EMPLOYMENT DISCRIMINATION LAW

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EMPLOYMENT DISCRIMINATION LAW

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Preface

This Supplement updates the 7th edition through the end of the 2014-15 Supreme Court term and includes relevant court decisions through mid-June, 2015. We thank our students and Casebook users for their helpful suggestions. The bold page numbers indicate the place in the Casebook affected by the supplemental materials.

Arthur B. Smith, Jr. — Chicago, Illinois
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NOTE

A plaintiff need not allege in his judicial complaint the facts demonstrating a prima facie case, but must merely provide notice to the defendant of the underlying form of discrimination being raised. See *Keys v. Humana Inc.*, 684 F.3d 605 (6th Cir. 2012).

Page 69, Note 4.

When the hidden bias of a manager meaningfully influences the adverse employment determination made by the deciding official, the "cat's paw" theory may be applied to impose liability on the responsible employer [*Chattman v. Toho Tenax Am. Inc.*, 686 F.3d 339 (6th Cir. 2012), *rehearing denied* (8/23/12)], but when the evidence fails to establish that the bias of the prejudiced manager impacted the challenged decision, no liability will be found [*Lobato v. N.M. Env't. Dep't.*, 733 F.3d 1283 (10th Cir. 2013); *Othman v. City of Country Club Hills*, 671 F.3d 672 (8th Cir. 2012)].

Sims v. MVM Inc., 704 F.3d 1327 (11th Cir. 2013), involved a 71 year old supervisor who claimed that he had been discharged because of his age. He presented evidence showing that his immediate supervisor did not like working with older workers, which probably contributed to criticisms that person had communicated to the deciding official, but the deciding official indicated that he had not based his decision on these communications but rather on other considerations. The court noted that claimants prosecuting age discrimination suits must prove that age was a "but for" factor, rather than simply a "motivating factor," [see *Gross v. FBL Fin. Servs.* 557 U.S. 167 (2009), discussed in Note 4 on page 80] and it found that Sims had failed to establish the presence of such a factor. It went on to indicate that the "cat's paw" proof construct recognized in *Staub v. Proctor Hospital* was not applicable under the Age Discrimination in Employment Act due to the fact claimants must prove "but for" causation. What if the sole basis for the challenged decision had been the information provided to the deciding official by Sims' immediate supervisor and had been based entirely on that individual's age bias against older workers?

Page 71, Note 8.

What if an employer discriminates against an individual because it thinks that person is Black, Hispanic or Muslim, when the person is actually neither? A number of lower courts have held that such claims of "misperception discrimination" are not cognizable under Title VII due to the inability of the claimant to show that he or she is actually in a protected class. See D, Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J. LAW REFORM 87 (2013) and Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being "Regarded as" Black and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (2005) (arguing that such misperception discrimination should be covered by Title VII).

When individuals of different races interact, their interactions are frequently influenced by "racial emotions." Each race may perceive behavior of opposing race members quite differently from the way they would perceive identical behavior by members of their same race. Such subtle racial differences may influence how job candidates are evaluated during employment interviews, and how supervisors and subordinates assess their interactions with each other. In many instances, these interpretive differences may affect employment decisions in a race-based manner. How might courts endeavor to ascertain the impact of such factors and determine if Title VII violations have occurred? See Tristin Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959 (2013).

Regarding the difficulty of applying the civil rights statutes to decisions that may have been influenced by implicit or subconscious bias, see JOAN WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW (2014); Joan Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and* Intersectionality, 37 harv. J. L. & GENDER 185 (2014);Jason Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797 (2011); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CAL. L. REV. 1359 (2012).

Page 71, Note 9.

When minority employees are discharged for conduct for which similarly situated nonminority employees only received suspensions, this dissimilar treatment can be sufficient to support discriminatory treatment claims. See *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012). Compare *Perez v. Thorntons, Inc.*, 731 F.3d 699 (7th Cir. 2013) (Hispanic female manager of convenience store terminated for allegedly purchasing candy bars from store at price well below regular price established prima facie sex and national origin claim by showing that non-Hispanic male manager who committed comparable infraction received only warning), with *Rodriguez c. Wal-Mart Stores, Inc.*, 540 Fed. Appx. 322 (5th Cir. 2013) (Hispanic protected age operations manager failed to establish that retail store's reason for discharge – violation of associate purchase policy and social media policy – was pretext for age and national origin discrimination, where she was not similarly situated to other employees she cited who did not have similar disciplinary records).

Page 72, Note 11.

In *Good v. University of Chicago Med. Ctr.*, 673 F.3d 670 (7th Cir. 2012), the court held that a white employee who was terminated for allegedly poor work performance failed to establish a reverse discrimination claim where she failed to present evidence demonstrating that the employer had any "reason or inclination to discriminate invidiously against whites," despite the fact that several similarly situated minority employees with performance difficulties had been allowed to take demotions in lieu of being terminated.

Page 80, Note 1.

Where the plaintiff claims that the sole reason for his termination was his national origin and the employer maintains that the sole reason for that decision was the plaintiff's unacceptable behavior, and no evidence was presented that suggested that the employer may have relied upon both factors, a trial court is unlikely to grant the plaintiff's request for a mixed motive jury instruction, because the jury must simply determine which factor actually motivated the employer's decision. *Rapold v. Baxter Intl. Inc.*, 708 F.3d 867 (7th Cir. 2013), *cert. denied* 134 S. Ct. 525 (2013).

In *Carter v. Luminant Power Services Co.*, 714 F.3d 268 (5th Cir. 2013), the court held that the monetary defense set forth in § 706(g)(2)(B) is limited to discrimination involving race, color, religion, sex, and national origin, which are also covered by § 703(m) which requires plaintiffs in such cases to establish that the impermissible factor was a "motivating factor" in order to be considered a prevailing claimant entitled to an award of attorney fees, and has no application to claims of retaliatory action under § 704(a). As a result, if an employer can demonstrate in a mixed-motive retaliation case that it would have made the same decision even if it had not considered the plaintiff's prior anti-discrimination efforts, no liability would be found and the plaintiff would not be entitled to an award of attorney fees.

Page 81, Note 4.

In *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*), the court held that the "but for" causation standard applied to Americans with Disabilities Act cases, instead of the "motivating factor" standard contained in § 703(m) of Title VII, due to the fact Congress did not similarly amend the ADA when it modified Title VII. Nonetheless, where an ADA claimant introduces evidence indicating that similarly situated coworkers without disabilities were treated more favorably than he was, summary dismissal should be denied and the case should be resolved through a regular trial. *Smothers v. Solvay Chems, Inc.*, 740 F.3d 530 (10th Cir. 2014).

§ 2.02 DISPARATE IMPACT CLAIMS

Page 131, Note 1.

See generally Robert Belton & Stephen K. Wasby, *The Crusade for Equality in the Workplace: the* ***Griggs v. Duke Power*** *Story* (2014).

When city residency requirements for certain positions have a disparate impact on protected groups, courts continue to find the disparate impact construct relevant. See *NAACP v. North Hudson Reg'l. Fire & Rescue*, 665 F.3d 464 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2749 (2012) (disparate impact on black applicants); *Meditz v. City of Newark*, 658 F.3d 364 (3d Cir. 2011) (disparate impact on white applicants). For a thoughtful criticism of the disparate impact approach, see Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621 (2011) (asserting that strict application of the disparate impact approach makes it difficult for employers to seek the most qualified employees due to the lower percentage of qualified minority applicants and encourages firms to use covert affirmative action programs to offset any perceived disparate impact under holistic hiring policies to avoid the high cost of validating challenged standards that may actually predict effective job performance).

Page 133, Note 4.

The Boston Police Department uses hair tests to determine if officers are using illegal drugs. Between 1999 and 2006, black officers and recruits tested positive for cocaine approximately 1.3% of the time, while white officers and cadets tested positive under 0.3% of the time. A group of black officers sued the city challenging this drug testing practice under the disparate impact approach with expert testimony pointing out that the reliance upon hair samples was often unreliable due to the fact that blacks tend to have higher levels of melanin in their hair causing chemicals to bind to their hair at higher rates. Although the trial court dismissed this claim, the First Circuit reversed. Although it noted that the racial difference in outcomes was not great, they did not appear to be random. "To the extent the facts make it appropriate to consider the eight-year aggregate data as a single sample, we can be almost certain that the difference in outcomes associated with race over that period cannot be attributed to chance alone." *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014).

Page 136, Note 5.

When employers can demonstrate that job standards having a disparate impact on protected groups are reasonably related to job performance, courts generally sustain those standards. See *M.O.C.H.A. Society v. City of Buffalo*, 689 F.3d 263 (2d Cir. 2012) (even where promotional exam for Buffalo fire lieutenants was based upon statewide survey of firefighters and included no findings pertaining to the particular obligations of Buffalo fire lieutenants).

Page 138.

NOTE

If an employer uses seemingly neutral written exams to screen entry level applicants and the test results disqualify an excessive number of minority candidates, it may be possible for rejected candidates to allege discriminatory treatment discrimination based upon the employer's use of tests it knew had a discriminatory impact. See *United States v. City of New York*, 717 F.3d 72 (2d Cir. 2013).

Page 171.

NOTE

In *Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012), the court held that the fact the *Ricci* decision held that the city's refusal to certify the results of the firefighters' promotional exam constituted discriminatory treatment of white firefighters did not preclude black firefighters from claiming that the specific weighting of that exam had a disparate impact on blacks who were not parties to the original law suit, since the *Ricci* decision did not really resolve that issue. Compare *Maraschiello v. City of Buffalo Police Dept.*, 709 F.3d 87 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 119 (2013), in which the court held that a white police captain could not rely on *Ricci* to establish that his promotion denial was discriminatory, despite the fact the department had replaced the exam on which he was highest scorer with another exam to avoid a reasonable fear of a disparate impact claim by minorities with lower scores on initial test. See generally Mark S. Brodin *Ricci v. Destefano: The New Haven Firefighters Case and the Triumph of White Privilege*, 20 REV. L. & SOC. JUSTICE 161 (2011).

CHAPTER 3

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

§3.01 SCOPE OF COVERAGE

Page 190, Note 1.

Tamika Covington is a female high school basketball referee in New Jersey. She is referred to school districts by Board 193 of the International Association of Approved Basketball Officials. Although she sought the opportunity to referee boys' games in the Hamilton Township School District during the regular season and the N.J. State Interscholastic Athletic Association (NJSIAA) during post-season playoffs, she was denied the right to referee such games allegedly because of her sex. Although the district court dismissed her Title VII claim against all three of these entities due to a perceived lack of any employment relationship between her and any one of them, the Third Circuit Court reversed. It noted that when individuals referee games for the Hamilton Township School District, that entity exercises some control over their actions and pays them for their services, just as the NJSIAA does with respect to post-season games. The court thus held that these entities could be viewed as "employers" within the meaning of Title VII. The court further held that Board 193 could be considered to be an "employment agency" which is defined under Title VII as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer." *Covington v. Int'l. Assn. of Approved Basketball Officials* 710 F.3d 114 (3d Cir. 2013).

Page 190, Note 2.

In *Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013), the court held that the claimant's former employer did not violate Title VII when its related company refused to do business with the claimant's business, even if this was because of the fact the claimant had previously filed a discrimination suit against his prior employer, where he sought work with the related firm as an independent contractor and thus was not a covered "employee" of his former employer or that firm's related company at the time of the conduct in question.

§ 3.02 RACE/COLOR

Page 196, Note 7.

When city residency requirements for certain positions have a disparate impact on protected groups, disparate impact claims are likely to be sustained. See *NAACP v. North Hudson Reg'l. Fire & Rescue*, 665 F.3d 464 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2749 (2012) (disparate impact on black applicants); *Meditz v. City of Newark*, 658 F.3d 364 (3d Cir. 2011) (disparate impact on white applicants).

Page 196, Note 9.

A black employee's discovery of banana peels on his truck on multiple occasions is relevant to establish his claim of a race-based hostile work environment, since the term "monkey" is a common racial slur against blacks, and a harasser may conjure up images of monkeys by using items associated with them. *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012). Compare *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cit. 2015) (en banc) (black cocktail server called "porch monkey" twice within 24 hours has triable claim for racial harassment), with *Albert-Roberts v. GGG Constr., LLC*, 542 Fed. Appx. 62 (2d Cir. 2013) (single use of "n ***" word by coworker not sufficiently severe to provide basis for hostile environment claim).

Page 197, Note 10.

Green v. Amer. Fed'n. of Teachers, 740 F. 3d 1104 (7th Cir. 2014), involved a tenured school African American teacher terminated by his school district. He asked his representative union to process a grievance under the bargaining agreement challenging his discharge and to represent him in a law suit filed under the state tenure law. The union declined to do either, and he brought a Title VII suit claiming that the labor organization was discriminating against him because of his race and because he had previously complained about other racial discrimination by the union. The district court dismissed his suit based upon its belief that Green would not have prevailed on the merits with respect to his claim against the school district. The Seventh Circuit Court reversed. "If the union would have processed Green's grievance or represented him under the Tenure Act had he been white – or had refrained from complaining about other discriminatory episodes – then the union violated Title VII," even if his substantive claim against the school district was without merit. It is interesting to note that in his separate suit under the tenure act, Green prevailed and was reinstated to his former position.

Page 222, Note 1.

The EEOC has updated its enforcement guidance with respect to employer determinations based upon the criminal records of applicants to indicate that violations will be found whenever employers deliberately discriminate among individuals with similar criminal records or where such policies have a disparate impact based upon race, national origin, or other protected category and the employers cannot demonstrate any "business necessity" supporting the policies in question. Daily Labor Rept. (B.N.A.) No. 80 (4/25/12) at A-1.

In *EEOC v. Kaplan Higher Educ. Corp.*, 748 F,3d 749 (6th Cir. 2014), the court rejected the EEOC's effort to establish that an employer's reliance upon the results of credit checks when making hiring decisions contravened Title VII, due to the inability of the Commission to produce sufficient evidence to establish that the credit checks had a disparate impact upon black applicants.

Page 222, Note 4.

See Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AMER. L. & POL. 2 (2012).

§ 3.03 RELIGION

Page 264.

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).

Abercrombie & Fitch imposes a Look Policy that governs its employees' dress. The Look Policy prohibits "caps" – a term not expressly defined – as too informal for Abercrombie's image. Samantha Elauf, a practicing Muslim who wears a headscarf pursuant to her religious beliefs, applied for a position at an Abercrombie store. The store's assistant manager who interviewed Elauf found her to be qualified for the position, but was concerned about the fact her headscarf would conflict with the Look Policy. She contacted the district manager. She told him she thought Elauf wore the headscarf because of her religious faith. The district manager told her that the headscarf would violate the Look Policy, and directed her not to hire Elauf.

The EEOC sued Abercrombie on Elauf's behalf, claiming that the failure of Abercrombie to try to accommodate Elauf's religious beliefs contravened Title VII. Although the District Court granted the EEOC its motion for summary judgement regarding the issue of liability, the Tenth Circuit reversed, finding that an employer could not be held liable under Title VII for failing to accommodate a person's religious practice until the applicant provides the employer with knowledge of her need for an accommodation. A seven Justice Supreme Court majority reversed.

> . . . The word "religion" is defined to "include[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j).
>
> Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.
>
> The disparate-treatment provision forbids employers to: (1) "fail . . . to hire" an applicant (2) "because of" (3) "such individual's . . . religion" (which includes his religious practice). Here, of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely believes that her religion so requires) Elauf's wearing of a headscarf is (3) a "religious practice." All that remains is whether she was not hired (2) "because of" her religious practice.
>
> The term "because of" appears frequently in antidiscrimination laws. It typically

imports, at a minimum, the traditional standard of but-for causation. *Universtiy of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. __ (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a "motivating factor" in an employment decision. 42 U.S.C. §2000e-2(m). "Because of" in §2000e-2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.

It is significant that §2000e-2(a)(1) does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do. For example, the Americans with Disabilities Act of 1990 defines discrimination to include an employer's failure to make "reasonable accommodations to the *known* physical or mental limitations" of an applicant. . . Title VII contains no such limitation.

Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII. . . .

. . . Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious . . . practice," it is no response that the subsequent "fail[ure] . . . to hire" was due to an otherwise neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

NOTE

When an employer has reason to suspect that a person may have religious practices that may have to be accommodated, it may not act negatively toward that person for the purpose of

avoiding the need to explore possible accommodations that might be available – even if the issue was not raised by the person herself. What if Abercrombie had not had any reason to suspect that Elauf was wearing the headscarf because of religious considerations? In footnote 3, the majority acknowledged that: "While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice – *i.e.*, that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice."

See also *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) (Sikh employee of IRS who was terminated for wearing ceremonial "kirpan" sword with three-inch blade inside federal building where she worked might be able to establish Title VII violation where she presented evidence establishing sincerely held religious belief that she had to wear at least three-inch blade instead of statutorily permitted 2 ½ inch blade, and she showed that most Sikhs wear kirpans with blades longer than 2 ½ inches).

Page 265, Note 1.

When a Muslim hematologist brought a religious harassment claim against his hospital employer based upon complaints he had filed regarding negative treatment by a coworker, the court dismissed his suit due to the fact that none of his complaints had linked the coworker's conduct with his religion. *Jajeh v. County of Cook*, 678 F.3d 560 (7th Cir. 2012).

What if an individual is discriminated against or subject to hostile environment discrimination based upon the belief he is Muslim when in fact he is not? Several lower courts have held that such a person has no claim under Title VII due to the fact the discrimination in question was not actually based upon any Muslim status. See D. Wendy Greens, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J. LAW REFORM 87 (2013) (arguing that such "misperception discrimination" should be covered since based upon the belief the claimant was Muslim).

Page 265, Note 3.

A Christian employee of the Chicago Police Department objected to Sunday work, because it conflicted with her need to attend church services. The Police Department suggested that she work a 3:30 pm to 11:30 pm shift on Sundays, rather than her regular 7:30 am to 3:30 pm shift. Although she wanted to be relieved entirely of Sunday work, the court found this to constitute a "reasonable accommodation" of her religious beliefs, since it would enable her to attend Sunday church services. The court noted that employers need not provide employees with their preferred accommodations, but only with reasonable accommodations. See also *Sanchez-Rodrigues v. AT & T Mobility Puerto Rico Inc.*, 673 F.3d 1 (1st /Cir. 2012) (no violation where employer offered employee "reasonable accommodation" even though not the one the worker preferred).

Page 270, Note 11.

When a nursing care facility is a tax exempt religious organization under the direction of the Daughters of Charity, a religious order within the Catholic Church, and it maintains its facility in accordance with Catholic principles, it constitutes an exempt religious entity under Title VII. *Kennedy v. St. Joseph's Ministries Inc.*, 657 F.3d 189 (4th Cir. 2011).

Page 270.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL v. EEOC

Supreme Court of the United States
132 S. Ct. 694 (2012)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the *Establishment* and *Free Exercise Clauses of the First Amendment* bar such an action when the employer is a religious group and the employee is one of the group's ministers.

