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FEDERAL LAW EMPLOYMENT ISSUES

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6-1 COMMON ELEMENTS

6-1.01 In General

While elements of the various federal employment discrimination laws vary, some aspects of the laws are substantially similar, if not identical. In most cases, administrative procedures before the Equal Employment Opportunity Commission (EEOC) are required before civil actions can be filed. The standard of proof for what the Supreme Court has called “status-based discrimination” is generally the so-called *McDonnell Douglas* proof scheme or mixed motive proof scheme. The claim of retaliatory action by the employer for assertion of federal employment rights is similarly treated for the different causes of action but has a different proof scheme than for the status-based claims. See *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517 (2013), discussed in section [6-1.04\(a\)\(2\)](#).

6-1.02 Administrative Exhaustion

The administrative exhaustion requirements for claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and Title I of the Americans with Disabilities Act of 1990 (ADA) are virtually the same. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 108 S. Ct. 1666 (1988); 42 U.S.C. § 12117. To maintain a federal law employment discrimination lawsuit, the employee must first exhaust administrative remedies by filing a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d) (300 days if the employee has filed a charge with a state or local deferral agency authorized to grant or seek relief); *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134 (4th Cir. 2007). By virtue of the work-sharing agreement between the EEOC and the Virginia Human Rights Council (VHRC), filing the claim with the EEOC constitutes filing with the VHRC such that the 300-day period applies and the sixty-day deferral period is waived. *Tinsley v. First Union Nat’l Bank*, 155 F.3d 435 (4th Cir. 1998); *Puryear v. Cnty. of Roanoke*, 214 F.3d 514 (4th Cir. 2000); *Gilliam*, *supra*.

A failure by the plaintiff to exhaust administrative remedies concerning a claim deprives federal courts of subject matter jurisdiction over the claim. *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297 (4th Cir. 2009). A court retains jurisdiction over exhausted, yet untimely filed, claims. *Hentosh v. Old Dominion Univ.*, 767 F.3d 413 (4th Cir. 2014).

An EEOC regulation, 29 C.F.R. § 1601.12(b), that allows relation back of an untimely sworn statement to a timely unsworn statement is within the agency’s authority and is

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consistent with the language of the applicable statute, 42 U.S.C. § 2000e5(b); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 122 S. Ct. 1145 (2002), *overruling* 228 F.3d 503 (4th Cir. 2000). In *Edelman*, the U.S. Supreme Court overruled the Fourth Circuit, which had held that a charge must be verified within the limitations period. On remand, the Fourth Circuit held that the untimely sworn statement can constitute a charge even if the EEOC fails to treat it as such, because the unsworn statement met all the substantive requirements of a "charge" under the statute and the plaintiff could not be charged with the errors that led to the EEOC's failure to recognize it as a charge. However, the court of appeals went on to hold that the untimely sworn statement cannot verify issues raised in the earlier unsworn statement but not reasserted in the subsequent sworn statement. *Edelman*, 300 F.3d 400 (4th Cir. 2002).

The EEOC does not have the authority to reconsider a withdrawn charge once the EEOC has accepted the withdrawal of the charge and terminated proceedings. *Lewis v. Norfolk S. Corp.*, 271 F. Supp. 2d 807 (E.D. Va. 2003). In at least one circumstance, the U.S. Supreme Court has concluded that a completed EEOC intake questionnaire and affidavit of the charging party requesting relief is sufficient to satisfy the requirement for filing a "charge" of discrimination. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 128 S. Ct. 1147 (2008); *cf. Thorington v. Sally Beauty Supply LLC*, No. 1:16cv626 (E.D. Va. May 10, 2017) and *Bland v. Fairfax Cnty.*, No. 1:10cv1030 (E.D. Va. May 3, 2011) (both holding that affidavit not required when intake questionnaire indicates intent to file a charge and provides for sharing of information with the employer) *with Graves v. Indus. Power Generating Corp.*, No. 3:09-cv-00717 (E.D. Va. Jan. 5, 2011) (sworn affidavit required), *summarily aff'd*, No. 11-1130 (4th Cir. July 8, 2011).

