Title VII Update – 2017 and 2018

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I. DISCRIMINATION

Blake v. MJ Optical, Inc., 870 F.3d 820 (8th Cir. 2017

The plaintiff sued the Employer alleging sex and age discrimination and sex harassment in violation of Title VII and other employment statutes. Id. at 822, 825. The alleged sex discrimination and harassment involved, for example, the Employer owner's son and Vice President (same person) grabbing the plaintiff's buttocks occasionally for almost a decade and commenting on her breasts. Id. at 823-25. The Eighth Circuit affirmed summary judgment for the Employer regarding the Title VII discrimination claims because the plaintiff did not give the employer a "reasonable chance" to remedy the alleged mistreatment given the plaintiff supposedly never reported the misconduct. Id. at 826-27. The Eighth Circuit upheld summary judgment as to the harassment claims because the plaintiff could not prove the supervisor's conduct was "unwelcome" given the plaintiff never made any timely complaints about the alleged harassment and, moreover, never rebuffed the harasser. Id. at 825-30. This decision follows a long line of Eighth Circuit cases that treat discrimination and harassment claims with skepticism and, in any event, highlights the importance of employees reporting any harassment and other discrimination issues immediately.

Edwards v. Hiland Roberts Dairy, Co., 860 F.3d 1121 (8th Cir. 2017)

The plaintiffs, two African-American employees terminated for alleged "time theft," pursued race discrimination claims under Title VII and State law. Id. at 1124-25. The Eighth Circuit affirmed summary judgment for the Employer despite comparator evidence apparently reflecting disparate treatment, the Employer's failure to follow its own policies, and the Employer's changing rationales for why it fired the plaintiffs. The Eighth Circuit justified its decision as follows: (1) the two white employees not terminated for "time theft" were not similarly situated to the plaintiffs because – despite having the same supervisors and being subject to the same employment standards – the white employees supposedly did not engage in dishonest conduct like the plaintiffs did; (2) the Employer's failure to follow its policies during investigation did not matter because the plaintiffs failed to prove the Employer's investigation was incomplete – declaring that "a shortcoming in an internal investigation alone, without additional evidence of pretext, would not suffice to support an inference of discrimination on the part of the employer;" and (3) the supervisor's shifting reasons for firing the plaintiffs were not "substantially different at all." Id. at 1125-27. This case provides another illustration of how narrowly the Eighth Circuit will construe what is sufficient to be probative comparator evidence or evidence. By ruling in this fashion, the Eighth Circuit appeared to decide material questions of fact reserved for trial under Fed. R. Civ. P. 56.

Pennington v. Ark. Game & Fish Comm'n, 2018 U.S. App. LEXIS 5914 (8th Cir. Mar. 9, 2018)

In an unpublished paragraph-long decision, the Eighth Circuit affirmed a summary judgment determination for the Employer on plaintiff's claims of failure to promote and discriminatory/retaliatory termination. 2017 U.S. Dist. LEXIS 74304 (E.D. Ark. May 16, 2017). The plaintiff, who is black, worked for the Employer for sixteen years in several positions of increasing importance, finally as a maintenance supervisor. The plaintiff applied for an

Operations and Facility Manager opening. Out of 179 applicants, 67, including the plaintiff, had the minimum qualifications. Ultimately, Employer hired a white applicant and the plaintiff filed an EEOC charge alleging he was not hired because of his race. Approximately nine months after filing the charge, Employer terminated the plaintiff for using the Employer's property (an air compressor) to repair a personal vehicle of a co-worker, in violation of the Employer's policy. The Employer also terminated the co-worker and the Fleet Manager of the mechanic shop (who had observed the plaintiff work on the vehicle) because they "had been complicit in [plaintiff]'s violations of [the Employer's] policy."