I
A

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in America. Hosanna-Tabor operated a small school in Redford, Michigan, offering a "Christ-centered education" to students in kindergarten through eighth grade. 582 F. Supp. 2d 881, 884 (ED Mich. 2008)

The Synod classifies teachers into two categories: "called" and "lay." "Called" teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a "colloquy" program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title "Minister of Religion, Commissioned." A commissioned minister serves for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation.

"Lay" or "contract" teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. At Hosanna-Tabor, they were appointed by the school board, without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and received a "diploma of vocation" designating her a commissioned minister.

Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003-2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004-2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft, that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom.

On January 30, Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a "peaceful release" from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22--the first day she was medically cleared to return to work--Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Following a school board meeting that evening, board chairman Scott Salo sent Perich a letter stating that Hosanna-Tabor was reviewing the process for rescinding her call in light of her "regrettable" actions. Salo subsequently followed up with a letter advising Perich that the congregation would consider whether to rescind her call at its next meeting. As grounds for termination, the letter cited Perich's "insubordination and disruptive behavior" on February 22, as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action." The congregation voted to rescind Perich's call on April 10, and Hosanna-Tabor sent her a letter of termination the next day.

B

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act, 104 Stat. 327, 42 U. S. C. §12101 et seq. (1990). The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. §12112(a). It also prohibits an employer from retaliating "against any individual because such individual has opposed any act or practice

made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." §12203(a).

The EEOC brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit. Perich intervened in the litigation, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act, Mich. Comp. Laws §37.1602(a) (1979). The EEOC and Perich sought Perich's reinstatement to her former position (or frontpay in lieu thereof), along with backpay, compensatory and punitive damages, attorney's fees, and other injunctive relief.

Hosanna-Tabor moved for summary judgment. Invoking what is known as the "ministerial exception," the Church argued that the suit was barred by the *First Amendment* because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason--namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally.

The District Court agreed that the suit was barred by the ministerial exception and granted summary judgment in Hosanna-Tabor's favor. The court explained that "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began," and that the "facts surrounding Perich's employment in a religious school with a sectarian mission" supported the Church's characterization. 582 F. Supp. 2d, at 891-892. In light of that determination, the court concluded that it could "inquire no further into her claims of retaliation." *Id.*, at 892.

The Court of Appeals for the Sixth Circuit vacated and remanded, directing the District Court to proceed to the merits of Perich's retaliation claims. The Court of Appeals recognized the existence of a ministerial exception barring certain employment discrimination claims against religious institutions--an exception "rooted in the *First Amendment's* guarantees of religious freedom." 597 F.3d 769, 777 (2010). The court concluded, however, that Perich did not qualify as a "minister" under the exception, noting in particular that her duties as a called teacher were identical to her duties as a lay teacher. *Id.*, at 778-781. Judge White concurred. She viewed the question whether Perich qualified as a minister to be closer than did the majority, but agreed that the "fact that the duties of the contract teachers are the same as the duties of the called teachers is telling." *Id.*, at 782, 784.

II

The *First Amendment* provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have said that these two Clauses "often exert conflicting pressures," *Cutter v. Wilkinson*, 544 U. S. 709, 719 (2005), and that there can be "internal tension ... between the *Establishment Clause* and the *Free Exercise Clause*," *Tilton v. Richardson*, 403 U. S. 672, 677 (1971) (plurality opinion). Not so here. Both *Religion Clauses* bar the government from interfering with the decision of a religious group to fire one of its ministers.

A

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church." J. Holt, Magna Carta App. IV, p. 317, cl. 1 (1965).

* * * *

Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship. . .

Colonists in the South, in contrast, brought the Church of England with them. But even they sometimes chafed at the control exercised by the Crown and its representatives over religious offices. . .

It was against this background that the *First Amendment* was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. See 1 Annals of Cong. 730-731 (1789) (noting that the *Establishment Clause* addressed the fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (remarks of J. Madison)). By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the *Religion Clauses* ensured that the new Federal Government--unlike the English Crown--would have no role in filling ecclesiastical offices. The *Establishment Clause* prevents the Government from appointing ministers, and the *Free Exercise Clause* prevents it from interfering with the freedom of religious groups to select their own.

* * * *

C

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a "ministerial exception," grounded in the *First Amendment*, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the *Free Exercise Clause*, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the *Establishment Clause*, which prohibits government involvement in such ecclesiastical decisions.

The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the *First Amendment* for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association--a right "implicit" in the *First Amendment*. *Roberts v. United States Jaycees*, 468 U. S. 609, 622 (1984). The EEOC and Perich thus see no need--and no basis--for a special rule for ministers grounded in the *Religion Clauses* themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the *First Amendment* analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the *First Amendment* itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the *Religion Clauses* have nothing to say about a religious organization's freedom to select its own ministers.

The EEOC and Perich also contend that our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), precludes recognition of a ministerial exception. In *Smith*, two members of the Native American Church were denied state unemployment benefits after it was determined that they had been fired from their jobs for ingesting peyote, a crime under Oregon law. We held that this did not violate the *Free Exercise Clause*, even though the peyote had been ingested for sacramental purposes, because the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.*, at 879.

It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. . .

III

Having concluded that there is a ministerial exception grounded in the *Religion Clauses of the First Amendment*, we consider whether the exception applies in this case. We hold that it does.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

To begin with, Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna-Tabor extended her a call, it issued her a "diploma of vocation" according her the title "Minister of Religion, Commissioned." She was tasked with performing that office "according to the Word of God and the confessional standards of the

Evangelical Luther- an Church as drawn from the Sacred Scriptures." The congregation prayed that God "bless [her] ministrations to the glory of His holy name, [and] the building of His church." In a supplement to the diploma, the congregation undertook to periodically review Perich's "skills of ministry" and "ministerial responsibilities," and to provide for her "continuing education as a professional person in the ministry of the Gospel."

Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning. To be eligible to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher. She also had to obtain the endorsement of her local Synod district by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry- related questions. Finally, she had to pass an oral examination by a faculty committee at a Lutheran college. It took Perich six years to fulfill these requirements. And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach. At that point, her call could be rescinded only upon a supermajority vote of the congregation--a protection designed to allow her to "preach the Word of God boldly."

Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning their compensation "'in the exercise of the ministry.'" . . . In a form she submitted to the Synod following her termination, Perich again indicated that she regarded herself as a minister at Hosanna-Tabor, stating: "I feel that God is leading me to serve in the teaching ministry .... I am anxious to be in the teaching ministry again soon."

Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna-Tabor expressly charged her with "lead[ing] others toward Christian maturity" and "teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and--about twice a year--she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible. During her last year of teaching, Perich also led her fourth graders in a brief devotional exercise each morning. As a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation.

In light of these considerations--the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church--we conclude that Perich was a minister covered by the ministerial exception.

In reaching a contrary conclusion, the Court of Appeals committed three errors. First, the Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's

position. It was wrong for the Court of Appeals--and Perich, who has adopted the court's view--to say that an employee's title does not matter.

Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed. But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions--particularly when, as here, they did so only because commissioned ministers were unavailable.

Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. It is true that her religious duties consumed only 45 minutes of each work- day, and that the rest of her day was devoted to teaching secular subjects. The EEOC regards that as conclusive, contending that any ministerial exception "should be limited to those employees who perform exclusively religious functions." We cannot accept that view. Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing religious functions as largely determinative. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Because Perich was a minister within the meaning of the exception, the *First Amendment* requires dismissal of this employment discrimination suit against her religious employer. The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the *Religion Clauses* to select its own ministers.

Perich no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the *First Amendment* than an order overturning the termination. Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.

The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich--that she violated the Synod's commitment to internal dispute resolution--was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful--a matter "strictly ecclesiastical," *Kedroff [v. Saint Nicholas Cathedral of Russian Orthodox Church in North America]*, 344 U. S. 94 (1952), at 119--is the church's alone.

IV

The EEOC and Perich foresee a parade of horribles that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers "unfettered discretion" to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.

* * * *

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the *First Amendment* has struck the balance for us. The church must be free to choose those who will guide it on its way.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

THOMAS, J., concurring

I join the Court's opinion. I write separately to note that, in my view, the *Religion Clauses* require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. As the Court explains, the *Religion Clauses* guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a "minister" under the organization's theological tenets. . .

JUSTICE ALITO, with whom JUSTICE KAGAN joins, concurring.

I join the Court's opinion, but I write separately to clarify my understanding of the significance of formal ordination and designation as a "minister" in determining whether an "employee" of a religious group falls within the so-called "ministerial" exception. The term "minister" is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.

The *First Amendment* protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions.

The "ministerial" exception should be tailored to this purpose. It should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.

I

* * * *

When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion can- not depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (CA3 2006). A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

* * * *

II

B

The ministerial exception applies to respondent because, as the Court notes, she played a substantial role in "conveying the Church's message and carrying out its mission." She taught religion to her students four days a week and took them to chapel on the fifth day. She led them in daily devotional exercises, and led them in prayer three times a day. She also alternated with the other teachers in planning and leading worship services at the school chapel, choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture.

It makes no difference that respondent also taught secular subjects. While a purely secular teacher would not qualify for the "ministerial" exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones. What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities. Because of these important religious functions, Hosanna-Tabor had the right to decide for itself whether respondent was religiously qualified to remain in her office. . . .

NOTE

The First Amendment ministerial exception precluded a terminated music director's age and disability discrimination claims, where he performed music at Mass on Saturday nights and Sunday mornings, and he and his wife selected the hymns to be played at Mass each Sunday. *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012).

If a religious school were to assign a sufficient number of religious functions to regular school teachers to allow it to limit such positions to persons of a particular ethnicity or gender, could someone denied access to those positions have the right to challenge that practice or would the school be exempt under the "ministerial exception"? Would it violate either the Establishment Clause or the Free Exercise Clause for courts to assert jurisdiction over such claims? See generally Jed Glickstein, *Should the Ministerial Exception Apply to Functions, not Persons?* 122 YALE L.J. 1964 (2013); Leslie Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013).

§ 3.04 GENDER

Page 271.

NOTE

When employers terminate female employees for "butting heads" with managers in a way that would have been tolerated if done by male workers, a Title VII violation may be found due to the different gender-based stereotypes being applied to men and women with respect to identical behavior. See *Potter v. Synerlink Corp.* 562 Fed. Appx. 665 (10th Cir. 2014).

Studies continue to show that employment advertisements occasionally use words that suggest that men or women are preferred for the positions in question. For example, advertisements for male dominated positions may include words like *leader*, *competitive*, or *dominant*, which are associated with male stereotypes, while advertisements for female dominated positions may include words like *support*, *understand*, or *interpersonal*, which are associated with female stereotypes. See Danielle Gaucher, Justin Friesen & Aaron C. Kay, *Evidence That Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality*, 101 J. PERSONALITY & SOC. PSYCH. 109 (2011).

[A] Bona Fide Occupational Qualification

Page 335, Note 2.

In T*eamsters Local 117 v. Wash. Dept. of Corrections*, 2015 WL 3634711 (9th Cir. 2015), the court found that sex was a BFOQ for 110 close-contact positions in women's prisons, where the policy was adopted to curb problems that included sexual abuse and other misconduct against female inmates by male prison guards.

[C] Marriage and Family Obligations

Page 345, Note 4.

It is interesting to note the degree to which gender stereotyping and assumed male-female family obligations continue to influence employment opportunities for women. See Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008); Timothy A. Judge & Beth A. Livingston, *Is the Gap More Than Gender? A Longitudinal Analysis of Gender, Gender, Role Orientation, and Earnings*, 93 J. APPLIED PSYCH.994 (2008).When employers prefer men over women for positions that require regular relocations, based upon the belief that men are more willing to move -- despite family obligations -- than women, would this constitute gender-based discriminatory treatment or disparate impact? See Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 De PAUL L. REV. 759 (2013); Naomi Schoenbaum, *Mobility Measures*, 2012 B.Y.U. L. REV. 1169 (2012).

Gender stereotyping and assumed male-female family obligations can also have a negative impact upon males who contravene assumed male roles and take over family care functions. "[M]ale leave-takers experienced a 'femininity stigma,' which in turn lowered their chances of promotion. Upon requesting leave, these men were rated higher in feminine traits (e.g., insecure, emotional, weak) and lower in masculine traits (e.g., confident, competitive, possesses leadership skills). Beyond perceptions, this stigma imposed direct economic costs on these men, as they became less eligible for raises and upward advancements after taking leave." Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUMBIA J. GENDER & LAW 253, 295 (2013). A recent empirical study found that "men who did not work for family reasons receive a wage penalty of 26.4% and women a penalty of 23.2%." Scott Coltrane, Elizabeth Mller, Tracy DeHaan & Lauren Stewart, *Fathers and the Flexibility Stigma*, 69 J. SOCIAL ISSUES 279, 288 (2013). In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), a case in which the Court sustained the power of Congress to extend FMLA rights to employees of state agencies, the Court acknowledged the discrimination male caregivers may experience: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination." 538 U.S. at 736-737. It should thus be clear that male caregivers who are denied salary increases or promotions due to their failure to conform to traditional male stereotypes should be able to bring claims under Title VII in the same manner in which female caregivers may do so under the reasoning of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[D] Maternity

Page 346.

YOUNG v. UNITED PARCEL SERVICE, INC.
135 S. Ct. 1338 (2015)

Justice **BREYER** delivered the opinion of the Court.

The Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat "women affected by pregnancy ... the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). We must decide how this latter provision applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

In our view, the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here—as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence—it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Ultimately the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. The Court of Appeals here affirmed a grant of summary judgment in favor of the employer. Given our view of the law, we must vacate that court's judgment.

I
A

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young subsequently brought this federal lawsuit. We focus here on her claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were "similar in their ... inability to work." She accordingly concluded that UPS must accommodate her as well.

UPS responded that the "other persons" whom it had accommodated were (1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans

with Disabilities Act of 1990(ADA), 104 Stat. 327, UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" relevant "persons."

B

Title VII of the Civil Rights Act of 1964 forbids a covered employer to "discriminate against any individual with respect to ... terms, conditions, or privileges of employment, because of such individual's ... sex." 78 Stat. 253, 42 U.S.C. § 2000e–2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat.2076, which added new language to Title VII's definitions subsection. The first clause of the 1978 Act specifies that Title VII's "ter[m] 'because of sex' ... include[s] ... because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e(k). The second clause says that

> "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ... ."

This case requires us to consider the application of the second clause to a " disparate-treatment" claim—a claim that an employer intentionally treated a complainant less favorably than employees with the "complainant's qualifications" but outside the complainant's protected class. *McDonnell Douglas, supra,* at 802. We have said that "[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision." Raytheon Co. v. Hernandez, 540 U.S. 44, 52, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003) (ellipsis and internal quotation marks omitted). We have also made clear that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985).

In *McDonnell Douglas,* we considered a claim of discriminatory hiring. We said that, to prove disparate treatment, an individual plaintiff must "carry the initial burden" of "establishing a prima facie case" of discrimination by showing

> "(i) that he belongs to a ... minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S., at 802.

If a plaintiff makes this showing, then the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class. *Ibid.* If the employer articulates such a reason, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [*i.e.*, the employer] were not its true reasons, but were a pretext for discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

* * *

C

In July 2007, Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC). In September 2008, the EEOC provided her with a right-to-sue letter. See 29 CFR § 1601.28 (2014). Young then filed this complaint in Federal District Court. She argued, among other things, that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework.

After discovery, UPS filed a motion for summary judgment. Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. They include the following:

* * *

> The manager determined that Young did not qualify for a temporary alternative work assignment.
>
> UPS, in a collective-bargaining agreement, had promised to provide temporary alternative work assignments to employees "unable to perform their normal work assignments due to an *on-the-job* injury." App. 547 (emphasis added); see also Memorandum 8, 45–46.
>
> The collective-bargaining agreement also provided that UPS would "make a good faith effort to comply ... with requests for a reasonable accommodation because of a permanent disability" under the ADA.
>
> The agreement further stated that UPS would give "inside" jobs to drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident.
>
> When Young later asked UPS' Capital Division Manager to accommodate her disability, he replied that, while she was pregnant, she was "too much of a liability" and could "not come back" until she " 'was no longer pregnant.' "
>
> Young remained on a leave of absence (without pay) for much of her pregnancy.
>
> Young returned to work as a driver in June 2007, about two months after her baby was born.

As direct evidence of intentional discrimination, Young relied, in significant part, on the statement of the Capital Division Manager (10 above). As evidence that she had made out a prima facie case under *McDonnell Douglas*, Young relied, in significant part, on evidence showing that UPS would accommodate workers injured on the job, those suffering from ADA disabilities, and those who had lost their DOT certifications. That evidence, she said, showed that UPS had a light-duty-for-injury policy with respect to numerous "other persons," but not with respect to pregnant workers.

Young introduced further evidence indicating that UPS had accommodated several individuals when they suffered disabilities that created work restrictions similar to hers. UPS

contests the correctness of some of these facts and the relevance of others. But because we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to Young, the nonmoving party.

> Several employees received accommodations while suffering various similar or more serious disabilities incurred on the job. (10–pound lifting limitation); (foot injury); (arm injury).
>
> Several employees received accommodations following injury, where the record is unclear as to whether the injury was incurred on or off the job. (recurring knee injury); (ankle injury); (knee injury); (stroke); (leg injury).
> Several employees received "inside" jobs after losing their DOT certifications. (DOT certification suspended after conviction for driving under the influence); (failed DOT test due to high blood pressure); (DOT certification lost due to sleep apnea diagnosis).
>
> Some employees were accommodated despite the fact that their disabilities had been incurred off the job. (ankle injury); (cancer).
>
> According to a deposition of a UPS shop steward who had worked for UPS for roughly a decade, "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant."

The District Court granted UPS' motion for summary judgment. It concluded that Young could not show intentional discrimination through direct evidence. Nor could she make out a prima facie case of discrimination under *McDonnell Douglas*. The court wrote that those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as "similarly situated comparator [s].". The court added that, in any event, UPS had offered a legitimate, nondiscriminatory reason for failing to accommodate pregnant women, and Young had not created a genuine issue of material fact as to whether that reason was pretextual.

On appeal, the Fourth Circuit affirmed. It wrote that "UPS has crafted a pregnancy-blind policy" that is "at least facially a 'neutral and legitimate business practice,' and not evidence of UPS's discriminatory animus toward pregnant workers." 707 F.3d 437, 446 (2013). It also agreed with the District Court that Young could not show that "similarly-situated employees outside the protected class received more favorable treatment than Young." Specifically, it believed that Young was different from those workers who were "disabled under the ADA" (which then protected only those with permanent disabilities) because Young was "not disabled"; her lifting limitation was only "temporary and not a significant restriction on her ability to perform major life activities." Young was also different from those workers who had lost their DOT certifications because "no legal obstacle stands between her and her work" and because many with lost DOT certifications retained physical (*i.e.*, lifting) capacity that Young lacked. And Young was different from those "injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury." Rather, Young more closely resembled "an employee who injured his back while picking up his infant child or ... an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter," neither of whom would have been eligible for accommodation under UPS' policies.

