2017: Federal Court Update

Katherine L. Butler
Butler & Harris
Houston, Texas

Reviewing a bunch of Fifth Circuit cases at one sitting always reveals some interesting and varied results. This year, as in the past, I see many cases where the panel seems to guarantee the result. I know that is a shocker. See if you can guess the panelists for some of these cases.

Barriers Are Cool. *Acker v. General Motors***,** 853 F.3d 784 (5th Cir. 2017). It is often said that union workers get a better deal than those in the private sector. But this case shows it ain't necessarily so. At GM, the collective bargaining agreement requires workers taking intermittent FMLA leave to make not one, but two, phone calls every day at least 30 minutes before the shift starts to report their absence. If they do not, they go down the path that ultimately leads to discipline. And the Fifth Circuit says that is hunky-dory so long as there are no "unusual circumstances." After all, the employer is just requiring employees to follow Its "usual and customary" procedures for requesting FMLA leave. Presumably, if the person were in a coma they might be excused from this requirement. But a man who needed FMLA leave for a condition that caused blackouts, grayouts, and heart palpitations is not.

The other point of this case is that requesting FMLA leave cannot be considered a request for reasonable accommodation. As the Court points out, a request for FMLA leave is a request to be off work because of a serious health condition. A request for reasonable accommodation, by contrast, says the employee can do the essential functions of the job.

Beware the Narrow Prima Facie Case. *Alkhawaldeh v. Dow Chemical Co.***,** 851 F.3d 422 (5th Cir. 2017). Sometimes, the case gods conspire to make things difficult for plaintiffs because the case includes just too much that allows judges to pigeonhole it in a negative way. They take a case where the guy is short-timer, has praised his boss effusively in the past, but now complains about his "racist" agenda after getting a bad appraisal. Then they mix in the fact that no other employee got such a low rating, and that rather than being fired, he is put on a PIP and even moved to another supervisor before finally being run out the door.

When the case gods get this kind of case, sometimes the results are really bad, as they were here. The Court says that the only way to prove a circumstantial case of discrimination is to show that an employee outside your protective group is treated more favorably under nearly identical circumstances. Here, that means someone who not only got a terrible performance appraisal but then made it thru the PIP process and was not fired. Wow. That's a search for a unicorn.

Sorry, folks, but that is not the law. The Fifth Circuit has long ago said that this is not what is needed to make a prima facie case. Take a look at this from *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 576 (5th Cir. 2003):

> the plaintiff need only show "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Nichols v. Loral Vought Sys. Corp.,* 81 F.3d 38, 41 (5th Cir. 1996*)* (quoting *Amburgey v. Corhart Refractories Corp.,* 936 F.2d 805, 812 (5th Cir. 1991)).

It's deja vu all over again. In *Palasota*, after all, the district court took the same position that the Fifth Circuit takes here – that there was only one narrow way to present a circumstantial evidence case. You really need a sense of history in this line of work. And, of course, you need the cooperation of the case gods.

Policymaker AWOL. *Bowden v. Jefferson County*, 676 Fed. App'x 251 (5th Cir., Jan. 19, 2017). The Fifth Circuit affirms dismissal of this case on the grounds that a constable is not a policymaker under 42 U.S.C. 1983. This case cites a string of cases to that effect. Worth keeping in mind. You need very unusual circumstances to vary from this.

Two Day Suspension Not Enough for Frequent Filer. *Cabral v. Brennan*, 853 F.3d 763 (5th Cir. 2017). Here is a case that says a two day suspension is not a "materially adverse action" to support a retaliation case. The test, as established in *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), is whether the action might have dissuaded a reasonable worker from making or supporting a charge of discrimination. But what does it take to dissuade a frequent filer (this guy had submitted multiple EEO complaints)?

> Unlike the plaintiff in *White*, Cabral has not shown that his suspension exacted a physical, emotional, or economic toll. He offers conclusional statements attesting to the emotional or psychological harm he suffered because of the two-day suspension, but he provides no documentation of any alleged harm. He points to the number of grievances he has filed against the Postal Service related to purported discrimination, harassment, and retaliation, but those complaints are not relevant to whether the two-day suspension in September 2013 constituted a materially adverse action.

Pretext in Abundance. *Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017). This is a good case to use when the employer changes its tune about why it dismissed the employee. The employer first said that Caldwell refused to do part of his job and that is why he was chosen for lay-off. In litigation, the employer said something very different – that Caldwell had not taken the initiative to spend as much time doing that part of his job as his colleagues. Curiously, they also said that his work ethic had nothing to do with the decision. Despite these vivid changes in their story, summary judgment was granted.