6-1.02(a) Standing

Construing Title VII, the Supreme Court held that the entitlement of an "aggrieved" person to sue does not extend as far as minimal Article III standing. But the Court did not adopt a narrow reading of standing either. Adopting its construction of the Administrative Procedure Act, the Court held that Title VII standing (and presumably all other employee protection statutes) is met when the plaintiff falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for the plaintiff's complaint. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863 (2011) (fired employee who was fiancé of employee who filed sex discrimination charge could assert retaliation claim). Article III standing requires only an allegation of injury in fact, causation, and redressability. Thus, the district court erred when it dismissed the plaintiff's Title VII and ADEA claims for lack of standing, finding her resignation did not constitute an adverse employment action, because it improperly intertwined the standing analysis with the merits of the case. *DiCocco v. Garland*, 52 F.4th 588 (4th Cir. 2022).

6-1.02(b) Accrual

The filing period runs from the time the employee is informed of the allegedly discriminatory employment decision. *Del. State Coll. v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980). The limitations period is not tolled because the employee may have continued to receive benefits after that date. *Price v. Litton Bus. Sys., Inc.*, 694 F.2d 963 (4th Cir. 1982); *see Standard v. HITT Contracting Inc.*, No. 1:16cv166 (E.D. Va. Apr. 14, 2016) (accrual occurred when told of termination date, even though termination date was three years away); *Lewis v. Norfolk S. Corp.*, 271 F. Supp. 2d 807 (E.D. Va. 2003) (accrued date was when "compelled" to submit retirement notice, not last date of employment); *Saffell v. State Farm Mut. Auto. Ins. Co.*, 202 F. Supp. 2d 475 (E.D. Va. 2002) (accrual date was when the employee was told of eventual termination even though termination occurred fifteen months later). In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002), the Supreme Court noted that there may be circumstances where it will be difficult to determine when accrual occurs. The Court recognized as an issue, but did not resolve, whether with a hostile work environment claim the time begins to run when an injury occurs as opposed to when an injury reasonably should have been discovered. The Court recognized that an

unlawful employment practice cannot be said to occur on a discrete day but occurs over a series of days or years. The Court held “so long as an act contributing to that hostile environment takes place within the statutory time period,” it is permissible to consider behavior outside the 300-day period.²

As the cause of action for a constructive discharge case is not “complete and present” until the employee actually resigns, the exhaustion limitations period runs from the date of resignation, not the last date of the employer’s alleged discriminatory actions. *Green v. Brennan*, 578 U.S. 547, 136 S. Ct. 1769 (2016).³ The Court also stated that constructive discharge is a separate claim, not just a damage enhancement for an employment discrimination claim. The date of accrual is the date definite notice of resignation is given, not the last day of work.

6-1.02(c) Tolling

The failure to timely file does not deprive the court of subject matter jurisdiction, thus the filing period is subject to the equitable doctrines of estoppel, waiver, and tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S. Ct. 1127 (1982); *Hentosh v. Old Dominion Univ.*, 767 F.3d 413 (4th Cir. 2014); *Greene v. Whirlpool Corp.*, 708 F.2d 128 (4th Cir. 1983); *Howze v. Va. Polytechnic*, 901 F. Supp. 1091 (W.D. Va. 1995). Such doctrines are to be applied sparingly.

The Fourth Circuit has further explained the rule by holding that before the filing period can be declared tolled, the plaintiff must demonstrate that his or her employer engaged in affirmative misconduct designed to mislead the employee and prevent him or her from complying with the deadline. *Weick v. O’Keefe*, 26 F.3d 467 (4th Cir. 1994) (employee justifiably relied on misrepresentations of federal employer’s EEO officers that the matter giving rise to her complaint had been resolved; filing period tolled); *Felty v. Graves-Humphreys Co.*, 785 F.2d 516 (4th Cir. 1986), appeal after remand, 818 F.2d 1126 (4th Cir. 1987) (employer’s act in offering employee a generous severance package conditioned upon employee’s agreement not to discuss his impending discharge with others held a potentially powerful inducement luring an older employee into failing to defend his rights; those circumstances could support equitable tolling of the filing period).

Further, in *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992), the Fourth Circuit held that an employee who reasonably relies on erroneous EEOC correspondence and delays filing a subsequent suit because of that reliance is entitled to equitable tolling of the filing period. See *Baradell v. Bd. of Soc. Servs. Pittsylvania Cnty.*, 970 F. Supp. 489 (W.D. Va. 1997) (ADA claim) (deadline for filing a charge with EEOC equitably tolled when EEOC’s actions, not plaintiff’s, caused delay in filing).

