6 Employment Claims

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Lisa Lawyer is sitting in her office when she gets a call from her friend, Tom Teller, who works at the local bank. Tom says he was just fired by Betty Branch Manager. Tom goes on to whine about Betty being a horrible manager who was always second-guessing him, telling him he wasn't following policies and procedures, hassling him about his time card, and writing him up for every little thing. Betty told him he was being fired for being late, but Tom insists that can't be the real reason because Bob Baker—Betty's

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favorite—is late all the time and he hasn't been fired. Tom therefore wants Lisa to sue the bank. On a contingent fee, of course.

After observing that, unlike the last defendant she sued, the bank won't be judgment-proof, Lisa asks Tom to come in the next morning so she can gather the information she will need to draft a complaint. After she hangs up, she remembers the sage advice of her mentor: before you take a contingent fee case, figure out if it is likely to make money, and remember that you aren't making money if you have to put too much time into the case. So Lisa starts outlining potential claims and what she will need to show to prove those claims. She immediately thinks of discrimination and wage and hour claims. Although Lisa briefly considers a breach of employment contract claim, she lives in a nonunion town and can't remember ever having seen an employment contract that didn't say—usually in bold letters—that the employee is employed at will.[1] She also starts writing down how banks are different than other defendants, and how those differences might affect Tom's case, for better or worse.

I. HOW BANKS ARE DIFFERENT THAN OTHER DEFENDANTS

In Lisa's experience, there are three main differences between banks and most other defendants. First, banks have cameras everywhere. Second, banks seem to have more written policies than any other business. Third, banks are heavily regulated, which could explain their fondness for written policies. As she sketches out questions to ask Tom, Lisa also starts writing down questions to ask the bank.

A. Banks Have Cameras Everywhere

Banks have cameras everywhere. Indeed, some post signs on their doors telling people to "smile, because you are on camera."[2] Although the cameras are part of a bank's FDIC-required security program,[3] as a practical matter they cover most areas of the bank and are likely to have recorded anything that happened in a bank branch. As a result, Lisa knows that there is likely to be video footage of when Tom showed up for work. That

1. As a result, Lisa decides not to waste her paper (or her time) trying to come up with a breach of employment contract claim.

2. *See, e.g.*, TD Bank.

3. *See* 12 C.F.R. § 326.3.

video will quickly make or break a claim that Tom wasn't really late and that Betty Branch Manager made that up as a pretext to fire him. And while the cameras don't record sound, there might be video that would prove (or disprove) Tom's claim that Betty Branch Manager constantly berated him.[4] Lisa therefore makes a note to get a document preservation letter out to the bank as soon as she can, because she knows that banks don't keep their camera footage forever.[5]

B. Banks Have Written Policies on Just About Everything

Lisa knows that banks have written policies on just about everything. Those policies, she knows, are a double-edged sword. On the one hand, they will let the bank say that Tom was fired for violating bank policy (i.e., being late). Presumably, they will also let the bank say that whatever Betty Branch Manager did was pursuant to bank policy, even if Tom found that policy, or the application of that policy, to be distasteful. But on the other hand, Lisa might be able to show either that whatever Tom did was permitted by bank policy (or at least was not contrary to bank policy) or that the bank wasn't following its own policies. She makes a note to request the bank policies governing whatever Tom says Betty did wrong, or did in an unfair (or unequal) fashion.

C. Banks Are Heavily Regulated

Most banks are regulated by a combination of the Office of the Comptroller of the Currency,[6] the Federal Reserve,[7] and the Federal Deposit Insurance

4. In making her notes, Lisa acknowledges that that the lack of sound makes many pictures equivocal. Presumably, Betty Branch Manager will say she was counseling Tom on his lack of performance, rather than berating him, if the cameras show the two of them deep in conversation. Lisa does, however, remember something else her mentor told her: you want as much evidence as you can get, and if it is bad for your case, you would rather know up front before you put more time into it.

5. The length of time banks keep video varies, so it is best to send a document preservation letter as soon as possible. To be useful, the document preservation letter should specify the dates (and ideally times) for which video should be preserved. A demand that a bank preserve all its video forever is not helpful to anyone.

6. When a bank has "N.A." (or National Association) after its name, or says it is a "national bank," it is regulated by the Office of the Comptroller of the Currency. The National Credit Union Administration, as its name suggests, regulates credit unions.

7. The Federal Reserve supervises banks that are members of the federal reserve system. Most banks are members.

Corporation (FDIC).[8] Lisa wonders whether she should try and get the regulators involved. The regulators could certainly put pressure on the bank, but she knows from experience that the regulators usually won't get involved in employment claims. And even if they did, Lisa knows that she wouldn't have any control over the regulators, and the bank would not be inclined to (and might not be able to) settle with Tom (and pay Lisa's fee) if the bank is facing regulatory scrutiny. She therefore doubts it makes sense to try and approach the regulators, but Lisa decides to postpone a final decision until she talks with Tom.