* * *

D

We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered disabilities ADA Amendments Act of 2008. As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. We express no view on these statutory and regulatory changes.

II

The parties disagree about the interpretation of the Pregnancy Discrimination Act's second clause. As we have said, the Act's first clause specifies that discrimination " 'because of sex' " includes discrimination "because of ... pregnancy." But the meaning of the second clause is less clear; it adds: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as *other persons* not so affected but *similar in their ability or inability to work*." 42 U.S.C. § 2000e(k) (emphasis added). Does this clause mean that courts must compare workers *only* in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant "other persons" are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving "the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her inability to work." Suppose the employer would not give "*that* [*pregnant*] *employee* " the "same accommodations" as another employee, but the employer's reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work." In other words, Young contends that the second clause means that whenever "an employer accommodates only a subset of workers with disabling conditions," a court should find a Title VII violation if "pregnant workers who are similar in the ability to work" do not "receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations."

UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. Under this view, courts

would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII. Cf. *post,* (SCALIA, J., dissenting) (hereinafter the dissent) (the clause "does not prohibit denying pregnant women accommodations ... on the basis of an evenhanded policy").

A

We cannot accept either of these interpretations. Young asks us to interpret the second clause broadly and, in her view, literally. As just noted, she argues that, as long as "an employer accommodates only a subset of workers with disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." She adds that, because the record here contains "evidence that pregnant and nonpregnant workers were not treated the same," that is the end of the matter, she must win; there is no need to refer to *McDonnell Douglas*.

The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.

Lower courts have concluded that this could not have been Congress' intent in passing the Pregnancy Discrimination Act. See, *e.g.*, Urbano, 138 F.3d, at 206–208; *Reeves*, 466 F.3d, at 641; . . . . And Young partially agrees, for she writes that "the statute does not require employers to give" to "pregnant workers all of the benefits and privileges it extends to other" similarly disabled "employees when those benefits and privileges are ... based on the employee's tenure or position within the company." . . .

. . . We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "*any* other persons" (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind.

Moreover, disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, *e.g.*, Raytheon, 540 U.S., at 51–55; Burdine, 450 U.S., at 252–258; McDonnell Douglas, 411 U.S., at 802. There is no reason to believe Congress intended its language in the Pregnancy Discrimination Act to embody a significant deviation from this approach. Indeed,

the relevant House Report specifies that the Act "reflect[s] no new legislative mandate." H.R.Rep. No. 95–948, pp. 3–4 (1978) (hereinafter H.R. Rep.). . .

B

Before Congress passed the Pregnancy Discrimination Act, the EEOC issued guidance stating that "[d]isabilities caused or contributed to by pregnancy ... are, for all job-related purposes, temporary disabilities" and that "the availability of ... benefits and privileges ... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10(b) (1975). Indeed, as early as 1972, EEOC guidelines provided: "Disabilities caused or contributed to by pregnancy ... are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."

Soon after the Act was passed, the EEOC issued guidance consistent with its pre-Act statements. The EEOC explained: "Disabilities caused or contributed to by pregnancy ... for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions." See § 1604.10(b) (1979). Moreover, the EEOC stated that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."

This post-Act guidance, however, does not resolve the ambiguity of the term "other persons" in the Act's second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related disabilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.

More recently—in July 2014—the EEOC promulgated an additional guideline apparently designed to address this ambiguity. That guideline says that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." . . .

The EEOC further added that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries." . . .

[T]he "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control." *Skidmore, supra,* at 140. These qualifications are relevant here and severely limit the EEOC's July 2014 guidance's special power to persuade.

We come to this conclusion not because of any agency lack of "experience" or "informed judgment." Rather, the difficulties are those of timing, "consistency," and "thoroughness" of "consideration." The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. . . Nor does

the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.

C

We find it similarly difficult to accept the opposite interpretation of the Act's second clause. UPS says that the second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be so.

The first clause accomplishes that objective when it expressly amends Title VII's definitional provision to make clear that Title VII's words "because of sex" and "on the basis of sex" "include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). We have long held that " 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause' " is rendered " 'superfluous, void, or insignificant.' " But that is what UPS' interpretation of the second clause would do.

The dissent, basically accepting UPS' interpretation, says that the second clause is not "superfluous" because it adds "clarity." (internal quotation marks omitted). It makes "plain," the dissent adds, that unlawful discrimination "includes disfavoring pregnant women relative to other workers of similar inability to work." Perhaps we fail to understand. *McDonnell Douglas* itself makes clear that courts normally consider how a plaintiff was treated relative to other "persons of [the plaintiff's] qualifications" (which here include disabilities).. If the second clause of the Act did not exist, we would still say that an employer who disfavored pregnant women relative to other workers of similar ability or inability to work had engaged in pregnancy discrimination. In a word, there is no need for the "clarification" that the dissent suggests the second sentence provides.

Moreover, the interpretation espoused by UPS and the dissent would fail to carry out an important congressional objective. As we have noted, Congress' "unambiguou[s]" intent in passing the Act was to overturn "both the holding and the reasoning of the Court in the *Gilbert* decision." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983); . .In *Gilbert*, the Court considered a company plan that provided "nonoccupational sickness and accident benefits to all employees" without providing "disability-benefit payments for any absence due to pregnancy." 429 U.S., at 128, 129. The Court held that the plan did not violate Title VII; it did not discriminate on the basis of sex because there was "no risk from which men are protected and women are not." (internal quotation marks omitted). Although pregnancy is "confined to women," the majority believed it was not "comparable in all other respects to [the] diseases or disabilities" that the plan covered. Specifically, the majority explained that pregnancy "is not a 'disease' at all," nor is it necessarily a result of accident. Neither did the majority see the distinction the plan drew as "a subterfuge" or a "pretext" for engaging in gender-based discrimination. In short, the *Gilbert* majority reasoned in part just as the dissent reasons here. The employer did "not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.*" It distinguished between them on a neutral

ground—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those.

Simply including pregnancy among Title VII's protected traits (*i.e.*, accepting UPS' interpretation) would not overturn *Gilbert* in full—in particular, it would not respond to *Gilbert* 's determination that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work. As we explained in California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987), "the first clause of the [Act] reflects Congress' disapproval of the reasoning in *Gilbert* " by "adding pregnancy to the definition of sex discrimination prohibited by Title VII." Id., at 284. But the second clause was intended to do more than that—it "was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.". The dissent's view, like that of UPS', ignores this precedent.

III

The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets forth. Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert,* and is consistent with longstanding interpretations of Title VII.

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. That framework requires a plaintiff to make out a prima facie case of discrimination. But it is "not intended to be an inflexible rule." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Rather, an individual plaintiff may establish a prima facie case by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under" Title VII. (internal quotation marks omitted). The burden of making this showing is "not onerous." Burdine, 450 U.S., at 253. In particular, making this showing is not as burdensome as succeeding on "an ultimate finding of fact as to" a discriminatory employment action. *Furnco, supra,* at 576. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. See McDonnell Douglas, 411 U.S., at 802 (burden met where plaintiff showed that employer hired other "qualified" individuals outside the protected class).

Thus, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas,* that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying her accommodation. 411 U.S., at 802. But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of

those ("similar in their ability or inability to work") whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.

If the employer offers an apparently "legitimate, non-discriminatory" reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine*, *supra,* at 255, n. 10. In particular, it is hardly anomalous (as the dissent makes it out to be, that a plaintiff may rebut an employer's proffered justifications by showing how a policy operates in practice. In *McDonnell Douglas* itself, we noted that an employer's "general policy and practice with respect to minority employment"—including "statistics as to" that policy and practice—could be evidence of pretext. Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines.

Our interpretation of the Act is also, unlike the dissent's, consistent with Congress' intent to overrule *Gilbert* 's reasoning and result. The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been 'treated the same' as everyone else." This logic would have found no problem with the employer plan in *Gilbert,* which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees—*i.e.,* it accommodated only sicknesses and accidents, and pregnancy was neither of those. See Part II–C, *supra*. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. But Congress' intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the employer's disability plan as denying coverage to pregnant employees on a neutral basis.

IV

Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. Viewing the record in the light most favorable to Young, there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis.

Young also introduced evidence that UPS had three separate accommodation policies (on-the-job, ADA, DOT). Taken together, Young argued, these policies significantly burdened pregnant women. (shop steward's testimony that "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant"). The Fourth Circuit did not consider the combined effects of these policies, nor did it consider the strength of UPS' justifications for each when combined. That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?

We do not determine whether Young created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than it treated these other nonpregnant employees were pretextual. We leave a final determination of that question for the Fourth Circuit to make on remand, in light of the interpretation of the Pregnancy Discrimination Act that we have set out above.

* * *

For the reasons above, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, concurring in the judgment.

As originally enacted, Title VII of the Civil Rights Act of 1964, made it an unlawful employment practice to discriminate "because of [an] individual's ... sex" but made no mention of discrimination because of pregnancy. In General Elec. Co. v. Gilbert, 429 U.S. 125, 135–140, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), this Court held that Title VII did not reach pregnancy discrimination. Congress responded by enacting the Pregnancy Discrimination Act (PDA), which added subsection (k) to a definitional provision. Subsection (k) contains two clauses. The first is straightforward; the second is not.

I

The first clause provides that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy." This clause has the effect of adding pregnancy to the list of prohibited grounds (race, sex, etc.) originally included in §

2000e–2(a)(1). Claims of discrimination under that provision require proof of discriminatory intent. . . Thus, as a result of the first clause, an employer engages in unlawful discrimination under § 2000e–2(a)(1) if (and only if) the employer's intent is to discriminate because of or on the basis of pregnancy.

If an employer treats a pregnant woman unfavorably for any other reason, the employer is not guilty of an unlawful employment practice under § 2000e–2(a), as defined by the first clause of the PDA. And under this first clause, it does not matter whether the employer's ground for the unfavorable treatment is reasonable; all that matters is the employer's actual intent. Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder *may* infer that the employer's asserted reason for its action is a pretext for unlawful discrimination. But if the factfinder is convinced that the employer acted for some reason other than pregnancy, the employer cannot be held liable under this clause.

II

The PDA, however, does not simply prohibit discrimination because of or on the basis of pregnancy. Instead, the second clause in § 2000e(k) goes on to say the following: "and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." This clause raises several difficult questions of interpretation that are pertinent to the case now before us.

A

First, does this clause simply explain what is meant by discrimination because of or on the basis of pregnancy? Or does it impose an additional restriction on employer conduct? I believe that this clause does not merely explain but instead adds to the language that precedes it.

This is the interpretation that is most consistent with the statutory text. This clause begins with the word "and," which certainly suggests that what follows represents an addition to what came before.

* * *

. . . [I]f the second clause does not set out an additional restriction on employer conduct, it would appear to be largely, if not entirely, superfluous. . . [T]he first clause of the PDA is alone sufficient to make it clear that an employer is guilty of an unlawful employment practice if it intentionally treats pregnant employees less favorably than others who are similar in their ability or inability to work. For these reasons, I conclude that the second clause does not merely explain the first but adds a further requirement of equal treatment irrespective of intent.

B

This leads to the second question: In determining whether pregnant employees have been given the equal treatment that this provision demands, with whom must the pregnant employees be compared? I interpret the second clause to mean that pregnant employees must be compared with employees performing the same or very similar jobs. Pregnant employees, the second provision

states, must be given the same treatment as other employees who are "similar in their ability or inability to work." . . . The treatment of pregnant employees must be compared with the treatment of nonpregnant employees whose jobs involve the performance of the same or very similar tasks.

C

This conclusion leads to a third, even more difficult question: When comparing pregnant employees to nonpregnant employees in similar jobs, which characteristics of the pregnant and nonpregnant employees must be taken into account? The answer, I believe, must be found in the reference to "other employees who are similar in their ability or inability to work." I see two possible interpretations of this language. The first is that the capacity to perform the tasks required by a job is the only relevant characteristic, but like the Court, I cannot accept this "most favored employee" interpretation.

This interpretation founders when, as in this case, an employer treats pregnant women less favorably than some but not all nonpregnant employees who have similar jobs and are similarly impaired in their ability to perform the tasks that these jobs require. . . United Parcel Service (UPS) drivers who were unable to perform the physical tasks required by that job fell into three groups: first, nonpregnant employees who received favorable treatment; second, nonpregnant employees who do not receive favorable treatment; and third, pregnant employees who, like the nonpregnant employees in the second category, did not receive favorable treatment. Under these circumstances, would the "most favored employee" interpretation require the employer to treat the pregnant women like the employees in the first, favored group? Or would it be sufficient if the employer treated them the same as the nonpregnant employees in the second group who did not receive favorable treatment?

Recall that the second clause of § 2000e(k) requires that pregnant women "be treated the same for all employment-related purposes ... as *other persons* not so affected but similar in their ability or inability to work." (Emphasis added.) Therefore, UPS could say that its policy treated the pregnant employees the same as "other persons" who were similar in their ability or inability to work, namely, those nonpregnant employees in the second category. But at the same time, the pregnant drivers like petitioner could say that UPS did not treat them the same as "other employees" who were similar in their ability or inability to work, namely, the nonpregnant employees in the first group. An interpretation that leads to such a problem cannot be correct.

I therefore turn to the other possible interpretation of the phrase "similar in their ability or inability to work," namely, that "similar in the ability or inability to work" means "similar *in relation* to the ability or inability to work." Under this interpretation, pregnant and non-pregnant employees are not similar in relation to the ability or inability to work if they are unable to work for different reasons. And this means that these two groups of employees are not similar in the relevant sense if the employer has a neutral business reason for treating them differently. I agree with the Court that a sufficient reason "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ... whom the employer accommodates." Otherwise, however, I do not think that the second clause of the PDA authorizes courts to evaluate the justification for a truly neutral rule. . . .

III

* * *

. . . Under the policy that United Parcel Service claims to have had in force at the time in question, drivers who were physically unable to perform the tasks required by that position fell into three groups. . . .

It is obvious that respondent had a neutral reason for providing an accommodation when that was required by the ADA. Respondent also had neutral grounds for providing special accommodations for employees who were injured on the job. If these employees had not been permitted to work at all, it appears that they would have been eligible for workers' compensation benefits.

The accommodations that are provided to drivers who lost their DOT certifications, however, are another matter. A driver may lose DOT certification for a variety of reasons, including medical conditions or injuries incurred off the job that impair the driver's ability to operate a motor vehicle. Such drivers may then be transferred to jobs that do not require physical tasks incompatible with their illness or injury. It does not appear that respondent has provided any plausible justification for treating these drivers more favorably than drivers who were pregnant. . . .

. . . [T]he legal obstacle faced by drivers who have lost DOT certification only explains why those drivers could not continue to perform all the tasks required by their ordinary jobs; it does not explain why respondent went further and *provided such drivers with a work accommodation*. Petitioner's pregnancy prevented her from continuing her normal work as a driver, just as is the case for a driver who loses DOT certification. But respondent had a policy of accommodating drivers who lost DOT certification but not accommodating pregnant women, like petitioner. The legal obstacle of lost certification cannot explain this difference in treatment. . . .

For these reasons, it is not at all clear that respondent had any neutral business ground for treating pregnant drivers less favorably than at least some of its nonpregnant drivers who were reassigned to other jobs that they were physically capable of performing. I therefore agree with the Court that the decision of the Court of Appeals with respect to petitioner's claim under the second clause of the PDA must be vacated, and the case must be remanded for further proceedings with respect to that claim.

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, dissenting.

Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act. To "treat" pregnant workers "the same ... as other persons," we are told, means refraining from adopting policies that impose "significant burden[s]" upon pregnant women without "sufficiently strong" justifications. Where do the "significant burden" and "sufficiently strong justification" requirements come from? Inventiveness posing as

scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice.

I

* * *

That is why Young and the Court leave behind the part of the law defining pregnancy discrimination as sex discrimination, and turn to the part requiring that "women affected by pregnancy ... be treated the same ... as other persons not so affected but similar in their ability or inability to work." § 2000e(k). The most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability or inability *because of pregnancy*. Here, that means pregnant women are entitled to accommodations *on the same terms* as other workers with disabling conditions. If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been "treated the same" as everyone else. UPS's accommodation for drivers who lose their certifications illustrates the point. A pregnant woman who loses her certification gets the benefit, just like any other worker who loses his. And a pregnant woman who keeps her certification does not get the benefit, again just like any other worker who keeps his. That certainly sounds like treating pregnant women and others the same.

* * *

Of these two readings, only the first makes sense in the context of Title VII. The point of Title VII's bans on discrimination is to prohibit employers from treating one worker differently from another *because of a protected trait*. It is not to prohibit employers from treating workers differently for reasons that have nothing to do with protected traits. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Against that backdrop, a requirement that pregnant women and other workers be treated the same is sensibly read to forbid distinctions that discriminate against pregnancy, not all distinctions whatsoever.

Prohibiting employers from making *any* distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. . . .

. . . [T]he Act makes plain that the existing ban on sex discrimination reaches discrimination because of pregnancy. Reading the same-treatment clause to give pregnant women special protection unavailable to other women would clash with this central theme of the Act, because it would mean that pregnancy discrimination differs from sex discrimination after all.

All things considered, then, the right reading of the same-treatment clause prohibits practices that discriminate against pregnant women relative to workers of similar ability or inability. It does not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy. . . .

Justice KENNEDY, dissenting.

It seems to me proper, in joining Justice SCALIA's dissent, to add these additional remarks. The dissent is altogether correct to point out that petitioner here cannot point to a class of her co-workers that was accommodated and that would include her but for the particular limitations imposed by her pregnancy. Many other workers with health-related restrictions were not accommodated either. And, in addition, there is no showing here of animus or hostility to pregnant women. . . .

NOTE

Would the fact UPS accommodated persons who had lost their DOT certifications due to reasons having no work related connections indicate that it would be difficult for it to articulate a "sufficiently strong" justification for denying such accommodations to pregnant employees?

When might it be possible for pregnant employees to claim that their conditions constitute covered "disabilities" under the Americans with Disabilities Act? See Jeannette Cox, *Pregnancy as "Disability" and the Americans with Disabilities Act*, 53 BOSTON COLL. L. REV. 443 (2012).

Page 355, Note 4.

In *EEOC v. Houston Funding II Ltd.*, 717 F.3d 425 (5th Cir. 2013), the court held that an employer violated the PDA when it discharged a female employee because she was lactating and wished to express breast milk at work, since such a policy "clearly imposes upon women a burden that male employees need not – indeed, could not – suffer" and thus contravenes Title VII. The court rejected the company claim that lactation is not a "related medical condition of pregnancy" within the meaning of the PDA, since "lactation is a physiological result of being pregnant and bearing a child." On the other hand, in *Ames v. Nationwide Mutual Insur. Co.*, 760 F.3d 763 (8th Cir 2014), *cert. denied*, 135 S. Ct. 947 (2015), the court rejected a claim of constructive discharge when Ames, a loss mitigation specialist, returned from maternity leave and was denied immediate access to a lactation room, was told she had to catch up on the work she had missed within two weeks, and was told by a supervisor to "go home to be with your babies." She had failed to comply with a company policy requiring employees to submit a request for access to the lactation room before they could obtain access, and had been told she could temporarily use a wellness room in the interim. The company required all employees returning from leave to catch up quickly. Even though her supervisor had said she go home and suggested language she might include in a resignation letter, the court noted that none of these factors were sufficiently onerous to support a constructive discharge claim. It held that not only must an employee in such circumstances demonstrate that her employer had deliberately created intolerable working conditions with the intention to induce her to resign, but the worker must raise the issues in question and provide her employer with the opportunity to resolve them before she quits. It found that Ames had failed to satisfy either of these burdens.