In another example, the federal district court in *Stafford v. Radford Community Hospital, Inc.*, 908 F. Supp. 1369 (W.D. Va. 1995), *aff’d*, 120 F.3d 262 (4th Cir. 1997), found that the employer’s affirmative misrepresentation to the discharged employee that her position was being eliminated, so that she would not know of the subsequent replacement of that employee by a younger worker in violation of the ADEA, acted to equitably toll the filing period for the discharged employee’s EEOC claim. *But see Olson v.*

² The Fourth Circuit held in *Gilliam v. South Carolina Department of Juvenile Justice*, 474 F.3d 134 (4th Cir. 2007), that the continuing violation rule did not apply if the incident occurring during the 300-day period viewed in isolation did not constitute a Title VII violation. See *Lewis v. City of Chicago*, 560 U.S. 205, 130 S. Ct. 2191 (2010) (Title VII plaintiff must show a “present violation” within the limitations period, but what is required depends on the type of discriminatory claim asserted).

³ Although this case involved an EEOC regulation applicable to federal employees only, the Court noted that the EEOC treats the federal and non-federal employee limitations periods as identical in operation.

Mobil Oil Corp., 904 F.2d 198 (4th Cir. 1990) (court found that plaintiff had already reached the conclusion during the limitations period that he was the victim of age discrimination).

While an employee's mere ignorance of the provisions of the ADEA is not sufficient reason for equitable tolling of the filing period, the employer's failure to post notice of those rights can result in tolling. *Fulton v. NCR Corp.*, 472 F. Supp. 377 (W.D. Va. 1979).

A circuit court held that the limitations period of the Federal Labor Standards Act (FLSA) could not be equitably tolled pursuant to Virginia's tolling statute for nonsuits. *Marston v. Weaver*, 69 Va. Cir. 301 (Rockingham Cnty. 2005).

6-1.02(d) Continuing Violation

The limitations period may also be extended in cases where the discrimination is a "continuing violation." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885 (1977); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992). The Supreme Court set forth the requirements for determining if a continuing violation exists in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002) (Title VII claim), distinguishing between claims for discrete acts and claims for hostile environment. Typically, for discrete acts such as termination, failure to promote, denial of transfer, refusal to hire, or payment discrimination, only incidents that take place within the timely filing period are actionable. *Id.*; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007) (holding that a sex discrimination plaintiff must file a charge under Title VII within 180/300 days, as applicable, of the allegedly discriminatory pay decision and that subsequent paychecks giving effect to the unlawful pay decision do not trigger a new Title VII filing period).⁴ For hostile environment claims, provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. See *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208 (4th Cir. 2016) (also holding that the continuing violations doctrine applies to 1981 claims); *Gilliam v. S. C. Dep't of Juvenile Justice*, 474 F.3d 134 (4th Cir. 2007); *White v. BFI Waste Servs., LLC*, 375 F.3d 288 (4th Cir. 2004).

A plaintiff who does not file a timely charge challenging the *adoption* of an employment policy may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice as long as each of the elements of a disparate impact claim is alleged. *Lewis v. City of Chicago*, 560 U.S. 205, 130 S. Ct. 2191 (2010). Although the unanimous Court acknowledged that employers may face new disparate impact suits for practices they have used regularly for years, barring the cause of action would result in allowing employers to continue an unconstitutional practice with impunity.

6-1.02(d)(1) Discrete Acts

Discrete discriminatory or retaliatory acts (such as termination, failure to promote, denial of transfer, payment discrimination, or refusal to hire) are not actionable if time barred, even when they relate to acts alleged in timely filed charges. For example, when an alleged discriminatory denial of tenure was time barred, the subsequent non-tenured employment of the plaintiff and then termination did not justify consideration of the tenure denial claim.

⁴ That principle no longer applies, however, to pay discrimination claims. With the 2009 enactment of the Lilly Ledbetter Fair Pay Act (FPA), (Public Law No. 111-2), Congress reacted to the Supreme Court's *Ledbetter* decision by amending Title VII, the ADEA, the ADA, and the Rehabilitation Act to extend the statutory limits for the filing of claims in order to reach every occurrence of a reoccurring, unlawful employment practice such as the periodic issuance of paychecks alleged to be low (or lower than others) on account of discrimination in pay practices. Thus, a plaintiff alleging pay discrimination based on any Title VII protected characteristic, or on age or disability, files a timely administrative charge if it is filed with 180/300 days of receiving a paycheck or other benefit allegedly affected by past discrimination in the setting of the pay rate or benefit criteria. See *Taylor v. Millennium Corp.*, No. 1:15cv1046 (E.D. Va. Mar. 4, 2016) (FPA does not operate to make long expired discrete acts of discrimination timely merely because they somehow touch on pay).