On appeal, however, thankfully there is a different result. The Court says this evidence presents a material fact issue on pretext. First, the explanations changed over time and the inconsistencies in their story "are those probative of their truth." But there is more. The Court pointed out that KHOU's own witnesses rebutted the veracity of the explanations.

The Court also found that there was another reason to reverse the case – noting that the employer refused to give Caldwell the same opportunities it gave other employees. The employer scheduled every other employee to do certain job duties multiple times per week. But they had removed Caldwell from these duties because of his serious disability – but not at his request. Further, the employer counseled every other employee who was deemed deficient at some job duty, but admittedly did not do so for Caldwell. This is exactly what happened in *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990) where the issue was the plaintiff's race. Good to see the Fifth Circuit acknowledge the power of this precedent and bring it back to life.

No To Telework. *Credeur v. Louisiana*, ____ F.3d____, 2017 WL 2704015 (5th Cir., June 23, 2017). Plaintiff's lawyers take note. A panel of Reavley, Elrod, and Graves rejected the notion that telework was a reasonable accommodation for a lawyer with disabilities.

Credeur's problems arose after a kidney transplant. After the 2010 transplant, she was granted an accommodation to work from home for about 6 months. Then she went back to the office and, in 2013, needed FMLA leave because of complications. After she exhausted her FMLA leave, she asked again for the accommodation of working from home. That was granted with the proviso that she start reintegrating into the office. But then things broke down between the parties. Finally, Credeur returned to work without restrictions, but not before she sued the State for failing to accommodate her. Six months later, she voluntarily resigned.

The big ticket item that Credeur wanted in his case was a declaration that telework was a reasonable accommodation. But she didn't get it. Instead, the Fifth Circuit adopted the anti-telework opinion from the Sixth Circuit.

While recognizing that the employer's word alone is not enough to show what the plaintiff's job duties really are, the Court makes very clear that the plaintiff's word alone is not enough either. "'An employee's unsupported testimony that she could perform her job from home' does not create a genuine dispute of fact to preclude summary judgment," *citing EEOC v. Ford Motor Co.*, 782 F.3d 753 F.3d 763-64 (6th Cir. 2017). Otherwise, the Sixth Circuit said, every accommodation case would have to go to trial because the employee always thinks the requested accommodation is reasonable.

The Court cites a "general consensus" among Courts that most jobs require regular work-site attendance. The Court also refers to the EEOC's own guidance on this point, which provides "[t]eleworking may not be feasible, for example, if the job requires 'face-to-face interaction and coordination of work with other employees', 'in-person interactions with outside colleagues, clients or customers, or 'immediate access to document or other information located only in the workplace.'" And then there is the issue of supervision and whether a person working at home can be adequately supervised.
Here, the job of a litigation attorney was interactive, team oriented, required day to day coordination and thus fell into that bucket of jobs where in person attendance was required.

But here is one thing that clearly underlies this decision: The Court notes that an increasing number of employers are permitting telework under certain circumstances. "Construing the ADA

to require employers to offer the option of unlimited telecom muting to a disabled employee would have a chilling effect."

Discovery Orders Reversed. *EEOC v. BDO USA, LLP,* 896 F.3d 356 (5th Cir. 2017). The EEOC brought this case on behalf of BDO's former head of HR, Hang Bower, who made very serious allegations that BDO subjected her and other female employees to discrimination, retaliation and hostile work environment. Bower claimed that her belief that complaints should be fairly investigated and her efforts at compliance hit a brick wall with the company and led to it excluding her from leadership meetings, reducing her job responsibilities, and ordering her to stop investigating cases.

As you might imagine, the EEOC asked for lots of documents in its investigation and BDO claimed that many of them were not discoverable because of the attorney-client privilege. Bower pushed back on this, explaining that, in many cases, business-related emails were sent to the attorney only to keep them informed. She also noted that the company had asked her to include attorneys on darn near every email so that the privilege could be raised. And in the court below, that worked. The magistrate judge who first considered the matter stated on the record that "anything that comes out of a lawyer's mouth is legal advice," and "I'm telling you that if it's communications from or to an attorney it's privileged." Huh? Kinda varies from settled law, which states that there is no presumption that communications with counsel are privileged.

Adding to the confusion is the fact that BDO's privilege log was woefully inadequate. Vague and incomplete entries, entries that fail to distinguish between legal advice and business advice, entries that fail to establish that communications were made in confidence and that confidentiality was not breached. Many entries just said "legal advice," when this in no way helps the opponent figure out whether the entire document or portions thereof are protected from disclosure.

