

EMPLOYMENT LAW UPDATE

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I. TITLE VII DISPARATE TREATMENT

A. Adverse Action

Jones v. Se. Pa. Transp. Auth., 796 F.3d 323 (3d Cir. 2015). A suspension with pay is neither a “hiring” nor a “firing,” nor does it reduce compensation or affect the “terms and conditions” of employment, where one of those terms typically is employee consent to appropriate discipline. With respect to the plaintiff’s ultimate termination, the plaintiff failed at step four of her *prima facie* case of gender discrimination, as she could not show that her gender, rather than her fraudulent timesheets, accounted for termination. Finally, the defendant also successfully asserted the *Faragher-Elleerth* defense to the plaintiff’s hostile work environment claim because it responded promptly and appropriately to the plaintiff’s complaint of harassment.

Chambers v. Burwell, No. 14-5047, 2016 WL 3064672 (D.C. Cir. May 31, 2016). The district court granted summary judgment to the employer on the ground that an employee cannot suffer a cognizable adverse employment action when the position she sought did not exist and her supervisor lacked the authority to create it. **The D.C. Circuit concluded: “As a matter of law, at least where a manager regularly requests and receives upgraded vacancies that are earmarked for his subordinates, his decision not to engage in that process because of an employee’s disability or race can be an adverse employment action under our case law.”** The court nonetheless affirmed on the ground that a reasonable juror could not find that the plaintiff was denied promotion because of her race or disability.

1. Assignment/Transfer

Bonenberger v. St. Louis Metro. Police Dep’t, 810 F.3d 1103 (8th Cir. 2016). The plaintiff, a white police sergeant, applied to be assistant director of the city’s police academy. An African- American sergeant was selected instead. The director of the academy told the plaintiff that “he had no choice” and “he had to bring color down to the academy.” **The court held that denial of a requested transfer may constitute an adverse employment action if the transfer would result in a change in pay, rank, or material working conditions.**

Deleon v. Kalamazoo Cty. Rd. Comm’n, 739 F.3d 914 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 783 (2015). The plaintiff was a 53-year-old Hispanic male who worked for the County Road Commission for 20 years. In 2008, after a vacancy opened for the equipment and facilities superintendent, the plaintiff applied, but did not get the job. Part of the job description indicated that one would be exposed to loud noise and diesel fumes. In 2009, the plaintiff was involuntarily transferred to the position. **The court found that the plaintiff sufficiently demonstrated that the conditions were “objectively intolerable”**

because he provided evidence that the position exposed him to “toxic and hazardous diesel fumes on a daily basis.” The plaintiff’s exposure caused him to develop bronchitis and sinus headaches, and he occasionally blew black soot out of his nose. “Despite the fact that respondent willingly applied for and never objected to the transfer, the Sixth Circuit held that receiving it was an adverse employment action.”

Alexander v. Casino Queen, Inc., 739 F.3d 972 (7th Cir. 2014). Two cocktail waitresses brought claims against their former employer, a casino, for race discrimination, retaliation, and hostile work environment under Title VII. The plaintiffs alleged that their supervisor moved them to areas of the casino where it was commonly known that waitresses did not receive large tips, and that white waitresses were moved to areas with higher tips. **The court found that the floor reassignments were sufficient to constitute an adverse employment action because they had a significant financial impact, given that the compensation of the waitresses depended heavily on tips.**

2. Extension of Probationary Status

Tolbert v. Smith, 790 F.3d 427 (2d Cir. 2015). The plaintiff, an African American, taught culinary arts at a public school in Rochester, New York. As a probationary teacher, the plaintiff was subject to several evaluations during the school year and an end-of-year review. After receiving mixed evaluations during his third and final probationary year, the plaintiff refused the defendants’ offer of a fourth year of probationary teaching. Rather, he brought suit alleging, *inter alia*, discrimination and hostile work environment. The primary decision-maker, the school principal, allegedly made remarks such as, “Do you only know how to cook black, or can you cook American too?” However, **the court of appeals affirmed the grant of summary judgment on the plaintiff’s hostile work environment claims. The plaintiff could show no more than that the principal’s alleged racist remarks were isolated acts; other detrimental decisions related to the plaintiff’s classroom resulted from budget cuts or other permissible reasons.**

3. Other Acts

Jones v. City of St. Louis, No. 15-2283, 2016 WL 3201393 (8th Cir. June 9, 2016). An African-American electrician for the City of St. Louis sued the City for race discrimination under Title VII after the City investigated him for falsifying time records and issued a reprimand, which it later withdrew. Due to stress caused by the investigation and reprimand, the plaintiff took nearly three months of paid medical leave. The plaintiff contended that because the City would have compensated him for unused medical leave upon separation, the reduction of accrued leave constituted an adverse action. The district court held that there was no adverse action and granted summary judgment to the City. **Held:** The Eighth Circuit affirmed. **The court held that depletion of accrued medical leave does not constitute an adverse employment action. The court reasoned that the City did not change the plaintiff’s working conditions, terminate his employment, cut his pay or benefits, or change his job responsibilities. The City merely “provided [the plaintiff] a favorable employment benefit that [he] took advantage of.” As such, there was no adverse action.**

