uses a particular employment practice that causes a disparate impact." Thus, each time the Port Authority failed to promote one of the plaintiffs, that plaintiff had 180 days to challenge the decision.

Daniels v. United Parcel Serv., 701 F.3d 620 (10th Cir. 2012). Concluding that the plaintiff's failure-to-promote claim did not allege discrimination in compensation, the court rejected the plaintiff's contention that her claim was timely pursuant to the Lilly Ledbetter Fair Pay Act. The court noted that the Ledbetter Act creates "a cause of action to challenge a 'compensation decision or other practice' after receiving any paycheck reflecting unequal pay resulting from certain discriminatory employment decisions." Pursuant to the Tenth Circuit's decision in Almond v. Unified School District No. 501, 665 F.3d 1174 (10th Cir. 2011), the Ledbetter Act applies only to claims of "discrimination in compensation," i.e., paying different compensation to similarly situated employees, and was not intended to create a "limitations revolution for any claim somehow touching on pay." Similarly, the court rejected the plaintiff's contention that the holding of National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) – that a failure to promote is a discrete act – was overruled by the Ledbetter Act, reasoning that Congress would have explicitly said so if that was its intention. Because the plaintiff's challenge to the failure to promote was untimely, the court affirmed summary judgment for the employer on that claim.

EEOC v. Ranir, L.L.C., 25 A.D. Cas. (BNA) 1628, 2012 WL 381339 (W.D. Mich. Feb. 6, 2012). Denying the defendant's motion to dismiss, the court held that the EEOC was not bound by the shortened limitations period of six months that the charging party had agreed to in her employment contract with the defendant. Although such contracts are enforceable if the time frame is reasonable, the EEOC was not a party to the contract. Relying on case law upholding the EEOC's broad enforcement authority, even where the charging party was limited by an arbitration agreement, the court concluded that the EEOC was not precluded from seeking individual relief for the charging party, even though the charging party's individual claim was time-barred. In addition, because the EEOC's suit eliminated the charging party's right to file an individual action, she was not bound, as an intervenor in EEOC's suit on her behalf, by the contractual time frame.

## B. Class Actions

Tabor v. Hilti, Inc., 703 F.3d 1206 (10th Cir. 2013). Affirming denial of class certification, the court held that the plaintiffs' challenge to a promotions policy failed to identify a question of law or fact common to the class. The plaintiffs challenged the employer's Global Develop and Coach Process (GDGP), which included multiple components tracking different aspects of an employee's promotion eligibility. The court stated that the plaintiffs had challenged a highly discretionary policy for granting promotions, and citing Wal-Mart, the court concluded that the plaintiffs had not shown that the employer maintained a "common mode for exercising discretion that pervaded the entire company." Given the broad discretion exercised under the GDGP and the highly individualized facts and circumstances raised by each promotion decision, the proposed class did not present a common issue that could be resolved efficiently in a single proceeding.

Bolden v. Walsh Constr. Co., 688 F.3d 893 (7th Cir. 2012). The court reversed the certification of two class claims alleging that African-American workers at all of the defendant's 262 Chicago-area construction sites were subjected to harassment and were denied overtime based on their race. The court noted that the defendant has a central organization of permanent employees, including superintendents who are assigned to manage particular projects, and while the central organization has a few policies, such as rules against race discrimination, superintendents have discretion over the management of worksites and over most subjects. Pursuant to Wal-Mart, a class might span multiple worksites if the employer used a policy or procedure that spanned all sites. However, granting discretion to local supervisors is the "opposite of a uniform employment practice that would provide the commonality needed for a class action." In McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), the plaintiffs had identified a national policy allowing brokers to form and distribute commissions within teams. By contrast, the defendant had no relevant policy that applied to all of the challenged worksites other than its rule against racial discrimination and its grant of discretion to superintendents in assigning work and coping with offensive language or racist conduct. The plaintiffs did not contest the first of these, and the second – the policy of on-site operational discretion – is the precise policy that the Wal-Mart Court concluded cannot be addressed in a company-wide class action.

### C. National Security Exemption

Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012). The plaintiff, a black male of Jamaican descent who converted to Islam while serving as the FBI's Legal Attaché in Saudi Arabia, alleged that the FBI's Office of International Operations (OIO) referred him to the Security Division for a security clearance investigation in retaliation for having complained about race and national origin discrimination. After a jury found in the plaintiff's favor, the Department of Justice appealed, arguing that the plaintiff's claim was not reviewable under the Supreme Court's decision in Department of Navy v. Egan. The agency also argued that Executive Order 12,698 requires certain employees to report any security concerns and that allowing judicial review over this reporting would hinder the Security Division's ability to conduct effective investigations. Initially, the court held that Egan's absolute bar on judicial review extends only to security clearance-related decisions made by Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns. Nonetheless, the court found "quite powerful" the agency's arguments that overly broad liability for a decision to report a security concern could present a "serious Egan problem[]" by having a "chilling" effect on an employee's willingness to bring potential security concerns to the attention of the Security Division. By contrast, "Title VII claims based on knowingly false reporting present no serious risk of chill." Therefore, the court remanded the case to allow for any necessary discovery and a determination as to whether there is sufficient evidence of knowing falsity for the plaintiff to bring his claim before a jury.