II. DISCRIMINATION CLAIMS

When Lisa starts outlining potential discrimination claims, she realizes that she is really drafting a matrix. This is because there are at least two ways to bring each type of discrimination claim: as a direct claim and as a retaliation claim. Then, depending on the protected class in which the plaintiff can claim membership, a plaintiff can bring discrimination claims under Title VII,[9] Section 1981,[10] the Age Discrimination and Employment Act (ADEA) (as amended by the Older Workers Benefit Protection Act),[11] the Americans with Disabilities Act (ADA),[12] or perhaps even the Family and Medical Leave Act (FMLA).[13] Plaintiffs can also bring state law claims.[14]

A. Direct vs. Retaliation Claims

Although Lisa is naturally drawn towards bringing a direct claim on Tom's behalf—because being fired is unquestionably an "adverse employment

8. In addition to regulating state-chartered banks, the FDIC insures most banks, and therefore imposes regulations on them.

9. *See* 42 U.S.C. §§ 2000e, *et seq.*

10. *See* 42 U.S.C. § 1981.

11. *See* 29 U.S.C. §§ 621, *et seq.*

12. *See* 42 U.S.C. §§ 12101, *et seq.*

13. *See* 29 U.S.C. §§ 2601, *et seq.*

14. *See, e.g.*, Pennsylvania Human Relations Act, 43 Pa. C.S.A. §§ 951, *et seq.*

action"[15]—she has often heard that retaliation claims are actually easier to prove and more likely to win than direct discrimination claims.[16] She therefore resolves to ask Tom whether he made any complaints, either about his own situation or about his coworkers' situations, before he was fired. After all, most employees complain about something (and some employees complain about everything). Lisa figures that she might get lucky and find that Tom had made a complaint that could give rise to a retaliation claim of some sort. And if she's really lucky, that complaint will be in an email that Tom copied to his personal account. One more question for her list of things to ask Tom.

In making her list, Lisa also remembers that "discrimination statutes allow employers to discharge employees for any reason whatsoever (even a mistaken but honest belief) as long as the reason is not illegal discrimination. Thus, when an employee is discharged because of an employer's honest mistake, federal antidiscrimination laws offer no protection."[17] She therefore resolves to ask Tom about anything Betty Branch Manager said or did that would suggest she knew what she was doing, and that she was doing it because of Tom's membership in a protected class.

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15. If Tom had quit, rather than having been fired, Lisa would have to determine if he could claim that he had been constructively discharged. A constructive discharge occurs when "the employer permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign." Colwell v. Rite Aid Corp., 602 F.3d 495, 502–03 (3d Cir. 2010) (citations omitted). A court employs an objective test in determining whether an employee was constructively discharged, *see Colwell*, 602 F.3d at 502, and "does not permit an employee's subjective perceptions to govern a claim of constructive discharge." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1083 (3d Cir. 1992) (citations omitted). To determine whether an employee was forced to resign, a court considers whether the employee was threatened with discharge, encouraged to resign, demoted, subjected to reduced pay, benefits or responsibilities, transferred to a less desirable position, or given unsatisfactory job evaluations. *See Colwell*, 602 F.3d at 503. A constructive discharge requires a "greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." Spencer v. Wal-Mart Stores, Inc., 469 F.3d 311, 316 n.4 (3d Cir. 2006).

16. *See, e.g.*, Eric Bachman, *Here's Why Retaliation Claims Are Easier to Prove in Court Than Discrimination Claims: The FedEx Case*, Forbes (Sept. 4, 2019), https://www.forbes.com/sites/ericbachman/2019/09/04/heres-why-retaliation-claims-are-easier-to-prove-in-court-than-discrimination-claims/?sh=19bc45657967.

17. Capps v. Mondelez Global LLC, 847 F.3d 144, 154 (3d Cir. 2017) (citation omitted).

Direct Claims

A direct discrimination claim is exactly what one would expect—a claim that a plaintiff "was treated less favorably than similarly situated employees who are not in the plaintiff's protected class."[18] The treatment giving rise to a discrimination claim can either be a specific act or a claim that the totality of the circumstances created a hostile work environment. A plaintiff bringing a hostile work environment claim must establish that "1) the employee suffered intentional discrimination because of his/her [membership in a protected class], 2) the discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of respondeat superior liability."[19] Absent a basis for respondeat superior liability, the plaintiff must prove that the defendant had actual or constructive knowledge of the existence of the hostile work environment and failed to take prompt and adequate remedial action.[20]

To prevail on a hostile work environment claim, the discrimination must be "severe or pervasive" enough to alter the conditions of the plaintiff's employment and create an abusive working environment.[21] When determining whether a work environment is sufficiently hostile to be actionable, a court considers "the totality of the circumstances," including "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or a mere offensive utterance, and whether it reasonably interferes with an employee's work performance."[22] Moreover, for a single instance to state a claim, it must be "an extreme isolated act of discrimination."[23] "An isolated incident, unless extremely serious, is not sufficient to sustain a hostile educational environment claim."[24] Indeed,

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18. Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358, 366 (3d Cir. 2008) (citations omitted).

19. Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3d Cir. 2013).

20. *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 427 (2013); Vazquez v. Carr & Duff, Inc., 2017 WL 4310253, at *4 (E.D. Pa. Sept. 28, 2017).

21. *See, e.g.*, Castleberry v. STI Grp., 863 F.3d 259, 264 (3d Cir. 2017); Fichter v. AMG Resources Corp., 528 F. App'x 225, 230–31 (3d Cir. 2013).

22. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

23. *Castleberry*, 863 F.3d at 265.

24. Katchur v. Thomas Jefferson Univ., 354 F. Supp. 3d 655, 664 (E.D. Pa. 2019).

an isolated incident must have been so severe that it altered the conditions of employment.[25]

In addition to denying that the allegedly hostile acts occurred (or that, if they occurred, they were sufficiently severe or pervasive), a defendant can claim that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm or otherwise."[26] In addition to constituting an affirmative defense, a claim that the plaintiff failed to take advantage of a complaint or corrective procedure can cast doubt on the veracity of the plaintiff's claims. Lisa agrees that a jury is likely to ask, "if it was that bad, why didn't plaintiff complain?" and to conclude that "if plaintiff didn't complain, it must not have been that bad." She therefore makes a note to ask Tom what complaint or corrective procedures were available[27] and whether—and when—he availed himself of them.

Retaliation Claims

A "prima facie case of illegal retaliation requires a showing of (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action."[28]

The "protected employee activity" must be a complaint that an objectively reasonable plaintiff would believe is about conduct that would violate the applicable statute.[29] As a result, a complaint that is not about conduct that would violate the applicable statute, or that is not objectively

25. *See* Sessoms v. Trustees of Univ. of Penn., 739 F. App'x 84, 90 (3d Cir. 2018); Roberts v. Health Partners Plans, Inc., 2017 WL 3310691, at *4–5 (E.D. Pa. Aug. 3, 2017).

26. Cacciola v. Work N Gear, 23 F. Supp. 3d 518, 530 (E.D. Pa. 2014).

27. Most banks' procedures require any employee who either witnesses or is the victim of misconduct to immediately report the misconduct. Employees are usually told to report misconduct to human resources, but many policies include either alternatives or "bypasses" (i.e., in case the employee believes a member of human resources is engaged in misconduct), such as reporting misconduct to in-house counsel. Most banks—unlike many other employers—have both a human resources department and an in-house counsel.

28. Harris v. Julia, 2018 WL 5316352, at *4 (E.D. Pa. Oct. 25, 2018). *See also* Barber v. CSX Distrib. Servs., 68 F.3d 694, 701 (3d Cir. 1995).

29. *See, e.g.*, Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 322 (3d Cir. 2008); Reynolds v. Belmont Behavioral Health, 2019 WL 318258, at *2 (E.D. Pa. Jan. 24, 2019).

reasonable, does not suffice.[30] Because the complaint must involve conduct that would violate the applicable statute, a "general complaint of unfair treatment is insufficient to establish protected activity."[31] Similarly, a vague allegation of a civil rights violation does not constitute protected activity.[32]

The "adverse action" must be "materially adverse," meaning it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[33] But it does not necessarily have to be an adverse *employment* action; a retaliation claim can be asserted on any materially adverse action by the employer.[34]

As for the "causal connection," to decide if there is a causal connection, courts look to "temporal proximity, intervening antagonism or retaliatory animus, inconsistencies in the employer's articulated reasons for terminating the employee, or any other evidence sufficient to support the inference of retaliatory animus."[35] Temporal proximity requires facts that "are unusually suggestive of retaliatory motive" to support an inference of causation.[36] Courts have found that fairly short gaps (i.e., less than three weeks) between the protected activity and the adverse employment action defeat a suggestion of retaliatory motive.[37] "With respect to the causation prong, the court considers whether a reasonable jury could link the employer's conduct to retaliatory animus."[38] Lisa therefore makes a note to push Tom to remember the exact chronology of events, and whether there were

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30. *See, e.g., Wilkerson*, 522 F.3d at 322; Curay-Cramer v. Ursuline Acad. of Wilmington, Del., 450 F.3d 130, 135 (3d Cir. 2006).

31. *Curay-Cramer*, 450 F.3d at 135. *See also* Smith v. Int'l Paper Co., 523 F.3d 845, 849–50 (8th Cir. 2008); Kodl v. Bd. of Educ. Dist. 45, Villa Park, 490 F.3d 558, 562–63 (7th Cir. 2007); *Barber*, 68 F.3d at 701–02.