Sellers v. Deere & Co., 791 F.3d 938 (8th Cir. 2015). An employee sued his employer and his supervisor, alleging age and disability discrimination and retaliation under the

ADEA, the ADA, and state law. He alleged he suffered two adverse employment actions: effective demotion when the employer changed its job classification scheme, and an unmanageable increase in work duties. He also identified two incidents in which his supervisor berated him, spit, pounded his fists, and pushed furniture. The district court granted summary judgment for the employer, holding that the employee had neither suffered an adverse employment action, as required for his discrimination and retaliation claims, nor alleged facts sufficient to support his hostile work environment claim. The employee appealed. *Held*: The Eighth Circuit affirmed. First, the employee was barred from arguing that his job reclassification constituted an adverse employment action because he had not presented that argument to the EEOC. Second, **the reclassification did not change the employee's working conditions regardless**. Third, because the employee's job was, by his own admission, dynamic and fluid, the alleged increases in his work duties did not constitute a material change in the terms and conditions of employment. Finally, two "isolated" incidents of offensive conduct and various other incidents of rude or unpleasant behavior in four years of employment were insufficient to support a hostile work environment claim.

B. *Prima Facie* Case – Proper and Improper Comparators

Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769 (6th Cir. 2016). The plaintiff, the only female mental health technician ("MHT") at a mental health crisis center, was terminated after she improperly discharged a suicidal patient. She sued, alleging that the defendant terminated her because of sex in violation of Title VII. The plaintiff acknowledged that her failure to check the wrongly discharged patient's ID band constituted a terminable infraction, but alleged that the defendant did not terminate two male MHTs who made mistakes of comparable seriousness, indicating that she was in fact terminated because of sex. The court explained that while differences certainly existed between the plaintiff and her comparators, "those differences do not render [the plaintiff] and her comparators so facially distinguishable as to obviate the need for [the defendant] to provide any explanation for its differential treatment."

Sweatt v. Union Pac. R.R., 796 F.3d 701 (7th Cir. 2015). The plaintiff, an African American who performed various manual labor tasks for the defendant, alleged violations of several employment statutes after he was denied a transfer to a position as a security guard. After several years in laborious posts like Assistant Foreman, Tracklayer and Tie Inserter, the plaintiff experienced joint and muscle pain and sought the less strenuous security job. In internal interviews for the security officer position, the plaintiff did not disclose on a written application or in an interview that he had been arrested. The arrest related to a domestic dispute, and the case had been dismissed. On the basis of the plaintiff's repeated refusal to disclose the arrest, the defendant denied him the security officer position. **The court of appeals rejected all of the plaintiff's proposed comparators because none of them had refused to disclose prior arrests or convictions throughout the interview process. The defendant had made clear in its application materials that it considered honesty of paramount importance for security guards, so it could not tolerate dishonesty about criminal records.**

C. Direct Evidence of Discrimination

Deets v. Massman Constr. Co., 811 F.3d 978 (7th Cir. 2016). The plaintiff, a white construction worker, was terminated from his position working on a federally assisted

construction project. The employer was required to make a good-faith effort to meet federally mandated goals for participation by minorities and women on the project. The plaintiff asked the project superintendent, "How can you possibly lay me off?" The superintendent responded, "My minority numbers aren't right. I'm supposed to have 13.9 percent minorities on this job and I've only got 8 percent." The plaintiff sued for race discrimination under Title VII and 42 U.S.C. section 1981. The district court held that the project superintendent's statement was not direct evidence of discrimination because it was not clear that the statement referred to the plaintiff's layoff and that the plaintiff's circumstantial evidence was unpersuasive. The district court granted summary judgment to the defendants. The Seventh Circuit reversed and remanded. **Given the circumstances of the superintendent's statement and the language he used, no inference was needed to conclude that the plaintiff was laid off because he was not a minority.**

Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C., 778 F.3d 473 (5th Cir. 2015). The plaintiff, who worked as a waitress and bartender at the defendant casino, brought suit under Title VII after she was denied a promotion to a managerial position. The plaintiff submitted an affidavit from a former manager stating that the defendant's general manager, who was responsible for hiring and promotion decisions, assigned duties to employees based on their skin color. The affidavit also reported comments from the general manager stating that he would not let "a dark skinned black person handle any money" and that the plaintiff "was too black to do various tasks at the casino." The district court granted summary judgment to the defendant, holding that the plaintiff had failed to establish a *prima facie* case of discrimination. The Fifth Circuit reversed and remanded for trial based on its determination **that the manager's affidavit constituted adequate direct evidence of discrimination to raise triable issues. The Fifth Circuit reiterated its four-factor test to determine whether remarks like those in the affidavit constitute "direct evidence" of discrimination or mere "stray remarks." The factors include: (1) whether the comments concern the plaintiff's protected characteristic; (2) the proximity of the comments to the employment decision; (3) whether the commenter held the authority to make the employment decision; and (4) whether the comments related to the employment decision. Applying these factors to the statements in the affidavit, the court of appeals held that a reasonable jury could find that the comments constituted illegal discrimination..**

