

DISCRIMINATION CASE LAW UPDATE

CHRISTOPHER A. TINARI, ESQUIRE

PITTSBURGH OFFICE
1500 GRANT BUILDING
PITTSBURGH, PA 15219-2203
412-281-4256

WESTMONT OFFICE
P.O. Box 2222
216 HADDON AVENUE
WESTMONT, NJ 08108-2886
856-858-7200

BERKELEY HEIGHTS OFFICE
THREE CONNELL DRIVE
SUITE 6200
BERKELEY HEIGHTS, NJ 07922
908-790-1401

MARGOLIS EDELSTEIN
THE CURTIS CENTER, 4TH FLOOR
INDEPENDENCE SQUARE WEST
PHILADELPHIA, PA 19106-3304
(215)922-1100
FAX (215)922-1772

CTINARI@MARGOLISEDELSTEIN.COM

SCRANTON OFFICE
THE OPPENHEIM BUILDING 409
LACKAWANNA AVENUE
SUITE 3C
SCRANTON, PA 18503
570-342-4231

HARRISBURG OFFICE
P.O. Box 932
HARRISBURG, PA 17106-0932
717-975-8114

WILMINGTON OFFICE
1509 GILPIN AVENUE
WILMINGTON, DE 19806
302-777-4682

Discrimination Case Law Update

By: Christopher A. Tinari, Esquire

Religion

Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 94 FEP 1476 (1st Cir. 2004) - An employer had no duty to accommodate an employee who insisted that her religion, the Church of Body Modification, required her to wear multiple facial piercings while at work because that would be equivalent to Costco losing its legitimate interest in controlling its public image. “Costco has made a determination that facial piercings, aside from earrings, detract from the ‘neat, clean and professional image’ that it aims to cultivate. Such a business determination is within its discretion.” 390 F.3d at 136. Her insistence on a wholesale exemption from the “no-facial-jewelry” policy precluded the employer from using its managerial discretion to search for a reasonable accommodation, and thus imposed more than a de minimis burden on the employer in its effort to present a professional public image.

Bodett v. CoxCom, Inc., 366 F.3d 736, 93 FEP 1108 (9th Cir. 2004) - An Evangelical Christian supervisor was discharged for harassing a lesbian subordinate by telling her that the Bible prohibited homosexuality. Despite the fact that the supervisor held that belief, it is not religious discrimination to discharge one for violating company policy by coercing and harassing an openly homosexual subordinate. In addition, the employee failed to demonstrate that the employer's reason was a pretext for religious discrimination.

Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 94 FEP 206 (9th Cir. 2004) - A female Presbyterian minister can sue her church for her supervisor's sexual harassment and recover damages. She cannot contest her discharge as a minister and the fact that she is barred from being a minister again under either a sex discrimination or retaliation theory because of the ministerial exception to Title VII. However, Plaintiff's claims could succeed if she proved she was subjected to a hostile work environment and the church did not prove she unreasonably failed to take advantage of available measures to eliminate that environment.

Peterson v. Hewlett-Packard Co., 358 F.3d 599, 92 FEP 1761 (9th Cir. 2004) - In response to messages displayed as part of a voluntarily-adopted diversity program, Plaintiff, a self-described “devout Christian,” posted biblical scriptures in a manner visible to coworkers which were anti-gay. When questioned by the company, he told them that the biblical passages condemned “gay behavior” and “were intended to be hurtful.” He hoped that his gay and lesbian coworkers would read the messages and repent. He was given paid time off to reconsider his refusal to remove the posters and then was terminated for insubordination. In this case, a religious accommodation request was denied because it would create undue hardship for the employer to accommodate the employee by allowing him to post messages intended to demean and harass his co-workers. Plaintiff was not discharged because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile environment for certain coworkers.

