International Association of Official Human Rights Agencies
Training Conference
Legal Update
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PROCEDURAL ISSUES

Timeliness: King v. Aramark Servs., 96 F.4th 546 (2d Cir. 2024)

Plaintiff alleged sex-based harassment by her supervisor culminating in her termination. Under Nat'l R.R. Passenger Corp. v. Morgan, a hostile work environment claim is timely if at least one incident contributing to the hostile work environment is timely. A timely discrete act may "render a hostile work environment claim timely *if it is shown to be part of the course of discriminatory conduct that underlies the hostile work environment claim*." Jury could find that the supervisor played a decisive role in King's termination and that his role contributed to a "long-running enterprise of subjecting King to a pervasive, hostile work environment." King also could challenge termination on its own as a discrete act.

When is a NRTS received: McDonald v. St. Louis University, Appeal No.: 23-2624 8th Cir. (2024)

Plaintiff's attorney requested a Notice of Right to Sue by email on April 27, 2024. On May 10, 2024, EEOC sent an email that "a new document was added to" plaintiff's EEOC case file with a link to log in to the EEOC Public Portal. A reminder email was sent on May 18. Plaintiff's attorney was unable to access the EEOC Public Portal because he lost his password. Plaintiff's attorney sent a second request for a NRTS on June 21. On June 28 EEOC sent an email with the NRTS attached. Attorney filed sue on September 23, 187 days after May 10 and 87 days after June 28.

Plaintiff alleged that actual and effective notice was not received until June 28. The court held that notice was received on May 10. The court also found that plaintiff was not entitled to equitable tolling because the attorney did not do much to get the password or to obtain the NRTS which arrived shortly after it was requested by the attorney.

Adverse action standard: Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024)

Female police officer alleged sex-based transfer in violation of Title VII which makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." The Eighth Circuit rejected Muldrow's claim because she failed to show a "materially significant disadvantage" resulting from the transfer. No diminution to title, salary, or benefits. Minor changes in working conditions were insufficient.

The Supreme Court vacated and remanded. "To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment." "The transfer must have left her worse off but need not have left her significantly so." The plaintiff need not show that the harm was "significant" nor that it meets any other "heightened bar." By

contrast, the retaliation provision requires "material" harm because it only covers actions reasonably likely to deter protected activity.

The court found Muldrow satisfied this standard:

- She was moved from a plainclothes job in a prestigious specialized division that gave her substantial responsibility over priority investigations and frequent opportunity to work with police commanders.
- She was moved to a uniformed job supervising one district's patrol officers, in which she was less involved in high visibility matters and primarily performed administrative work.
- Her schedule became less regular, often requiring her to work weekends; and she lost her take-home car.

Adverse action standard: Post-Muldrow Cases

Milczak v. Gen. Motors, 2024 WL 2287687 (6th Cir. 2024): reassignments resulted in some harm, including loss of opportunity to make overtime pay; lack of adequate training; supervisory responsibilities over difficult trade employees; requirement to work evening hours; position's failure to utilize plaintiff's skills; and requirement that plaintiff work by himself. Court identifies these as separate harms, so any of them should be sufficient by itself.

Smith v. Sec'y of Army, 2024 WL 2804428 (D.N.M. 2024); Zuniga v. City of Dallas, 2024 WL 2734956 (N.D. Tex. 2024): Muldrow does not affect severe-or-pervasive standard for hostile work environment.

DISPARATE TREATMENT

Motivating factor causation: Bart v. Golub Corp., 96 4th 566 (2d Cir. 2024)

As part of her managerial duties at a supermarket, the plaintiff oversaw hot food stations, which required her to keep food logs.
During the plaintiff's tenure at the Oxford location, her supervisor made multiple statements directly to the plaintiff or in her presence that women should not be managers.
The plaintiff was fired after being disciplined a third time since her transfer to the Oxford location a year earlier, for falsifying or failing to maintain food logs. The district court granted summary judgment to the employer because the termination for misconduct was valid under the employer's policy, so she could not establish pretext.

Under McDonnell Douglas, the plaintiff must show: 1) the employer's reason was pretextual; or 2) an impermissible factor was a motivating factor in the decision, without establishing that the employer's asserted reason was not also a factor. The plaintiff showed that sex was a motivating factor: Sex-based comments were made repeatedly; linked gender to the conclusion that the plaintiff should not be a manager; and were made by a supervisor who played a substantial role in the termination decision. Where multiple decisionmakers are involved, a biased decision maker may affect the process, even if an employer's stated reasons are accurate and held by other decision makers. The employer can use the same-decision defense to limit relief.

Federal sector: Buckley v. Sec'y of the Army, 97 4th 784 (11th Cir. 2024)

The plaintiff, a speech pathologist, alleged that she was terminated from her position because of her race (Black). A federal employee alleging race-based termination can prevail by merely showing that race played a role in the decision-making process. However, if the plaintiff would have been fired anyway, she cannot obtain relief flowing from the termination, including reinstatement, back pay, and compensatory damages. The agency asserted that the plaintiff was terminated for improperly sharing patient information in violation of the Health Insurance Portability and Accountability Act (HIPAA).

The plaintiff did not show that race was a but-for-cause of her termination. The plaintiff did not allege that the misconduct cited as the basis for termination—three HIPAA violations, including two after being warned not to disclose private patient information—did not occur or that it did not violate HIPAA or agency regulations. The plaintiff conceded that other employees were disciplined, included by firing, for the same infraction during the relevant time period.