The plaintiff sued, alleging: (1) he was not promoted to the Operations and Facility Manager job because of his race; (2) he was terminated because of his race; and/or (3) he was terminated in retaliation for the EEOC charge. The Eighth Circuit affirmed the judgment on de novo review, noting that "to prove pretext, plaintiff must both discredit [the] asserted reason for adverse employment action and show that [the] circumstances permit [a] reasonable inference that [the] real reason for [the] adverse action was unlawful discrimination." The Eighth Circuit also agreed that the District Court properly evaluated the plaintiff's claims under the *McDonnell-Douglas* framework, and that comments by the decision-maker in the hiring decision that plaintiff "needs to get his black … ass … away from here" was not direct evidence of discrimination because there was not "a specific link" between the comment and the hiring decision.

Rooney v. Rock-Tenn Converting Co., 878 F.3d 1111 (8th Cir. 2018)

Plaintiff asserted religious and gender discrimination under Title VII and pendant state law claims alleging Employer terminated him because he was non-Jewish and male. Id. 1112.The District Court granted Employer's motion for summary judgment in its entirety finding there were no genuine factual issues in dispute to sustain his claims. Id. 1115. On appeal, the plaintiff asserted the District Court improperly applied *McDonnell Douglas* as it cited additional reasons Employer had articulated in making the termination decision outside of what he had been told at the time of his termination. Id. 1116-1117. The Eighth Circuit disagreed stating "Title VII does not impose a legal obligation to provide an employee an articulated basis for dismissal at the time of firing, and an employer is certainly not bound as a matter of law to whatever reasons might have been provided." Id at 1116. The Eighth Circuit further stated, "it is well-settled that an employer may elaborate on its explanation for an employment decision." Id. (citing Mervine v. Plant Eng'g Servs., LLC, 859 F.3d 519, 528 (8th Cir. 2017) (other citations omitted)). The Eighth Circuit further clarified that only a "substantial shift" in an employer's reason may be evidence of pretext. Id. The Eighth Circuit further held the plaintiff had not set forth direct evidence of discrimination or pretext and upheld the District Court's decision.

Stone v. McGraw Hill Fin., Inc., 856 F.3d 1168 (8th Cir. 2017)

The plaintiff sued the Employer under Title VII and related employment statutes for race discrimination, harassment, and retaliation. Id. at 1170. The Eighth Circuit affirmed summary judgment for the Employer on the following grounds: (1) the plaintiff failed to show that his two co-workers who receive higher salaries were "similarly situated in all relevant respects" because his co-workers "were hired from competitors of [the Employer] and had prior experience in roles

similar to the [job] position;" (2) the plaintiff failed to identify any similarly situated employee who received bonuses that the plaintiff did not receive; (3) there was no evidence of any racial motivation during the alleged harassment, and the race-related comment by the plaintiff's manager was not sufficiently severe or pervasive; (4) the manager's mistaken belief that the plaintiff had performance problems and then firing the plaintiff on that basis was not pretext for discrimination; and (5) the plaintiff failed to provide enough evidence of a causal connection between his termination and any protected activity. Id. at 1174-76. This provides a graphic example of the constricted nature of the Eighth Circuit's evaluation of discrimination, harassment, and retaliation claims. In particular, the interpretation of "similarly situated," "honest belief," and "causal connection" all generally tend to favor defendants over plaintiffs.

Tovar v. Essentia Health, 857 F.3d 771 (8th Cir. 2017)

The plaintiff, an insured employee, sued the Employer and health insurer under Title VII, the Minnesota Human Rights Act, and the Affordable Care Act ("ACA") because her son was denied coverage for gender reassignment surgery despite being a beneficiary under the Employer's medical plan and being diagnosed with gender dysphoria. Id. at 773-74. The District Court granted the Employer's motion to dismiss and found that the plaintiff's claims failed for lack of standing. Id. at 774. The Eighth Circuit affirmed in part, reversed in part, and remanded the case for further proceedings. Id. at 779. The Eighth Circuit reasoned that the plaintiff's complaint on her own behalf about the Employer's refusal to cover treatment for her son did not fall within the protections of Title VII because the statute prohibits employers from discriminating against employees on the basis of their own protected characteristics rather than the protected characteristics of the plaintiff's son. Id. at 775-76. The Eighth Circuit reversed the District Court's conclusion that the plaintiff's action against the health insurer lacked Article III standing because the plaintiff had properly named the defendants and alleged that, if the health insurer had provided the Employer with a discriminatory plan document, the plaintiff's injuries could well be traceable to, and redressable by, damages from the defendants. Id. at 778-79. The Eighth Circuit remanded the case for further proceedings to allow the District Court to examine whether the plaintiff's claim should be dismissed because the plaintiff does not "fall[] within the class of plaintiffs whom Congress has authorized to sue under" the ACA. Id. at 779-80. Once again, the Eighth Circuit has taken a limited approach to the interpretation of Title VII's reach.