D. Circumstantial Evidence of Discrimination

Ahmed v. Johnson, 752 F.3d 490 (1st Cir. 2014). The plaintiff, an Immigration Enforcement Agent for U.S. Immigration and Customs Enforcement ("ICE"), applied for a position as a Deportation Officer. Three white men were selected for the openings. The plaintiff alleged that he was denied the promotion in violation of Title VII because of his Muslim religion, his Arab race, and his Algerian national origin. The district court granted summary judgment for the defendant because it held that the plaintiff did not rebut the fact that the three chosen individuals were better qualified, and the recommending officer had recommended those individuals before the plaintiff even submitted his application. The First Circuit vacated and remanded. The court rejected the district court's reasoning about the timing of the promotion decision, since the hiring decision was announced after the plaintiff submitted his application, and the recommending officer testified that he had the chance to consider the plaintiff's application, as did the ultimate decision-maker. Viewing the facts in the light most favorable to the plaintiff, the court concluded that he had

established a *prima facie* case of discrimination. **With regard to whether ICE’s proffered reason for the decision was pretextual, the court considered evidence that the plaintiff had excellent performance evaluations, that the plaintiff’s prior work experience was relevant to the position he applied for, that the plaintiff spoke another language, and that he received a higher score on the qualification test than the chosen individuals. The court noted that the decision-makers did not review personnel records or seek any information beyond the application materials, which further suggested that their proffered reason was pretextual.**

1. No Evidence of Pretext

Cox v. First Nat’l Bank, 792 F.3d 936 (8th Cir. 2015). The plaintiff sued her employer for gender discrimination under Title VII after it chose a man over her for promotion. The plaintiff had multiple graduate degrees and loans experience. The man had neither, but he had been a vice president longer than the plaintiff, had worked for the defendant three times longer, had as good or better performance reviews, and scored better on a matrix created by the outgoing holder of the open position. Without interviewing either candidate, the defendant’s president promoted the man, purportedly based on tenure and matrix scores. **The court recognized that the plaintiff’s evidence that fourteen of fifteen of the defendant’s executives were male did support an inference of pretext, but it held that this evidence alone was insufficient to defeat summary judgment.**

E. Collective Decision-Making/“Cat’s Paw”

Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265 (1st Cir. 2014). The plaintiff, a former general manager at a company that managed shopping centers, alleged sex discrimination and retaliation in violation of Title VII. A human resources manager had made romantic advances toward the plaintiff, which he had declined. After a confrontation at a conference they both attended, the human resources manager made comments that the plaintiff understood to be threatening. The plaintiff reported the conduct to his supervisor, who told him to send a conciliatory e-mail to the human resources manager. Meanwhile, the human resources manager discussed the plaintiff’s performance problems with his supervisors. One of the plaintiff’s supervisors recommended a performance improvement plan, but after the human resources manager made further romantic advances toward the plaintiff and he asked that she leave him alone, the human resources manager recommended the plaintiff’s immediate termination. The plaintiff was terminated for unsatisfactory performance and attendance issues. The district court granted summary judgment for the employer and the plaintiff appealed. **The First Circuit reversed as to the discriminatory termination claim, but otherwise affirmed the judgment. The court agreed that the human resources manager was not plaintiff’s supervisor, but held that an employer is liable if “the coworker acted, for discriminatory reasons, with the intent to cause the plaintiff’s firing; the co-worker’s actions were in fact the proximate cause of the termination; and the employer allowed the co-worker’s acts to achieve their desired effect though it knew (or reasonably should have known) of the discriminatory motivation.”**

Woods v. City of Berwyn, 803 F.3d 865 (7th Cir. 2015). The plaintiff, a 53-year-old firefighter, alleged that his fire chief wanted to fire him because of his age and a back injury he sustained in the line of duty. The plaintiff brought claims for age discrimination, disability discrimination, and unlawful retaliation. The defendant responded that it

terminated the plaintiff because of his threats to a co-worker that “he wanted to kill somebody, all of them,” and that his children would “go over there” and “tune them up,” referring to his co-workers and superiors. The fire chief looked into these statements and ultimately recommended termination. The defendant argued that the Board of Fire and Police Commissioners made the final termination decision after a full evidentiary hearing, and not the fire chief. The plaintiff alleged that the cat’s paw theory applied, as the fire chief was the discriminatory subordinate who used the formal decision-maker, the Board, to fire the plaintiff. The district court granted summary judgment on all claims to the defendant. The Seventh Circuit affirmed and ruled **that where “the ultimate decision-maker does determine whether the adverse action is entirely justified apart from the supervisor’s recommendation, then the subordinate’s purported bias might not subject the employer” to liability. Otherwise, where a discriminatory subordinate makes an allegation and the plaintiff employee is fired, there would be no steps the ultimate decision-maker could ever take to break the chain of proximate causation.**

