FEDERAL UPDATE

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I am happy to present a wrap up of important cases in 2019.

First, Let's Hear from the Supremes:

Read 'Em and Weep. *Mt. Lemmon Fire Dist. v. Guido,* 139 S.Ct. 22 (2018). A small fire department in Arizona fired its two oldest workers. When those workers sued, the fire department said they were too small to be covered by the ADEA. A unanimous Supreme Court says no way, no how.

It all boils down to the statutory language of the ADEA. When first adopted, the ADEA did not cover governmental entities but, after that changed, the statute's definition of employer was as follows:

> "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees.... The term *also* means (1) any agent of such a person, and (2) a State or political subdivision of a State...."

(emphasis supplied). Seems pretty straightforward to me, but the case includes a section explaining that "also" is "additive rather than clarifying."

The fire department asked the Court to interpret the ADEA the same way as Title VII, which requires governmental entities to have the requisite number of employees before they are subject to liability. The problem is that, when Title VII was amended to add governmental entitles, the language was quite different and that accounts for the different result.

I have not looked at the legislative history to see if there is any reason for this difference or just sloppy draftsmanship but, for me, the real lesson of this case is never count Guido out.

Which Law Governs? *Parker Drilling Mgmt. Sys., Inc. v. Newton,* 139 S.Ct. 1881 (2019). Here is another statutory construction case and another unanimous decision. It's good to see that they can agree on how to read the law – at least sometimes.

Here the issue is what law governs the Outer Continental Shelf. You are probably on the edge of your seat by now. The plaintiff, Mr. Newton, worked on a drilling platform on the Outer Continental Shelf. He worked 14 days straight, with 12 hours on and 12 hours on standby. Because he couldn't leave the worksite during his standby time, he and others sued, alleging that California state law required them to be compensated during their off hours.

The issue presented is statutory language that state laws be adopted as federal law on the Outer Continental Shelf "[t]o the extent that they are applicable and not inconsistent" with other federal law. Does this mean, as Newton claims, that the state law need only cover the same subject matter and that state law was "not inconsistent" with federal law because it was not "incompatible, incongruous, [or] inharmonious" with federal wage and hour law, but rather just provided great protection? To the Court, this may be a "close case" but not one that comes out in the workers' favor.

> Because federal law is the only law on the OCS, and there has never been overlapping state and federal jurisdiction there, the statute's reference to "not inconsistent" state laws does not present the ordinary question in pre-emption cases—*i.e.*, whether a conflict exists between federal and state law. Instead, the question is whether federal law has already addressed the relevant issue; if so, state law addressing the same issue would necessarily be inconsistent with existing federal law and cannot be adopted as surrogate federal law. Put another way, to the extent federal law applies to a particular issue, state law is inapplicable.

As the Court says elsewhere, "All law on the OCS is federal, and state law serves a supporting role, to be adopted only where there is a gap in federal law's coverage."

Charge Process Ain't Jurisdictional. *Davis v. Ft. Bend County*, 139 S.Ct. 1843 (2019). This is a Texas case that finds that the charge filing process requirement in Title VII is not jurisdictional. This ended up benefitting the plaintiff who had filed a charge against her employer for sexual harassment and retaliation yet then found herself out of a job because she failed to come to work on a Sunday because of a church event. She tried to amend her charge by writing "religion" on an intake questionnaire but never amended the charge itself.

When she filed the case, she raised religion and retaliation for reporting harassment. No jurisdictional challenge was made. The case proceeded to a summary judgment, which the Fifth Circuit reversed as to religious discrimination. When the case returned to district court, Ft. Bend claimed for the first time that the Court lacked jurisdiction to hear the case because the plaintiff had not exhausted administrative remedies. The district court agreed and the Fifth Circuit reversed. The Supremes affirmed. Once again in a unanimous opinion, the Court said that the charge filing process is not jurisdictional.