Benner v. St. Paul Public Schs, 2017 U.S. Dist. LEXIS 198821 (D. Minn. Dec. 4, 2017)

The District Court denied the Employers Rule 12 motion with respect to the plaintiff's claims of race discrimination and retaliation under Title VII and related state law claims, but granted the Employer's motion as to his claim for harassment. Id. *23. Plaintiff, an African-American former teacher of Employer for approximately twenty years, filed an amended complaint alleging discrimination, harassment and retaliation, including constructive discharge, after he was forced to resign from his employment for fear of losing his tenure and benefits was too great, after objecting to Employer's "racial equity" policy. Id. *2-10. Plaintiff asserted facts in his amended complaint to show he was disciplined, investigated and ultimately treated differently than other Caucasian teachers after making his complaint about the policy.

The District Court stated that the plaintiff's amended complaint asserted sufficient facts to establish discrimination and retaliation but not harassment. Id. *14-22. As to his harassment claim, the District Court asserted that "adequately pleading a hostile work environment simply requires more than alleging that the plaintiff was insulted." Id. *23(citations omitted). Citing from the amended complaint the District Court stated, "[b]ut fatal to Plaintiff's [harassment] claim, by his own admissions, these 'investigations and disciplinary actions were an *insult* to Plaintiff who, up until the point he challenged [Employer's] racial equity policy[,] was a good teacher with no investigations or disciplinary actions taken against him." Id.

Cardoso v. Bd. of Regents of the Univ. of Minn., 2018 U.S. Dist. LEXIS 2535 (D. Minn. Jan. 5, 2018)

The plaintiff, an African-American of Portuguese origin, sued the Employer under Title VII for alleged race, color, and national origin discrimination when the Employer elected not to renew his employment contract. Id. at *1. In response, the Employer provided evidence it chose nonrenewal because the plaintiff had worsened the Employer's relationship with the Teamsters, had disobeyed his superior's directions and attempted to keep the insubordination secret, and had substandard management skills. Id. at *9-11. The plaintiff did not provide any evidence that the Employer's reasons were pretextual, relying instead on mere allegations to support his factual theory. Id. at *10. The District Court granted the Employer's motion for summary judgment, finding that the Employer articulated legitimate reasons for its actions, and the plaintiff provided no evidence to create a genuine dispute about whether any of the Employer's proffered reasons were pretext for discrimination. Id. at *11. This is but one example of the District Court dismissing claims that are based on "mere allegations, unsupported by specific facts or evidence beyond the plaintiff's own conclusions."

Dahir, et al v. UPS Mail Innovations, Inc., et al., 2017 U.S. Dist. LEXIS 207952 (D. Minn. Dec. 18, 2017)

The plaintiffs sued UPS Mail Innovations, Inc. ("UPS") and Doherty Staffing Solution, Inc. ("Doherty") alleging religious discrimination and failure to accommodate and retaliation in violation of Title VII and other state employment statutes. Id. at *4. According to the Second Amended Complaint, at issue in the defendants' motion to dismiss, the plaintiffs alleged UPS was their co-employer as Doherty placed them to work at its facility. Id. at *2. The plaintiffs claimed that when they first started working at the UPS site, they were allowed to observe their prayer times each day. Id. According to the plaintiffs, this changed when UPS named a new operations manager they claimed were hostile to Muslims and no longer allowed them to choose their break times or pray outside of the designated break times chosen for them. Id. The plaintiffs also claimed the new UPS manager asked the Muslim employees who needed to pray to raise their hands and thereafter, instructed Doherty to replace all of those employees. Id. at *3. The plaintiffs allege two employees who raised their hands were terminated days later and they were told if they wanted to pray, they should go home which they believed constituted a termination. Id.

