Emerging Issues in Anti-Discrimination Law

ALI-CLE
2016

Lisa J. Banks
Sam Kramer†

Katz, Marshall & Banks, LLP
1718 Connecticut Ave., N.W.
Sixth Floor
Washington, DC 20009
(202) 299-1140
www.kmblegal.com
banks@kmblegal.com

TABLE OF CONTENTS

I. Federal Workplace Protections for LGBT Workers ..................................................2
II. Developments in Pregnancy Discrimination Law ....................................................11
III. Applicability of the “Manager Rule” in Title VII Claims ......................................18
IV. Background Checks and Disparate Impact ............................................................22
V. Implicit Bias Evidence in Employment Discrimination Cases ..............................27
VI. Retaliation Claims by Employees Terminated for “Lying” in Internal EEO Complaints.31

†Lisa J. Banks is a founding partner with Katz, Marshall & Banks, LLP, a civil rights law firm based in Washington, D.C. that specializes in the representation of plaintiffs in employment law, whistleblower, civil rights and civil liberties matters. Sam Kramer, a Litigation Fellow with the firm, assisted in the drafting.
I. FEDERAL WORKPLACE PROTECTIONS FOR LGBT WORKERS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (Title VII), is the primary federal law that protects employees from discrimination and retaliation on the basis of certain protected statuses. Title VII currently prohibits a covered employer from terminating or otherwise discriminating against an employee in any manner “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color religion, sex or national origin.” 42 U.S.C. §2000e-2(a)(1). Additionally, the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA) protects employees from discrimination on the basis of disability, while the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (ADEA) protects workers from discrimination on the basis of their age. Together, these statutes establish the general class of federally-protected statuses, and employees falling within those statuses are protected from unlawful discrimination and certain retaliatory personnel actions.

Title VII does not currently include an express provision including sexual orientation or gender identity/expression as statuses that enjoy federal employment protections. As a result, employees historically could not invoke the protections of Title VII in instances where an employer subjects them to discrimination because of their sexual orientation or gender identity, or where the employee objects to such discrimination and is thereafter subjected to retaliatory actions because of those objections. There have been certain limited exceptions to that general rule, which largely involve instances of sex stereotyping and failures to conform to gender roles in the workplace. Recently, actions by the Equal Employment Opportunity Commission (EEOC) and decisions by some federal district courts have caused practitioners and advocates to rethink the status of LGBT workers under Title VII.

A. Historical Treatment of Sexual Orientation and Gender Identity Claims under Title VII

Historically, it has been difficult, if not impossible to bring a claim for sexual orientation discrimination because Title VII does not explicitly refer to it. Although Title VII does not provide a specific cause of action to LGBT persons subjected to discrimination, the Supreme Court’s holding in Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989) (plurality opinion), provides a narrow but important exception to the general rule that sexual orientation and gender identity-based claims are not actionable under Title VII through its prohibition on “sex stereotyping.” Price Waterhouse established that it is unlawful discrimination within the meaning of Title VII for an employer to take adverse actions against an employee on the basis of the employee’s failure to conform to gender norms. Id. The plaintiff in Price Waterhouse, a female manager in the prestigious accounting firm, was denied partnership in part because the firm’s senior leadership considered her too “macho” and lacking in feminine qualities. Id. at 235. The firm advised the plaintiff that she could improve her chances for partnership if she were to take “a course at charm school,” “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Id. (internal quotation marks omitted).

Six members of the Supreme Court agreed that these comments reflected actionable gender discrimination resulting from sex stereotyping – i.e., discrimination based on Hopkins’
refusal to act like a woman consistent with management’s pre-conceived ideas of gender norms. \(\text{Id.} \) at 250-51 (plurality opinion of four Justices); \(\text{Id.} \) at 258-61 (White, J., concurring); \(\text{Id.} \) at 272-73 (O’Connor, J., concurring) (accepting plurality’s sex stereotyping analysis and characterizing the “failure to conform to [gender] stereotypes” as a discriminatory criterion; concurring separately to clarify the distinct issues of causation and allocation of the burden of proof). The Supreme Court thus made clear that, in the context of Title VII, discrimination because of sex includes gender discrimination: “In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” \(\text{Id.} \) at 250. The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” \(\text{Id.} \) at 251.

The reasoning underlying Price Waterhouse provided an opening for practitioners to bring sex stereotyping claims against employers when LGBT workers are subjected to discrimination because those workers do not conform to gender norms or roles. See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1316-20 (11th Cir. 2011) (in case decided on equal protection grounds, court notes that Title VII’s sex-discrimination protections extend to transgender people under a sex-stereotyping theory); Smith v. City of Salem, 378 F.3d 566, 571-75 (6th Cir. 2004) (discussing Price Waterhouse and holding that homosexual employee properly stated a Title VII sex discrimination claim where he alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind employer’s adverse actions); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001) (same); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (claim for sex discrimination could be grounded in comments targeting gay man for “effeminate behavior,” but dismissing claim because sex stereotyping theory had not been advanced before trial court); Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), vacated on other grounds, 523 U.S. 1001 (1998). These holdings are consistent with legal commentators who have long argued that “the stigmatization of the homosexual has something to do with the homosexual’s supposed deviance from traditional sex roles.”

Many courts, however, have generally approached sex stereotyping claims of this nature with skepticism and have been disinclined to allow such claims to proceed. In Williams v. Waffle House, 2010 WL 4512819 (M.D. La. Nov. 2, 2010), for example, a district judge dismissed a gender-based discrimination claim under Price Waterhouse involving sexual orientation issues, criticizing it as a “poorly disguised claim of [non-actionable] sexual orientation discrimination.” A variety of trial and appellate courts across the nation have followed similar reasoning to reject sexual orientation discrimination claims by plaintiffs. See, e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1084-85 (7th Cir. 2000), cert. denied, 532 U.S. 995 (2001) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation. Therefore, harassment based solely upon a

---

person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII”) (citation omitted); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001), cert. denied, 122 S. Ct. 1126 (2002) (plaintiff’s claim indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, and the district court properly determined that there was no cause of action under Title VII); Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (discharge for sexual orientation is not prohibited by Title VII); Oiler v. Winn–Dixie Louisiana, Inc., 2002 WL 31098541 (E.D. La. Sept. 16, 2002) (courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person’s “sex”); Mims v. Carrier Corp., 88 F.Supp.2d 706, 714 (E.D. Tex. 2000) (discrimination on basis of sexual orientation not actionable under Title VII, as “[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act. Therefore, lacking membership in a protected class, the plaintiff’s claim fails as a matter of law”).

Plaintiffs have fared better in seeking protection against same-sex sexual harassment. The Supreme Court has interpreted discrimination on the basis of sex with respect to the terms, conditions, or privileges of employment to include sexual harassment through the creation of a sexually hostile work environment. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). An actionable hostile work environment is one in which “discriminatory intimidation, ridicule, and insult . . . [is] sufficiently severe or pervasive as to alter the conditions of a victim’s employment.” Meritor Savings Bank, 477 U.S. at 67. To establish a prima facie case for a sexually hostile work environment, the plaintiff must demonstrate: (1) she was subjected to harassment because of her sex; (2) she found the harassment subjectively unwelcome; (3) the harassment was sufficiently severe or pervasive to create an objectively abusive, hostile working environment; and (4) she has some basis for imputing liability for the harassment to the employer. See Meritor Savings Bank, 477 U.S. at 67; Howard v. Winter, 446 F.3d 559, 565 (4th Cir. 2005).

Given this formulation of the plaintiff’s prima facie case, same-sex sexual harassment is actionable under Title VII. The Supreme Court held in Oncale v. Sundower Offshore Services, Inc., 523 U.S. 75 (1998), that Title VII protects gay and lesbian employees from gender-based discrimination in the form of sexual harassment. According to the Supreme Court, a plaintiff seeking to establish a viable same-sex sexual harassment claim must show that the alleged harasser made explicit or implicit proposals of sexual activity and supply credible evidence that the harasser (not the victim of the harassment) was homosexual. Id. at 80. See, also, Love v. Motiva Enterprises LLC, 2009 WL 3334610, at *1 (5th Cir. 2009); see also Barrows v. Seneca Foods Corp., 512 F. App’x 115, 117 (2d Cir. 2013). Despite the historic pattern of denying LGBT workers protections under Title VII, the Court’s decisions in Price Waterhouse and Oncale created narrow openings for plaintiffs to bring Title VII claims based on sexual orientation discrimination, or same-sex sexual harassment. More recent developments have built off of those precedents.
B. Executive Orders Protecting LGBT Employees in the Federal Sector

Civilian LGBT employees in the federal sector have always fared better than their private sector counterparts in terms of protections from employment discrimination. On May 28, 1998, President Bill Clinton signed Executive Order 13087, which amended Executive Order 11478 – signed by President Richard Nixon and prohibiting discrimination in the federal workforce on the basis of certain protected statuses – to prohibit discrimination on the basis of sexual orientation in the competitive service of the federal civilian workforce. The class of protected workers includes employees of the District of Columbia government, the U.S. Postal Service, and civilian workers in the U.S. Armed Forces, but excludes employees in the excepted services (e.g., the Central Intelligence Agency, Federal Bureau of Investigation, and the National Security Agency) and uniformed members of the U.S. military. The White House made clear that Executive Order 13087 merely stated the Clinton Administration’s policy, and did not and could not create any new enforcement rights for employees (such as the right to proceed before the EEOC) that were within the authority of Congress alone to establish. That said, federal employees covered by Executive Order 13087 acquired the right to bring complaints of discrimination before the Office of Special Counsel on the basis of sexual orientation, and to appeal adverse determinations of those grievances to the Merit Systems Protection Board.

President Barack Obama again expanded employment protections for LGBT federal sector workers when he signed Executive Order 13672 on July 21, 2014, which further amended Executive Order 11478 to add gender identity to the class of protected statuses. President Obama’s Executive Order 13672 also amended Executive Order 11246, which President Lyndon Johnson signed to prohibit discrimination by federal government contractors and subcontractors on the basis of race, color, religion, sex, or national origin, to add sexual orientation and gender identity to the protected statuses. While the addition of gender identity to the class of statuses protected by Executive Order 11478 (i.e., discrimination in the competitive services) applied immediately, the federal contractor protections were not applicable until December 9, 2014, when the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) issued its Final Rule Implementing Executive Order 13672. The Final Rule, which was not subject to notice and comment came into effect on April 8, 2015, provides that companies who violate OFCCP rules by discriminating on the basis of sexual orientation or gender identity run the risk of being declared ineligible to receive federal contracts. The Final Rule does not require contractors to conduct data analysis regarding sexual orientation or gender identity of their applicants or employees, nor does it require contractors to collect information about applicants’ or employees’ sexual orientation or gender identity. However, the Final Rule does not prohibit a contractor from questioning applicants and employees to provide this information voluntarily, although asking such questions could be prohibited by state or local law, and a contractor may not use any information gathered from such inquiries to discriminate against an applicant or employee based on sexual orientation or gender identity. Federal contracting agencies also must include gender identity and sexual orientation as prohibited bases of discrimination under the Equal Opportunity Clause included in federal contracts.3

3 Each contracting agency in the Executive Branch of federal government must include the equal opportunity clause in each of its nonexempt government contracts. This clause requires a contractor to take affirmative action to ensure that applicants are employed, and that employees are treated during
Importantly, Executive Order 13672 does not affect the existing exemption for religiously-affiliated federal contractors from Executive Order 11246, which President George W. Bush added in 2002 via Executive Order 13279. President Bush’s order provides that religiously affiliated contractors (which are defined to include religious corporations, associations, educational institutions, or societies) can legally favor individuals of a particular religion when making employment decisions without violating Executive Order 11246. Executive Order 13279 does not require that contractors obtain pre-approval to invoke the religious exemption, although cautious contractors tend to submit written exemptions requests to OFCCP’s Division of Program Operations and set forth the basis for the exemption in writing. Despite this limitation, the issuance of these executive orders led to fairly robust protections for LGBT workers in the federal government, even as their private sector counterparts were largely left unprotected against workplace discrimination.