Disability/Handicap - General

Raytheon Co. v. Hernandez, 540 U.S. 44, 14 A.D. Cas. 1825 (2003) - In this case, the Supreme Court reversed the Ninth Circuit's finding that the policy of never rehiring involuntarily terminated employees violated the ADA when applied to a rehabilitated drug addict because "a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA." 540 U.S. at 52. This case was remanded for determination as to whether a reasonable jury could conclude that a no-rehire policy was in fact applied. Here, Respondent did not pursue a disparate-impact claim. The Ninth Circuit characterized Hernandez's workplace misconduct as merely "testing positive because of (his) addiction.... To the extent that the court suggested that, because Respondent's workplace misconduct is related to his disability, (Raytheon's) refusal to rehire Respondent ... violated the ADA, we point out that we have rejected a similar argument in the context of the Age Discrimination in Employment Act. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993)." *Id.* at 54 n.6. The decision maker was apparently unaware of Hernandez's alleged disability. Raytheon could not have been motivated to reject Respondent's application because of his disability since they were entirely unaware that such a disability existed. "If no part of the hiring decision turned on Respondent's status as disabled, he cannot, *ipso facto*, have been subject to disparate treatment." *Id.* n.7.

Barnes v. Gorman, 536 U.S. 181, 13 A.D. Cas. 193 (2002) - Punitive damages cannot be awarded in a cause of action brought under Title II, Section 202 (discrimination against disabled by public entities).

Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 13 A.D. Cas. 97 (2002) - In this case, Chevron refused to hire the applicant because a physical examination showed liver damage caused by Hepatitis C, which the employer's doctors said would be aggravated by continued exposure to toxins at the employer's refinery. After the Ninth Circuit struck down an EEOC regulation allowing employers to exclude from the workplace individuals whose performance on the job would endanger the individuals' own health because of a disability, the Supreme Court reversed. On remand, the determination will be whether the exclusion was based on the sort of individualized medical inquiry required by the regulation. Chevron legitimately wished to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under tort law, and any OSHA violations. There is an open question as to whether an employer could be liable under OSHA for hiring an individual who knowingly consented to dangers.

Board of Trustees v. Garrett, 531 U.S. 356, 11 A.D. Cas. 737 (2001) - Supreme Court held 5-4 that private suits to enforce Title I (prohibiting employment discrimination and requiring reasonable accommodations for individuals with disabilities) of the ADA against state governments were barred by the Eleventh Amendment. The Court concluded that while Congress affirmatively authorized suits against the states when it passed the ADA, Title I was not legislation implementing the provisions of the Fourteenth Amendment and thus could not subject an uncontestable state to suit. The Court relied upon *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), for the proposition that distinctions based upon disability are not constitutionally suspect and that "states are not required by the Fourteenth Amendment to make special accommodations for the disabled,

so long as their actions toward such individuals are rational.” 531 U.S. at 367-68. The Court concluded that the remedy for any unconstitutional behavior by state governments created by Title I, reasonable accommodation unless the employer is able to prove undue burden, “far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.” *Id.* at 372.

Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 13 A.D. Cas. 1716 (3d Cir. 2003) - Here, an employee asserted allergies to common workplace chemicals and fragrances, and asked for accommodation. She was fired for alleged insubordination during a meeting concerning her accommodation request. Summary judgment for the employer was reversed. It is not a defense that the employer never established that she was disabled. There were inconsistent reasons for firing her including comments suggesting that the company did not want to be bothered by persistent accommodation requests and that the company was upset by the EEOC complaint. The employer’s actions could very well lead a reasonable jury to conclude that the employee was fired because she took the “legal route.”