The plaintiff still showed that race "factored into the decision-making process along the way." The plaintiff's supervisor asked the HIPAA specialist if they could "get" the plaintiff on a HIPAA violation. After the specialist determined the violation could not be substantiated, the supervisor went over the specialist's head to have the determination reversed. The supervisor was aware of a scheme to divert white patients away from the plaintiff but did little to stop it, despite having authority to do so. The supervisor asked the plaintiff whether her children had the same father, which could be reasonably viewed as reflecting a racial stereotype about Black women.

Race and sex discrimination: Duvall v. Novant Health, 95 F.4th 778 (4th Cir. 2024)

The plaintiff, a white man, was fired from his position as Senior Vice President of Marketing and Communications for a large healthcare company. At the time of his termination, the company was implementing a widescale diversity and inclusion plan, which included D&I metrics, a commitment to "adding additional dimensions of diversity to" upper-level management, and a "decision making process that includes a diversity and inclusion lens." Demographic data showed that, during the course of the plan, there was an increase in female leadership, a decrease in white workers and leaders, and an increase in Black workers and leaders. Because of continued underrepresentation of Hispanics and Asians, the company adopted a long-term plan tying executive bonuses to increasing Hispanic and Asian representation.

The court affirmed a jury verdict that the plaintiff was terminated because of his race and sex. The plaintiff "performed superbly" and had received "high praise." When fired, the plaintiff was only told that the company was "going in a different direction." The plaintiff's duties were assigned on an interim basis to two women, and the person selected for the permanent position was a Black woman. The company contended it fired the plaintiff because he lacked "engagement" and "support from the executive team," but provided no contemporaneous evidence of the plaintiff's deficiencies. After the plaintiff's termination, his supervisor told a recruiter that he was not fired for performance reasons and that the supervisor would hire him again.

SEXUAL ORIENTATION AND GENDER IDENTITY

Cisgender status: McCreary v. Adult World, 2024 WL 1494169 (E.D. Pa. 2024)

The plaintiff alleged that he was fired because of his cisgender status in violation of Title VII. The employer contended that because a cisgender female was fired the same day, the plaintiff failed to show that employees outside his protected class were treated better. The defendant contended that coverage of transgender status did not necessarily require coverage of cisgender status. Disagreeing, the court concluded that firing someone for being cisgender necessarily means firing them, in part, because of sex. Plaintiff's allegation that the employer favored transgender employees over cisgender men and cisgender women raised an inference of discrimination.

Heterosexual status: Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822 (6th 2023)

Heterosexual plaintiff alleged she was denied a promotion and demoted because of her sexual orientation in violation of Title VII. In a "reverse discrimination" case, the plaintiff must present "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." Minority group (gay people) made the decision; or statistical evidence of pattern of discrimination against majority. Plaintiff was demoted by heterosexual and did not allege she was not promoted by a gay person. She could point only to her own experience to establish a pattern of discrimination. Plaintiff therefore failed to establish a prima facie case.

Health insurance: Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024) (en banc)

Certain gender-affirming procedures were only covered for those assigned the corresponding sex at birth, e.g., mastectomies for gender-affirming purposes only covered for those assigned male at birth. Policy cannot be applied without reference to sex. Policy is based on gender stereotypes.

Health Insurance: Lange v. Houston Cnty., 101 F.4th 793 (11th Cir. 2024)

Insurance excludes services and supplies for "sex changes." Blanket denial of gender-affirming services affects only transgender persons, so policy facially discriminates against transgender persons. Cites EEOC Enforcement Guidance on Harassment in the Workplace.

Health Insurance: Lawrence v. OPM, Appeal No. 0120162065 (May 30, 2024)

For plan years 2013 and 2014, the Federal Employee Health Benefits Program excluded "services, devices, or supplies related to sex transformations."(In 2016, OPM revised its policy to remove the exclusion.) Lawrence alleged that he was subjected to gender identity discrimination when, pursuant to the exclusion, he was denied coverage for services related to gender dysphoria.
Exclusion of gender-affirming services "plainly discriminates against transgender employees." To withhold a benefit because an employee needs it in connection with a gender transition is to discriminate on the basis of transgender status, and therefore sex, in violation of Title VII. Discriminating against a transgender individual includes discriminating based on "the fact that the person has transitioned or is in the process of transitioning." (citing Macy v. Dep't of Justice)

Challenged exclusion is an impermissible sex-based rule for providing benefits. "The Exclusion denies Complainant coverage for medical care because his need for it arises out of a difference between his gender identity (male) and his sex assigned at birth (female)."

RELIGIOUS DISCRIMINATION AND ACCOMMODATION

Undue hardship: Groff v. DeJoy, 600 U.S. 447 (2023)

Gerald Groff did not work on Sundays because of his religious beliefs. He was employed by USPS as a Rural Carrier Associate, a non-career employee who provides coverage for absent career employees. Under a contract with Amazon, USPS delivers Amazon packages, including on Sundays. USPS offered to find coworkers willing to swap with Groff, but on multiple occasions, no one volunteered, and Groff did not work, leading to disciplinary action. Groff eventually resigned after USPS failed to provide his requested accommodation of not being scheduled to work on Sundays.