In the defendants' motion for judgment on the pleadings under Rule 12(c), they sought dismissal of the retaliation claims for failure to exhaust administrative remedies arguing that the plaintiffs'

amended charge, although it checked the "retaliation/reprisal" box, they did not add facts to the amended charge to otherwise assert a claim of retaliation. Id. at *5-6. In the alternative, defendants' argued the claim fails as requesting an accommodation is not "protected activity" under Title VII and they did not amend the charge until 300 days after the alleged violation occurred. Id. UPS also argued there were no facts asserted alleging they requested an accommodation from UPS or that UPS was a co-employer. Id. at *6-7. Finally, UPS alleged the facts pled were insufficient to sustain a discrimination claim as they did not provide facts in the complaint to assert they were treated differently. Id. at *7. Doherty did not challenge the sufficiency of the pleadings with respect to the discrimination claim. Id.

In its decision, the District Court granted UPS's motion in its entirety finding it was not the plaintiffs' employer. Id. at *1-2. The District Court rejected the argument that plaintiffs' failed to exhaust their administrative remedies or were otherwise untimely bringing the lawsuit. Id. at *7-8. But, the District Court did agree that the plaintiffs' requests to pray was not protected activity under Title VII for purposes of a retaliation claim dismissing the retaliation claim against Doherty. Id. at *8-9. The District Court relied on the definition provided under Title VII for protected activity, "opposing an unlawful employment practice or making a charge, testifying, participating in an investigation or other proceeding under Title VII." Id. (internal citations omitted). The District Court found that plaintiffs only alleged they requested an accommodation to support their claim for retaliation and therefore, the District Court dismissed the retaliation counts under Title VII against Doherty. Id. *9-10.

Ultimately, the District Court dismissed all claims against UPS as they did not allege facts to support a theory that UPS was a co-employer and the retaliation claims under Title VII against Doherty based on the fact they did not allege facts to assert hey engaged in protected activity. Id. at *13.

Miller v. Bd. of Regents of the Univ. of Minn., 2018 U.S. Dist. LEXIS 17531 (D. Minn. Feb. 1, 2018)

The plaintiffs, three lesbian women who were former coaches for the Employer, the University of Minnesota Duluth ("UMD"), claimed their contracts were not renewed or they were constructively discharged based on their sex and sexual orientation and in retaliation for accusing UMD of violating Title IX. They also made claims of a hostile work environment and for violations of the Equal Pay Act ("EPA"). The District Court granted summary judgment on all claims except one of the plaintiff's claims of sex discrimination and retaliation. The District Court held the plaintiff whose claims survived proffered sufficient evidence that UMD's explanation for her firing was pretextual due to inconsistent explanations, application of different criteria in renewing her male counterpart's contract, overstating its dire financial condition, and temporal proximity to her complaints regarding Title XI violations. Id. at *8-10. The District Court dismissed all three plaintiffs' sexual orientation claims because the Eighth Circuit has held sexual orientation is not a protected class under Title VII. The District Court noted that the plaintiffs could have pursued their sexual orientation discrimination claims under the Minnesota Human Rights Act in state court, but the District Court lacked jurisdiction over the plaintiffs' state law claims against the university, an arm of the state. The plaintiffs' hostile work environment claims failed because none could demonstrate that "she suffered a hostile

environment *on account of* her sex" or that she endured something worse than "the stupid decisions of bosses or the irritating behavior of co-workers," which the District Court noted is "the type of bad behavior found in most workplaces." Id. at *11-12 (emphasis added). The District Court also held that two of the plaintiffs failed to establish termination or constructive discharge, noting the "constructive-discharge standard is even more difficult to meet than the hostile-environment standard." Id. at *30.