32. *See* Slagle v. Cty. of Clarion, 435 F.3d 262, 268 (3d Cir. 2006).

33. Moore v. City of Phila., 461 F.3d 331, 341 (3d Cir. 2006), as amended (Sept. 13, 2006).

34. *See* Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

35. Gavurnik v. Home Properties, L.P., 227 F. Supp. 3d 410, 420–21 (E.D. Pa. 2017), aff'd, 712 F. App'x 170 (3d Cir. 2017) (citations omitted).

36. *See Escanio*, 538 F. App'x at 200.

37. *See, e.g.*, Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 307 (3d Cir. 2012); Thomas v. Town of Hammonton, 351 F.3d 108, 114 (3d Cir. 2003); Williams v. Philadelphia Housing Auth., 380 F.3d 751, 760 n.4 (3d Cir. 2004), superseded by statute in nonrelevant part Robinson v. First State, 920 F.3d 182, 187–89 & n.30 (3d Cir. 2019).

38. Ward v. MBNA America, 962 F. Supp. 2d 680, 687 (D. Del. 2013), aff'd, 570 F. App'x 143 (3d Cir. 2014).

other intervening acts between what he thinks constitutes a complaint and what he thinks was an adverse action taken against him.

B. Title VII

Title VII prohibits discrimination[39] based on a plaintiff's race, color, religion, sex, or national origin.[40] It is important to note that "sex discrimination" need not be sexual,[41] and the victim and the harasser may be any sex (and may also be the same sex).[42] Title VII claims (as well as Section 1981 claims and many state law antidiscrimination claims, which will be discussed later) are governed by the three-step burden-shifting framework in *McDonnell Douglas Corp. v. Green*.[43] Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case.[44] If the plaintiff does so, the defendant must "articulate a legitimate, nonretaliatory or nondiscriminatory reason for its action."[45] If the defendant does so, "the burden then shifts back to the plaintiff to prove that the employer's nonretaliatory or nondiscriminatory explanation is merely a pretext for the discrimination or retaliation."[46]

39. A Title VII plaintiff must first exhaust administrative remedies by filing with the EEOC. *See* Fort Bend County, Texas v. Davis, 139 S. Ct. 1843, 1844 (2019); 42 U.S.C. § 2000e–5(b) and (e)(1); *see also* U.S. Equal Employment Opportunity Commission, *Time Limits for Filing a Charge*, https://www.eeoc.gov/time-limits-filing-charge. An EEOC charge must be filed within 180 days (or 300 days in a cofiling state) of the act giving rise to the claim. *See* 42 U.S.C. § 2000e-5(e)(1). A plaintiff must obtain a "right to sue" letter from the EEOC before filing in court. *See, e.g.*, 42 U.S.C. § 2000e–5(f)(1); U.S. Equal Employment Opportunity Commission, *After You Have Filed a Charge*, https://www.eeoc.gov/after-you-have-filed-charge. Once the right to sue letter is obtained, a plaintiff must file a lawsuit within 90 days. *See* 42 U.S.C. § 2000e-5(f)(1).

40. *See, e.g.*, 42 U.S.C. § 2000e-2(b).

41. *See, e.g.*, U.S. Equal Employment Opportunity Commission, *Sex-Based Discrimination*, https://www.eeoc.gov/sex-based-discrimination.

42. *Id.*

43. *See* 411 U.S. 792 (1973); Greer v. Mondelez Global, Inc., 590 F. App'x 170, 172 & n.4 (3d Cir. 2014); Kier v. F. Lackland & Sons LLC, 72 F. Supp. 3d 597, 607 n.1 (E.D. Pa. 2014). This burden-shifting framework does not apply when there is direct evidence of discrimination, meaning "evidence which, if believed, would prove the existence of the fact in issue without inference or presumption," but there is a "high burden" in asserting a direct evidence case. *See* Shade v. Alfa Laval, Inc., 2017 WL 839456, at *7 (M.D. Pa. Mar. 3, 2017).

44. *See, e.g.*, Tourtellote v. Eli Lilly & Co., 636 F. App'x 831, 842 (3d Cir. 2016).