Relied on precedent interpreting Trans World Airlines, Inc. v. Hardison as defining undue hardship as anything more than de minimis. Under the de minimis standard, the proposed accommodation of never scheduling Groff on Sundays would have resulted in undue hardship since it would have imposed more than a de minimis cost on USPS by imposing on coworkers, disrupting the workplace, and diminishing employee morale.

The Supreme Court rejected the de minimis standard. To establish undue hardship, an employer "must show that the burden of granting the accommodation would result in substantial increased costs in relation to the conduct of its particular business." This test requires consideration of "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'" This standard is consistent with Hardison's repeated references to "substantial" burdens and with the ordinary understanding of the term "undue hardship." Effects on coworkers are only relevant if tied to business operations—religious animosity does not establish undue hardship. "[A] good deal of the EEOC's guidance" on undue hardship will likely be unaffected by this "clarifying decision." This includes guidance explaining why undue hardship does not result from "temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs." The Court remanded the case to be considered under the "clarified standard."

COVID shots: Ringhofer v. Mayo Clinic, 102 F.4th 894 (8th Cir. 2024)

Three Christian employees alleged denial of religious accommodation of their objections to a COVID-shot requirement. Each cited two principles: (1) their "body is a temple" and shall not be injected with impure or unknown substances, and (2) their anti-abortion beliefs, rooted in their religion, prevent them from using a product developed with fetal cell lines. District court improperly focused on narrow parts of complaints in finding objections were "medical" or "personal." Overlap between religious and non-religious views does not place religious objection outside Title VII as long as it is part of a comprehensive religious belief system. Fact that many Christians took the vaccine did not defeat the employees' beliefs.

Two employees who were granted religious exemptions to the vaccination requirement adequately pled religious objections to weekly testing. One employee explained her religious belief that her "body is a temple for the Holy Spirit" and that she does not believe in putting unnecessary vaccines or medications into her body, or going to the doctor or allowing testing of her body when it is not necessary. The other employee explained: "My faith is in my Creator who is my Healer. . . Shifting my faith from my Creator to medicine is the equivalent of committing idolatry—holding medicine in greater esteem then Elohim. . . [R]edundant intrusive testing of healthy, asymptomatic humans . . . crosses the line violating my conscience before Elohim . . . ."

Misgendering students: Kluge v. Brownsburg Cmty. Sch. Corp., 2024 WL 1885848 (S.D. Ind. Cir. 2024)

High school music teacher requested permission to call all students by last names as religious accommodation to policy requiring students be called by their preferred names. Accommodation was initially granted but rescinded after it was found to be detrimental to both transgender students and others. What is the nature of a school's business? School: nature of business is "educating all students" by "fostering a learning environment of respect and affirmation" Plaintiff: make school open to children of town's inhabitants; fostering safe environment not a legal mandate trumping accommodation requirement

Undue hardship is evaluated within the context of a particular business. A school is not a typical business, and a student is not a typical customer. A school is entitled to determine that its mission is to provide a safe and inclusive learning environment for all students. Because of substantial student harm, the last-name policy imposed substantially increased costs, and therefore resulted in undue hardship. Policy also substantially increased costs by putting school at substantial and unreasonable risk of Title IX liability.

Undue hardship: Hebrew v. Texas Dep't of Criminal Justice, 80 F. 4th 717 (5th Cir. 2023)

A correctional officer was fired after the employer denied his religious accommodation request to keep his beard and hair long. Employer's reasons for denial: Beards interfere with wearing a gas mask when chemical agents are used. Long hair could be used by an inmate against the plaintiff and makes it difficult to detect contraband. Beards and long hair are prohibited under the grooming policy.

The employer failed to establish undue hardship. Employer failed to identify any costs, much less substantial costs. Employer cites security and safety concerns without regard to costs. Employer could search plaintiff for contraband. Extra time required if *everyone* had long hair and beards did not justify denying accommodation to one person. Employer allowed 1/4" beards and did not show greater safety risk in allowing plaintiff to keep his beard. Employer allows women to have long hair and does not even treat religion neutrally.
In addition to unlawful denial of accommodation, the employer unlawfully fired plaintiff because of religion when it fired him because of a neutral policy that must "give way" to the requested accommodation.

Undue hardship: Barrett v. Dep't of Agric., EEOC Appeal No. 2019005478 (2024)

The complainant alleged that he was unlawfully denied religious accommodation when the agency denied his request to be excused from the LGBTQ+ portion of mandatory civil rights training. EEOC affirmed the agency decision of no violation. The EEOC first rejected the agency's suggestion that the complainant was required to show some adverse action beyond denial of accommodation. An employee does not stop being discriminated against if he suspends a religious practice to comply with an employer policy.

Complainant failed to show that attending the training "conflicted with his religious beliefs, impacted a religious 'observance,' or hindered any religious 'practice.'" Complainant did not explain how the training worked or how he was pressured to change his religious observances or practices. Training referenced LGBTQ+ issues only in context of explaining protected bases. Complainant's statements after the training belied his contentions. He acknowledged LGBTQ+ portion of training was "professional, proportionate" and respectful of religious beliefs like his.