Raino v. Target Corp., 2017 WL 3411946 (D. Minn. 2017)

The plaintiff took legal action under Title VII and Minnesota's "ban the box" law, alleging the Employer refused to hire her upon learning that she had a prior felony conviction. Id. at *1. The magistrate judge recommended that the Title VII claim be dismissed with prejudice for failure to state a claim on which relief may be granted and that the State law claim be dismissed without prejudice for lack of subject-matter jurisdiction – and the District Court agreed. Id. Notably, the magistrate judge reasoned that "individuals who have committed criminal offenses are not a protected class under Title VII. That [the Employer] may have excluded [the plaintiff] from employment due to her criminal record, taken alone, does not implicate Title VII. And [the plaintiff] does not allege that [the Employer] used its exclusion of persons with criminal records as a stand-in for express discrimination against groups that are protected by Title VII." Id. at *1. The tenor of this decision, at least from a policy standpoint, seems to be in tension with the public pronouncements and guidance provided by the United States Equal Employment Opportunity Commission on the question of criminal background checks being evaluated under Title VII.

Teckler v. Minnesota, 2018 U.S. Dist. LEXIS 2683 (D. Minn. Jan. 8, 2018)

The District Court (J. Ericksen) granted a Rule 12 Motion brought by Employer, Minnesota Department of Veteran's Affairs, and dismissed the plaintiff's four-count complaint alleging national-origin discrimination and harassment in violation of Title VII state law. The plaintiff's Title VII claims were dismissed as untimely, despite her argument that she did not receive the EEOC's right-to-sue letter because she had moved: "Equitable tolling does not apply in cases where a claimant could have – but did not – inform the EEOC of his or her new address." Alternatively, the District Court found the plaintiff did not state a plausible claim for relief as her complaint contained "only 'threadbare recitals' of the elements."

Temple v. Metro. Council, 2017 Minn. App. Unpub. LEXIS 1013 (Dec. 11, 2017)

The plaintiff, an African-American law enforcement officer, sued his former employer, the Metro Transit Police Department ("MTPD"), alleging claims of racial discrimination and reprisal in violation of the MHRA. The District Court granted summary judgment finding that the plaintiff failed to establish that his termination was causally connected to his race or that he had engaged in the requisite protected activity necessary to establish a reprisal claim. The plaintiff appealed the District Court's grant of summary judgment to the employer, claiming that he had provided sufficient direct evidence of racial discrimination to avoid summary judgment and otherwise provided sufficient indirect evidence to establish a prima facie case of discrimination and reprisal. The Minnesota Court of Appeals affirmed summary judgment on the following

grounds: (1) the plaintiff failed to show a "specific link" between any alleged discriminatory motive on the part of the employer and an adverse action, or that race was a "substantial causative factor" of his termination; (2) the plaintiff failed to show that he was treated less favorably than others on the basis of race; (3) the Employer's decision to temporarily suspend the plaintiff's squad car responsibilities was "a mere inconvenience or alteration of job responsibilities, without a material change in employment," and therefore insufficient to be considered an adverse employment action; (4) the plaintiff failed to establish facts sufficient to establish his "cat's paw" theory; (5) the plaintiff failed to provide evidence from which a fact finder could determine that he had a good-faith, reasonable belief that his assignments and/or discipline were unlawful acts that violated the MHRA on the basis of racial discrimination; (6) the plaintiff failed to establish a causal connection between the alleged protected conduct and his adverse employment actions; (7) the plaintiff did not demonstrate that Employer's reason for discipline were pretext for retaliation. This case reinforces the long-standing principle that a plaintiff's mere suspicions, without more, that the employer's decisions were motivated by race or reprisal will be insufficient to avoid summary judgment.

II. HARASSMENT

Abdel-Ghani v. Target Corp., 686 F. App'x 377 (8th Cir.), cert. denied, 138 S. Ct. 362 (2017)

Plaintiff, a Pakistani employee, asserted national origin harassment and discrimination under Title VII and the Minnesota Human Rights Act. Id. at 378. The alleged harassment involved the plaintiff's direct supervisor telling him to "go back home, go to your country" and other co-workers allegedly calling him names like "camel jockey, Muslim, Arab, terrorist, and sand nigger, often from behind shelves in the employee backroom" at least 10 times during his 2 months working for the Employer. Id. The Eighth Circuit affirmed summary judgment for the Employer for the following reasons: (1) because although the facts alleged "may have been 'morally repulsive,' they were not physically threatening" and did not interfere with the plaintiff's work performance; and (2) the statement by a manager of the plaintiff that the plaintiff should "go back home, go to your country" was "facially neutral as to national origin" and therefore did not "demonstrate animus on [her] part." Id. at 379-80. Cases like this, which create such a high bar for what is deemed severe or pervasive harassment, help to explain why many harassment claims fail and, thus, why targets of harassment may be reluctant to come forward with their claims.