II. DISPARATE IMPACT

Lopez v. City of Lawrence, No. 14-1952, 2016 WL 2897639 (1st Cir. May 18, 2016). African- American and Hispanic police officers alleged that a police sergeant’s exam used in 2005 and 2008 by several Massachusetts communities, including the City of Boston, had an unlawful disparate impact. The exam consisted of an 80-question written test (80% of the applicant’s final score) and an “education and experience” rating (the remaining 20%). The subject matter tested on the exam was based on a study performed by a Massachusetts state agency in 1991 and updated in 2000 examining the knowledge, skills, abilities, and personal characteristics critical to the performance of the police sergeant job. Candidates were selected in strict rank order based on their scores on the exam. The plaintiffs argued that both the exam and the rank-order selection independently produced an unlawful disparate impact. The defendants conceded that the selection process had a disparate impact but contended that the exam was job-related for the position in question and consistent with business necessity, and therefore lawful. The defendants sought to prove that the exam was valid by showing “content validity”—*i.e.*, that the content of the selection procedure is representative of important aspects of performance on the job. The First Circuit **held that the district court did not clearly err in finding that the exam evidenced content validity because the district court “trained its focus on critical and important knowledge, skills, and abilities called for by the job.”** The court stated: “We cannot see how it is an error of law to find that an exam that helps determine whether an applicant possesses a large number of critical and necessary attributes for a job serves an important need of the employer.” Second, the court held that the district court did not clearly err in finding that the rank ordering was lawful because (1) rank ordering furthered the defendants’ interest in eliminating patronage and intentional racism, “itself a reasonable enough business need,” and (2) the plaintiffs failed to demonstrate that rank ordering on its own caused the disparate impact.

Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014). Former police officers alleged that the police department’s drug testing program had a disparate impact on African-American officers in violation of Title VII. They also brought claims under 42 U.S.C. section 1983 and the ADA. The plaintiffs alleged that the drug test the department used, which tested samples of hair, generated false-positive results for African Americans due to the way it processed the type of hair common to many black individuals. The district court granted

summary judgment. **The First Circuit vacated the grant of summary judgment. The court reasoned that the plaintiffs presented statistical evidence that the difference in outcomes between different races very likely did not result from chance. Although the results were not “practically significant,” the court concluded that the failure to show practical significance did not preclude the plaintiffs from using statistically significant data to make a *prima facie* case of disparate impact.**

III. RACE DISCRIMINATION AND HARASSMENT

A. Reverse Discrimination/Affirmative Action

Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013). The plaintiff sued the University of Texas at Austin and University officials after the University denied her undergraduate admission. The plaintiff alleged that the University’s practice of considering race in the admission process violated the Equal Protection Clause. Although the University does not assign race a specific value in the application, “it is undisputed that race is a meaningful factor.” On cross-motions for summary judgment, the district court granted summary judgment for the University. The Fifth Circuit affirmed, finding that *Grutter v. Bollinger*, 539 U.S. 306 (2003), “required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity’s benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal.” The Supreme Court granted *certiorari* and vacated and remanded. Two Justices wrote concurring opinions and one Justice dissented. The Court reviewed three cases regarding racial classifications in education: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Grutter*. The Court reaffirmed that *Grutter* requires strict scrutiny when admissions programs use racial classifications. While the district court and the Fifth Circuit correctly noted that *Grutter* “calls for deference to the University’s conclusion” that diversity would positively impact the educational goals, the Court indicated that further judicial determinations are still required. The Court explained that even if the University demonstrates that its goal is “consistent with strict scrutiny,” it still needs to prove that the means are narrowly tailored, and in that regard a court may not give deference. Thus, a reviewing court must “verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.” After the lower courts upheld the admission program, the Supreme Court again granted *certiorari*. *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015). **The Court determined on further appeal that consideration of race is acceptable in college admissions where a quota is not used.**

B. Harassment

Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264 (4th Cir. 2015) (*en banc*). The plaintiff, an African-American waitress at a resort hotel, sued the defendant for creating a hostile work environment and for retaliation. The plaintiff had worked at the hotel for just over a month when, one evening, a customer ordered a complicated drink. Unable to convince the nearest bartender to make the drink, the plaintiff went to another bar in the hotel. Returning with the drink, the plaintiff took a route through the kitchen to avoid upsetting the first bartender. After delivering the drink, the plaintiff was confronted by a supervisor who was loudly yelling at her for going through the kitchen and ignoring her

reprimands. The supervisor berated the plaintiff for some time, said she “would be sorry,” and twice called her a “porch monkey.” After further conversations, the owner of the hotel inquired into the plaintiff’s performance with the director of food and beverage, who indicated she had performed poorly in every position to which she had been assigned during her brief period of employment. The owner then fired the plaintiff. The district court granted summary judgment for the defendant, ruling that the two slurs had not created a “severe or pervasive” environment of harassment. Applying circuit precedent, the district court then granted summary judgment on the retaliation claim because an objective observer could not conclude that the plaintiff was likely to be subjected to a severely harassing or discriminatory work environment. On appeal, the panel affirmed the ruling on the hostile work environment claim (unanimously), and affirmed the ruling as to the retaliation claim (in a split decision). The circuit voted to rehear the case *en banc*. The full Fourth Circuit reversed. First, the full circuit **held that a reasonable jury could conclude that the use of such an offensive epithet as “porch monkey,” even though isolated, was sufficiently serious to create a hostile work environment.** Then, the court addressed the plaintiff’s claim of retaliation and held that **employees are protected from retaliation for reporting a hostile work environment when an isolated incident is “physically threatening or humiliating.”**

