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Barrett McNagny LLP
ATTORNEYS AT LAW

Case Law Update

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Thomas Kimbrough serves his clients by providing counseling and representation to union and non-union employers in every aspect of employee relations and employment law. He also exclusively represents, counsels, and defends corporations and professional organizations in various labor and employment cases. With more than 30 years of experience in defense of companies in discrimination and employment-related claims, Thomas also has extensive experience in handling other litigation claims.

Thomas was selected as a Fellow of the American College of Trial Lawyers which is limited to the top one percent of the total lawyer population in any state. He has also been selected for inclusion since 2015 in *The Best Lawyers® in America* and the *Indiana Super Lawyers* publications, and is an AV® Preeminent™* rated attorney based on Martindale-Hubbell's peer review ratings, a member of the National Council on Litigation Management, a member of the Defense Trial Counsel of Indiana, and a member of the Indiana State and Allen County Bar Associations where he sits on the Labor and Employment Law section committees for each bar. He is a frequent speaker and lecturer on various labor and employment topics on a local, state, and national level.

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- The information and procedures set forth in this manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, any forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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DISPARATE TREATMENT

- ***Prima Facie* Case**

- ***David v. Bd. of Trs. of Cmty. Coll. Dist. No 508***, 846 F.3d 216 (7th Cir. 2017). The plaintiff, an African-American woman over the age of 40, worked in computer support for the City College of Chicago ("CCC"). Her job did not require a Bachelor's degree. A month after announcing her retirement, the plaintiff asked for a new job title and a salary increase to account for additional job responsibilities inherited from a male co-worker. Her supervisors failed to properly process her request. When the plaintiff retired, her extra responsibilities reverted back to her male co-worker, but he did not receive a raise for resuming these duties. A year later, another female, Hispanic co-worker over 40 started performing the plaintiff's old responsibilities, in addition to her original job duties. Both co-workers' job descriptions required a Bachelor's degree and both earned annual salaries greater than the plaintiff's. The plaintiff sued CCC, alleging, among other things, that the disparities between her pay and her co-workers' pay evidenced gender, race, and age discrimination in violation of Title VII and the Equal Pay Act. The district court granted summary judgment for CCC. *Held:* The Seventh Circuit affirmed. It analyzed the plaintiff's pay claims using the *McDonnell Douglas* framework, focusing on whether the plaintiff's proffered comparators were similarly situated to her. While the court acknowledged that the plaintiff's co-workers performed some of the plaintiff's old job duties, it concluded there was no evidence that either co-worker solely performed duties equivalent to that which the plaintiff performed. Moreover, the plaintiff did not maintain that she was qualified for either of her co-worker's jobs. Because neither person was similarly situated to the plaintiff for purposes of her disparate pay claim, she failed to establish a *prima facie* case of discrimination.

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DISPARATE TREATMENT

- **Means of Proof of Discrimination**
  - **Circumstantial Evidence of Discrimination**
    - **Evidence of Pretext**

- ***Figueroa v. Pompeo***, 923 F.3d 1078 (D.C. Cir. 2019). The plaintiff, a Hispanic male born in Puerto Rico, worked as a foreign service officer in the U.S. Department of State. Beginning in 2000, the plaintiff unsuccessfully applied each year for a promotion to a higher pay grade until his retirement in 2009. Candidates for promotion were evaluated based on substantive criteria called "core precepts," which primarily included subjective determinations in performance areas such as leadership skills, managerial skills, and interpersonal skills. Additionally, candidates were given a fresh look each year, meaning that their ranking on core precepts from years prior were not considered during their annual reviews. Eventually, the plaintiff sued for discrimination in violation of Title VII, alleging that the promotion process had a disparate impact on Hispanic and Latino applicants and that he was denied a promotion because of his Hispanic ethnicity. The district court granted the Secretary of State's motion for summary judgment on both claims. *Held*: The D.C. Circuit affirmed in part and reversed in part. First, the court affirmed summary judgment as to the plaintiff's disparate impact claim because there was no causal evidence demonstrating how the challenged policy of giving candidates a fresh look each year, as opposed to other aspects of the promotion process, led to a statistical disparity for Latino or Hispanic applicants. Second, as to the plaintiff's disparate treatment claim, the court clarified an employer's burden under the second step of the *McDonnell Douglas* framework. Specifically, the court explained that "an employer at the second prong must proffer admissible evidence showing a legitimate, nondiscriminatory, clear, and reasonably specific explanation for its actions." Where the nondiscriminatory reason involves subjective criteria, the evidence "must provide fair notice as to how the employer applied the standards to the employee's own circumstances." The Secretary's proffered explanation that the candidates who were promoted were more qualified than the plaintiff fell short of this standard because it did not explain how the core precepts applied to the plaintiff's particular case, nor did the Secretary explain why the plaintiff was less qualified than the other candidates. Thus, the Secretary failed to meet his burden of production under the second prong of the *McDonnell Douglas* framework. As a result, the court reversed the district court's grant of summary judgment as to the plaintiff's disparate treatment claim, and remanded for further proceedings to decide the plaintiff's cross-motion for summary judgment.

DISPARATE TREATMENT

- ***Baines v. Walgreen Co.***, 863 F.3d 656 (7th Cir. 2017). The plaintiff, an African-American former pharmacy technician at Walgreens, alleged that the company retaliated against her in violation of section 1981 and Title VII when it refused to rehire her in 2014 based on race bias charges she leveled against the company years earlier. The district court granted summary judgment for Walgreens, finding no evidence linking the plaintiff's protected activity (filing EEOC charges) and Walgreens's adverse employment actions (failing to rehire her). *Held:* The Seventh Circuit reversed. The plaintiff offered sufficient circumstantial evidence to satisfy the summary judgment standard. One critical piece of evidence, which the lower court wrongly excluded as inadmissible hearsay, was testimony from the plaintiff's cousin. The plaintiff's cousin—who ironically got the job the plaintiff was denied—stated that the hiring manager let slip that she had wanted to hire someone named "Regina" (the plaintiff's first name), but had been blocked by her district manager. The court noted that the district manager had been personally involved in handling the plaintiff's EEOC complaints, and the cousin's testimony connected those prior events to Walgreens's refusal to rehire the plaintiff. Aside from the cousin's testimony, other evidence of retaliatory intent included: (1) the plaintiff's "mysteriously missing" 2014 application and interview scores; (2) the hiring manager's initial denial to the EEOC that she had interviewed the plaintiff; and (3) the hiring manager possibly lying to the plaintiff about having hired someone else when she told the plaintiff that she had been passed over. Given this circumstantial evidence, a jury could draw a reasonable inference that the employer had acted with unlawful retaliatory intent.

DISPARATE TREATMENT

- **No Evidence of Pretext**
- ***Rooney v. Rock-Tenn Converting Co.***, 878 F.3d 1111 (8th Cir. 2018). The plaintiff sued his former employer under Title VII, alleging that he was discriminated against for being male and non-Jewish. At the time of his termination, the plaintiff was told he was being fired because of his difficulties interacting with co-workers and failure to support a client account. In its motion for summary judgment, the defendant elaborated on these reasons to support its argument that it had legitimate, nondiscriminatory reasons for the termination. The district court granted summary judgment to the defendant. *Held*: The Eighth Circuit affirmed. The court held that the defendant's elaboration at trial on its reasons for terminating the plaintiff was not evidence of pretext because the elaboration was consistent with the defendant's proffered belief that the plaintiff interacted poorly with co- workers and failed to support a client account. The court noted that Title VII imposes no obligation on employers to articulate a reason for termination contemporaneously with the termination, and that employers are not bound by the reasons they choose to articulate at the time of termination. In the same vein, the court noted that its own inquiry was "not so limited" by the defendant's contemporaneously articulated reasons for the termination.

DISPARATE TREATMENT

- **No Evidence of Pretext**
- ***Lauth v. Covance, Inc.***, 863 F.3d 708 (7th Cir. 2017). The plaintiff began working for the defendant in 2006 at the age of 54. Following six years of mediocre performance reviews, the plaintiff was placed on a performance improvement plan ("PIP") in 2012, which indicated, among other things, that he needed to improve his "communication practices." In October 2012, four of the plaintiff's subordinate employees complained that the plaintiff was "intimidating," "unprofessional, condescending, and non-communicative." The plaintiff's supervisors investigated the complaints, and ultimately terminated the plaintiff based on "continued performance deficiencies in violation of his PIP." The plaintiff subsequently sued, alleging age discrimination and retaliation under the ADEA. The defendant moved for summary judgment, arguing that the plaintiff failed to establish a dispute of material fact as to why the plaintiff was terminated. The district court granted summary judgment for the defendant. *Held:* Affirmed. The plaintiff offered only his own arguments that concerns about his purported problematic and condescending communication style with managers, peers, and subordinates had no basis. His belief was not enough to counter the defendant's performance concerns about the plaintiff, which were raised repeatedly over six years. In addition, the plaintiff failed to identify younger supervisors who received more lenient discipline despite similar behavior.

DISPARATE TREATMENT

- **Abandonment of Direct/Indirect Dichotomy**
- ***Ferrill v. Oak Creek-Franklin Joint Sch. Dist.***, 860 F.3d 494 (7th Cir. 2017). The plaintiff, an African-American woman, was hired as the principal of an elementary school for a two-year term with an automatic third-year rollover unless the Board of Education opted out. During the plaintiff's tenure, numerous complaints were made about the plaintiff's divisive and confrontational management style. The plaintiff was placed on a performance improvement plan, and the school hired an independent consultant to assist the plaintiff with her performance deficiencies. However, the plaintiff resisted the consultant's suggestions, and the consultant recommended removing the plaintiff from her position. The Board exercised its option to not renew the plaintiff's term. The plaintiff sued, alleging racial discrimination and harassment in violation of Title VII. The district court granted the defendant's motion for summary judgment as to the plaintiff's discrimination and retaliation claims. *Held:* The Seventh Circuit affirmed. The court of appeals held that the plaintiff had not established the second element of her *prima facie* case—that she was meeting the employer's legitimate performance expectations—under the *McDonnell Douglas* test. The Seventh Circuit analyzed the plaintiff's claims under the standard set forth in *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), which embraced a "more straightforward" inquiry than the burden-shifting framework in *McDonnell Douglas*: "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race … caused the [plaintiff's] discharge or other adverse employment action." The court of appeals found that undisputed evidence established that the Board opted out of renewing the plaintiff's third-year term because of her persistent resistance to improving her performance, which was well-documented and confirmed by an independent consultant, and that no reasonable factfinder could conclude otherwise.

DISPARATE TREATMENT

- **Abandonment of Direct/Indirect Dichotomy**
- ***Mourning v. Ternes Packaging, Ind., Inc.,*** 868 F.3d 568 (7th Cir. 2017). The plaintiff filed suit against her employer for sex discrimination after she and her supervisor were terminated for performance reasons. Eight of the plaintiff's ten subordinates filed written complaints against her. The district court granted summary judgment for the employer, concluding that the plaintiff had failed to establish a claim of sex discrimination under the "indirect" framework established by *McDonnell Douglas*. *Held*: The Seventh Circuit affirmed. The court of appeals clarified that, as of its decision in *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), employment discrimination cases do not have separate evidentiary frameworks for indirect and direct evidence, and, instead, the ultimate inquiry was whether the evidence would permit a reasonable factfinder to conclude the plaintiff's sex caused the adverse action. The court of appeals noted that, although the plaintiff's argument tracked the *McDonnell Douglas* framework, the plaintiff "[did] not focus on trying to show that [the decisionmakers] acted against her because she is a woman." The Seventh Circuit found that the plaintiff failed to show that similarly situated employees outside of her protected class were treated more favorably by the same decisionmaker, and failed to show that the proffered reasons for her termination were false (and not merely unfounded).

DISPARATE TREATMENT

- **Collective Decision-Making/"Cat's Paw"**
  - **Theory Inapplicable**

- ***Turner v. Hirschbach Motor Lines***, 854 F.3d 926 (7th Cir. 2017). The defendant offered to the plaintiff, an African American, a job as a truck driver contingent on his completion of orientation and a drug test. When the plaintiff tested positive for marijuana, he asked the defendant's safety officer for a "split test" so that the second half of his urine could be tested by a different laboratory. The safety officer allegedly cancelled the split test and told the plaintiff the retest would be "waste of time" and that he was "never going to pass the test" based on his race. The initial drug results were then sent to the defendant, and the defendant refused to hire the plaintiff. The plaintiff subsequently sued under Title VII, alleging that the safety officer's expressed racial animus caused the decision not to hire him using a "cat's paw" theory of liability. The district court granted summary judgment for the defendant. *Held:* Affirmed. The district court correctly concluded that the plaintiff lacked evidence supporting his federal claim for race discrimination under a "cat's paw" theory. The safety officer was not the hiring decision maker, and the cat's paw theory was unavailing because the plaintiff did not show that his drug test was unreliable or that the split test would have been negative. In addition, the hiring decision maker was unaware of the alleged retest request. Accordingly, there was no evidence that the failure to hire the plaintiff was proximately caused by the safety officer's presumably discriminatory action—cancelling the split test.

RACE DISCRIMINATION AND HARASSMENT

- **In General**
  - **Sufficient Proof of Discrimination**

- ***Taylor v. Vill. of Dolton, Ill.***, 718 F. App'x 425 (7th Cir. 2017). The plaintiff, a black firefighter, brought claims against his former employer for discriminatory discharge in violation of Title VII. During his employment, the plaintiff's co-workers routinely used racial epithets and made derogatory comments regarding his race, told him that black firefighters did not belong in the fire station, and disparaged the plaintiff's Caucasian wife. The last racially offensive comment occurred approximately one year before the plaintiff filed an EEOC charge. The plaintiff was also repeatedly accused of smelling of alcohol while on duty, despite never being seen drinking on the job. In response to one accusation, the plaintiff asked the fire chief to write an order for an alcohol test, consistent with the collective bargaining agreement ("CBA"). The written order did not call for a blood test—despite the CBA's requiring that alcohol test samples be preserved for confirmatory testing—and the plaintiff refused to submit to a blood test, instead agreeing to a breathalyzer test, which showed no trace of alcohol. The plaintiff was placed on administrative leave for refusing the blood test. He was then offered a three-day suspension as a disciplinary measure, but refused to accept the discipline and instead was fired for "insubordinate and threatening behavior." The district court granted the employer's motion for summary judgment and denied the plaintiff's motion for reconsideration. *Held*: The Seventh Circuit vacated the order granting summary judgment on the discriminatory-discharge claim. The court concluded that a dispute of fact existed as to whether the employer's "insubordination" rationale was pretext for discrimination. On the one hand, the employer maintained that the plaintiff knew a blood test was required under the CBA, despite the written order's lack of specification. On the other hand, the breathalyzer presumably satisfied the requirement of the written order and the CBA did not specify any method for the alcohol test. Against the alleged backdrop of racially charged comments, the court concluded, a reasonable jury could find for the plaintiff.

RACE DISCRIMINATION AND HARASSMENT

- **In General**
  - **Sufficient Proof of Discrimination**

- ***McKinney v. Office of Sheriff of Whitley Cnty.***, 866 F.3d 803 (7th Cir. 2017). In 2013, the plaintiff became the first-ever black police officer to be hired by the Whitley County, Indiana, sheriff's office. After he was fired nine months later by the same sheriff who hired him, the plaintiff sued under Title VII for race discrimination. The district court granted summary judgment to the defendant. *Held*: The Seventh Circuit reversed and remanded. The court opined that the district court had "overestimated the strength of the 'common actor' inference" when it concluded that, had the hiring sheriff wanted to discriminate against the plaintiff, he would have refused to hire the plaintiff in the first place. The court noted that while the inference is useful in limited situations, it should be considered by the ultimate trier of fact and not on summary judgment. The court gave the following example of when the inference was unsound: "The same supervisor could hire a county's first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague, that same supervisor could fire the black officer because of his race based on a mistaken notion of the 'greater good' of the department." The court also observed that the defendant offered eight different reasons for firing the plaintiff, but that this "ever-growing list of rationales" fell apart in the face of the plaintiff's evidence. Indeed, the court noted that the lawsuit was most striking because of the sheer number of the defendant's rationales and the quality and volume of the plaintiff's evidence, much of which was so specific that a jury could conclude that the defendant's rationales were not only mistaken, but dishonest.