Cooper Tire & Rubber Co. v. Nat'l Labor Relations Bd., 866 F.3d 885 (8th Cir. 2017)

In deciding an unfair labor practice charge, the National Labor Relations Board ("NLRB") ordered an employee to be reinstated with back pay; the employee had not been recalled after a lockout by the Employer because the employee made racist remarks to African-American replacement workers. Id. at 889. The NLRB petitioned for enforcement of the order, and the Eighth Circuit held that the Employer's obligations under Title VII did not conflict with reinstatement of the locked-out employee who made comments concerning fried chicken and watermelon to African-American replacement workers who the crossed picket line. Id. at 890-94. In so ruling, the Eighth Circuit explained that the Employer's anti-discrimination/harassment

policy did not justify the firing of the employee who made racist remarks. Id. at 892. This case appears to endorse less than robust enforcement of employer anti-discrimination/harassment policies.

Hales v. Casey's Mktg. Co., 2018 U.S. App. LEXIS 8385 (8th Cir. Apr. 3, 2018)

Employer terminated the plaintiff, a convenience store employee, after a customer reported she burned him with her cigarette. The plaintiff stated she did so to defend herself after the customer was hitting on her and made her feel uncomfortable and unsafe—though she did not call police or report the incident to a supervisor. Id. at *2-4. The plaintiff sued for "hostile work environment sexual harassment" and retaliatory discharge in violation of Title VII "for resisting sexual harassment." Id. at *1-4.

The Eighth Circuit affirmed dismissal on summary judgment. Procedurally, the Eighth Circuit held that the plaintiff's state law claims failed because she did not file suit within 90 days of receiving her right-to-sue notice from the Iowa Civil Rights Commission, and the pendency of the EEOC review did not automatically toll her state claims. Id. at *7-9. The Eighth Circuit also dismissed her Title VII retaliation claim as untimely. The plaintiff received the EEOC's dismissal notice and right-to-sue for her retaliation claim prior to the EEOC's notice for her hostile work environment claim. Although she timely filed her hostile work environment claim, she filed her retaliation claim after the 90-day window. Id. at *13-14.

On the merits, the Eighth Circuit affirmed dismissal of the plaintiff's hostile work environment claim because she could not show that the isolated incident was so severe or pervasive as to affect a term, condition, or privilege of her employment. Id. at *10-11. The Eighth Circuit also affirmed the District Court's decision to exclude evidence of the plaintiff's "previous sexual assault and her related therapy" stating that although a court must examine social context relating to "whether a reasonable person would find the harassment so severe that it would affect a term or condition of employment," it need not "delve into a plaintiff's personal background" to give context to the incident to examine whether plaintiff acted reasonably. Id. at *12.

Jackson v. Norac, Inc., 685 F. App'x 510 (8th Cir. 2017)

The plaintiff sued the Employer under VII and State law for harassment and retaliation. Id. at *1. In a per curiam opinion, the Eighth Circuit affirmed summary judgment for the Employer based on the following conclusions: (1) the plaintiff did not endure actionable sex harassment when a co-worker handed her a penis ring and asked if she knew what it was because the plaintiff did not report the incident and the Employer "took care of it" when the plaintiff reported that the same co-worker showed her a picture of himself naked; (2) the plaintiff did not endure actionable race harassment because the various forms of hostility ("unfriendly attitude from her supervisors, the negative memos . . . being denied the accounts payable position. . . ." did not create an objectively hostile environment given they were "not constant" and "none was physically threatening or humiliating; and they don't appear to have unreasonably interfered with [the plaintiff's] work;" and (3) the plaintiff did not endure actionable retaliation because she failed to prove that the Employer's termination of her due to reduction in force "lacks a factual basis." Id. Once again, the Eighth Circuit erects a high barrier to trial on the case merits,

seemingly making credibility determinations and weighing evidence. Decisions like this have helped to give the Eighth Circuit the reputation as one of the most employer-friendly Circuits – if not the most employer-friendly Circuit – in the country.