C. EEOC Recognition of Title VII Protections for LGBT Workers

In recent years the Equal Employment Opportunity Commission (EEOC) has asserted that Title VII does proscribe discrimination on the basis of sexual orientation, despite the lack of explicit statutory language and substantial case law to the contrary. The EEOC’s power to affect the legal protections of LGBT workers has taken two forms: (1) its decisions regarding Title VII complaints by federal government employees; and (2) its litigation of private disputes. On both fronts, the EEOC has made notable progress for LGBT workers in recent years.

The first notable development in the EEOC’s treatment of LGBT workers was its decision in Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012), when it first determined that Title VII proscribes discrimination on the basis of gender identity. Id. at *7 (“When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim”) (citations omitted). Significantly, the Commission went further than courts had previously gone in extending the Price Waterhouse line of cases when it concluded that Title VII provides protections for transgender employees “regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.” Id. The Commission posited that the holding in Price Waterhouse was not limited to cases involving gender stereotyping, but rather allowed gender stereotyping to be one form of evidence that proves discrimination on the basis of sex. Id. at *10. The Commission thus concluded that “intentional discrimination against a

employment, without regard to certain protected statuses (which Executive Order 13672 amended to include sexual orientation and gender identity). The inclusion of this clause in federal contracts makes equal employment opportunity and affirmative action critical elements of a contractor’s agreement with the U.S. government. A contractor’s failure to comply with the non-discrimination or affirmative action provisions is deemed to be violation of the contract. See 41 C.F.R. § 60-1.4.
transgender individual because that person is transgender is, by definition, discrimination ‘based
on . . . sex,’ and such discrimination therefore violates Title VII.” Id. at *11.

The EEOC applied a similar analysis in 2015 when it addressed discrimination on the
basis of sexual orientation in Baldwin v. Fox, EEOC DOC 0120133080, 2015 WL 4397641 (July
16, 2015). Faced with a Title VII allegation by a prospective employee of a federal agency that
he was not hired because of his sexual orientation, the Commission concluded that
“sexual orientation is inseparable from and inescapably linked to sex and, therefore, that
allegations of sexual orientation discrimination involve sex-based considerations.” Id. at *5. As
in Macy, the Commission made it clear that its holding was not limited to cases in which a gay
employee proved he had been discriminated against because of gender stereotyping. See id. at
*7. Indeed, the Commission identified several ways in which a gay employee could be
discriminated on the basis of sex:

An employee could show that the sexual orientation discrimination he or she experienced
was sex discrimination because it involved treatment that would not have occurred but
for the individual’s sex; because it was based on the sex of the person(s) the individual
associates with; and/or because it was premised on the fundamental sex stereotype, norm,
or expectation that individuals should be attracted only to those of the opposite sex.

Id. at *10.

Both Macy and Baldwin have important, but limited authority. As EEOC precedents,
future Commissions are likely to abide by them. Compared to the protections of LGBT
employees provided by executive order (discussed in more detail below), these holdings are thus
more likely to endure past a change in executive administration. Furthermore, as the federal
agency tasked with administering Title VII, the EEOC’s position might be entitled to deference
if courts are asked to interpret Title VII’s prohibition on sex discrimination in the future. Should
a court defer to the EEOC on this issue, the Commission’s decisions in Macy and Baldwin would
potentially have significant impact on Title VII protections for LGBT employees more generally.

In the handful of cases discussed in this section, the EEOC’s evolving position on the
status of sexual orientation and gender identity in Title VII’s definition of “sex” is based on a
fundamental rethinking of the significance of Price Waterhouse. While the post-Price
Waterhouse cases discussed above in Section IV-A treat that holding as an opportunity to
shoehorn sexual orientation and gender identity discrimination claims into a Title VII claim by
relying on gender stereotyping, the EEOC seems to interpret the case as actually expanding Title
VII’s definition of “sex.” This is a significant distinction. Under the EEOC’s interpretation of
Price Waterhouse, a plaintiff can state a claim under Title VII by alleging discrimination on the
basis of sexual orientation of gender identity, period. There is no need to adduce evidence that
the discrimination was related to a perceived failure to match gender stereotypes. Interpreting
Title VII in this manner essentially does the job of proposed legislation such as the Employment
Non-Discrimination Act and the Equality Act by providing full protection for LGBT workers
who are discriminated against on the basis of their sexual orientation or gender identity. Should
the EEOC’s interpretation of Title VII gain broader acceptance in the courts, workplace
protections for LGBT people will be forever transformed.
D. Recent Developments in the Case Law

Although the EEOC’s decisions in Macy and Baldwin seem to have extended the protections of Title VII to LGBT workers in the federal workforce, the impact of these decisions will be revealed by the federal courts’ treatment of them. So far, the reaction to the decisions by federal district courts has been mixed, with some citing the cases approvingly, and others refusing to defer to the EEOC’s interpretations. See Roberts v. Clark Cty. Sch. Dist., No. 215CV00388JADPAL, 2016 WL 123320, at *9 (D. Nev. Jan. 11, 2016) (rejecting an argument that the EEOC’s holding in Macy should not be given deference); Koke v. Baumgardner, No. 15-CV-9673 (LAK), 2016 WL 93094, at *1 (S.D.N.Y. Jan. 5, 2016) (holding that it remains to be seen whether Title VII proscribes workplace discrimination based on sexual orientation, but citing to Baldwin for the proposition that it might); Isaacs v. Felder Servs., LLC, No. 2:13CV693-MHT, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015) (“This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII.”); Burrows v. Coll. of Cent. Florida, No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (holding that Baldwin is only persuasive authority, and without a decision from the Supreme or Circuit Courts, the prevailing legal position prevails). This small body of case law is far from definitive, but suggests an openness in at least some courts to the EEOC’s reasoning.

In an effort to shape the law in this area, the EEOC has intervened in several cases involving claims of sexual orientation or gender identity discrimination brought under Title VII.4 Most notably, the EEOC wrote an amicus brief in Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014), as amended on denial of reh’g (Oct. 16, 2014). In Muhammad, a panel of the Seventh Circuit Court of Appeals originally rejected the plaintiff’s Title VII sexual orientation discrimination claim on the grounds that Title VII does not prohibit discrimination on the basis of sexual orientation. When the plaintiff petitioned for rehearing en banc, the EEOC wrote an amicus brief arguing that at minimum, the panel should remove references to the conclusion that Title VII’s prohibition of discrimination on the basis of sex does not include discrimination on the basis of sexual orientation. The brief argued that the court’s conclusion on this issue was based on precedents overruled by Price Waterhouse. According to the EEOC, Price Waterhouse rejected the narrow definition of sex that characterized decisions from earlier Title VII cases involving sexual orientation. Although the panel chose not to rehear the case, it amended the original opinion by removing its original rulings regarding the scope of Title VII coverage. The amendment of the opinion suggests at least some openness to the arguments made by the EEOC.

The applicability of Baldwin to Title VII cases involving private employees appears likely to be decided by at least two circuit courts in 2016. The Seventh Circuit recently heard oral arguments in Hively v. Ivy Tech Community College, a case in which the plaintiff claims she was denied opportunities for advancement and ultimately fired by her employer because of her sexual orientation. No. 3:14-CV-1791, 2015 WL 926015, at *1 (N.D. Ind. Mar. 3, 2015). The district court expressed sympathy for the plaintiff’s argument, but stated that it was bound by Seventh Circuit precedent to dismiss the case because Title VII does not protect against

---

discrimination on the basis of sexual orientation.  \textit{Id} at *3.  The decision was issued two months prior to the EEOC’s Baldwin decision, and on appeal the Seventh Circuit will consider whether that decision deserves deference in light of the numerous cases in which it has held that Title VII does not proscribe discrimination on the basis of sexual orientation.  Given the Seventh Circuit’s removal of citations to these cases in its amended Muhammad opinion, there seems to be at least some likelihood that the court will agree with EEOC and recognize a proscription of discrimination based on sexual orientation under Title VII.

The Eleventh Circuit currently has two cases on appeal in which the issues decided in Baldwin are at the center.  In \textit{Evans v. Georgia Reg’l Hosp.}, the plaintiff claims she was discriminated against and harassed by her employer because of her sexual orientation.  No. CV415-103, 2015 WL 5316694, at *1 (S.D. Ga. Sept. 10, 2015) \textit{report and recommendation adopted, No. CV415-103, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015).}  The district court, without citing Baldwin, held that sexual orientation discrimination claims are not cognizable under Title VII.  \textit{Id}, at *2-3.  In Burrows v. Coll. of Cent. Florida, the court held that Baldwin was not binding authority, and therefore Eleventh Circuit precedent required the dismissal of the plaintiff’s claim that she was terminated because of her sexual orientation.  No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135, at *1 (M.D. Fla. Sept. 9, 2015).  Both cases are now on appeal before the Eleventh Circuit.  The EEOC has submitted \textit{amicus curiae} briefs in both cases urging the court to adopt its holding in Baldwin.

The outcome of the Seventh and Eleventh Circuit cases will likely have significant ripple effects.  Should the courts both adopt the EEOC’s position, the cases in those circuits holding that Title VII does not proscribe discrimination on the basis of sexual orientation would effectively be overturned.  Other circuits might soon join the Seventh and Eleventh in weighing in on this issue.  Ultimately, it seems likely that the Supreme Court will have to decide whether Title VII protects LGBT workers from discrimination on the basis of their orientation.  Such a decision could come soon.

\textbf{E.  Hobby Lobby and the Use of “Religious Liberty” to Attack LGBT Rights}

As support for LGBT equality has grown over the past decades to include the extension of basic legal protections, so too has the intensity and creativity of opposition to this change.  The most controversial, and thus far effective, challenge to legal equality for LGBT individuals is unquestionably the use of religious freedom as the basis of an equally compelling “right” to discriminate.  Most notably, the Supreme Court’s decision in \textit{Burwell v. Hobby Lobby Stores, Inc.}, 134 S. Ct. 2751 (2014), raised the portent of significant risks to workplace protections for LGBT people.  In \textit{Hobby Lobby}, the Court’s conservative members (Justices Alito, Roberts, Thomas, and Scalia) and Justice Kennedy comprised a 5-4 majority, holding that federal regulations implementing the Affordable Care Act that mandate the provision of contraceptives through employer provided health insurance violated the federal Religious Freedom Restoration Act of 1993 (RFRA).  The Court found that RFRA applied to closely-held private corporations claiming a faith-based opposition to contraception and abortion, and that the government’s contraception mandate substantially burdened the corporations’ exercise of religion.  The dissent authored by Justice Ginsburg criticized the majority’s “radical” willingness to allow commercial
enterprises to depart from the law, with conduct that has profound impact on the third parties that do not share the corporation’s underlying religious beliefs. \textit{Id.} at 2787.

Since \textit{Hobby Lobby}, there have been other developments that give credence to fears that its reasoning could impact other regulations, including those intended to prevent discrimination in the workplace. The majority opinion in \textit{Obergefell}, for example, while not explicitly taking up the issues presented in \textit{Hobby Lobby}, conceded the importance of respecting conflicting religious liberties. The key passage on this issue states:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

\textit{Obergefell}, 135 S. Ct. at 2607.