### D. Successor Liability

EEOC v. Global Horizons, Inc., 860 F. Supp. 2d 1172 (D. Haw. 2012). Claimants' failure to name the employer's successor in discrimination charges did not bar EEOC's Title VII suit against the successor, where the successor allegedly retained all of the employer's full-time workers, the successor had knowledge of EEOC administrative charges against the employer prior to purchase, and it was likely that the employer would not be able to provide adequate monetary or injunctive relief.

### E. Class Arbitration

American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013). Small merchants were subject to the class action waiver in their mandatory arbitration agreements with a large credit card issuer, even though the costs of pursuing their Sherman Antitrust Act claim would far exceed their potential individual recoveries. The Court rejected the plaintiffs' argument that, absent a class action, such cost pressures effectively denied the plaintiffs any forum for their claims, explaining that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." While acknowledging that excessive filing and administrative fees could justify a refusal to compel arbitration, the Court otherwise rejected what it characterized as dictum from Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth that courts may invalidate "on public policy grounds, arbitration agreements that operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies." Otherwise, the Court concluded, federal courts would be required to conduct a detailed review of claims before holding a plaintiff to its contractual obligation, which "would undoubtedly destroy the prospect of speedy resolution that arbitration . . . was meant to

secure.” The Court also noted that the Sherman Antitrust Act predated the adoption of class action procedures, and so Congress clearly viewed individual claims as an effective method for vindicating statutory antitrust rights. Further, the Court found no Congressional intent to preclude a class action waiver in the context of antitrust law. It noted that, in Gilmer, the Court had enforced a class action waiver in an arbitration agreement even though the ADEA expressly permits collective actions.

## II. Title VII

### A. Race

Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2012). The plaintiff, an African-American postal employee, alleged race discrimination when she was fired after telling her psychiatrist that she thought about killing her supervisor. The plaintiff presented evidence that two white male employees at the same facility had recently threatened another employee at knife-point, yet received only one-week suspensions from the same manager who had fired the plaintiff. The court stated that the “similarly situated” standard requires a plaintiff to demonstrate that a comparator was treated more favorably by the same decisionmaker. When the same supervisor treats a similarly situated employee better, one can often reasonably infer unlawful animus. The inference of discrimination is weaker when there are different decisionmakers, since they may rely on different factors when deciding whether, and how severely, to discipline an employee. In this case, although the plaintiff and the comparators had different direct supervisors, a common decisionmaker (the maintenance operations manager) approved the plaintiff’s termination and the comparators’ suspensions. Also, although the comparators had different job titles and duties than the plaintiff, the question was whether the employer subjected them to different employment policies. The comparators and the plaintiff were similarly situated because they were at the same job site, they were subject to the same standards of conduct, they violated the same rule against workplace violence, and they were disciplined by the same manager.

Waldon v. Cincinnati Pub. Sch., 2013 WL 1755664 (S.D. Ohio Apr. 24, 2013). The court denied the defendant’s motion to dismiss the plaintiffs’ disparate impact claim challenging a criminal record policy. Pursuant to Ohio law, all school employees were required to undergo criminal background checks, and employees who had been convicted of certain crimes were to be terminated, no matter how far in the past the crime occurred or how little it related to the employee’s present qualifications. Noting that nine out of the ten employees terminated by the defendant under the policy were African American, the court concluded that the plaintiffs had alleged a prima facie case of disparate impact. Citing Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir.1975), the court stated that a “sweeping disqualification for employment resting on solely past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis.” Applying this standard, the court could not conclude as a matter of law that the defendant’s policy was justified by business necessity. With respect to the two plaintiffs in this case, the policy resulted in the termination of “valuable and respected employees” based on offenses that were remote in time, even though both had demonstrated decades of good performance. Moreover, although the challenged policy was imposed on the defendant by the state, “Title VII trumps state mandates,”

and the defendant could have consulted the state board of education regarding the stark racial disparity resulting from the policy.

## B. National Origin

Shah v. Oklahoma, ex rel. Oklahoma Dep't of Mental Health & Substance Abuse, 2012 WL 3935699 (10th Cir. Sept. 11, 2012) (unpublished). The plaintiff, a physician, alleged that his employer did not renew his medical residency contract because of his East Indian accent. Affirming summary judgment for the employer, the court found that the plaintiff was lawfully terminated because of performance deficiencies that compromised patient care. Although doctors had commented on the plaintiff's need to improve his English language skills, the comments were "good faith suggestions to improve his interpersonal communication skills, which are essential for patient care in psychiatry and to his ability to fulfill residency position requirements." The court found no evidence of comments criticizing the plaintiff's accent and noted that awards the plaintiff had received for two articles written during his residency did not suggest that the employer's reasons were a pretext for discrimination, because "written communication is not the same as oral communication."