45. *Id.*

46. *Id.*

A prima facie case of discrimination (again, under Title VII, Section 1981, and most state antidiscrimination laws) requires demonstrating that (1) the employee is a member of a protected class, (2) the employee is qualified for the position, (3) the employee suffered an adverse employment action, and (4) the action was taken under circumstances that give rise to an inference of unlawful discrimination.[47] In addition to arguing that they were individually harmed, a Title VII plaintiff can argue that they (and every member of their protected class) suffered a disparate impact as a result of the defendant's actions. A disparate impact claim asserts that, even though the defendant did not intend to discriminate against the plaintiff, the defendant's actions had a disproportionate impact on members of a protected class.[48] An employer can defeat a disparate impact claim by demonstrating that the challenged practice is related to the job's requirements and is consistent with business necessity.[49]

To establish pretext, a plaintiff must

> submit evidence which casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication or would allow the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.[50]

It is not enough to show that the employer's decision "was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."[51] As a result, to establish pretext, a plaintiff must proffer evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated reason by showing such "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions . . . that a

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47. *See, e.g.*, Sarullo v. U.S. Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003); Massaro v. Wells Fargo Home Mortg., 2018 WL 4076319, at *3 (E.D. Pa. Aug. 24, 2018), appeal dismissed, 2018 WL 7890260 (3d Cir. Oct. 18, 2018); Baur v. Crum, 882 F. Supp. 2d 785, 800 (E.D. Pa. 2012), aff'd, 517 F. App'x 101 (3d Cir. 2013).

48. *See, e.g.*, 42 U.S.C. § 2000e-2(k).

49. *Id.*

50. Oguejiofo v. Bank of Tokyo, 704 F. App'x 164, 167–68 (3d Cir. 2017) (citations omitted).

51. Capilli v. Whitesell Const. Co., 271 F. App'x 261, 265–66 (3d Cir. 2008) (citations omitted). *See also* Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

reasonable fact finder could rationally find them unworthy of credence,"[52] or (2) believe that invidious discrimination was more likely than not the motivating or determinative cause of the employer's action.[53]

Although Lisa believes she knows the protected classes to which Tom belongs, she realizes that she has never actually asked him. Her mentor was fond of saying that "you can't (and shouldn't) judge a book by its cover," so she makes a note to start her interview by asking Tom in what classes he belongs. She can then follow up and ask what Betty Bank Manager did that could be considered to be discriminatory against someone in those classes.

C. Section 1981

Unlike Title VII claims, which can be brought by members of any race, color, religion, sex, or national origin,[54] Section 1981 claims can be brought only by a member of a race or ethnicity (not a member of a religion, sex, or nationality) that was recognized in 1866.[55]

A plaintiff must show "but for causation" to prevail on a Section 1981 claim; the motivating factor standard from Title VII does not apply. "To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right."[56]

Unlike under Title VII, a Section 1981 plaintiff does not have to file with the EEOC and is not subject to the 180-day statute of limitations in which to do so.[57] Similarly, a Section 1981 plaintiff is not subject to Title VII's damages caps.[58] Lisa therefore makes a note to confirm whether Tom falls into any class protected by Section 1981, and to be sure to ask him about things that happened outside Title VII's statute of limitations (assuming, of course, Tom can avail himself of Section 1981's protections).

52. *Capilli*, 271 F. App'x at 266 (citations omitted).

53. *See* Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

54. *See, e.g.*, 42 U.S.C. § 2000e-2(b).

55. *See, e.g.*, St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 611–13 (1987); Torgerson v. City of Rochester, 643 F.3d 1031, 1052–53 (8th Cir. 2011).

56. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1019 (2020).

57. *Compare* 42 U.S.C. §§ 2000e-5(e)(1), 12117(a) *with* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004).

58. *See, e.g.*, Williams v. ConAgra Poultry Co., 378 F.3d 790, 798 (8th Cir. 2004); 42 U.S.C. § 1981a(b)(3).

D. ADEA[59]

To establish a prima facie case of age discrimination under the ADEA, a plaintiff must allege that "(1) he is at least forty years old; (2) he suffered an adverse employment decision; (3) he was qualified for the position in question; and (4) he was ultimately replaced by another employee who was sufficiently younger so as to support an inference of a discriminatory motive."[60] Lisa realizes that she doesn't know how old Tom is. As awkward as it might be to ask, Lisa resolves to do so. She also makes a note to ask the bank who replaced Tom, and how old they were.[61]

E. FMLA

A plaintiff can assert either an interference or a retaliation claim under the FMLA. To make an interference claim under the FMLA, a plaintiff must establish that

> (1) he or she was an eligible employee under the FMLA; (2) the defendant was an employer subject to the FMLA's requirements; (3) the plaintiff was entitled to FMLA leave; (4) the plaintiff gave notice to the defendant of his or her intention to take FMLA leave; and (5) the plaintiff was denied benefits to which he or she was entitled under the FMLA.[62]

"To make a retaliation claim under the FMLA, a plaintiff must show that he invoked his right to FMLA-qualifying leave, that he suffered an adverse

59. As with Title VII and Section 1981, the elements of parallel state law claims are often the same. *See* Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996); *Harris*, 2018 WL 5316352, at *4.

60. Van Lieu v. Sapa Extrusions, 2019 WL 1003636, at *2 (E.D. Pa. Mar. 1, 2019); *see also* Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 645 (3d Cir. 2015).

