

EEO Academy 2015

**Recent Decisions Affecting Workplace
Discrimination Complaints and Investigations**

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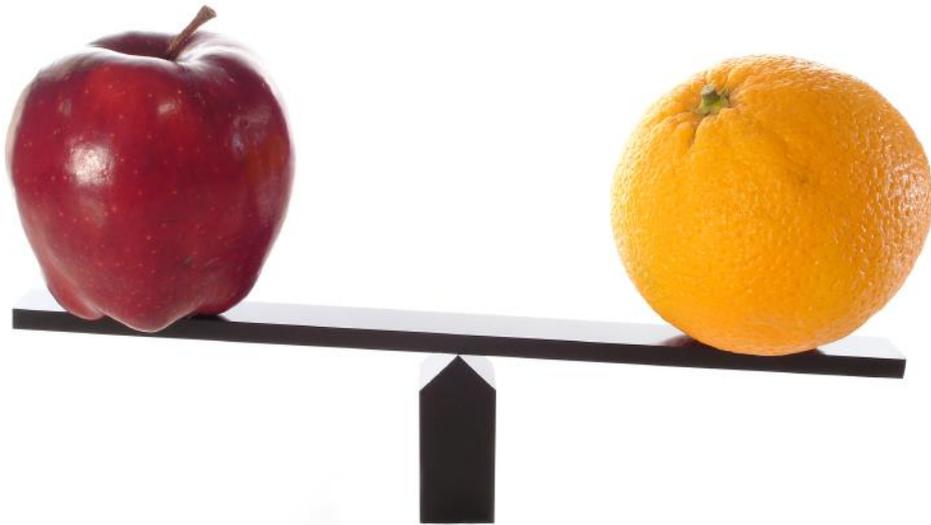
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Griffin v. Finkbeiner

(6th Cir. 2012)

- ⦿ Blacks lack parenting skills
- ⦿ Black men cannot hold jobs or take care of their families
- ⦿ Black women just want to have babies and collect welfare
- ⦿ Black ministers are pimps
- ⦿ Black employees lack drive and professionalism
- ⦿ Referred to the Fire Chief as “King Kong”
- ⦿ Called manager “a black stain on the glass ceiling”

COMPARABLES



Louzon v. Ford

(6th Cir. 2013)

- ⦿ Same supervisors not required for comparables
- ⦿ Artificially limiting pool of comparators criticized

Bobo v. UPS, Inc.

(6th Cir. 2012)

- ⦿ USERRA and race case
- ⦿ Files of Caucasian supervisors assigned far fewer trainees sought
- ⦿ Files of Caucasian and non vet supervisors who falsified driver safety evals or other safety records sought
- ⦿ Almost all the other supervisors had different managers and many worked in other cities and locations

Orton-Bell v. Indiana

(7th Cir. 2014)

Orton–Bell and Ditmer are primarily differentiated by the fact that she was a counselor of two years and he was a twenty-five-year veteran of the DOC's Custody branch. But this cuts both ways.

...

... judging comparators is a commonsense inquiry...

Shazor v. Professional Transit Management, Ltd., (6th Cir. 2014)

African American women are subjected to unique stereotypes that neither African American men nor white women must endure *** If a female African American plaintiff (for example) establishes a sufficient foundation of discrimination, a defendant cannot undermine her prima facie case by showing that white women and African American men received the same treatment. The realities of the workplace, ..., will not allow such an artificial approach.