Albert-Aluya v. Burlington Coat Factory Warehouse Corp., 2012 WL 1590890 (11th Cir. May 8, 2012) (unpublished). The plaintiff, a U.S. citizen born and raised in Nigeria, alleged that she was discriminated against based on her national origin when she was terminated from her position as a regional loss prevention manager. The plaintiff presented evidence that several managerial-level employees made derogatory comments about her African ethnicity, told her that she was being terminated due to her "thick African accent," and criticized her for failing "to speak more like an American." Noting that "[c]omments about an accent may indicate discrimination based on one's national origin," the appeals court held that the district court had erred in granting the defendant's motion for summary judgment because the plaintiff had presented sufficient evidence to permit a reasonable jury to conclude that the firing was discriminatory.

Dafiah v. Guardsmark, L.L.C., 2012 WL 5187762 (D. Colo. Oct. 19, 2012). The plaintiffs, a Sudanese U.S. citizen and an Ethiopian asylum-approved resident of the U.S., alleged that they were terminated from security guards positions in T-Mobile's Aurora, Colorado warehouse due to their national origin. T-Mobile argued that the plaintiffs were terminated because managers had difficulty understanding them on the radio due to their accents, and T-Mobile was worried that the plaintiffs would not be able to communicate clearly in an emergency. The court denied T-Mobile's motion for summary judgment, holding that the plaintiffs provided sufficient evidence that they were able to successfully fulfill their job duties and that a reasonable jury could find that T-Mobile's decision to remove the plaintiffs was based on their national origin rather than their alleged inability to communicate clearly in English.

## C. Religion

EEOC v. Thompson Contracting, Grading, Paving, & Utils., Inc., 2012 WL 6217612 (4th Cir. Dec. 14, 2012) (unpublished). The court affirmed summary judgment for the employer on the EEOC's claims of denial of accommodation and discriminatory termination on behalf of a Hebrew Israelite who was one of four company dump truck drivers who requested Saturdays off

to observe the Sabbath. The court concluded that excusing him from Saturday work would have imposed an undue hardship (more than de minimis cost) because any work left undone would necessarily have to be completed by the other drivers or by hired independent contractors, or else would not be completed at all. Moreover, it would have imposed an undue hardship on the company to arrange ahead of time for an alternative dump truck driver from among its workforce, because securing proper substitutes would have required the company to incur the costs of recruiting, training, and qualifying each driver on its insurance policy. Finally, the company was not required to offer the driver a transfer to a general equipment operator position, because it reasonably believed that he would have rejected such an offer in light of evidence that he had previously indicated that he preferred driving a dump truck to performing manual labor.

Porter v. City of Chicago, 700 F.3d 944 (7th Cir. 2012). The plaintiff, a Christian employee of the Chicago police department, objected when she was assigned to work 7:30 am to 3:30 pm on Sundays, because it conflicted with her Sunday morning church attendance. In response, the administrator who had the authority to reassign work schedules offered, among other options, that he could assign her to work 3:30 pm to 11:30 pm on Sundays instead, thereby permitting her to attend church. Affirming summary judgment for the employer on the plaintiff's denial of accommodation claim, the court ruled that the city reasonably accommodated her religious beliefs by offering her the work shift change, even though if it was not the option she preferred.

EEOC v. Rent-a-Center, Inc., 117 Fair Empl. Prac. Cas. (BNA) 45, 2013 WL 208948 (D.D.C. Jan. 18, 2013). The court granted summary judgment for the employer in an action brought on behalf of a Seventh Day Adventist store manager who sought to be excused from working every Saturday for Sabbath observance. Ruling that the proposed accommodation would pose an undue hardship, the court cited these uncontested facts: (1) the business is closed on Sundays, and Saturday is the busiest day of the week both for the business overall and for the store at issue; (2) store manager is the most important position, with a variety of supervisory responsibilities, including some that are exclusive to that position; and (3) the company's policy requires all managers to work every Saturday, "reflecting its awareness of and focus on the first two facts."

Hickey v. State Univ. of N.Y. at Stony Brook Hosp., 2012 WL 3064170 (E.D.N.Y. July 27, 2012). The plaintiff, whom the court described as a "Born Again Christian," was hired as a painter in the hospital's physical plant department, and regularly wore a lanyard around his neck printed with the phrase "I <<heart>> Jesus." Attached to the lanyard was a clear plastic badge holder containing a piece of paper with the handwritten words "Jesus Loves You!" and a drawing of a cross. On the reverse side, vertically aligned, was the handwritten message: "False Evidence Appearing Real." When management directed him to remove it because it was not part of his uniform, he refused, saying that he would only do so if a Muslim woman was told to take off her headscarf, a Hindu his turban, and a Jewish man his yarmulke. Subsequently, a manager made a complaint accusing the plaintiff of approaching her, her mother, and her aunt talking "about God and preaching about religion." The hospital subsequently terminated him, citing "several incidents and his unsatisfactory job performance." Denying the parties' cross-motions for summary judgment on the plaintiff's claims of discriminatory termination and denial of accommodation, the court held that there was evidence in the record to support the conclusion that the lanyard was a "necessary expression" of the plaintiff's religion, and whether that belief was sincere was a fact question requiring a trial. In reaching this conclusion, the court noted that

Title VII protects “[i]mpulses prompted by dictates of conscience as well as those engendered by divine commands . . . so long as the [plaintiff] conceives of the beliefs as religious in nature.”