The Court first explained that it has made a distinction between claim-processing rules and jurisdictional prescription. It recited a number of mandatory claim-processing rules that have been declared non-jurisdictional and then explained that unless Congress clearly states that a prescription is jurisdictional, courts should treat it as non-jurisdictional. Here, Title VII charge-filing provisions "speak to ... a party's procedural obligations." Ft. Bend tried to win the day by focusing on the importance of the congressional purposes embodied in the charge-filing scheme, including encouragement of conciliation of disputes and letting the EEOC have first dibs at filing a lawsuit, but the Court was having none of it. As the Court put it,

> a prescription does not become jurisdictional whenever it "promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169, n. 9, 130 S.Ct. 1237. And recognizing that the charge-filing requirement is nonjurisdictional gives plaintiffs scant incentive to skirt the instruction. Defendants, after all, have good reason promptly to raise an objection that may rid them of the lawsuit filed against them. A Title VII complainant would be foolhardy consciously to take the risk that the employer would forgo a potentially dispositive

defense.

> In sum, a rule may be mandatory without being jurisdictional, and Title VII's charge-filing requirement fits that bill.

While this is a victory for the plaintiff, it ain't a huge victory for the very reason the Court explains. But it did help at least one person.

Then from the Fifth Circuit

Go Back to Where You Came From. *Cicalese v. UTMB,* 924 F.3d 762 (5th Cir. 2019). Two Italian scientists brought this case to challenge their treatment at UTMB, which they contend is based on their national origin. After all, they point out they were told, "What are you doing here?" "You should go back to Italy." And that was not all. Stupidity was referred to as "an Italian thing." And they suffered adverse action as well – the wife was demoted, had her pay cut, and was forced to stop her own research. The husband found his salary cut, his work restricted, and his work and himself demeaned. After all that, the case was dismissed under 12(b)(6).

Say what? Was the problem that the judge could not envision that Italians would be subjected to such treatment? Hard to say but the bottom line is that the judge held the plaintiffs to an improper pleading standard. Never mind that the Supreme Court weighed in on this 17 years ago and said there was no heightened pleading standard for discrimination cases. Here the problem, according to the district judge, was that the plaintiffs had failed to plead a plausible national origin discrimination case. What was the problem? It seems to be that the Court confused the *Iqbal/Twombly* standard with the *McDonnell Douglas* standard.

The Fifth Circuit again explains that a Title VII complaint must only identify (1) an adverse action (2) taken against the plaintiff because of protected activity. Here, at the pleading stage, the district court inappropriately subjected the plaintiff's allegations to a rigorous evidentiary analysis under *McDonnell Dougas*. The district court wanted them to identify similarly situated non-Italian employees treated differently and also categorized the remarks made about the couple as "stray remarks." The district judge even faulted them for failing to say when and how many times derogatory comments were made.

But at this stage of the proceeding, a plaintiff must only "plausibly alleged facts going to the ultimate elements" and they "surmounted that lower bar."

A Successful Strategy. *Clark v. Charter Communications, L.L.C.* 2019 WL2537395 (5th Cir. June 19, 2019). This is yet another case showing how powerful it can be for a defendant to cooperate when a plaintiff needs accommodation. Here the plaintiff has narcolepsy and, rather than firing her after she fell asleep in a training session, it allowed her to take time to get medical tests, which uncovered the problem. Then when she fell asleep on the job, again she was not fired. Instead, they took her off night duty, allowed additional breaks, and said she could take two days a month for medical treatments. After she exhausted FMLA leave, they allowed her to take an unpaid leave of absence to address her narcolepsy. Then, when she returned, they agreed to her request for a 15 minute break every two hours.

When the case got to court, the plaintiff made claims of disability discrimination, failure to accommodate, retaliation and disability harassment. The district court granted summary judgment on all and the Fifth Circuit affirmed.

In appealing dismissal of the disability discrimination and failure to accommodate claims, the plaintiff made a difficult claim – that staying awake was not an essential job function. According to the Court, she offered no supporting evidence. For the retaliation claim, the Court felt she had not shown any adverse action and for the disability harassment claim, that the harassment was just not enough.

At the end of the day, I cannot help but wonder if all the help the defendant had offered allowed them to win the day because it affected the prism through which the facts were viewed.