Page 356, Note 7.

When a teacher at a Christian school was terminated shortly after informing school officials that she was pregnant and admitting that she had conceived the child before she got

married, the court found that she could still prosecute a sex discrimination claim based upon the fact that the deciding official had indicated that his decision was based more on her pregnancy than the fact she had become pregnant when not yet married. *Hamilton v. Southland Christian School Inc.*, 680 F.3d 1316 (11th Cir. 2012).

Page 367.

NOTE

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), concerned a section of the Affordable Care Act which requires employers to provide health insurance which includes contraceptive coverage for employees. A closely-held, for-profit corporation whose Christian owners believe that life begins at conception, asserted that the requirement that they provide health insurance coverage that might result in the destruction of embryos would contravene their rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq. A closely divided Supreme Court sustained their claim, and held that it would violate the RFRA for Congress to impose such a requirement, since, even if it had a compelling interest to do so, there were other less restrictive means that could be used to extend such coverage to those employees without imposing the requirement on their Christian employers. The four dissenting Justices strongly disagreed with this application of the RFRA.

[E] Grooming Codes

Page 402, Note 3.

See D. Wendy Greene, *Black Women Can't Have Blond Hair . . . in the Workplace,* 14 J. GENDER, RACE & JUSTICE 407 (2011).

[F] Sexual Harassment

Page 418, Note 2:

Where five Black correctional officers established an objectively severe pattern of race-based harassment, they could each prosecute Title VII claims even if the particular acts experienced by individual officers may have been insufficient to establish claims, since the specific individual acts should be viewed as illustrative acts of an expansive pattern of discriminatory harassment creating a hostile environment adversely affecting all of them. *Ellis v. Houston,* 742 F.3d 307 (8th Cir. 2014).

Page 419, Note 3.

Even where a hostile employment exists, individual employees may only prosecute sexual harassment claims if they can demonstrate that they were personally aware of the conduct

in question. It is insufficient to simply show that the harassing behavior affected other workers. *Adams v. Austal, USA, LLC*, 754 F.3d 1240 (11th Cir. 2014).

Page 419, Note 4.

Where supervisors repeatedly use sexually derogatory terms like "bitch" toward female subordinates, hostile work environments are likely to be found. See *Passananti v. Cook County*, 689 F.3d 655 (7th Cir. 2012).

Page 422, Note 11.

Where employers have effective anti-harassment policies and take reasonable care to prevent and rectify harassing behavior by coworkers or supervisors, they may usually avoid Title VII liability even if their actions do not preclude all future acts of harassment. *Bertsch v. Overstock.com*, 684 F.3d 1023 (10th Cir. 2012); *Crawford v. BNSF Ry. Co.*, 665 F.3d 978 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 144 (2012).

Page 426, Note 1.

Even where a hostile environment target does not raise the issue for several years, her Title VII charge will still be timely so long as she files it within 300 days of some act which is part of the overall series of events related to her claim. *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157 (3d Cir. 2013).

Page 427.

NOTE

When a male employee demonstrated that his immediate male supervisor regularly touched him and rubbed his hair in a sexual manner and his employer failed to take prompt corrective action, the court found that he had established a case of actionable same-sex harassment. *Cherry v. Shaw Coastal Inc.*, 668 F.3d 182 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 162 (2012). On the other hand, where a male oil rig worker alleged that a male coworker repeatedly made sexually offensive comments, teased him, and touched his buttocks, the court found that he could not establish that this conduct was "because of his sex," where he worked on an all-male platform and he could not show that the coworker was gay or bisexual or teased him due to his gender. *Wasek v. Aarow Energy Services, Inc.*, 682 F.3d 463 (6th Cir. 2012). See also *Rickard v. Swedish Match N. Amer., Inc.*, 773 F.3d 181 (8th Cir. 2014), *cert. denied*, 135 S. Ct. __ (2015) (male employee failed to establish hostile work environment claim based on male supervisor's conduct in squeezing his and several other male employees' nipples and rubbing towel on his crotch, where no evidence supervisor was generally hostile toward males or was motivated by sexual desire).

Page 448.

Vance v. Ball State University, 133 S. Ct. 2434 (2013). Maetta Vance, an African-American woman employed initially as a part-time catering assistant and then as a full-time catering assistant by Ball State University, brought a racial harassment claim against Ball State based upon the actions of Saundra Davis, a white woman employed as a catering specialist.

> Vance complained that Davis "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her." She alleged that she was "left alone in the kitchen with Davis, who smiled at her"; that Davis "blocked" her on an elevator and "stood there with her cart smiling"; and that Davis often gave her "weird" looks.

Vance alleged that Ball State was vicariously liable for the actions of Davis, based upon her claim that Davis was a Ball State "supervisor." The District Court and the Seventh Circuit rejected this claim, and Vance appealed to the Supreme Court. A five-Justice majority rejected this contention and affirmed the lower court determinations. The majority decision initially noted the critical distinction between harassment by coworkers and by supervisors. Employers are only liable for harassment by coworkers when they negligently fail to prevent harassing behavior. On the other hand, they are strictly liable for harassment by supervisors, it when the responsible supervisors "take tangible employment action." When no tangible action is taken, employers will still be liable for supervisory harassment, unless they can establish that they have effective anti-harassment policies which the claimants unreasonably failed to invoke under *Ellerth* and *Faragher.* Although EEOC Guidance indicated that persons could be regarded as "supervisors" if they are "authorized to direct the employee's daily work activities," the majority rejected this expansive approach.

> We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth.* . .
>
> [T]he framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers. Those decisions contemplate a unitary category of supervisors, *i.e.*, those employees with the authority to make tangible employment decisions. There is no hint in either decision that the Court had in mind two categories of supervisors: First, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker's labor to some ill-defined degree. On the contrary, the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation. The approach recommended by the EEOC Guidance, by contrast, would depend on a highly case-specific evaluation of numerous factors.
>
> * * * *
>
> The *Ellerth/Faragher* framework draws a sharp line between co-workers and supervisors. Co-workers, the Court noted, "can inflict psychological injuries" by creating a hostile work environment, but they "cannot dock another's pay, nor can one co-worker demote another." Ellerth, 524 U.S., at 762. Only a supervisor has the power to cause "direct economic harm" by taking tangible employment action. "Tangible

> employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control. . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ibid.* The strong implication of this passage is that the authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors.

The majority noted that under the National Labor Relations Act, Congress has included what might be viewed as a more expansive definition of "supervisor" for determining who may or may not be included in collective bargaining units. Nonetheless, the Labor Board and the courts have distinguished "between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action."

Dissenting Justices Ginsburg, Breyer, Sotomayor, and Kagan suggested that the majority approach was excessively narrow in rejecting what they perceived to be a reasonable EEOC approach.

> . . . Addressing who qualifies as a supervisor, the EEOC answered: (1) an individual authorized "to undertake or recommend tangible employment decisions affecting the employee," including "hiring, firing, promoting, demoting, and reassigning the employee"; *or* (2) an individual authorized "to direct the employee's daily work activities."
>
> The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces. I would follow the EEOC's Guidance and hold that the authority to direct an employee's daily activities establishes supervisory status under Title VII.

NOTE

1. Antonio Velazquez-Perez was a regional general manager for a shopping center management company. He interacted regularly with Rosa Martinez, a human resources representative who did not possess any supervisory authority. She flirted with him regularly, but he rejected her advances. She complained to his immediate supervisors about his allegedly poor work performance. These complaints ultimately resulted in his termination. He brought a claim for quid pro quo sexual harassment based upon the fact he was allegedly terminated because of his unwillingness to give in to Martinez's sexual advances. Although quid pro quo harassment usually involves conduct by persons with supervisory authority over the alleged victims, the First Circuit Court held that Velazquez-Perez's employer could be held liable under the "negligence

theory" of harassment, due to the fact it had carelessly allowed her discriminatorily motivated complaints regarding his allegedly poor performance to influence its decision to discharge him. *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265 (1st Cir. 2014).

2. In *Kramer v. Wasatch County Sherriff's Office*, 743 F.3d 726 (10th Cir. 2014), the court held that the rape of a female employee in the sheriff's office by a supervising male sergeant did not constitute a "tangible employment action" that would preclude assertion of the *Ellerth/Faragher* affirmative defense, since it did not involve any employment related action.

[G] Sexual Orientation & Gender Identity

Page 468.

NOTE

In July, 2014, President Obama amended Executive Order 11,246 to extend the ban against discrimination by covered government contractors to cover sexual orientation and gender identity, and he declined to carve out an exception for religion-affiliated employers. "Obama Issues Order Banning LGBT Bias, Declines Call to Expand Religious Exemption," Daily Lab. Rept. (B.N.A.), No. 139 (July 21, 2014), at AA-1. He also amended Executive Order 11.478 to ban discrimination by federal government agencies based upon gender identity. That Executive Order already prohibited discrimination by federal agencies based on sexual orientation.

Page 468, Note 1.

The EEOC had decided that Title VII protects persons who are discriminated against because of their transgendered status. *Macy v. Holder*, Daily Labor Rept. No. 80 (4/25/12) at A-4. Do you think that courts will accept this EEOC interpretation? See K. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at* Work, 161 U. PENN. L. REV. 757 (2013); S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 WOMEN'S RTS. L. REP. 283 (2011). In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the court held that a government employer engages in a violation of the Equal Protection Clause, actionable under 42 U.S.C. § 1983, when discriminates against a transgender or transsexual employee because of his or her gender non-conformity.

§ 3.05 NATIONAL ORIGIN

Page 475, Note 1.

What if an employer discriminates against an individual because it believes he or she is Hispanic or Middle Eastern when he or she is not? Several lower courts have held that such a person has no Title VII claim due to the fact he or she was not treated differently "because of" his or her nationality. See D. Wendy Greene, *Categorically Black, White, or Wrong:*

"Misperception Discrimination" and the State of Title VII Protection, 47 U. MICH. J. LAW REFORM 87 (2013) (arguing that such "misperception discrimination" should be covered by Title VII since based upon the claimant's perceived nationality).

When an employer discriminates against an immigrant, not because of that person's nationality but because of their questionable immigration status, the court is likely to find no actionable national origin discrimination. *Guimaraes v. SuperValu Inc.*, 674 F.3d 962 (8th Cir. 2012), *rehearing denied* (5/23/12). For similar reasons, if an employer discriminates against an employee, not because they are married to a Mexican immigrant but because of their spouse's illegal immigration status, no Title VII liability is likely to be found. *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936 (7th Cir. 2012).

EEOC v. Peabody Western Coal Co., 773 F.3d 977 (9th Cir. 2014), concerned a coal company that leased land on a Navajo reservation and agreed to provide a hiring preference for Navajo Nation members over members of other Native American tribes. Although Section 703(j) allows Indian tribes to prefer members of their own tribes on reservations, the court found that this provision was inapplicable here due to the fact an outside entity was doing the hiring. Nonetheless, the court rejected a claim that such a preference constituted unlawful "national origin" discrimination, based upon the finding that the discrimination involved was based upon "political classification" rather than "national origin." As a result, the challenged preference was not prohibited by Title VII.

§ 3.06 RETALIATION

Page 494.

NOTE

The Second Circuit Court has held that a human resources director's internal investigation of an employee's sexual harassment complaint before any charge was filed with the EEOC does not constitute protected activity under the participation clause contained in § 704(a), due to the fact the clause is limited to persons who have "participated in any manner in an investigation, proceeding, or hearing *under this title*," which refers to investigations conducted in conjunction with EEOC charges. *Townsend v. Benjamin Enters. Inc.*, 679 F.3d 41 (2d Cir. 2012). If an employer were to discipline employees who have participated in internal EEO investigations, would that excuse individuals who have declined to raise harassment issues involving supervisors through internal procedures, based upon the claim that their refusal to expose themselves to possible retaliatory action shows that their decision not to invoke those procedures was not unreasonable within the meaning of the affirmative defense recognized in *Ellerth* and *Faragher*?

Page 495, Note 1.

For a number of years, Byron Underwood and his wife Linda Underwood worked for the Florida Department of Health (DOH). In 2009, Byron accepted employment with the Florida

Department of Financial Services (DFS). After Byron joined DSF, Linda filed a sex discrimination charge against DOH which was finally resolved in early 2010. About a month later, Byron was terminated by DFS. Although he was supervised at DFS by the person who controlled the state funds used to resolve Linda's claims and asserted that he was discharged in retaliation for her discrimination charge, the Eleventh Circuit Court refused to apply the reasoning of *Thompson v. North American Stainless*, based upon the finding that DFS had no direct connection to DOH. Since Byron was not terminated by Linda's direct employer, the court found that the *Thompson* rationale did not apply to his situation. *Underwood v. Dep't. of Financial Servs.*, 518 Fed. Appx. 637 (11th Cir. 2013). Should the fact that both DSF and DOH were entities of the State of Florida have made the *Thompson* doctrine applicable to Byron's circumstances?

Page 496, Note 2.

Boyer-Liberto v. Fontainebleau Corp., 2015 U.S. App. LEXIS 7557 (4th Cir. 2015), involved a black hotel worker who was terminated after she complained about having been called a "porch monkey" twice by a coworker. She claimed that she had been fired in retaliation for her complaint regarding possible racial harassment. Although the district court rejected her claim based upon the conclusion she could not have *reasonably* thought that two such isolated statements could possibly have constituted actionable harassment, the Fourth Circuit reversed. It noted that since a "single, sufficiently severe incident" may establish a racially hostile environment, the claimant cold reasonably have believed that the use of the term "porch monkey" did constitute actionable harassment.

EEOC v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015), concerned several employees who complained to their supervisor regarding that manager's sexual harassment of them. After they were terminated by that supervisor, they brought claims under § 704(a). The court noted that "oppose" has to be given its "ordinary meaning" which is "to resist: or "to contend against," and it found that their actions constituted protected opposition conduct even though they complained to the harassing supervisor involved. The court further found that the employer was aware of the relevant supervisor conduct, and was thus liable for the opposition action taken against them. Since tangible action was involved, the *Faragher/Ellerth* affirmative defense was not available to their former employer.

Rodriguez-Vives v. Puerto Rico Firefighters Corps. of P.R., 743 F.3d 278 (1st Cir. 2014), concerned a female employee who brought a law suit under 42 U.S.C. § 1983 alleging that she had been denied a firefighter position due to sex discrimination. The law suit was settled, and she was employed as a "transitory" firefighter until she could be admitted into the training academy. She thereafter brought a suit under Title VII, alleging that she was being subjected to various forms of abuse because of her prior 1983 suit. Even though that previous suit had not been brought under Title VII, the court held that she had a claim under the Title VII anti-retaliation provision, based upon the fact that her prior 1983 suit constituted protected "opposition" conduct within the meaning of § 704(a).

Page 496, Note 3.

In *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), a divided Supreme Court held that the § 703(m) language indicating that Title VII claimants may prevail if they demonstrate that "race, color, religion, sex, or national origin was a motivating factor . . ., even though other factors also motivated the practice" is limited to "status based" cases alleging those specific forms of discrimination. As a result, claims of retaliation under § 704(a) are not covered by that provision. Individuals litigating retaliation claims must thus establish that a retaliatory motive was the *but for* factor with respect to the challenged action. In mixed motive cases in which claimants cannot prove that their prior anti-discrimination conduct was the but for factor, their case must be dismissed and they do not constitute prevailing claimants entitled to attorney fee awards. See *Carter v. Luminant Power Services Co.*, 714 F.3d 268 (5th Cir. 2013). On the other hand, even where claimants cannot prove that retaliation was the sole motivating factor, they can still prevail if they can demonstrate that the adverse action they suffered would not have occurred in the absence of a retaliatory motive. See *Kwan v. The Andalex Group LLC*, 737 F.3d 834 (2d Cir. 2013).

In *Foster v. Univ. of Maryland-Eastern Shore*, 127 F.E.P. Cases 167 (4th Cir. 2015), the court held that even under *Nassar*, the usual *McDonnell Douglas* proof construct continues to apply to retaliation claims, allowing plaintiffs to prove causation without direct evidence of retaliatory animus. "If a plaintiff can show that she was fired under suspicious circumstances and that her employer lied about its reasons for firing her, the factfinder may infer that the employer's undisclosed retaliatory animus was the actual cause of her termination."

Page 496, Note 4.

In *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012), the court held that employers could be held liable for retaliatory hostile work environments created by supervisors designed to punish employees who have raised discrimination issues.

Page 497, Note 4.

Where a labor organization retaliated against two firefighter members for filing EEOC charges against the union by editorializing against them to other union members, a violation of § 704(a) could be sustained, despite the union claim that such a finding would contravene its First Amendment freedom of speech. *Booth v. Pasco Cnty.*, 757 F.3d 1198 (11th Cir. 2014).

Page 498, Note 8.

The Cook and Shaw Foundation is a nonprofit organization composed of current and former employees of the Library of Congress. The Foundation assists employees pursue allegations of racial discrimination against the Library. The Foundation requested recognition by the Library as an employee organization, but was denied such status which caused it to be denied certain benefits afforded to recognized employee entities. The Foundation filed a retaliation claim under § 704(a), but the court held that since the statute only protects "employees or applicants for employment," such employee organizations are not entitled to Title VII protection. *Cook & Shaw Foundation v. Billington*, 737 F.3d 767 (D.C. Cir. 2013).

Page 499, Note 9.

In *Aldrich v. Rural Health Servs. Consortium, Inc.*, 579 Fed. Appx. 335 (6th Cir. 2014), the court held that an employee was not protected under the participation clause when she forwarded e-mails containing confidential patient information to her personal account, despite the contention she was preserving such evidence for an age discrimination suit filed by a coworker, where she was not directly involved in the litigation or responding to any request from the coworker's attorney.

In *Benes v. A.B. Data Ltd.*, 724 F.3d 752 (7th Cir. 2013), the court held that an employer did not violate the anti-retaliation provision when it discharged an employee who barged into the employer's room during an EEOC sponsored mediation session and told the employer to take its proposal and "shove it up your ass," where the employer terminated him for such mediation misconduct and not for having filed charges of discrimination.