Justice Kennedy’s opinion focuses here on the widely accepted right of religious organizations and persons to teach principles that are in opposition to same-sex relationships, in contrast to the equal protection guaranteed by the state itself. Advocates of LGBT equality are rightly concerned, however, that Justice Kennedy’s prior support of corporate “religious freedom” in \textit{Hobby Lobby} indicates a rather stark, potentially broad double standard, under which private actors are essentially excused for discriminatory conduct that society has deemed fundamentally unjust for other groups and unacceptable on the part of the government in the context of marriage and other areas. Indeed, activist evangelical Christians and their political allies have rallied to this position since the Supreme Court’s recognition of a constitutional right to marriage in \textit{U.S. v. Windsor}, 133 S. Ct. 2675 (2013), and \textit{Obergefell v. Hodges}, 135 S. Ct. 2584 (2015), as illustrated by the slew of states considering and even passing state Religious Freedom Restoration Act laws,\footnote{\url{http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx}.} and the support given to Rowan County, Kentucky Clerk Kim Davis, who refused to issue marriage licenses to same-sex couples despite a court order. These developments suggest the strategic path ahead for opponents to LGBT equality, and the power of judicial ambivalence to encourage resistance to equal rights.

Should courts continue to signal tolerance for religion-based anti-equality arguments, it could have grave consequences for any antidiscrimination laws that seek to protect LGBT workers. It takes no great imagination to envision a case in which a corporation with devout

Christian owners, like Hobby Lobby, challenges a federal antidiscrimination law that may come into existence soon – such as the Equality Act or a re-interpreted Title VII – as substantially burdening their religious beliefs by forcing them to give equal treatment to LGBT workers. Indeed, in something of an echo of Justice Scalia’s impassioned warnings about the expansion of LGBT rights that he feared was building years ago, Justice Ginsburg’s dissent in Hobby Lobby raised the specter of the contraction of these rights by people using religious belief as grounds to exempt themselves from antidiscrimination laws. Hobby Lobby, 134 S. Ct. at 2804-05. In response to this concern, Justice Alito’s majority opinion retorted that such fears were unfounded:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Id. at 2783. While this passage indicates that Hobby Lobby cannot be used as a shield against antidiscrimination laws, it notably focuses on race, a category that is considered suspect under the Equal Protection Clause, and is explicitly listed in Title VII. It remains to be seen whether the Hobby Lobby majority would extend the “freedom” afforded to companies that wish deny contraceptives to their employees on religious grounds to companies that also wish to deny equal workplace rights to their LGBT workers. A case raising this very issue seems inevitable before long, as advocates for, and opponents to, LGBT equality continue to clash in the courtroom over these vitally important civil rights.

II. DEVELOPMENTS IN PREGNANCY DISCRIMINATION LAW

In the years following the passage of Title VII, courts issued a series of confusing, sometimes contradictory decisions regarding the law’s treatment of pregnancy. In 1978, Congress sought to address these issues through passage of the PDA. The law made clear Congress’s intention that women should be protected from discrimination based on their role as child bearers. The amended law established that:

[T]he terms “because of sex” or “on the basis of sex,” as used in Title VII include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; 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 person not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k). By its simplest interpretation, the PDA establishes that women cannot be fired or rejected for a job because they are or may become pregnant. Nor may they be demoted, denied a promotion, or discriminated against with respect to “compensation, terms, conditions, or privileges of employment,” because they are or may become pregnant. Further, employers may
not force pregnant women to stop working and take pregnancy leave if they are still willing and able to work.

Recently, both the Supreme Court and the EEOC have provided new guidance on two important issues related to pregnancy discrimination. The first, addressed by the Supreme Court in *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1341 (2015), was which groups served as “comparators” to whom pregnant workers should be compared. The second, addressed by the EEOC, in its recent enforcement guidance, Equal Employment Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues (2015) available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#II (“Enforcement Guidance”), was the impact of recent amendments to the ADA on workers with pregnancy-related impairments.

A. *Young v. UPS*

As discussed in the section above, the PDA requires that employers treat pregnant workers and those of childbearing age the same as their “similarly situated” counterparts. Specifically, this second clause of the PDA states:

> [W]omen 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.

42 U.S.C.A. § 2000e(k). Until very recently, a key issue in addressing claims based on this provision was to whom pregnant workers should be compared. The question was not easily answered, and federal courts reached divergent conclusions. Most courts have applied the analysis employed in non-PDA related Title VII cases, requiring that the individuals used for comparison, i.e., those that were considered “similarly situated,” have “dealt with the same supervisors, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.” Elam v. Regions Fin. Corp., 601 F.3d 873 (8th Cir. 2010) (citing Hervey v. County of Koochiching, 527 F.3d 711, 720 (8th Cir. 2008)). Those courts rejected arguments that the PDA, despite its language, alters Title VII’s traditional sex discrimination analysis to establish that pregnant women should be compared to workers solely based on their ability or inability to work. This issue came into play most often when employers maintained special policies for individuals injured on the job. If pregnant women were required to be similar in all respects, they would only be able to benefit from employer-established accommodations if they were injured on the job. Under the broader view, pregnant women were considered similarly unable to work as those injured on the job, and courts held that pregnant women should therefore be given the same accommodations regardless of whether or not they were injured on the job. On March 25, 2015, the U.S. Supreme Court finally addressed directly the issue of comparator groups and accommodations in *Young v. United Parcel Services, Inc.*, 135 S. Ct. 1338, 1341 (2015).

In *Young*, the Supreme Court adopted what many consider to be a compromise position. The plaintiff was a driver for UPS who was advised to seek light duty by her doctor after she
became pregnant. \textit{Id.} at 1344. UPS had a policy of giving temporary work assignments to employees who were unable to perform their regular jobs because of on-the-job injuries. \textit{Id.} Because Young’s pregnancy was not an injury suffered while working, UPS denied the plaintiff’s request for light duty. \textit{Id.} As the Court of Appeals for the Fourth Circuit observed in ruling for UPS, the company’s policy was “pregnancy-blind” and “at least facially a neutral and legitimate business practice, and not evidence of UPS’s discriminatory animus toward pregnant workers.” \textit{Young v. United Parcel Serv., Inc.}, 707 F.3d 437, 446 (4th Cir. 2013).

Young and UPS argued for two very different interpretations of the PDA’s requirement that employers not discriminate against pregnant women relative to other employees who can perform similar duties. Young argued for what the Supreme Court dubbed a “most-favored-nation” approach, contending that pregnant employees should receive the same accommodation that any other worker receives for a condition that creates similar impediments to performing his or her work. 135 S. Ct. at 1349. The Court held that there was no indication that Congress intended for the PDA to be construed so broadly as to require total equality in any arguably similar circumstance. \textit{Id.} at 1349-50. Moreover, the Court held that such a construction of the statute would eliminate the need for a plaintiff to prove intentional discrimination, which underlies any disparate treatment claim. \textit{Id.} at 1350.

UPS, meanwhile, advocated for a narrow interpretation that would render the second clause of the PDA amendments merely definitional. \textit{Id.} at 1352. The company noted, correctly, that the clause requiring that “women affected by pregnancy, childbirth, or related medical conditions . . . be treated the same [as employees similar in their ability to do work] for all employment-related purposes” is contained in the “Definitions” section of Title VII, and in the sentence that defines “because of sex” or “on the basis of sex.” \textit{Id.} Thus, UPS argued, the clause simply defines sex discrimination to include pregnancy discrimination and clarifies when such discrimination might arise. \textit{Id.} The majority in \textit{Young} held that such an interpretation would render the second clause of the PDA superfluous. \textit{Id.} Moreover, the Court observed that UPS’s reading would fail to fulfill a primary objective of the PDA, which was to overturn the Supreme Court’s decision in \textit{General Electric Co. v. Gilbert}, 429 U.S. 125 (1976). In addition to refusing to acknowledge pregnancy discrimination as a form of sex discrimination, \textit{Gilbert} held that an employer could treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work. \textit{See Young}, 135 S. Ct. at 1353 (citing \textit{Gilbert}, 429 U.S. at 136). The second clause of the PDA responded directly to this component of the \textit{Gilbert} holding. \textit{Id.}

Having rejected the arguments that both parties offered, the Supreme Court established guidelines for analyzing pregnancy discrimination claims arising under the second clause of the PDA. The Court noted that the \textit{McDonnell Douglas} analytical framework applied to such claims, and thus that a plaintiff could make out a prima facie case by showing: (1) that she belongs to the protected class of pregnant women, (2) that she sought accommodation, (3) that the employer did not accommodate her, and (4) that the employer did accommodate others “similar in their ability or inability to do work.” \textit{Id.} at 1353-54 (citing \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1973)). The employer must then set forth a legitimate, nondiscriminatory reason for denying the employee an accommodation, and 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 do work’) whom
the employer accommodates.” _Id._ at 1354. The burden of production then shifts back to the employee to demonstrate that the employer’s proffered reasons are pretextual. _Id._

The Court noted that a pregnant woman can avoid summary judgment and reach a jury “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,” such that the employer’s explanation gives rise to an inference of intentional discrimination. _Id._ The Court also gave an example of one way that an employee can demonstrate whether a significant burden exists, namely “by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.” _Id._ The Court observed that in Young’s case, the evidence suggested that she could show that UPS accommodates most nonpregnant employees with lifting restrictions, but does not accommodate pregnant employees with the same limitations. _Id._ at 1354-55. The Court vacated and remanded to the Fourth Circuit for an analysis consistent with the framework the majority set forth. _Id._ at 1355-56. The parties later settled. See Robin Shea, BREAKING: Young and UPS settle pregnancy lawsuit (Oct. 2, 2015), available at: http://www.employmentandlaborinsider.com/pregnancy/breaking-young-and-ups-settle-pregnancy-lawsuit/. It remains to be seen how courts will apply the Young framework, and whether the decision will make a practical difference in how the courts analyze PDA disparate treatment claims based on the failure to accommodate pregnancy-related conditions.

**B. EEOC Enforcement Guidance on Reasonable Accommodations for Pregnant Workers under the ADA**

The _Young_ case was, therefore, not a complete victory either for employers or pregnant employees. Moreover, it may be that the Americans with Disabilities Act Amendments Act (“ADAAA”), will provide an alternate – and perhaps easier – road for pregnant employees to establish a claim of discrimination. As Justice Kennedy noted in his dissent in _Young_, the ADAAA “expand[ed] protections for employees with temporary disabilities,” which would include pregnancy- and childbirth-related medical conditions and restrictions.6 135 S. Ct. at 1367. The EEOC also recognized the significance of the ADAAA in its recent Enforcement Guidance on pregnancy discrimination. Equal Employment Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues (2015) available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#II (“Enforcement Guidance”). It may very well be that the ADA, rather than the PDA, becomes the most viable vehicle for pregnancy discrimination claims going forward.

The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. 42 U.S.C. § 12101 _et seq._ The ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an

6 Because the ADAAA was enacted after the events that gave rise to the case, the Court did not address this issue directly.
impairment.” 42 U.S.C. § 12102(2). Individuals who can demonstrate the first prong are entitled to reasonable accommodations.

In the years following the law’s enactment, a series of court decisions limited the scope and impact of the law. See Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (impairments that can be mitigated with corrective action are not disabilities for the purposes of the ADA); Murphy v. United Parcel Service, 527 U.S. 516 (1999) (same); Albertson’s v. Kirkingburg, 527 U.S. 555 (1999) (same); Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002) (establishing a strict standard for those seeking to establish their disabilities under the ADA so that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”). This series of cases drastically limited the pool of individuals who could access to the law’s protections.

Pregnant women who suffered complications related to their pregnancies were no exception. District courts across the country repeatedly ruled that pregnancy does not qualify as a disability and, because they are normal symptoms of reproduction, the conditions associated with pregnancy only rise to the level of a disability in extremely rare circumstances. See Gudenkauf v. Stauffer Commc’ns, Inc., 922 F. Supp. 465, 472 (D. Kan. 1996) (“[P]regnancy is a physiological condition, but it is not a disorder. Being the natural consequence of a properly functioning reproductive system, pregnancy cannot be called an impairment.”); Willareal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 142 (S.D. Tex. 1995) (same); Tsseteranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995) (same); Farrell v. Time Service, Inc., 178 F. Supp. 2d 1295 (N.D. Ga. 2005) (“At most, courts have held that pregnancy may rise to the level of a disability if there are severe complications.”); Minott v. Port Authority of NY & NJ, 116 F. Supp. 2d 513 (S.D.N.Y. 2000) (“Courts have held only in extremely rare circumstances that complications arising from pregnancy constitute a disability under the ADA.”).