See *Del. State Coll. v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980). Each discrete act starts a new clock for filing charges alleging that act as discriminatory. See *Lewis v. Norfolk S. Corp.*, 271 F. Supp. 2d 807 (E.D. Va. 2003) (discrete acts are to be construed broadly to limit the extension of the statute of limitations). The existence of past acts and the employee's prior knowledge of their occurrence, however, do not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim. The value of such evidence is not to show mere continuity but instead, whether any present violation exists. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Coleman v. Masonic Home of Va.*, No. 3:12cv682 (E.D. Va. Jan. 15, 2013), *aff'd*, 557 F. App'x. 247 (2014).

6-1.02(d)(2) Hostile Work Environment

In contrast, a hostile environment claim by its nature involves repeated conduct and cannot be said to have occurred on a particular day. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. See *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208 (4th Cir. 2016) (a discrete act, even if independently actionable, can be part of a discriminatory pattern of conduct); *White v. BFI Waste Servs.*, 375 F.3d 288 (4th Cir. 2004) (acts occurring before time limitation not barred because alleged hostile environment acts extended to period within time limitations). *But see Reeves v. Virginia*, No. 2:02cv00020 (W.D. Va. Jan. 9, 2003) (time barred because no violation occurred within filing period), *aff'd*, No. 03-1177 (4th Cir. May 20, 2003); *Taylor v. Millennium Corp.*, No. 1:15cv1046 (E.D. Va. Mar. 4, 2016) (subsequent paychecks do not extend limitations period for discrimination claims other than for the Equal Pay Act). Moreover, it is irrelevant for purposes of the limitations period when an employee realizes (or should have realized) that the cumulative conduct is actionable. An unreasonable delay in filing a charge is relevant, however, to the available defense of laches, which requires a showing of lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense. The Court in *National Railroad* declined to state how, or how much, prejudice must be shown and the consequences of establishing laches.

6-1.02(e) Investigation and Right to Sue

After notice to the employer, the EEOC will investigate the charge to determine if there is reasonable cause to believe that the charge is true. See *EEOC v. Washington Suburban Sanitary Commission*, 631 F.3d 174 (4th Cir. 2011) for an extensive discussion of legislative immunity and the subpoena power of the EEOC. See also *EEOC v. Randstad*, 685 F.3d 433 (4th Cir. 2012) (EEOC has wide discretion in determining the breadth of its investigation). If reasonable cause does not exist, the EEOC will dismiss the charge and issue a "notice of right to sue" letter to the complainant in Title VII cases. While the ADEA does not require that a potential plaintiff obtain a right-to-sue letter before filing litigation, 29 U.S.C. § 626 imposes a sixty-day waiting period after the filing of a claim with EEOC before filing suit.

In cases where reasonable cause is found, the EEOC must attempt to resolve the matter through conciliation. The duty of the EEOC to attempt conciliation is mandatory and a precondition to filing a lawsuit. At a minimum, the EEOC must inform the employer about the specific discrimination allegation, describing the employee's charge and which employees (or class of employees) have suffered. The EEOC must try to engage the employer in a discussion (oral or written) in order to give the employer a chance to remedy the allegedly discriminatory practice. A sworn affidavit from the EEOC stating that it has performed these obligations will normally suffice to show that it has met the conciliation requirement. If the employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the fact-finding necessary to resolve that limited dispute. The aim of such judicial review is to verify that the EEOC actually tried to conciliate

a discrimination charge. If the EEOC failed to do so, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 135 S. Ct. 1645 (2015). If conciliation with a political subdivision fails, the case is referred to the Attorney General for possible legal action.