Granting the accommodation would impose an undue hardship on the conduct of the agency's business. Although not all effects on coworkers will result in undue hardship, coworker impacts that affect the conduct of the business are properly considered. This includes impacts on coworkers' Title VII interests. Accommodation may impose undue hardship if it interferes with agency's efforts to meet other EEO obligations. Because the training was designed to promote Title VII compliance and agency standards of conduct with respect to employees and the public, granting an exemption would have imposed an undue hardship.

Ministerial exception: Billard v. Charlotte Catholic High Sch., 101 F.4th 316 (4th Cir. 2024)

English teacher at a Catholic high school alleged sex discrimination when he was fired because he planned to marry his male partner. The plaintiff's claim was barred by the ministerial exception. Teachers were expected to "model faith" in all subjects. He coordinated with religion teachers, began classes with a prayer, and attended Mass with students. Plaintiff conformed his instruction to Christian thought and provided a classroom environment consistent with Catholicism. He consulted with religion teachers to ensure he was teaching Shakespeare through a faith-based lens. "The ministerial exception protects religious institutions in their dealings with individuals who perform tasks so central to their religious missions . . . ."

The court did not address the employer's statutory defenses: Title VII religious organization exception and the Religious Freedom Restoration Act. The employer's view that the religious organization exception applies to any decision motivated by religion had not been adopted by an appellate court. However, the view could not necessarily be easily dismissed. The view that RFRA applies to claims by private parties had been rejected by all but one appellate court. The ministerial exception is settled law and more straightforward than the statutory issues.

EQUAL PAY ACT

Burden of proof: Baker v. Upson Reg'l Med. Ctr., 94 F.4th 1312 (11th Cir. 2024)

Female OB-GYN alleged that her starting pay was less than that of a male OB-GYN in violation of the EPA. Baker had a lower base salary and different bonus structure. The District Court used three steps to analyze plaintiff's claim: Step 1: Plaintiff establishes prima facie case (equal work in jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions). Step 2: Employer establishes affirmative defense (pay difference based on seniority, merit system, incentive system, or any other factor other than sex). Step 3: Plaintiff establishes employer's explanation is pretext for discrimination.

The Court of Appeals stated that EPA analysis has only two steps. There is no pretext step because, unlike Title VII, the EPA does not require proof of intentional discrimination. Under Title VII, the employer presents evidence of a nondiscriminatory reason (burden of production), and the plaintiff has the burden of proving that the employer's asserted reason was a pretext for discrimination (burden of persuasion). Under the EPA, the employer bears the burdens of production and persuasion in showing that the pay differential was based on one of the EPA's exceptions.

The Court of appeals nonetheless affirmed for the employer. The employer established that it paid the comparator more because of his greater experience and board certification and he had never had a fetal demise or been sued. The evidence also supported a different bonus structure because the plaintiff was a new physician. The male comparator had to satisfy a higher threshold to be eligible for bonus, but he received a higher bonus rate after achieving that threshold. Baker was a new physician and was eligible for bonus at a lower threshold while she grew and ramped up her practice. She acknowledged she may have received a lower bonus some years if under the comparator's bonus structure.

"Factor other than sex": Eisenhauer v. Culinary Inst. of Am., 84 F.4th 507 (2d Cir. 2023)

Female professor alleged she was paid less than male professor carrying a similar course load, in violation of the EPA. The employer argued that the pay disparity was based on its compensation plan, which required fixed pay raises triggered by time, promotion, and degree completion. ***What is the scope of the "factor other than sex" exception?*** Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir. 1992): employer asserting that a pay disparity is based on a job classification system must show the disparity is rooted in legitimate business-related differences in work responsibilities and qualifications for the positions.

Plaintiff argued compensation plan was not a "factor other than sex" because it was not connected to differences in work responsibilities and qualifications. Principles of statutory construction demonstrate that "any other factor other than sex" refers to any factor except those based on sex. In Aldrich, the Second Circuit held that a *job*-relatedness requirement is necessary merely to ensure that a *job*-classification system is not sex-based. Legislative history does not suggest otherwise. The compensation plan is a "factor other than sex." The terms of the plan are sex neutral. Fixed-dollar raises reflect skill, experience, or added value associated with additional degrees or

academic promotions. The decision is contrary to EEOC position, as well as Sixth, Ninth, and Eleventh Circuits.

Reliance on pay history: Boyer v. United States, 97 F.4th 834 (Fed. Cir. 2024)

The plaintiff, a GS-12 VA pharmacist, alleged that she was paid less than a GS-12 male VA pharmacist in violation of the EPA. The evidence showed that Boyer's salary was lower, at least in part, because of her lower prior salary. ***When does reliance on prior salary constitute a "factor other than sex"?***

Federal Circuit adopted middle-ground approach: Prior pay can be a factor other than sex only if it is considered together with at least one other permissible factor, such as experience or education. Sex discrimination can be inherent in prior pay, but that is not always the case. Reliance on prior pay alone could undermine core concern of eradicating sex-based pay discrimination. This approach accommodates legitimate business interests. Federal legislation provides that agencies may depart from minimum pay rate after considering existing pay, higher or unique qualifications, or the special needs of the agency.

This legislation is compatible with the middle-ground approach. Congress did not intend different standards for federal employees. The pay-setting statutes are permissive, not mandatory. No congressional statute will be defeated by construing statutes not to authorize EPA violations. Same standard thus applies to federal sector.