RACE DISCRIMINATION AND HARASSMENT

- **Insufficient Proof of Discrimination**

- ***Smith v. Illinois Dep't of Transp.***, No. 18-2948, 2019 WL 3938264 (7th Cir. Aug. 21, 2019). The plaintiff, an African American formerly employed by the state transportation department, sued the department alleging race discrimination and retaliation in violation of Title VII. The plaintiff had been hired for a probationary period, which "did not go well," and was marked with negative performance evaluations. The plaintiff wrote multiple memoranda to the department, including to its internal EEO office, about his alleged treatment, including the use of "abusive language," and differential treatment based on race. After sending him a statement of charges, outlining "unsatisfactory work performance," the department terminated the plaintiff. In support of his retaliation claim, the plaintiff alleged that he was terminated for complaining of racial discrimination. The court granted summary judgment for the department on all claims. The plaintiff appealed, in part, contending that the court erroneously excluded evidence of his two witnesses. *Held*: The Seventh Circuit affirmed. The court held that the plaintiff's witness testimony was inadmissible; his expert submitted an opinion that was "fundamentally flawed," and his former supervisor submitted an affidavit "so vague" that it was proper for the court not to consider it. As to the plaintiff's retaliation claim, the court explained that there was no question that the department terminated him for poor performance, rather than his "protected activity." Specifically, the plaintiff received multiple unsatisfactory ratings; his "failings" were chronicled in conversations and e-mails; and he was considered "unsafe, argumentative, and unable to follow instructions." On the hostile work environment claim, the court held that the plaintiff could not make the necessary demonstration that the harassment was "based on a reason forbidden by Title VII—here, race." Although the plaintiff alleged that colleagues used offensive profanity—for example, calling him a "stupid dumb motherf[]"—he did not connect these instances to his race. The court noted that the plaintiff did identify one incident of race-based harassment—an "egregious racial epithet," but it was insufficient to support his claim, because the single use of the word did not "alter[] the conditions of his employment and create[] a hostile or abusive working environment."

RACE DISCRIMINATION AND HARASSMENT

- **Reverse Discrimination/Affirmative Action**
- ***Golla v. Office of Chief Judge of Cook Cnty., Ill.***, 875 F.3d 404 (7th Cir. 2017). The plaintiff, a white male, alleged that the defendant engaged in intentional reverse race discrimination by paying an African-American male a significantly higher salary, despite both men working in the same department and performing the same duties under essentially the same title. The district court granted summary judgment to the defendant. *Held*: The Seventh Circuit affirmed. The court found that the plaintiff's race discrimination claim failed because he failed to present evidence from which a reasonable factfinder could infer that he received lower pay than the African-American employee because of his race. The court reasoned that the plaintiff's and his comparator's pay grades were set years before they began working in the same department and that no one in the department was a decision-maker regarding compensation. The court noted that the plaintiff offered only one comparator and presented no evidence to show that race contributed to the pay disparity, whereas the defendant offered evidence that many white and African-American employees were compensated at lower pay grades than the plaintiff. The court noted that a remark by the plaintiff's African-American supervisor that "all my life people have been standing in my way, and they all looked exactly like you" did not support the plaintiff's claim because the remark was ambiguous and the supervisor was not a decision-maker.

RACE DISCRIMINATION AND HARASSMENT

- **Harassment**

- ***Gates v. Bd. of Educ.***, 916 F.3d 631 (7th Cir. 2019). The plaintiff, an African-American engineer, sued the defendant, the Chicago Board of Education, for hostile work environment and retaliation under Title VII. The plaintiff alleged that his *supervisor* twice referred to him using the N-word and threatened to discipline his "black ass." The district court granted summary judgment for the defendant, explaining that the "threshold for plaintiffs is high, as the workplace that is actionable is one that is 'hellish.'" The district court found that the harassment was too infrequent to be pervasive (three racial slurs in a six-month period of a four-year employment), not particularly severe, physically threatening, or humiliating. *Held*: The Seventh Circuit affirmed as to the retaliation claim, finding that this claim was waived on appeal, but reversed the dismissal of the hostile work environment claim. First, the court held that the "hellish" standard relied upon by the district court was inconsistent with the Supreme Court's opinion in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The court explained that "[w]hile a 'hellish' workplace is surely actionable, plaintiffs' evidence need not show a descent into the Inferno." Next, the court noted that the district court "failed to focus on the difference in our hostile work environment cases between having the plaintiff's co-workers show racial hostility and the plaintiff's supervisor show racial hostility." This distinction is critical, as a supervisor's use of racially toxic language is much more serious than a co-worker's. The court ultimately concluded that "when the harassment involves such appalling racist language in comments made directly to employees by their supervisors, we have not affirmed summary judgment for employers."

RACE DISCRIMINATION AND HARASSMENT

- **Harassment**

- ***Johnson v. Advocate Health & Hosps. Corp.***, 892 F.3d 887 (7th Cir. 2018). The plaintiffs, a group of African-American hospital janitors, all claimed that they faced race discrimination at the hands of their supervisors. The plaintiffs' five allegations included: (i) janitors were paid unequally based on race; (ii) African-American janitors were regularly denied promotions and raises; (iii) African- American janitors were more scrupulously disciplined than other janitors; (iv) African-American janitors were given more strenuous and less desirable assignments than other janitors; and (v) supervisors subjected African-American janitors to a hostile work environment. The district court granted summary judgment to the employer on all counts, holding that there was no basis for employer liability and that the plaintiffs did not experience severe or pervasive race-based harassment. *Held*: The Seventh Circuit affirmed as to the first four claims, finding that the plaintiffs failed to make a sufficient factual showing to defeat summary judgment, but reversed and remanded the hostile work environment claim. First, considering all the supervisors' comments, the court reasoned that a jury could determine that they were sufficiently severe and pervasive. For example, the plaintiffs testified that supervisors told certain of them that they "cleaned like a monkey"; supervisors regularly used the "N-word"; supervisors would tell female African-American female janitors not to give them the "black girl ghetto attitude"; supervisors sometimes called janitors "black wig-wearing witch[es]"; and a particular supervisor called janitors "porch monkey[s]." There also was testimony stating that supervisors told janitors to help recruit new people, but that they "don't want any blacks. They're lazy." Second, the court found that the plaintiffs demonstrated a basis for employer liability by showing that they complained about many of the remarks to Human Resources, but the remarks persisted. Based on these facts, the court found that there was sufficient evidence of notice to the employer to proceed past a motion for summary judgment.

RACE DISCRIMINATION AND HARASSMENT

- **Harassment**

- ***Fellers v. Brennan***, 699 F. App'x 554 (7th Cir. 2017). The plaintiff, a Caucasian man, worked as a custodian at a United States Postal Service facility. The plaintiff's supervisor asked him to wax the floors in both the men's and women's locker rooms with the specific instruction to discourage his co-workers from entering the locker rooms while he worked. While waxing the men's locker room, a Caucasian co-worker entered the locker room and called the plaintiff a "f------ asshole" when the plaintiff asked him to refrain from entering. Another male co-worker, this time of Asian descent, entered the locker room immediately after the first co-worker, leaving a series of footprints on the freshly waxed floor. Next, after moving to the women's locker room, the plaintiff again faced opposition from co-workers. Two female co-workers disregarded the plaintiff's sign designating the locker room as closed and proceeded to enter. After the plaintiff asked the two women to stay out, a black female co-worker called the plaintiff a "dumb, stupid snowflake," a "dumb, stupid white boy," and a "dumb, stupid f------ asshole white boy." The other woman, of Asian descent, did not say anything to the plaintiff, but upset him by changing her clothes in his presence. The plaintiff submitted formal complaints to his direct supervisor as well as the women's supervisor. After the Postal Service failed to take any action, the plaintiff sued alleging that it violated Title VII by subjecting him to a hostile work environment. The district court granted the defendant's motion for summary judgment, holding that the plaintiff's co-workers' comments and actions "were not sufficiently severe, pervasive or offensive" to rise to the level of a hostile work environment. The district court also explained that there was no evidence that the defendant had failed to end the harassment once managers were alerted, explaining that "there is no evidence that the harassment continued after plaintiff reported it." *Held*: The Seventh Circuit affirmed, explaining that, although the co-workers' conduct was offensive, the plaintiff was not physically threatened and the comments were not frequent or pervasive, as they all occurred on a single day. Additionally, while the comments referred to race and sex, the Seventh Circuit explained that isolated epithets were not sufficient to defeat summary judgment.

RACE DISCRIMINATION AND HARASSMENT

- **Criminal Background Checks**

- ***Texas v. EEOC*,** 933 F.3d 433 (5th Cir. 2019). The EEOC had issued a guidance that there would be "Title VII disparate impact liability" where an employer's "criminal record screening policy or practice disproportionately" impacts protected groups, citing to data suggesting that "blanket bans" on hiring employees with criminal records "impact minorities." The State of Texas, which "long excluded persons with felony convictions" from public jobs, received an EEOC complaint challenging its no-felon hiring policy. Texas then sued the EEOC and the Attorney General under the Declaratory Judgment Act ("DJA") and the Administrative Procedure Act ("APA"), arguing that the EEOC's guidance "purports to limit the prerogative of employers," and the agency should be enjoined from enforcement for an injunction against enforcement of the interpretation; was promulgated without sufficient notice-and-comment procedures; and was unreasonable. The district court dismissed on subject-matter jurisdiction grounds, but a panel reversed, with a majority holding that Texas had Article III standing to sue. The panel, which held that the guidance was a final agency rule under the APA, withdrew its opinion, vacated the judgment and remanded. On remand, the district court dismissed the DJA claim, granting summary judgment for Texas, in part, and denying the EEOC's motion. The court enjoined the EEOC from enforcing the interpretation, but did address whether the agency has authority to promulgate a substantive rule regarding Title VII. *Held*: The Fifth Circuit affirmed as modified, vacated the district court's ruling on the DJA claim, and dismissed the DJA claim. First, as to jurisdiction, under *Bennett v. Spear*, 520 U.S. 154 (1997), review under the APA is proper where there is a final agency action, by which "rights or obligations have been determined, or from which legal consequences will flow." Observing that the guidance committed the agency to a "view of the law" with accompanying legal consequences, the court was satisfied that it had jurisdiction. Second, regarding the standing issue, the court reasoned that Texas had suffered "cognizable injuries"; so long as the guidance was in place, Texas faced the "threat of referral" for legal action. Third, the court considered the scope of the injunctive relief, and Texas's request to modify the injunction and "unconditionally enjoin treatment of the Guidance as binding." The district court had enjoined the EEOC from enforcing its guidance until it "complied with the notice and comment requirements under the APA." Since the EEOC lacked authority to promulgate a substantive rule, the court modified the injunction by striking the notice-and-comment language. Finally, the court declined to reach the DJA claim, reasoning that "[a]mple precedent" provides that courts should not exercise discretion for declaratory relief where a challenged law does not affect the plaintiff. After affirming the injunction, the court vacated the district's court decision on the DJA claim.

RELIGIOUS DISCRIMINATION AND HARASSMENT

- **Duty to Accommodate Religious Beliefs**
  - **Job Requirements That Conflict with Religious Beliefs**

- ***EEOC v. Consol Energy, Inc.***, 860 F.3d 131 (4th Cir. 2017). An evangelical Christian coal miner alleged that he was forced to retire after his religious beliefs prevented him from submitting to a biometric hand-scanner implemented by his employer. The employee believed that using the biometric hand-scanner would give him the "Mark of the Beast" and allow the Antichrist to identify and manipulate him. The employer provided an alternative to employees who could not use the hand- scanner for non-religious reasons, but the employer refused to accommodate the employee's religious objection. The EEOC sued the employer on behalf of the employee and alleged that the employer violated Title VII by constructively discharging the employee instead of accommodating his religious beliefs. After trial, the jury returned a verdict in favor of the EEOC. The employer sought judgment as a matter of law, and a new trial. The district court denied the employer's motion. *Held:* The Fourth Circuit affirmed. The court of appeals held that the evidence presented at trial allowed the jury to conclude that the employer failed to make available to a sincere religious objector the same reasonable accommodation it offered other employees, in violation of Title VII. The employer argued that it did not fail to reasonably accommodate the employee's religious beliefs because the scripture stated the "Mark of the Beast" could only be placed on an individual's forehead or right hand, and the biometric hand-scanner would allow the employee to use his left hand. However, the court of appeals rejected the employer's argument, stating that whether the scripture or the employer agreed with the employee's beliefs was irrelevant—the proper inquiry was whether the employee's beliefs were religious in nature and sincerely held, and the jury found for the employee on this element. The Fourth Circuit also rejected the employer's argument that the employee was not constructively discharged because the employer did not deliberately deny the employee an accommodation in an effort to provoke his retirement. The court of appeals noted that per the Supreme Court's decision in *Green v. Brennan*, 136 S. Ct. 1769 (2016), "deliberateness" or intent is no longer a requirement to establish constructive discharge.

SEX AND PREGNANCY DISCRIMINATION

- **Because of Sex**

- ***Terry v. Gary Cmty. Sch. Corp.***, 910 F.3d 1000 (7th Cir. 2018). The plaintiff, a long-time employee of the defendant school district, was a female principal at an elementary school until it closed due to declining enrollment. The defendant subsequently reassigned the plaintiff to serve as an assistant principal at another elementary school. When an opening for a principal position opened up at a different school, the defendant selected a male candidate who did not interview for the position instead of the plaintiff, who earned the highest ranking from the interview committee. The plaintiff then sued, alleging that she was demoted, passed over for a promotion, and paid less, in violation of Title VII and the Equal Pay Act. The district court granted summary judgment on all claims. *Held:* On the plaintiff's demotion theory, the court found that the plaintiff did not offer any evidence of a discriminatory purpose; rather, she was reassigned to the assistant principal position because the school she had worked at closed. The court rejected the plaintiff's failure-to-promote theory because the defendant had a sex-neutral reason for hiring the male candidate: he had experience at the school with the vacant position, so he was familiar with its operation and population. The fact that the male candidate did not interview, coupled with the plaintiff's high score from the interviewing committee, was insufficient to defeat summary judgment without evidence of how the district typically filled vacant positions and whether an interview was a necessary component of the hiring process. Lastly, the plaintiff's equal pay claim failed because the difference in salary between the two principal positions was due to the district's salary freeze implemented years earlier.

SEX AND PREGNANCY DISCRIMINATION

- **Because of Sex**
- ***Amos v. Vigo Cnty. Council***, 240 F. Supp. 3d 937 (S.D. Ind. 2017). The plaintiff, a female physician, was elected coroner of her county. Her predecessor, a male physician, specialized in pathology and performed autopsies for the county for free. After his retirement, the county had to budget additional money to pay for the autopsies. Additionally, certain tax caps had reduced the county's overall budget. To account for these budget changes, the county council reduced the female coroner's base salary by half. The plaintiff sued the county council under 42 U.S.C. section 1983 alleging that she was subjected to gender discrimination. The county moved for summary judgment. *Held:* The district court granted summary judgment for the county, finding no genuine dispute of material fact. The plaintiff failed to establish that the county's explanations for her salary decrease—the necessity of adding $50,000 to the budget to account for fact that there was the need to pay for autopsy services that her male predecessor used to perform for free, the implementation of a property tax cap, and the realization that the county coroner was being paid more than other comparable counties' coroners— were pretextual.