If a charge has not been resolved after 180 days, a Title VII complainant may request a notice of right-to-sue letter. Once the EEOC has issued the right-to-sue letter or notified the complainant of the termination of proceedings, the employee has a ninety-day period to file a claim in court. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 629(e); *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993); *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652 (4th Cir. 1987). In its discretion, the court may appoint legal counsel to represent the employee. *Young v. K-Mart Corp.*, 911 F. Supp. 210 (E.D. Va. 1996). The Fourth Circuit has held that the 180-day waiting period is not a jurisdictional requirement but a procedural rule. *Stewart v. Iancu*, 912 F.3d 693 (4th Cir. 2019).

An EEOC regulation (29 C.F.R. § 1601.28(a)(2)) allows the EEOC to issue a right-to-sue letter prior to the expiration of 180 days if the EEOC finds it is probable that it will not complete administrative processing of the charge within 180 days. District courts in Virginia are split as to whether the regulation goes beyond EEOC authority such that a right-to-sue letter cannot be issued before 180 days have passed. See *Bryant v. Dan River Inc.*, 209 F. Supp. 2d 609 (E.D. Va. 2002) (nothing in statute requires wait of 180 days); *West v. Merillat Indus.*, 92 F. Supp. 2d 558 (W.D. Va. 2000) (premature issuance allowed, noting split in decisions); *Marston v. AT&T*, No. 3:02cv516 (E.D. Va. Oct. 23, 2002) (same), *subsequent summary judgment summarily aff'd*, No. 03-1539 (4th Cir. Feb. 13, 2004); *Taylor v. Cardiology Clinic Inc.*, No. 4:14cv46 (W.D. Va. Feb. 24, 2015) (EEOC required to investigate for at least 180 days; regulations exceed agency authority); *Meredith v. Nat'l Bus. Coll. Corp.*, No. 97-0031-R (W.D. Va. July 28, 1997) (exceeds EEOC authority). Even if a plaintiff has not received the right-to-sue letter, he may file in federal court if he is "entitled" to receive the letter. *Veliainov v. P.S. Bus. Parks*, 857 F. Supp. 2d 589 (E.D. Va. 2012) (180 days had passed without action by the EEOC, letter requested by plaintiff but not received before filing suit).

To be granted equitable tolling from the ninety-day period, the plaintiff has the burden of showing that (1) he was induced or tricked by the employer's misconduct to allow the filing deadline to pass, or (2) "extraordinary circumstances" beyond the plaintiff's control prevented the timely filing. *Blakes v. Gruenberg*, No. 1:14cv1652 (E.D. Va. Dec. 18, 2015). The ninety-day period in which to file a claim after receipt of the right-to-sue letter is not tolled by the pendency of a timely filed suit that is voluntarily dismissed under Fed. R. Civ. P. 41(a). *Neal v. Xerox Corp.*, 991 F. Supp. 494 (E.D. Va.), *aff'd*, 155 F.3d 560 (4th Cir. 1998). The ninety-day period does not run from the date of actual receipt of the right-to-sue letter; if there is no evidence of the date the letter was received at the address, the presumption is that it was received three days after it was mailed. *Scott v. Hampton City Sch. Bd.*, No. 4:14cv128 (E.D. Va. Apr. 27, 2015); *Beale v. Burlington Coat Factory*, 36 F. Supp. 2d 702 (E.D. Va. 1999); *accord Taylor v. Nat'l Card Co.*, No. 3:97cv268 (E.D. Va. July 18, 1997) (also holding no equitable tolling based on EEOC advice that actual receipt began ninety-day period). A district court noted that the timing requirements are strictly construed and held that the continuing violation doctrine does not relieve a plaintiff of the need to file an action within ninety days of receiving the right-to-sue letter. *Lewis v. Norfolk S. Corp.*, 271 F. Supp. 2d 807 (E.D. Va. 2003); *see also Scott v. Hampton City Sch. Bd.*, No. 4:14cv128 (E.D. Va. Apr. 27, 2015).