And that's the bottom line, after all. The privilege log must have enough information to allow courts and other parties to test the merits of the privilege claim. That did not happen. Here are deficiencies identified by the Court: Numerous entries failed to identify a sender, recipient, date, or provide a substantive description of the subject matter; stated only that "legal advice" was sought and did not indicate whether communications were made or maintained in privilege.

The Court also notes that descriptions do not indicate whether a particular entry consists of one email or a string – which is important to determining privilege. Did the lawyer just get copied on one part, did some of the emails in the strand only discuss factual matters as opposed to legal advice, did persons outside the privilege get copied on the emails?
The magistrate and district court had no problem with these deficiencies, but the Court of Appeals sure did. In response, BDO said that the factual underpinning to these emails was provided in its position statement. The Court responded, "This argument is unpersuasive." The position statement is not a fact to which a person testifies. There were no affidavits provided by BDO.

Bottom line is that the Court says BDO did not prove its prima facie case of attorney-client privilege as to many log entries. The Court also notes that, on remand, it appears that an in camera inspection of the documents will be necessary.

The case also involved a protective order granted to BDO prohibiting the EEOC from communicating with Bower or other BDO employees about conversations with counsel; requiring the EEOC to disclose the names of BDO employees and the substance of discussions about conversations with counsel; requiring produce notes of those conversations; and destructions of any notes or documents that were created as a result of reviewing the documents; The Court agreed that this order was based on the magistrate's misunderstanding of the law of privilege. So back the case goes for a analysis of the protective order under the correct standard.

Causal Connection. *EEOC v. Emcare, Inc.,* 857 F.3d 678 (5th Cir. 2017). This appeal comes from a trial verdict for the EEOC, finding that Emcare fired three employees in retaliation for complaining of sexual harassment. What was the harassment? Persistent sexual remarks and gestures by a CEO that ultimately led him to saying this about a 15 year girl who came to "Bring Your Child to Work Day": "There is no way she is 15 with breasts like that." And, of course, he did that in the kid's presence. When the mother got upset, he laughed. Three employees complained about the guy and within two months, they had all been fired. Surely, this was mere coincidence. When the case got to trial, numerous witnesses testified how offensive this guy was. And the jury agreed.

Emcare appealed just one of those cases, claiming that there was no evidence that the person who fired one of the employees, Trahan, had any idea about the CEO's conduct. The Court says no way, there is adequate information.

First of all, there was testimony that the purported decision-maker, Richardson, had personally observed the perp's harassment. So the jury could conclude that he had knowledge and still had taken no action.

The court also noted that Trahan testified that whenever he complained, his boss (the perp) would criticize him, always without being able to offer specifics. This would lead to the inference that the perp know about the complaints. Richardson was a supervisor in the same division as the perp, leading to a conclusion he probably knew as well. The jury could also infer that Trahan's boss, Thornton, who met with Richardson to discuss Trahan's performance and termination would have discussed the harassment allegations Trahan made.

And finally, there was information that Richardson and Thornton jointly made the termination decision, rendering Thornton's unquestioned knowledge an appropriate consideration. A decision-maker is one who actually made the decision or caused it to be made. And Thornton clearly is the one who ordered the audit that was used as the grounds to terminate Trahan. She was also present for the firing. And she entered it into their system when she was personally involved.

So plenty of information to support a causal connection between the complaint and the termination.

Can They Read? *Heath v. Southern University*, 850 F.3d 731 (5th Cir. 2017). Those who have heard me at past seminars may recall that I have often suggested that federal judges be required to read the important employment law precedents and be tested to ensure they actually understand them. If that had happened, this case would never have gotten to the Fifth Circuit.

The lawsuit is by a university professor (strike one for the Courts), raising claims of harassment on the basis of sex, national origin, race, and religion under Title VII and 1983 (strike two). The case was thrown out because, in the lower court's view, the case was cut off 300 days before the EEOC charge. The Court ruled similarly on the 1983 claim. In making this decision, the lower court judge did not even mention *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Instead, it based its opinion on pre-*Morgan* case law saying that a plaintiff may not base a suit on individual acts that took place outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran.

Morgan took a different approach, holding hostile environment cases are deemed to be continuing violations if one act contributing to the claim occurs within the filing period. That means that the cases the magistrate relied on have been overruled by the top dogs of the court hierarchy. There is no "should have filed earlier" rule any longer.

OK, so clearly the magistrate judge wasn't keeping up on the case law. I mean the case had only been on the books for 14 years and it is only from the Supreme Court. And the magistrate made another significant error, ruling that it was significant that another female had not suffered similar discrimination. As the Court reaffirms, "there is no token exception to anti-discrimination law."