SEX AND PREGNANCY DISCRIMINATION

- **Comparator Evidence**

- ***Owens v. Old Wis. Sausage Co., Inc.,*** 870 F.3d 662 (7th Cir. 2017). The plaintiff, a human resources manager, sued her employer for sex discrimination and retaliation under Title VII after her employer terminated her for her failure to disclose her personal relationship with a subordinate, her poor performance, and her uncooperative behavior. The plaintiff failed to disclose she was in a long-term romantic relationship with an applicant she interviewed and later supervised. After the plaintiff's other subordinates submitted complaints about their relationship and preferential treatment, the company attempted to interview the plaintiff to ascertain the nature of her relationship with her subordinate, as was the company's practice. The plaintiff stated that the questions she was asked were "borderline sexual harassment," and she refused to answer any questions about her relationship with her subordinate. After the plaintiff's termination, she filed a lawsuit against the company alleging sex discrimination and retaliation under Title VII. The plaintiff argued that she was terminated for refusing to answer questions about her relationship with her subordinate, which constituted sex discrimination, and for complaining about "borderline sexual harassment" during her questioning, which constituted retaliation. The district court granted summary judgment for the employer. *Held*: The Seventh Circuit affirmed. The court of appeals noted that the plaintiff failed to present evidence that similarly situated employees outside her protected class were treated more favorably. The plaintiff attempted to introduce three male supervisors as proper comparators, but the first male manager had informed the company of his relationship with his subordinate, the second male manager did not directly supervise the employee with whom he was in a relationship with, and the third male manager attempted to hide the relationship with his subordinate, but was questioned about his relationship by the company. As to the plaintiff's retaliation claim, the Seventh Circuit found that the plaintiff did not engage in protected activity because she did not have a good-faith, reasonable belief that the questioning was "borderline sexual harassment." The court of appeals noted that the plaintiff knew other employees had complained about her relationship with her subordinate and potential conflicts of interest, and the plaintiff further testified that she was aware of another manager who was questioned about his relationship with his subordinate.

SEX AND PREGNANCY DISCRIMINATION

- **Equal or Fair Pay**
  - **Federal Equal Pay Act**

- ***EEOC v. George Washington Univ.***, No. 17-1978 (CKK), 2019 U.S. Dist. LEXIS 77605 (D.D.C. May 8, 2019). The EEOC sued on behalf of the plaintiff, an assistant to the director of a university's athletics department, alleging preferential treatment of a male colleague and disparate pay practices based on sex, in violation of the Equal Pay Act and Title VII. The university moved to dismiss, arguing that the EEOC had failed to plead a claim as to either cause of action. *Held:* The district court denied the university's motion to dismiss. Under the EPA, discrimination is prohibited on the basis of sex by paying wages to employees at a rate less than the opposite sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," 29 U.S.C. § 206(d)(1). The regulations interpreting the EPA make clear that the work need not be "identical"—just "substantially equal." 29 C.F.R. § 1620.13(a). To withstand dismissal, the EEOC was only required to plead that the plaintiff's job and that of her male comparator are "substantially equal" and, despite the fact that the job descriptions were not attached to the complaint, it had done so. The court determined that the motion-to-dismiss stage is not the appropriate time to assess the differences between the jobs. Instead, it is sufficient for the EEOC to plead that the plaintiff and her male comparator performed "substantially the same job responsibilities," while also pleading that their respective salaries were $38,500-40,000 and $77,500. As to the Title VII claim, the court ruled that the EEOC had sufficiently pled a "course of preferential treatment" to the plaintiff's male comparator based, in part, on the university's conduct "before, during, and after" hiring him for a role that the plaintiff was allegedly dissuaded from applying for. Moreover, the university could not demonstrate non-discriminatory explanation; the EEOC rebutted any non-discriminatory justification by the pattern of favorable treatment—despite the fact that it lacked supporting details. In other words, the court found that the EEOC had satisfied a relatively low pleading threshold.

SEX AND PREGNANCY DISCRIMINATION

- **Equal or Fair Pay**
  - **Federal Equal Pay Act**

- ***Lauderdale v. Ill. Dep't of Human Servs.***, 876 F.3d 904 (7th Cir. 2017). The plaintiff, a female superintendent of a state school for the deaf, sued the state Department of Human Services for sex discrimination under Title VII and the Equal Pay Act. When the male superintendent of a state school for the visually impaired resigned, the defendant created one superintendent role to cover both schools and offered the plaintiff the new role. The plaintiff asked to be paid at least as much as the male superintendent had been paid and the defendant counteroffered. The plaintiff ultimately accepted a salary lower than that of the male superintendent, but claimed that the pay disparity violated the Equal Pay Act because the new dual superintendent position required work equal to, if not more demanding than, the work performed by the male superintendent. The district court granted summary judgment to the defendant. *Held*: The Seventh Circuit affirmed. With respect to the Equal Pay Act claim, the court found that the defendant believed a detailed pay plan for state employees applied to the new position, as evidenced by its submission of forms establishing the position and setting a salary range and its special request for approval of a pay increase greater than allowed under the pay plan. The court also held that the plaintiff's prior salary was a legitimate factor other than sex that was clearly a factor in her pay determination. The court noted that although basing pay on prior wages may be discriminatory if sex discrimination caused lower prior wages, the plaintiff had not asserted that claim. Finally, the court concluded that the record showed the defendant's genuine concern about an ongoing budget crisis, including e-mails expressing concern that a salary increase of even 19% would "push[] the limits of public acceptability" in the current climate. Although a salary higher than the male superintendent's was within the salary range for the dual superintendent position, the court opined that it would not determine how agencies should spend their money so long as they did not discriminate.

SEX AND PREGNANCY DISCRIMINATION

- **Executive Order**
- **Executive Order 13782**, 82 Fed. Reg. 15607 (Mar. 27, 2017). On March 27, 2017, President Trump signed Executive Order 13782, which revoked the 2014 Fair Pay and Safe Workplaces order then- President Obama implemented to ensure companies with federal contracts comply with 14 labor and civil rights laws. President Obama's order included two rules that impacted women workers: paycheck transparency and a ban on forced arbitration clauses for sexual harassment, sexual assault or discrimination claims. By overturning the prior order, President Trump has made it possible for businesses with federal contracts to continue requiring the arbitration of sexual harassment cases.

SEXUAL ORIENTATION/GENDER IDENTITY DISCRIMINATION

- **Sexual Orientation Discrimination**
  - **Actionable under Title VII**

- ***Hively v. Ivy Tech Comm. Coll. of Ind.***, 853 F.3d 339 (7th Cir. 2017) (*en banc*). The plaintiff, a part-time adjunct professor, alleged that she was "[d]enied full time employment and promotions based on sexual orientation" in violation of Title VII. The district court granted the defendant's motion to dismiss on the ground that Title VII does not apply to claims of sexual orientation discrimination. *Held:* After a panel affirmed the district court's ruling, the Seventh Circuit granted the plaintiff's petition for rehearing *en banc*, and ultimately reversed the district court's dismissal. The court of appeals found that sexual orientation necessarily falls within unlawful sex discrimination under Title VII, stating that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[.]" The court of appeals noted that had the plaintiff been a man, but everything else remained the same—including the sex or gender of her partner—the defendant would not have discriminated against her. Thus, the court of appeals explained, the defendant "is disadvantaging [the plaintiff] because she is a woman." The Seventh Circuit further held that the line between a gender nonconformity claim and one based on sexual orientation "does not exist at all." Lastly, the Seventh Circuit held that sexual orientation discrimination also constitutes sex discrimination under an associational theory. Relying on *Loving v. Virginia*, 388 U.S. 1 (1967), and its progeny holding that an employer violates Title VII when it discriminates against an employee because the employee's spouse is married to a racial minority, the Seventh Circuit held, "[T]o the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of … the sex of the associate." The dissent criticized the majority's opinion for providing a meaning to Title VII that was not within Congress's contemplation at the time the statute was enacted.

SEXUAL ORIENTATION/GENDER IDENTITY DISCRIMINATION

- **Sexual Orientation Discrimination**
  - **Interplay of Right Against Sexual Orientation Discrimination and Religious Beliefs**

- ***Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n***, 138 S. Ct. 1719 (2018). Jack Phillips, a baker and devout Christian, refused to bake a custom wedding cake for a same-sex couple (the "couple") after they inquired about a cake for "our wedding." Phillips explained that his bakery does not "create" wedding cakes for gay couples because of his religious opposition to same-sex marriage and his deeply held belief that creating a custom cake would be tantamount to celebrating something contrary to his religious beliefs. Phillips did, however, offer to sell the couple other baked goods, such as birthday cakes, shower cakes, brownies, and cookies. Unsatisfied with those options, the couple walked out of the shop. Shortly after their interaction with Phillips, they filed a charge of discrimination with the Colorado Civil Rights Division (the "Division") pursuant to the Colorado Anti-Discrimination Act ("CADA"). The charge alleged that Phillips had denied the couple "full and equal service" due to their sexual orientation and that it was Phillips's "standard business practice" to deny custom wedding cakes to same-sex couples. Following an investigation into Phillips and his bakery, the Division referred the case to the Colorado Civil Rights Commission (the "Commission"). The Commission first held a public hearing to consider the case and determine whether it was proper to send the matter to an administrative law judge ("ALJ") for a formal hearing on the merits. During the Commission's public hearing, two commissioners offered commentary that suggested the Commission did not consider religious beliefs to be a legitimate concern. For example, one commissioner stated, "if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." Following the hearing, the Commission sent the case to an ALJ, who ruled against Phillips and held that his actions amounted to prohibited discrimination on the basis of sexual orientation. Phillips then appealed the ALJ's written decision to the full Commission—a 7-member appointed body. During the second Commission hearing, which was public and on the record, one particular commissioner doubled down on the statements commissioners made during the earlier hearing. That commissioner stated, "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religions had been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust ... to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." The Commission ultimately affirmed the ALJ's decision in full and ordered Phillips, among other things, to "cease and desist from discriminating against ... same sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." The Commission also required Phillips to prepare quarterly reports documenting any occasions where patrons were denied service. Phillips then appealed the Commission's ruling to the Colorado Court of Appeals, which affirmed the Commission's order. After the Colorado Supreme Court declined review, Phillips sought review in the U.S. Supreme Court. *Held*: In a 7-2 opinion, the Court reversed the Colorado Court of Appeals, finding that the prior administrative proceedings were tainted by anti-religious bias. Specifically, the Court cited to the abovementioned comments by the Commission and explained: "To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." The Court further stated: "This sentiment is inappropriate for a commission charged with the solemn responsibility of fair and neutral enforcement of [CADA]—a law that protects discrimination on the basis of religion as well as sexual orientation." Additionally, the Court pointed to how the Division handled other similar cases differently. For example, when faced with cases where a baker refused to bake pro-Christian and anti-gay cakes, the Division consistently determined that those bakeries did not discriminate against Christian patrons because "of the offensive nature of the requested messages." Thus, the Court reasoned, the Division unlawfully based its decisions on its own "assessment of offensiveness" rather than a neutral application of law to fact. The Court concluded that the prior hearings were "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral towards religion." Because Phillips was not given neutral and fair decision makers, the Court reversed the judgment and found for Phillips.

SEXUAL ORIENTATION/GENDER IDENTITY DISCRIMINATION

- **Transgender Discrimination**
  - **Not Actionable under Title VII**

- **Department of Justice actions on gender identity under Title VII.** On October 5, 2017, then- Attorney General Jeff Sessions reversed the Department of Justice's previous position that gender identity is protected as part of Title VII's prohibition against sex discrimination. Since 2014, the DOJ has taken the position that Title VII's prohibition on sex discrimination includes a prohibition against gender identity discrimination and transgender discrimination. Pursuant to the DOJ's previous stance, it had initiated actions against the State of North Carolina and several state entities over North Carolina's law requiring transgender persons to use public restrooms corresponding to the gender identified on their birth certificates. *United States v. North Carolina*, No. 1:16-cv-00425 (M.D.N.C. filed May 9, 2016). The October 5, 2017, letter now states that the DOJ takes the position that Title VII does not cover bias based on an employee's transgender status, and that the Department of Justice "will take that position in all pending and future matters." The DOJ's position is now contrary to the position held by the Equal Employment Opportunity Commission, which views discrimination against an individual because of gender identity as a violation of Title VII.

SEXUAL HARASSMENT

- **In General**
  - **Sufficient Proof**

- ***EEOC v. Costco Wholesale Corp.***, 903 F.3d 618 (7th Cir. 2018). The EEOC brought a Title VII claim on behalf of a female former employee, alleging that the employer had subjected her to a hostile work environment by tolerating a male customer's harassment of her. Over a 13-month period, the customer followed the employee through the employer's warehouse while she worked, at times disguising his appearance or filming her. The customer touched the employee with his shopping cart multiple times and touched her face and wrist. He repeatedly asked her on dates; commented on her appearance; asked which male employees she spoke with and whether she had a boyfriend, among other things; and acknowledged that his attention scared her. When the employee complained to management, the employer told the customer to avoid her, but the employer denied her request to park near the store entrance to avoid being alone in the parking lot. The employee ultimately obtained a restraining order against the customer and went on a medical leave of absence. The employer could not confirm a violation of its harassment policy through its investigation, but instructed the customer to shop at a different location. Pursuant to company policy, the employer terminated the employee because her medical leave of absence had extended beyond 12 months. The jury returned a verdict for the EEOC, and the district court denied the employer's motion for judgment as a matter of law. *Held*: The Seventh Circuit affirmed. The court rejected the employer's argument that the at-issue conduct was not objectively severe or pervasive enough to create a hostile work environment. The court acknowledged that on a "scale of vulgarity, ... unsuccessful Title VII plaintiffs have endured far worse[,]" but noted that Title VII does not require harassment to be overtly sexual to be actionable. Instead, the court held, a reasonable jury could find that the customer's behavior, which continued despite the involvement of management and the police, was pervasively intimidating or frightening to an average person. The employer did not challenge the jury's decision that while it did respond to the employee's complaints about the customer, its response was unreasonably weak.

SEXUAL HARASSMENT

- **In General**
  - **Sufficient Proof**

- ***Smith v. Rosebud Farm, Inc.***, 898 F.3d 747 (7th Cir. 2018). The plaintiff, a butcher, sued his employer, a small grocery store, alleging sex discrimination in violation of Title VII. Within weeks of starting work, male co-workers began consistently—if not constantly—grabbing the plaintiff's genitals and buttocks, groping and grabbing him, and miming oral and anal sex on the plaintiff and each other. The behavior continued for years, and the plaintiff's supervisor participated in the behavior on one or two occasions. After the plaintiff filed a charge of discrimination with the EEOC, the supervisor told the meat-counter employees to stop the "goofing off" and "horseplay." The employees reacted by banging meat cleavers and pointing large knives at the plaintiff, and on one occasion the plaintiff found his car—which he had parked in a gated employee parking lot—with slashed tires and a cracked windshield. The jury returned a verdict for the plaintiff, and the district court denied the employer's motions for judgment as a matter of law and a new trial. *Held*: The Seventh Circuit affirmed. The court agreed that unwanted sexual behavior is not necessarily actionable under Title VII, but rejected the employer's argument that the plaintiff experienced "sexual horseplay" and not sex discrimination. The court held that the plaintiff had offered direct comparative evidence that only male employees experienced the same treatment as the plaintiff, and thus the jury was free to conclude that the plaintiff had been discriminated against on the basis of sex. The court also rejected the argument that the plaintiff's comparative evidence was insufficient because the meat counter was exclusively staffed by male employees. Even were that true, the court noted, the alleged male-on-male harassment took place elsewhere in the store, including in areas where female employees worked.