Pung v. Regus Mgm't Grp., 2017 U.S. Dist. LEXIS 210168 (D. Minn. Dec. 21, 2017)

The plaintiff alleged Employer discrimination, harassment and retaliation under Title VII, and other state law claims, after she was subjected to adverse employment actions and eventually terminated in a reduction in force after ending a consensual sexual relationship with her supervisor. Id. * 1. The plaintiff alleged after she ended the consensual relationship with her supervisor, he attempted to issue her performance corrective actions until she complained to the Employer placing it on notice that they had a relationship that ended and she believed he was harassing and retaliating against her because she had broken off the relationship. Id. *2-4. Employer claimed it changed her reporting supervisor, which the plaintiff denied, but did not issue her the corrective actions her former supervisor intended. Id. *4-5. However, her new supervisor placed her on a Performance Improvement Plan ("PIP") approximately 6 months later claiming she exceeded the budget in planning a client holiday party; something no one had ever been reprimanded for. Id. *5-7. Approximately one month later, Employer terminated the plaintiff in a reduction in force – the reason for selecting her was the fact she was on a PIP. Id. *6-7.

Employer moved for summary judgment on all counts. The District Court granted summary judgment as to the plaintiff's claim for hostile work environment but denied it based on her theories of quid pro quo discrimination and retaliation. The District Court denied Employer's argument that the plaintiff's claims should be dismissed based on judicial estoppel as she had not claimed the matter in her bankruptcy proceedings finding that the plaintiff's debts had not been discharged in the bankruptcy proceedings. Id. *9. Likewise, the District Court denied Employer's argument that the supervisor who had placed her on the PIP which eventually led to her termination was insufficient to preclude summary judgment using the cat's paw theory. Id. *16. Ultimately the District Court stated her discrimination and retaliation claims "narrowly survived" summary judgment. Id. *22.

III. RETALIATION

Donathan v. Oakley Grain, Inc., 861 F.3d 735 (8th Cir. 2017)

The plaintiff, who the Employer terminated after complaining about the lack of bonuses, brought suit against the Employer for alleged retaliation in violation of Title VII and related employment statutes. Id. at 737-38. The Eighth Circuit reversed summary judgment for the Employer because the Court acknowledged that a material fact dispute existed. Id. at 737, 743. The Eighth Circuit reasoned that that the plaintiff's letter complaining of unequal pay based on her sex was protected activity and that she suffered an adverse employment action by being terminated. Id. at 740. The Eighth Circuit also found that the plaintiff met her prima facie burden regarding causation because the termination occurred shortly after she complained about discrimination and despite the absence of negative reviews. Id. at 741-43. The Eighth Circuit explained its rare reversal of summary judgment as follows: "Temporal proximity, therefore, is more

meaningful in a case such as the present one where it is impossible to infer timing issues arise from an employee's calculated or strategic engagement in protected conduct." Id. at 743. In so declaring, the Eighth Circuit expressed a cynical view of plaintiffs and, moreover, tacitly reinforced the default notion that temporal proximity is now more of a shield for defendants rather than a sword for plaintiffs.

Winfrey v. City of Forrest City, 2018 U.S. App. LEXIS 3639 (8th Cir. Feb. 16, 2018)

The Eighth Circuit affirmed dismissal of the plaintiff's claims alleging retaliation "for standing up against the city and the mayor" concerning himself and other police officers being underpaid. Id. at *3 n.3. The claim was "plainly insufficient under Title VII" because the plaintiff did not plead that he engaged in protected conduct. Id. at *2. "Title VII prohibits, broadly speaking, employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like." Id. at *2-3. Title VII's anti-retaliation statute protects either: "1) opposing any discrimination made unlawful *by Title VII*; or 2) making a charge or participating in any manner in an investigation or proceeding *under Title VII*." Id. at *2 (emphasis added). Accordingly, "[p]rotesting application of unfair treatment unmoored from the distinct classed Title VII protects—as [plaintiff] has said, both in his complaint and at his deposition, he was doing—is not a basis for a Title VII retaliation claim." Id. at *3.