Back this case goes to the magistrate. Wonder if she will read *Morgan* now. I do remember the tale of a judge who would get reversed and make a big show of throwing the decision away, saying "they can reverse me, but they cannot make me read it." Sigh!

When is a Supervisor not a Supervisor? *Morrow v. Kroger Ltd. Partnership*, 2017 WL 1013072 (5th Cir., March 14, 2017). Two women filed suit against their manager, claiming he had sexually harassed them and Kroger was responsible since the perp was their supervisor. Kroger investigated and gave the guy (ironically the head of the meat market) a "constructive advice" for his actions. Kroger also gave the women the choice between transferring to another department or store or remaining in place.

This case is one of a series of cases showing how hard it is to get courts to find that a supervisor is really a supervisor. Here, the faux supervisor did the following acts: filed out performance evaluations, handled scheduling; boasted that he could influence who was hired into his department, was consulted about hiring decision, and may have had a close relationship with the store manager. But is he a supervisor? No way, says the Court. That evidence does not show that the faux supervisor had authority to cause a tangible employment action as required under

Vance v. Ball State Univ., 133 S.Ct. 2434, 2443 (2013). So not even an issue of fact about whether this faux supervisor's admission was accurate. Case closed.

This result causes one to ponder filing claims for sexual harassment, not under the *Faragher/Ellerth* model, but the negligence model. Under that approach, the employer is liable if Kroger knew or should have known and failed to take prompt remedial action. Until a more common sense approach comes from the Courts, this may be the only way to go in lots of cases.

Reasonable Accommodation? Not. *Moss v. Harris County Constable, Precinct One*, 851 F.3d 413 (5th Cir. 2017). Just in case anyone is in the dark about this, the Fifth Circuit does not believe that an unlimited request for leave can be a reasonable accommodation. "[T]aking leave without a specified date to return or, in this case, with the intent of never returning is not a reasonable accommodation."

So Moss, whose FMLA leave ran out when he was still not ready to return for months is not "qualified" for the job and thus his claim that his dismissal violated the ADA is slapped down. And while Moss also said he could have done a light duty job, he presented no evidence that such a job was available or that he could have done it, if it was.

Arbitration. *Salas v. GE Oil & Gas***,** 847 F.3d 278 (5th Cir. 2017). Salas filed a claim against GE and GE responded with a motion to compel arbitration. Salas had signed an arbitration agreement with Dresser, GE's predecessor. And when GE took over, the company instituted a dispute resolution system that forced an employee to agree to arbitration or forfeit their job.

In December 2014, the judge granted the motion to compel arbitration. But then nothing happened with the arbitration. The opinion says each party blamed the other for the delay. In February 2016, the plaintiff moved to compel arbitration, which GE said was redundant. But on March 30, 2016, the judge withdrew the earlier order and reopened the case, noting that the parties had failed to arbitrate.

The Fifth Circuit rules that the district judge did not have the power to reopen the case. Although noting that a judge does retain ancillary authority after compelling arbitration and dismissing the case, that authority is narrow. And the district court's order went beyond that authority. So while a court can determine whether the agreement to arbitrate was valid and enforce the decision reached in arbitration, it had no jurisdiction to reopen the case.

And while a party can sometimes be found to waive arbitration if it "substantially invokes the judicial process," the defendant here did not invoke the judicial process at all. So no way no how can Salas get relief.

BTW, isn't arbitration sold as quicker than litigation? Hmmm.

Fees Slashed. *Saldivar v. Austin Ind. School Dist.*, 675 Fed. App'x 429 (5th Cir., Jan. 11, 2017).

It is painful for a plaintiff's lawyer to read a case like this. This case started off as an age discrimination and FLSA case. The judge threw out the age claims and a jury then found the plaintiff due 80 hours of overtime. Total award was a little over $2,100.

When it came to fees, the case took a second sad turn. The plaintiff sought $172,000 in fees at a rate of $350 per hour. In response, the defendant did not contest the hourly rate or that fees were due. It said, whoa, this is over the top. And ultimately the district court agreed, slashing the award to $29,000 based on Saldivar's limited success and an analysis of fee awards in similar cases.

The Fifth Circuit affirms that award. The starting point, the Court says, is the lodestar – the reasonable hourly rate times the reasonable hours spent. There is a strong presumption that the lodestar amount is a reasonable fee, but the court can adjust based on a number of factors. The "most critical factor" is "the degree of success obtained." And here, the degree of success would have to be analyzed by the fact that the main claim was dismissed before trial.