SEXUAL HARASSMENT

- **Insufficient Proof**

- ***Swyear v. Fare Foods Corp.***, 911 F.3d 874 (7th Cir. 2018). The plaintiff, a female outside salesperson, brought a lawsuit against her employer, alleging sexual discrimination, sexual harassment and retaliation in violation of Title VII, and breach of contract. During the plaintiff's interview for the job, she alleged that the company's HR supervisor told her she would their first female outside salesperson. After beginning work, she alleged that the environment was "unprofessional," with male employees using nicknames like "Bitchy Ritchie," and colleagues openly discussing sexual activities. The plaintiff joined a male colleague, Russell Scott, at a county fair to meet with customers; after finishing their work, the plaintiff sought permission from her sales manager to leave Scott and proceed on her own, but was directed to stay with him. The plaintiff and Scott stayed at the same hotel, where the plaintiff alleged that Scott became intoxicated, touched her inappropriately, tried to enter the room where she was staying, and called her multiple times. The plaintiff later reported this incident during a performance review and her sales manager initiated an investigation, which confirmed the incident. The plaintiff had a second performance review, during which her manager told her that she had punctuality issues and was inappropriately using company vehicles for personal use. The plaintiff received 30 days to improve her performance. A few days later, she was terminated after driving a company vehicle to her home. The district court granted summary judgment for the employer. *Held:* The Seventh Circuit affirmed the district court's dismissal. First, the court found that, under Title VII, the plaintiff failed to show that the work environment was, on the whole, "sufficiently severe and pervasive" to create a hostile work environment. It reasoned that, though some behavior was crude and immature, it was not directed at the plaintiff, nor did she receive a nickname. Moreover, the incident with Scott was not hostile or abusive because it only happened once and the plaintiff testified that she felt in control of the situation. Second, the Seventh Circuit agreed with the district court that the plaintiff could not demonstrate any evidence implying that her employer's reasoning for her termination was pretextual, and she offered no evidence that was she meeting the company's legitimate expectations. Finally, the court found that the plaintiff failed to identify the elements of a contract claim under Illinois law.

SEXUAL HARASSMENT

- ***Faragher-Ellerth* Defense**

- ***Hunt v. Wal-Mart Stores, Inc.,*** 931 F.3d 624 (7th Cir. 2019). The plaintiff, an overnight employee at an electronics store, alleged that her supervisor made "unwanted sexual remarks" over the course of several months after he issued to her a written coaching for poor attendance. After the plaintiff filed a complaint with human resources, the defendant investigated the claims but was not able to substantiate them. The defendant then directed the supervisor to undergo anti-harassment training. The plaintiff filed a charge with the EEOC, and then filed suit, alleging sexual harassment and hostile work environment under Title VII. The defendant moved for summary judgment, arguing that there was no demonstration of a hostile work environment and, in the alternative, that it had established the defense under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus v. Ellerth*, 524 U.S. 742 (1998). The district court granted the motion, finding that the defendant had established the *Faragher-Ellerth* defense. *Held*: The Seventh Circuit affirmed. The court found that the plaintiff was unable to establish an adverse employment action sufficient to preclude invocation of the defendant's *Faragher-Ellerth* defense. Specifically, the court explained that there was no evidence that the plaintiff was "forced into involuntary resignation" due to her supervisor's conduct. Instead, the plaintiff worked for several years in the same shift without additional allegations of sexual harassment, and was terminated more than three years later after failing to return from a medical leave. Moreover, the conduct she faced did not raise to the "intolerable" level of egregiousness found in other constructive discharge cases. Although the supervisor's behavior—including several sexually suggestive remarks—was "unacceptable" and "inappropriate," it was not severe. Additionally, the plaintiff did not allege that she was "ever touched" by her supervisor; that he "threatened" her; or that she was "concerned for her safety." As a result, the court affirmed the defendant's *Faragher-Ellerth* defense that it took sufficient preventative measures. The court rejected the plaintiff's argument that the defendant's measures were deficient, reasoning that the defendant had a comprehensive policy "explicitly prohibit[ing] sexual harassment," and that it had conducted a thorough and timely investigation into the plaintiff's complaint—in other words, the defendant did what "a reasonable employer should."

AGE DISCRIMINATION

- **Proof of Discrimination**
- ***Carson v. Lake Cnty.***, 865 F.3d 526 (7th Cir. 2017). The plaintiffs, who were 65 years or older, accepted a retirement incentive package that included a supplemental Medicare insurance plan and part-time employment after their retirement. Shortly thereafter, the county's attorney informed the county that the plaintiffs' supplemental Medicare insurance plan posed financial and regulatory concerns. To avoid legal repercussions, the county terminated the plaintiffs. The plaintiffs subsequently sued under the Americans with Disabilities Act and the Equal Protection Clause of the Fourteenth Amendment, alleging age discrimination. The district court granted summary judgment for the county. *Held:* Affirmed. The plaintiffs could not proceed with their age discrimination claims based on their firing after the county discharged them due to financial and regulatory concerns about keeping them on the plan. Although being age 65 or older was a necessary factor to become a member of the fired group, the plaintiffs' age was not the "but-for" cause of their termination. Employees also had to be on the supplemental plan in order to be affected, and employees who were over 65 and not on the insurance plan were not fired. In addition, the county did not engage in prohibited stereotyping, and the county's explanation for the decision was rational.

AGE DISCRIMINATION

- **Disparate Impact**

- ***Kleber v. CareFusion Corp.***, 914 F.3d 480 (7th Cir. 2019) (*en banc*). The plaintiff, a 58-year-old lawyer, applied for a senior counsel position with the in-house legal department of a medical device company. The job posting specifically stated that applicants had to have "3 to 7 years (no more than 7 years) of relevant legal experience." Despite having much more experience, the plaintiff submitted an application, but did not receive an interview. Instead, the company hired a 29-year-old applicant.

- The plaintiff sued, alleging that the cap on years of experience was "based on unfounded stereotypes and assumptions about older workers, deters older workers from applying for positions ... and has a disparate impact on qualified applicants over the age of 40." The company asserted that the experience cap was an "objective criterion based on the reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties ... which could lead to issues with retention." The district court dismissed the plaintiff's claim, holding that the ADEA's disparate impact provision does not cover job applicants who are not *already employed* by the defendant. After a divided panel reversed the district court's ruling, the Seventh Circuit granted *en banc* review. *Held*: The Seventh Circuit affirmed the district court's ruling, holding that the plain language of the relevant ADEA provision does not protect outside job applicants from disparate impact age discrimination. Reviewing section 4(a)(2), which makes it unlawful for an employer to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," the court reasoned that "ordinary principles of grammatical construction" require limiting "any individual" to someone with "status as an employee." The court also noted that section 4(a)(1), the ADEA's disparate treatment provision, does not limit its protection to those with "status as an employee." Lastly, the court rejected the plaintiff's argument that *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), which requires any employment test be "reasonable measure of job performance," should control the analysis, because the *Griggs* plaintiffs were internal candidates suing under Title VII. Additionally, Congress also amended Title VII after *Griggs* to include "applicants for employment," whereas no similar amendments were made to the ADEA. The dissent would have held that job applicants, not just current employees, could bring disparate-impact claims under the ADEA.

AGE DISCRIMINATION

- **Disparate Impact**
- ***Karlo v. Pittsburgh Glass Works, LLC***, 849 F.3d 61 (3d Cir. 2017). The defendant, a manufacturer of automobile glass, engaged in several reductions in force ("RIFs") to offset deteriorating sales. The defendant gave individual directors broad discretion in selecting whom to terminate; it did not provide RIF training, written policies, or guidelines. The plaintiffs, all of whom were over 50 years old, were terminated. In response, the plaintiffs sued under the ADEA, alleging, among other claims, that the defendant's RIF disfavored a "subgroup" of employees aged 50 and older. The employer moved for summary judgment, and the district court granted the motion, concluding that the plaintiffs' 50 and older disparate impact claim was not cognizable under the ADEA. *Held:* The Third Circuit reversed. It held that the ADEA permits a plaintiff to prosecute a disparate impact case based on a segment of the 40-and-above protected class. In so doing, the court rejected the view of the Second, Sixth, and Eighth circuits that such claims are not allowed. Instead, the Third Circuit found that the plain language of the ADEA and the remedial purpose of the statute permit workers in their 50s to sue under federal age discrimination law when an employment policy negatively affects them more than it affects similarly situated co-workers in their 40s.

AGE DISCRIMINATION

- **Retaliation**
- ***Wrolstad v. Cuna Mut. Ins. Soc'y***, 911 F.3d 450 (7th Cir. 2018). The 52-year-old plaintiff worked as a financial reporting manager for the defendant before his position was eliminated in a corporate restructuring. The plaintiff subsequently applied for a different vacant position within the company, but the defendant hired a 23-year-old external candidate instead. Upon his departure, the plaintiff signed a severance agreement releasing all claims against the defendant. Despite this agreement, the plaintiff filed an age discrimination claim with the state's Equal Opportunities Commission. In response, the defendant sent to the plaintiff a letter stating that it would sue to enforce the waiver in the severance agreement if the plaintiff did not drop his charge. The plaintiff refused and the defendant subsequently sued for breach of contract. The plaintiff eventually sued in federal court alleging that the defendant discriminated against him on the basis of his age and retaliated against him by threatening suit to enforce the severance agreement and following through on that threat when he refused to drop his charge. The district court granted summary judgment on both claims. *Held:* The Seventh Circuit affirmed. First, in addressing the plaintiff's age discrimination claims, the court rejected several of the plaintiff's arguments that were not raised below and held, on the merits, that a job screener's note about the 23-year-old candidate's "potential for longevity" was not a proxy for age because the screener tied the note to age neutral factors, such as the candidate's enthusiasm and persistence in applying for a job at the defendant company. Second, with regard to the plaintiff's retaliation claim, the court applied the standard set forth in *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980), and concluded that the retaliation claim accrued when the defendant sent to the plaintiff the letter—not when the defendant filed the lawsuit— because the letter unequivocally communicated a firm and final decision to enforce the waiver if necessary. Additionally, the filing of the lawsuit was not a "discrete retaliatory" act that started its own limitations clock under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), because the letter and the defendant's lawsuit were constituent parts of the same action. The dissent would have held that the defendant's filing of the threatened lawsuit was a distinct, independently retaliatory act.

DISABILITY DISCRIMINATION

- **Qualified Individual**

- ***Bilinsky v. Am. Airlines, Inc.***, 928 F.3d 565 (7th Cir. 2019). The plaintiff, who suffered from multiple sclerosis, worked as a communication specialist with American Airlines until his termination. For several years, the plaintiff and American agreed on a "Work from Home Arrangement," whereby the plaintiff performed her job from her home in Chicago, even though her colleagues worked out of American's headquarters in Dallas, because her multiple sclerosis symptom were aggravated by Dallas's excessive heat. However, in 2013, American merged with another airline, resulting in the restructuring of its operations. American determined that the merger fundamentally changed the nature of the plaintiff's positon and that the new position required consistent, physical presence on site in Dallas. When the plaintiff refused to relocate to Dallas, American terminated her employment. The plaintiff subsequently sued, alleging, *inter alia*, American failed to accommodate her disability under the ADA. The district granted summary judgement for American, finding that the plaintiff was no longer qualified for the position in light of the changes in her responsibilities. *Held*: The Seventh Circuit affirmed. The court reasoned that the merger caused the plaintiff's job responsibilities to evolve from independent activities to team-centered crisis management activities, involving frequent face-to-face meetings with other employees on short notice to coordinate work. Thus, the court held that the plaintiff could no longer perform the job's essential functions from her home in Chicago. The court noted that its holding was confined to the unique facts presented by the merger, and that, absent a change in circumstance, an employer cannot rescind an accommodation simply because it is inconvenient or burdensome. The court also offered a note of caution to future litigants, warning that ADA cases involving remote work accommodations should be assessed as to what is reasonable under current technological capabilities, not what was possible years ago. The dissent would have let the jury decide whether working in Dallas five days a week was an essential job function of the plaintiff's job, noting that her job had no written job description.

DISABILITY DISCRIMINATION

- **Qualified Individual**
- ***Moss v. Harris Cnty. Constable Precinct One***, 851 F.3d 413 (5th Cir. 2017). The plaintiff, a former Harris County police officer, was fired by his employer while on FMLA leave. The plaintiff then sued his former employer, alleging disability discrimination and retaliation under the ADA and violation of Title II of the ADA. The plaintiff took a medical leave of absence because of a disability. Prior to his leave, the plaintiff had spoken out against his supervisor's candidacy for constable and had investigated allegations that a company that the supervisor partly owned had a chemical leak in one of its facilities. The plaintiff reported the leak to the precinct environmental division and spoke to the local paper about it. The district court granted summary judgment to the employer on all claims. *Held:* The Fifth Circuit affirmed. On the disability discrimination claim, even though the plaintiff was fired while out of work and disabled, the court of appeals concluded that the plaintiff had not shown that he was qualified for his job at the time of the termination. The court found that at the time of the termination, the plaintiff had exhausted all FMLA leave and his doctor still stated that he needed to be out of work for six more months. Thus, he was not qualified for his job and was not qualified under the ADA. The court rejected the plaintiff's argument that an additional leave was a sufficient reasonable accommodation because the plaintiff had expressed a desire to retire once his leave was over, and leaving and not coming back is not a reasonable accommodation. The court also rejected the plaintiff's claim that he could have been assigned to a light duty job, as the plaintiff had failed to produce any evidence that such a job was available. As to the plaintiff's Title II claim, the court concluded that Title II did not cover employment discrimination claims.

DISABILITY DISCRIMINATION

- **Qualified Individual**
- ***Whitaker v. Wis. Dep't of Health Servs.***, 849 F.3d 681 (7th Cir. 2017). The Wisconsin Department of Health Services ("WDHS") terminated the plaintiff, a support specialist with chronic back pain, when she did not come back to work after exhausting her unpaid medical leave. In response, the plaintiff sued WDHS, claiming that it failed to accommodate her disability and terminated her employment in violation of the Rehabilitation Act. The district court granted summary judgment for WDHS, concluding that (1) the plaintiff failed to establish that she was capable of performing essential functions of her job with or without a reasonable accommodation; (2) the plaintiff admitted she was not terminated "solely by reason of her disability;" and (3) the plaintiff's accommodation request "amounted to an open-ended leave request." *Held:* Affirmed. The plaintiff was unable to show that she was she was an "otherwise qualified" employee under the Act. Her position required regular attendance as she was responsible for answering telephone calls, attending in-person meetings with clients, and using WDHS's internal computer system, among other things. The plaintiff was unable to provide any evidence that attendance was not an essential function of her job; nor did the plaintiff offer evidence regarding the effectiveness of her treatment or likelihood of recovery. Accordingly, there were no genuine issues of material fact, and the plaintiff's claims could not survive summary judgment.