IV. RELIGIOUS DISCRIMINATION AND HARASSMENT

A. Duty to Accommodate Religious Beliefs

Telfair v. Fed. Express Corp., 567 F. App’x 681 (11th Cir. 2014). The plaintiffs, who worked as FedEx couriers, were practicing Jehovah’s Witnesses. FedEx informed them that the schedule for their position was changed from a Monday-to-Friday schedule to a Tuesday-to-Saturday schedule, because of a decreased need for couriers on Mondays. Couriers who did not want to work the Tuesday-to-Saturday schedule were given a choice between switching to a different available position or taking a 90-day unpaid leave of absence, at the end of which they would be considered to have resigned. FedEx denied the plaintiffs’ request to work Tuesday to Friday, with Saturdays off, and plaintiffs did not apply for any other available positions. After their employment ended, the plaintiffs sued, alleging religious discrimination. The district court granted summary judgment. The Eleventh Circuit affirmed and **reasoned that FedEx provided a reasonable accommodation by offering the opportunity to apply for a different position and providing plaintiffs with a 90-day period in which to secure other employment. Although the open positions would have caused a reduction in plaintiffs’ pay, they did not cite any binding authority that such a pay cut would make the accommodation unreasonable.** Since FedEx was not required to offer the plaintiffs their requested accommodation or prove that it would have been an undue burden, the court concluded that the district court properly granted summary judgment.

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015). The defendant, a retail clothing company, had a “Look Policy” dictating how employees dress that otherwise prohibited employees from wearing any form of headwear while working. Elauf, a practicing Muslim, applied for a position at one of the defendant’s retail stores and was selected for an interview. At the interview, Elauf wore a black headscarf but neither informed Cooke, the assistant manager who interviewed her, that she was Muslim nor explained the reasons that she wore the headscarf. Cooke, however, assumed Elauf was

Muslim. After the interview, Cooke rated Elauf qualified for hire based on the defendant's standard interview guidelines, but was not sure whether Elauf's headscarf would conflict with the Look Policy. Cooke consulted the district manager, Johnson, who advised Cooke that Elauf's headscarf would violate the Look Policy and directed Cooke not to hire Elauf, regardless of the reason Elauf wore the headscarf. The EEOC sued alleging that the defendant failed to accommodate Elauf's religious beliefs on a theory of disparate treatment. The Supreme Court reversed the Tenth Circuit's decision in favor of the employer. Construing the text of Title VII of the Civil Rights Act of 1964, Justice Scalia wrote for the majority that in a disparate treatment case alleging religious discrimination such as this one, neither religion nor a religious practice may be a motivating factor of an adverse employment action; and unlike other protected characteristics under Title VII, religion is a "privileged" characteristic insofar as employers may be required to modify their otherwise neutral policies to accommodate religious practice. **Because the defendant's decision not to hire was motivated by Elauf's headscarf, which was a religious practice, the defendant acted "with the motive of avoiding the need for accommodating a religious practice," in violation of Title VII. This is true regardless of the defendant's knowledge that the practice is a religious one; its mere suspicion that Elauf's headscarf was worn for religious reasons is enough. Therefore, Elauf's failure to put the defendant on notice of her religious beliefs was immaterial.** The majority expressly reserved the question of liability where an employer is not motivated by the religious feature of an employee's practice. The issue was not presented in this case, as the defendant knew or suspected that the headscarf was for religious purposes

Nobach v. Woodland Vill. Nursing Ctr., Inc., 799 F.3d 374 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016). The plaintiff, a nursing assistant, was fired by the defendant after she refused to pray the Rosary at the request of a patient. The patient's request was relayed to the plaintiff by a fellow employee who lacked any supervisory authority over her; the plaintiff responded that doing so would be against her religious beliefs. However, she did not inform any of her supervisors about her religious beliefs at the time. After the patient complained, the plaintiff's supervisors investigated the incident and terminated the plaintiff a few days later. In the meeting informing her that the defendant had terminated her, the plaintiff's supervisor stated that she was fired for refusing to pray the Rosary. The plaintiff responded that doing so was against her religion, informing her superiors about her religious beliefs for the first time. The supervisor replied, "I don't care if it is against your religion or not. If you don't do it, it's insubordination." The plaintiff alleged that the defendant had violated her Title VII rights by discriminating against her on the basis of her religious beliefs. The jury entered a verdict in favor of the plaintiff, and the district court denied judgment as a matter of law. The Fifth Circuit reversed, finding insufficient evidence to support the jury's determination that the defendant was motivated by the plaintiff's religious beliefs. The Supreme Court granted the plaintiff's writ of *certiorari* and directed the Fifth Circuit to reconsider its decision in light of *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). On remand, the Fifth Circuit again ordered judgment as a matter of law in favor of the defendant. **The court of appeals could find no evidence in the record that the defendant knew, suspected, or reasonably should have known—before terminating the plaintiff—that the plaintiff's religious beliefs conflicted with praying the Rosary, and the fact that the plaintiff informed her supervisor after he announced the termination decision was irrelevant. The plaintiff put on no evidence showing that the co-worker relayed the plaintiff's**