Finnie v. Lee Cnty., Miss., 2012 WL 124587 (N.D. Miss. Jan. 17, 2012). The plaintiff, a Pentecostal female juvenile detention officer, alleged that the county violated Title VII by refusing to accommodate her religious objections to the pants-only uniform policy. Granting summary judgment to the county on this claim, the court ruled that there was deposition testimony, an expert report, and evidence of past incidents demonstrating detailed legitimate safety concerns about detention officers wearing skirts, including the ability of an officer to perform various defense-tactic maneuvers. For example, an assailant could pin the material of the skirt to the floor with his knees, thereby preventing the officer from moving her body as needed to perform a maneuver. “[T]o carry a burden of showing undue hardship, Defendants do not even need to prove that a skirt has – for example, in the past – actually caused such safety and security problems. Instead, [they] must show safety and security risks.” Moreover, relying on Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir. 2009), and other law enforcement cases, the court held that it would be an undue hardship to make an exception to the pants-only policy, because the standardized uniform requirement enhanced efficiency by subordinating individuality to the overall group mission.

#### D. Sex

##### 1. Pregnancy

Young v. United Parcel Serv., 707 F.3d 437 (4th Cir. 2013), pet. for cert. filed, 81 U.S.L.W. 3602 (Apr. 8, 2013). Affirming summary judgment for the employer, the court held that the employer’s policy of giving light duty only to those injured on the job, those needing disability accommodation, and those who lost DOT certification neither constituted direct evidence of pregnancy discrimination nor raised any inference of pregnancy discrimination. The court reasoned that to hold otherwise would be to construe Title VII to mean that pregnant employees had a right to accommodation while other employees with off-the-job injuries had no similar right and that such construction did not accord with Congress’s intent in enacting the PDA.

EEOC v. Houston Funding II, Ltd., 717 F.3d 425 (5th Cir. 2013). Vacating summary judgment for the employer, the court held that discharging an employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII. In this case, the EEOC brought a claim on behalf of Donnicia Venters, who wanted to express breast milk after she returned from pregnancy leave. The district court had concluded that lactation is not protected by Title VII because is not a medical condition related to pregnancy or childbirth. In rejecting the district court’s analysis, the Fifth Circuit noted that taking an adverse employment action against an employee because she is expressing breast milk “clearly imposes upon women a burden that male employees need not – indeed, could not – suffer.” In addition, because lactation is “the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth,” it is a medical condition related to pregnancy or childbirth. The EEOC had established a prima facie case of sex discrimination based on evidence that the employer fired Venters because she was lactating and wanted to express milk at work. The EEOC also submitted evidence that the employer’s asserted

reason for its action – job abandonment – was pretextual. Therefore, the EEOC satisfied the requirements under McDonnell Douglas to proceed to trial.

Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316 (11th Cir. 2012). The plaintiff was hired as a teacher by the defendant Christian school. After telling the employer that she was pregnant and that she had conceived the child before getting married, she was fired, allegedly for engaging in premarital sex. The district court granted summary judgment to the employer on the plaintiff's pregnancy-based discharge claim, reasoning that the plaintiff had failed to establish a prima facie case of discrimination because she had not identified a nonpregnant comparator who had received more favorable treatment. On appeal, the Eleventh Circuit explained that a plaintiff does not need a comparator to establish a prima facie case if she has other evidence from which discrimination can be inferred. In this case, the plaintiff presented such evidence raising an inference, including evidence that the firing official expressed more concern about having to replace her because of her pregnancy than about premarital sex. The appeals court therefore reversed summary judgment for the employer.

Quinlan v. Elysian Hotel Co. L.L.C., 2013 WL 65982 (N.D. Ill. Jan. 4, 2013). The plaintiff, a public relations director, alleged that she was terminated because of her sex and her pregnancy. Denying summary judgment to the employer on the plaintiff's termination claim, the court concluded that the plaintiff's termination may have been based on gender where the director of marketing informed the plaintiff that she could "always get back into PR later in life" if she decided not to return after giving birth, cautioned that "it will be very difficult to do this job and be a good mom" and that "you only get to be a mom once," and advised the plaintiff to consider her options because "it's going to be hard to manage this workload and be a mom." In ruling for the plaintiff, the court noted that the director of marketing repeatedly initiated the conversations about the plaintiff's pregnancy, that the comments were made within a few months of the plaintiff's termination, and that the director of marketing participated in the termination decision. The evidence showed that the plaintiff's supervisor and the general manager had also made comments regarding the plaintiff's pregnancy, e.g., telling the plaintiff that it was "not a big deal" if she decided not to return to work after she gave birth and that staying at home was a sacrifice that the plaintiff should make for her family. Noting that the comments by the plaintiff's supervisor and the general manager were made several months before the termination decision and that the general manager's comments were made in a personal context, the court questioned the relevance of those comments. However, the court acknowledged that a reasonable jury might be willing to overlook a "substantial time gap" between a discriminatory comment and an adverse action in caregiver discrimination cases because the basis for discrimination (balancing work and childcare responsibilities) arises after pregnancy and, in some cases, after maternity leave.