DISABILITY DISCRIMINATION

- **Discrimination Because of Disability**
  - **Insufficient Proof**

- ***Guzman v. Brown Cnty.***, 884 F.3d 633 (7th Cir. 2018). The plaintiff, a former 911 dispatcher, sued her employer, alleging it discriminated against her because she was disabled and refused to accommodate her disability. After being diagnosed with sleep apnea, the plaintiff used a machine to treat the condition until she underwent gastric bypass surgery, at which point she disposed of the machine. She was not re-diagnosed with sleep apnea following the gastric bypass surgery, but over the next several years she was disciplined a number of times for violations of the employer's policy requiring employees to report to work on time. When the plaintiff eventually was suspended for an incident of tardiness, she blamed sleeping through alarms, but did not mention her sleep apnea diagnosis. When the plaintiff was again late for work, her supervisor reported it to the call center supervisor, who decided to terminate the plaintiff's employment. The plaintiff offered to provide a doctor's note in a meeting with her supervisor that day, and may have mentioned her sleep apnea, but her supervisor did not inform the call center supervisor. The plaintiff then obtained a note from her doctor stating that she probably suffered from recurrent sleep apnea. In a meeting shortly thereafter, the employer terminated the plaintiff's employment and she provided the doctor's note, but the parties dispute the order of events. The district court granted summary judgment for the employer. *Held*: The Seventh Circuit affirmed. The court held that the plaintiff could not establish that any adverse action occurred as a result of her alleged disability because she failed to identify any evidence showing that the employer knew of her sleep apnea before deciding to terminate her. That the plaintiff's repeated violations of the employer's tardiness policy were a side effect of undiagnosed sleep apnea, the court opined, did not change the analysis. Further, the plaintiff could not show that the employer failed to accommodate her disability because there was no evidence that the employer was on notice of her disability, and the conduct for which the plaintiff was terminated had already occurred by the time the plaintiff first mentioned the sleep apnea diagnosis.

DISABILITY DISCRIMINATION

- **Discrimination Because of Disability**
  - **Insufficient Proof**

- ***Ennin v. CNH Indus. Am., LLC***, 878 F.3d 590 (7th Cir. 2017). The plaintiff, a naturalized American citizen born in Ghana, worked as a shift supervisor for a construction equipment manufacturer. After working at the manufacturer for two years without incident, the plaintiff received a written warning after he got into a verbal altercation with a co-worker in front of two of his subordinates. Approximately six months later, the plaintiff violated multiple company policies when his car broke down on the way to work and he called a subordinate, who was on the clock, to request that the subordinate drive to his location to assist him. After the subordinate arrived at the plaintiff's location and helped revive the plaintiff's car, the two returned to work, where the plaintiff allowed the subordinate to enter through the supervisor's entrance, which was expressly against company policy. The plaintiff also neglected to edit the subordinate's timecard to make sure he was not paid for the time he spent offsite helping the plaintiff. Two days later, on November 19, 2014, the plaintiff attended a meeting with his superiors to discuss his actions. Because the plaintiff was unapologetic and lied about knowing that the subordinate was on the clock while he helped the plaintiff, the plaintiff's superiors decided to terminate the plaintiff the next day. Later that afternoon, the plaintiff sent a text message to his boss to inform him that his hemorrhoids were acting up and he had to go home. The plaintiff did not go in to work the next day and instead requested a leave of absence until January 1, 2015. On December 1, 2014, the plaintiff's employer learned that the plaintiff was approved for short-term disability benefits through December 14, 2014. That same day, they sent the plaintiff a letter informing him that his employment was terminated as of that day, but they allowed him to receive his short-term disability benefits until December 14, 2014. The plaintiff sued, alleging that he was fired because of his disability and his decision to take FMLA leave, as well as his race and national origin. The district court granted summary judgment to the employer, finding that the plaintiff failed to satisfy his burden of proof as to any of his claims. *Held:* The Seventh Circuit affirmed, holding that the evidence established that the employer terminated the plaintiff before the employer learned of his disability and before the plaintiff had requested FMLA leave. That timeline proved that the plaintiff's termination could not have been discrimination on the basis of his disability or retaliation for taking FMLA leave. The court also affirmed summary judgment as to the plaintiff's race and national origin discrimination claims, finding that the plaintiff could not point to any evidence to raise suspicion of racial discrimination.

DISABILITY DISCRIMINATION

- **Discrimination Because of Disability**
  - **Insufficient Proof**

- ***Monroe v. Ind. Dep't of Transp.***, 871 F.3d 495 (7th Cir. 2017). The plaintiff sued his former employer, the Indiana Department of Transportation, alleging that it violated the ADA and the Rehabilitation Act when it terminated his employment. The plaintiff's supervisor initiated an investigation of the plaintiff's conduct after seven or eight of the plaintiff's subordinates complained about his treatment of them. During the investigation, the plaintiff disclosed that he recently had been diagnosed with Post Traumatic Stress Disorder ("PTSD"). Decision-makers for the defendant extensively discussed this claimed diagnosis and ultimately decided to terminate the plaintiff for creating a hostile and intimidating work environment. The plaintiff contended that by discussing his diagnosis during meetings about his conduct and the proper course of action, the defendant had discriminated against him because of his diagnosis. The district court granted summary judgment to the defendant. *Held*: The Seventh Circuit affirmed. The court held that the fact that the decision- makers discussed the plaintiff's claimed diagnosis during the meeting at which they decided to discharge him did not establish that their stated reason for discharge was a pretext for discrimination. The court observed that the at-issue discussion concerned whether the plaintiff actually had PTSD, given the fortuitous timing of his diagnosis, and thus it was "illogical" to argue that the discussion proved the decision-makers' intent to discriminate based on the diagnosis. Moreover, the court noted, even if the defendant believed that the plaintiff's PTSD caused his volatility and sleeplessness, this still would not establish pretext because employers may terminate employees for inappropriate behavior even when the employee's disability precipitates that behavior.

DISABILITY DISCRIMINATION

- **Reasonable Accommodation**
  - **Duty to Accommodate**

- ***Maubach v. City of Fairfax***, No. 1:17-cv-921, 2018 WL 2018552 (E.D. Va. Apr. 30, 2018). The plaintiff, a night shift 911 dispatcher, suffered from panic attacks. After experiencing a panic attack at work, the plaintiff approached her therapist to request that he write a letter to her employer, identifying her dog, "Mr. B," as an emotional support animal and requesting that her employer allow the plaintiff to bring the dog to work. After receiving the letter, the plaintiff contacted her employer to request that she be allowed to bring Mr. B to work. On the condition that the plaintiff provide confirmation of Mr. B's vaccination and service animal registration records, the city allowed the plaintiff to bring the dog to work on a trial basis. Shortly after the plaintiff began bringing Mr. B to work, however, the plaintiff's supervisor began suffering allergic reactions to the dog and began receiving complaints that day shift employees were experiencing allergic reactions as well. The supervisor was also notified by other members of the team that the plaintiff had allowed an inexperienced officer to monitor the phones while the plaintiff took Mr. B on walks. Following these episodes, the plaintiff was asked to provide additional information regarding her request for an accommodation pursuant to the ADA. In response, the plaintiff explained that she would not return to work unless she was allowed to bring Mr. B. The plaintiff then requested and was granted short- term disability leave. The personnel director contacted the plaintiff in the final days of her leave to discuss her return to work and presented the plaintiff with the option of returning to work on the day shift, which had the same pay and benefits as the night shift but would give the plaintiff a much more flexible schedule. The plaintiff was not willing to work the day shift, however, as she wanted to work with a particular dispatcher who worked the night shift. Based on the plaintiff's statements regarding her mental health and her extended leave of absence, she was also asked to submit to a medical review. Following a psychological evaluation, the plaintiff was deemed not psychologically fit for duty. After learning about the results, the plaintiff did not return to work and filed a charge with the EEOC. In response to the EEOC charge, the city attempted to accommodate the plaintiff again by suggesting that she could bring a hypoallergenic dog to the work place in place of Mr. B. The plaintiff refused and sued the city, alleging it had violated the ADA by failing to accommodate her disability by allowing her to bring Mr. B to work. The city moved for summary judgment. *Held*: The district court granted summary judgment for the city, concluding that the plaintiff failed to act in good faith and engage in the interactive process of identifying a reasonable accommodation for her disability. The court explained that, while the city offered multiple reasonable alternatives during the interactive process, including allowing the plaintiff to bring in a hypoallergenic dog or allowing the plaintiff to work the day shift, the plaintiff simply refused to engage in the interactive process. The court also held that the plaintiff's preferred accommodation was not reasonable due to the allergy issues created by Mr. B's presence.

DISABILITY DISCRIMINATION

- **Duty to Accommodate**
  - **No Duty to Accommodate**

- ***Severson v. Heartland Woodcraft, Inc.***, 872 F.3d 476 (7th Cir. 2017). A former employee brought a claim against his employer for terminating his employment in violation of the ADA rather than providing additional unpaid leave as a reasonable accommodation. The plaintiff had exhausted the entirety of his FMLA allotment, and on the final day of his protected leave, he had back surgery and requested an additional two to three months off from work. *Held*: The Seventh Circuit held that a long-term leave of absence cannot be a reasonable accommodation, stating that "the ADA is an antidiscrimination statute, not a medical-leave entitlement." The court did not analyze whether granting the plaintiff additional time off would constitute an undue hardship on the employer. Rather, it disagreed with the EEOC's position that extended leave may be required under the ADA because an employee who needs long-term medical leave cannot work and therefore is not a "qualified individual" under the ADA. However, the Seventh Circuit noted that a brief leave of absence of "a couple of days or even a couple of weeks" may be analogous to a part-time work schedule, and thus, that short medical absences may be required by the ADA in certain circumstances.

DISABILITY DISCRIMINATION

- **Special ADA Issues**
  - **Medical Inquiry**

- ***Painter v. Ill. Dep't of Transp.***, 715 F. App'x 538 (7th Cir. 2017). A former employee alleged that her employer required her to undergo unnecessary mental health examinations in violation of the ADA. At issue were two of five fitness-for-duty examinations ordered by the defendant. The first exam was conducted by a psychiatrist and precipitated by the plaintiff's colleagues' complaints that she "snapped and screamed at them, gave blank stares and intimidating looks, ranted, constantly mumbled to herself, repeatedly banged drawers in her office, and had mood swings," "glared and growled at them," "was rude, angry, abrasive, aggressive, and threatening," kept a log detailing co- workers' conversations and actions, and generally inspired fear. The second exam occurred after complaints that the plaintiff engaged in argumentative, confrontational, insubordinate, and disruptive behavior. The psychiatrist also reviewed e-mails suggesting that the plaintiff suffered from a personality disorder and paranoid thinking, which he observed is a risk factor for violence. The district court granted summary judgment to the defendant, reasoning that the challenged examinations were job-related and consistent with business necessity. *Held*: The Seventh Circuit affirmed. The court observed that "[p]reventing employees from endangering their co-workers is a business necessity," and that even multiple inquiries concerning an employee's psychiatric health may be permissible where they reflect concern for the safety of other employee and the public. Because both examinations were based on the defendant's reasonable concern for its employees' safety, the defendant met its "quite high" burden of establishing business necessity for compelled medical examinations.

DISABILITY DISCRIMINATION

- **Employer Wellness Programs**
- ***EEOC v. Flambeau, Inc.***, 846 F.3d 941 (7th Cir. 2017). The EEOC alleged that the defendant violated the ADA, which generally prohibits employers from requiring employees to submit to medical examinations, by conditioning participation in its health insurance plan on participating in a "wellness program." Participating employees were required to complete a health risk assessment and a biometric screening test similar to a routine physical examination. The defendant used the information from these assessments to estimate the cost of providing insurance, set participants' premiums, evaluate the need for stop-loss insurance, adjust co-pays for preventive exams, and adjust co-pays for certain prescription drugs. The defendant argued that the wellness program fell within the ADA's "safe harbor," which provides an exemption for activities related to the administration of a *bona fide* insurance benefit plan. The parties filed cross-motions for summary judgment. The district court granted summary judgment to the defendant. As a matter of first impression in the Seventh Circuit, the district court held that the ADA's safe harbor may extend to wellness programs that are part of an insurance benefit plan. The court then held that the defendant's wellness program requirement was a "term" of the defendant's insurance benefit plan and was based on "underwriting risks, classifying risks, or administering such risks," thereby entitling it to protection under the safe harbor. The court reasoned that (1) the defendant's employees were required to complete the program before enrolling in the plan; (2) the defendant provided its employees adequate notice of the wellness program requirement; and (3) the plan's summary plan description explained that participants would be required to enroll "in the manner and form prescribed by [the defendant]," which put employees on notice that there might be additional enrollment requirements not spelled out in the summary plan description. *Held:* On appeal, the Seventh Circuit affirmed the case without reaching the merits of the parties' statutory debate. The employer determined the program was not economically viable and halted the mandatory wellness program before the EEOC filed suit. Because there was nothing to enjoin, neither party had a serious stake in the case's outcome. Accordingly, the court concluded that the EEOC's claim for injunctive relief was moot, and declined to address the genuine statutory issues.
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RETALIATION

- **Protected Activity Generally**
  - **Protected Activity Not Found**

- ***Digital Realty Trust, Inc. v. Somers***, 138 S. Ct. 767 (2018). The plaintiff, a former employee, sued the employer for violation of the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Shortly after he had reported to the employer's senior management suspicions that the company was violating securities laws, the employer terminated the plaintiff's employment. The employer moved to dismiss the lawsuit on the ground that because the plaintiff did not report the suspected violations to the Securities and Exchange Commission ("SEC"), he was not a whistleblower protected under Dodd-Frank's anti-retaliation provision. The district court denied the employer's motion to dismiss and certified an interlocutory appeal. The Ninth Circuit affirmed. *Held*: The Supreme Court reversed and remanded. The Court held that, unlike a similar provision in the Sarbanes-Oxley Act, Dodd-Frank's whistleblower anti- retaliation provision does not extend to an individual who does not report violations of securities law to the SEC, reasoning that the "core objective" of the Dodd-Frank whistleblower provision is "to motivate people who know of securities law violations to tell the SEC."

RETALIATION

- **Public Employees**
- ***Bogart v. Vermilion Cnty.***, 909 F.3d 210 (7th Cir. 2018). The plaintiff, a former county financial director, was a Democrat who was terminated after Republicans gained a majority of the county's board seats. She sued under the First Amendment and Equal Protection clause, arguing that the county violated her political affiliation rights and that her termination was motivated by political retaliation. The district court granted summary judgment for the county, finding that the plaintiff's equal protection claim was duplicative of her First Amendment claim. The court also ruled that her First Amendment claim was not viable because it fell under the *Elrod-Branti* exception, where courts consider whether an employer can demonstrate that party affiliation is an appropriate requirement for effective performance of the public job. *Held*: The Seventh Circuit affirmed. The court explained that, under the *Elrod-Branti* exception, political affiliation-based termination will not violate an employee's First Amendment rights where "political loyalty is a valid job qualification." Since the plaintiff held a senior role as a financial director, her responsibilities entailed policymaking, but also required the trust and confidence of the county's board members to implement fiscal decisions. On that basis, her termination fell within the *Elrod-Branti* exception. The court also affirmed the district court's dismissal of her claim under the Equal Protection Clause as duplicative of her First Amendment claim.