6-1.02(f) Named Party

The employee may file suit only "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e); *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998). Courts have construed that rule liberally in favor of the employee by recognizing exceptions to the "naming requirement." A defendant not named in the EEOC charge may still be sued if it is

“functionally identical” to a named respondent or if there is a substantial “identity of interests” between the defendants. *Ross v. Franklin Cnty. Dep’t of Soc. Servs.*, 186 F. Supp. 3d 526 (W.D. Va. 2016) (substantial identity between board of social services and department of social services); *Robinson v. City of Alexandria*, No. 1:16cv00855 (E.D. Va. Dec. 2, 2016) (city not substantially identical to local health department); *Leuenberger v. Spicer*, No. 5:15cv36 (W.D. Va. Jan. 28, 2016) (county is not substantially identical to the commonwealth attorney’s office); *Nicol v. Imagematrix, Inc.*, 767 F. Supp. 744 (E.D. Va. 1991); see also *Wells v. Winnebago Cnty.*, 820 F.3d 864 (7th Cir. 2016) (county responsible for discriminatory conduct of state employees, as county hired, paid, and identified state court employees on tax forms as its own employees). But see *Gholson v. Benham*, No. 3:14cv622 (E.D. Va. May 19, 2015) (as only housing authority was named in EEOC charge, individual defendants (housing authority commissioners and employees) may not be sued). An official elected subsequent to the filing of an action may be substituted as the defendant in his official capacity. *King v. McMillan*, 594 F.3d 301 (4th Cir. 2010).

6-1.02(g) Class Action

The ability to bring a class action employment discrimination suit is limited. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011), the Supreme Court held that class claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. The Court further stated that significant proof of a general policy of discrimination was necessary to certify a class and that an allegation of a strong corporate culture of allowing discrimination was insufficient proof. Furthermore, damages must be measurable class-wide based on the theory of the case. *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426 (2013). The Fourth Circuit took a restrictive approach to the application of *Wal-Mart* in *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105 (4th Cir. 2013), stating that *Wal-Mart* did not set out a per se rule against class certification where subjective decision-making or discretion is alleged. It held that even in cases where the complaint alleges discretion, if there is also an allegation of a company-wide policy of discrimination, the putative class may still satisfy the commonality requirement for certification. It also stated that *Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel. See also *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015) (class certification justified); *Meeker v. Med. Transport LLC*, No. 2:14cv426 (E.D. Va. Apr. 1, 2015) (refusing to adopt heightened standard at the conditional certification stage when some discovery has been completed).

Federal courts may exercise supplemental state law jurisdiction in a class action suit alleging violations of the overtime provisions of the FLSA and the state law gap pay provisions. *Winingear v. City of Norfolk*, No. 2:12cv560 (E.D. Va. Oct. 16, 2013). The parties subsequently settled for \$3.2 million (settlement order entered July 14, 2014).

6-1.02(h) New Claims

The plaintiff cannot raise new claims that are unrelated to the charge of discrimination filed with the EEOC. Claims in the lawsuit are barred if they “exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof.” *Dennis v. Cnty. of Fairfax*, 55 F.3d 151 (4th Cir. 1995); see also *Chacko v. Patuxent Inst.*, 429 F.3d 505 (4th Cir. 2005) (failure to exhaust administrative remedies where administrative charges referenced time frames, actors, and discriminatory conduct different from the central factual allegations in suit); *Pressley v. City of Norfolk*, No. 2:17cv264 (E.D. Va. Sep. 27, 2017) (hostile work environment was new claim when charge was race discrimination); *Johnson v. Quin Rivers Agency*, 128 F. Supp. 2d 332 (E.D. Va. 2001) (no gender claim jurisdiction when only claimed race and age discrimination in EEOC charge), *aff’d*, No. 01-1784 (4th Cir. Apr. 24, 2002); 140 F. Supp. 2d 657 (E.D. Va. 2001) (same case) (no jurisdiction over claim for discriminatory discharge where EEOC charge did not include an

allegation of discriminatory discharge), *aff'd*, No. 01-1784 (4th Cir. Apr. 24, 2002); *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401 (4th Cir. 2013) (intake questionnaire or letters to the EEOC not a part of the charge and claims cannot be based on the information contained therein); *Taylor v. Va. Union Univ.*, 193 F.3d 219 (4th Cir. 1999) (en banc) (vague affidavit filed as part of EEOC complaint does not exhaust sexual harassment claim).