Saldivar claimed that the district court's decision impermissibly imposed a strict proportionality requirement, which the Court rejected in *Combs v. City of Huntington*, 829 F.3d 388, 398 (5th Cir. 2016). After all, the district court's opinion mentions that the award sought was 79 times the damages received. But the Court rejects this, saying the district court even recognized this would be error and entered an award more than 13 times the actual damages.

Saldivar also claims that the district court improperly focused only on only one *Johnson* factor, degree of success. Again, the Court rejects this, The Court says the district court looked at the fees awarded in similar cases, which was entirely appropriate.

Perhaps the main lesson here is that judges really expect plaintiffs to exercise billing judgment and, when they feel that is not being done, they react poorly.

The Devil Is In The Details. *Seibert v. Jackson County*, 851 F.3d 430 (5th Cir. 2017). This case is truly a cautionary tale about how failure to dot I's and cross T's really can screw up a case. The underlying facts are disturbing and indicate gross sexual harassment by a sheriff of a subordinate. The sheriff was eventually removed from office.

When the plaintiff went to trial against Jackson County for this sheriff's sexual harassment, the jury found against her. However, the plaintiff got a verdict on intentional infliction of emotional distress against the former sheriff individually.

This led to two JMOLs. One by the bad sheriff arguing that if there was a negative jury verdict against the county, there had to be one against him as well. The plaintiff had the opposite view, that the evidence was so strongly in her favor that the jury could not reach the opposite conclusion.

Ultimately, the district judge granted JMOL to the bad sheriff and denied it to the plaintiff. His rationale for granting the sheriff's motion was that, if there was a finding of no sexual

harassment, there could be no intentional infliction. The Fifth Circuit rejects this, pointing out that this analysis violates Rule 50. That rule requires a judge to look at all the evidence and grant the motion only if "there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." The judge didn't analyze the case looking at all the evidence. Instead, it threw out all the sexual harassment evidence and only dealt with non-sexual harassment. This was reversible error.

As to the plaintiff, however, the Court notes that she never asked for JMOL before the case went to the jury. While the plaintiff said this should be excused, the Court noted that she had not presented evidence of the kind of narrow non-compliance that is excused. Accordingly, the decision was reviewed under a plain error standard, which means that the bad guy needed to show only that there was some evidence to support the jury's verdict. Since the bad sheriff had taken the stand and denied everything, this was enough to justify a denial of the JMOL. This same evidence was also enough to deny her motion for new trial on this claim. Only if there is "an absolute absence of evidence" to support a jury verdict is a new trial mandated.

Seibert also appealed the district court's grant of summary judgment on her quid pro quo sexual harassment claim. The district court ruled that she had waived this by failing to include this claim in her pre-trial order. The Court of Appeals agrees.

Res Judicata. *Welsh v. Ft. Bend Independent School Dist.*, 2017 WL 2684490 (5th Cir., June 22, 2017). Welsh is a teacher who sued Ft. Bend ISD for discrimination under Title VII and the ADEA – twice. So here's what happened. Welsh filed a charge in 2012, which she amended in 2014. She got a right to sue in August and she filed a state court lawsuit the following month. A state court judge dismissed the case in January 2015. Later that same month, Welsh was back at the EEOC, alleging discrimination and retaliation for incidents occurring between April and December of 2014. In May 2015, she filed this lawsuit in federal court. The district court threw out all her claims based on res judicata. This appeal says some of those claims have a new chance.

The reason? There were claims in Welsh II that were not mature at the time of filing of Welsh I. Texas has refused to apply res judicata to claims that were not yet mature at the time of the first lawsuit. The Court also noted that Texas compulsory counterclaim rule requires that a party assert as a counterclaim any action arising out of the same transaction so long as the action is mature at the time of filing the pleading. But if the claim matures after the filing of the pleading, it is a permissive counterclaim only. Accordingly, the case goes back to the district court.

That's it from the Fifth Circuit for my part. Other speakers are covering retaliation cases, as well as GLBT issues, and the NLRB.

But I also wanted to share a few interesting cases from the other Courts of Appeals.

Disparate Impact and the ADEA. *Karlo v. Pittsburgh Glass Works, L.L.C.***,** 849 F.3d 61 (3d Cir. 2017). In this case, the Third Circuit creates a circuit split and declares that ADEA disparate impact cases can allege discrimination against a subset of the protected class – here employees

over 50.

The case starts with a RIF in 2009, which was not exactly a model for such things. As the Court opinion explains, Individual unit directors had broad discretion in selecting whom to terminate. PGW did not train those directors in how to implement the RIF. Nor did PGW employ any written guidelines or policies, conduct any disparate-impact analysis, review prospective RIF terminees with counsel, or document why any particular employee was selected for inclusion in the RIF."