Cox v. Onondaga Cnty. Sheriff's Dept., 760 F.3d 139 (2d Cir. 2014), involved several white police officers who filed false racial harassment charges with the EEOC alleging harassment by a black coworker who had accused them of being members of a "skinhead" racial supremacy group. The court held that Title VII's anti-harassment language does not suggest that an absolute privilege immunizes employees who knowingly file false bias charges. "Employers are under an independent duty to investigate and curb racial harassment by lower level employees of which they are aware . . . It would therefore be anomalous to conclude that an employer is not allowed to investigate, with a view to discipline, false complaints of harassment that themselves might be viewed as intended racial harassment."

Page 499.

NOTES

15. In *EEOC v. Allstate Insurance Co.*, 778 F.3d 444 (3d Cir. 2015), the court held that an employer did not violate § 704(a) when it offered employees being terminated in a reorganization the opportunity to be converted to independent contractors only if they waived any employment claims they might have, where they were not entitled to such conversion and employers may require terminated employees to waive existing legal claims in order for them to receive unearned post-termination benefits.

CHAPTER 4

NON-TITLE VII ANTIDISCRIMINATION PROTECTION

§ 4.01 THE CONSTITUTION

[A] Race

Page 510, note 3, add to end of first full paragraph.

In 2006 Michigan voters adopted an amendment to the state constitution prohibiting state and other governmental entities from granting race-based and other preferences in public employment, public education, or public contracting. In *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*, 134 S.Ct. 1623 (2014), the Supreme Court held that the United States Constitution did not permit the judiciary to set aside this amendment to the United States Constitution.

In *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013), the Supreme Court vacated a decision by the United States Court of Appeals for the Fifth Circuit rejecting a *Grutter* challenge to the university's consideration of race in its undergraduate admissions process. In doing so, the Court concluded that the Fifth Circuit did not hold the university to the demanding burden of strict scrutiny articulated in *Grutter* and in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and that the Fifth Circuit had erroneously deferred to the university's good faith in its use of racial classifications. The Court instructed that the university had to "make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that encompasses a . . . broad array of qualifications and characteristics of which racial and ethnic origin is but a single though important element." Narrow tailoring "involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." On remand, the Fifth Circuit held that the university demonstrated that its race-conscious holistic review of applicants was necessary to make workable its Top Ten Percent plan which guaranteed admission to Texas students in the top ten percent of their high school class. *See Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014). The Supreme Court has granted the plaintiff's writ of *certiorari* and will review the Fifth Circuit's ruling. *See* 2015 WL 629286 (2015).

[B] Religion

Page 515, end of note 5.

As previously noted in § 3.03, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012), the Supreme Court held that a "called" teacher was a "minister" covered by the ministerial exception. *See also Conlon v. Intervarsity Christian Fellowship/USA*, 772 F.3d 829 (6th Cir. 2015) (employee who worked as a "spiritual advisor" fell within the scope of the ministerial exception); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (former music director's employment discrimination suit against Catholic diocese and church is barred by the ministerial exception). For an excellent discussion of the Court's *Hosanna-Tabor* decision, see Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L. REV. 981 (2013).

[D] Sexual Orientation

Page 537, after end of *Padula*.

GLENN v. BRUMBY
United States Court of Appeals, Eleventh Circuit
663 F.3d 1312 (11th Cir. 2011)

BARKETT, Circuit Judge:

Sewell R. Brumby appeals from an adverse summary judgment in favor of Vandiver Elizabeth Glenn on her complaint seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for alleged violations of her rights under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Glenn claimed that Brumby fired her from her job as an editor in the Georgia General Assembly's Office of Legislative Counsel ("OLC") because of sex discrimination, thus violating the Equal Protection Clause. The district court granted summary judgment in Glenn's favor on this claim.

Glenn also claimed that her constitutional rights were violated because Brumby terminated her employment due to her medical condition, known as Gender Identity Disorder ("GID"). The district court ruled against Glenn on this claim, granting summary judgment to Brumby. Brumby appeals the district court's sex-discrimination ruling, and Glenn cross-appeals the ruling on her medical condition claim.

Vandiver Elizabeth Glenn was born a biological male. Since puberty, Glenn has felt that she

is a woman, and in 2005, she was diagnosed with GID, a diagnosis listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

Starting in 2005, Glenn began to take steps to transition from male to female under the supervision of health care providers. This process included living as a woman outside of the workplace, which is a prerequisite to sex reassignment surgery. In October 2005, then known as Glenn Morrison and presenting as a man, Glenn was hired as an editor by the Georgia General Assembly's OLC. Sewell Brumby is the head of the OLC and is responsible for OLC personnel decisions, including the decision to fire Glenn.

In 2006, Glenn informed her direct supervisor, Beth Yinger, that she was a transsexual and was in the process of becoming a woman. On Halloween in 2006, when OLC employees were permitted to come to work wearing costumes, Glenn came to work presenting as a woman. When Brumby saw her, he told her that her appearance was not appropriate and asked her to leave the office. Brumby deemed her appearance inappropriate "[b]ecause he was a man dressed as a woman and made up as a woman." Brumby stated that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing," and that a male in women's clothing is "unnatural." Following this incident, Brumby met with Yinger to discuss Glenn's appearance on Halloween of 2006 and was informed by Yinger that Glenn intended to undergo a gender transition.

In the fall of 2007, Glenn informed Yinger that she was ready to proceed with gender transition and would begin coming to work as a woman and was also changing her legal name. Yinger notified Brumby, who subsequently terminated Glenn because "Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable."

Glenn sued, alleging two claims of discrimination under the Equal Protection Clause. First, Glenn alleged that Brumby "discriminat[ed] against her because of her sex, including her female gender identity and her failure to conform to the sex stereotypes associated with the sex Defendant[ ] perceived her to be." Second, Glenn alleged that Brumby "discriminat[ed] against her because of her medical condition, GID[,]" because "[r]eceiving necessary treatment for a medical condition is an integral component of living with such a condition, and blocking that treatment is a form of discrimination based on the underlying medical condition."

Glenn and Brumby filed cross-motions for summary judgment. The District Court granted summary judgment to Glenn on her sex discrimination claim, and granted summary judgment to Brumby on Glenn's medical discrimination claim. Both sides timely appealed to this Court. We first address Glenn's sex discrimination claim.

I. Equal Protection and Sex Stereotyping

In any § 1983 action, a court must determine "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States. . . . Here, the question is whether Glenn's termination violated the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause requires the State to treat all persons similarly situated alike or, conversely, to avoid all classifications that are "arbitrary or irrational" and those that reflect "a bare ... desire to harm a politically unpopular group." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (internal quotation marks omitted). States are presumed to act lawfully, and therefore state action is generally upheld if it is rationally related to a legitimate governmental purpose. . . . However, more than a rational basis is required in certain circumstances. In describing generally the contours of the Equal Protection Clause, the Supreme Court noted its application to this issue, referencing both gender and sex, using the terms interchangeably:

> Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability ... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest.

Id. at 440–41. In *United States v. Virginia*, the Supreme Court reaffirmed its prior holdings that sex-based discrimination is subject to intermediate scrutiny under the Equal Protection Clause. 518 U.S. 515, 555 (1996). This standard requires the government to show that its "gender classification ... is substantially related to a sufficiently important government interest." *Cleburne*, 473 U.S. at 441. Moreover, this test requires a "genuine" justification, not one that is "hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533.

The question here is whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause. For the reasons discussed below, we hold that it does.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination. In that case, the

Court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered "macho," and "overcompensated for being a woman." . . . Six members of the Supreme Court agreed that such comments were indicative of gender discrimination and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender. . . . The Court noted that "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group...." . . .

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flinn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. . . .

The Sixth Circuit [has] recognized that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause. *See Smith v. City of Salem*, 378 F.3d 566 (6th Cir.2004). The court concluded that a transsexual firefighter could not be suspended because of "his transsexualism and its manifestations," . . . because to do so was discrimination against him "based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance." . . .

. . . .

All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. For example, courts have held that plaintiffs cannot be discriminated against for wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in child-rearing. An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they

cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.

. . . .

We conclude that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.

II. Glenn's Termination

We now turn to whether Glenn was fired on the basis of gender stereotyping. The first inquiry is whether Brumby acted on the basis of Glenn's gender-nonconformity. . . . If so, we must then apply heightened scrutiny to decide whether that action was substantially related to a sufficiently important governmental interest. . . .

A plaintiff can show discriminatory intent through direct or circumstantial evidence. . . . In this case, Brumby testified at his deposition that he fired Glenn because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that Glenn would appear wearing women's clothing. Brumby testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and Brumby admitted that his decision to fire Glenn was based on "the sheer fact of the transition." Brumby's testimony provides ample direct evidence to support the district court's conclusion that Brumby acted on the basis of Glenn's gender non-conformity.

If this were a Title VII case, the analysis would end here. *See Lewis v. Smith*, 731 F.2d 1535, 1537–38 (11th Cir.1984) ("If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved."). However, because Glenn's claim is based on the Equal Protection Clause, we must, under heightened scrutiny, consider whether Brumby succeeded in showing an "exceedingly persuasive justification," . . . that is, that there was a "sufficiently important governmental interest" for his discriminatory conduct. . . . This burden "is demanding and it rests entirely on the State." . . . The defendant's burden cannot be met by relying on a justification that is "hypothesized or invented post hoc in response to litigation." . . .

On appeal, Brumby advances only one putative justification for Glenn's firing: his purported

concern that other women might object to Glenn's restroom use. However, Brumby presented insufficient evidence to show that he was actually motivated by concern over litigation regarding Glenn's restroom use. To support the justification that he now argues, Brumby points to a single statement in his deposition where he referred to a speculative concern about lawsuits arising if Glenn used the women's restroom. The district court recognized that this single reference, based on speculation, was overwhelmingly contradicted by specific evidence of Brumby's intent, and we agree. Indeed, Brumby testified that he viewed the possibility of a lawsuit by a co-worker if Glenn were retained as unlikely and the record indicates that the OLC, where Glenn worked, had only single-occupancy restrooms. Brumby advanced this argument before the district court only as a *conceivable* explanation for his decision to fire Glenn under rational basis review. . . . The fact that such a hypothetical justification may have been sufficient to withstand rational-basis scrutiny, however, is wholly irrelevant to the heightened scrutiny analysis that is required here.

Brumby has advanced no other reason that could qualify as a governmental purpose, much less an "important" governmental purpose, and even less than that, a "sufficiently important governmental purpose" that was achieved by firing Glenn because of her gender non-conformity. . . .

We therefore **AFFIRM** the judgment of the district court granting summary judgment in favor of Glenn on her sex-discrimination claim. . . .

Page 538, end of note.

In *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Supreme Court held that the federal Defense of Marriage Act's definition of "marriage" and "spouse" as excluding same-sex partners constituted a deprivation of the liberty of persons protected by the Fifth Amendment to the United States Constitution. (DOMA provided that in determining the meaning of any act of Congress or any federal administrative agency's or bureau's ruling, regulation, or interpretation, the word "marriage" "means only a legal union between one man and one woman as husband and wife" and the word "spouse" "refers only to a person of the opposite sex who is a husband or a wife.") The *Windsor* Court determined that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." In the Court's view, "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality . . . Responsibilities, as well as rights, enhance the

dignity and integrity of the person."

More recently, in *Obergefell v. Hodges*, 2015 WL 2473451 (2015), the Supreme Court held that same-sex couples may not be deprived of the right to marry, a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that states must recognize lawful same-sex marriages performed in other states. The Court concluded that laws prohibiting same-sex marriages "burden the liberty of same-sex couples, . . . abridge central precepts of equality," and deny to same-sex couples "all the benefits afforded to opposite-sex couples" who are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them." While *Obergefell* is not an employment case, the decision may have implications for claims of transgender, sexual orientation, gender, and/or gender identity discrimination in the workplace as well as marital discrimination actions brought under state antidiscrimination laws.

[E] Alienage

Page 548, after note 3.

DANDAMUDI v. TISCH
United States Court of Appeals, Second Circuit
686 F.3d 66 (2d Cir. 2012)

WESLEY, Circuit Judge:

This case involves a state regulatory scheme that seeks to prohibit some legally admitted aliens from doing the very thing the federal government indicated they could do when they came to the United States—work. Plaintiffs–Appellees are a group of nonimmigrant aliens who have been authorized by the federal government to reside and work as pharmacists in the United States. All currently reside in New York and are licensed pharmacists there. Plaintiffs obtained pharmacist's licenses from New York pursuant to a statutory waiver to New York Education Law § 6805(1)(6)'s requirement that only U.S. Citizens or Legal Permanent Residents ("LPRs") are eligible to obtain a pharmacist's license in New York. The waiver provision was set to expire in 2009. In response, plaintiffs sued various state officials responsible for enforcing the law in the United States District Court for the Southern District of New York.

Plaintiffs allege that § 6805(1)(6) is unconstitutional because it violates the Equal Protection

and Supremacy Clauses of the United States Constitution. In a thorough and well-reasoned opinion, the district court granted plaintiffs' motion for summary judgment and permanently enjoined defendants from enforcing the law. . . .

On appeal, New York asks us to abrogate the Supreme Court's general rule that state statutes that discriminate based on alienage are subject to strict scrutiny review. The state argues that the statute at issue here, which discriminates against nonimmigrant aliens should be reviewed only to determine if there is a rational basis that supports it. In our view, however, a state statute that discriminates against aliens who have been lawfully admitted to reside and work in the United States should be viewed in the same light under the Equal Protection Clause as one which discriminates against aliens who enjoy the right to reside here permanently. Applying strict scrutiny, therefore, and finding, as the state concedes, that there are no compelling reasons for the statute's discrimination based on alienage, we hold the New York statute to be unconstitutional. We affirm the district court's grant of summary judgment for plaintiffs.

I. BACKGROUND

Most of the plaintiffs have H–1B temporary worker visas. Under the Immigration and Nationality Act ("INA"), H–1B visas may be given to aliens who come "temporarily to the United States to perform services ... in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). The remaining plaintiffs have what is known as "TN" status. "TN" status is a temporary worker status created by federal law pursuant to the North American Free Trade Agreement ("NAFTA"). NAFTA permits "a citizen of Canada or Mexico who seeks temporary entry as a business person to engage in business activities at a professional level" to enter the United States and work here pursuant to the requirements of the TN status. 8 C.F.R. § 214.6(a).

These provisions technically grant plaintiffs admission to the United States for a finite period. Because plaintiffs' status grants them the right to reside and work in the United States only temporarily, plaintiffs are part of the group of aliens the immigration law refers to as nonimmigrants. 8 U.S.C. § 1101(a)(15). And, although plaintiffs had to indicate that they did not intend to stay here permanently to obtain their visas, the truth is that many (if not all) actually harbor a hope (a dual intention) that some day they will acquire the right to stay here permanently. The BIA and the State Department both recognize this doctrine of dual intent, which allows aliens to express an intention to remain in the United States temporarily (to satisfy the requirements of their temporary visas) while also intending to remain permanently, which allows them to apply for an adjustment of status. *Matter of Hosseinpour,* 15 I. & N. Dec. 191 (BIA 1975); 70 No. 42 Interpreter Releases 1444, 1456–58 (Nov. 1, 1993).

For purposes of both the H1–B and TN visas, the initial period during which the visa-holder

can legally remain and work in the United States is three-years. 8 C.F.R. §§ 214.2(h)(9)(iii)(A)(1) (H1–B visa), 214.6(e) (TN status). Each visa status also permits a three-year extension of the initial period. *Id.* at §§ 214.2(h)(15)(ii)(B), 214.6(h). But an alien with an H1–B visa is limited to one such extension, essentially restricting H1–B status to a six-year period. *Id.* at § 214.2(h)(15)(ii)(B)(1). In practice, however, federal law permits many aliens with TN or H1–B status to maintain their temporary worker authorization for a period greater than six years. All plaintiffs in this case, for example, have been *legally authorized* to reside and work in the United States for more than six years. And, six plaintiffs have been authorized to reside and work in the United States for more than ten years.

Several factors contribute to the difference between the technical limitations on H1–B and TN status and the length of time these aliens remain authorized to reside and work in the United States. Many aliens who receive temporary worker authorization are former students who entered the United States with a student visa and who have made their home in the United States for many years before entering the professional world. Many nonimmigrant aliens are also often eligible to apply for LPR status. This process is typically quite slow, and the federal government therefore regularly issues Employment Authorization Documents ("EADs"), which extend the time period during which these aliens are eligible to work in the United States while they await their green cards. 8 C.F.R. § 274a.12(c)(9).

Twenty-two plaintiffs have applied for Permanent Resident status. Sixteen have received EADs because they have exhausted the six-year maximum authorization provided by H1–B status.

Based on their visa status, all plaintiffs currently reside in the United States legally and have permission to work here. All are pharmacists who were granted a pharmacist's license (albeit a "limited" one) pursuant to a previous version of the New York statute at issue here. Section 6805(1)(6), in its current incarnation, provides that to be eligible for a pharmacist's license in New York, an applicant must be either a U.S. Citizen or a LPR. The statute bars all other aliens, including those with work-authorization who legally reside in the United States, from becoming licensed pharmacists.

II. DISCUSSION

New York argues that . . . the Equal Protection . . . [does not prevent] a state from prohibiting a group of aliens who are legally authorized to reside and work in the United States from working in certain professions. The state relies principally on two decisions from our sister circuits. *See League of United Latin Am. Citizens (LULAC) v. Bredesen,* 500 F.3d 523, 531–34, 536–37 (6th Cir.2007); *LeClerc v. Webb,* 419 F.3d 405, 415 (5th Cir.2005), *reh'g en banc*

denied, 444 F.3d 428 (2006). The Fifth and Sixth Circuits viewed nonimmigrant aliens as distinct from aliens with LPR status and applied a rational scrutiny test to determine if the state statutes in question ran afoul of the Equal Protection Clause. In both cases, the courts "decline[d] to extend" the protections of LPRs to certain nonimmigrants. *LULAC,* 500 F.3d at 533; *LeClerc,* 419 F.3d at 419. We disagree; the Supreme Court has repeatedly affirmed the general principle that alienage is a suspect classification and has only ever created two exceptions to that view. We decline to create a third in a case where the statute discriminates against aliens who have been granted the legal right to reside and work in the United States. Under a strict scrutiny analysis, § 6805(1)(6) of the New York Education Law violates the Equal Protection Clause.

. . . .

The Fourteenth Amendment provides that states may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Fourteenth Amendment, a law that "impermissibly interferes with the exercise of a fundamental right or *operates to the peculiar disadvantage of a suspect class* " is reviewed under the strict scrutiny standard. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (emphasis added) (footnote omitted); *see Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir.2001).

There is no question that the Fourteenth Amendment applies to *all* aliens. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982). Indeed, the Supreme Court has long held that states cannot discriminate on the basis of alienage. "Aliens as a class are a prime example of a discrete and insular minority," the Court reasoned in *Graham v. Richardson*, "[and] the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." 403 U.S. 365, 372 (1971) (internal quotation marks omitted).

. . . .