statements concerning her religion to her supervisors. Because the plaintiff could not show that her religious beliefs were a motivating factor in her termination, the Fifth Circuit ordered the entry of judgment as a matter of law.

V. SEX AND PREGNANCY DISCRIMINATION

Bauer v. Lynch, 812 F.3d 340 (4th Cir. 2016). The Federal Bureau of Investigation (“FBI”) uses a gender-normed physical fitness test to assess Special Agent recruits, meaning that it sets different minimum passing scores for men and women so that equal percentages of men and women pass. The plaintiff, a male former Special Agent recruit who was unable to pass the push-up portion of the test and was forced to resign from the FBI Academy, sued the FBI for sex discrimination under Title VII. The district court granted summary judgment for the plaintiff. The district court reasoned that because the plaintiff would have been required to do fewer push-ups had he been a woman, the gender-normed standards ran afoul of Title VII’s prohibition of sex discrimination. The Fourth Circuit vacated and remanded and **explained that “the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness.”** Emphasizing that the FBI uses the physical fitness test to assess an “overall level of physical fitness,” the court held that the test in fact imposes equal burdens on men and women. **The court concluded: “An employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each.”**

On February 1, 2016, the EEOC issued a proposal to compel employers to submit summary pay data grouped by sex, race, and ethnicity as part of their EEO-1 form obligations. This obligation would begin with EEO-1 forms filed by employers on March 31, 2018. The proposal mandates that all employers with 100 or more employees will be required to submit summary pay data, which will fall within 12 separate pay bands. To minimize the burden on employers, the EEOC proposes to require reporting of pay data from W-2 forms. **The EEOC aims to use the data to identify potential pay discrimination problems, to publish analyses of pay trends across industries and geographic regions, and to encourage employers to conduct internal pay analyses and fix any discovered wage disparities.** The 60-day comment period for this proposal ends on August 15, 2016. The EEOC plans to vote on a completed EEO-1 form by September 30, 2016, after sending its final proposal to the White House Office of Management and Budget for review.

Legg v. Ulster County, 820 F.3d 67 (2d Cir. 2016). The plaintiff, a county jail corrections officer, brought a claim of pregnancy discrimination against the County and several officials. The plaintiff alleged that the County denied her request for an accommodation under its light-duty policy, under which only employees injured on the job were eligible for light-duty assignments. The plaintiff’s supervisor placed her informally on light duty for about a month, until she was gradually required to work with inmates again. After a run-in with an inmate while pregnant, the plaintiff took unpaid leave until she gave birth. The district court granted the defendants’ motion for judgment as a matter of law, reasoning that the accommodation policy could not be discriminatory because it was facially neutral as to pregnancy. The Second Circuit vacated the district court’s judgment and remanded

for a trial in light of the Supreme Court’s decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015). In *Young*, the Supreme Court held that an employer’s facially neutral accommodation policy gives rise to an inference of pregnancy discrimination if the policy imposes a significant burden on pregnant employees that is not justified by the employer’s nondiscriminatory explanation. The Second Circuit held that the plaintiff met her *prima facie* case because as a matter of policy, the County provided light-duty accommodations to other employees who were similar to the plaintiff in their ability or inability to work. However, these other employees were able to go on light duty as a result of on-duty injuries rather than pregnancy. The Second Circuit then considered the defendant’s legitimate, nondiscriminatory reason for its policy—compliance with a state law requiring accommodation of employees injured on the job but not employees unable to work for other reasons. The Second Circuit reasoned that the plaintiff could establish pretext for two reasons. First, the County’s justification had significant inconsistencies, including several different justifications for declining to extend light-duty accommodations to pregnant employees besides compliance with state law. Second, a reasonable jury could conclude that the defendants imposed a significant burden on the plaintiff and other pregnant employees, because the County categorically denied light-duty accommodations to pregnant employees. Finally, the court considered that a reasonable jury could find that the County was motivated not just by compliance with state law, but also by cost. The County lacked the same financial incentive to continue to employ pregnant employees in some capacity and had a countervailing incentive to replace them. **The Second Circuit held that cost alone is not generally a legitimate basis for refusing to accommodate pregnant employees.**