RETALIATION

- **Retaliatory Intent**
  - **Sufficient Proof of Retaliatory Intent**

- ***Donley v. Stryker Sales Corp.***, 906 F.3d 635 (7th Cir. 2018). The plaintiff filed an internal harassment complaint with the defendant's director of human resources against a sales manager who had sexually harassed another employee. The defendant investigated the complaint, resulting in the firing of the sales manager. Shortly after, the defendant investigated the plaintiff for a separate incident taking place six week earlier, in which it was alleged that the plaintiff had photographed the intoxicated CEO of one of the defendant's vendors and shared the photos with other employees. The defendant subsequently fired the plaintiff for "inappropriate conduct and poor judgment." The plaintiff then sued under Title VII, alleging that the defendant retaliated against her for filing the internal complain. The district court granted summary judgment for the defendant, finding that the plaintiff did not offer evidence supporting a causal link between her harassment complaint and the defendant's decision to fire her. *Held:* The Seventh Circuit reversed and remanded. The plaintiff provided evidence that the defendant knew about the photographs well before the plaintiff filed an internal harassment complaint. This raised a material factual dispute because a reasonable jury could interpret the delay in starting the investigation as evidence of retaliation. Additionally, the defendant's inconsistencies and contradictions explaining why it began investigating the plaintiff supported the conclusion that the defendant initially found the plaintiff's actions to be tolerable and that only later, after she had filed her internal complaint, the defendant used this incident as pretext to fire her for retaliatory reasons.

RETALIATION

- **Retaliatory Intent**
  - **Insufficient Proof**

- ***Hamer v. Neighborhood Hous. Servs. of Chicago***, 897 F.3d 835 (7th Cir. 2018). The plaintiff worked at a mortgage help center. After a younger, male colleague received a promotion that the plaintiff had applied for, she met with a Human Resources director to voice her concern that she was not given the promotion due to age and sex discrimination. During the meeting, the plaintiff discussed her intention to file a charge with the EEOC. A few days later, a deputy director of the help center informed the HR director that the plaintiff would be removed from the mortgage help center, explaining that the plaintiff's removal was due to the plaintiff's ongoing communication issues, which the plaintiff's supervisor had observed for some time. The plaintiff's employer did, however, allow the plaintiff to work temporarily at the employer's central office, where she was ultimately offered a permanent position that came with a 25% pay cut. The plaintiff then sued her employer for discrimination and retaliation under Title VII and the Age Discrimination in Employment Act. The district court granted summary judgment to the employer, and the plaintiff appealed the retaliation claim only. *Held*: The Seventh Circuit affirmed, holding that the plaintiff had failed to develop a causal link between her discrimination complaint and either adverse action. The court explained that the plaintiff only offered mere speculation, as the HR representative was the only person who knew about the plaintiff's EEOC charge, and the HR representative neither told anyone about the charge nor made any decisions regarding the plaintiff's employment. Moreover, the managers who decided to remove the plaintiff from her position all filed affidavits asserting they were never told about the EEOC charge. Thus, because it is impossible to retaliate against a complaint that a person does not know about, the plaintiff failed to establish a causal nexus.

RETALIATION

- **Causation**
  - **Sufficient Proof of Causation**

- ***Owens v. Chi. Bd. of Educ.,*** 867 F.3d 814 (7th Cir. 2017). The plaintiff was a 61-year old former janitor in the Chicago public school system. When the plaintiff was placed under a new manager, he told the manager about a pending age discrimination lawsuit he had filed against the school system. The manager allegedly told the plaintiff that he was crazy if he thought that he could keep his job after filing a lawsuit against his employer. The manager gave the plaintiff an unsatisfactory rating, which meant during the next string of layoffs, due to budget concerns, the plaintiff was selected for layoff. The plaintiff subsequently brought suit against his employer for retaliation and age discrimination. The district court granted summary judgment to the school on both claims. *Held*: The Seventh Circuit affirmed the district court's summary judgment with regards to the age discrimination claim and reversed as to the plaintiff's retaliation claim. The court held that there was sufficient evidence to show that the employer's proffered reasons were legitimate and that the plaintiff failed to show pretext because other similarly-aged managers had not been let go during the layoffs. However, the court of appeals reversed the district court's order regarding the retaliation claim, finding that the manager's alleged statements were sufficient to create a dispute of fact regarding whether the unsatisfactory rating (which led to the layoff) was given for performance reasons or in response to the plaintiff's age discrimination lawsuit.

RETALIATION

- **Causation**
  - **Insufficient Proof**

- ***Burton v. Bd. of Regents of Univ. of Wis. Sys.***, 851 F.3d 690 (7th Cir. 2017). A professor at the University of Wisconsin-Platteville sued her employer alleging retaliation under Title VII. A student complained to the plaintiff that a professor had handed her an inappropriate note in class, and the plaintiff complained to the dean and the chairman of her department. Both the dean and the chairman began to experience difficulties working with the plaintiff, but ultimately granted her tenure. Several months after, the plaintiff filed a complaint with the EEOC and a state agency alleging discrimination and harassment on the basis of sex. Following the plaintiff's complaint, the dean sent the plaintiff a "letter of direction," which identified incidents of the plaintiff's inappropriate behavior and included specific directions for the plaintiff to follow. The plaintiff rejected the directions and the dean subsequently filed a complaint against the plaintiff with the chancellor of the Board of Regents, asking for a formal letter of reprimand. The plaintiff also alleged that numerous faculty members had "pressured" her to drop the lawsuit. The plaintiff also alleged that the dean threatened her with discipline for cancelling class without permission, but did not discipline the plaintiff after students responded that the class had occurred. The district court granted summary judgment to the defendants. *Held:* The Seventh Circuit affirmed. The court of appeals held that pressure to drop the suit and the threat of discipline related to the accusation regarding the cancelled class were not materially adverse actions as a matter of law because they did not cause the plaintiff any injury. The court also held that the plaintiff failed to establish that the plaintiff's protected activity was the but-for cause of the dean's "letter of direction" or the complaint to the chancellor. The court noted that the six-month gap in between the protected activity and the dean's letter "substantially weakened" the plaintiff's claim. The court concluded that no reasonable jury could find that either the letter of direction or the subsequent complaint were caused by the plaintiff's protected activities, rather than legitimate disagreements between the plaintiff and the university's faculty.

RETALIATION

- **42 U.S.C. § 1983**
- ***Buntin v. City of Boston***, 857 F.3d 69 (1st Cir. 2017). The administratix of the estate of a former city employee brought a 42 U.S.C. section 1981 action against the employee's city employer and former supervisors. The employee was suspended without pay for failing a random drug and alcohol test. Four years later, the employee was terminated for violating the City's drug and alcohol policy a second time. The plaintiff claimed that the stated ground for termination was a pretext for racial discrimination and retaliation against the employee for protesting past discriminatory treatment at work. The district court granted summary judgment to the defendants, finding that 42 U.S.C. section 1981 provided no implied private right of action for damages against state actors. *Held:* The First Circuit affirmed. After analyzing the legislative history, the court concluded that 42 U.S.C. section 1983 remains "the exclusive federal damages remedy" for section 1981 violations by state actors. The court also rejected the plaintiff's attempts to sue representatives in their individual capacities, since she did not allege that they took any relevant actions outside of the scope of their supervisory roles.

COVERAGE OF EEO LAWS

- **Who Is a Covered Employer?**
  - **State Employers**

- ***Guido v. Mount Lemmon Fire Dist.***, 139 S. Ct. 22 (2018). The plaintiffs, the two oldest full-time employees at the Mount Lemmon Fire District, were terminated in 2009 and alleged that the terminations violated the ADEA. Under the ADEA, only "employers" are covered, which section 630(b) defines as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ... The term also means ... a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." The Fire District moved for summary judgment, arguing that the statute was ambiguous and that the twenty-employee minimum applied to political subdivisions as four other circuits had previously held. The district court granted the Fire District's motion for summary judgment, concluding that the Fire District was not an "employer" within the meaning of the ADEA because, even though the Fire District was a political subdivision of a state, it did not have at least twenty employees. The Ninth Circuit reversed, holding that section 630(b) is unambiguous and that the twenty-employee minimum does not apply to a political subdivision of a state. *Held:* The Supreme Court affirmed, holding that state political subdivisions are "employers" under the ADEA regardless of whether they have twenty or more employees. The Court reasoned that section 630(b)'s two sentence delineation, and the expression "also means" at the start of the second sentence, combined to establish two separate categories of "employers" under the ADEA: persons engaged in an industry affecting commerce with twenty or more employees; and States or political subdivisions with no attendant numerosity limitation.

COVERAGE OF EEO LAWS

- **Who Is a Covered Employer?**
  - **Religious Organizations**

- ***Sterlinski v. Catholic Bishop of Chicago***, 934 F.3d 568 (7th Cir. 2019). The plaintiff, a former organist at a Catholic church, alleged that he was terminated because of his Polish heritage in violation of Title VII. The church maintained that, as an organist, the plaintiff should be treated as a "minister" for purposes of *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), because organ-playing served important religious purposes within the church. The plaintiff asserted that he was just "robotically playing the music that he was given" and, as a result, could not be treated as a "minister." The district court granted summary judgement for the church, finding that the plaintiff, as an organist, was properly considered a "minister" under *Hosanna-Tabor*. *Held*: The Seventh Circuit affirmed, holding that *Hosanna-Tabor's* ministerial exception barred the plaintiff's claims under Title VII because organ-playing served a religious function in the life of the church. Notably, the court rejected the approach urged by the plaintiff, and endorsed by the Ninth Circuit in *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), that would have required the court to assess independently whether an organist's role was sufficiently like that of a priest to be considered part of the ministry. Rather, the court explained that its role in evaluating issues under *Hosanna-Tabor* is to determine whether a religious organization's proffered justification for considering an employee a "minister" was pretextual or honest. Here, the plaintiff did not contend that the church's justification for calling him a "minister"—that organ playing served important religious purposes—was pretextual. Thus, the court concluded that under the rationale of *Hosanna-Tabor* the plaintiff's claims were outside the scope of Title VII.

COVERAGE OF EEO LAWS

- **Who Is a Covered Employer?**
  - **Religious Organizations**

- ***Fratello v. Archdiocese of New York***, 863 F.3d 190 (2d Cir. 2017). The plaintiff, a former principal of a Catholic school, alleged that she was terminated on the basis of unlawful gender discrimination and retaliation in violation of Title VII. The defendants—the school, the church, and the archdiocese—moved for summary judgment on the ground that her claims were barred by the "ministerial exception." The ministerial exception, which is based on First Amendment grounds, precludes "ministers" from asserting employment-discrimination claims against the religious organizations that employ or formerly employed them. The purpose of the exception is to shield religious employers from discrimination claims that might compromise their freedom to choose religious leaders and instructors. The district court concluded that the plaintiff was a "minister" and awarded the defendants summary judgment. The plaintiff appealed. *Held:* Affirmed. The ministerial exception barred the plaintiff's employment discrimination claims because in her role as principal, she was a minister within the meaning of the exception. Although the plaintiff's job title—lay principal—was not "inherently religious," "she held herself out as a spiritual leader" and performed "many important religious functions" to advance the school's Roman Catholic mission. These included implementing a new prayer system, communicating religious messages over the school's loudspeaker during various holidays, and planning and executing religious assemblies for students. Her evaluations also considered whether she "fostered a Christian atmosphere," prioritized "comprehensive religious education programs," and "upheld and strengthened [the school's] Catholic identity," among other things. The court also noted that teachers of secular subjects at parochial schools often are allowed to pursue discrimination claims because courts find their essential job functions are not religious. However, because the plaintiff, as principal, was expressly required to advance the school's religious mission, she functionally was a "minister" for purposes of the exception.

COVERAGE OF EEO LAWS

- **Who Is a Covered Employer?**
  - **Religious Organizations**

- **Department of Justice actions on religious freedom in hiring**. On October 6, 2017, then-U.S. Attorney General Jeff Sessions advised federal departments and agencies on interpreting religious liberty protections in federal law to accommodate religious observance and practice in government employment, contracting and programming. Among the 20 “principles of religious liberty” referenced in his memorandum is the principle that religious employers are entitled to employ only persons whose beliefs and conduct are consistent with the employers’ religious precepts. The memorandum refers to express exemptions in Title VII that allow religious corporations, associations, educational institutions, and societies to discriminate in employment. “But even in the absence of the Title VII exemption,” the memorandum states, “religious employers might be able to claim a similar right under [the Religious Freedom Restoration Act] or the Religious Clauses of the Constitution.”

COVERAGE OF EEO LAWS

- **Who Is a Covered "Employee"?**
- ***Levitin v. Nw. Cmty. Hosp***., 923 F.3d 499 (7th Cir. 2019). The plaintiff, a surgeon, sued the hospital where she performed surgeries, alleging sex, religious, and ethnic discrimination in violation of Title VII. The plaintiff, who operated her own private medical practice, had privileges at the hospital and, for several years, earned the majority of her income from that work. The plaintiff complained that a male surgeon was harassing her. Sometime after that, the hospital committee looked into complaints about her professional judgment. After the committee terminated her practice privilege, she filed a complaint with multiple employment and antitrust claims, including federal and state claims for sex discrimination. Initially, the district court dismissed the antitrust claim, permitting Title VII and state law claims to proceed. On summary judgment, the district court found that the plaintiff was not a hospital employee and, as a result, her claim was outside the scope of Title VII. *Held:* The Seventh Circuit affirmed. Acknowledging that it could be feasible that a surgeon enjoying privileges has an indirect employment relationship sufficient to maintain a Title VII cause of action, the court found that this was not the case, because the plaintiff "owned her own medical practice, billed her patients directly, and filed taxes as a self-employed physician," in addition to the fact that she received no employment benefits from the hospital. Although the hospital placed some restrictions on the plaintiff, they were minimal and, in any event, insufficient to general the control necessary for an employment relationship. The court rejected the plaintiff's argument that the hospital's peer-review procedure raised a factual dispute about whether she was an employee, reasoning that control generates from contractual terms governing the parties' working relationship, relates to contractual relationships, rather than an isolated peer-review event. Since the plaintiff was not a hospital employee, her Title VII was properly disposed.

STATUTE OF LIMITATIONS AND CONTINUING VIOLATION DOCTRINE

- **Equitable Tolling**
- ***Artis v. District of Columbia***, 138 S. Ct. 594 (2018). The plaintiff, a code inspector for the District of Columbia Department of Health, alleged that her supervisor singled her out for unfair treatment. While the plaintiff's administrative complaint was pending with the Equal Employment Opportunity Commission, the District terminated her employment. The plaintiff filed a lawsuit in federal court alleging violations of Title VII and invoked the court's supplemental jurisdiction to assert claims under the District of Columbia's Whistleblower Act, False Claims Act, and common law. The district court granted the District's motion on the pleadings as to the plaintiff's sole federal claim, and thus dismissed her remaining claims, finding it had no basis to exercise supplemental jurisdiction. Fifty- nine days after the dismissal, the plaintiff filed the remaining claims in a District of Columbia trial court. The court dismissed her claims as time-barred. The District of Columbia Court of Appeals affirmed, holding that 28 U.S.C. section 1367 accorded the plaintiff only a 30-day grace period to re- file her claims in state court following dismissal of the federal case. *Held*: By a 5-4 vote, the Supreme Court reversed and remanded. The Court held that the tolling provision of section 1367 operates to suspend or "stop-the-clock" on supplemental state court claims while the concordant federal suit is pending and for 30 days thereafter. The Court rejected the defendant's argument that under section 1367, the state limitations period continues to run during pendency of the federal suit, but a plaintiff may re-file her claims in state court only within 30 days of the dismissal of the federal case. The Court also rejected the argument that it should disavow the stop-the-clock approach as a matter of constitutional avoidance, explaining that questions regarding the statute's constitutionality had been settled under prior case law. The dissent opined that the majority's stop-the-clock approach both misconstrued the statute and unconstitutionally infringed on state sovereignty.