Ehrhard v. Lahood, 114 Fair Empl. Prac. Cas. (BNA) 1112, 2012 WL 1038803 (E.D.N.Y. Mar. 28, 2012). The plaintiff, an air traffic controller for the Federal Aviation Administration, alleged that he was denied leave to care for his children even though such leave was freely granted to three female employees. The defendant asserted that the female employees were not similarly situated because they had been converted to full time when the facilities manager eliminated part-time positions. As a result of the female employees' written request, the facilities manager made a special arrangement allowing them to freely request childcare leave, as needed, from

their direct supervisors. Rejecting the agency's motion for summary judgment, the court noted that the plaintiff compared himself to female employees holding the same job. Although the plaintiff failed to make a written request for a special arrangement, he was not aware that such an arrangement was available for male employees and was never told about such a possibility when he had disputes with his supervisor about childcare leave. Under these circumstances, it could not be resolved on summary judgment whether the previously part-time female employees were similarly situated to the plaintiff.

## 2. LGBT Issues

Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. April 20, 2012) (discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964).

Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (E.E.O.C. July 1, 2011) (discrimination based on sex stereotype that men should only marry women can constitute discrimination based on sex).

Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (E.E.O.C. December 20, 2011) (discrimination based on sex stereotype that women should only have sexual relationships with men can constitute discrimination based on sex).

## III. Age Discrimination in Employment Act

Sims v. MVM, Inc., 704 F.3d 1327 (11th Cir. 2013). At one time during the plaintiff's employment, his supervisor may have stated that the plaintiff was "old and slow." Because there was no showing that the alleged statement was in any way related to the plaintiff's termination and there was ample evidence that all of the supervisors familiar with the plaintiff's work recommended his termination, the court affirmed summary judgment for the employer.

Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128 (1st Cir. 2012). The court reversed summary judgment for the employer on the plaintiff's claim that he was terminated because of his age (56) and replaced by a substantially younger (age 34) employee. The plaintiff was informed that he was discharged because of incidents in which the manufacturing plant was subjected to unsanitary conditions and the quality of the product was called into question. The court determined that there was a substantial issue of fact regarding (1) whether the plaintiff was in any way responsible for the contamination, at least one incident having occurred while he was on vacation; (2) whether the contamination resulted from actions caused by outside contractors making changes to the factory; (3) whether the younger replacement was treated far better than the plaintiff, despite the existence of an even greater number of incidents during the replacement's tenure; and (4) whether remarks by the plaintiff's supervisor were evidence of age bias. With regard to the remarks, six months before the plaintiff's termination, the supervisor who was responsible for the overall operations at the factory stated to the Human Relations Manager that the supervisor wanted Human Relations to investigate the plans of those who were nearing retirement age to determine, as part of the supervisor's new "recruitment plan instituted

for the purpose of proceed[ing] to substitute the persons who were of retirement age,” whether older workers were planning to retire. The court stated that while the remarks may have been nondiscriminatory, “they could also be interpreted by a reasonable factfinder as referring to the older employees who had remained longer on the job” and the supervisor’s “displeasure at older employees’ long tenure at the company.”

Hale v. ABF Freight Sys., Inc., 2012 WL 5259156 (6th Cir. Oct. 25, 2012) (unpublished). The plaintiff, an operations supervisor, was terminated after his supervisor documented numerous timeliness issues with regard to freight deliveries. The plaintiff argued that the timeliness issues were a pretext for age discrimination for three reasons: (1) on several occasions, his supervisor asked him when he planned to retire; (2) his supervisor told a coworker that the plaintiff is “going to leave here when he is 62[, and] I am going to see to it”; and (3) his supervisor regularly committed the same infractions that she cited to justify the plaintiff’s termination. In reversing summary judgment for the employer, the court determined: (1) asking an individual when he planned to retire was not based upon his age; (2) stating that an employee is going to leave when he is 62 is directly based on his age; and (3) the fact that the supervisor committed the same infractions as the plaintiff was potential evidence of pretext.

#### **IV. Genetic Information Nondiscrimination Act (GINA)**

**EEOC v. Founders Pavilion** (Case No. 6:13-cv-06250) filed May 16, 2013 (W.D. N.Y.) -- EEOC alleges that rehab center requested family medical history in post-offer medical exams.

**EEOC v. Fabricut, Inc.** (Case No. 13-CV-248-CVE-PJC), consent decree May 7, 2013 (N.D. Okla.) – EEOC alleged that contract medical examiner requested family medical history in post-offer medical exam – case settled for \$50,000.