In 2008, Congress passed the ADA Amendments Act (“ADAAA”). The Act overturned the strict interpretations of what it means to be disabled under the law. The ADAAA left in place the ADA’s definition of disability, but mandated that the definition of disability be broadly construed. See 42 U.S.C. § 12102(4) (“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this act, to the maximum extent permitted under the terms of this Act.”).

In March, 2011, the EEOC issued regulations implementing the ADAAA. See 29 C.F.R. § 1630. The regulations broadly construed what it means to have a “physical or mental impairment that substantially limits one or more major life activities,” and provide an expanded list of examples that constitute major life activities whose limitation could equate to a disability. For example, a major life activity may encompass “caring for oneself, performing manual tasks … standing … lifting … bending.” 29 U.S.C. § 1630.2(i). It might also mean an impact to the operation of a major bodily function, including “digestive … bladder … circulatory … and reproductive functions.” Id. The regulations also define the meaning of impairment broadly.7

---

7 The regulations define impairment as: “(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological,
Finally, the regulations made clear that impairments that are episodic or temporary may nonetheless be considered disabilities and expressly did not set a minimum duration that an impairment’s effects must last in order to be deemed substantially limiting. 29 C.F.R. §1630.2(j); see also Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act, www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

The EEOC built on these regulations in 2015 when it issued its Enforcement Guidance. The Enforcement Guidance explicitly addressed the application of the ADA as amended to pregnancy-related conditions, stating that, “[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended.” The Enforcement Guidance explains that an impairment’s cause, and its temporary nature do not affects its status under the ADA as amended. The Enforcement Guidance then lists several examples of pregnancy-related impairments that could result in limitations that give rise to a right to reasonable accommodation under the ADA as amended, including: a diagnosis of cervical insufficiency requiring bed rest; pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting brain function). This list illustrates the EEOC’s broad interpretation of “disability” under the ADA as amended, and should give rise to an increasing number of workers with pregnancy-related conditions asserting a right to reasonable accommodations. Under the EEOC’s interpretation, the ADA, as amended by the ADAAA, may now provide them with relief both under the ADA and potentially under the PDA.

First, based on the terms of the ADAAA and on the EEOC’s regulations and Enforcement Guidance regarding covered impairments and temporary impairments, more complications of pregnancy may now be considered disabilities. While the EEOC regulations continue to state that pregnancy is “not the result of a physiological disorder” and is therefore not an impairment in and of itself, the EEOC also explicitly states that “a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.” 76 Fed. Reg. 16978, 917007 (Mar. 25, 2011) (explaining 29 C.F.R § 1630.2(h)).

Indeed, just by expanding the definition of “impairment” and “major life activity,” the ADAAA encompasses a broader swath of disabilities that courts previously would have refused to recognize. These broadened definitions likely encompass pregnancy complications that might not have qualified under pre-ADAAA precedent. For example, the appendix to the EEOC

musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h).
regulations suggests that a person with an impairment resulting from a lifting restriction that will last for a finite period of time would qualify as disabled. This analysis could also extend to women whose pregnancies limit their ability to lift heavy items.

The EEOC Guidance cites several district court cases in which the courts took an approach similar to the EEOC’s in addressing ADA claims based on pregnancy-related conditions. See Heatherly v. Portillo’s Hot Dogs, Inc., 2013 WL 3790909, at *6 (N.D. Ill. July 19, 2013) (concluding that there was a triable issue on the question of whether the plaintiff had a disability within the meaning of the amended ADA, where her doctor characterized the pregnancy as ‘high risk’ and recommended that the plaintiff limit her work hours and not lift heavy objects, even though the doctor did not identify a specific impairment); McKellips v. Franciscan Health Sys., 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013) (plaintiff’s allegations that she suffered severe pelvic inflammation and immobilizing pain that necessitated workplace adjustments to reduce walking and early pregnancy-related medical leave were sufficient to allow her to amend her complaint to include an ADA claim); Nayak v. St. Vincent Hosp. and Health Care Ctr., Inc., 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (denying defendant's motion to dismiss plaintiff’s ADA claim based on symphysis pubis dysfunction causing post-partum complications and requiring physical therapy); Mayorga v. Alorica, Inc., 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (denying defendant’s motion to dismiss where plaintiff claimed impairments related to her pregnancy included premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, and extreme headaches).

The case law is slightly more divided than the cases cited in the Enforcement Guidance might suggest. For example, in Oliver v. Scranton Materials, Inc., No. 3:14-CV-00549, 2015 WL 1003981, at *8 (M.D. Pa. Mar. 5, 2015), the court dismissed the plaintiff’s ADA claim because although she listed major life activities impacted by her pregnancy-related condition, she did not identify what that condition was in her pleadings. However, the court dismissed without prejudice and stated that the claim could be “cured by a more specific pleading.” Id. Similarly, in Lang v. Wal-Mart Stores E., L.P., No. 13-CV-349-LM, 2015 WL 898026, at *4 (D.N.H. Mar. 3, 2015) reconsideration denied, No. 13-CV-349-LM, 2015 WL 1523094 (D.N.H. Apr. 3, 2015), the court dismissed the plaintiff’s ADA claim, which was based on her employer’s refusal to honor lifting restrictions honored by her doctor, because the court held that lifting restrictions were merely routine suggestions during a pregnancy, and were not indicative of a “disorder or an unusual or abnormal circumstance.” More encouraging for advocates of pregnant workers is Bray v. Town of Wake Forest, No. 5:14-CV-276-FL, 2015 WL 1534515, at *12 (E.D.N.C. Apr. 6, 2015), in which the court denied the defendant’s motion to dismiss the plaintiff’s ADA claim even though the pleadings did not identify a specific pregnancy-related condition, but rather stated that the plaintiff’s doctor ordered her to avoid “running or jumping activities” and lifting more than 25 pounds. Cases like these, which would surely have fallen outside of the ADA’s definition of disability prior to the ADAAA now represent the outer limits of pregnancy discrimination claims under the ADA. It is in this area that the law is likely to evolve in the coming years.

Second, the newly expanded ADAAA may provide pregnant women with additional recourse under the PDA. As discussed above, the PDA requires that women affected by
pregnancy, childbirth, or related medical conditions be treated the same as those who are similarly situated. The ADAAA’s expansion does not change the underlying analysis, but should in theory expand the comparator groups against whom women may be judged. Whereas previously, a woman who needed light duty because of a lifting restriction might only be able to point to workers injured on the job as comparators, employers covered by the ADAAA may now be compelled to give light duty to any employees who suffer back problems not related to a work injury. Consequently, even if a pregnant woman’s lifting restrictions were not considered a “disability,” she might now be able to point to a “similarly situated” employee who was given light duty as an accommodation. The Enforcement Guidance references this theory in a footnote, but does not take a position on its validity.

It is unclear whether this argument will be successful, as courts may decide that those protected by the ADA are not an appropriate comparator group. The Seventh Circuit did precisely this in *Serednyj v. Beverly Healthcare*, 656 F.3d 540 (7th Cir. 2011). In that case, a nursing home activity director became pregnant. She had previously suffered a miscarriage and was experiencing complications from her pregnancy. Her doctor advised her to refrain from lifting heavy objects. Though she was still able to perform the essential functions of her job, her employer refused to accommodate her, stating that it had a policy of granting light duty only to those employees who suffered work related injuries or whose non-work related injuries were accommodated under the ADA. Because Ms. Serednyj was not injured on the job, and her pregnancy-related complications were not considered disabilities under the ADA, the Seventh Circuit determined that she was not similarly situated with those other individuals and not entitled to light duty. If this analysis holds sway in other districts, it is possible that the expansion of the ADA will not provide a broader comparison group. Indeed, it could even make matters worse. As the ADA covers more employees, if pregnant women cannot be compared to those covered by the ADA, pregnant women will face more difficulty establishing that they are being treated differently than their peers.

There is little guidance on how these questions will pan out going forward. There is minimal case law currently as courts have not yet had the opportunity to explore the issue in full.\(^8\) This area of law is developing and the impact on pregnant employees will become clearer over time as more courts reach decisions that take the ADAAA into account.

III. **APPLICABILITY OF THE “MANAGER RULE” IN TITLE VII CLAIMS**

An issue that has vexed many practitioners of antidiscrimination law is the applicability of the so-called “manager rule” to retaliation claims. The manager rule requires certain employees, namely human resources managers and compliance officers, to “step outside” of their

---

\(^8\) Courts have held that the statute is not retroactive. *See, e.g., Nyrop v. Independent Sch. Dist. No. 11*, 2010 WL 3023665 (8th Cir. 2010) (holding that ADA amendments are not retroactive); *Becerril v. Pima County Assessor’s Office*, 587 F.3d 1162, 1164 (9th Cir. 2009) (same); *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27, 34 n.3 (1st Cir. 2009); *Fredrickson v. United Parcel Serv., Co.*, 581 F.3d 516, 521 n.1 (7th Cir. 2009); *Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 567 (6th Cir. 2009); *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 469-70 (5th Cir. 2009).
roles of representing the company in order to engage in protected activity. In other words, employees who are responsible from fielding complaints of discrimination cannot claim protection under Title VII if they are retaliated against for reporting discriminatory conduct in the course of their job. Instead, they must step outside of their role as a representative of the company in order to enjoy the protections of Title VII. The manager rule adds an extra layer of complication to any retaliation claim asserted by a large swath of employees. Recent cases have addressed the applicability of the rule in the Title VII context.

**A. History of the Manager Rule in Title VII Litigation**

The manager rule was first applied in the context of retaliation claims under the Fair Labor Standards Act (FLSA). Under the rule, an employee must “step outside his or her role of representing the company” in order to engage in protected activity. McKenzie v. Renberg’s Inc., 94 F.3d 1478, 1486 (10th Cir.1996). The idea behind the rule seems to be that the spirit of the concept of protected activity does not include protections for employees who simply perform their assigned duties. In the FLSA context, the rule purports to address a concern that if fielding and communicating employee complaints is part of a manager’s job, then “nearly every activity in the normal course of a manager's job would potentially be protected activity,” and “[a]n otherwise typical at-will employment relationship could quickly degrade into a litigation minefield.” Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir.2008).

A number of courts in several circuits have imported the manager rule to the context of Title VII retaliation claims. See, e.g., Brush v. Sears Holdings Corp., 466 F. App’x 781, 787 (11th Cir. 2012); Weeks v. Kansas, 503 F. App’x 640, 642 (10th Cir. 2012); Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 49 (1st Cir. 2010) (assuming, without deciding that the manager rule applied to Title VII cases); EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998) (applying the manager rule but finding the plaintiff stepped outside his managerial role); Rice v. Spinx Co., No. 10–1622, 2012 WL 684019, at *5 (D.S.C. Mar. 2, 2012); Hill v. Belk Stores Servs. Inc., No. 06–398, 2007 WL 2997556, at *1 (W.D.N.C. Oct. 12, 2007).