Walk a Mile in My Shoes. *Peterson v. Linear Control, Inc.,* 757 Fed. Appx. 370 (5th Cir., Feb. 6, 2019). The plaintiff was on a team of workers that was half black and half white. He alleged that for 10 days in July, his employer had the black workers toiling outside and the white workers inside in the air conditioning. This case basically says, well, he was there for a long time so this was just a small part of his employment and working outside was part of his job description. OK, but it was in July and we all know what that means. Add to that the plaintiff says he was

one of four late for a safety meeting and the only one written up. Add to that his supervisor was heard to say "F_ _ _ that N _ _ _ _ _" when speaking on the plaintiff.

When you add all that together, you should have a trial on racial harassment. But no. The Court segregates each factor, in direct violation of Fifth Circuit precedent and says that taken individually each piece of evidence is not enough. But that's not the way the analysis is supposed to work. The facts are to be viewed in the light most favorable to the non-movant. As the Third Circuit said many years ago, in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (1990), "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." 895 F.2d at 1484.

Think what would happen if this opinion's "logic" were used in sexual harassment cases. The victim has been there for 10 years and the harassment only started in her 7th year, so it's not cognizable.

This case is just chock full of errors and serves as a reminder that the Court often does not follow its own precedent. It doesn't even follow Supreme Court precedent. Here, the Court says that the plaintiff cannot show "his job performance or career outlook were affected." 757 Fed. Appx. at 375. Sounds like the standard rejected in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). i.e., 26 years ago. Remember that law clerks shape a lot of these opinions. We need to walk them through the law as it really is.

Failure to Dot i's and Cross t's. *Thomas v. Tregre,* 913 F.3d 458 (5th Cir. 2019). Not quite sure why this case was published. Here's what happened. A deputy sheriff and two of his colleagues were charged with excessive force. None were fired but two were transferred from street work to the corrections department after either failing or having an inconclusive polygraph. Thomas quit instead of taking the transfer. After the three were cleared by a trial, Tregre reassigned one of the guys (the other had not been transferred in the first place because his polygraph judged him as truthful) and gave him back pay. Thomas did not apply to go back to work. Instead, he filed a complaint with the EEOC. He never applied for reinstatement. The closest he got was that his lawyers sent Tregre a settlement agreement that had Thomas being reinstated and receiving back pay. That was a

big mistake. If you are going to claim you want reinstatement, it turns out you should ask for it.

Thomas accused Tregre of race discrimination because the white man was never transferred. But, of course, he was the one cleared by the polygraph. Perhaps unsurprisingly, the Court found the two men were not similarly situated. Thomas also accused Tregre of race discrimination for believing the testimony of the criminal defendant as to which officers used excessive force, but again does not explain how believing the criminal defendant could be race discrimination in a case where there were conflicting stories about what happened, not to mention conflicting polygraph results.

Sad Development. *Ryerson v. Berryhill,* 2019 WL 2427247 (5th Cir., June 10, 2019). I know I should not be surprised, but I was surprised to see this case where a white IRS employee blamed the magistrate's decision on racial bias. The magistrate is African-American and supposedly her "racial heritage would prejudice her against Ryerson." No evidence was proffered, of course, but it is a sign of the times, I suppose.

Too Clever By Half. *Thompson v. Dallas City Attorney's Office,* 913 F.3d 464 (5th Cir. 2019). The plaintiff filed lawsuits challenging workplace harassment, discrimination and retaliation because of "race, color, sex or age." She filed in both state court using state law and federal court using federal law. In state court, her case was dismissed as time barred. The defendant then took that order and asked for the federal case to be dismissed on res judicata grounds. The district court agreed and so did the Fifth Circuit.

The plaintiff argued that prior Fifth Circuit authority precluded the court's ability to dismiss the federal claim. The state court case, after all, was dismissed on limitations grounds, not on the merits. And a 1981 Fifth Circuit case, *Henson v. Columbus Bank & Trust Co.*, 651 F.3d 320 (5th Cir. 1981), said no can do. But the Court says not so fast. *Henson* was at odds with Supreme Court precedent at the time it was issued and at odds with Supreme Court precedent that followed its issuance. Those cases say federal court must look to state law to see if a state court judgment is entitled to preclusive effect. Not only that, but there were a string of Fifth Circuit cases saying the same thing.