Equal Employment Opportunity Comm'n v. N. Mem'l Health Care, 262 F.Supp.3d 863 (D. Minn. 2017)

The United States Equal Employment Opportunity Commission initiated action against the Employer for alleged retaliation against a prospective employee by rescinding a conditional job offer when the prospective employee requested a religious accommodation. Id. at 865-66. Specifically, the prospective employee was a Seventh Day Adventist and explained that she could not work on Friday nights for religious reasons and asked for an accommodation. Id. at 865. The District Court granted the Employer's motion for summary judgment and held the prospective employee's request for religious accommodation was not a protected activity within the meaning of Title VII's prohibition on retaliation. Id. at 869. The District Court reasoned that requesting a religious accommodation was not a protected activity under the plain language of Title VII because: (1) it is not protected under the opposition clause because "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation" and (2) it is not protected under the participation clause because there was no evidence that the prospective employee "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" prior to the employer's rescission. Id. at 866-69. The District Court declined to apply the Eighth Circuit's precedent finding that requesting an accommodation was protected activity under the Americans with Disabilities Act ("ADA"), instead finding the differences between the ADA and Title VII weighed against applying ADA precedent to a Title VII claim. Id. at 868. The District Court's distinction between requesting an accommodation under the ADA, which is protected activity, and requesting an accommodation under the Title VII, which is supposedly not protected activity, seems questionable and could very well be reversed by the Eighth Circuit.

Fields v. Strom Eng'g Corp., 2018 U.S. Dist. LEXIS 21143 (D. Minn. Jan. 11, 2018)

The *pro se* plaintiff sued the Employer under Title VII and the state law for alleged unlawful retaliation and reprisal in state court. Id. at *2. The Employer removed the case to federal court on the basis of federal question jurisdiction, and subsequently filed its Answer. Id. Thereafter, the plaintiff failed to appear at the Pretrial Conference, failed to serve any written discovery of her own, failed to respond to any of the Employer's discovery requests, failed to comply with the District Court's order that she respond to the Employer's Motion to Compel, failed to attend the hearing on the Motion to Compel, and failed to comply to the Order that she produce the discovery responses to the Employer, despite being cautioned therein that failure with that Order could lead to the dismissal of the action. Id. at *2-5. As a result, the Employer filed its Motion for Summary Judgment and Involuntary Dismissal under Fed. R. 41(b). Id. at *5. The magistrate judge recommended that the Employer's Motion for Involuntary Dismissal be granted, finding that the plaintiff abandoned the action, since she was clearly aware of the case when she commenced the action and when she had a single telephone call with the Employer's counsel in which she approved the Employer's proposed Rule 26(f) Report and Proposed Scheduling Order. Id. at *6-7. The magistrate judge also recommended that the dismissal be with prejudice in light of the plaintiff's failure to comply the with Order granting the Employer's Motion to Compel that led to the complete lack of discovery in the litigation, her failure to file anything with the District Court, and there being no indication that the plaintiff lacked notice of the proceedings at which she failed to appear. Id. at *9-10. This decision provides some insight as to how much leeway the Court is willing to afford a *pro se* party.

Abou v. Univ. of Minnesota, 2017 WL 2836175 (Minn. Ct. App. 2017)

The plaintiff, denied tenure and a promotion, asserted retaliation under Title VII and the Minnesota Human Rights Act, among other claims. Id. at *1-3. The Court of Appeals affirmed summary judgment for the Employer about the retaliation claim because the plaintiff failed to establish a prima facie case in that there was no open position for which he was qualified nor was there a pattern of creating positions for someone in his situation – and "Title VII does not mandate the creation of new positions." Id. at *8-9. This case shows that State court, although generally less favorable than Federal court to employers, will nonetheless not hesitate to grant summary judgment – particularly when following Federal precedent and applying Federal law.