The plaintiffs were all over 50 and claimed to be disparately impacted by the RIF. The question presented is whether so called "subgroup" disparate impact claims are allowed under the ADEA. This Court emphatically says yes.

The Court's analysis begins with a case decided twenty years ago, *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In that case, a 56 year old had been replaced by someone over 40. The Fourth Circuit held that a prima facie case under the ADEA required the plaintiff to show he was replaced by someone under 40. But the Supreme Court disagreed, holding that the ADEA

> does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*

The Court also noted that the proposed limitation of the prima facie case to require a replacement be under forty has no "logical connection" to the plain language of the ADEA. After all, the point of the ADEA was to protect relatively older workers from discrimination that works to the advantage of the relatively young.

Fast forward twenty years to *Karlo*, where the defense was that the plaintiffs had no case because, if you lumped everyone in the age protected class together, no disparate impact could be shown. The Court says, hey wait a minute, look at *O'Connor*.

> The Supreme Court's reasoning ineluctably leads to our conclusion that subgroup claims are cognizable. Simply put, evidence that a policy disfavors employees older than fifty is probative of the relevant statutory question: whether the policy creates a disparate impact "because of such individual[s'] age." Requiring the comparison group to include employees in their forties has no "logical connection" to that prohibition.

(citations omitted).

The Court also points out that *Connecticut v. Teal*, 457 U.S. 440 (1982), also supports this decision. That Title VII disparate impact case confirms that a disparate impact case is designed to protect the rights of individual employees not the rights of a class as a whole. In *Teal*, the

focus was on a testing protocol for promotions. First, there was a written test. Then, if you passed the test, you went into the promotional pool.

The plaintiffs in *Teal* had not passed the test, but the state defended by saying that, at the second stage of the process, blacks who passed the test were given preferential treatment through an affirmative action program. But the Court rejected that, saying that favorable treatment of some members of the racial group did not justify discrimination against others.

> The same reasoning applies to this case. The ADEA "does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons" aged forty or older were preferred. "That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory."

(citations omitted). Further, the Court notes that mandating a forty-and-older comparison group would green light neutral policies that have a serious disparate impact on those over 50 so long as those under 50 receive favorable treatment. If no intra-age group protection were provided by the ADEA, then the statute would be cold comfort to anyone in the upper ages of the protected class.

The Court points out that other Circuits have seen it differently but that two of the three circuit decisions predate *O'Connor* and contradict it. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989); *Smith v. Tenn. Valley Auth.*, 924 F.3d 1059 (6th Cir. 1991). The third, *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999), contradicts *Teal*.

Accommodation or Not? *Equal Employment Opportunity Commission v St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016). This is a reasonable accommodation case where the Court says that, when assignment to another position is at issue, the employer can require the person to compete for the job with other applicants.

> This case does not involve a seniority system or a civil service system, but a best-qualified applicant policy. Nevertheless, *Barnett*'s framework is instructive in this context. Requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable "in the run of cases." As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance. In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients.

842 F.3d at 1347.

The defendant only gave the woman 30 days to find another job, which the EEOC said should have been an issue for a jury to consider. But the Court rejected that, saying that the employer

offered to extend the time for any jobs for which she was being considered and also did not prohibit her from applying after her termination. As such, the thirty day time period was "reasonable as a matter of law."

Gender Discrimination. *Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016). This case presents a very common scenario. A woman has been doing well on the job for a long time, here 10 years, and then a new boss of the office arrives. The first interaction between the two went this way. He asked, "Who are you? And "what do you do for me? After she answered, he turned around and left without saying another word. A male employee who witnessed it called it demeaning and said he had never been asked that. Within a week, most of the woman's job is removed and given to males. She finds herself with very little to do. And the big boss treats her rudely and brings a baseball bat along every time he talks to her – even pounding it on her desk at one point. When she tried to talk to him about her duties, he again turned around and left.

Further, the big boss's excuse for removing duties was that he wanted to foster leadership in the males that got the duties. But what about her? Why did he view the woman as incapable of leadership even when she had demonstrated that ability for ten years?

The truly sad thing to me is that the case was thrown out by a female judge. That always astounds me. Here the district judge said that Burns could not show that the conduct was because of her sex. The defendant also says she could not show an adverse employment action. The Court of Appeals disagrees on both points.

Regarding the adverse employment action,

> The reduction transferred seventy-five percent of her responsibilities to others and replaced a system she had in part designed. In these circumstances, a reduction from duties of such importance as those outlined here to performing clerical work is material. Indeed, such changes are more dramatic than those that were accepted as an adverse action in *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980). There, the Second Circuit found a transfer of an art teacher from a junior high school to an elementary school to be an adverse action despite no change in salary, workload, or general subject taught, where the plaintiff previously spent many years teaching junior high school students and had graduate degrees in adolescent art education programs.