In the years after *Graham*, the Court continued to apply strict scrutiny to statutes discriminating on the basis of alienage. It invalidated a New York statute that prohibited immigrants from working in the civil service, *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973), a Connecticut statute that barred immigrants from sitting for the bar, *In re Griffiths*, 413 U.S. 717, 721–22, 729 (1973), a Puerto Rico law that denied licenses to immigrant engineers, *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 601–06 (1976), and a New York law that required immigrants to pledge to become citizens before they could receive financial aid, *Nyquist v. Mauclet*, 432 U.S. 1, 7, 12 (1977). In each case, the Court began its discussion by reasserting its commitment to the holding in *Graham:* laws that single out aliens for disparate treatment are presumptively unconstitutional absent a showing that the classification was "necessary" to fulfill a constitutionally "permissible" and "substantial"

purpose. *In re Griffiths*, 413 U.S. at 721–22, 93 S.Ct. 2851.

The Court has recognized only two exceptions to *Graham*'s rule. The first exception allows states to exclude aliens from political and governmental functions as long as the exclusion satisfies a rational basis review. In *Foley v. Connelie*, the Court upheld a statute that prohibited aliens from working as police officers. 435 U.S. 291, 295–96 (1978). For a democracy to function, the Court reasoned, a state must have the power to "preserve the basic conception of a political community," and states can limit certain "important nonelective executive, legislative, and judicial positions [to] officers who participate directly in the formulation, execution, or review of broad public policy." . . .

The second exception crafted by the Court allows states broader latitude to deny opportunities and benefits to undocumented aliens. . . . In *Plyler*, the Court declined to apply strict scrutiny to a statute that prohibited undocumented alien children from attending public school. . . . The Court acknowledged that *Graham* placed a heavy burden on state statutes targeting lawful aliens, but reasoned that undocumented aliens fell outside of *Graham*' s reach because "their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" . . . The Court held that the plaintiffs' unlawful status eliminated them from the suspect class of aliens generally; nevertheless, the Court applied a *heightened* rational basis standard to the Texas law denying free public education to undocumented alien children and found the law unconstitutional. . . .

Thus, statutes that deny opportunities or benefits to aliens are subject to strict scrutiny unless they fall within two narrow exceptions. The first allows states to exclude aliens from certain civic roles that directly affect the political process. The second acknowledges that people who reside in the United States without authorization may be treated differently than those who are here legally.

The state acknowledges that neither exception applies here. Without an existing basis for distinguishing *Graham*'s requirement that such statutes are strictly scrutinized, New York proposes a third exception—the Fourteenth Amendment's strongest protections should apply only to virtual citizens, like LPRs, and not to other lawfully admitted aliens who require a visa to remain in this country. Defendants argue that the Supreme Court's strict scrutiny analysis of classifications based on "alienage" is inapplicable to classifications of nonimmigrant aliens and that only rational basis review of the statute is required.

The state reasons that the Supreme Court has never explicitly applied strict scrutiny review to a statute discriminating against nonimmigrant aliens. That is true, but that argument ignores the underlying reasoning of the Court in its prior decisions as well as the fact that the Court has

never held that lawfully admitted aliens are outside of *Graham*'s protection. Indeed, the Court has never distinguished between classes of *legal* resident aliens. The state's argument that suspect class protection extends no further than to LPRs simply has no mooring in the High Court's prior ventures into this area.

New York disagrees and urges us to follow the lead of the Fifth and Sixth Circuits, both of which drew a distinction between LPRs and citizens, on the one hand, and other lawfully admitted aliens, on the other. In *LeClerc*, the Fifth Circuit upheld a Louisiana Supreme Court rule that required applicants for admission to the Louisiana State Bar to be citizens or LPRs. . . . The majority noted that "[l]ike citizens, [permanent] resident aliens may not be deported, are entitled to reside permanently in the United States, may serve ... in the military, ... and pay taxes on the same bases as citizens." . . .

In *LULAC*, the Sixth Circuit upheld a Tennessee law that conditioned issuance of a driver's license on proof of United States citizenship or LPR status. . . . The Sixth Circuit, like the Fifth, held that nonimmigrant aliens are not a suspect class because, unlike citizens and LPRs, they "are admitted to the United States only for the duration of their authorized status, are not permitted to serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits." . . . The state would have us join these courts and narrow *Graham*'s holding to reach only those aliens who are indistinguishable from citizens. This argument, however, misconstrues both law and fact.

Ultimately, for three reasons, we reject the state's argument that this Court should follow the rationale of the Fifth and Sixth Circuits. First, the Supreme Court's listing in *Graham* of the similarities between citizens and aliens refuted the state's argument that it did have a compelling reason for its law, but this language does not articulate a test for determining when state discrimination against any one subclass of lawful immigrants is subject to strict scrutiny. Second, nonimmigrant aliens are but one subclass of aliens, and the Supreme Court recognizes aliens generally as a discrete and insular minority without significant political clout. Third, even if this Court were to determine that the appropriate level of scrutiny by which to analyze the discrimination should be based on the nonimmigrant aliens' similarity (or proximity) to citizens, we would still apply strict scrutiny in this case because nonimmigrant aliens are sufficiently similar to citizens that discrimination against them in the context presented here must be strictly scrutinized.

. . . .

Nothing in the Supreme Court's precedent counsels us to "judicially craft[ ] a subset of aliens, scaled by how [we] perceive the aliens' proximity to citizenship." *LeClerc v. Webb*, 444 F.3d 428, 429 (5th Cir.2006) (Higginbotham, *J.*, dissenting from the denial of reh'g en banc).

Rather, the Court's precedent supports drawing a distinction among aliens only as between lawfully admitted aliens and those who are in the United States illegally.[3] *See Plyler*, 457 U.S. at 223, 102 S.Ct. 2382 (utilizing a heightened rational basis review for a state law discriminating against *undocumented* alien children).

Any other distinction ignores that the Fourteenth Amendment is written broadly as protecting *all persons* and that aliens necessarily constitute a "discrete and insular" minority because of their "impotence in the political process, and the long history of invidious discrimination against them." *LeClerc*, 419 F.3d at 428–29 (Stewart, *J.*, dissenting) (citing *Plyler*, 457 U.S. at 218 n. 14, 102 S.Ct. 2382). Notably, the bedrock of the Supreme Court's decisions in this area is the fact that although lawfully admitted aliens and citizens are not constitutionally distinguishable, aliens constitute a discrete and insular minority because of their limited role in the political process. . . . Certainly, nonimmigrant aliens cannot be said to suffer less from these limitations than LPRs and indeed, likely are "more powerless and vulnerable to state predations—more discrete and insular." *See Constitutional Law—Equal Protection—Fifth Circuit Holds that Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar*, 119 Harv. L.Rev. 669, 674 (2005) (internal quotation marks omitted).

But even if the state's argument—that Supreme Court precedent allows for a distinction based on a subclass's similarity to citizens—had some traction, we conclude strict scrutiny still applies. Nonimmigrants do pay taxes, often on the same terms as citizens and LPRs, and certainly on income earned in the United States. *See* 26 U.S.C. § 7701(b) . . . Further, any claimed distinction based on permanency of residence is equally disingenuous. Although it is certainly true that nonimmigrants must indicate an intent not to remain permanently in the United States, this ignores the dual intent doctrine—nonimmigrant aliens are lawfully permitted to express an intent to remain temporarily (to obtain and maintain their work visas) as well as an intent to remain permanently (when they apply for LPR status). . . . And the final distinction—limited work permission—is wholly irrelevant where, as here, the state seeks to prohibit aliens from engaging in the very occupation for which the federal government granted the alien permission to enter the United States.

. . . .

. . . The state argues that the nonimmigrant's transient immigration status distinguishes nonimmigrant aliens from LPRs and introduces legitimate state concerns that would allow for rational basis review of the statute. This focus on transience is overly formalistic and wholly unpersuasive. The aliens at issue here are "transient" in name only. Certainly the status under which they were admitted to the United States was of limited duration. But the reality is quite different. A great number of these professionals remain in the United States for much longer than

six years and many ultimately apply for, and obtain, permanent residence. These practicalities are not irrelevant. They demonstrate that there is little or no distinction between LPRs and the lawfully admitted nonimmigrant plaintiffs here. Therefore, even if the Supreme Court's precedent were read to require a determination that the subclass of aliens at issue is similar to LPRs or citizens, strict scrutiny would apply.

Finally, creating a third exception to strict scrutiny analysis for statutes discriminating against lawfully admitted aliens would create odd, some might say absurd, results. If statutes discriminating against *lawfully* admitted nonimmigrant aliens were reviewed under a rational basis framework that would mean that a class of *unlawful* aliens would receive greater protection against state discriminatory statutes than those *lawfully* present. . . . In *Plyler* the Court applied a *heightened* rational basis test to invalidate a Texas statute excluding *undocumented* immigrant children from public schools. . . . We see no reason to create an exception to the Supreme Court's precedent that would result in such illogical results that clearly contradict the federal government's determination as to which individuals have a legal right to be here.

The Supreme Court has repeatedly announced a general rule that classifications based on alienage are suspect and subject to strict scrutiny review. As Judge Gilman advocated in his *LULAC* dissent, we should "tak[e] the Supreme Court at its word." 500 F.3d at 542. Neither the state's reasoning nor that of the Fifth and Sixth Circuit majority opinions' persuades us that creating a third exception to the general rule that alienage classifications are suspect is warranted here. Therefore, we hold that the subclass of aliens known as nonimmigrants who are lawfully admitted to the United States pursuant to a policy granting those aliens the right to work in this country are part of the suspect class identified by *Graham.* Any discrimination by the state against this group is subject to strict scrutiny review.

The statute here, which prohibits nonimmigrant aliens from obtaining a pharmacist's license in New York, is not narrowly tailored to further a compelling government interest. As noted above, appellants concede that New York has no compelling justification for barring the licensed pharmacist plaintiffs from practicing in the state. Further, we agree with the district court that there is no evidence "that transience amongst New York pharmacists threatens public health or that nonimmigrant pharmacists, as a class, are in fact considerably more transient than LPR and citizen pharmacists." . . . Citizenship and Legal Permanent Residency carry no guarantee that a citizen or LPR professional will remain in New York (or the United States for that matter), have funds available in the event of malpractice, or have the necessary skill to perform the task at hand.

The statute is also far from narrowly tailored. . . . [T]here are other ways (i.e., malpractice insurance) to limit the dangers of potentially transient professionals. . . . As such, the statute

unconstitutionally discriminates against plaintiffs in violation of their Fourteenth Amendment rights.

§ 4.02 THE NINETEENTH CENTURY CIVIL RIGHTS ACT

Page 578, end of note 6.

While Title VII authorizes suit against an employer rather than individuals who serve as the employer's agents, individuals may be sued and held liable in § 1981 cases. *See Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012).

Page 602, end of note.

See Smith v. Bray, 681 F.3d 888 (7th Cir. 2012) ("§ 1981 authorizes claims for retaliation, if one person takes action against another for asserting the right to substantive contractual equality provided by § 1981"; the "substantive standards and methods of proof that apply to claims of racial discrimination and retaliation under Title VII also apply to claims under § 1981"); *Harris v. Dist. Of Columbia Water and Sewer Auth.*, 2015 WL 3851919 (D.C. Cir. 2015) (frameworks applicable to Title VII and § 1981 retaliation claims are "essentially the same").

§ 4.03 LABOR RELATIONS STATUTES

[A] The Duty of Fair Representation

Page 606, after note 4.

5. *See also Fowlkes v. Ironworkers Local 40*, 2015 WL 3796386 (2d Cir. 2015) (transgender employee's allegations that union refused to refer him to work for which he was qualified because of his transgender status stated a claim under the NLRA for breach of the duty of fair representation); *Yeftich v. Navistar, Inc.*, 722 F.3d 911 (7th Cir. 2013) (plaintiffs' action for breach of labor agreement by employer dismissed because plaintiffs did not adequately allege the prerequisite breach by the union of its duty of fair representation); *Bondurant v. ALPA*, 679 F.3d 386 (6th Cir. 2012) (union's decision to create cutoff date for claim eligibility was neither arbitrary nor discriminatory and did not breach its duty of fair representation).

§ 4.04 THE EQUAL PAY ACT

[B] Any Other Factor Other Than Sex

Page 663, before Notes.

KING v. ACOSTA SALES AND MARKETING, INC.
United States Court of Appeals for the Seventh Circuit
678 F.3d 470 (7th Cir. 2012)

EASTERBROOK, Chief Judge.

Acosta Sales and Marketing is a food broker, which represents producers that seek to sell to supermarkets and other bulk purchasers. In 2001 Acosta's midwest operation hired Susan King as one of its business managers—a term that Acosta uses for people who represent a group of producers. (McCormick & Co., which sells spices and spiced foods, was one of King's major clients.) After quitting in 2007, King charged . . . that Acosta paid women less than men for the same work [in violation of] the Equal Pay Act, 29 U.S.C. § 206(d). . . .
. . . .

. . . Even a dollar's difference based on sex violates both Title VII and the Equal Pay Act—and King established much larger differences. Some men in the same job classification, doing the same work under the same conditions, received more than twice her pay. Here's a table, with women's names in italics:

Business Manager	**Starting Year**	**Starting Salary**	**2007 or Final Salary**
Thomas Connelly	1998	$91,000.08	$122,004.00
Thomas Robaczewski	2000	$95,000.00	$101,921.00
Tim Wilson	2004	$85,000.01	$ 99,500.11
Helmut Fritz	2001	$94,999.99	$ 97,635.55
Edgar Perez	2006	$93,000.00	$ 93,000.00
Mario Saracco	1998	$69,448.56	$ 81,502.73
Steven Blanchard	2002	$77,182.51	$ 79,881.10
Dennis Muhr	1998	$72,799.92	$ 79,598.69
Matthew Marron	1998	$63,000.00	$ 72,375.05
Rosanne Maschek	2001	$38,666.64	$ 60,399.62

Brett Lanford	2007	$60,000.00	$ 60,000.00
Christopher Pfister	2005	$40,000.01	$ 60,000.00
John Czarnik	2007	$55,000.00	$ 55,000.00
Pearl Martinez	2005	$40,000.01	$ 52,299.77
Susan King	2001	$40,000.01	$ 46,850.23
Elizabeth Wood	2005	$45,000.00	$ 46,350.00
Michelle Carroll	2007	$42,500.64	$ 42,500.64
Carrie Mengel	2007	$40,000.42	$ 40,000.42
Mary Anne Sapp	2001	$64,000.01	$ 37,752.00
Nancy Rogers	2001	$38,092.01	$ 26,624.00

The difference between men and women is striking. All of the men were paid more than all but one of the women—and that one woman achieved her $60,000 salary only after six years on the job, while men exceeded the $60,000 line faster.

"Business manager" was a sales job, and the pay of many salespersons is strongly influenced by customers' purchases. But Acosta does not contend that the difference in business managers' pay can be accounted for by the volume of sales; indeed, it concedes that King was one of its most successful sales executives, on a par with Connelly, who was paid almost three times as much. But if sales don't explain the disparity revealed by the table, what does?

Acosta contends that education and experience account for the men's salaries. All have college degrees; King does not. (The record does not show whether other women do.) Education and experience often increase the pay that employers offer, and Acosta had to match or exceed what other firms would pay in order to hire a capable staff. Neither Title VII nor the Equal Pay Act requires employers to ignore the compensation that workers could receive in other jobs, which in the language of the Equal Pay Act is a "factor other than sex" (29 U.S.C. § 206(d)(1)) . . . .

The district court made a legal error at this step of the analysis. The court thought it enough for Acosta to articulate education and experience as potentially explanatory variables, without proving that they *actually* account for the difference; the court wrote that King must show that Acosta's explanation is a pretext for discrimination. That's part of the burden-shifting approach under Title VII, see *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142–43 (2000), but is not the way the Equal Pay Act is written.

An employee's only burden under the Equal Pay Act is to show a difference in pay for "equal

work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" (§ 206(d)(1)). An employer asserting that the difference is the result of a "factor other than sex" must present this contention as an affirmative defense—and the proponent of an affirmative defense has the burdens of both production and persuasion. So the Supreme Court said, about § 206(d)(1) in particular, in *Corning Glass Works v. Brennan*, 417 U.S. 188, 204 (1974). See also, e.g., *Warren v. Solo Cup Co.*, 516 F.3d 627, 630 (7th Cir.2008). A concurring opinion in *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir.2012), observed that the burden-shifting approach may cause more confusion than can be justified by its benefits. Today's case illustrates one form that confusion can take.

King's claim under the Equal Pay Act must be returned to the district court for a trial at which Acosta will need to prove, and not just assert, that education and experience account for these differences. . . .

Let us suppose that education and experience (which imply greater pay at other firms, with which Acosta is competing for talent) explain some or even all of the difference in the *starting* salaries reflected in the table. There is no reason why they should explain increases in pay while a person is employed by Acosta. Changes in salary at most firms depend on how well a person performs at work. Education and experience may predict on-the-job performance, but the prediction affects the starting wage, just as scores on the LSAT predict grades in law school and thus affect the probability of admission. Once a person has been admitted to a given law school, however, it is performance on exams, or in writing papers, not the LSAT, that determines grades; and grades plus extracurricular activities, not the LSAT score, affect who is hired by which law firms; after that, performance on the job, not the LSAT or grades in law school, determines who makes partner and how much each lawyer is paid. Similarly, if men arrive at Acosta with higher salaries because of education, but men and women are equally good on the job, women should get more rapid raises after employment and the salaries should tend to converge. Law firms may pay extra to people with better credentials, which they can tout to clients, and perhaps Acosta also did this, but this is compatible with salary convergence during employment.

Look at the difference between the starting salary column in the table and the 2007 or final salary column. Men receive substantially greater increases in pay. Salaries did not converge after business managers began work; they diverged. King worked at Acosta for six years, and her salary rose by less than $7,000; Tim Wilson's salary, by contrast, rose more than $14,000 in three years. Christopher Pfister was hired at $40,000, the same as King's starting wage; but within two years Pfister was at $60,000, while in six years King never topped $50,000. These numbers can't be explained by education and experience at the time of hire, which should matter less as years pass on the job. Differences in the rate of change might be explained by different on-the-job performance, but as we've already mentioned King was one of Acosta's top producers yet was

not rewarded accordingly.

Gary Moe, Acosta's general manager for the midwest region, set the business managers' salaries. He testified by deposition that King's sales were "comparable" to that of men who were paid twice as much. When asked how he set salaries, Moe testified that the process was "subjective"; he could not, or would not, elaborate on the reasons why he set any particular business manager's salary where he did.

Acosta's national management set pay scales that were supposed to constrain the discretion of the regional general managers. In 2007 the pay scale for business managers ran from $51,600 to $88,400 a year, with a target median of $73,700. King and all but one of the other women were paid less than the low end of the scale, and all were paid less than the target median. Five men were paid more than the top end of the scale, and seven received more than the target median. Moe had no explanation for how men's salaries had become so far out of line, or why women were not paid even the minimum. King has an explanation—sex discrimination—and a reasonable juror could conclude that King is right.