Disability - ADA Covered Disability

Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 12 A.D. Cas. 993 (2002) - The Supreme Court unanimously held that findings of disability under the Americans with Disabilities Act of 1990 (“ADA”) based on substantial liability to perform manual tasks must look to the individual’s ability to accomplish isolated or minor tasks. Here, an automobile assembly line worker’s medical diagnosis of carpal tunnel syndrome is insufficient proof of her inability to perform manual tasks. There must be an individualized assessment of the effect of the impairment on the employee’s activities that goes beyond a mere medical diagnosis. The Sixth Circuit did not apply the proper standard in determining that respondent was disabled under the ADA because it analyzed only a limited class of work-related manual tasks, which were not determinative of whether respondent’s impairments “substantially limit a major life activity.” The central issue is thus whether her condition restrict her from performing tasks that are of central importance to most people’s daily lives such as personal hygiene and household chores. The language of the ADA requires that there be a “demanding standard for qualifying as disabled.” Congress said the Act covered 43 million people when it was enacted, but this number would have been much higher if it included “everyone with a physical impairment that precluded the performance of some isolated, unimportant or particularly difficult manual task.”

Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 13 A.D. Cas. 110 (3d Cir. 2002) - This “regarded as” case was dismissed since the employee was not regarded as disabled under the ADA and the Pennsylvania Human Relations Act (“PHRA”). The PHRA is basically the same as the ADA and Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts. In this case, the employee had sensitivity to dust and paint fumes after being hospitalized for pneumonia, a temporary condition not protected by the ADA. Also, the employer argued that it did not know that the employee had asthma and the employee admitted that he did not tell the employer that he had asthma. Thus, there was no basis for a court to find that the employer regarded him as suffering from asthma. In any event, there is no evidence of the employer’s belief that the plaintiff could not perform a wide array of jobs or of employer’s perception about the severity of his condition. The employer simply knew that he could not work exposed to dust and fumes.

Disability - Qualified Individual with Disability - Essential Job Functions

Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 14 A.D. Cas. 874 (3d Cir. 2003) - Reporting to work at 8:00 a.m. was not an essential function of the bank manager who was discharged for excessive tardiness caused by morning sedation for depression. While an employer has a right to expect managers to set an example of timeliness, that does not elevate it to an essential job function. "Essential functions" must be fundamental to one's job and not simply marginal. The inquiry into whether a job requirement is essential to one's job is a factual determination that must be made on a case by case basis based upon all relevant evidence, which may include the employer's judgment and employee's actual experience. 29 C.F.R. § 1630.2(n).

Disability - Reasonable Accommodation

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 12 A.D. Cas. 1729 (2002) - An accommodation is normally unreasonable if it conflicts with seniority rules for job assignments. "To show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'" *Id.* at 394. However, "the plaintiff remains free to present evidence of special circumstances that make 'reasonable' a seniority rule exception in the particular case." *Id.* In this case, an employee who injured his back while working requested reassignment to a mailroom position as a reasonable accommodation. However, this would have violated the rules of the employer's seniority system. The employer decided not to make an exception to the seniority system, and the employee lost his job. The Court determined that the ADA did not require the employer to assign the employee to the mailroom position in violation of the established seniority system. To defeat a motion for summary judgment, a plaintiff must show only that an accommodation seems reasonable on its face. Once the plaintiff has made this showing, the defendant must show special circumstances that demonstrate undue hardship. Normally, an accommodation that violates a seniority rule would not be reasonable. The types of special circumstances that could be shown is that the employer retained the right to change the seniority system and exercise that right frequently. The plaintiff has the burden to show that special circumstances warrant an exception.

Williams v. Philadelphia Hous. Auth. Police Dept., 380 F.3d 751, 15 A.D. Cas. 1507 (3d Cir. 2004) - An employee "regarded as" disabled is entitled to an accommodation. The Third Circuit joins the First Circuit in so holding. A police officer was unable to carry a firearm as the result of a mental condition and was erroneously perceived by his employer as unable to be around firearms because of depression should have been reassigned to the radio room rather than taken off duty. Pursuant to the ADA, an employer has a duty to engage in an "interactive process" of communication with an employee requesting an accommodation so that the employer will be able to ascertain whether there is in fact a disability and, if so, the extent thereof, and thereafter be able to assist in identifying reasonable accommodations where appropriate. *Id.* at 771. In the Third Circuit, "a 'regarded as' plaintiff can make out a case [even] if the employer is innocently wrong about the extent of his or her impairment meaning that there is no general 'good faith' defense available to [the employer] to the extent it misperceived [the employee] as having an impairment that substantially limits a major life activity based upon myths, fears, or stereotypes associated with disabilities. There is, however, a limited defense available to employers who engage in an 'individualized

determination of the employee's actual condition' and develop a misperception 'based on the employee's unreasonable actions or omissions.'" *Id* at 770, n.14.