Texas res judicata doctrine requires that the prior judgment be "on the merits," between the same parties, and the same claims were or could have been raised in the second. Only the first element was contested, so the question is whether a judgment on limitations grounds is "on the merits." "It was," says the Court. It was a summary judgment and prior authority said that summary judgments were entitled to res judicata.

The most important point of this case – at least to me – is that it is a mistake to prosecute the same case in both state and federal court. As this court notes, no good can come of it.

Reinstatement. *Bogan v. MTD Consumer Group*, 919 F.3d 332 (5th Cir. 2019). This is a painful case to read since the plaintiff won but received only one dollar because of a failure to mitigate. Post trial, the judge took that away and further ruled against reinstatement, "leaving her with no remedy."

The Fifth Circuit saw the case differently. It said that two of the reasons used to deny reinstatement were off the mark.

Reinstatement is the preferred equitable remedy under Title VII and, while there may be outlier situations where no equitable remedy is appropriate, in most cases, either reinstatement or front pay should be awarded. The goal, after all, is to make the plaintiff whole.

Let's look at the factors the court used to determine whether or not to reinstate:

1. Position no longer exists
2. Plaintiff was embarking on another career
3. Would have terminated her anyway
4. Discord between parties

The Court acknowledged that the first two weighed against reinstatement, but not the second two. The third factor flies directly in the face of the jury's finding that she was wrongly dismissed. The jury was instructed it had to find for the defendant if the defendant would have terminated her even if it had not considered her race of gender. But it did not.

The final factor – discord between the parties – is, the Court said, problematic because of the source of the discord, which is the lawsuit. Is reinstatement inappropriate because of antagonism between the parties? No, because if it were, no one would ever get reinstated unless the defendant felt like reinstating the plaintiff. Litigation comes with acrimony so, to avoid reinstatement, there has to be some special acrimony that makes the relationship irreparably damaged. That was not shown. What was shown was only that the HR rep was clear that he did not want to reinstate the plaintiff. If that were enough, again, the jury's verdict would be ignored. Always remember that the winner is entitled to be made whole for their injuries.

Harassment in a Nursing Home. *Gardner v. CLC of Pascagoula, LLC,* 915 F.3d 320 (5th Cir. 2019). This is the second opinion in a sexual harassment case in a very challenging setting. The perpetrator was an elderly man in a nursing home diagnosed with dementia and a host of other maladies. The plaintiff is a nursing assistant who had to deal with not only his words, but his persistent assaults. She alleges the nursing home refused to assist her in dealing with this resident and ultimately terminated her when she became rightly upset about it.

Although the Court in prior cases had sided with nursing homes that dealt with this issue, this case crossed the line because it involves not just verbal harassment but multiple assaults. That, the Fifth Circuit says, is just too much to expect. So while summary judgment was granted in this case by the district court who felt this kind of thing was just part of the job, the Court of Appeals reverses.

> We conclude that the evidence of persistent and often physical harassment by J.S. is enough to allow a jury to decide whether a reasonable caregiver on the receiving end of the harassment would have viewed it as sufficiently severe or pervasive even considering the medical condition of the harasser. The frequency and nature of the conduct, along with its effect on Gardner's employment, would allow (but not require) that finding.
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> J.S.'s inappropriate conduct occurred daily. His conduct was far more severe than other residents' and consisted of physical sexual assault

> and violent outbursts. J.S.'s physical assault on Gardner took his behavior outside the realm of a "mere offensive utterance." And his actions interfered with her work performance, leaving Gardner unable to work for three months. A jury could conclude that an objectively reasonable caregiver would not expect a patient to grope her daily, injure her so badly she could not work for three months, and have her complaints met with laughter and dismissal by the administration.

(citations omitted.) The facts of this case show how hard the work of folks who work with dementia patients can be.

Of course, the existence of the harassment alone is not enough for liability. There must be evidence that the employer knew or should have known and failed to take prompt remedial action. Here, there was evidence that management would laugh when the plaintiff raised the issue of her treatment and tell her to get back to work. There was also evidence of the ways in which nursing homes appropriately deal with such situations, including removal of the person from the facility. Notably, this nursing home ultimately removed this patient and sent him to an all-male facility but only after he assaulted another patient. No reason was given for why this sort of action was not taken when many caregivers complained about this man's grossly inappropriate behavior and he had assaulted another resident too. So, this too is a jury question.