The more recent circuit court decisions on this issue are particularly interesting. In Weeks, the Tenth Circuit held that the manager rule precluded a Title VII retaliation claim by an in-house lawyer who stipulated in the district court that in raising concerns about discrimination, she was acting within the scope of her duties in order to assist her employer in complying with its legal obligations. 503 F. App’x at 642. The Tenth Circuit said that this stipulation “doom[ed] her case under McKenzie’s rule.” Id. Interestingly, McKenzie was a FLSA case that, although it discussed Title VII, did not explicitly state that the manager rule applied in the context of Title VII, yet in Weeks, the Tenth Circuit applied the manager rule adopted in McKenzie without even discussing whether a rule applied in the FLSA context might have different implications in the Title VII context. Instead, the court made the conclusory statement that by admitting she had only acted within the scope of her duties as in-house counsel, the plaintiff had sunk her Title VII retaliation claim under the manager rule.

The Eleventh Circuit’s decision in Brush also provides an interesting view into the development of the law governing Title VII retaliation claims. Prior to Brush, the Supreme Court ruled in Crawford v. Metro. Gov’t of Nashville & Davidson Cty., Tenn., that “[w]hen an
employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee’s opposition to the activity.” 555 U.S. 271, 276 (2009) (first emphasis added) (internal quotation marks omitted). The plaintiff in Brush argued that Crawford contradicted the case law supporting the application of the manager rule in Title VII retaliation cases. 466 F. App’x at 787. Despite Crawford’s strong language, the Eleventh Circuit rejected the plaintiff’s argument, and adopted the manager rule in the Title VII context for the first time. Id.

Until recently, the only circuit court that appears to have rejected the application of the manager rule in Title VII cases was the Sixth Circuit. In Johnson v. University of Cincinnati, the court reversed the district court’s holding that the plaintiff, an affirmative action officer at the school, did not engage in protected activity under Title VII by advocating for the hiring of women and minorities and opposing what he saw as discriminatory hiring practices, because he did so as part of his job. 215 F.3d 561, 579–81 (6th Cir. 2000). The court found that “the fact that Plaintiff may have had a contractual duty to voice such concerns is of no consequence to his claim” because there is no language in Title VII’s opposition clause that qualifies who is protected against retaliation. Id. at 580.

B. Recent Cases Involving the Manager Rule

Recently, the tide seems to have turned against the manager rule. First, in Littlejohn v. City of New York, the Second Circuit rejected the defendant’s argument that the manager rule precluded the plaintiff, the director of equal employment opportunity in her office, from stating a claim for retaliation under Title VII. 795 F.3d 297, 318 (2d Cir. 2015). Unlike the Eleventh Circuit, in Brush, the Second Circuit was persuaded by the Supreme Court’s ruling in Crawford, arguing that because it did not distinguish between retaliation against different types of employee, it contradicted the arguments that justify the manager rule. Id. Furthermore, it interpreted the language of Title VII’s opposition clause, which prohibits employers from “discriminat[ing] against any ... employee[ ] ... because he has opposed any practice made an unlawful employment practice by this subchapter,” 42 U.S.C. § 2000e–3(a) (emphasis added) – as containing no exception for managers. Id. Finally, the court rejected the defendant’s argument that allowing employees who are responsible for fielding, investigating, and communicating discrimination complaints would lead to gratuitous litigation because all such employees could at least make a prima facie case of retaliation. Id. The court found such fears unfounded, explaining that:

Where the officer merely transmits or investigates a discrimination claim without expressing her own support for that claim, the mere passing on of a complainants statements by a supervisor or human resources manager is not inherently ‘oppositional’ in the same way as the victim's own report of that misconduct.

Id. (internal citations and quotations removed). This suggests that there are some limitations on a managers ability to assert a retaliation claim, namely that one must have done more than “merely transmit or investigate” a discrimination claim in order to have engaged in protected activity. Indeed, at least one district court in the Second Circuit has cited Littlejohn in its dismissal of a claim in which the plaintiff alleged she was terminated for “alerting her supervisors to federal regulation mandates in the course of performing her job so as to bring the
The Fourth Circuit also rejected the manager rule in DeMasters v. Carilion Clinic, 796 F.3d 409, 422 (4th Cir. 2015). There, the EEOC, appearing as amicus curiae, argued that whatever role the manager rule has in FLSA jurisprudence, it should not apply to Title VII cases because nothing in the language of Title VII indicates that the protection accorded an employee’s conduct depends on the employee’s job duties. Id. The court found that the language of Title VII differed from FLSA so as to make the manager rule inapplicable, and that Supreme Court precedent in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006), and Crawford militates against limiting the scope of the protections afforded by Title VII’s anti-retaliation provision. Id. at 422-23. Additionally, the court found the manager rule problematic when viewed in conjunction with other doctrines applicable in the Title VII context. First, it found that under the balancing test adopted by the Fourth Circuit in Armstrong v. Index Journal Co., 647 F.2d 441 (4th Cir.1981), in which an employer is not liable when the employee’s conduct is sufficiently “insubordinate, disruptive, or nonproductive,” applying the manager rule would create the dilemma of requiring to step outside their role to enjoy the protections of Title VII, but risk losing that protection if the deviation from their assigned role was sufficiently insubordinate or disruptive. Id. at 423. Second, the court found that the affirmative defense available to employers in Title VII cases when an employee fails to take advantage of the employer’s internal investigation processes, rendered the manager rule unworkable by discouraging the very employees empowered to conduct those investigations from voicing concerns about workplace discrimination. Id. Like the Second Circuit, the Fourth Circuit also rejected the policy argument that in choosing not to apply the manager rule, the court would create a “litigation minefield,” concluding that such concerns were outweighed by the risk of leaving employees who are in the best position to address workplace discrimination unprotected from retaliation for so doing. Id.

At least one district court has adopted the position taken by the Second and Fourth Circuits. In Chapman v. Milwaukee Cty., the court surveyed the relevant case law from all the circuits that had ruled on this issue, and held that the Second and Fourth Circuits had the better argument. No. 15-CV-14, 2015 WL 9008384, at *5-6 (E.D. Wis. Dec. 15, 2015). Notably, the Seventh Circuit has never ruled on this issue, and it appears this is the only district court case in that circuit to rule on it.

The Ninth Circuit recently called into question the applicability of the manager rule in the FLSA context. See Rosenfield v. GlobalTranz Enterprises, Inc., No. 13-15292, 2015 WL 8599403, at *2-4 (9th Cir. Dec. 14, 2015). That certainly leaves the status of the manager rule in the Title VII context in question in that circuit, making the manager rule either inapplicable or of questionable application in the Title VII context in four circuits, with a fifth (the Seventh Circuit) having no case law but a recent district court cases rejecting the applicability of the rule. With the exception of the Sixth Circuit, all these decisions have come down in a very short period of time beginning in mid-2015. Since then, no published opinions in any circuit have applied the manager rule in the Title VII retaliation context.

Furthermore, the EEOC recently weighed in on the debate, filing amicus briefs arguing against the manager rule in both the DeMasters and Rosenfield cases, and publishing a Proposed
Enforcement Guidance that argues the rule is inapplicable in the Title VII context. See Proposed Enforcement Guidance on Retaliation and Related Issues (2016) available at: http://www.regulations.gov/#!docketDetail;D=EEOC-2016-0001. The Proposed Guidance touches on a wide variety of issues related to retaliation claims, but its discussion of the manager rule is among its most interesting and potentially significant passages. It states that there is simply no statutory or public policy rationale for applying the manager rule in employment discrimination cases. The EEOC’s forceful rejection of the manager rule seriously calls into question its continuing viability in employment discrimination cases. The EEOC’s position, along with the recent circuit court decisions on this issue strongly suggest that the tide has turned against the manager rule in this context.

IV. BACKGROUND CHECKS AND DISPARATE IMPACT

Title VII permits plaintiffs to prove discrimination in one of two ways: disparate treatment, and disparate impact. While disparate treatment claims require direct evidence of a discriminatory motivation, disparate impact requires the identification of a facially neutral policy that disproportionately harms a protected class. Because of the disproportionate rates of arrest and incarceration of certain protected classes, civil rights advocates have long argued that conditioning employment on the successful completion of criminal background checks creates an unlawful barrier to equality in the workplace. The same is true of credit checks, which are more likely to disqualify low-income applicants, who are disproportionately made up of certain racial and ethnic groups.

In recent years, the EEOC has taken aim at the practice of requiring employees to submit to background checks. In 2012 the Commission issued an aggressive enforcement guidance that communicated the position that employers should either abandon background checks altogether, or at least put procedures in place to ensure individual considerations for applicants disqualified by the results of such checks. The EEOC has followed up on this guidance by pursuing numerous cases against employers who use background checks, with mixed results. At the same time, private litigants have increasingly attacked background checks in disparate impact cases. None of this has taken place without strong pushback from employers, many of whom have argued that the background checks are necessary to comply with federal, state, and local laws, and to protect customers from danger.

A. EEOC Guidance on Employee Background Checks

The EEOC issued policy guidance on the issue of criminal background checks in 1987 and 1990. In those documents, the EEOC took the position that criminal background checks must be supported by a business necessity. The Commission listed three “Green factors,” named for the Eighth Circuit’s decision in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977), in which the court held that under Title VII an employer could not create a complete bar to employment based on any criminal conviction. These three factors are: (1) The nature and gravity of the criminal offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. The 1990 guidance also took the position that when a background check shows an arrest record without a conviction, the employer must evaluate whether the arrest record reflects the applicant’s conduct.
In 2012, the EEOC issued a new Enforcement Guidance that built on the 1987 and 1990 documents by going much further in arguing against the use of background checks for employment purposes. See Equal Employment Opportunity Commission, Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2015), available at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (“EEOC Guidance”). The EEOC Guidance emphasized that in order to comply with Title VII, employers must engage in an individualized assessment of candidates and employees otherwise disqualified by the results of a background check. The EEOC suggested that such an assessment must include a dialogue with the applicant or employee. The EEOC Guidance did not, however, require individualized assessment in all cases. When an employer has an internal policy that excludes candidates who have committed certain offenses, such a policy can be lawful under Title VII when it is narrowly tailored. Narrow tailoring requires “targeted screens” that are based on the Green factors.

The EEOC Guidance goes further than previous EEOC positions on this issue in other ways as well. The EEOC now argues that “arrest record standing alone may not be used to deny an employment opportunity,” a position that goes further than the 1990 guidance. However, the EEOC Guidance does allow an employer to use an arrest record in making an employment decision, as long as the decision is based on the underlying conduct behind the arrest, and not the arrest itself (e.g. a school administrator is arrested on allegations of inappropriately touching students, is not convicted, but the school investigates and finds the allegations credible). The EEOC Guidance also goes further than previous EEOC positions by arguing that although federal law can be grounds for “business necessity,” state and local laws cannot.

The EEOC’s position on state and local laws has been called, “perhaps the greatest concern” raised by the EEOC Guidance. Susan M. Corcoran, Mark A. de Bernardo, et al., EEOC Issues New Enforcement Guidance on Use of Arrest and Conviction Records in Employment (April 26, 2012), available at: http://www.jacksonlewis.com/resources-publication/eeoc-issues-new-enforcement-guidance-use-arrest-and-conviction-records-employment. Indeed, the State of Texas went so far as to sue the EEOC in federal district court over this policy, arguing that its state laws forbid the hiring of people who committed certain crimes for certain employment opportunities in state and local government, including law enforcement, education, elderly and disabled care, juvenile justice, and other public service fields. Texas argued that state agencies would have to violate state law to comply with the EEOC Guidance, and that doing so would expose those agencies to liability for employee misconduct. Todd Fredrickson, EEOC’s criminal background check policy under fire (Jan. 22, 2014), available at: http://www.bizjournals.com/denver/blog/broadway_17th/2014/01/eeocs-criminal-background-check.html. The district court ultimately dismissed the suit, but it is currently on appeal in the Fifth Circuit, where the parties are disputing whether the EEOC Guidance is ripe for review. See Aaron Vehling, Texas Can Challenge EEOC Background Checks, 5th Circ. Told (June 25, 2015), available at: http://www.law360.com/articles/672471.