STATUTE OF LIMITATIONS AND CONTINUING VIOLATION DOCTRINE

- **Equitable Tolling**

- ***Hamer v. Neighborhood Hous. Servs. of Chicago***, 138 S. Ct. 13 (2017). The plaintiff, a former intake specialist, sued her former employers under the ADEA and Title VII. She claimed that her employers failed to promote her because of discrimination and fired her after she complained. The district court granted the plaintiff a 60-day extension of the deadline for appealing its decision, and the plaintiff filed an appeal within that period. The Seventh Circuit found the plaintiff's appeal to be untimely, reasoning that under the Federal Rules of Appellate Procedure, the district court could not grant extensions of more than 30 days. *Held*: The Supreme Court reversed. The Court held that the court of appeals had erroneously held as jurisdictional a time limit specified in Federal Rule of Appellate Procedure 4(a)(5)(C). The Court reasoned that only Congress may determine lower federal courts' subject-matter jurisdiction, and thus "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time."

ADMINISTRATIVE PROCESSES

- **Failure to Exhaust Administrative Remedies**
  - **Not Jurisdictional**

- ***Fort Bend Cnty. v. Davis*****,** 139 S. Ct. 1843 (2019). Title VII requires that an individual file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occur[s]." 42 U. S. §2000e–5(b). The plaintiff, a county employee, filed a charge with the EEOC claiming retaliation after reporting sexual harassment. As the charge was pending, the plaintiff was terminated for attending a religious commitment instead of work. As a result, she attempted to amend her EEOC charge, supplementing her EEOC "intake questionnaire"—not a formal charge document—in handwriting, adding "religion," "discharge" and "reasonable accommodation" to the form. The plaintiff commenced her lawsuit in district court and, after years of litigation, only the religious claim remained. The county moved to dismiss on the grounds that the court lacked jurisdiction on the religion-based claim, due to the plaintiff's failure comply with the charge-filing requirements of Title VII. The district court granted the county's motion to dismiss, concluding that the charge-filing requirement was "jurisdictional" and could not be forfeited. The Fifth Circuit reversed, holding that the county forfeited their jurisdictional argument because Title's VII's charge-filing requirement is a "prudential prerequisite" rather than a jurisdictional bar and, as a result, the county waived the objection by not raising in a "timely manner." *Held:* The Supreme Court affirmed, holding that the charge-filing requirement of Title VII is a non-jurisdictional rule that is forfeited if an objection is not timely asserted. The Court reasoned that the term "jurisdictional" is reserved for prescriptions that limit the type of cases that courts may hear, which are distinct from non-jurisdictional rules that raise procedural requirements to ensure efficient litigation. The latter category, despite the fact that it may be mandatory, is subject to being forfeited when a party has not raised it in the appropriate timeline.

ADMINISTRATIVE PROCESSES

- **Failure to Exhaust Administrative Remedies**
  - **In General**
    - **Exhaustion Found**

- ***Trujillo v. Rockledge Furniture LLC***, 926 F.3d 395 (7th Cir. 2019). The plaintiff, a manager of a furniture store, sued his employer for age discrimination and retaliation. He alleged that his employer launched an initiative focused on hiring and promoting younger employees, and that he was terminated only after he complained about a younger manager's work performance issues. The plaintiff filed a charge with the EEOC in which he listed his employer's name as the store where he had worked—Ashley Furniture HomeStore—as well as the address and telephone number of that store. However, the employer's formal business name was "Ashley Furniture HomeStore— Rockledge." This error caused the EEOC to contact the wrong entity, and the plaintiff's employer was never correctly served with the EEOC charge. The plaintiff subsequently filed suit in the district court asserting claims under the ADEA and his employer moved to dismiss, arguing that the plaintiff failed to exhaust his administrative remedies. The district court granted the employer's motion because the plaintiff did not name his employer sufficiently and the EEOC never managed to notify the correct employer of the plaintiff's charge. *Held*: The Seventh Circuit reversed and remanded on two grounds. First, the court noted that the mistake here was that one word was missing from the employer's assumed business name on the EEOC charge. Thus, this case did not present a failure to name a party, but was a minor error in stating the name of the employer, which did not defeat the plaintiff's ability to pursue his claim. Second, while the court recognized that the EEOC's failure to give proper notice to the employer denied it the opportunity to pursue informal resolution of the dispute, the appropriate remedy was not an entire dismissal of the case. Rather, the best remedy was to allow the parties a reasonable opportunity to pursue conciliation if they chose to do so.

ADMINISTRATIVE PROCESSES

- **Power of the EEOC to Investigate and Pursue Relief**
- ***EEOC v. Union Pac. R. R.***, 867 F.3d 843 (7th Cir. 2017). Two employees filed complaints against their employer with the EEOC. After the EEOC issued the employees a right-to-sue letter, the employees filed a lawsuit against their employer alleging racial discrimination in violation of Title VII. The court granted summary judgment in favor of the employer. The EEOC subsequently sought to enforce a subpoena against the employer as part of a continuing investigation of the employees' claims. The employer sought to dismiss the EEOC's enforcement action, arguing that the EEOC lost investigatory authority after (1) issuing the right-to-sue notice, and (2) after the court granted the employer's summary judgment motion in the lawsuit filed by the employees. The district court denied the employer's motion to dismiss. *Held*: The Seventh Circuit affirmed. The court of appeals recognized the circuit split between the Fifth Circuit (which holds that EEOC investigative authority ends upon issuance of a right-to-sue letter) and the Ninth Circuit (which holds that a right-to-sue letter does not strip the EEOC of authority to continue to process or investigate the administrative charge). The Seventh Circuit sided with the Ninth Circuit and concluded that neither the issuance of a right- to-sue letter by the EEOC nor the entry of judgment in a lawsuit against the employee who originally filed the administrative charge against an employer bars the EEOC from continuing its own investigation and enforcing subpoenas relevant to its investigation.

ARBITRATION

- **Applicability of Federal Arbitration Act**

- ***New Prime Inc. v. Oliveira***, 139 S. Ct. 532 (2019). The plaintiff was a driver for an interstate trucking company pursuant to an independent-contractor agreement that included a mandatory arbitration provision. When the plaintiff filed a wage-and-hour class action against the company, alleging that he was misclassified and was entitled to wages as an employee, the company responded that the case should be compelled to arbitration pursuant to the Federal Arbitration Act (the "FAA"). The plaintiff countered that the court lacked authority to compel arbitration because section 1 of the FAA exempts from coverage disputes involving "contracts of employment" of certain transportation workers. The company maintained that any question regarding section 1's applicability belonged to the arbitrator alone to resolve, or, assuming the court could address the question, "contracts of employment" referred only to contracts that establish an employer-employee relationship and not to contracts with independent contractors. The district court and the First Circuit Court of Appeals agreed with the plaintiff and denied the motion to compel. *Held*: The Supreme Court affirmed. The Court ruled that a court should determine whether a section 1 exclusion applies before ordering arbitration under the FAA because that power to compel arbitration is delineated by the statute. The Court then held that section 1's reference to a "contract of employment" includes any agreement to perform work, regardless of whether a worker is classified as an employee or an independent contractor. The Court cited the "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." In 1925, when the FAA was enacted, the phrase "contract of employment" was broadly understood to mean any contract for work, not necessarily a contract between an employer and an employee. Because the contract between the plaintiff and the company was a "contract of employment" for a transportation worker within the meaning of the section 1 exclusion, regardless of the plaintiff's independent-contractor classification, the lower courts were correct to decline to compel arbitration under the FAA.

ARBITRATION

- **Validity and Scope of Arbitration Clauses**
  - **Class or Representative-Action Waivers**

- ***Lamps Plus, Inc. v. Varela***, 139 S. Ct. 1407 (2019). In 2016, a hacker tricked Lamps Plus into disclosing tax information of about 1,300 of its employees. A Lamps Plus employee filed a class action against the company on behalf of employees whose information had been compromised. Relying on the arbitration agreement in the employee's employment contract, Lamps Plus sought to compel arbitration—on an individual rather than a classwide basis—and to dismiss the suit. The district court rejected the individual arbitration request, but authorized class arbitration and dismissed the case. Lamps Plus appealed, arguing that the district court erred by compelling class arbitration, but the Ninth Circuit affirmed. *Held*: The district court erred in compelling class arbitration because the arbitration agreement did not expressly provide for class arbitration. The Supreme Court noted that it previously had held that a court may not compel classwide arbitration when an agreement is silent on the availability of such arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010). Similarly, under the Federal Arbitration Act ("FAA"), an ambiguous agreement also cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. Arbitration is strictly a matter of consent, and the task for courts and arbitrators is to give effect to the intent of the parties. In carrying out that responsibility, it is important to recognize the fundamental difference between class arbitration and the individualized form of arbitration envisioned by the FAA. Class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. Because of such crucial differences, courts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so. Silence is not enough, and ambiguity is not enough, either. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage of arbitration.

ARBITRATION

- **Validity and Scope of Arbitration Clauses**
  - **Class or Representative-Action Waivers**

- ***Epic Sys. Corp. v. Lewis***, 138 S. Ct. 1612 (2018). In each of three consolidated cases, employees signed arbitration agreements that required individualized arbitration to resolve employment disputes. The employees later sued under the Fair Labor Standards Act ("FLSA") and state wage-hour law, alleging class and collective actions on behalf of themselves and other similarly situated employees. The employers moved to compel arbitration, arguing that the Federal Arbitration Act ("FAA") requires courts to enforce arbitration agreements as written, and in one case the employees separately filed a charge with the National Labor Relations Board ("NLRB"). The employees countered that the agreements were unlawful because the class waiver violated their right under the National Labor Relations Act ("NLRA") to join together in concerted activity. They argued that FAA's savings clause permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." *Held*: The Supreme Court held that arbitration agreements must be enforced according to their terms, including arbitration agreements containing class-action waivers. First, the Court rejected reliance on the FAA's savings clause, which preserves generally applicable defenses to contract formation, not "defenses that target arbitration either by name or by more subtle methods, such as 'interfer[ing] with the fundamental attributes of arbitration[,]'" such as "the individualized nature of the arbitration proceedings[.]" Second, the Court held that the NLRA does not override the FAA. Although the NLRA was enacted several years after the FAA, "repeals by implication are 'disfavored[,]'" and the NLRA "does not express approval or disapproval or arbitration." Third, the Court declined to defer to the NLRB's holding in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), that the NLRA prohibits individualized arbitration agreements. The Court reasoned that the NLRB sought to interpret not only the NLRA, but also the FAA, despite having no power to interpret, let alone administer, the FAA. Deference was particularly unwarranted because the NLRB took a contrary view on the question presented to that of the U.S. Justice Department.

ARBITRATION

- **Validity and Scope of Arbitration Clauses**
  - **Third-Party Beneficiaries**

- ***Scheurer v. Fromm Family Foods***, 863 F.3d 748 (7th Cir. 2017). The plaintiff, a temporary employee, sued the company for sexual harassment and retaliation under Title VII of the Civil Rights Act. During discovery, the company learned that the plaintiff's contract with her staffing agency called for "final and binding arbitration" of employment disputes. The company moved to compel arbitration based on the contract principles of equitable estoppel and as a third-party beneficiary. The district court denied the motion. The company appealed. On appeal, the company dropped the third- party beneficiary argument. *Held:* The company could not force the plaintiff, a temporary employee, to arbitrate her sexual harassment and retaliation claims based on an agreement she signed with the staffing agency that placed her. Equitable estoppel was not available because there was no evidence that the company relied on the arbitration agreement between the plaintiff and the temporary staffing agency. The company only found out about the employment agreement during discovery and it could not have relied on an arbitration provision it did not know about.

LITIGATION AND TRIAL ISSUES

- **Adequacy of Complaint**

- ***Clarke v. Law Office of Terrence Kennedy, Jr.***, 709 F. App'x 826 (7th Cir. 2017). The plaintiff, a former legal assistant, alleged that when she turned 51 years old (approximately five years after starting her job), the law firm she worked at began to treat younger similarly situated legal assistants more favorably. The plaintiff alleged that she was excluded from meetings, removed from work assignments, and issued a poor performance evaluation that led to her suspension. After the plaintiff filed a charge asserting that her age motivated her poor treatment, the law firm fired her. The plaintiff subsequently brought claims that she was terminated because of her age and complaints of age discrimination, as well as a claim of defamation. The district court dismissed the plaintiff's discrimination and retaliation claims for failing to state a plausible claim, as well as failure to allege an "essential element" of her claim: the ADEA only applies to those employing 20 or more employees, and the plaintiff had not plausibly alleged the law firm employed more than 17. The plaintiff's defamation claim was also dismissed by the district court as untimely. *Held*: The Seventh Circuit vacated the district court's ruling and allowed the discrimination and retaliation claims to proceed, but affirmed the dismissal of the plaintiff's defamation claim. The court noted that in order to properly plead a claim for employment discrimination, the plaintiff need only identify the type of discrimination, when it occurred, and by whom. Although the law firm argued that the pleadings were implausible, the court held that the plausibility standard is "not akin to a probability requirement" and that the plaintiff was entitled to proceed to discovery. The court also rejected the district court's contention that the plaintiff needed to allege the law firm employed at least 20 employees. The court found that the threshold is a non-jurisdictional defense to liability and that the plaintiff did not need to plead in anticipation of defenses. Regarding the plaintiff's retaliation claim, the court found that the plaintiff's complaint stated a plausible claim as well. The plaintiff need only have alleged that her employer subjected her to adverse employment action because she filed the charge, and the plaintiff claimed that the law firm fired her *because* she had filed age-discrimination charges the year before.

LITIGATION AND TRIAL ISSUES

- **Jurisdiction**

- ***Perry v. Merit Sys. Prot. Bd.,*** 137 S. Ct. 1975 (2017). Under the Civil Service Reform Act of 1978 ("CSRA"), the Merit Systems Protection Board ("MSPB") has the power to review certain serious personnel actions against federal employees. The plaintiff, a U.S. Census Bureau worker who was allegedly forced into early retirement, signed an agreement waiving his right to challenge his exit before the MSPB. Despite the agreement, he appealed his suspension and retirement to the MSPB, alleging discrimination based on race, age, and disability. The settlement, he maintained, did not stand in the way of his appeal because he had been coerced into signing it. An MSPB administrative law judge ("ALJ") determined that the plaintiff failed to prove that the settlement was coercive and dismissed the case. He concluded that, because voluntary actions are not appealable to the MSPB, the board lacked jurisdiction to hear the plaintiff's claims. In affirming the ALJ's decision, the board recommended the plaintiff seek judicial review in the Federal Circuit. The plaintiff instead sought review in the D.C. Circuit, which, the parties later agreed, lacked jurisdiction. However, the parties disagreed on where his mixed case—which included a discrimination claim and a jurisdictional element—should be appealed. The D.C. Circuit held that the proper forum for mixed cases under the CSRA was the Federal Circuit and transferred the case there. *Held*: Reversed and remanded. The case turned on a provision of the CSRA's exception designating a mixed case as one in which an employee "affected by an [adverse] action … may appeal" to the MSPB. The government argued this exception defeats district court review because the board lacks jurisdiction to take his appeal. According to the government, the plaintiff should split his mixed claims, appealing MSPB nonappealability rulings to the Federal Circuit while repairing to the district court to adjudicate his discrimination claims. The plaintiff countered that the district court alone can resolve his entire complaint because the "key consideration … is not what the MSPB determined about appealability; it is instead the nature of an employee's claim that he had been 'affected by an action [appealable] to the [MSPB].'" In a 7-2 decision, the Supreme Court agreed with the plaintiff's "more sensible reading," and held that district court is the proper review forum when the MSPB dismisses a mixed case. The majority also criticized the government for departing from *Kloekner v. Solis*, 133 S. Ct. 596 (2012), where it stated that differentiating between jurisdictional and procedural dismissals would be "difficult and unpredictable." The dissent, penned by Justice Gorsuch and joined by Justice Thomas, accused the majority of "tinkering" with "a perfectly good law." Rather than directing that mixed cases be sent to district court, Justice Gorsuch argued, the CSRA's exception sends civil service decisions to the Federal Circuit for deferential review and discrimination questions to the district court for review *de novo*. The plaintiff's "proposal to streamline the process by keeping these tracks attached invites a host of questions more complicated than juggling twin legal proceedings."