As to whether the big boss targeted Burns because of her gender, the defendant said he didn't use any slurs. The Court was not impressed:

> The idea that discrimination consists only of blatantly sexist acts and remarks was long ago rejected by the Supreme Court. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion), superseded in part by statute, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071. As this circuit has repeatedly held, stereotyping, cognitive bias, and certain other "more subtle cognitive phenomena which can skew perceptions and judgments" also fall within

> the ambit of Title VII's prohibition on sex discrimination.

In addition to many hostile encounters (the defendant admits the man made comments that "were, frankly, tone deaf" and asked questions that were "awkwardly phrased."), the guy admitted his bias. He admitted removing her duties to give more "leadership" to the male employees.

When it came time to analyze the sex harassment claim, again the Court was not impressed. The district judge said the operative standard was whether the conduct was "severe and pervasive." No, that's not the standard. So that part of the case was reversed as well.

Total Shocker. *Ernst v. City of Chicago,* 837 F.3d 788 (7th Cir. 2016). This case would have to be included because it ain't often that two defense verdicts are reversed. But it is also an important case that considers the validity of physical skills tests.

The case started with five experienced female paramedics suing the City of Chicago when they lost out on City firefighter paramedic jobs because they failed the physical skills entrance exams. But while they lost a bench trial on their disparate impact claim and a jury trial on their disparate treatment claim, the Court of Appeals reverses both.

A clear jury instruction error required the reversal of the jury verdict. But in looking at the standards themselves, we see a panel that obviously rolled up its sleeves and dug into the details of what makes a physical skill test proper. First off, there are federal regulations that address this. 29 C.F.R. 1607.14(B). Secondly, there is the ultimate issue: what skills does a person really need to do the job.

> We recognize that, in itself, there is nothing unfair about women characteristically obtaining lower physical-skills scores than men. But the law clearly requires that this difference in score must correlate with a difference in job performance. To guard against this unfairness, the law requires that the physical exam must validly test job-related skills. We recognize that, if men and women have adequate physical skills together, patients can benefit from coed paramedic teams. The minimum requirement is adequacy, not superiority. *See Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286, 287 (3d Cir.2002) (affirming that, in a disparate-impact claim, "a discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job"). Perhaps mixed-gender teams could offer patients a more diverse combination of physical and psychological care than single-gender teams. A female paramedic might fit into a space where a male paramedic does not; a female victim might be helped by having a female paramedic on the team. And in this case, the validated testing of job-related skills simply is not there: it is not enough to show a strong correlation between two tests that Chicago *805 created concurrently. To validate the other test, at least one test must itself be a valid measure of job skills

837 F.3d at 804-05. In this day and age where the supposed benefits of deregulation are constantly touted, I could not help but think about how poorly women would fare in these kinds of jobs if we removed from the books the carefully crafted regulations that are designed to ensure that physical skills test do not end up excluding women from the workplace who can actually do the job.

No Magic Words Required. *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016). This is a disability case where the question presented is whether the plaintiff had requested a reasonable accommodation when she had explained to her boss that she needed four months physical therapy before she could complete her basic life support certification.

After Trinity got notice that more time was needed, it fired the plaintiff saying that she could not perform one of the essential functions of the respiratory tech position. But it did not engage in the interactive process to see if there was an accommodation that would work.

The district court tossed the case, saying that the plaintiff had never asked for a reasonable accommodation. After all, the plaintiff admittedly did not ever say "I need a reasonable accommodation." But the Court of Appeals saw things differently:

> When Kowitz advised her supervisor that she would be unable to complete the physical requirements of her basic life support certification until she had done four months of physical therapy, she was not required to "formally invoke the magic words 'reasonable accommodation' " to transform that notification into a request for accommodation. Viewed in context, Kowitz's written notification that she would be unable to complete the basic life support certification without medical clearance, and her statement that she required four months of physical therapy before completing the certification, could readily have been understood to constitute a request for a reasonable accommodation of her condition

839 F.3d at 748 (citations omitted). The Court said that the plaintiff's statement needed to be viewed in context, which was the employer's knowledge of her condition and its knowledge of her limitations. The determination of whether the plaintiff really asked for accommodation "is not limited to the precise words spoken by the employee at the time of the request." *Id.*

This was not, however, a unanimous opinion. In the view of one panel member, "By eliminating the requirement of a clear request for accommodation that is distinct from notice of disability, the court generates regrettable uncertainty." 839 F.3d at 750.