Beware of Social Media. *O'Daniel v. Industrial Service,* 922 F.3d 299 (5th Cir. 2019). This is a case involving a woman who claims she was fired for "pro-heterosexual speech." Here's what happened. On her own time, this employee (who by the way worked in HR) posted a picture of a man wearing a dress in the dressing room at Target. Her comments included the following: "For all of you people who don't care which bathroom it's using, you are full of shit." And "Let this try to walk into the bathroom when my daughters are in there." Mind you, one of the owners of the company is a member of the LGBT community so no matter what you think of the post, it's not the brightest thing she could have done.

The co-owner did get very angry and wanted to fire her but apparently was talked out of it. The co-owner set up a call with the plaintiff in which she required her to take sensitivity classes. A few days later, the plaintiff was put under this woman's

supervision. Did I mention the plaintiff never went to the sensitivity classes, citing a variety of excuses?

Things progressed in a bad way with the plaintiff claiming she was being harassed and wanting to file a complaint after she was wrongly reprimanded for job problems and found her schedule changed to conflict with her children's schedule. Then she was dismissed for "unsatisfactory job performance." The plaintiff responded that she felt that she was being discriminated against and retaliated against because she was heterosexual.

The district court dismissed case saying no sexual orientation claim under Title VII. The plaintiff appealed saying that cannot be so AND at least she would reasonably have believed that there was one. The Fifth Circuit affirms.

As you might expect, this case proves the rule that politics makes strange bedfellows. Supporting the plaintiff were the ACLU, Lambda Legal Defense and EEOC. But they were not able to help, as the Court noted that this case would require them to overrule prior circuit precedent, which a panel cannot do.

IMHO and as Judge Haynes says in her concurrence, there is a more fundamental point "Title VII does not grant employees the right to make online rants about gender identify with impunity."

Sex and the Law. *Wittmer v. Phillips 66,* 915 F.3d 328 (5th Cir. 2019). This is an interesting case because the same judge wrote the majority opinion and a concurrence that is more than twice as long as the majority opinion.

The case started with a woman applying for a job with Phillips. And Phillips was interested. So she was interviewed at which point she was asked about her current work. And she did not tell the truth. Said she wanted to leave her current employer because of all the travel she would have to do. Truth be told, she had been fired from the job.

After the interview, Phllips offered plaintiff the job, subject to a background check. The background check revealed she had been dismissed from her last job. When asked about that, the plaintiff admitted her misrepresentation. She said it wasn't a big deal. Phillips disagreed and started the wheels turning to reject her.

At this point, plaintiff sent a scathing email that they were denying her the job because of her transgender status. Phillips withdrew the offer. At this point, I should say that I certainly understand that a person would be inclined to shade the truth when asked a direct question about her employment status in a job interview. But you would expect the person to realize the error and move on. Not so here.

When the case went to Court, Phillips took no position on whether transgender discrimination was covered under Title VII. Instead, it focused on the fact that the plaintiff lied in her interview. The case was thrown out. District court found that her being transsexual had nothing to do with the case. The real issue is that she lost a job because she had not been truthful in her applications and interview and thus could not rebut the employer's reason for the dismissal. But in the course of that opinion, the district court said it presumed that a person could make a claim for transgender discrimination, noting that the Fifth Circuit had not ruled on that.

This did not sit well with Judge Ho, who wrote this case's two opinions. He said the Fifth Circuit had dealt with the issue forty years ago in a case called *Blum v. Gulf Oil Corp.*, 597 F2d. 936 (5th Cir. 1979) where the Court said this in a footnote: "Discharge for homosexuality is not prohibited by Title VII or Section 1981." That case had not been cited by the district court.

So, even though the case had been thrown out and the judgment affirmed, Judge Ho wrote more than five pages about the vitality of *Blum* and a parade of horribles that would befall the country if the Supreme Court rules for a more expansive definition of "sex." Spoiler alert: we are going to have to deal with co-ed bathrooms.