Other Acts

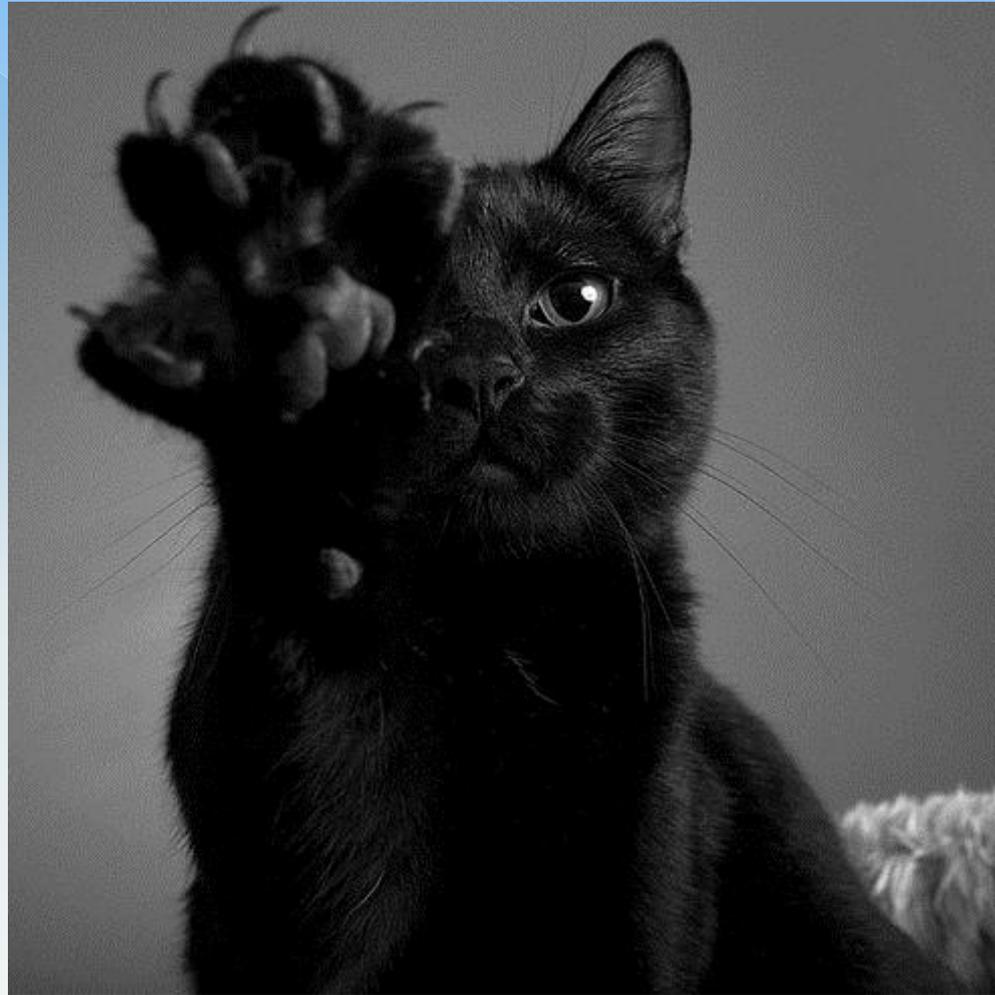


Griffin v. Finkbeiner

(6th Cir. 2012)

- ⦿ Temporal proximity
- ⦿ Geographic proximity
- ⦿ Knowledge of the other decisions
- ⦿ Nature of retaliation in each instance
- ⦿ Common policies or practices involved
- ⦿ Personnel process and participants involved
- ⦿ Whether employees are similarly situated in other relevant respects

Cat's Paw Since *Staub* (2011)



Vance v. Ball State Univ.

(7th Cir. 2013)

“If an employer does attempt to confine decision making power to a small number of individuals, those individuals... will likely rely on other workers who actually interact with the affected employee. ***
Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.”

“STRAY” REMARKS AFTER *STAUB*



Griffin v. Finkbeiner

(6th Cir. 2012)

- ⦿ Even if about other employees; that only affects whether remarks are direct evidence
- ⦿ Considering Mayor's position and influence, statements constitute circumstantial evidence given other evidence of pretext

Chattman v. Toho Tenax America

(6th Cir. 2012)

- ⦿ Employee terminated for “horse play” by upper level managers
- ⦿ Final decision made by upper level managers
- ⦿ White HR director allegedly made racist statements including use of the “n word”
- ⦿ 6th Cir. held that statements were direct evidence of racial bias to be imputed to ultimate decision makers

- ◎ ***Sloban v. Mahoning Youngstown Community Action Partnership (6th Cir. 2015)*** - “When they get old, they should get out of here. I don’t know why they would stay. I don’t know why they won’t retire and just go. I don’t know why they would want to stay.”
- ◎ ***Sampson v. Sisters of Mercy of Willard, Ohio (W.Dist. Ohio 2015)*** - “too old to cry”
- ◎ ***Tolbert v. Smith (2nd Cir. 2015)*** - “Do you only know how to cook black, or can you cook American too?” “how [she] expected to learn if all [she] was learning to cook was black food.” “black kids can't learn in a cooking class because all they want to do is eat.”
- ◎ ***Boyer-Liberto v. Fontainebleau Corp (4th Cir. 2015)*** - “Porch Monkey” 2 times within 24 hours
- ◎ ***Sims v. MVM, Inc. (11th Cir. 2013)*** – “old and slow,” and “too slow.”

Pretext



“[One] can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as “affirmative evidence of guilt.”

- ⦿ that the proffered reasons had no basis in fact,
- ⦿ that the proffered reasons did not actually motivate his discharge, or
- ⦿ that they were insufficient to motivate discharge.”

Castro v. DeVry Univ., Inc.

(7th Cir. 2015)

- ⦿ DeVry told EEOC that key manager recommending termination did not know about employee's discrimination complaint
- ⦿ Evidence indicated Key Manager did know about complaint

- ⦿ ***Moran v. Al Basit LLC (6th Cir., 2015)*** – Court holds plaintiff’s testimony alone sufficient in FLSA case
- ⦿ ***Durukan America, LLC v. Rain Trading, Inc. (7th Cir. 2015)*** - long ago buried-or at least tried to bury-the misconception that uncorroborated testimony ... cannot prevent summary judgment because it is ‘self-serving.’
- ⦿ ***Tolan v. Cotton (Supreme Court 2014)*** – 5th Cir. criticized for disregarding plaintiff’s testimony and crediting police testimony in police shooting case
- ⦿ ***Jacobs v. N.C. Administrative Office of the Courts (4th Cir. 2015)*** – *Tolan* applied to reverse trial courts extensive fact finding in favor of employer



YUP, STRAW WILL DO THAT TO YOU.