Disability - Effect of Representations in Applying for Disability Benefits

Detz v. Greiner Indus. Inc., 346 F.3d 109, 92 FEP 1185 (3d Cir. 2003) - An Age Discrimination in Employment Act ("ADEA") plaintiff was barred from asserting he was qualified for purposes of establishing a *prima facie* case because he successfully asserted before the Social Security Administration that he was completely disabled as of the date of his discharge. However, to establish a *prima facie* case under the ADEA and the PHRA, the employee asserted that, at the time of his termination, he was qualified for his position and was capable of continuing to perform it. In order for a plaintiff who successfully contended he was disabled to proceed with his lawsuit he must explain the inconsistency in a manner that would be sufficient to warrant a reasonable juror's conclusion that assuming the employee's good faith belief in the earlier statement, the employee could nevertheless perform the essential functions of the job. The positions taken by the employee in his social security benefits application and ADEA claim were patently inconsistent, and he failed to adequately reconcile the two positions.

Family and Medical Leave Act

Callison v. City of Philadelphia, 128 Fed. Appx. 897 (3d Cir. 2005) - The Third Circuit held that enforcement of the City of Philadelphia's sick leave policies against an employee while he was on leave pursuant to the Family and Medical Leave Act ("FMLA") did not interfere with his substantive FMLA rights. Here, the employee argued that the FMLA anti-abuse and eligibility provisions conflicted with the city's sick leave policy requiring an employee on leave to call in when leaving home during regular working hours. Based on the fact that he was permitted to return to work after his leave, the employee argued that his rights were interfered with because he was issued two suspensions for leaving his home without notifying the city. However, the Third Circuit held that the city's call-in policy did not conflict with any substantive provisions of the FMLA because it neither prevented employees from taking FMLA leave nor discouraged employees from taking such leave. *Id.* Further, the court stated that "nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave." *Id.*

Throneberry v. McGehee Desha County Hospital, 403 F.3d 972 (8th Cir. 2005) - According to the Eighth Circuit, the FMLA can't protect an employee on family leave from being fired for good cause. In this case, a home health-care nurse took family leave because she was suffering from emotional problems. The employee's deteriorating mental health led her to miss work, leave work to visit a casino, fail to read important mail, and use improper billing methods. While on paid medical leave, the employee also showed up at work wearing inappropriate attire and disrupted the workplace. Consequently, the employee was forced to resign due to her declining work performance. The employee alleged that the employer violated the FMLA by interfering with her FMLA rights and failing to reinstate her. However, the Eighth Circuit held that "an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove it would have made the same decision had the employee not exercised the employee's FMLA rights." *Id.* at 977.

Race and Color

Patrolmen's Benevolent Ass'n of City of N.Y., Inc. v. City of N.Y., 310 F.3d 43, 90 FEP 1 (2d Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003) - An involuntary lateral transfer of black and black-Hispanic police officers into a heavily minority precinct following an incident where a black citizen was assaulted by white officers violates the Equal Protection Clause. The city admitted that the transfers were race-based, but contended it was necessary to prevent a delicate situation from getting out of control. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. 310 F.3d at 52. Accordingly, all racial classifications imposed by a government actor must be analyzed by a reviewing court under strict scrutiny. *Id.* "To survive that strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest." *Id.* The mere assertion of an operational need to make race-conscious employment decisions does not meet this test. Further, a lateral transfer of an employee that does not result in a reduction in pay or benefits may be an adverse employment action in violation of Title VII if it alters the terms and conditions of the plaintiffs employment in a materially negative way.