First Amendment Ain't That Broad. *Buchanan v. Alexander,* 919 F.3d 847 (5th Cir. 2019). I know tenure is sacred for many, because my brother is a tenured professor. But sometimes even a tenured prof loses her right to a cushy job. And so it was here.

This tenured professor trained teachers working in the kindergarten through 3rd grade levels. In 2013, she started receiving complaints about her behavior in the classroom. She said, wait a minute, my behavior is covered by the first amendment. Here is some of what she did in class: talked about student's sex lives; used "extreme" profanity; told sexually explicit jokes; told students it was

not her fault if anyone chose to be a mommy or wife and not to expect an A in her class; and made comments about women who wear brown pants being considered lesbians.

At the end of the investigation into the various complaints, the faculty wanted to censure her. The administration went further and fired her.

The professor sued under the first amendment, claiming her free speech rights were abridged. To prevail, she had to show that her speech involved a matter of public concern and that her interest in the speech outweighed the university's interest in regulating the speech. Because she couldn't meet the first element, the Court ruled against her. "[S]peech that does not serve an academic purposes is not of public concern." It also noted that she had sued the wrong parties on her facial challenge because, rather than suing the University or its board, she had sued only individuals with limited authority to enforce them.

Rule 68 Offer Can Hurt. *Gurule v. Land Guardian, Inc.,* 912 F.3d 252 (2018). This is another in a recent series of cases about fees being cut for lack of success.

Four people sued the company under the FLSA, alleging failure to pay minimum wage and overtime. At the end, one woman was left standing. For this plaintiff, the defense made several Rule 68 offers ranging from $3133 to $5000 near the time of trial. The offers were rejected. After a one day trial, the plaintiff was awarded $1131. Ouch!

An additional problem for the plaintiff arose when fees and costs were considered. First, the plaintiff was ordered to reimburse defendant $1557 in costs. But what about fees? The plaintiff wanted almost $130,000 in fees but only got $25,000.

The Court says that in order to calculate the fee, you start with the lodestar – hours worked times hourly rate, which by plaintiff's calculations led to a fee of $129,000

The Court discounted for time spent on other cases, time spent by paralegals whose rate was not proven up, block billing and lack of billing judgment. That took the fee down to $62,000. Then Court turned to a review of the *Johnson* factors, focusing on one – degree of success – and said that a downward departure of 60 percent was justified. And just so the record was clear, the Court said that a

court considering fees in a fee-shifting statute case should consider the prevailing party's rejection of a Rule 68 offer.

Judge Ho concurred and indicated how he will approach fee cases:

> If an attorney cannot explain how the time was spent in the good faith pursuit of client value, then a district court would be right not only to reduce the fee devoted to a wasted task, but to eliminate the fee altogether.

I think it is fair to say there was one vote for a zero fee for the plaintiff. Stay tuned. There will be more to come on that score.

Individualized Assessment Required. *Nall v. BNSF Railway Co.,* 917 F.3d 335 (5th Cir. 2019). This is an important case involving a plaintiff with a progressive disability and how the law requires his condition to be analyzed. From one perspective, it is true that, as one of BNSF's employees allegedly told his wife, "people with Parkinson's don't get better" and courts often look at individuals as just their condition. But that is not what the law requires. The law requires an analysis of how this man with Parkinson's is able to perform at a specific moment in time.

The case starts with a worker diagnosed with Parkinson's disease (now deceased) who was sidelined after his diagnosis. To be fair, the railroad took no action for a year and a half, but then removed him from his job as a trainman based on the complaint of a co-worker about his ability to perform the job safely. It told him that he needed to obtain a release from the medical department to return to work.

The plaintiff complied with each and every request for medical testing, even though he was told that he "was never coming back to work" and that they were just sending paperwork to "be nice." Repeatedly his doctors said he was capable of doing his job. Then BNSF required a field test, which the plaintiff again successfully completed. But still no return to work because the physical therapist noted his tremor, jerky movements, and decreased balance when reaching. Finally, BNSF classified him as "permanently medically disqualified."

This lawsuit ensued and the district court threw out the case on summary judgment, saying that BNSF had proven that the plaintiff was not qualified for the

job. The parties agreed that the question of whether he was qualified is directly related to the question of whether BNSF is entitled to a "direct threat" defense.