Burrage v. U.S.

(Supreme Court 2014)

- ⦿ “because,” ... “require[s] proof that the desire to retaliate **was [a] but-for cause of the challenged** employment action.” *Nassar, supra*.
- ⦿ Relying on dictionary definitions of “[t]he words ‘because of’ ”... we held that “[t]o establish a disparate-treatment claim ... a plaintiff must prove that age was [a] ‘but for’ cause of the employer's adverse decision.” *Gross v. FBL Financial Services, Inc.*

Burrage v. U.S.

(Supreme Court 2014)

- ⦿ Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run.
- ⦿ It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game.

Burrage v. U.S.

(Supreme Court 2014)

- ◎ The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back.

Pryor v. United Air Lines, Inc.

(4th Cir. 2015)



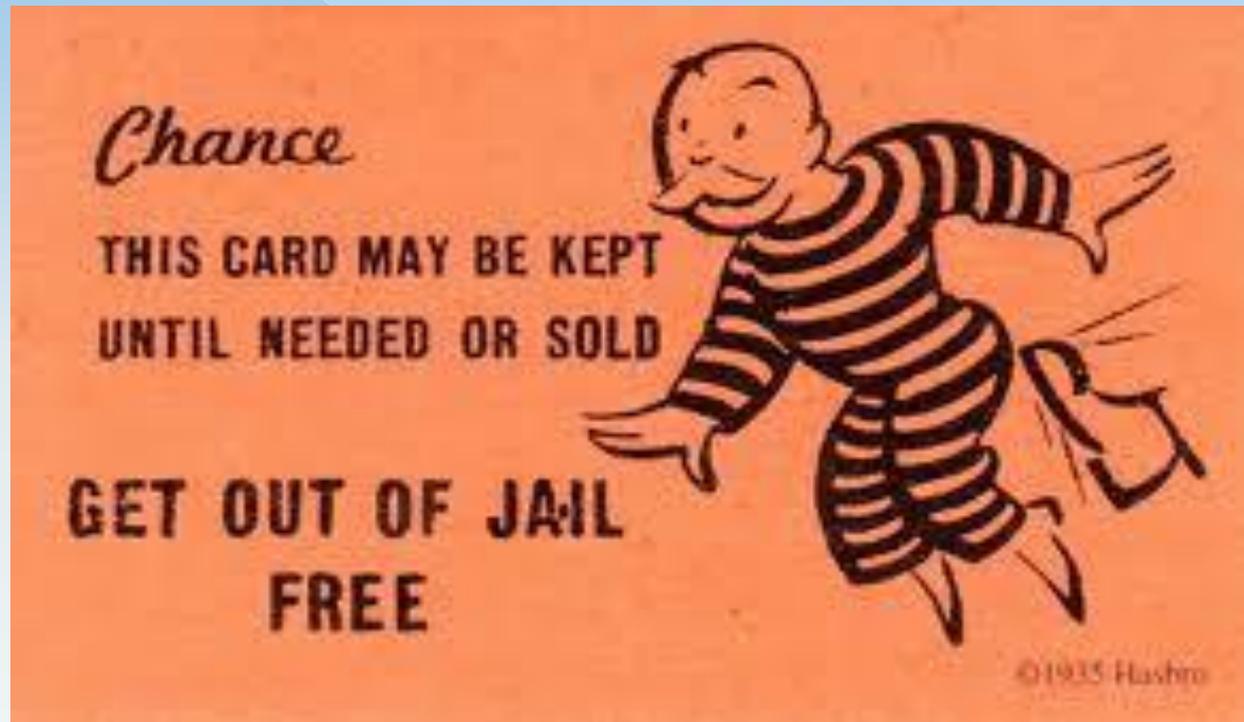
Pryor v. United Air Lines, Inc.

(4th Cir. 2015)

- ⦿ Didn't follow company procedure
- ⦿ Prior rumors about black flight attendants and 2 racist apartment ads unreported
- ⦿ No investigation of first anonymous racist threat
- ⦿ Second identical threat largely uninvestigated, no cameras placed
- ⦿ 9 other attendants and employees received threats

Hauser v. Dayton Police Department

(Supreme Court 2014)



Ohio Revised Code 4112.02(J)

- ⦿ to aid, abet, incite, compel, or coerce the doing of any act
- ⦿ to obstruct or prevent any person from complying with this chapter
- ⦿ to attempt directly or indirectly to commit any act declared an unlawful discriminatory practice.

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