Fairchild v. All Am. Check Cashing, Inc., 815 F.3d 959 (5th Cir. 2016). The plaintiff was terminated two months after she told her supervisor and her manager that she was pregnant. She sued for sex discrimination under Title VII and proceeded under an indirect-evidence theory. The defendant provided evidence of legitimate, nondiscriminatory reasons for the plaintiff’s termination. The district court concluded that the plaintiff’s only evidence of pretext was the temporal proximity between her employer learning she was pregnant and her termination. Finding this insufficient, the district court granted the defendant’s motion for judgment as a matter of law after the close of the plaintiff’s case in chief. The Fifth Circuit affirmed. **As a matter of first impression in the Fifth Circuit, the court held that temporal proximity between an employer learning of an employee’s pregnancy and the employee’s termination is insufficient, without more, to prove pretext for pregnancy-based sex discrimination claims under Title VII.**

VI. AGE DISCRIMINATION

Liebman v. Metro. Life Ins. Co., 808 F.3d 1294 (11th Cir. 2015). The plaintiff sued his former employer for age discrimination under the ADEA after he was terminated and replaced. The plaintiff was 49 when terminated. His replacement was 42. The district court granted summary judgment to the defendant, holding that the plaintiff had not stated a proper ADEA claim because his replacement was over forty and therefore also a member of the protected class. The Eleventh Circuit vacated and remanded. Citing *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the court emphasized that under the ADEA, the fact that one person in the protected class lost out to another person in the protected class is irrelevant so long as he lost out because of his age. Citing Eleventh Circuit precedent, the court stated that the proper inquiry under

McDonnell Douglas instead is whether the plaintiff's replacement was "substantially younger" than him. **The court held that a seven-year age difference qualifies as "substantially younger" under the ADEA and that the plaintiff therefore could establish a *prima facie* case.**

VII. RETALIATION

Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016). The plaintiff, a police officer, filed a claim pursuant to 42 U.S.C. section 1983 against the City and various officials, alleging that he was demoted in retaliation for exercising his First Amendment rights. The plaintiff was demoted the day after other police officers saw him obtain a local mayoral candidate's campaign sign. The plaintiff had no actual involvement in the candidate's campaign, and only picked up the sign for his mother, who could not get the sign herself. The district court awarded summary judgment to the defendants, concluding that the plaintiff had not been deprived of any constitutionally protected right because he did not actually engage in First Amendment conduct. The Third Circuit affirmed, concluding that the plaintiff's claim was not actionable under section 1983. The Third Circuit reasoned that the plaintiff would have an actionable claim only if the demotion was prompted by the plaintiff's actual, rather than his perceived, exercise of free speech. The Supreme Court reversed the grant of summary judgment in favor of the City. **The Court held that where an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge this action under section 1983—even if the employer operated under a factual mistake about the employee's behavior.** The Court first addressed the issue of whether the City's factual mistake made a legal difference, and concluded that it did not. For the purposes of this decision, the Court assumed that the City demoted the plaintiff with a constitutionally improper motive. The Court noted that previous precedent and the language of section 1983 did not address whether the protected "right" at issue primarily focuses on an employee's actual activity or on a supervisor's motive. **The Court concluded that the government's motive for demoting the plaintiff is what matters, even if the reason rests upon a factual mistake.** The Court reasoned that a rule of law finding liability here tracks the language of the First Amendment, which focuses on government activity, or in this case, the police department's activity. Indeed, the resulting constitutional harm remains the same whether or not the employer relied on a factual mistake—discouragement of employees from engaging in protected speech or association. The Court then reasoned that a rule of law which imposed liability upon the employer despite a factual mistake will not likely increase the employer's costs. Ultimately, the employee bears the burden of proving an improper employer motive. Finally, because the Court assumed for the purposes of the opinion that the City demoted the plaintiff with an improper motive, the Court remanded the matter for determination of whether the City's policy related to the demotion violated the Constitution.

VIII. STATUTE OF LIMITATIONS AND CONTINUING VIOLATION DOCTRINE

Green v. Brennan, 136 S. Ct. 1769 (2016). The petitioner, a black Postal Service worker, sued the Service for race discrimination on the theory that he was constructively discharged. After the petitioner complained that he was denied a promotion because of his race, two supervisors accused him of intentionally delaying the mail—a criminal offense.