#### **V. Harassment**

Vance v. Ball State Univ., 133 S. Ct. 2434 (2013). For purposes of holding an employer vicariously liable for unlawful harassment by a supervisor, an employee qualifies as a “supervisor” only if the employer has authorized him or her to take tangible employment actions against the target of the harassment, i.e., to “effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’” The Court explained that the term “supervisor” is not a Title VII statutory term but rather a term it had adopted in Faragher and Ellerth to identify those employees whose conduct may give rise to vicarious employer liability; thus, the meaning of the term depends on the highly structured framework adopted by those cases. That framework “strong[ly]” implies that the authority to take tangible employment actions is the “defining characteristic of a supervisor.” The Court declined to defer to the EEOC’s standard, which defines an employee as a supervisor if he or she has the authority to take tangible employment actions or to control the complainant’s daily work activities, concluding that the EEOC’s guidance is not persuasive and would often make the issue of supervisor status “murky.” Because there was no evidence that the university had empowered the alleged harasser to take tangible employment actions against the plaintiff, the university was

not liable unless the plaintiff established that the university was negligent in preventing the harassment from taking place. The court of appeals concluded that the plaintiff had failed to establish negligence, and therefore the Supreme Court affirmed summary judgment for the university.

Jones v. UPS Ground Freight, 683 F.3d 1283 (11th Cir. 2012). Based on the totality of the evidence, the court held that a reasonable jury could conclude that banana peels were placed on the plaintiff's truck because of his race and therefore could be considered in evaluating whether he was subjected to a racially hostile work environment. The plaintiff, an African-American truck driver, alleged that he was subjected to racial harassment when, among other things, he repeatedly found banana peels on his truck after it was parked during off-duty hours at the employer's terminal. Rejecting the employer's contention that the banana incidents were not race-based, the court explained that the determination of whether conduct was race-based requires "careful consideration of the social context in which particular behavior occurs and is experienced by its target." Given the history of racial stereotypes against African-Americans, "'it is a reasonable – perhaps even an obvious – conclusion that' the use of monkey imagery is intended as a 'racial insult' where no benign explanation for the imagery appears." In this case, the plaintiff found banana peels on his truck on multiple occasions, each time either on the steps up to the truck's cab or on the back of the truck, even though he parked in a different location each night. In addition, there was no evidence that bananas were found on any other truck or that the plaintiff found any other refuse on his truck. This combination of facts suggested that the banana peels were not appearing on the plaintiff's truck "by mere chance" and would allow a rational factfinder to conclude that the banana peels were placed on the plaintiff's truck to "send a message of racial intolerance."

Zayadeen v. Abbott Molecular, Inc., 2013 WL 361726 (N.D. Ill. Jan. 30, 2013). A reasonable jury could conclude that the plaintiff's coworkers harassed him because of his national origin and race by calling him "Borat." The employer contended that the plaintiff could not have been harassed based on his national origin because he was from Jordan whereas the character Borat was from Kazakhstan. Rejecting this contention, the court noted that some of the harassment was unrelated to Borat and concerned the plaintiff's speaking Arabic and eating Jordanian food. In addition, the plaintiff was not required to show that the harasser knew his particular national origin; it was sufficient that the plaintiff was treated differently because of his foreign accent or appearance. The court further concluded that a jury could find that the plaintiff was harassed because of his Arab race, noting that two incidents were related to the plaintiff's speaking Arabic and that language is a defining characteristic of ancestry and race. Although the character Borat was not Arab, the movie's comedic elements included his being mistaken for an Arab. Thus, a jury could conclude that the plaintiff's coworkers were "playing along with the joke by intentionally conflating Arab and Kazakh identities." Alternatively, even if the coworkers were unaware that Arabs and Kazakhs are different, the harassment was nonetheless race-based since, as with the plaintiff's national origin claim, using incorrect derogatory racial remarks was not a defense.

Ross v. Colorado Dep't of Transp., 116 Fair Empl. Prac. Cas. (BNA) 985, 2012 WL 5975086 (D. Colo. Nov. 14, 2012). The plaintiff, a devout Christian, alleged that he was subjected to a religiously hostile work environment when the defendant "permitted and promoted Muslim

religious observances and traditions, rather than maintaining a religiously neutral work environment.” Concluding that the alleged conduct was not objectively severe or pervasive, the court noted that while the plaintiff was subjectively offended by the employer’s accommodation of Muslim religious practices, including rescheduling a luncheon so that those who observed Ramadan could participate, a reasonable person would not have viewed the events as creating a hostile work environment. Moreover, the plaintiff had not suggested that anyone had ever disparaged Christianity. Granting summary judgment to the defendant on the plaintiff’s claim of religious harassment, the court explained: “That an employee occasionally may be confronted at work with religious beliefs or practices different from and offensive to his own does not make out a claim for a religiously hostile work environment, at least on the record . . . here.”