61. Lisa knows that it is often difficult to determine who "replaced" a given employee. In this case, Tom was fired, and Lisa has no reason to believe that someone else was immediately moved into his job. On the contrary, she assumes that the bank simply made do with one fewer teller for a period of time, possibly with tellers from other branches providing coverage. But she decides that she still wants to ask the bank who replaced Tom, because the worst that can happens is the bank will say "no one did."

62. *Capps*, 847 F.3d at 155 (citation omitted).

employment decision, and that the adverse action was causally related to this invocation of rights."[63]

Although a qualified employee is entitled to FMLA leave, "there is no right in the FMLA to be 'left alone' and be completely absolved of responding to the employer's discrete inquiries."[64] As a result, if "the [employer's] contacts were aimed only at retaining [plaintiff] as an employee, and there is no evidence showing that [the employer] in any way hampered or discouraged [plaintiff's] exercise of her right to medical leave, or attempted to persuade her to return from her leave early," there is no claim.[65] Finally, "the FMLA does not provide employees with a right against termination for a reason other than interference with rights under the FMLA. [An employer], therefore, can defeat Plaintiff's claim if it can demonstrate that Plaintiff was terminated for reasons unrelated to his alleged exercise of rights under the FMLA."[66] As a result, if the plaintiff was terminated because of an employer's mistaken belief (for example, that the employee had exhausted all available PTO and was therefore absent without excuse), the FMLA claim will fail.[67]

Again, Lisa realizes that she doesn't know much about Tom's home situation and who he might have to care for. She therefore resolves to ask. Again, she thinks it is a long shot because employees must provide adequate notice to their employer about their need to take FMLA leave,[68] but Lisa decides there is no harm in asking Tom if he gave such notice.

F. ADA

An ADA plaintiff must prove "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential

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63. *Id.* at 152 n.6 (citation omitted).

64. O'Donnell v. Passport Health Commc'ns, Inc., 561 F. App'x 212, 218 (3d Cir. 2014).

65. *Id.*

66. Lassalle v. Port Auth. of N.Y. & N.J., 2013 WL 6094339, at *15 (D.N.J. Nov. 19, 2013) (citation omitted).

67. *See, e.g.*, Balding v. Sunbelt Steel Texas, Inc., 2018 WL 1281767, at *3 (10th Cir. Mar. 13, 2018); Dalpiaz v. Carbon Cty., 760 F.3d 1126, 1134 (10th Cir. 2014); Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996 (8th Cir. 2012); Phillips v. Matthews, 547 F.3d 905, 911 (8th Cir. 2008); Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672 (7th Cir. 1997).

68. *See Lichtenstein*, 691 F.3d at 303; 29 U.S.C. § 2612(e)(2).

functions of the job, with or without reasonable accommodation[69] by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination."[70] While discrimination can include a refusal to provide a reasonable accommodation,[71] the plaintiff bears the burden of identifying a reasonable accommodation.[72] The *McDonnell Douglas* framework applies to ADA claims.[73]

It is important to remember that the plaintiff bears the burden of proving that he "is an 'otherwise qualified' individual" as defined by the ADA.[74] To determine if the plaintiff has done so, the court "must consider whether or not the individual can perform the essential functions of the position held or desired with or without reasonable accommodation."[75]

"The determination of whether an individual with a disability is qualified is made at the time of the employment decision," and the burden is on the employee to prove that he is an "otherwise qualified" individual.[76] As a result, courts have routinely held that an employee who cannot, on the date they are terminated, return to work due to a disability is not a "qualified individual" and therefore fails to state a prima facie case under the ADA.[77]

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69. A failure-to-accommodate claim is just a different form of discrimination under the third prong of the prima facie case required for an ADA discrimination claim. *See Williams*, 380 F.3d at 761. An employee asserting a failure-to-accommodate claim must show that "(1) he was disabled and his employer knew it; (2) he requested an accommodation or assistance; (3) his employer did not make a good faith effort to assist; and (4) he could have been reasonably accommodated." *Capps*, 847 F.3d at 157 (citations omitted). A plaintiff asserting a failure-to-accommodate bears the burden of identifying a reasonable accommodation. *See Capps*, 847 F.3d at 147; *Fogleman*, 122 F. App'x at 585–86. "An employer . . . is not required to reallocate essential functions" as a reasonable accommodation. *See* Lombardo v. Air Prod. & Chemicals, Inc., 2006 WL 1892677, at *11 (E.D. Pa. July 7, 2006) (quoting ADA regulations). As a result, "a request to be exempted from an essential duty is not an accommodation designed to help plaintiff perform the job." *Lombardo*, 2006 WL 1892677, at *11 (citations omitted).

70. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (citations omitted).

71. *See, e.g., Williams*, 380 F.3d at 761.

72. *See, e.g.*, Fogleman v. Greater Hazleton Health Alliance, 122 F. App'x 581, 585–86 (3d Cir. 2004).