In this case, there was evidence both ways whether prior pay was the sole factor. Some evidence showed prior pay could trump other factors. Other evidence indicated other factors, such as years of service and publications, were also considered. If the claims court determines a bona fide reason played a role, the court would also have to find that the VA relied on specific differences in experience or credentials relevant to the work performed. If the court determines that the VA relied on prior pay alone, the government will have the chance to show that the prior pay was not itself based on sex.

DISPARATE IMPACT

Disparate impact: Erdman v. City of Madison, 91 F.4th 465 (7th Cir. 2024)

Plaintiff was eliminated in the final part of a seven-part physical abilities test for firefighters. Parts included ladder event, hose drag, and pike pole. To pass the test, applicants must get at least the minimum score in each part and also get the higher "cut score" in at least five parts. A plaintiff alleging disparate impact must show that an employer "uses a particular employment practice that causes a disparate impact." Decision making process can be analyzed as a whole if it cannot be separated for analysis.

Seventh Circuit held that the district court did not clearly err in concluding that the test parts could not be separated. Parts did not test distinct physical capabilities, but instead evaluated the sorts of activities firefighters might reasonably be expected to do on the job. Parts required applicants to use the same muscle groups and same elements of physical fitness. Separating parts could

”encourage, or at least, allow gamesmanship in structuring multi-element tests to limit the set of plaintiffs who could bring discrimination challenges.” Under city’s analysis each question on a written test would be analyzed separately even if the test is scored in the aggregate. Test as a whole had a sex-based disparate impact.

Plaintiff failed to establish a less discriminatory alternative that was “substantially equally valid.” Proposed alternative test included similar parts, but method of timing differed, and applicants had three chances to pass the test, rather than one chance with the city’s test. Plaintiff failed to validate the alternative locally by showing that candidates with the lowest passing scores on the alternative would be “roughly as qualified” as those who obtain the lowest passing score on the Madison test. Plaintiff did not show that design differences between the test were ineffective or pretextual. Evidence showed city’s test was better predictor of who would later “wash out” during the training process.

DISABILITY

Definition of disability: Mueck v. La Grange Acquisitions, 75 F.4th 469 (5th Cir. 2023)

Defendant terminated plaintiff with alcohol use disorder because some of his court-ordered weekly substance use disorder classes conflicted with his scheduled shifts, and he could not reliably find coverage. District court granted summary judgment to the defendant in part based on finding that plaintiff failed to provide sufficient evidence to show that alcohol use disorder was an ADA disability. Fifth Circuit held that the district court erred in this part of its decision, expressly acknowledging, for the first time, that, following the passage of the ADA Amendments Act, an impairment need not be “permanent or long-term” to qualify as a disability.

Notice of need for reasonable accommodation: Kelly v. Town of Abingdon, 90 F.4th 158 (4th Cir. 2023)

Fourth Circuit affirmed finding that letter to employer from employee’s attorneys addressing general workplace issues was not a request for reasonable accommodation. Plaintiff did not have to identify precise limitation of his medical condition(s) or specify what accommodation he sought but there must be a “logical bridge” connecting a medical condition to a requested change. “[N]ot every work-related request” by an employee with a disability constitutes a request for reasonable accommodation.

Interactive process/essential functions: Tafolla v. Heilig, 80 F.4th 111 (2d Cir. 2023)

Clerk typist suffered a spine injury in car accident and requested that another employee take over her archiving tasks, which involved entering information into database. Clerk brought in a doctor’s note that said, “No lifting over 5 pounds, - No bending, pushing exercises,” which clerk contended meant she could not do archiving, while employer contended it only restricted her from archiving certain files. Clerk brought in additional notes and employer stated that it did not have light duty assignments and if clerk was unable to perform job, she could be out of work on medical leave. Clerk took disability leave, and County terminated her employment after a year.

Jury question of which party caused breakdown in interactive process where parties disagreed on whether plaintiff's medical limitations required relief from all archiving responsibilities, or just some. Although plaintiff ultimately chose to go out on medical leave, jury could attribute breakdown in interactive process to employer. Last act in interactive process is not always what causes a breakdown. ADA does not require an employee to continually prod an employer to provide an accommodation where employer's actions signal it does not intend to do so. Whether a job function is "essential" is a fact-specific inquiry into both the employer's description of a job and how the job is performed in practice.

Essential functions: Kinney v. St. Mary's Health, Inc., 76 F.4th 635 (7th Cir. 2023)

Court questioned 30 years of its caselaw holding that attendance in the workplace can be an essential function. This formulation, rather than focusing on actual job duties and what is required to perform them, invites "too much reliance on generalities . . . losing sight of a specific job and specific arrangements and accommodations." Question should be "whether the essential functions of the job must be performed in person, such that allowing the employee to perform those functions from home would not be a reasonable accommodation." Court's reframing of the issue articulates EEOC's long-standing position. Reframing permits consideration of technological advances and successful experience of many employers with telework during the pandemic, which makes "[d]etermining whether a specific job has essential functions that require in-person work . . . much more of case-specific inquiry."

Reasonable accommodation: EEOC v. Charter Commc'ns, LLC, 75 F.4th 729 (7th Cir. 2023)

Employee with cataracts that caused difficulty seeing in the dark requested modified work schedule to reduce nighttime driving on commute home. Seventh Circuit reversed district court's grant of summary judgment to employer. Accommodation was not foreclosed simply because the employee did not need any accommodation to perform an essential job function once he arrived at work. Although getting to/from work is generally employee's responsibility, employee may be entitled to accommodation if commuting is a prerequisite to essential job function, such as in-person attendance. Whether an accommodation that affects a commute is required is fact specific.