EEOC v. Management Hospitality of Racine, Inc., 666 F.3d 422 (7th Cir. 2012). Affirming a jury verdict on a sexual harassment claim brought by the EEOC on behalf of two teenage servers at a fast food restaurant (Katrina Shisler and Michelle Powell), the court held that the evidence was sufficient for the jury to have concluded that the employer failed to exercise reasonable care to prevent and correct harassment. First, the court noted that, although the employer had a sexual harassment policy in place, one assistant manager violated the policy by engaging in harassment, and the restaurant’s other assistant manager and the restaurant’s manager both failed to report the harassment after Shisler and Powell complained. Second, the evidence suggested that sexual harassment training was inadequate. Third, a rational jury could have concluded that the employer’s corrective action was not reasonable and prompt because its investigation did not begin until two months after Shisler and Powell first complained. Finally, a reasonable jury could have concluded that the employer’s written policy was not reasonably effective. The court noted that an employer must adopt a clear complaint process, especially when a number of employees are teenagers. The employer’s policy, however, provided no names or contact information at all. Therefore, the jury reasonably concluded that the employer failed to exercise its duty to prevent and correct sexual harassment.

Wright v. Monroe Cmty. Hosp., 2012 WL 3711743 (2d Cir. Aug. 29, 2012) (unpublished). The court granted summary judgment to the employer on the plaintiff’s claim that she was subjected to a racially hostile work environment by a patient. The plaintiff, a nurse, alleged that she was subjected to a hostile work environment when she was reassigned to care for a patient who was known to make “intolerable racist comments,” including “n\_\_\_r”; the patient repeatedly made racist comments; and the employer refused to acknowledge the plaintiff’s complaints or stated that the patient had dementia and told the plaintiff that “sometimes you have to deal with it.” Initially, the court concluded that the plaintiff’s own complaint suggested that the reassignment was not motivated by racial animus. As to the patient’s racist comments, the court stated that while the conduct was “certainly objectionable,” there was insufficient basis for imputing the conduct to the employer because it could not “be held responsible for the outbursts of a patient suffering from dementia.” Compare Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908 (7th Cir. 2010) (defendant was potentially liable for the racially hostile work environment experienced by the plaintiff, an African-American nursing assistant at a nursing home).

## **VI. Retaliation**

### **A. Opposition**

Summa v. Hofstra Univ., 708 F.3d 115 (2d Cir. 2013). The plaintiff, a graduate student hired as a team manager for the football team, complained about sexual conduct and on-line harassment by football players, in particular the showing of a movie on the team bus that included several sex scenes and led a number of players to make inappropriate comments about the plaintiff. The court noted that whether the plaintiff's complaint was protected depended on her own beliefs, not the defendant's, and thus the fact that the school considered the complaint a "student-on-student" situation was "of no moment." The plaintiff clearly was complaining about harassment arising out of her employment by the athletic department as she would not have been on the team bus absent her position. Although her oral complaint concerned a single incident, it was sufficiently severe that a reasonable person would have believed it unlawful. Finally, even if the bus incident was insufficient by itself to violate Title VII, the district court had disregarded several written complaints filed by the plaintiff that detailed many incidents of sexual harassment over the course of her employment.

Wright v. Monroe Cmty. Hosp., 116 Fair Empl. Prac. Cas. (BNA) 1426, 2012 WL 3711743 (2d Cir. 2012) (unpublished). Complaining about an assignment to care for a patient who used racial epithets and otherwise denigrated racial minorities was not protected opposition. The court stressed that the patient suffered from dementia, and therefore the plaintiff did not have a reasonable, good faith belief that the employer's unwillingness or inability to control the patient's behavior was unlawful racial discrimination.

EEOC v. IPS Indus., Inc., 899 F. Supp. 2d 507 (N.D. Miss. 2012). An employee's complaint to a supervisor about his sexual harassment, including confronting the supervisor about his insinuations that the employee was involved in a relationship with a coworker, telling the supervisor not to touch her again after he reached around behind her, and informing him that she would only return to work if he stopped touching her, were not "mere rejections" of inappropriate sexual conduct, but rather constituted protected conduct under Title VII's opposition clause.

#### B. Adverse Action

Rivera v. Rochester Genesee Reg'l Transp. Auth., 702 F.3d 685 (2d Cir. 2012). A supervisor's statement that the plaintiff could be fired for filing his EEOC charge would "dissuade a reasonable worker" and thus constituted an adverse action. The court further found that "unchecked retaliatory harassment" by the plaintiff's supervisor could by itself constitute an adverse action because it was sufficiently severe. Specifically, when the plaintiff complained of his coworker's use of racial slurs, his supervisor responded, "[S]uck it up and get over it, n\*\*\*\*r!" Further, shortly after he filed an EEOC charge, the plaintiff met with a vice president who admonished him for making "disturbing comments and 'false accusations' in the workplace," which a reasonable juror could interpret as sending a message that the plaintiff's employment "was in serious jeopardy as a result of the EEOC charges." Accordingly, the court reversed summary judgment for the employer and remanded the plaintiff's retaliation claims for trial.

Arizanovska v. Wal-Mart Stores, Inc., 682 F.3d 698 (7th Cir. 2012). After the plaintiff experienced pregnancy complications, her request for "light duty" was denied, and she filed a pregnancy discrimination complaint. Thereafter, she was placed on unpaid leave, which the

plaintiff alleged was retaliation for her pregnancy discrimination claim. Rejecting the employer's argument that the plaintiff suffered no adverse action because the only alternative under internal policies was termination, the court explained that "such a finding would allow companies to retaliate, and even discriminate with impunity so long as the employment action complained of was consistent with some internal policy." The plaintiff was moved from a part-time paid position to unpaid leave; "the mere fact that it was the result of [the employer's] Accommodation Policy [did] not make it sting any less."