B. EEOC Litigation of Disparate Impact Claims Involving Background Checks

In addition to issuing the EEOC Guidance, the Commission has aggressively pursued several enforcement actions against employers who disqualify candidates on the basis of
information discovered in background checks. The EEOC’s record in these cases is mixed, though no court has, as of yet, rejected the underlying theory that background checks can give rise to a disparate impact claim under Title VII. Instead, the cases the EEOC has pursued have mostly involved intense disputes over discovery and expert witnesses.

The first blow to the EEOC’s enforcement strategy on this issue came in EEOC v. Kaplan Higher Educ. Corp., which was originally filed in the U.S. District Court for the Northern District of Ohio. No. 1:10 CV 2882, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013). The defendant in that case, Kaplan, offered higher education courses to students, many of whom received financial aid. EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 750-51 (6th Cir. 2014). Because information about student finances was available to some Kaplan employees, and the company had once discovered that certain employees were stealing that information for financial gain, it adopted a policy of submitting candidates for certain positions to credit checks. Id. at 751. The EEOC sued Kaplan on behalf of African-American candidates who it claimed were disproportionately disqualified for these positions by the credit checks. Id. at 750.

In an effort to prove the disparate impact of credit checks on African-American employees, the EEOC offered the report and testimony of an expert who claimed to have analyzed data provided by Kaplan and to have found that the credit checks disproportionately impacted African-American candidates. Id. Kaplan disputed the validity of the data used by the EEOC’s expert, and filed a motion to exclude the expert’s testimony, and a motion for summary judgment. The district court granted both motions, finding that the expert’s methodology in analyzing Kaplan’s hiring data did not stand up to the scrutiny required of evidence under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Id. at 572-73. At issue was the expert’s use of “race rating,” a procedure used by the EEOC’s expert to determine the race of applicants by matching their names to photos in public records, and having five “race raters” vote on which race of the person in the photo. Id. at 571. A cross-check of this method revealed an 80% accuracy rate. Id. at 753. On appeal, the Sixth Circuit ruled strongly in Kaplan’s favor, taking every opportunity to belittle the methods of the EEOC’s expert, and the EEOC’s litigation strategy. The court concluded its opinion with the statement: “The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” Id. at 754. Despite not ruling on the merits of the case, the court strongly suggested that it found the EEOC’s position problematic. Interestingly, the court’s opinion opens by pointing out that the EEOC itself conducts credit checks on prospective employees. Id. at 750. Taking such a tone suggests that the EEOC would have struggled to convince the panel on the merits, even with more reliable expert testimony.

The Fourth Circuit came to a similar conclusion in another recent EEOC case. See EEOC v. Freeman, 778 F.3d 463, 468 (4th Cir. 2015). In that case, the defendant, an event planning company, conducted credit checks on candidates for certain positions dealing with financial information, and criminal background checks for all employees in an effort to prevent the hiring of people convicted of certain crimes. Id. at 465. The EEOC brought the enforcement action, relying on the same expert as in Freeman to assert that the background check policy had a disparate impact on African-American and male candidates. The U.S. District Court for the District of Maryland excluded the EEOC’s expert’s testimony and granted summary judgment
for Freeman for many of the same reasons identified in Freeman. On appeal, the Fourth Circuit upheld the district court’s decision, finding that the expert’s reports included “an alarming number of errors and analytical fallacies.” Id. at 466. The Fourth Circuit panel’s tone was notably less harsh than the Sixth Circuit’s in Freeman. The panel emphasized that its decision was based only on the district court’s findings regarding the expert reports, and that it was not expressing an opinion on the merits of the case. Id. at 468 n.8.

The EEOC has had more success in two other cases. The first, EEOC v. BMW Mfg. Co., LLC, No. 7:13-1583-HMH, 2015 WL 5431118 (D.S.C. July 30, 2015), recently resulted in a $1.6 million settlement for the Commission. Equal Employment Opportunity Commission, BMW to Pay $1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit (September 8, 2015), available at: http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm (“EEOC Press Release”). In that case, a BMW plant in South Carolina changed its provider of employee screening services in 2008, which resulted in new criminal background checks that led to the termination of 100 employees. BMW, 2015 WL 5431118 at *1. Eighty percent of those terminated were African-American. See EEOC Press Release. The settlement came not long after the EEOC defeated a BMW motion for summary judgment based on the argument that the 724 employee data set used by the EEOC to analyze the background check policy’s impact was inadequate. See BMW, 2015 WL 5431118 at *3. In that same decision, the EEOC also defeated BMW’s motion to exclude the testimony of its expert, who was not the same controversial expert at the heart of the Kaplan and Freeman cases. See BMW, 2015 WL 5431118 at *4. This ruling and settlement could very mark a turning point for the EEOC, which seems to have avoided making the mistakes that plagued the Kaplan and Freeman cases.

The EEOC is also currently litigating a case against the retailer Dollar General based on its use of background checks. See EEOC v. Dolgencorp, LLC, No. 13-CV-04307, 2015 WL 2148394, at *1 (N.D. Ill. May 5, 2015) reconsideration denied, stay granted, No. 13-CV-04307, 2015 WL 3856403 (N.D. Ill. June 19, 2015). In that case, the EEOC claims that the retailer’s use of background checks has had a disparate impact on African-American candidates for positions in Dollar General stores. See Jonathan Bilyk, Judge: Dollar General must tell how it screens job applicants, EEOC doesn’t need to supply info on why it brought disparate impact action (Nov. 18, 2015), available at: http://cookcountyrecord.com/stories/510648838-judge-dollar-general-must-tell-how-it-screens-job-applicants-eeoç-doesn-t-need-to-supply-info-on-why-it-brought-disparate-impact-action. In that case, the EEOC has won on several discovery-related motions, and appears to have won access to most documents and information it has sought. This case appears to be the only active background check case that the EEOC is currently litigation.

C. Litigation of Disparate Impact Claims Involving Background Checks by Private Litigants

At the same time that the EEOC has brought its background check cases, several private litigants have followed suit, with varying degrees of success. In at least four cases filed in federal courts, employees have made discrimination claims based on employers’ use of background checks in the hiring process. As in the cases brought by the EEOC, the underlying disparate impact arguments have been mostly pushed to the background in the cases brought by private litigants, but each of these cases provides insights into the issues raised by these cases.
Perhaps the most noteworthy background check case brought by a private litigant is *Waldon v. Cincinnati Pub. Sch.*, 89 F. Supp. 3d 944 (S.D. Ohio 2015). *Waldon* essentially tests the argument made by Texas and other critics of the EEOC Guidance that preventing certain employers from conducting background checks could lead to serious conflict with state law. In *Waldon*, two African-American employees of the Cincinnati Public School system were terminated after the Ohio legislature passed a law requiring all school districts to conduct criminal background checks on their employees and terminate those convicted of certain crimes. *Id.* at 946. The plaintiffs, argued that this policy had a disparate impact on African-American employees in the district, as evidenced by the fact that all of the non-licensed employees terminated due to the policy were African-American. *Id.* at 948. The main issue in the case was whether the policy should be judged on a district-wide, or state-wide basis. Ultimately the court agreed with the school district that the disparate impact analysis should be made at the state level because the policy was a state mandate, and therefore dismissed for a lack of state-wide evidence to support the plaintiff’s claims. *Id.* at 949. The case is now before the Sixth Circuit Court of Appeals, which will now weigh in on its first background check case since *Kaplan*.

Employees were equally unsuccessful in challenging employers’ background check policies in two other cases, though for different reasons. In *Mays v. BNSF Ry. Co.*, the court dismissed the plaintiff’s disparate impact claim after concluding that the plaintiff’s were employees of another entity, and not the defendant. 974 F. Supp. 2d 1166, 1179 (N.D. Ill. 2013). In *Washington Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*, the court granted a public employer’s motion for injunctive relief against a union that brought an arbitration claim against the employer’s use of background checks in screening potential employees. 113 F. Supp. 3d 121, 127 (D.D.C. 2015). The court issued the injunction because the union could not show that any of its employees were harmed by the policy, since all of them passed through the screening and were hired. *Id.*

Ironically, the most successful case on the merits of the theory that background checks disparately impact certain protected groups of employees was filed *pro se* by a plaintiff who made claims against 16 different defendants, including a generalized conspiracy by the State of Vermont against all African-Americans. See *McCain v. United States*, No. 2:14-CV-92, 2015 WL 1221257 (D. Vt. Mar. 17, 2015). One of the many claims in *McCain* was that the retailer Kohl’s discriminated against African-American job candidates by conducting criminal background checks on all applicants. *Id.* at *17. The court found that based on the EEOC Guidance, the plaintiff had stated a plausible claim that the Kohl’s background check policy disparately impacted African-Americans. *Id.* This appears to be the only case in which a court has given deference to the EEOC Guidance. Like the BMW and Dollar General cases, *McCain* suggests an openness by at least some courts to the argument the EEOC and some private litigants are making.

Ultimately, successful litigation based on the arguments contained in the EEOC Guidance may have less of an impact on employers than other events. First, many state and local governments have recently adopted so-called “ban the box” legislation that bans the practice of requiring employees to submit to a criminal background check as a condition of employment. Such laws are likely to tamp down the growth of these practices. Second, a recent wave of Fair
Credit Reporting Act class action lawsuits against employers who have improperly gathered criminal and credit histories from third-party credit reporting agencies seems to have had a chilling effect on these practices. See Barry A. Hartstein, Rod M. Fliegel, Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment (Feb. 23, 2015), available at: https://www.littler.com/update-criminal-background-checks-impact-eeoc-v-freeman-and-ongoing-challenges-continuously-changing. Together with the EEOC’s aggressive stance against background checks, these developments could spell the end of regular use of background checks by employers.

V. IMPLICIT BIAS EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES

The social science behind so-called implicit biases – unconscious conclusions we all draw about people based on characteristics such as race and gender – has received increased attention in recent years. High-profile events such as the shooting of young African-American men such as Trayvon Martin, Eric Gardner, and Michael Brown has given research on implicit bias greater prominence in the discourse on race.

At the same time, several academics and practitioners have argued that research on implicit bias can provide valuable evidence in employment discrimination cases. These arguments are based on the belief that disparate treatment can be the result of unconscious biases, rather than conscious judgments based on race, ethnicity or gender. This has sparked a strong backlash by employers and others, who argue that the science behind implicit bias is too uncertain, and the implications of importing it into antidiscrimination law too great to justify its introduction into litigation. With much attention being paid to this topic, it seems likely that these arguments will find their way into the courtroom with greater frequency in the years to come.

A. The Theory of Implicit Bias as Evidence in Employment Discrimination Cases

Research into implicit bias developed from the study of attitudes. National Center for State Courts (NCSC), Helping Courts Address Implicit Bias, available at: http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx. Over time, researchers have found strong evidence that people harbor unconscious biases that operate without our knowledge or control. Id. Researchers have concluded that implicit bias has its roots in generalized associations that are either formed through repetitive experiences, or unique and limited experience and exposure. Erik J. Girvan, On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law, 26 Geo. Mason U. Civ. Rts. L.J. 1, 32 (2015). Such experiences can include developmental history, affective experience, observation of culture, and self-reflection. See NCSC. One common example of the type of experience that shapes our implicit biases is the routine viewing of black, but not white criminals in the media, which leads people to treat individual African-Americans as more likely to have a criminal background than an individual white person. Girvan at 32.

Researchers have found that people act on implicit biases in meaningful ways. They have found that much of a person’s mental process takes place in the cognitive unconscious, outside of the person’s awareness. Krieger & Fiske at 1030-31. The result is that people make
decisions based on implicit biases without knowing it. **Id.** at 1031. Such decisions include perception or characterization of, and behavior toward members of certain groups. **Id.** at 1032-33. In other words, people draw conclusions about individuals, and then act on those conclusions, based on unconscious ideas about the group those individuals belong to, all without any awareness that this mental action is taking place.