Reasonable accommodation: Tartaro-McGowan v. Inova Home Health, 91 F.4th 158 (4th Cir. 2024)

The COVID-19 pandemic, combined with a shortage of field nurses, led the employer to require all internal staff to provide direct patient care in the field until new staff could be hired. Plaintiff sought an exemption from this requirement as a reasonable accommodation. Defendant denied Plaintiff's specific accommodation request, but offered alternative that would allow her to screen field visits to avoid those that would conflict with her disability-related restrictions. Defendant also offered to spread out field assignments to the extent possible to minimize stress to her knees. Plaintiff refused Defendant's proposals as "not responsive to [her] medical needs." Plaintiff was fired for refusing to conduct direct patient care field visits.
Question of whether an accommodation is reasonable is "sensitive to the particular circumstances of the case." Employee is not always entitled to elimination of non-essential job function as an

accommodation. Court held that because of circumstances created by the COVID-19 pandemic, defendant did not act unreasonably in denying plaintiff's request to be excused from field visits.

Reasonable accommodation/adverse action: Beasley v. O'Reilly Auto Parts, 69 F.4th 744 (11th Cir. 2023)

Case brought by Deaf employee who requested ASL interpreter for meetings, training, and a company picnic. Eleventh Circuit ruled a failure to provide reasonable accommodation is only actionable if the failure results in an adverse employment action (i.e., negatively impacts a term/condition/privileges of employment). Issues of fact as to whether some of the requests related to essential job functions and resulted in adverse employment action.

Post-employment benefits: Stanley v. City of Sanford, Fla., 83 F.4th 1333 (11th Cir. 2023)

City firefighter took early disability retirement because of Parkinson's. City subsequently terminated her free health insurance benefits. Court affirmed that the alleged discriminatory act (benefits termination) did not violate the ADA, because it occurred post-employment. Protections for a "qualified individual with a disability" are limited to individuals who currently either work for, or seek to work for, an employer. Holding does not affect ADA retaliation and interference provisions, which protect "any individual."

On June 24, 2024, the Supreme Court granted cert. on the issue of whether a former employee — who was qualified to perform her job and who earned post-employment benefits while employed — loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.

State of Law re: COVID-19

District courts have adopted EEOC position that a person with COVID-19 or Long COVID may have an actual disability. See Brown v. Roanoke Rehab. & Healthcare Ctr., 586 F. Supp. 3d 1171 (M.D. Ala. 2022).
BUT asymptomatic COVID-19 or COVID-19 causing mild symptoms that resolve quickly (similar to those of the common cold or flu), with no other consequences, not an ADA disability. See Cupi v. Carle Bromenn Med. Ctr., No. 1:21-cv-01286, 2022 WL 138632 (C.D. Ill. Jan. 14, 2022).

Being unvaccinated for COVID-19 does not constitute a disability (either "actual" or "regarded as"). See Kerkering v. Nike, Inc., 2023 WL 5018003 (D. Or. May 30, 2023), report and recommendation adopted, 2023 WL 4864423 (D. Or. July 31, 2023).

Questions about vaccination history are not disability-related inquiries. See Bobnar v. AstraZeneca, 672 F.Supp.3d 475 (N.D. Ohio 2023).

HARASSMENT

Race-based harassment: Banks v. Gen. Motors, 81 F.4th 242 (2d Cir. 2023)

The plaintiff, a Black woman who worked as a safety supervisory, alleged race- and sex-based harassment over a period of more than 12 years. She was called a called a "dumb n****r" by a manager during a meeting with other employees. She was exposed to racist and sexist graffiti around the plant. She observed depictions of the Confederate flag on employees' vehicles and clothing. At least three employees directed sexually offensive comments at her. A manager yelled at her in front of other employees and threateningly shook a thick, rolled up document in her face after she dismissed a contractor for safety violations. She experienced insubordination in her role as Mattoid safety supervisor that was not experienced by white supervisors.

Whether conduct creates a hostile work environment depends on the totality of the circumstances. "A plaintiff must show that 'either a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment.'" Incidents that are not facially discriminatory may sometimes help establish a hostile work environment, such as where the same person engaged in multiple harassing acts, some facially discriminatory and some not. Conduct not directly targeting the plaintiff but purposely taking place in her presence can create a hostile work environment. "If a plaintiff alleges harassment arising from both race and sex-based hostility, the 'interplay between the two forms of harassment' is pertinent to evaluating the hostile work environment claim."

The dispute about the contractor was sufficiently severe to create a hostile work environment because it involved a physical threat and compromised her authority as a safety supervisor. Three nooses placed at or near Black employees' workstations over 11 years was sufficiently pervasive to create a hostile work environment. Even one placement could be considered sufficiently severe, given the historical use of a noose as a tool and symbol of violence. Evidence showed that the plaintiff and other Black employees were targeted by "frequent and highly repugnant insults," including the n-word, that were "sufficiently pervasive—even if not independently severe—to support a hostile work environment claim."