73. *See, e.g.*, Wright v. Providence Care Ctr. LLC, 822 F. App'x 85, 90 & n.6 (3d Cir. 2020).

74. Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir. 1998) (citations omitted).

75. *Id.*

76. *Id.*

77. *See, e.g.*, Williams v. Pinnacle Health Family Care Middletown, 2020 WL 8991688, at *1–2 (M.D. Pa. Mar. 18, 2020), report and recommendation adopted, 2020 WL 8991685 (M.D. Pa. Aug. 4, 2020), aff'd, 2021 WL 1116390 (3d Cir. Mar. 24, 2021); Garner v. School

Although a plaintiff can bring a retaliation claim under the ADA, a retaliation claim premised on a failure to provide a requested accommodation fails as a matter of law.[78] This is because a "retaliation claim [that] is based entirely upon his failure to accommodate claim [] cannot be presented as a separate claim."[79]

Again, after thinking that Tom wouldn't qualify under the ADA, Lisa stops herself. She remembers reading that the Social Security Administration has said that approximately one-third of people born in 1997 will be disabled at some point prior to reaching their normal retirement age.[80] While the incidence of disability increases with age,[81] she resolves to ask Tom whether he considers himself disabled in any way, whether he told anyone from the bank about any sort of impairment he was suffering, and whether he requested any accommodations from the bank.

G. State Law Claims

The elements of state law discrimination claims generally parallel the federal elements, and courts often "incorporate" the federal standards (and case law) into the state statutes.[82] Why, then, would Lisa bring a state law, rather than a federal law claim? Potentially for three reasons. First, Lisa might want to be in state court. Leaving aside the question of whether she might happen to be very friendly with the local state court judge, Lisa might think

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Dist. of Phila., 63 F. Supp. 3d 483, 489–90 (E.D. Pa. 2014), aff'd, 636 F. App'x 79 (3d Cir. 2015); Jacoby v. Bethlehem Suburban Motor Sales, 820 F. Supp. 2d 609, 622–23 (E.D. Pa. 2011).

78. *See, e.g., Garner*, 63 F. Supp. 3d at 500.

79. *Id.*; *see also* Williams v. Philadelphia Housing Auth., 230 F. Supp. 2d 631, 640 (E.D. Pa. 2002), aff'd & rev'd in nonrelevant parts, 380 F.3d 751 (3d Cir. 2004).

80. *See* Johanna Maleh and Tiffany Bosley, *Disability and Death Probability Tables for Insured Workers Born in 1997*, Social Security Administration (Oct. 2017), https://www.ssa.gov/oact/NOTES/ran6/an2017-6.pdf. *See also* Ashley Welch, *1 in 4 U.S. Adults Has a Disability, CDC Says,* CBS News (Aug. 16, 2018), https://www.cbsnews.com/news/1-in-4-u-s-adults-has-a-disability-cdc-says; The World Bank, *Disability Inclusion,* (last updated Apr. 3, 2023), https://www.worldbank.org/en/topic/disability.

81. *See, e.g.,* Ashley Welch, *1 in 4 U.S. Adults Has a Disability, CDC Says,* CBS News (Aug. 16, 2018), https://www.cbsnews.com/news/1-in-4-u-s-adults-has-a-disability-cdc-says.

82. *See, e.g.,* Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996); *Harris*, 2018 WL 5316352, at *4.

that a federal judge is likely to be quicker to grant a dispositive motion.[83] Second, some state law claims lack Title VII's $300,000 damages cap.[84] Third, some state laws have longer statutes of limitations.[85]

H. What Constitutes Discrimination?

After listing the elements she must prove to win a discrimination case, Lisa sits back and thinks. What is discrimination? Do microaggressions, which Lisa keeps hearing about whenever she looks at her feed, count as discrimination? Under the law, probably not. This is because courts routinely hold that the antidiscrimination laws do not amount to a "civility code,"[86] and do not require employees or supervisors to "play nice." Instead, they hold "that [plaintiff] experienced personality conflicts resulting in a less than ideal work environment is simply not actionable under Title VII."[87] To be actionable, the complained-of acts must be sufficiently "severe or pervasive" so that they alter the terms and conditions of employment.[88] Offhand comments and isolated incidents do not suffice.[89] Isolated, offhand comments do not create a hostile work environment because a comment that "falls into the category of isolated and offhand comments, and although inappropriate, cannot be considered to have altered the terms and conditions" of employment.[90] Similarly, comments that are "subject to a non-racial interpretation" and "not physically threatening or humiliating" do not create a hostile work environment.[91] Annoyances, such as unwelcome supervision or monitoring of an employee, cannot constitute an adverse employment

83. Some cynical practitioners claim to have seen a sign on the door of a rural courthouse saying "No Spittin' - No Cussin' - No Summary Judgment."