At oral argument, Acosta's lawyer suggested that Moe may have set salaries haphazardly or irrationally. Random decision is a factor other than sex. If Moe had acted randomly, however, then the entries for men and women in the table should be jumbled together. The actual distribution is not random. It is difficult to see how every man could be paid more than all but one woman, and why men received greater raises, if Moe were pulling numbers out of a jar.

The judgment is . . . reversed with respect to salaries, and the case is remanded for trial.

Page 667, add to end of last paragraph before next section.

Warf v. United States Dept. of Veterans Affairs, 713 F.3d 874 (6th Cir. 2013) (plaintiff failed to make out a *prima facie* case that employer violated the EPA; she did not provide evidence that she and male employee performed substantially similar jobs and did not address the male employee's professional background); *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015) (discussing *prima facie* case elements of EPA claim and employer defenses).

§ 4.05 EXECUTIVE ORDER NO. 11246, AS AMENDED

Page 667, before *Traylor* case.

On July 21, 2014, President Obama signed Executive Order 13672, an order amending

Executive Order 11246. Effective April 8, 2015, Executive Order 11246 now provides that a "contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin," and that the contractor "will take affirmative action to ensure" that applicants are employed and employees are treated during their employment without regard to the aforementioned characteristics.

Page 672, add to end of note 3.

Malbrough v. Hensley R. Lee Contracting, Inc., 2013 WL 160280 (E.D. La. 2013) (private causes of action for violations of Executive Order 11246 are not recognized).

§ 4.06 AGE DISCRIMINATION IN EMPLOYMENT ACT, AS AMENDED

[A] The Prima Facie Case

[1] Disparate Treatment

Page 700, after first sentence in note 2:

More recently, in *Sims v. MVM, Inc.*, 704 F.3d 1327 (11th Cir. 2013), the court declared that it would continue to evaluate ADEA claims based on circumstantial evidence under the *McDonnell Douglas* framework consistent with decisions by the First, Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. This view "is entirely consistent with *Gross*, which expressly left open the question of whether this application is appropriate. . . . *Gross* held that it is improper to shift the burden of *persuasion* to the defendant in an age-discrimination case. . . . But the *McDonnell Douglas* framework does not shift the burden of persuasion to the defendant; instead, once the employee establishes a prima facie case of discrimination, the burden of *production* is shifted to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action." The burden of persuasion remains on the employee. *See also Geller v. Henry County Bd. Of Educ.*, 2015 WL 3461608 (6th Cir. 2015) (applying the *McDonnell Douglas* framework in ADEA case).

Page 700, add to end of note 3.

Charles A. Sullivan, *The Curious Incident of* Gross *and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. SEE ALSO 157 (2012).

[2] Disparate Impact

Page 717, add to end of Note 4.

The agency's final rule and regulation were issued in March 2012. *See Disparate Impact and Reasonable Factors Other than Age Under the Age Discrimination in Employment Act*, 77 Fed. Reg. 19080 (Mar. 30, 2012).

Page 718, add after Note 8.

9. *See also Bondurant v. ALPA*, 679 F.3d 386 (6th Cir. 2012) (holding that a cutoff date adopted by a union for the purpose of distributing claim shares to employees was based on a reasonable factor other than age, thereby precluding plaintiffs' disparate impact suits).

[C]

[1] "Me Too" Evidence

Page 751, add to end of Note 1.

In *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012), the appeals court held that the district court abused its discretion and erred in determining that evidence of other alleged retaliatory discharges was not admissible. The district court "improperly focuses exclusively on whether the same person made each allegedly retaliatory personal decision" and "looked only to the existence of a common decisionmaker as the necessary tie." The district court failed to "consider other ways in which the excluded evidence could be" related to the plaintiff's circumstances and the theory of the case, "such as temporal and geographical proximity, whether the various decisionmakers knew of the other decisions, whether the employees were similarly situated in relevant respects, or the nature of each employee's allegations of retaliation."

"Me too" evidence was held to be properly excluded in another case, *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157 (3d Cir. 2013), wherein the court concluded that the proffered evidence consisted of the deposition testimony of two former employees who were employed by the defendant's parent corporation and not by the defendant.

§ 4.07 THE REHABILIATION ACT AND THE AMERICANS WITH DISABILITIES ACT

[A] Coverage and Basic Protections

[1] Disabilities that Substantially Limit Major Life Activities

Page 818, before Note.

ANGELL v. FAIRMOUNT FIRE PROTECTION DISTRICT
United States District Court, District of Colorado
907 F.Supp.2d 1242 (D. Colo. 2012)

CHRISTINE M. ARGUELLO, District Judge.

. . . In this case, Plaintiff brings . . . a claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) . . .

. . . .

Plaintiff Don Angell was the fire chief of the Fairmount Fire Protection District ("FFPD"), located in Golden, Colorado, when he was terminated on March 31, 2011. . . .

. . . .

Plaintiff was diagnosed with cancer in September of 2010. . . . [H]e underwent multiple surgeries for his cancer. . . . At some point prior to being fired, Board Chairman Craig Corbin ("Corbin") instructed Plaintiff he "could not go out on [emergency] calls." . . .

. . . .

The ADA prohibits discrimination against a "qualified individual with a disability on the basis of the disability." . . . To establish a *prima facie* case of discrimination under the ADA, a plaintiff must show that: (1) he is a disabled person as defined by the ADA; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held; and (3) his employer discriminated against him because of his disability. . . .

. . . .

The ADA defines the term "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities ... (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C.A. § 12102(1).

It is undisputed that Plaintiff was diagnosed with cancer in September of 2010. . . . The Tenth Circuit has not decided an ADA-related case involving cancer since the [ADA Amendments Act

of 2008] became effective on January 1, 2009. . . . . However, Congress passed the ADAAA with the explicit purpose of "reinstating a broad scope of protection ... under the ADA," Pub.L. No. 110–325 § 2(b)(1), 122 Stat. 3553–3554 (2008), and stated that "it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* § 2(b)(5). To that end, the ADAAA added language to the ADA providing for a broad construction of the definition of disability. 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

Pertinent to this case, the ADAAA provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." *Id.* § 12102(4)(D). Additionally, the definition of a "major life activity" was specifically expanded in the ADAAA, to include "operation of a major bodily function, including ... normal cell growth." *Id.* § 12102(2)(B). As the Equal Employment Opportunities Coalition ("EEOC") implementing regulations state, "it should easily be concluded that ... cancer substantially limits [the major life activity of] normal cell growth" and accordingly, constitutes a disability. 29 C.F.R. § 1630.2(j)(3)(iii).

Based upon the ADAAA and the EEOC's post-enactment regulations, several courts have held that a Plaintiff's cancer is a disability for purposes of the ADAAA, even when the cancer is in remission. *See Norton v. Assisted Living Concepts, Inc.*, 786 F.Supp.2d 1173, 1185 (E.D.Tex.2011) (remissive cancer is a disability under the ADAAA); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F.Supp.2d 976, 985–86 (N.D.Ind.2010) (same); *Chalfont v. U.S. Electrodes*, No. 10–2929, 2010 WL 5341846, at *9 (E.D.Pa. Dec. 28, 2010) (unpublished) (same). Here, it is undisputed that Plaintiff was diagnosed with cancer, and that he underwent surgeries and treatment for his cancer; therefore, Plaintiff has adequately alleged that he had a disability under the ADA.

. . . .

FELKINS v. CITY OF LAKEWOOD

United States Court of Appeals, Tenth Circuit

774 F.3d 647 (10th Cir. 2014)

Before BRISCOE, Chief Judge, HARTZ and HOLMES, Circuit Judges.

Opinion

HARTZ, Circuit Judge.

Plaintiff Cynthia Felkins, formerly an emergency dispatcher for the City of Lakewood, Colorado, alleges that she suffers from a condition called avascular necrosis that qualifies as a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2012), and that the City refused to accommodate that disability. She brought suit against the City under the Act, but the district court granted the City summary judgment. We exercise jurisdiction . . . and affirm. Ms. Felkins's claim fails because she presented no expert medical evidence that any of her major life activities have been substantially limited by avascular necrosis.

I. BACKGROUND

Avascular necrosis is a rare condition that can cause bone tissue to die from poor blood supply. Ms. Felkins alleges that she suffers from the condition and that she so informed the City during her initial interview for an emergency-dispatcher job when she told her interviewers that she could not lift more than ten pounds because of her condition.

Ms. Felkins began working for the City in October 2007, resigned a month later, but was then rehired in June 2008. In December 2008 her femur fractured while she was at work. According to Ms. Felkins, she was driven to the hospital by her supervisor, Jodi Malpass, and on the way she told Ms. Malpass that her femur broke because she suffers from "a bone disease that results in the death of bone tissue due to a lack of blood supply to the bone." . . .

After her surgery Ms. Felkins called Ms. Malpass, allegedly to explain that the procedure had been more complicated than anticipated and healing would be delayed. Later that day, Ms. Malpass emailed Ms. Felkins's other supervisors, writing that the surgery "went well" and that the doctors repaired Ms. Felkins's femur using bone from a cadaver. . . A physician assistant completed two forms related to Ms. Felkins. The first was a Family and Medical Leave Act (FMLA) document (though Ms. Felkins was not eligible for FMLA benefits) indicating that Ms. Felkins had received hospital care but did not have a chronic condition. The second was a note stating only "Return to work full duty 1/7/09." . . .

Ms. Felkins returned to work in early January 2009, using crutches or a wheelchair to get around as her femur healed. The healing femur caused significant pain. Consequently, Ms. Felkins and Ms. Malpass agreed that Ms. Felkins would work up to a full ten-hour shift gradually, starting with four hours per day and increasing the number of hours over time. In late February Ms. Felkins met with all three of her supervisors, including Ms. Malpass, to further discuss her pain issues. At no time did Ms. Felkins request a disability accommodation in the form of reduced work hours, although she asserts that she had no reason to make the request because she believed that the City was aware of her disability and had already provided the reduced work hours as an accommodation. To support the accuracy of her belief, she states that Ms. Malpass knew that Ms. Felkins's ex-husband had to do the grocery shopping because Ms. Felkins could not, and that one of her supervisors knew she had handicapped plates on her car.

Between January and April 2009, Ms. Felkins missed a significant number of work hours. She

never resumed a full ten-hour shift, making it only to eight hours. In early March she took a one-week vacation—though she alleges that the City approved. In late March she tripped over her dog and aggravated her femur injury, causing her to miss three days of work; and in early April she sustained a broken pelvis in a car accident, causing her to miss two more days of work.

On April 8 the City called and fired her. Ms. Felkins alleges that the City told her she was terminated because she had used too much leave, that she responded that she was willing to work a full shift to keep her job, and that the City did not pursue her offer. The City followed up with a termination letter, stating that Ms. Felkins was being fired because she had "used an inordinate amount of leave as a probationary employee" and had failed to "demonstrate[ ] the ability to consistently report for her shifts." . . . Included with the letter was a chart showing that Ms. Felkins had taken 466 hours of paid and unpaid leave since starting her job ten months earlier. . . . She states that the City never told her before she was fired that she needed to work more hours. The City does not appear to contest this. Nonetheless, the City maintains that its official policy requires emergency dispatchers like Ms. Felkins to work a ten-hour shift four days a week to meet minimum staffing requirements, and that a dispatcher's failure to do so burdens other employees and places the public at risk because of a decreased capacity to handle emergency calls.

. . . .

II. DISCUSSION

. . . .

The ADA prohibits "discriminat[ion] against a qualified individual on the basis of disability," 42 U.S.C. § 12112(a), including by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity," *id.* § 12112(b)(5)(A). Thus,

> to establish a prima facie case of disability discrimination under the ADA, a plaintiff must demonstrate that [s]he (1) is a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability.

EEOC v. C.R. England, Inc., 644 F.3d 1028, 1037–38 (10th Cir.2011) (internal quotation marks omitted).

This case turns on the first prong—whether Ms. Felkins is a disabled person. Under the ADA,

"[t]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Because Ms. Felkins does not contend that she had a record of an impairment or that the City regarded her as impaired, her sole claim is one for actual impairment under paragraph (A). Hence, she "must (1) have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one or more of those activities." *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1142 (10th Cir.2011) (internal quotation marks omitted). Among the major life activities in the ADA are walking, standing, and lifting, and "the operation of a major bodily function, including ... normal cell growth [and] ... circulatory ... function[s]." 42 U.S.C. § 12102(2).

In district court Ms. Felkins consistently identified her disabling impairment as avascular necrosis. Her complaint stated: "Ms. Felkins suffers from avascular necrosis.... Her *impairment* substantially limits her ability to do ... major life activities...." . . . Therefore, Ms. Felkins had to present sufficient evidence to prove (1) that she has a condition (namely, avascular necrosis) (2) that substantially limits at least one of her . . . major life activities. We hold that she did not.

None of the medical evidence in the appellate record supports Ms. Felkins's allegation that she has avascular necrosis or details the degree to which it affects her major life activities. After Ms. Felkins's surgery, a physician assistant filled out an FMLA form stating that Ms. Felkins did not have a chronic condition. That same physician assistant later wrote a note stating only "Return to work full duty 1/7/09." . . . There is no mention of avascular necrosis, much less a description of its effects on Ms. Felkins.

That leaves only Ms. Felkins's own declarations. She states that she has avascular necrosis and told others that she has the condition. She also asserts that the condition caused her femur fracture, that it complicated her femur surgery, and that it caused her alleged difficulties walking, standing, and lifting.

Such lay evidence, however, is inadmissible in court . . .

. . . Ms. Felkins's declarations are admissible insofar as they describe her injuries and symptoms, such as pain and difficulties walking, standing, and lifting. They are inadmissible, however, insofar as they diagnose her condition as avascular necrosis or state how that condition causes limitations on major life activities, for those are clearly matters "beyond the realm of common experience and ... require the special skill and knowledge of an expert witness." *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir.2011) (internal quotation marks omitted).

Ms. Felkins argues that the ADA Amendments Act of 2008 (ADAAA), Pub.L. No. 110–325, 122 Stat. 3553, lowered the standard of proof for disability claimants and relieves her of the obligation to provide expert testimony. The ADAAA conveyed "the intent of Congress that the

primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and ... that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* § 2(b)(5), 122 Stat. at 3554. Thus, regulations implementing the ADAAA (though not yet in effect when Ms. Felkins was fired) provide that "[t]he comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis." 29 C.F.R. § 1630.2(j)(1)(v) (2011). We are not saying, however, that Ms. Felkins failed to show that her performance of a major life activity is significantly lower than that of others. Rather, the failure of proof on which our decision turns is that she has not provided proper evidence that any limitation she may have is *caused* by avascular necrosis.

. . . .

In short, Ms. Felkins has failed to present admissible evidence that she suffers from avascular necrosis that has caused any of her claimed limitations of walking, standing, and lifting, or of enjoying normal cell growth or circulatory function. The district court properly granted summary judgment.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

Page 818, add new note before Note 1.

See also Summers v. Altarum Institute, Corporation, 740 F.3d 325 (4th Cir. 2014) (employee alleged that accident left him unable to walk for seven months, and that he would have been unable to walk for a longer period of time without surgery, pain medication, and physical therapy; court holds that such an impairment can constitute a disability under the ADAAA).

Page 818, add to Note.

Young v. UPS, 707 F.3d 437 (4th Cir. 2013); *Reynolds v. American National Red Cross*, 701 F.3d 143 (4th Cir. 2012).

[2] Disabilities that Interfere with Essential Job Functions

Page 826, add to end of Note 1.

And in *Knutson v. Schwan's Home Service, Inc.*, 711 F.3d 911 (8th Cir. 2013), the court held that

the employer did not engage in disability discrimination when it terminated an employee with monocular vision who was not DOT qualified to drive a delivery truck, an essential function of the plaintiff-employee's job. *See also EEOC v. Picture People, Inc.*, 684 F.3d 981 (10th Cir. 2012) (as deaf employee was unable to perform the essential job function of being able to communicate verbally, the termination of her employment did not violate the ADA); *Hawkins v. Schwan's Home Service, Inc.*, 778 F.3d 877 (10th Cir. 2015) (former employee suffering from several heart conditions could not obtain the DOT certification viewed by the employer as an essential function of his position and was not a qualified individual with a disability).

[3] Job-Related Qualification Standards Consistent with Business Necessity

Page 834, add after Note 4.

5. In *Owusu-Ansah v. Coca-Cola Company*, 715 F.3d 1306 (11th Cir. 2013), the court held that requiring an employee, who had been placed on paid leave after allegedly threatening other employees, to undergo a psychiatric/psychological fitness-for-duty evaluation before returning to work was job-related and consistent with business necessity.

[4] Hostile Environment Claims

Page 834, following current paragraph.

RYAN v. CAPITAL CONTRACTORS, INC.
United States Court of Appeals, Eighth Circuit
679 F.3d 772 (8th Cir. 2012)

WOLLMAN, Circuit Judge.

Ron Ryan sued his former employer, Capital Contractors, Inc. (Capital Contractors), under the . . . the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, . . .

. . . .

We state the facts in the light most favorable to Ryan. . . . Ryan was hired by Capital Contractors in 1973. He worked until his voluntary departure in 1999. Ryan was rehired in 2000 and again left voluntarily in 2003. Ryan was hired for a third time in 2005, and he was

terminated on December 1, 2008.

A neuropsychological evaluation showed that Ryan has a Full Scale IQ of fifty-six, which corresponds to the mildly to moderately mentally retarded range. Ryan also speaks with a stutter that becomes more pronounced when he is excited, nervous, or tired. Ryan was placed in special education classes in school. Although he graduated from high school, he stated that he "just passed through." He has difficulty reading and writing, and a vocational rehabilitation specialist concluded that Ryan's cognitive functioning limits his ability to speak and work. Ryan, however, never informed any member of Capital Contractors' management that he was disabled, and his limitations did not keep him from completing the tasks expected of him at work. Although Ryan's co-workers and management at Capital Contractors knew that he was a little "slow," they also noticed that he could be "pretty inventive." Davis Crist, the vice president and general manager of Capital Contractors, testified that Ryan was probably in the "lower half" of Capital Contractors employees in terms of cognitive function, but he was not the lowest.

Prior to his termination, Ryan was working as a sandblaster. Troy Collins, the paint room foreman, was his supervisor. Collins oversaw Ryan and one other employee, Gregg Dissmeyer. Foremen at Capital Contractors work alongside the employees they oversee. The foreman can direct the day-to-day tasks of the workers, but they have limited authority and cannot select workers for overtime or discipline the workers directly, although they can write up a worker for tardiness or other infractions.

Physical horseplay and name calling done in a joking manner were common at Capital Contractors, but the company had a "no fighting" policy and employees knew that fighting would result in termination. Ryan testified that Collins frequently called him "fucking dummy," "fucking retard," "stupid," "idiot," and "numb nuts." According to Ryan, Collins also asked Ryan if his mother had dropped him on his head when he was little. None of these derogatory comments were made in the presence of management. Ryan also called Collins names—"fatty," "Shrek," "giant," and "bitch"—as well. Additionally, Ryan and Collins would give each other "charley horses" and "titty twisters," and regularly pinch each other. Ryan testified that although he repeatedly asked Collins to stop this behavior, Collins did not do so.