Race-based harassment: Robinson v. Priority Auto. Huntersville, 70 F.4th 776 (4th Cir. 2023)

Two Black sales managers at a car dealership failed to establish unlawful race-based harassment. The plaintiffs provided no evidence to show that the general manager told sales associates not to bring them deals because of their race. Evidence showed the plaintiffs' sales dropped because, unlike other managers, they chose not to relocate to the new location. The GM's one-time use of "thugs" directed at a group including both Black and non-Black employees did not raise an objective inference of racial harassment. The GM's statement that he wanted to make Priority Honda "great again" was not objectively racist. One instance in which a coworker was overheard telling another coworker to "come over to the white side" was insufficient to create a hostile work environment based on race.

Disability-based harassment: Mattioda v. Nelson, 98 F.4th 1164 (9th Cir. 2024)

Agreeing with other circuits, the court concluded that hostile work environment claims are cognizable under the ADA and Rehab Act. The plaintiff, a NASA scientist with a hip defect and spinal disease, plausibly alleged a disability-based hostile work environment. A supervisor repeatedly made harassing comments over a period of years. Another supervisor threatened his job, demeaned him by making him sign a letter acknowledging her refusal to reconsider his poor performance rating, and made insulting comments about his reasonable-accommodation requests and job performance. Neither severity nor frequency standing alone indicated that the plaintiff was subjected to unlawful harassment, but the questionable "severity of frequent abuse" was more appropriate for a factfinder to resolve.

Gender-identity-based harassment: Copeland v. Ga. Dep't of Corr., 97 F.4th 766 (11th Cir. 2024)

The plaintiff, a transgender male sergeant at a medium-security prison, alleged that he was subjected to unlawful harassment based on gender identity. Coworkers ended radio transmissions to him with "ma'am" so that the whole institution could hear it three or four times a day. He was also harassed off the radio, including jokes about transgender people in front of inmates, a nurse refusing to call him "sir" because that "wasn't who [he] was," comments by supervisors about his gender in front of the plaintiff's subordinates, and inappropriate comments by inmates. An officer told the plaintiff she was offended when the plaintiff corrected colleagues who called him "ma'am" because she was "proud to be a woman." She pushed the plaintiff a few days later, and as he walked to his car, circled around him while carrying a pistol.

Severe-or-pervasive standard charts "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." (quoting Harris v. Forklift Servs.) Four factors are considered in assessing whether harassment creates an objectively hostile work environment: (1) frequency, (2) severity, (3) whether it is "physically threatening or humiliating," and (4) whether it "unreasonably interferes with ... job performance." No factor is required, and the determination depends on the totality of circumstances.

Harassment was frequent: The plaintiff was harassed by at least 34 individuals on a daily basis. The harassment was severe. Harassment continued even after the plaintiff's objections. Harassment involved supervisors, not merely peers or coworkers. Correctional context is dramatically more dangerous than typical workplace. Harassing an employee "sends the message to coworkers that the victim need not receive the support and cooperation necessary to remain safe . . . and sends the message to inmates that the victim is fair game."

Harassment was physically threatening and humiliating. Harassment in the presence of coworkers is especially humiliating. "[M]ost people have a special sense of privacy in their genitals." The HR Director jokingly asked whether he'd undergone genital surgery, and a coworker joked he must have a "dildo in his pants."

Harassment negatively affected plaintiff's job performance. Harassment undermined plaintiff's authority: 1) subordinates refused to obey orders; 2) harassment by inmates supported conclusion that plaintiff's authority was diminished; 3) supervisors' failure to take action signaled that harassing the plaintiff was acceptable. Each of the four factors favored conclusion that harassment was sufficiently severe or pervasive to create a hostile work environment.

DEI training: Young v. Colo. Dep't of Corr., 94 F.4th 1242 (10th Cir. 2024)
A white sergeant at a state prison alleged that mandatory DEI training subjected him to a hostile work environment based on race. He alleged that the training "demeaned him because of his race and promoted divisive racial and political theories that would harm his interaction" with employees and inmates. The training materials were based on a glossary bearing the imprimatur of the Colorado Department of Public Health & Environment. The glossary stated, "that all whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that 'whiteness' and 'white supremacy' affect all 'people of color within a U.S. context.'"

Although the race-based rhetoric in the training materials "could promote racial discrimination and stereotypes within the workplace," the plaintiff failed to allege sufficient facts to establish severe or pervasive hostility. The plaintiff failed to allege specific facts showing how the training affected his actual workplace experience, such as alleging that the training occurred more than once, that supervisors threatened to discipline employees who failed to take the training or to agree with the material, or that coworkers engaged in harassing conduct directed at him because of the training. "The lack of racial animus manifesting itself in Mr. Young's day-to-day work environment distinguishes his case from those that have ratified a racially-hostile workplace claim."

For contrast, the court cited De Piero v. Pa. State Univ., 2024 WL 128209 (E.D. Pa. Jan. 11, 2024), where a different claim related to DEI training was not dismissed. There, the plaintiff was required to attend several training sessions where facilitators "ascrib[ed] negative traits to white people or white teachers without exception and as flowing inevitably from their race," and the plaintiff described personal interactions from the time period reflecting anti-white bias. Quoting De Piero, the court explained: "[D]iscussing 'the influence of racism on our society does not necessarily violate federal law,' . . . But 'the way these conversations are carried out in the workplace matters.' 'When employers talk about race—any race—with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law.'"