Much of this may seem obvious to practitioners of antidiscrimination law who have long observed the disparate treatment of individuals belonging to certain groups by seemingly well-meaning people. What makes the developments in the field of implicit bias research so interesting though is the numerous ways in which researchers have managed to measure and quantify the existence and effects of implicit bias. Perhaps the most famous measurement in this field is the Implicit Association Test (IAT), which was first introduced in 1998 by Anthony Greenwald, Debbie McGhee, and Jordan Schwartz. Anthony Greenwald, Debbie McGhee & Jordan Schwartz, *Measuring individual differences in implicit cognition: The Implicit Association Test*, 74 Journ. of Personality and Social Psychology 1464 (1998). The IAT is a computerized test that measures the test-taker’s implicit associations by having him match words and photographs of faces. See Project Implicit, available at: https://implicit.harvard.edu/implicit/iatdetails.html. By measuring how long it takes the test-taker to match so-called good words, and so-called bad words with images of faces, the IAT measures a person’s implicit biases toward the groups of people represented in the images. **Id.** The test, which is available to anybody for free online, has been taken by millions of people, and has created a significant sample size by which to judge the public’s implicit biases.

Researchers have measured implicit biases in other ways as well. For example, researchers have done physiological testing on people based on their IAT scores and their measures of explicit biases to determine the brain’s “startle response” to photographs of certain racial groups. See Krieger & Fiske at 1033. Other measurements have included sequential priming procedures measuring response times to concepts associated with negative stereotypes of certain groups, word completion games that measure how often people complete the spelling of incomplete words in stereotypic ways, and physiological testing of peoples’ heart rate and sweat production in response to exposure to members of certain racial groups. See NCSC. Researchers have used the results of all of these tests to show that implicit biases are real and play a role in peoples’ decision-making.

Implicit bias research has naturally drawn the attention of academics and practitioners in the field of employment discrimination law. Not surprisingly, many civil rights and employee advocates have cited the research as potentially useful in proving discrimination under various state and federal employment discrimination laws. See, e.g., Sabreena El-Amin, *Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?*, 2015 Harv. J. Racial & Ethnic Just. Online 1, 8 (2015); Krieger & Fiske. The most forceful and widely-cited of these arguments came from Linda Hamilton Krieger and Susan T. Fiske, who argue that “the science of implicit bias demonstrates that disparate treatment can result not only from the deliberate application of consciously endorsed prejudiced beliefs, but also from the unwitting and uncorrected influence of implicit attitudes and associations in the social-perception process.” Krieger & Fiske, 1033-34. Therefore, they argue, courts must adjust their thinking in evaluating employment discrimination claims to accommodate the research on implicit bias. **Id.** at 1062. In
making this argument, Krieger and Fiske closely examined the text of Title VII. They argue that the plain meaning of “discrimination” as used in Title VII is not limited to intentional acts, and should include unintentional discrimination the results from an employer’s implicit biases. Id. at 1055. More importantly, they argue, Congress amended Title VII in 1991, providing that an employee can prove his employer violated Title VII by demonstrating that race, color, religion, sex, or national origin was a “motivating factor” for an employment practice, and “motivating factor” is an internal mental state, which includes cognitive structures such as implicit biases. Id. at 1055-56. Under this plain meaning interpretation of the statute, they argue, an employee can prove that an employer violated Title VII by allowing his implicit biases to influence an employment practice. Id. at 1058. What Krieger and Fiske propose, in light of this conclusion, is that courts adjust the inferences they draw from certain evidence to better reflect the research on implicit bias. Id. at 1059-62. Such an adjustment to Title VII litigation would undoubtedly lead to a sea change in the way such cases are litigated.

Employer advocates are understandably troubled by this suggestion. An article by Maurice Wexler, Kate Bogard, Julie Totten, and, Lauri Damrell neatly summarizes the concerns raised by these advocates. Maurice Wexler et al., Implicit Bias Evidence and Employment Law: A Voyage into the Unknown, Bloomberg Law (July 8, 2013), available at: http://www.bna.com/implicit-bias-evidence-and-employment-law-a-voyage-into-the-unknown//, archived at http://perma.cc/R7W9-6KCB. The authors argue that although implicit bias research is important, and worth pursuing further, it has no place in today’s legal landscape because it is not a reliable measurement and has not been proven to cause explicit discrimination. Id. They argue that those who advocate for using evidence of implicit bias in employment litigation undervalue “the importance of pure human instinct, discretion, and subjectivity in making successful employment-related selection decisions and job-related business decisions.” Id. They specifically take issue with the IAT, which they describe as an unreliable measurement of implicit bias, and not predictive of explicit bias or discriminatory conduct. Id. In particular, they criticize the researchers behind the IAT for failing to control for the “infinite individual differences” in the population, and by failing to control the population it tests by allowing individuals to take the test multiple times. Id. Given this lack of reliability, the authors argue that implicit bias research, including that generated by the IAT, would not stand up to the scrutiny of evidence required by Daubert. Id.

Perhaps more importantly, the authors argue that implicit biases are essentially irrelevant to the type of conduct that is actionable under federal antidiscrimination law, which they argue requires intentional conduct. Id. They argue that the text and jurisprudence of Title VII makes it clear that only intentional conduct is actionable under the statute. Id. They criticize those who define intent to include implicit bias are confusing cause and effect. Id. Although they concede that implicit bias could have the same effect as conscious bias, they argue that there would be “substantial difficulties” in proving that implicit bias caused the challenged employment action. Id.

B. Implicit Bias in Employment Discrimination Litigation

Implicit bias has been raised in several Title VII cases in recent years. Those who argue that adverse employment actions caused by implicit bias are actionable under Title VII find
support in an older First Circuit case that does not explicitly discuss implicit bias, which was not as widely discussed at the time. In Thomas v. Eastman Kodak Co., the First Circuit held that a plaintiff can establish disparate treatment is “because of race” regardless of whether the employer consciously intended to treat employees differently, “or simply did so because of unthinking stereotypes or bias.” 183 F.3d 38, 58 (1st Cir. 1999). Advocates for considering implicit bias research in Title VII cases point to the holding of Thomas to support the argument that implicit biases can be the cause of discriminatory action even when there is no proof that an employer consciously discriminated against an employee.

Recently, litigants and courts have discussed implicit bias more openly. For example, in Kimble v. Wisconsin Dep’t of Workforce Dev., in the opinion issued at the conclusion of a bench trial, the court cited many of the researchers behind the theory of implicit bias and explained that scholars had concluded that “[i]ndividuals draw lines and create categories based in part on race, gender and ethnicity, and the stereotypes they create can bias how they process and interpret information and how they judge other people.” 690 F. Supp. 2d 765, 776 (E.D. Wis. 2010). The court found that this research supported the plaintiff’s argument that he had been unconsciously subjected to discrimination on the basis of his race, as evidenced by his supervisor having mostly ignored him for most of his tenure, and the fact that he was quickly blamed for problems before his supervisor discovered all the facts. Id. at 776-77. Citing the research on implicit bias, the court concluded that the supervisor’s behavior “may well have been because she viewed him through the lens of an uncomplimentary stereotype.” Id. at 778. Indeed, the court found that the supervisor “behaved in a manner suggesting the presence of implicit bias.” Id. Based on this conclusion, the court held that defendants discriminated against the plaintiff in violation of Title VII. Id.

Kimble is unique in that it directly addressed the viability of the theory that implicit bias alone can satisfy the causation standard for disparate treatment claims. Implicit bias is more commonly addressed in the context of evidentiary challenges to the use of expert reports authored by Dr. Anthony Greenwald, one of the creators of IAT who has also been involved in the scholarship supporting the use of implicit bias to prove discrimination in the employment context. The only case in which a plaintiff was able to convince the court to admit Dr. Greenwald’s testimony and report was Samaha v. Washington State Dep’t of Transp., No. CV-10-175-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012). In Samaha, the defendant argued that Dr. Greenwald’s testimony and report were neither relevant, nor helpful to the jury because he could not explain how specific conduct is consistent with any implicit bias, and that Dr. Greenwald could not testify as to the role implicit bias played in the defendant’s actions which were at issue in the case. Id. at *3. The plaintiff countered that Dr. Greenwald’s testimony was relevant and helpful to the jury because it would help them understand the presence of implicit bias in the employment setting, and could help counteract the jury’s own potential bias. Id. The court agreed with the plaintiff, holding that testimony regarding implicit bias is relevant to the issue of whether an employer intentionally discriminated against an employee. Id. at *4.

Two other courts have come down on the other side of this issue. In Jones v. Nat’l Council of Young Men’s Christian Associations of the United States of Am., 34 F. Supp. 3d 896 (N.D. Ill. 2014), and Karlo v. Pittsburgh Glass Works, LLC, No. 2:10-CV-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015), the courts refused to allow Dr. Greenwald to testify about
implicit bias, finding his testimony did not meet the Daubert standard. In Jones, the court rejected the plaintiff’s argument that Dr. Greenwald’s testimony was for the limited purpose of educating the jury as to general principles, instead concluding that his testimony was intended to prove causation. Jones, 34 F. Supp. 3d at 899-900. The court refused to allow Dr. Greenwald to testify on the topic of causation because it found that his methodology was too far removed from the specific facts of the case before it. Id. at 900-01. In Karlo, an age discrimination case under the ADEA, the court considered both Jones and Samaha, and found that the former was more instructive. 2015 WL 4232600, at *7. Specifically, the court found that Dr. Greenwald’s methods for applying his theories to the specific case before the court were unreliable. Id. at *7. More troublingly, to advocates of applying this research in discrimination cases, was the court’s conclusion that the IAT itself is an unreliable methodology for determining the existence of implicit bias in the general public, because Dr. Greenwald cannot establish that the group of people who have taken the test are a representative sample of the population. Id. at *8. The rulings in Jones and Karlo suggest that Maurice Wexler and his colleagues who criticized the use of implicit bias research in Title VII cases were correct in predicting that plaintiffs would have a high hurdle to clear in meeting the standard of admissibility under Daubert.

Finally, another recent case dealt more directly with the role that allegations of implicit bias should play in Title VII claims. In Wells-Griffin v. St. Xavier Univ., the plaintiff argued that circumstantial evidence that her supervisors were dismissive of her and assumed the worst of her supported her discrimination claim. 26 F. Supp. 3d 785, 793 (N.D. Ill. 2014). The plaintiff cited Kimble in support of her argument that implicit bias could cause discrimination. Id. In comparing the case to Kimble, the court found that the plaintiff had failed to do what the plaintiff in Kimble had done, which was to identify similarly situated employees belonging to other racial groups who were treated more favorably. Id. In this way, the court seemed to argue that what matters in implicit bias claims is the identification of comparators in another group that received better treatment than the plaintiff.

These cases illustrate the two primary issues that are likely to come up in almost any employment discrimination case in which the employee seeks to argue that implicit bias caused the employer to take an adverse employment action: (1) whether implicit bias alone can cause an adverse employment action; and (2) whether evidence of implicit bias is admissible at trial. As illustrated by these cases, courts are likely to come down on both sides of these issues, creating uncertainty in the world of employment discrimination. Only through continued testing of this theory in litigation are we likely to gain a better understanding of how implicit bias fits within the framework of employment discrimination law.

VI. RETALIATION CLAIMS BY EMPLOYEES TERMINATED FOR “LYING” IN INTERNAL EEO COMPLAINTS

A common fact pattern in Title VII retaliation cases involves the registering of complaints about discrimination or harassment by an employee with human resources, a subsequent investigation of those claims by the employer, the conclusion by the employer that the employee fabricated his claims, and the termination of the employee for lying. This fact pattern plays out in many forms, and in many instances leads to litigation. Such a scenario raises two related questions: (1) does the protection of Title VII extend to all EEO complaints, or just
those that are truthful; and (2) what standard of proof must an employer meet in order to conclude that an employee lied in their EEO claim to justify terminating the employee? Courts have addressed both of these questions and come to differing conclusions.