On November 26, 2008, an altercation took place between Ryan and Collins. Collins told Ryan to "get the f[___] over there and start grinding." Ryan asked Collins either, "what's up your butt?" or "what's up you're a[__]?," and began to walk away. According to Dissmeyer, the only eyewitness, Collins then grabbed Ryan by the coat with both hands. Dissmeyer's written statement, from the day of the incident, states that Collins then "kinda picked Ronnie up" and shook him. After grabbing Ryan, Collins told him that if he did not want to work he could go home, and Ryan "ended up in the pit, from a small push from [Collins]." Ryan then swung at

Collins and knocked the breathing device off of Collins's respirator mask. Collins told Ryan to go home and reported the incident to his supervisor.

At the time of the incident, Jerry Borrell was the production superintendent and Collins's direct supervisor. On November 26, 2008, however, Ron Neidecker was acting as superintendent in Borrell's absence. Neidecker testified that he first learned of the incident when Ryan approached him during the morning break. Ryan told Neidecker that Collins had grabbed him and that he (Ryan) then had taken a swing at Collins. At the end of the break, Collins spoke to Neidecker. Someone reported the incident to Crist, the general manager. Crist and Borrell each spoke with Ryan, Collins, and Dissmeyer. Crist made the ultimate decision to terminate Ryan, with input from Borrell. Crist determined that Ryan would be terminated "the minute he [Ryan] admitted to striking a fellow employee." According to both Crist and Borrell, it took longer to decide how to deal with Collins because he was a supervisor.

On December 1, 2008, Ryan was terminated from his employment with Capital Contractors. Collins was demoted from foreman status, lost the pay associated with being a foreman, was suspended without pay for three days, and was placed on probation for ninety days. The work reprimand report stated that Ryan was dismissed for striking a fellow employee and that Collins was disciplined for aggressive behavior toward a subordinate. Two or three days later, Ryan asked Frank Sidles, the owner of Capital Contractors, if he could have his job back. Sidles refused to rehire him.

Collins was terminated in January of 2009, during his probationary period, after Crist and Borrell received complaints from several individuals that Collins engaged in unwelcome physical contact. Collins was rehired as a painter in July 2009, with the stipulation that he would hold no supervisory positions.

Ryan sued Capital Contractors . . . He appeals from the district court's grant of summary judgment with respect to his disability discrimination claims. Ryan alleges . . . that he was subjected to a hostile work environment in violation of the ADA.

. . . .

To prevail on a hostile work environment claim under the ADA, Ryan must show "that he is a member of the class of people protected by the statute, that he was subject to unwelcome harassment, that the harassment resulted from his membership in the protected class, and that the harassment was severe enough to affect the terms, conditions, or privileges of his employment." . . . When the alleged harasser is the plaintiff's fellow employee there is a fifth element: that the

employer knew or should have known of the harassment and failed to take proper action. . . . This element does not apply to allegations of supervisory harassment. . . .

We have adopted a narrow definition of the term "supervisor" for purposes of determining whether a company is vicariously liable for a hostile work environment. To be considered a supervisor in the context of this claim, "the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." . . . Collins did not have this type of authority, and we must determine whether Capital Contractors knew or should have known of the harassment here.

It is not clear that the conduct at issue was "unwelcome" in the sense required in hostile work environment claims. "The proper inquiry is whether [Ryan] indicated by [his] conduct that the alleged harassment was unwelcome." *Scusa v. Nestle U.S.A. Co., Inc.,* 181 F.3d 958, 966 (8th Cir.1999) (quoting *Quick v. Donaldson Co., Inc.,* 90 F.3d 1372, 1378 (8th Cir.1996)). In *Scusa,* we upheld a grant of summary judgment where the plaintiff yelled and swore at her co-workers in the same manner that she claimed constituted harassment. . . . We assume, for purposes of summary judgment, that Ryan was offended by Collins's conduct and repeatedly asked him to stop. But Ryan, like the plaintiff-appellant in *Scusa,* "engaged in behavior similar to that which [he] claimed was unwelcome and offensive." *See id.* Ryan's behavior failed to send a consistent signal that Collins's conduct was unwelcome.

Even if Collins's conduct constituted unwelcome harassment, it did not affect the terms, conditions, or privileges of Ryan's employment. . . . A hostile work environment must be both subjectively and objectively offensive, as well as "extreme in nature and not merely rude or unpleasant." *Sutherland v. Mo. Dep't of Corr.,* 580 F.3d 748, 751 (8th Cir.2009) (citations omitted). "In determining whether a plaintiff has demonstrated a hostile work environment, we consider the totality of the circumstances, including the frequency and severity of the conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the plaintiff's job performance." *Cross v. Prairie Meadows Racetrack & Casino, Inc.,* 615 F.3d 977, 981 (8th Cir.2010).

Collins's conduct in this case did not reach the level of creating a hostile work environment. Ryan was able to perform his duties at work and did everything that was required of him despite Collins's conduct. . . . In considering the totality of the circumstances, Collins's behavior was undoubtedly inappropriate and likely subjectively offensive. But given the atmosphere of the workplace, Ryan's participation in similar conduct, and Ryan's continued ability to perform his duties, it did not rise to the level of extreme behavior that is objectively offensive.

Finally, Ryan has failed to present evidence that Capital Contractors knew or should have known of this harassment and failed to address it. It is undisputed that Collins did not call Ryan names and engage in horseplay when members of management were present. It is also undisputed that Ryan never complained to anyone other than Collins about Collins's conduct. "An employee has a duty to take reasonable steps to prevent harassment and mitigate harm." . . . Ryan had worked with production superintendent Borrell for most of the past thirty years, and he also demonstrated that he knew to contact owner Sidles when he wanted his job back. He could have complained of Collins's conduct to either Borrell or Sidles when Collins was not responsive to Ryan's requests that he cease engaging in such conduct.

We conclude that Ryan failed as a matter of law to demonstrate the elements necessary to establish a hostile work environment claim.

[B] Structure of Proof, Reasonable Accommodation and Undue Hardship

[1] Structure of Proof

Page 840, end of note 5.

Accord Palmquist v. Shinseki, 689 F.3d 66 (1st Cir. 2012) (Rehabilitation Act case); *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (en banc).

Page 857, at end of Note 3.

; *Minnihan v. Mediacom Communications Corporation*, 779 F.3d 803 (8th Cir. 2015) (noting that "there is no per se liability under the ADA if an employer fails to engage in the interactive process" and concluding that the employer was not required to reallocate essential functions of the plaintiff's job to accommodate him; 'the record is clear that Mediacom made a good faith effort to assist Minnihan in finding a reasonable accommodation").

§ 4.08 THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

Page 865, after last paragraph in section.

In *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011), the Supreme Court held that federal immigration law did not preempt certain provisions of the Legal Arizona Workers Act of

2007. Pursuant to that state law, the business licenses of employers that knowingly or intentionally employ unauthorized aliens could be, and in certain circumstances must be, suspended or revoked. The Court noted that IRCA expressly preempts states from imposing civil or criminal sanctions on those who employ unauthorized aliens "other than through licensing and similar laws." In its view, Arizona's licensing law "falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." In addition, the Court determined that the state's law was not impliedly preempted by IRCA as there was no conflict between state and federal law.

In another decision, *Arizona v. United States*, 132 S.Ct. 2492 (2012), the Court held that certain provisions of an Arizona statute known as S.B. 1070, including those which made the failure to comply with federal alien registration requirements a state misdemeanor and also made it a misdemeanor for undocumented persons to seek or engage in work in Arizona, were preempted by federal law. The Court noted the federal government's constitutional power to "establish an uniform Rule of Naturalization" as set forth in Art. I, § 8, cl. 4 of the United States Constitution; Congressional power to preempt state law pursuant to the Constitution's Supremacy Clause. Art. VI, § 2; and the ways in which the Arizona law intruded on the field of alien registration and stood as an obstacle to the federal regulatory system and IRCA's comprehensive framework for addressing and combatting the employment of undocumented workers.

§ 4.09 SOURCES IN OTHER LEGISLATION

Page 869, end of note 10.

In *Lowe v. Atlas Logistics Group Retail Services*, 2015 WL 2058906 (N.D. Ga. 2015), the court held that DNA tests constituted genetic tests prohibited by GINA. As part of an employer investigation into mystery defecations at one of its warehouses, employees were asked to submit to cheek swabs, and their cheek cell samples were sent to a lab where cheek cell DNA was compared to DNA from the "offending fecal matter." Two employees filed suit under GINA. The court determined that GINA's unambiguous language—it is "an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee"—covered the employer's request for employees' genetic information. The court concluded, further, that the DNA tests violated the EEOC's GINA regulations.

CHAPTER 6

PROCEDURES FOR ESTABLISHING CLAIMS

§ 6.01 TITLE VII AND THE AMERICANS WITH DISABILITIES ACT

[C] EEOC Voluntary Compliance Efforts

Page 918.

Resolving a conflict among the federal circuit courts, in *Mach Mining, LLC v. EEOC,* 135 S.Ct. 1645 (2015), the Supreme Court decided that courts *may review* whether the EEOC has fulfilled its duty to attempt to conciliate discrimination claims before litigation. According to Justice Kagan, writing for a unanimous Court, courts may enforce the EEOC's statutory obligation to give the employer notice and an opportunity to achieve voluntary compliance and the aim of judicial review is to verify that the EEOC actually tried to conciliate a discrimination charge." To comply with Title VII, The Court ruled that: (1) the EEOC must inform the charged party about the specific discrimination allegation; (2) this notice must describe the claim—specifically, what the charged party has allegedly done and which employees (or class of employees) have suffered; and (3) the EEOC must try to engage the charged party in a discussion in an effort to achieve voluntary compliance and to give the charged party a chance to remedy the allegedly discriminatory practice. In determining whether the EEOC has fulfilled these obligations, the Court determined that a sworn affidavit submitted by the EEOC stating that it has performed its Title VII conciliation obligations but that its efforts have failed would suffice. "If, however, the [charged party] provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the fact finding necessary to decide that limited dispute." Finally, the Court held that if a court rules that the EEOC did not satisfy its conciliation obligations,, the appropriate remedy is not dismissal of the lawsuit, but, instead, an order requiring the EEOC to undertake voluntary compliance by the process of conciliation.

[D] Resort to Federal Court by Individuals

[2] Class Actions

Page 929, after first full paragraph.

WAL-MART STORES, INC. v. DUKES

United States Supreme Court
131 S.Ct. 2541 (2011)

Justice SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal–Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal–Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal–Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F.R.D. 137, 145 (N.D.Cal.2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq.*

Betty Dukes began working at a Pittsburgh, California, Wal–Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a Wal–Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal–Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal–Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see 42 U.S.C. § 2000e–2(k). And, respondents say, because Wal–Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see § 2000e–2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal–Mart's female employees. The basic theory of their case is

that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal–Mart's stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that:

"(1) the class is so numerous that joinder of all members is impracticable,

"(2) there are questions of law or fact common to the class,

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

"(4) the representative parties will fairly and adequately protect the interests of the class" (paragraph breaks added).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." [FN2]

FN2. Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications ... that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impeded their ability to protect their interests." Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The applicability of these provisions to the plaintiff class is not before us.

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of " '[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and

management track promotions policies and practices.' " . . . As evidence that there were indeed "questions of law or fact common to" all the women of Wal–Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal–Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal–Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. 603 F.3d 571, 601 (C.A.9 2010) (en banc).

Wal–Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements of commonality, typicality, and adequate representation. Wal–Mart further contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal–Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class.

. . . .

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. 603 F.3d 571. . . .

. . . .

II

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." . . . Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.' " . . .

A

The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." Rule 23(a)(2). That language is easy to misread,

since "[a]ny competently crafted class complaint literally raises common 'questions.' " Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." . . . This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. . . .

In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a *pattern or practice* of discrimination.[FN7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

> FN7. In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that ... discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. 324, 358 (1977); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). If he

succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against the continuation of the discriminatory practice." *Teamsters, supra,* at 361.

B

This Court's opinion in [*Gen. Tel. Co. of the Southwest v.*] *Falcon*[, 457 U.S. 147 (1977)] describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. . . . We rejected that composite class for lack of commonality and typicality, explaining:

"Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims." . . .

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." . . . Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." . . . We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal–Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires "significant proof" that Wal–Mart "operated under a general policy of discrimination." That is entirely absent here. Wal–Mart's announced policy forbids sex discrimination, . . . and as the District Court recognized the company imposes penalties for denials of equal employment opportunity. . . . The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on "social framework" analysis, Bielby testified that Wal–Mart has a "strong corporate culture," that makes it " 'vulnerable' " to "gender bias." . . . He could not,

however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition ... Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." . . . The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Civil Procedure 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. . . . We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990 (1988).

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." . . . But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements . . . And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected. In a company of Wal–Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal–Mart ... [and] these disparities ... can be explained only by gender discrimination." . . . Bendick compared work-force data from Wal–Mart and competitive retailers and concluded that Wal–Mart "promotes a lower percentage of women than its competitors." . . .

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." . . . A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d, at 637. A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial

or sexual disparity *is not enough.* "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Watson,* 487 U.S., at 994; accord, *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656 (1989) (approving that statement), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims together. Merely showing that Wal–Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States,* 431 U.S. 324 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. . . . That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.,* at 337, 97 S.Ct. 1843, and the class itself consisted of around 334 persons. . . . The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. . . . Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores. . . . More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal–Mart's operations at all. . . . Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate [s] under a general policy of discrimination," *Falcon, supra,* at 159, n. 15, which is what respondents must show to certify a companywide class.

. . . .

In sum, we agree with Chief Judge Kozinski that the members of the class:

> "held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed .... Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F.3d, at 652 (dissenting opinion).

. . . .

The judgment of the Court of Appeals is

Reversed.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. . . . A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e.g.*, qualification for, and the amount of, backpay or compensatory damages—and that a class action is "superior" to other modes of adjudication.

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand. The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class." The Rule "does not require that all questions of law or fact raised in the litigation be common," 1 H. Newberg & A. Conte, Newberg on Class Actions § 3.10, pp. 3–48 to 3–49 (3d ed.1992); indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003). See Advisory Committee's 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 138 (citing with approval cases in which "there was only a question of law or fact common to" the class members).

A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed.1992). See also Black's Law Dictionary 1366 (9th ed.2009) (defining "question of fact" as "[a] disputed issue to be resolved ... [at] trial" and "question of law" as "[a]n issue to be decided by the judge"). Thus, a "question" "common to the

class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," . . . found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. . . .

The District Court certified a class of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998." . . . The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions. They allege that the company "[r]eli[es] on gender stereotypes in making employment decisions such as ... promotion[s][and] pay." . . . Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." . . . Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." . . . Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept. of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." . . . "[T]he higher one looks in the organization the lower the percentage of women." . . . The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." . . .

The District Court identified "systems for ... promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which these systems affect the class raises issues that are common to all class members." . . . The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. . . . Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. . . .

Wal–Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. . . .

Wal–Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal–Mart used to maintain a "carefully constructed ... corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal–Mart TV," "broadcas[t] ... into all stores." . . .

The plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused Wal–Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie Qs." . . . One manager told an employee that "[m]en are here to make a career and women aren't." . . . A committee of female Wal–Mart executives concluded that "[s]tereotypes limit the opportunities offered to women." . . .

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart "can be explained only by gender discrimination and not by ... neutral variables." . . . Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia*, job performance, length of time with the company, and the store where an employee worked. . . . The results, the District Court found, were sufficient to raise an "inference of discrimination." . . . .

C

The District Court's identification of a common question, whether Wal–Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.[FN6] The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

> FN6. An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 715–716 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. . . . Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to

> disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens. . . .

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 991 (1988). . . . In *Watson*, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" caused a discriminatory effect based on race. . . . Four different supervisors had declined, on separate occasions, to promote the employee. . . . Their reasons were subjective and unknown. The employer, we noted "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors." . . .

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." . . .

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal–Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

. . . .

Wal–Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. . . . A finding that Wal–Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States*, 431 U.S. 324, 359 (1977) . . . That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused ... advancement ... for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

. . . .

NOTES

1. Were you persuaded by Justice Scalia's majority opinion or by Justice Ginsburg's dissent?

2. For commentary on the Court's decision, see George Rutherglen, *The Way Forward After* Wal-Mart, 88 NOTRE DAME L. REV. 871 (2012); Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433 (2012); Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012). For a discussion of the "social framework analysis" mentioned in Justice Scalia's opinion, see Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009).

3. The *Duke* plaintiffs returned to the district court and sought certification of a smaller class that would conform to the Supreme Court's ruling. That class would include approximately 150,000 women working in Wal-Mart's "California Regions." The district court held that the plaintiffs failed to establish that the chain's California regions operated under a general policy of discrimination, did not establish that challenged employment practices were class-wide practices, and did not establish a common question underlying their disparate impact claim related to the delegation of authority to local store managers. *See Dukes v. Wal-Mart Stores, Inc.*, 964 F.Supp.2d 1115 (N.D. Cal. 2013), *petition to appeal denied,* 2013 WL 6085948 (9th Cir. 2013).

Page 953, last line of note 2.

Delete "2011 U.S. Lexis 3367 (April 27, 2011)." and insert "131 S.Ct. 1740 (2011)."

Page 953, add note 2.

American Express Co., v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013), held that a contractual waiver of class arbitration is enforceable under the FAA where the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the plaintiff's potential recovery. The Court concluded that a requirement "that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim, and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing evidence, and the damages that would be recovered in the event of success . . . would undoubtedly destroy the prospect of

speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure." *See also Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013) (arbitrator did not exceed his powers in authorizing a class arbitration; the parties asked the arbitrator to decide whether the agreement allowed for class arbitration and the arbitrator, after analyzing the text of the arbitration clause, concluded that the class on its face expressed the parties' intent that class arbitration could be maintained).

CHAPTER 8

REMEDYING EMPLOYMENT DISCRIMINATION

§ 8.01 TITLE VII, THE NINETEENTH CENTURY CIVIL RIGHTS ACTS AND THE AMERICANS WITH DISABILITIES ACT

[C] Compensatory and Punitive Damages

Page 1072, after Note 7.

8. For an excellent discussion and analysis of Title VII and punitive damages, see Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473 (2012), and Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008).

[D] Attorney Fees and Other Litigation Expenses

Page 1079, end of Note 6.

A Rule 68 offer of judgment can also have consequences in collective actions brought by a single employee on behalf of herself and other similarly situated employees. In *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), the Supreme Court, by a vote of 5-4, held that such a collective action alleging violations of the Fair Labor Standards Act became moot as a result of the employer's offer of judgment in an amount sufficient to make the plaintiff-employee whole. Justice Thomas, writing for the Court, concluded that "[i]n the absence of any claimant's opting in, [the plaintiff-employee's] suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action." A dissenting Justice Kagan, noting that the plaintiff had not accepted the employer's offer, argued that "an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."