Walker v. Mueller Industries, Inc., 408 F.3d 328 (7th Cir. 2005) - In this case, the employee, a union steward, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting that his employer had discriminated against him on the basis of his race (he is white) by failing to provide a workplace free of racial discrimination and also by retaliating against him for raising complaints of racial discrimination on behalf of his African American co-workers. He alleged that, as a result of his raising the complaints, he was subjected to mistreatment in the form of being assigned to a less favorable job, being rejected for a promotion, and his being disciplined on trumped-up charges. The Seventh Circuit determined that the employee had abandoned any claim of discrimination based on his own race, and was asserting a derivative claim of discrimination based on a hostile work environment. *Id.* To successfully pursue a derivative claim of race discrimination, an individual must offer proof that racially offensive conduct rendered the workplace hostile not only to the targeted minority employees, but also for the reasonable employee who was the bystander. *Id.* Generally, an employee who observes workplace hostility but is not a member of the class of persons at whom the harassment is directed, may not bring a derivative claim for the harassment. *Id.*

National Origin and Citizenship

Storey v. Burns Int. Sec. Servs., 390 F.3d 760, 94 FEP 1601 (3d Cir. 2004) - Plaintiff was discharged for insisting on displaying the Confederate flag on his lunch box and pickup truck. He alleged discrimination based on his national origin as a "Confederate Southern-American." Plaintiff also claimed religious discrimination because he is Christian based on the assertion that the Confederate flag incorporates the Cross of St. Andrew, a religious symbol. The employee's claim was properly dismissed because he failed to allege that he suffered an adverse employment action within the meaning of Title VII. *Id.* at 761. Since Plaintiff would not have been terminated had he removed the Confederate flag symbol, he chose to be terminated and therefore has not suffered an adverse employment action. Moreover, the employee did not claim that anything fundamental to his national origin or religion required a display of Confederate symbols. Instead, the display was based

on the employee's personal need to share his heritage. Accordingly, even if the employee was a member of a protected class and the Confederate flag could be viewed as a religious symbol, the employee failed to establish a *prima facie* case of national origin or religious discrimination.

Sex

Moser v. Indiana Dept. of Corr., 406 F.3d 895 (7th Cir. 2005) - The Seventh Circuit affirmed judgment in favor of the employer where comments of a sexual nature did not rise to the level of actionable harassment. In this case, the employee alleged that the employer disciplined her unfairly on the basis of her sex and that a co-worker's remarks subjected her to a hostile work environment. However, the Seventh Circuit found that a rational factfinder could conclude that the handful of comments were in the context of jokes, as opposed to serious or threatening comments. *Id.*

Everson v. Michigan Dept. of Corr., 391 F.3d 737, 94 FEP 1542 (6th Cir. 2004) - After several lawsuits by female prisoners alleging rampant sexual abuse of female prisoners by male guards, the prison administrator designated guard positions in housing units at female prisons as female only. The prison conceded that it adopted a facially discriminatory plan, but the disparate treatment was justified under Title VII. The Sixth Circuit determined that sex is a bona fide occupation qualification ("BFOQ") for working in a women's prison because it would enhance security, decrease the likelihood of sexual abuse and protect the female inmates' privacy rights. One must examine the particular circumstances of the individual employer. Consequently, prison administrators must be afforded great flexibility to ensure safety and security.

Groves v. Cost Planning & Mgmt. Int. Inc., 372 F.3d 1008, 93 FEP 1769 (8th Cir. 2004) - After being terminated, an employee brought a Title VII action, alleging pregnancy discrimination. Summary judgment was awarded to the employer despite the employee's allegation that her selection for layoff immediately followed her disclosure of pregnancy. Temporal proximity is insufficient to raise an issue of fact since the employer's justification was that it discharged the least valuable employee in each department after considering factors such as productivity, project load, flexibility and seniority. Further, the evidence showed that the employee was terminated before the employer knew of her pregnancy.