Honest Belief? *DeJesus v. WP Co., LLC*, 841 F.3d 527 (D.C. Cir. 2016). This case has two big takeaways. First, even statements that seem benign at first blush can be evidence of discrimination. Second, just saying you have an "honest belief" is not enough.

The plaintiff was a long-time employee who, according to the defendant, was terminated for willful neglect of duty and insubordination. Interestingly enough, that misconduct involved him complying with orders he had been given by the defendant. But I digress.

When the case went to Court, the defendant said, look, we had a reasonable belief that he wilfully neglected duty and was insubordinate. And the district court agreed. But the Court of Appeals said no so fast. The decision-makers belief must be both "honest and reasonable." 841 F.3d at 534.

> [T]he factfinder is tasked with evaluating the reasonableness of the decisionmaker's *belief* because honesty and reasonableness are linked: a belief may be so unreasonable that a factfinder could suspect it was not honestly held. Here...the supervisor's immediate response did not even hint at any irretrievable misstep, a jury could find Wainwright's interpretation of the events—that this was insubordination, not mere miscommunication—so unreasonable that it provokes suspicion of mendacity. In other words, the jury might hear Wainwright's explanation and think: "she doesn't really believe that."

Id. The Court also pointed out that characterizations in the termination memo were ones that the jury could find "misleading, even mendacious." *Id.* While claiming that the plaintiff did not follow her instructions, the evidence also would allow a jury to believe the decision-maker deliberately exaggerated the plaintiff's purported mistake in an effort to manufacture cause to terminate him. Yes, there was evidence on the other side of the scale, but, at the summary judgment stage, the evidence is viewed in the light most favorable to the non-movant plaintiff.

The Court also discussed the evidence of discrimination presented by the plaintiff. Here too there is good language for plaintiffs. First, the Court says some of the comments – like complimenting the plaintiff for "speaking well," dismissing a black client as "opinionated" and describing both the client and the plaintiff as "not a good fit," were "susceptible to being interpreted as race-inflected code." 841 F.3d at 536.

Then the Court discusses the evidence submitted by other black employees about this supervisor's bias.

> It may be argued that these statements and attitudes are immaterial because they do not concern the employment decision—termination—in controversy. "Although we have found that an isolated race-based remark unrelated to the relevant employment decision could not, without more, permit a jury to infer discrimination, we have not categorically labeled such comments immaterial." *Morris*, 825 F.3d at 669–70 (citation omitted). Indeed, a reasonable jury could treat evidence of a decisionmaker's broad-based racial animus or bias as corroborating evidence that such animus or bias infected a particular employment decision; it is not unreasonable to doubt that an employer quarantines her animus or bias to day-to-day treatment of colleagues, away from decisions about hiring, or promotion, or termination. Wainwright's comments and attitude bear on the central question in this case: were Wainwright's employment decisions motivated by race?

Id.

How Not to Accommodate. *EEOC v. Consol Energy, Inc*., 860 F.3d 131 (4th Cir. 2017). Some things seem like common sense to me but then I find a case where people have fought about them for years. This is such a case. It involves a coal miner, Beverly Butcher, who had been a good employees for decades. But he is also an evangelical Christian and this caused him to object when his employer wanted to use biometric scanning to keep track of his work hours.

Butcher believed that undergoing biometric scanning could lead to his identification with the Antichrist. The manufacturer of the scanner had a different view, but that didn't convince Butcher. Finally, Butcher retired because Consol would not accommodate his religious beliefs. Here's the rub. At about the same time that they gave Butcher the bum's rush, Consol was providing an accommodation to other employees that allowed them to bypass the new scanner. According to Consol's own trial witness, this accommodation imposed no additional cost or burden on the company, and allowing Butcher to use the keypad procedure would have been similarly cost-free. Wow.
After losing at trial, Consol tried and failed to get JMOL. And then it appealed – also a losing effort. As the Court explained, Consol thought it was enough to say that Butcher's religious beliefs, although sincere, were mistaken. After all, his own pastor disagreed with him. But, as the Court points out, that is not the employer's role. "It is not Consol's place as an employer, nor ours as a court, to question the correctness or even the plausibility of Butcher's religious understandings."

The only bad news in the opinion is the failure of the Court to recognize that these facts should give rise to punitive damages. Even though others were given the exact accommodation that was denied on religious grounds, that was not enough. "Nor, given Consol's efforts to accommodate Butcher, is this the kind of case in which employer conduct is so "egregious" that by itself it is evidence of reckless indifference to Title VII rights." The Court tells us again that cases where punitive damages are considered appropriate are few and far between.