On appeal, the majority finds that there is a fact question on the issue of whether Nall was qualified for the job.

> A reasonable jury could conclude that BNSF did not consider the "best available objective evidence" or meaningfully engage in an "individualized assessment" of whether Nall could perform the essential duties of a trainman safely—and that, as a result, BNSF's direct threat determination was not objectively reasonable.

The issue, after all, is not whether a person with Parkinson's could pose a direct threat but rather

> the question is whether BNSF reasonably concluded that *Nall* posed a direct threat via an individualized assessment that relied on the best available objective evidence and was not, as Nall alleges, manipulated midstream to achieve BNSF's desired result of disqualifying him. More precisely, the question is whether there is any evidence in the record that creates a genuine issue of material fact as to whether BNSF meaningfully assessed Nall's ability to perform his job safely and reasonably concluded that he posed a direct threat.

Looking at the evidence through this lens, it is clear that a jury is needed to resolve this question. Nall presented numerous reports from numerous doctors concluding that he could perform the job. Nall successfully completed each of the tasks required in the first field test. Nall also provided evidence of comments that cast doubt on the evaluation process, such as that he was "never coming back to work" and that the medical paperwork was requested only to "be nice."

> Thus, although there is no requirement under the ADA for the employer to follow certain procedures in making a "direct threat" assessment, the language in *Echazabal* and the related EEOC regulation establishes that intentional disregard for the best available objective evidence, in whatever form it takes, undermines an employer's credibility and renders its direct threat conclusion objectively unreasonable

There is both a concurrence and dissent here. The concurrence is well worth a read because it calls out the convoluted way discrimination cases are considered by the courts in a situation like this:

> When a concern about the disability's negative impact on workplace safety is the reason for the adverse action, the "causation" element of an ADA discrimination claim should be straightforward

He notes that it is not, because folks – both lawyers and judges – are so conditioned to the *McDonnell Douglas* burden shifting framework. He calls it the "kudzu" of employment law.

The dissent says he would have affirmed the district court but applauds the withdrawal of the previous opinion, which he viewed as requiring not only that the employer show the employee was a direct threat but also that the process used was objectively reasonable. That second part has been excised from this opinion.

Finally, A Couple of Cases from the Hinterlands (i.e, outside the Fifth)

Pretext Plus Tried Again. *Westmoreland v. TWC*, 924 F.3d 718 (4th Cir. 2019). This is an age discrimination case where the 30 year employee was replaced by a 37 year old. The cable company's reason for terminating was that the plaintiff had whited out a date on a form, which she freely admitted. The date was on a form memorializing a meeting with one of her subordinates. The initial meeting had been on July 21st but it was six days later by the time the plaintiff completed the form. So after the subordinate signed it with the July 27th date, the plaintiff asked her to change it to July 21st, which she did.

The plaintiff never denied her action, saying that the date of the meeting was July 21st and that's why she asked for the change on the form. She testified that her supervisor told her "not to worry about it" and that their discussion about it was "just a slap on the wrist." A couple weeks later, the plaintiff was fired and brought this lawsuit. She won her case on the second try and the defendant appealed.

On appeal, the defendant tried two things. First, it tried to relitigate the facts, which the majority rejected because the jury had spoken. Second, it tried to resurrect pretext-plus, saying that the plaintiff had to do more than undermine the

defendant's rationale for the termination; it had to introduce new evidence that no only undercut the employer's justification but also showed a specific and discriminatory motive. Thankfully, the Court pointed out that *Reeves* eliminated pretext plus.

Since I did not attend the trial, I cannot say with any certainty what swayed the jury but I did see that the plaintiff's boss denied knowing that her replacement (who was 37) was younger than she was (at age 61). Wow. This is the kind of ridiculous testimony that makes a big difference in a case.

The defendant also raised the "courts don't sit as super-personnel departments" defense on appeal. Here's what the Fourth Circuit majority said -

> Of course, it would be improper for a jury to rule for an employee because it believed her firing was not a 'wise' or 'prudent' employment decision. But nothing bars a jury from considering an employee's tenure and performance in evaluating whether her employer's justification for her termination is so flimsy as to be untrue or implausible, and thus asserted in an attempt to mask a discriminatory motive.