A. Do All EEO Complaints Constitute Protected Activity Under Title VII?

To make a prima facie showing of retaliation under the governing opposition clause, a plaintiff must show: (1) she engaged in statutorily protected opposition conduct; (2) that she suffered an adverse employment action; and (3) that there is “some causal relation” between the two events. Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1268 (11th Cir. 2010). Title VII’s anti-retaliation provisions cover two types of activity: opposition and participation. The opposition clause makes it unlawful for an employer to discriminate against an employee “because he has opposed any practice made . . . unlawful . . . by this subchapter.” 42 U.S.C. § 2000e-3(a). The participation clause makes it unlawful for an employer to discriminate against any employee “because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” Id. Several courts have concluded that the definition of protected activity – the first requirement in stating a retaliation claim under Title VII – differs depending on whether the case is brought under the opposition or participation clause.

Participation clause cases, in other words cases in which the plaintiff claims her employer retaliated against her for complaining about harassment or discrimination, are the ones that have caused the biggest difference in opinion. The First, Third, Sixth, Eight, and Ninth Circuits have adopted the rule that under the participation clause, a plaintiff is not required to have had a reasonable basis for the EEOC charge or to have made the charge in good faith. See Slagle v. Cnty. of Clarion, 435 F.3d 262 (3d Cir.2006) (citing case law and the EEOC Compliance Manual for the proposition “that a plaintiff is protected under the participation clause ‘regardless of whether the allegations in the original charge were valid or reasonable’ ”); Johnson v. Univ. of Cincinnati, 215 F.3d 561 (6th Cir.2000) (stating that the participation clause's protections “are not lost if the employee is wrong on the merits of the charge” or even “if the contents of the charge are malicious or defamatory”); Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir.1999) (“The underlying charge need not be meritorious for related activity to be protected under the participation clause.”) (citations omitted); Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir.1994) (“As for the participation clause, ‘there is nothing in its wording requiring that the charges be valid, nor even an implied requirement that they be reasonable.”) (citations omitted); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir.1978) (stating that it is “well settled” that the participation clause protects an employee regardless of the merits of his or her EEOC charge); Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir.1969) (fact that employee made false and malicious statements in the EEOC charge is irrelevant). Conversely, the Seventh Circuit requires that a participation clause plaintiff demonstrate that his EEO complaint was not “utterly baseless.” Mattson v. Caterpillar, Inc., 359 F.3d 885 (7th Cir.2004).

In contrast to the courts’ somewhat divergent approaches to participation clause cases, courts uniformly agree that in opposition clause cases, a plaintiff must demonstrate that he had a reasonable good faith belief that her claims or complaints had a legal basis. See, e.g., Ray v. Ropes & Gray LLP, 799 F.3d 99, 110 (1st Cir. 2015); Merritt v. Dillard Paper Co., 120 F.3d
“The opposition clause by its very nature focuses upon the motive of the employee, covering only one who ‘has opposed’ any practice which violates Title VII. By contract, the participation clause ... is not so limited.”). To summarize, most courts have adopted the rule that participation clause plaintiffs do not need to have had an objectively reasonable good faith belief that their complaints or concerns were well-founded in order to have engaged in protected activity, while opposition clause plaintiffs do.

The natural question raised by these rules is how courts should treat retaliation claims in which the employer claims the plaintiff’s original complaints were fabricated. More specifically, courts must determine whether factually-contested EEO complaints constitute protected activity. It seems quite clear that under the objectively reasonable good faith belief standard for opposition clause plaintiffs, a fabricated complaint does not constitute protected activity. See EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 (11th Cir. 2000) (“Even if false statements made in the context of an EEOC charge (per the participation clause) are protected and cannot be grounds for dismissal or discipline this extreme level of protection for untruth is not afforded to false statements made under the opposition clause.”) (citations omitted). The status of such complaints under the participation clause is not as obvious.

In Mattson, the Seventh Circuit adopted the outlier position that all plaintiffs in Title VII retaliation cases, regardless of whether their claims are made under the opposition clause or the participation clause, must at least not be “utterly baseless.” 359 F.3d at 891. In that case, the plaintiff complained to the HR department that his supervisor had sexually harassed him by allowing her breasts to brush against his arm, but later said he did not know if it was intentional, and a coworker told company investigators that the plaintiff has said he needed to do whatever it took to get rid of the supervisor. Id. The court found that his original EEO complaint was so utterly baseless that it did not constitute protected activity.

In circuits that have not adopted the same standard for participation clause plaintiffs as the Seventh Circuit, the results have been more varied. In Calhoun v. EPS Corp., the defendant argued that the plaintiff had not engaged in protected activity because her original EEO complaint was of questionable veracity, but the court held that the plaintiff “engaged in protected participation when she filed the EEO complaint regardless of its veracity or merit.” 36 F. Supp. 3d 1344, 1360 (N.D. Ga. 2014). Recently, the First Circuit suggested, without deciding, that in order to engage in protected activity, a plaintiff must at least make EEO complaints “in good faith,” though not with an objectively reasonable belief in the unlawfulness of the conduct. Ray, 799 F.3d at 111.

These cases demonstrate three approaches to the question of what constitutes protected activity under the participation clause when the underlying complaint is of questionable veracity: (1) the complaint must meet the same standard that applies to opposition clause cases; (2) the plaintiff must demonstrate that the complaint was at least made in good faith; and (3) any EEO complaint, true or not, constitutes protected activity. There does not seem to be a clear consensus on this question, and few courts have ruled definitively on it.
B. The Standard for An Employer’s Conclusion that an Employee Lied in Her EEO Complaint

Perhaps the more complicated question is what an employer must do before concluding that an employee who makes an EEO complaint lied, and terminating that employee. Once a plaintiff states a prima facie case of retaliation, the burden shifts to the employer to assert a legitimate, nondiscriminatory reason for the adverse employment action. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000). At least five courts have had to address the question of when an employer’s conclusion that an employee fabricated an EEO complaint constitutes a “legitimate, nondiscriminatory reason” for the adverse employment action, and have taken different approaches.

In Gilooly v. Missouri Dep't of Health & Senior Servs., the Eighth Circuit addressed this issue in the context of a claim that an employee was terminated after filing a sexual harassment complaint with her employer when the employer determined she was lying based on statements by other witnesses who contradicted the employee’s story. 421 F.3d 734, 740 (8th Cir. 2005). The employer in that case had no direct evidence that the employee had lied, but rather found the witnesses who contradicted her story more credible. Id. The Eighth Circuit held that under such circumstances, the employer had not stated a legitimate, non-discriminatory reason for terminating the plaintiff. Id. at 740-41. The court identified the tension created by such cases:

It cannot be the case that any employee who files a Title VII claim and is disbelieved by his or her employer can be legitimately fired. If such were the case, every employee could be deterred from filing their action and the purposes of Title VII in regards to sexual harassment would be defeated. However, it also cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis in fact. Id. at 740. In this case, the Eighth Circuit found, the employer’s conclusion that the employee had lied was not well-founded because it did not independently verify the statements of witnesses who contradicted the employee’s claims. Id. at 740-41. The court explained that the task of assessing witness credibility belongs to fact-finders in courts, and that employers cannot engage in this process to justify the termination of an employee who files a questionable EEO complaint. Id. at 741.

In a more recent case, the U.S. District Court for the District of Arkansas refused to recognize an employer’s belief that the plaintiff’s underlying EEO complaint was fabricated as a legitimate, non-discriminatory reason for terminating her. See Stoner v. Arkansas Dep. of Correction, 983 F. Supp. 2d 1074, 1101-02 (E.D. Ark. 2013). In Stoner, the employer relied on its interpretation of video surveillance footage of the incident that the employee claimed amounted to sexual harassment to conclude that the employee was lying when she said a coworkers advances were unwelcome. Id. at 1101. The court explained that in concluding that an employee is lying about harassment, an employer must have “a clear record of deception” and
independently verifiable evidence confirming a good faith belief that the employee lied. *Id.* at 1101. In the case of the surveillance footage, the court held that it was open to interpretation, and thus did not constitute sufficient evidence for the employer to draw the conclusion it did. *Id.* at 1101-02.

In *Parker v. Side by Side, Inc.*, the court found that an employer’s conclusion that an employee’s EEO complaint was fabricated was a legitimate, nondiscriminatory reason for terminating the employee under Title VII. 50 F. Supp. 3d 988, 1018-19 (N.D. Ill. 2014). The plaintiff argued that the employer’s conclusion was based simply on its disbelief of his complaints. *Id.* at 1018. The court found that because the plaintiff refused to cooperate in the employer’s investigation of his complaint, the employer was justified in concluding that the employee was lying. *Id.* at 1019.

One of the more influential cases in this area is the Eleventh Circuit’s decision in *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000). In that case, the plaintiff brought a retaliation claim under the opposition clause after she was terminated following her statement to an HR manager investigating a coworker’s sexual harassment claim. *Id.* at 1173. Other employees denied the accusations the plaintiff had made in her statement, and based on those denials, the employer concluded the plaintiff had lied. *Id.* The plaintiff, represented by the EEOC, argued that to avoid liability under Title VII, the employer must prove that the employee actually lied. *Id.* at 1176. The court disagreed, holding that the employer only needed to have a good faith belief that the employee lied in order to justify terminating her. *Id.*

Recently, the EEOC filed an appellate brief in the Eleventh Circuit on a case similar to *Total System Services*. See [http://www.eeoc.gov/eeoc/litigation/briefs/jiudicy.html](http://www.eeoc.gov/eeoc/litigation/briefs/jiudicy.html). In *EEOC v. Jiudicy*, the plaintiff was terminated after accusing her supervisor of making lewd phone calls to her. *Id.* After she complained to a different supervisor, her employer investigated the complaint by mostly looking into her professional and sexual history to determine whether she was trustworthy. *Id.* When they concluded she was not – a conclusion with little factual support – they terminated her. The district court held that her termination was based on a legitimate, nondiscriminatory reason, and the EEOC appealed on her behalf. In its brief the EEOC argued that *Total System Services*, the case the district court relied upon in finding for the defendant, is no longer good law. They argued that the Supreme Court had rejected the rationales behind *Total System Services* by concluding that:

(1) the legality of an adverse employment action turns on whether the action would dissuade a reasonable worker from complaining about unlawful discrimination; (2) the antiretaliation provision must be construed in a way that promotes *Faragher* and *Ellerth*’s reporting regime; and (3) a broad construction of the antiretaliation provision is needed to do so.

*Id.* The EEOC said that although false allegations are not protected activity, the question of whether an employer believed that the employee was lying must go to a jury. *Id.* Only when an employer’s proof is supported by independent corroboration, the EEOC argued, will its conclusion that the employee lied constitute a legitimate, nondiscriminatory reason for taking an adverse employment action against the employee. *Id.* The Eleventh Circuit did not have the
opportunity to rule on the EEOC’s arguments because the case settled out of court. See Equal Employment Opportunity Commission, Jiudicy to Pay $150,000 to settle EEOC Retaliation Suit (February 5, 2014), available at: http://www.eeoc.gov/eeoc/newsroom/release/2-5-14b.cfm.

As these types of cases are increasingly common, it seems likely that the EEOC will have another opportunity to make its case to the courts. Over time, the courts will have to determine what standard of proof an employer must meet in order to assert that its belief that an employee fabricated an EEO claim constitutes a legitimate, nondiscriminatory reason for taking an adverse employment action against her. Until that question is answered more clearly, employee and employers will continue to deal with the uncertainty created by this unsettled legal question.