Irizarry v. Board of Educ., 251 F.3d 604, 85 FEP 1169 (7th Cir. 2001) - In this case, the employer extended spousal health benefits to domestic partners only if the partner was of the same sex as the employee, which excluded plaintiff's male domestic partner. Plaintiff's partner satisfied all the conditions for domestic-partner benefits except being of the same sex. The Seventh Circuit held that an employer that provides health benefits to domestic partners of homosexual employees need not provide those benefits to domestic partners of heterosexual employees. It was rational for defendant to refuse to extend domestic-partnership benefits to persons who could marry and thus spare defendant from having to make a factual inquiry into the nature of their relationship. *Id.* at 610.

Sexual Orientation

Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 92 FEP 89 (7th Cir. 2003) - Here, the employee alleged that his male coworkers did not believe he fit the sexual stereotype of a man, and that their sexual stereotyping was evidence of discrimination "because of" sex, as required under Title VII. However, the Seventh Circuit held that being perceived as gay is not the same as sexual harassment. Harassment could be linked to the perception that the plaintiff was gay and coworker concern that he was not pulling his weight. Thinking someone is gay is not enough to prove the coworkers believed he did not fit the sexual stereotype of a male.

Age - General Issues

General Dynamics Land Sys., Inc. v. Cline., 124 S. Ct. 1236, 93 FEP 257 (2004) - The ADEA does not prohibit favoring "the old over the young." The ADEA is concerned with protecting a relatively old worker from discrimination that worked to the advantage of the relatively young. In this case, a collective bargaining agreement provided better benefits for those over the age of 50. Age was not included in Title VII because Congress recognized that there were legitimate reasons for making employment decisions based on age and directed a study by the Secretary of Labor. Congressional hearing testimony "dwelled on unjustified assumptions about the effect of age on ability to work." *Hazen Paper Co. v. Biggins* recognized that the essence of age discrimination was an assumption "that productivity and competence decline with old age." 124 S. Ct. at 1241. In summary, "the ADEA's text, structure, purpose, history, and relationship to other federal statutes show that the statute does not mean to stop an employer from favoring an older employee over a younger one." *Id.* at 1248-9.

Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 FEP 970 (2000) - Plaintiff filed suit under the ADEA alleging that respondent state employers discriminated against petitioners on the basis of age. However, the ADEA cannot be applied to the states under the enforcement section of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause. Unlike race or gender, age cannot be characterized as seldom relevant to the achievement of any legitimate state interest. While Congress intended to apply the ADEA to the states, it does not satisfy the "congruence and proportionality" test. It therefore exceeds Congress's enforcement authority to apply it to the states. Consequently, states may discriminate on the basis of age without offending the Fourteenth Amendment if there is a rational relationship to a legitimate state interest. 528 U.S. at 83.

Kautz v. Met-Pro Corp., No. 04-2400, 2005 U.S. App. LEXIS 11559 (3d Cir. 2005) - The Third Circuit affirmed summary judgment for the employer and dismissed the employee's claim of age discrimination because he did not meet his burden of proof that his employer's reasons for laying him off were pretextual. The employee was laid off during a reduction in force which cut back the number of regional sales managers. The employer asserted that it decided to lay off the employee after comparing the sales statistics and personnel files of the two managers who were the lowest performers. However, the employee offered no evidence showing that the employer's evaluation discriminated against him because of his age. The court noted that pretext is not shown by evidence

that an employer's business decision was wrong or mistaken, but rather that discriminatory animus motivated the employer. *Id.* at 9 (citing *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994)).