Of interest to me was a dissent by Judge Niemeyer who says "There is absolutely no evidence that Glenda Westmoreland was fired because of her age." Some may recall that there was a time when his was the view of the vast majority of Fourth Circuit judges. No longer.

Admission of Party Opponent. *Weil v. Citizens Telecom,* 922 F.3d 993 (9th Cir. 2019). A *former* supervisor tells an employee that he was not promoted because he was a former Verizon employee, white and "not female."

Is this an admission of a party opponent – i.e., the statement of a party's agent within the scope of that relationship and while it existed? FRE 801(d)(2) . The defendant said no, pointing out the speaker was no longer a supervisor, and the district court agreed, refusing to consider evidence because the supervisor was not employed in that position at the time the statement was made.

The Ninth Circuit reverses, saying the issue was not the job held by the speaker but that she had an employment relationship at the time.

> To read the Rule otherwise could lead to absurd results. For instance, if a supervisor—just after being promoted—made a statement admitting to a discriminatory motive for terminating an employee the day before, the alternative reading of the Rule would exclude that statement, merely because the statement concerned a matter that was perhaps no longer within the scope of that supervisor's employment. Such a reading disregards the agency principles on which the Rule is predicated and would potentially allow employers to avoid liability by merely changing employees' positions or narrowly redefining the scope of their employment. Accordingly, we read the third element of the Rule to require that the statement be made while the employment relationship still exists, without regard to the declarant's specific scope of employment at the time the statement is made.

There is a dissent here, which says the district court got this one right.

> L.H. surely knew something about the processes she was involved in. And she *might* have even known something about how the final decisions were made. But once she was excluded from the decisionmaking process in January, Weil had to offer *some* basis for her statement. Otherwise, the statement may be nothing more than her uninformed opinion, a statement "made in [that employee's] capacity as wiseacre only."

When I read that, I kept thinking: What about the role of cross-examination?

Paternalism or Discrimination? *EEOC v. McLeod Health, Inc.*, 914 F.3d 876 (4th Cir 2019).

The plaintiff has a condition that makes walking difficult. She worked at the company for 30 years editing their internal employee newsletter. As part of her work, she traveled around the various campuses of the employer, which are spread around an area of 100 miles.

After learning that she fell three times in a four month period (only once at work), the employer expressed concerns about her ability to navigate the entire campus "safely." So a fitness for duty exam was ordered. Ultimately, the plaintiff was terminated and sued. She brought two claims: (1) that the defendant's medical exam was illegal; and (2) that she was dismissed because of her disability.

The ADA prohibits fitness-for-duty exams unless the examination is shown to be job-related and consistent with business necessity. The EEOC's enforcement guidelines require proof that the employer reasonably believed, based on objective evidence, that either (a) the employee's ability to perform an essential job function is impaired by a medical condition, or (b) the employee can perform all the essential functions of the job, but because of his or her medical condition, doing so will pose a "direct threat" to her own safety or the safety of others.

For the illegal medical exam claim, the question comes down to this: is navigating hospital campuses an essential function of the job? Not as a matter of law, says the Court, which puts it this way:

> [C]ould a reasonable jury conclude that it was unreasonable for McLeod to believe – based on the objective evidence available to it at the time – that Whitten was medically unable to navigate its campuses without posing a direct threat to her own safety? We believe the answer is yes. Specifically, a reasonable jury, viewing the evidence in the light most favorable to Whitten, could conclude that in the context of Whitten's employment history, it was not reasonable for McLeod to believe that she had become a direct threat to herself on the job simply because (a) she had fallen multiple times recently and (b) her manager thought she looked groggy and out of breath. This is especially so given that the only one of Whitten's recent falls to occur at work resulted in virtually no injury.

After all, as the court said, "Our job at this stage is not to decide which party's evidence is stronger or more persuasive. It is only to determine whether the EEOC has produced more than "a mere scintilla of evidence" in support of its position that navigating to and within McLeod's campuses was not an essential function of Whitten's job." And, in the court's view, the plaintiff had done so.