RETALIATION

Protected Activity: Warren v. Kemp, 79 F.4th 967 (8th Cir. 2023)

While serving as an interim superintendent, the plaintiff reported significant differences between a predominantly Black school and a predominantly white school, such as a larger weight room and better gym seating at the predominantly white school. The plaintiff did not engage in protected activity because the disparity in facilities did not relate to a term, condition, or privilege of employment but instead related to a violation student rights. "Though we do not rule out that the disparity in the facilities could affect employees too, there is simply no evidence here that Dr. Warren believed she was complaining about a discriminatory employment practice."

In dissent, Judge Kelly argued that there was sufficient evidence for a jury to conclude that the disparity in facilities negatively affected the predominantly Black staff at the school with inferior facilities.

Adverse action: Moll v. Telesector Res. Grp., 94 F. 4th 218 (2d Cir. 2024)
Transferring the plaintiff to a job site 160 miles away was materially adverse for purposes of Moll's retaliation claim. Juror could find that requiring an employee who was a mother with young children, attended week-night classes, and helped care for her widowed and disabled mother to spend more than 60 extra hours driving every month to get to work could well dissuade a reasonable employee from engaging in protected activity.

Adverse action: Noonan v. Consolidated Shoe Co., 84 F.4th 566 (4th Cir. 2023)

Reducing photography duties and increasing writing duties was not materially adverse. Plaintiff failed to show that photography responsibilities were objectively better, e.g., more chances for promotion or professional development, and merely asserted that she "really likes photography."

Pretext: Anderson v. KAR Global, 78 F.4th 1031 (8th Cir. 2023)

The plaintiff was employed as an outside sales representative, which required him to travel about 3.5 days per week. During the early stages of a merger that included a reduction-in-force, lower-level managers discussed with the plaintiff his job duties going forward and told him he would spend all his time recruiting new accounts as a "hunter." Shortly after this, the plaintiff had a seizure, and he was instructed by his doctor not to drive for six months. The employer initially accommodated the plaintiff by allowing him to work in the office 3 days per week and then having an inside sales rep drive him to appointments the other two days.

About a week later, the employer retracted the accommodation, and the plaintiff proposed the alternative accommodation that his father-in-law drive him to appointments. The defendant never responded to the plaintiff's proposal. Sometime after learning about the plaintiff's restriction, the Vice President of Sales was told that the plaintiff was not the best at building relationships but would be "pretty darn good" in a pure hunter role. The plaintiff was subsequently terminated and told that the defendant did not have a hunter role for him and that his sales numbers were lower than the three other employees in his position. The plaintiff alleged that his termination was based on his disability and in retaliation for his accommodation requests.

Temporal proximity can establish causation for disability and retaliation claims. Jury could conclude that the defendant's attitude toward the plaintiff changed after the VP became aware of Anderson's disability. The 10-day interval between when the VP learned about the plaintiff's disability and when she indicated he had been identified for termination was sufficient to establish causation based on temporal proximity for the purpose of plaintiff's prima facie case of disability discrimination and retaliation. Jury could conclude VP only looked at performance after learning of the plaintiff's disability. Therefore, the plaintiff's performance was a post-hoc rationalization and did not motivate the termination decision.

Objective standard: Varva v. Honeywell International, Inc., Appeal No. 23-2823 (7th Cir. 2023)

Honeywell required employees to complete online unconscious bias training. Plaintiff refused to attend the training and his employment was terminated. Plaintiff claimed he were terminated in

retaliation for making claims of race discrimination. For an employee's protests of an employer's actions to be protected from retaliation under Title VII, the employee must have "an objectively reasonable belief that the action [he] opposed violated the law." The court held that to be objectively reasonable, the employee must have some knowledge of the conduct he is opposing. In this case, the employee could not show an objectively reasonable believe that the conduct he was protesting violated the law because he had no knowledge of the contents of the training because he never accessed the virtual training. The employee assumed that the training would vilify white people and treat people differently based on race. His belief was based purely on speculation.

REMEDIES

Duvall v. Novant Health, 95 F.4th 778 (4th Cir. 2024)

The plaintiff, an executive, was not precluded from recovering back pay because "he didn't actively apply for jobs but merely waited for work to come to him." Record showed that executive hiring is through recruiters. The plaintiff consulted trade journals and networked with connections. Back pay also was not precluded merely because the plaintiff turned down some jobs. The plaintiff withdrew from consideration for one position because of the employer's comparatively small size. The plaintiff was not required to accept inferior work that could damage his future career prospects. The plaintiff also was still pursuing jobs with other companies. The plaintiff therefore exercised reasonable diligence in seeking new employment.

Punitive Damages: Harris v. FedEx, 92 F.4th 286 (5th Cir. 2024)

Evidence was sufficient to show the plaintiff's supervisor retaliated against her but did not satisfy the higher standard for punitive damages that the supervisor acted "in the face of a perceived risk" that her actions would violate federal law. Evidence showed the supervisor believed that the plaintiff should be disciplined for insubordination because she was argumentative, not in retaliation for her internal EEO complaints. Even if the supervisor had acted with malice and reckless indifference, the employer made good-faith efforts to comply with Title VII. Each time the plaintiff filed an internal complaint, HR conducted an in-depth investigation by interviewing multiple witnesses, examining relevant evidence, and providing a detailed analysis of the plaintiff's allegations. The employer's policy also did not allow discipline during ongoing investigations.