Retaliation

Clark County School Dist. v. Breeden, 532 U.S. 268, 85 FEP 730 (2001) (*per curiam*) - Respondent claimed that she suffered adverse employment actions for complaining about alleged sexual harassment. However, the Supreme Court held that even though the EEOC issued a right to sue letter three months before the supervisor announced a transfer and the actual transfer occurred one month after the lawsuit was filed, the EEOC did not create a factual issue of causation. Further, “employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed.” 532 U.S. at 272. Here, the Ninth Circuit suggested that the right to sue letter provided the first notice of the charge before the EEOC, which allowed an inference that the transfer proposal made three months later was retaliation, but the Court disagrees. *Id.* at 273. “The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close.’” *Id.* The Court cites cases holding three-month and four-month periods insufficient. Accordingly, the action in this case, taken 20 months later suggests no causality at all.” *Id.* at 274.

Fasold v. Justice, 409 F.3d 178 (3d Cir. 2005) - Plaintiff filed suit after going through the union grievance process alleging retaliation after termination from his position as an investigator for the district attorney’s office. Here, plaintiff engaged in a protected activity by filing a complaint with the EEOC and Pennsylvania Human Relations Commission (“PHRC”) and was subject to an adverse employment action when his second level grievance was denied. The district court held that the plaintiff failed to establish a “causal link” between his institution of agency proceedings and the denial of his grievance. However, the Third Circuit reversed and determined that the plaintiff has shown sufficient evidence to support an inference by the trier of fact of a causal link between the filing of the administrative complaint and the denial of his grievance. “Even when an employer’s underlying employment decision was not based on an impermissible ground, the employer may not deny the employee’s resultant grievance because the employee had sought administrative relief under the federal or state procedure.” *Id.* at 18. (citing *EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 430 (7th Cir. 1992)). The Third Circuit determined that three months was a short enough period of time to establish a temporal proximity between employee’s protected conduct and an adverse employment decision. *Id.* at 19. “Such temporal proximity may provide an evidentiary basis from which an inference of retaliation can be drawn.” *Id.*

Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 88 FEP 513, 12 A.D. Cas. 1505 (3d Cir. 2002) - In this case, the plaintiff was discharged after his father, also an employee, sued for age and disability discrimination. Specifically, the employee alleged that he was fired in retaliation for his father having sued the employer and that the employer violated the anti-discrimination laws by terminating him because it thought that he was assisting his father with his suit. Title VII requires that the person retaliated against also be the person who engaged in the protected activity, so merely being a relative of the person who engaged in a protected activity would not be sufficient. However, the ADA contains a second anti-retaliation provision protecting any individual who aids or

encourages another individual to engage in protected activity. Furthermore, under both Title VII and the ADA, the plaintiff could pursue a claim that the employer retaliated against him because it perceived that he was assisting his father to engage in protected activity.

Sexual and Other Forms of Harassment - Cases Interpreting *Faragher/Ellerth*

Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 93 FEP 173 (2004) - The employer claimed that no tangible employment action occurred to hold the them liable for the supervisors' alleged harassment where the employee failed to take advantage of the employer's process for dealing with workplace harassment claims. However, the Court held that constructive discharge allegedly caused by sexual harassment can be established and can constitute a tangible employment action under *Faragher/Ellerth* if the plaintiff shows that “the abusive working environment became so intolerable that her resignation qualified as a fitting response.” 124 S. Ct. at 2347. Nevertheless, such a constructive discharge is subject to a *Faragher /Ellerth* defense, “unless the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.” *Id.* A hostile environment constructive discharge claim requires more than simply a hostile environment. “When an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for the extension of the affirmative defense to the employer.” *Id.* at 2355. In such circumstances, the *Faragher/Ellerth* affirmative defense will enable the employer to prove that “it should not be held vicariously liable.” *Id.* It was the employer's burden, however, to demonstrate the existence of an effective remedial process and the employee's unreasonable failure to utilize the process. *Id.* at 1237.