ATTORNEYS' FEES

- ***Sommerfield v. City of Chicago***, 863 F.3d 645 (7th Cir. 2017). The plaintiff, a German-Jewish police officer, sued his employer, alleging discrimination based on ethnicity and religion in violation of Title VII. He alleged that his supervisor made offensive remarks about the plaintiff's ethnicity. A jury awarded the plaintiff $30,000 and his attorney requested attorneys' fees of $1.5 million. The district court reduced the award to $430,000. The plaintiff appealed, challenging the district court's handling of the case and its refusal to grant his attorney the full $1.5 million in fees. *Held*: The district court properly adjusted the award to $430,000. Among other reasons, the officer lost on most claims, the requested hourly rate was not justified, and over 800 of the claimed hours of work were found to be unnecessary or frivolous.

Legally Managing a Multi-Generational Workforce

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Attorney Tess Anglin concentrates her practice in the area of employment and business law. Tess represents business entities in all facets of their employment matters and assists clients with business formation, mergers and acquisitions, and contract drafting and review.
Tess works with employers to help prevent and solve disputes with employment contracts, and claims involving Title VII, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Indiana Wage Payment Statute, the Indiana Wage Claims statute, and the Indiana Worker’s Compensation Act. Prior to joining the firm, Tess served as a Senior Law Clerk for the Worker’s Compensation Board of Indiana, a Law Clerk of the Indiana Attorney General, and an Investigative Intern for the Equal Employment Opportunity Commission (EEOC).

What is a Multi-Generational Workforce?

- A multi-generational workforce is a workforce made up of employees from different generations, like the Baby Boomer generation, Generation X, the Millennial generation, and Generation Z.
- In the coming years, organizations could potentially work with teams of people from four to six different generations at one time, which is why learning how to manage a multi-generational workforce now is so important.
- A recent human resource management study of organizations with more than 500 employees reported that 58% of the managers experience conflicts between younger and older employees on a frequent basis.

An Ever-changing Workforce

- A recent study conducted by Georgetown University found that by 2020, 65% of jobs will require postsecondary education and training.
- Among employers, there are increasing concerns that the U.S. is not producing enough two-and four-year college graduates to meet job requirements.
- While companies struggle to find employees with sufficient skills and competencies, they're also facing the loss of existing skills and institutional knowledge with the exit of Baby Boomers from the workplace (known as the "Brain Drain"). Approximately 10,000 Baby Boomers become retirement-eligible every day, taking with them a wealth of knowledge, experience, and skills critical to an organization's success.

The Realities of COVID-19

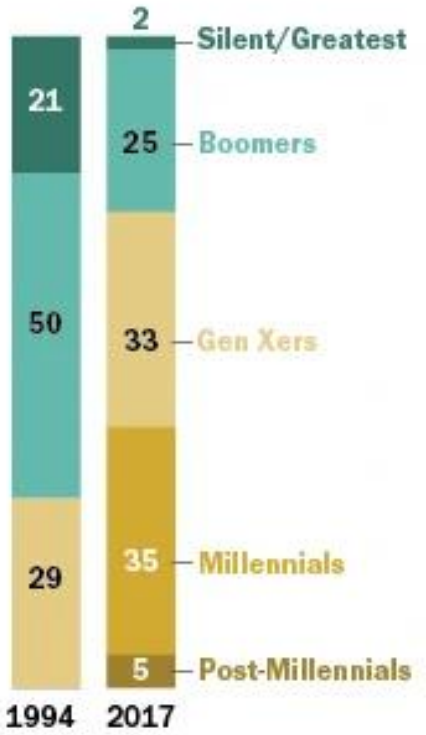
- The COVID-19 global pandemic is changing the way we work, but not every generation views this the same.
- A significant number of young people are experiencing boredom as they cope with the forced inactivity in a wide range of ways.
- Older generations are experiencing less boredom, as their work tends to translate more easily to a remote-work setting.
- “Boomers” are most likely to have not experienced a drop in household income – 63% vs. 43-47% for all other generations.
- All employees across generations are experiencing a shift as new technologies are introduced and remote work becomes the new norm.

Current Generations in Today's Workforce

- Baby Boomers
- Generation X
- Millennials
- Generation Z

More than a third of the workforce are Millennials

% of the U.S. labor force



Note: Labor force includes those ages 16 and older who are working or looking for work. Annual averages shown.
Source: Pew Research Center analysis of monthly 1994 and 2017 Current Population Survey (IPUMS).

PEW RESEARCH CENTER

Generational Stereotypes – Baby Boomers

- “Out of touch” & disinterested in learning new things
- Fear-driven (stemming from having childhoods so close to the war era)
- Stubborn and resistant to change (likely due to the emergence of technology disrupting their well-established lifestyles)
- “Workaholics”

Generational Stereotypes – Gen X

- Dubbed America's neglected "middle child" being the generation in between Baby Boomers and Millennials
- Cynical & poor team members
- Independent/individualistic

Generational Stereotypes – Millennials

- Lazy (stemming from 23% of Millennials reporting to still live at home or that they are slower to adopt a career, home life, and all the other traditional fixings valued by Baby Boomers)
- Entitled (likely stemming from Millennials tendency to speak out against injustice and will to change the future for the better)
- Referred to as the “me generation”

Generational Stereotypes – Gen Z

- Addicted to technology and can't handle face-to-face interactions (resulting from being the first generation that cannot recall a time before the internet).
- Short attention span (likely due to growing up in a time where there is an overload of information – more than 60% of their time is spent online).

Generational Snapshot - Baby Boomers

- 1946-1964
- Defining characteristics:
  - Loyalty
  - Self-motivation
  - High work ethic
  - “Live to work” mentality
  - Deep experience
  - Average tenure: 15 years
  - Focused on financial stability/retirement
- According to Gallup, many Baby Boomers do not have enough money saved for retirement, and Social Security benefits aren’t enough to enable them to live comfortably.
- Almost half of the Baby Boomers who are still working say they don’t expect to retire until they’re over 65, and 10% predict they may never retire.

Generational Snapshot - Baby Boomers

- More seasoned Baby Boomers bring deep experience and industry expertise the table and can make excellent coaches and mentors for Gen X and Millennial employees.
- Baby Boomers are motivated by:
  - Technology training
  - Flexibility
  - Soft retirement and/or consulting opportunities
  - Reverse/reciprocal training

Generational Snapshot - Generation X

- 1965-1979
- Defining Characteristics:
  - Ability to learn new technologies
  - Highly educated
  - Good work ethic
  - High leadership potential
  - Self-reliant
  - Average tenure: 5 years
  - Focused on work-life balance
- According to Harvard Business Review, over the past five years, 66% of Gen X leaders have received only one promotion or none at all, compared to Millennials and Baby Boomers who were more likely to have received two or more promotions during the same time.
- Gen X promotion rates have consistently been 20-30% lower than that of Millennials. As a result, almost 1 in 5 Gen X leaders said their intention to leave their job has increased over the last year.

Generational Snapshot - Generation X

- Gen X is motivated by:
  - Leadership training
  - Career pathing
  - Work-life balance
  - Coaching and mentorship opportunities
  - Continuing education and tuition reimbursement

Generational Snapshot - Millennials

- 1980-1995
- Defining Characteristics:
  - Idealistic
  - Flexible
  - Tech savvy
  - Able to integrate work and life
  - Ambitious
  - Highly educated
  - Average tenure: 2 years
  - Focused on career growth
- In 2017, Millennials surpassed Gen X and Baby Boomers to become the largest generation in the current labor force.
- Millennials are higher educated – 39% of those ages 25 to 37 have a bachelor's degree or higher.
- Millennials have brought more racial and ethnic diversity to American society.
- Rather than ladder-climbing and job-hopping, Millennials are searching for more stability, better core benefits, and greater job satisfaction.

Generational Snapshot - Millennials

- While Millennials lack experience, they are known to be very tech savvy and bring energy, creativity, and a spirit of open collaboration to the workplace.
- Millennials are more connected and networked than any previous generation.
- Millennials are motivated by:
  - Robust employee development programs for emerging leaders in various fields
  - College and educational partnerships to attract top talent and build employer brand
  - Internships
  - STEM programs
  - Mentorship programs
  - Work exchange programs
  - Access to formal and self-guided training
  - Continuing education, tuition reimbursement, certifications and training

Generational Snapshot - Generation Z

- 1996-Present
- Digital natives with strong entrepreneurial tendencies.
- Defining Characteristics:
  - Multicultural
  - Tech native
  - Entrepreneurial
  - Able to multitask
  - Independent
  - Average tenure: TBD
  - Focused on learning with purpose
- Gen Z will be the last generation in the U.S. to be a Caucasian majority, making diversity the “norm” for this generation.

Importance of Recognizing Multi-Generational Issues

- An “age-neutral” workplace supports real communication and understanding across all ages, and builds on the unique values and strengths of each generation.
- Businesses that pay attention to intergenerational issues will see an impact on their bottom line in a number of areas including:
  - Corporate culture
  - Recruitment
  - Employee Engagement
  - Retention
  - Customer Service

Reimagining the Office and Work Life: COVID-19

- In the beginning of April, Gallup reported 62% of employed Americans worked at home, compared to about 25% a few years ago.
- 80% of employed Americans reported that the global pandemic is materially affecting their daily work lives.
- All generations are impacted as we reimagine what employment looks like in the times of COVID-19.

“New Normal”

- COVID-19 is proving to be the greatest catalyst for rapid change in the workplace we’ve ever seen.
- Most desk jobs have been converted to somewhere other than an office, with a significant number of positions working remotely.
- Flexible work arrangements are now much more common.
- Organizations must be able to navigate momentous macroeconomic challenges and global health pandemics.
- But even in this “new normal”, remember the same employment laws and regulations apply.

1876

Employment Law and COVID-19

- Be cautious in today's world as we navigate more remote working and changed circumstances to not allow discrimination, particularly relating to age.
- Per EEOC guidance, an employer cannot postpone start date or withdraw a job offer simply because the individual is 65 years old or at higher risk from COVID-19.
- An employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

Generation-specific Impacts of COVID-19

- Older generations can become fearful of a loss of professional identity and the prospect of not being able to keep track of digital developments.
- Boomers are likely focused on an elderly parent's health.
- Gen X is likely juggling demands of working from home with child rearing.
- Millennials entered the workforce during the global financial crisis of 2008. Stagnant wage growth and student debt meant that many in this grouping have never experienced true financial security, creating higher anxiety surrounding job security.
- Millennials are projected to be the first generation in modern American history to end up poorer than their parents.

Tools to Engage Remote Workers

- Employees will have unique challenges depending on which stage of life they're in. But it's crucial to look at work from home during COVID-19 as an "everyone challenge."
- Pains surrounding remote work are shared across generations, including distractions, loneliness, and lack of access to work resources.
- Tools to help connect and engage every age bracket during this time include:
  - Mobile phones – People want to be able to work from anywhere and from multiple screens, in order to have real-time collaboration with co-workers.
  - Virtual events to bring people together (whether it's a Zoom happy hour or an online conference)
  - Sharing photos and videos – Employees are craving connectivity.
  - Interactive learning/skill development, like online courses and webinars.

Additional Resources to Provide Employees

- WFH resources for employees including tips on managing teams and working remotely.
- Consider re-working the 9-5 schedule by discussing flexible hours with employees working remotely.
- Regular email updates from leadership.
- Regular Zoom/live updates, where employees are encouraged to ask questions and provide feedback.
- Virtual happy hours.

Challenges of a Multi-Generational Workforce - Age

- A preference exists among employees to work and interact with people of similar age.
- Data generally supports that many of the prevailing stereotypes about various generations are unfounded, so avoid stereotypes.
- Managers should create a workplace environment that is flexible enough to suit the different work styles and attitudes across age groups.
- For older generations, this might mean focusing on employee wellness and work-life balance, whereas younger generations focus on a flexible work environment with a chance to work from whenever, wherever.
- Emphasis must be placed on improving communication between the diverse generations to enhance the cross-generational understanding of each other's strengths and weaknesses.

Challenges of a Multi-Generational Workforce - Values

- Influential events such as economic recessions, periods of war and developments within technology shaped values in a way differing from one generation to the other.
- One of the clearest generational splits is between the idea of “working to live” vs. “living to work.” Older generations considered their relationship with a company to be highly important, requiring and demanding self-sacrifice in exchange for financial security. Younger generations tend to view these relationships as disposable. They value the opportunity to achieve work-life balance, but appreciate professional development with a clear trajectory toward growth.
- While Baby Boomers value individuality and place importance on material success, Gen X are more focused on flexible work arrangements, family time and faster promotional opportunities. Millennials value social activities, personal freedom and workplace engagement.
- Baby Boomers expect younger generations of employees to have the same commitment to long work hours and respect hierarchical structures which they grew up with.
- Gen X places strong emphasis on family and enjoys flexible work hours, preferring less supervision.
- Millennials value time off of work.

Challenges of a Multi-Generational Workforce - Communication

- Millennials rely on utilizing social media or other digital technologies to communicate with people in their environment, whereas Baby Boomers and older Gen X's prefer communicating face-to-face or via phone calls and emails.
- The communication style of younger generations is more informal and relies heavily on the use of abbreviations, compared to older generations of employees.

Breaking the Multi-Generational Barriers

- Demonstrate flexibility – different age groups have different personal and professional needs. Make sure to create a workplace that is open and flexible to different ways of working and work attitudes.
- Managers must make sure to use multiple communication channels when addressing their employees. This includes different meeting formats, style of personal communication and use digital media.
- As different generations bring different expectations to the office, frequent feedback, evaluation and encouragement will be increasingly important for managers to implement as part of the daily work routines.
- Create space for knowledge sharing. Let the older and more experienced generations of employees act as career mentors for the younger generation, while at the same time creating an environment where younger generations can inspire the older workers with new innovative solutions and ways of working.

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Breaking the Multi-Generational Barriers

- Managers should try to build teams with a blend of age ranges. Each generation can bring its own unique skill set to a project.
- Mixed age teams enable older employees to leverage their decades of experience and share their knowledge with younger workers. Without mixed-age groups in place, companies limit the institutional knowledge transfer that helps bring younger generations up to speed.
- Knowledge transfer is not a one-way street. Reverse mentoring is an emerging trend that involves a younger employee advising an older coworker.

Breaking the Multi-Generational Barriers

- Employees under the age of 25 are twice as likely to use their smartphone for work communications as their colleagues over 55.
- Younger workers use technology (such as video conferencing) four times as much as Baby Boomers.
- Younger workers are looking for faster implementation of new technologies and improved collaboration tools. Older employees want more of a focus on making existing technology more user-friendly.
- Having a workforce employ separate technologies can lead to mistakes and communication breakdowns.

Breaking the Multi-Generational Barriers

- Workers of all ages share a desire for financial stability, rewarding work, and work-life balance.
- When considering implementing work perks, companies should understand that some benefits have a broader interest than previously thought.
- For example, a traditional stereotype is that only millennials want work flexibility. A recent study found that 94% of Baby Boomers valued work flexibility, compared to 74% of Millennials.
- Develop recognition/bonus programs that reward productivity *and* longevity. Having multiple incentive strategies ensures that every employee feels they have an equal opportunity to be rewarded for their work.
- Industries experiencing labor shortages have instituted perks like remote work, job sharing, and a compressed workweek to keep Baby Boomers from retiring.