84. *Compare* 42 U.S.C. §1981a(b)(3) *with* Gagliardo v. Connaught Labs, Inc., 311 F.3d 565, 570–71 (3d Cir. 2002); *see also* Hoy v. Angelone, 691 A.2d 476, 483 (Pa. Super. 1997) (punitive damages not available under the Pennsylvania Human Relations Act).

85. *Compare* 29 U.S.C. § 626(d) and 42 U.S.C. §§ 2000e-5(e)(1) *with* 43 Pa. Stat. Ann. § 962(c).

86. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Burgess v. Dollar Tree Stores, Inc., 642 F. App'x 152, 155 (3d Cir. 2016).

87. Fairclough v. Wawa, Inc., 412 F. App'x 465, 469 (3d Cir. 2010).

88. *See, e.g., Faragher*, 524 U.S. at 786.

89. *Id.*

90. *See* Huggins v. Coatesville Area Sch. Dist., 2010 WL 4273317, at *6 (E.D. Pa. Oct. 29, 2010); *see also Woodard*, 255 F. App'x at 609.

91. *See, e.g.*, Sherrod v. Phila. Gas Works, 57 F. App'x 68, 77 (3d Cir. 2003).

action if the supervision does not directly or immediately lead to a cut in job duties or pay.[92] As a result, they are not actionable. The hostility of a work environment is measured based on the totality of the circumstances, such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[93] Unless extremely severe, offhand comments and isolated incidents are insufficient to sustain a hostile work environment.[94] "Every job has its frustrations, challenges, and disappointments . . . An employee is protected from a calculated effort to pressure her into resignation through the imposition of unreasonably harsh conditions . . . [the employee] is not, however, guaranteed a working environment free of stress."[95]

Indeed, courts have held that actions that go far beyond "micro" aggressions are not actionable. For example, "a paid suspension pending an investigation of an employee's alleged wrongdoing does not fall under any of the forms of adverse action mentioned by Title VII's substantive provision."[96] This is because a "suspension without pay, without more, is not an adverse employment action."[97] Lisa therefore resolves to take Tom's complaints with the proverbial grain of salt and to ask Tom to specify how Betty Branch Manager's actions changed his job duties, and how they changed his job duties in a way that is different from everyone else's job duties. After all, Lisa reminds herself, while she would make a very nice living if she could simply sue every bad boss for being a jerk, the law simply hasn't evolved that far.

III. WAGE AND HOUR CLAIMS

Wage and hour claims are usually brought under the Fair Labor Standards Act (FLSA)[98] and "parallel" state laws. The FLSA requires that all non-exempt[99] employees be paid overtime if they work more than forty hours per

92. *See, e.g., McKinnon*, 642 F. Supp. 2d at 423.

93. *Fichter*, 528 F. App'x at 230.

94. *See, e.g.*, Woodard v. PHB Die Casting, 255 F. App'x 608, 609 (3d Cir. 2007).

95. *Gray*, 957 F.2d at 1083.

96. Jones v. SEPTA, 796 F.3d 323, 326 (3d Cir. 2015).

97. *Id.*

98. 29 U.S.C. §§ 201, *et seq.*

99. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.100(a).

week.[100] Lisa remembers reading articles about an explosion of lawsuits—usually in California[101]—claiming that employees were not given uninterrupted meal or rest breaks[102] or that they were made to "work off the clock." She therefore resolves to ask Tom about how his hours were tracked and if he thinks he was paid properly. She knows that banks usually have systems for closely monitoring employees' time cards and that employees usually have to sign off on their time cards every two weeks (which makes it hard to claim that there was an underpayment, especially if substantial time has passed without protest), so a wage and hour claim would be a long shot. But as her mentor once told her, sometimes long shots pay off.

IV. WHAT CLAIMS SHOULD LISA BRING?

As she puts down her pen, Lisa realizes that she has worked through dinner. Again. The result is an impressive list of potential claims. She wonders which of them will be borne out by the facts. She also realizes that she will have to make a tactical decision: whether to bring every possible claim or whether to restrict herself to the likely winners. Lisa knows that some plaintiff's lawyers believe that the way to "buckle a defendant's knees" is to bring dozens of claims, even if many (or even most) of them are unlikely to succeed. She also knows that some judges say that the bad claims drive out the good, and that the best lawyers only plead what they can prove. She also realizes that, although she hasn't been practicing as long as her mentor, she has never seen a bank's knees buckle. Instead, in her experience, although banks usually negotiate when they think it is "just business" and there is a deal to be made, they usually dig in if they think the other side is overreaching. But, she realizes as she turns out her office lights, which claims to bring is a decision for another day, after she has interviewed Tom.

100. *See* 29 U.S.C. § 207(a)(1).

101. *See, e.g.*, Ferra v. Loews Hollywood Hotel LLC, 456 P.3d 415 (Cal. 2021).

102. *See, e.g.*, Cal. Labor Code § 512.