Sexual and Other Forms of Harassment - General

Clark County School Dist. v. Breeden, 532 U.S. 268, 85 FEP 730 (2001) (*per curiam*) - A female employee alleged that, during a review of job applicant files, male co-workers' reactions to an applicant's sexually explicit comment constituted sexual harassment. Specifically, the female plaintiff met with her male supervisor and another male employee to review psychological evaluation reports of four job applicants. “The report for one of the applicants disclosed that the applicant had once commented to a coworker, ‘I hear making love to you is like making love to the Grand Canyon.’” 532 U.S. at 269. Both males chuckled at this comment. *Id.* Sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. *Id.* at 270. In this case, the incident did not violate Title VII because it is not severe or pervasive. Consequently, “simple teasing and isolated incidents will not amount to discriminatory changes in the terms and conditions of employment.” *Id.* at 271.

Thomas v. Town of Hammonton, 351 F.3d 108, 92 FEP 1701 (3d Cir. 2003) - The Third Circuit determined that a supervisor sexually harassed a female trainee despite a contention that a male trainee observed and was subject to the identical conduct and therefore it was not because of sex. Even if both trainees had been exposed to the same conduct, there could be a hostile work environment because the conduct contained comments that were disparaging to women, and the

conduct, coming in the context of a male supervisor having control over the fate of a female trainee, could be intimidating in a way not experienced by the male trainee. *Id.* at 117. Further, based on the evidence in this case, a trier of fact could infer that the hostile environment experienced by the female trainee would not have existed if she had been a male. *Id.*

Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 86 FEP 553 (3d Cir. 2001) - In this case, summary judgment for the employer was affirmed on a claim of an employee perceived to be homosexual that he was harassed because he was so perceived. He offered no evidence to prove he was harassed “because of sex.” The basic allegation was that a coworker used anti-gay epithets against him. The question is whether there is sufficient evidence to support a claim of same-sex sexual harassment. This requires a finding that the plaintiff was not harassed because of his sexual orientation, but because of his sex. In same-sex harassment cases, there can be evidence that the harasser sexually desires the victim as when a gay supervisor desires a same-sex subordinate or that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender. *Id.* at 262-3. However, in this case the plaintiff was discriminated against because of his sexual orientation, not because he was a man. Harassment on the basis of sexual orientation is morally reprehensible, but not actionable under Title VII

Discharge - General

Cigan v. Chippewa Falls School Dist., 388 F.3d 331, 16 A.D. Cas. 193 (7th Cir. 2004) - There was no constructive discharge when a teacher was told six months before the end of the school year that the superintendent would recommend against renewing her contract. She therefore decided to retire at the end of the school year, six months later. The teacher wanted the court to treat retirement as a constructive discharge, but did not contend that her working conditions were unendurable. *Id.* at 332-3. Instead, she contended that working conditions were irrelevant when a prospect of discharge lurked in the background, however, the prospect of being fired at the conclusion of an extended process was not itself a constructive discharge.

Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 86 FEP 1197 (3d Cir. 2001) - In this case, the former employee argued that she was constructively discharged as a result of a continuing pattern of discrimination by the employer. However, the Third Circuit held that there was no constructive discharge despite an employee’s exclusion from committees, hiring decisions, staff meeting, and a supervisor seminar. Further, the court noted that the employer never threatened to fire the employee, never encouraged her to resign from her position, or involuntarily transferred her to a less desirable position. In fact, she received satisfactory job evaluations throughout her employment. Thus, the employee did not produce evidence from which a reasonable jury could find an adverse employment action, that she was constructively discharged, a prerequisite to a successful age discrimination claim. *Id.* at 167. When the employee is unable to establish a *prima facie* case, no inference of discrimination is raised and the employer has no burden to proffer a reason for any action. *Id.*

* *This publication references recent decided cases as selected by the author. This publication will be updated on an annual basis.*

** *Law clerk, Christopher Fallon, assisted in the research and preparation of this publication.*