On December 16, 2009, the petitioner and the Service signed an agreement: the Service promised not to pursue criminal charges in exchange for the petitioner's promise to leave his current post. The petitioner then chose to retire rather than be assigned to a less desirable post and submitted his resignation on February 9, 2010, effective March 31, 2010. On March 22, 41 days after submitting his resignation but 96 days after signing the settlement agreement, the petitioner contacted the EEOC to report an unlawful constructive discharge. The petitioner later filed suit. Under 29 C.F.R. section 1614.105(a)(1), before a federal employee may sue his employer under Title VII, he must contact the EEOC "within 45 days of the date of the matter alleged to be discriminatory." The district court granted summary judgment to the Service on the ground that the petitioner failed to timely contact the EEOC. **The Tenth Circuit affirmed. It held that the "matter alleged to be discriminatory" encompassed only the Service's discriminatory actions, not the petitioner's decision to resign, and that the 45-day period therefore began running when the parties signed the settlement agreement. The Tenth Circuit joined the D.C. and Seventh Circuits in holding that the limitations period for a constructive-discharge claim begins to run after the employer's last discriminatory act.** In contrast, the Second, Ninth, Eighth, and Fourth Circuits had held that the limitations period does not begin to run until the employee resigns. **In a 7-1 decision, the Supreme Court vacated and remanded. The Court held that a constructive-discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the date of the last discriminatory act that causes the resignation.** The Court based this holding on the "standard rule" canon for limitations periods: a limitations period typically commences when the plaintiff has a present cause of action (*i.e.*, when the plaintiff can file suit and obtain relief). The Court held that: (1) in the context of a constructive-discharge claim, a resignation is part of the complete and present cause of action; (2) nothing in the text of Title VII or 29 C.F.R. section 1614.105(a)(1) clearly indicates an intent to displace the standard rule; and (3) starting the limitations period *before* a plaintiff can bring suit on a constructive-discharge theory would actively negate Title VII's remedial structure. The Court also held that an employee resigns, starting the limitations period, when he gives his employer definite notice of his intent to resign; if an employee gives two weeks' notice, for example, the limitations period begins to run on the day he gives notice, not on his last day of work. The Court remanded to the Tenth Circuit to determine when the petitioner gave definite notice.

IX. LITIGATION AND TRIAL ISSUES

A. Rule 68 Offers and Settlement Considerations

Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016). The U.S. Navy engaged the marketing firm Campbell-Ewald to conduct a recruiting campaign that involved sending texts to cell phone users who consented to marketing solicitations. The plaintiff received one of these texts, and he filed a putative class action alleging that Campbell-Ewald violated the Telephone Consumer Protection Act ("TCPA") by sending the marketing message without his consent. Before the plaintiff filed a motion to certify the class, Campbell-Ewald filed a Rule 68 offer, offering to pay the plaintiff the statutory maximum he could recover under the TCPA plus court costs. The plaintiff did not accept the offer, and it lapsed after 14 days. Campbell-Ewald then moved to dismiss the matter for lack of subject matter jurisdiction because it offered the plaintiff all the relief he could obtain on his

TCPA claim. Thus, Campbell-Ewald argued, there remained no case or controversy under Article III. The district court denied the motion to dismiss, and the Ninth Circuit affirmed, holding that an “unaccepted Rule 68 offer does not moot a class action.” *Held*: The Supreme Court affirmed the Ninth Circuit, holding that **an unaccepted Rule 68 offer that satisfies a named plaintiff’s individual action does not moot a class action under Article III**. The Court reasoned that under contract law principles, the defendant’s Rule 68 offer had no legal effect once the plaintiff refused to accept it. Once the offer lapsed, the parties remained as adverse as when the plaintiff filed his complaint. Thus, the “case or controversy” requirement of Article III remained satisfied. **The Court, however, did reserve the decision as to “whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”**

X. DAMAGES, EQUITABLE RELIEF, ATTORNEYS’ FEES, AND COSTS

A. Attorneys’ Fees

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016). A female truck driver for CRST, a trucking company, filed a charge with the EEOC alleging that two male trainers sexually harassed her during a training trip. The EEOC investigated and discovered that four other women had filed EEOC charges against CRST. The EEOC informed CRST that it had reasonable cause to believe that CRST subjected the first driver and “a class of employees and prospective employees” to sexual harassment. When conciliation efforts failed, the EEOC brought suit on behalf of the first driver and other similarly situated employees. During discovery, the EEOC identified more than 250 allegedly aggrieved women. **The district court dismissed the EEOC’s claims on behalf of 67 of the women on the ground that the EEOC failed to investigate and conciliate as to them. The district court held that CRST was a “prevailing party” as to these claims and awarded CRST attorneys’ fees under 42 U.S.C. section 2000e-5(k). The Eighth Circuit reversed.** The court held that a Title VII defendant can be a prevailing party only if it obtains a ruling on the merits, contrary to prior rulings by the Fourth, Ninth and Eleventh Circuits. The court concluded that because dismissal for failure to investigate or conciliate is not a ruling on the merits, CRST could not recover attorneys’ fees. **In an 8-0 ruling, the Supreme Court vacated the Eighth Circuit’s ruling and remanded. The Court held that a defendant need not obtain a favorable judgment on the merits to be a “prevailing party.”** The Court explained that a defendant’s objective is to prevent the plaintiff from obtaining a material alteration in the legal relationship between the parties. The defendant fulfills this objective whenever the plaintiff’s challenge is rebuffed, regardless of the reason. As such, “the defendant may prevail even if the court’s final judgment rejects the plaintiff’s claim for a non-merits reason.” The Court also indicated that the standard for awarding attorneys’ fees to a prevailing defendant in these circumstances is the same when the defendant wins on the merits: the defendant must show that the plaintiff’s position was “frivolous, unreasonable, or groundless.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Finally, the Court declined to address the EEOC’s argument that a defendant must obtain a *preclusive* judgment to prevail, instead remanding the issue to the Eighth Circuit to decide in the first instance.