Payne v. Salazar, 899 F. Supp. 2d 42 (D.D.C. 2012). Although changes to work duties and general dissatisfaction with one's supervisor ordinarily do not create a materially adverse action, "pervasive oversight of an employee's performance [in] a proactive search for minor infractions as a pretext for retaliatory harassment" will state a claim. The court also noted that it was required to consider whether the "combined effect" of allegations would dissuade a reasonable worker from engaging in protected activity. Here, assigning duties to the plaintiff for each minute of the work day, requiring her to scrub the floor on her hands and knees despite knowledge that the plaintiff had recently undergone back surgery and could not safely kneel on the floor, requiring the plaintiff to climb a ladder and wash each individual window blind with a wet towel every day, requiring the plaintiff to repeat her tasks whenever she did not "do it right" while a supervisor stood behind her and watched, and refusing to call 911 when the plaintiff sustained a back injury and was suffering from an asthma attack were materially adverse.

### C. Causal Link Requirement

University of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013). The Court held that a plaintiff alleging retaliation in violation of Title VII must establish that the employer's discriminatory motive was a "but for" cause of the challenged employment practice, as opposed to merely a "motivating factor," which would allow liability even where the employer would have taken the same action absent a discriminatory motive. The Court explained that section 703(m) of Title VII, which allows motivating factor causation, does not apply to retaliation because it does not explicitly refer to retaliation. Relying on its interpretation in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), of the ADEA prohibition of discrimination "because of" age, the Court found that the plain meaning of the Title VII retaliation provision (704(a)) requires "but for" causation. The Court rejected the argument that, similar to Gomez-Perez v. Potter, 553 U.S. 474 (2008) (inferring retaliation prohibition in federal sector ADEA provision) and similar cases, retaliation could be inferred from the list of protected bases included in 703(m). The court distinguished those cases because they involved substantive bars on discrimination rather than a causation standard, and because those cases were interpreting broad language as opposed to the "detailed statutory scheme" of Title VII. The Court also refused to defer to EEOC guidance that applies 703(m) to retaliation claims, finding that it is not persuasive. Finally, the Court found that the "motivating factor" causation standard in Price Waterhouse does not apply to Title VII retaliation claims because Congress displaced that framework by passage of the Civil Rights Act of 1991, which created the 703(m) motivating factor provision. In this case, because the jury that found for the plaintiff had improperly received a motivating factor instruction, the Supreme Court vacated and remanded the case for further proceedings.

### D. Pretext

Kelley v. Correctional Med. Servs., Inc., 707 F.3d 108 (1st Cir. 2013). Reversing summary judgment for the defendant, the court concluded that a reasonable jury could find that the plaintiff, a registered nurse, was disciplined in retaliation for her ADA reasonable accommodation requests, as opposed to her refusal to follow a direct order from her supervisor. The plaintiff was in an accident and subsequently had several physical restrictions, including the need to work a limited schedule and to use crutches or a cane at work. Her supervisor informed her that if she could not return to work full-time (12-hour shifts, instead of just 10), she would be fired; attempted to deny her the use of a cane at work; and initially denied her accommodation requests because her doctor's information was not completed on the appropriate form. On several occasions the supervisor questioned the extent of the plaintiff's injuries, and the supervisor consistently criticized the plaintiff's work performance in documentation added to the plaintiff's employment file. Ultimately, the supervisor fired the plaintiff for insubordination when she refused to take sole responsibility for the clinic because the plaintiff feared that she would not be able to perform the physical demands of emergencies that sometimes arise in the clinic but not in other assignments within the facility. Although another employee offered to handle the physically demanding clinic responsibilities, the supervisor still had the plaintiff escorted from the premises and fired. Given the history of disability-based conflict between the plaintiff and her supervisor, a reasonable factfinder could find that the supervisor's action "was 'a disingenuous overreaction to justify dismissal of an annoying employee who asserted [her] rights under the ADA.'"

Brown v. City of Jacksonville, 711 F.3d 883 (8th Cir. 2013). The court found that while the plaintiff established a prima facie case of employment discrimination, she failed to prove that the employer's legitimate reason for terminating her was a pretext for retaliation. The plaintiff established a prima facie claim because she had filed a claim with EEOC, suffered an adverse action when she was terminated, and established a causal link based on her supervisor's admission that her EEO complaint prompted an investigation that unearthed information that eventually led to the plaintiff's termination. Nonetheless, the court found that the employer had a legitimate rationale for terminating the plaintiff; the investigation revealed that the plaintiff pressured coworkers, that she exhibited volatile behavior that stressed her coworkers, and that the plaintiff's colleagues were frustrated by her inefficient work performance. The court explained that while Title VII's anti-retaliation provision provides a "shield" for individuals to challenge workplace discrimination, "[i]t is not a cudgel to be wielded by underperforming and unprofessional employees to prevent justified, non-discriminatory employment termination."