The judicial claims need not be identical to the EEOC charges, however. If a plaintiff's claims in the judicial complaint are "reasonably related" to the EEOC charge and can be expected to follow from a reasonable administrative investigation, they are administratively exhausted. *Sydnor v. Fairfax Cnty.*, 681 F.3d 591 (4th Cir. 2012) (although EEOC charge requested reasonable accommodation through light duty work, plaintiff allowed to raise issue of reasonable accommodation through full duty work in a wheelchair in the judicial suit); *Bryson v. DLP Twin Cnty. Reg'l Healthcare LLC*, No. 7:16cv233 (W.D. Va. Oct. 20, 2016) (Title VII claims are cognizable as long as they are reasonably related to the allegations of the charge and grow out of such allegations); *Clanton v. City of Va. Beach*, No. 2:14cv649 (E.D. Va. Apr. 3, 2015) (complaint claims that varied from charge sufficiently related to be exhausted); *Brown v. Huntington Ingalls Inc.*, No. 4:13cv26 (E.D. Va. July 25, 2013) (claims related to training and promotion sufficiently related to EEOC charge of discrimination in assignment of duties; court states that a "helpful standard" is asking if the discriminatory action listed in the EEOC charge occurred because of the discriminatory action pled in the judicial complaint); *Coles v. Carilion Clinic*, 894 F. Supp. 2d 783 (W.D. Va. 2012) (claims of nonverbal harassment in suit sufficiently related to claims of verbal harassment in EEOC charge); *Nieves v. CCC Transp. LLC*, No. 3:12cv500 (E.D. Va. Sep. 6, 2012) (EEOC complaint that checked national origin box sufficiently related to suit alleging race discrimination). *But see Chamblee v. Old Dominion Sec. Co.*, No. 3:13cv820 (E.D. Va. Apr. 11, 2014) (although judicial claim states that employment policy had a disparate impact and EEOC charge mentioned the policy, EEOC charge did not imply in any way that policy had disparate impact and thus disparate impact claim dismissed).

The failure to state a claim in a charge is not jurisdictional, however, and the claim can still be adjudicated if the defendant does not timely object. *Fort Bend Cnty. v. Davis*, 587 U.S. ___, 139 S. Ct. 1843 (2019).

6-1.02(i) Exhaustion of Retaliation Claims

An employee claiming retaliation related to a previous EEOC charge can proceed directly to court without filing a new administrative charge. *Hentosh v. Old Dominion Univ.*, 767 F.3d 413 (4th Cir. 2014); *Jones v. Calvert Group Ltd.*, 551 F.3d 297 (4th Cir. 2009); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992); *Pinzon v. Sentara RMH Medical Center*, No. 5:20cv91 (W.D. Va. Sep. 21, 2021) (claim for retaliatory termination was the predictable culmination of alleged discriminatory and retaliatory conduct, and the termination was reasonably related to the allegations in the EEOC charge). This applies even if the complainant is no longer an employee when the retaliation charge is made. *Burke v. AT&T Tech. Servs. Co.*, 55 F. Supp. 2d 432 (E.D. Va. 1999). The retaliation, however, must be related to the initial charge. *Hentosh v. Old Dominion Univ.*, 767 F.3d 413 (4th Cir. 2014) (retaliation related to untimely filed discrimination claim); *Sloop v. Mem. Mission Hosp.*, 198 F.3d 147 (4th Cir. 1999) (no exhaustion for Title VII retaliation claim when initial charge was for age discrimination); *see also Williams v. Mancom, Inc.*, 323 F. Supp. 2d 693 (E.D. Va. 2004) (EEOC charge that race was the reason employee was not rehired sufficiently exhausted administrative remedies so plaintiff could claim retaliatory failure to rehire in subsequent lawsuit); *Carter v. Rental Uniform Serv.*, 977 F. Supp. 753 (W.D. Va. 1997) (retaliation is reasonably related to termination and can be raised even if not in EEOC complaint; harassment and failure to rehire, however, cannot); *Rollins v. Chesterfield Cnty. Sch. Bd.*, No. 3:97cv217 (E.D. Va. Aug. 8, 1997) (failure to allege age discrimination in EEOC charge precludes ADEA claim).

Federal district courts have held that retaliation claims must be administratively exhausted when the conduct occurred *prior* to the filing of the EEOC charge. See *Wright v. Carfax, Inc.*, No. 3:13cv451 (E.D. Va. Dec. 3, 2013) (retaliation claim dismissed due to plaintiff's failure to check retaliation box on EEOC charge or to mention retaliation specifically or by inference in charge); *Kerney v. Mountain States Health All.*, 894 F. Supp. 2d 776 (W.D. Va. 2012) (failure to check retaliation box or mention retaliation in EEOC charge required dismissal of retaliation claim in suit).

6-1.03 Proof Schemes

6-1.03(a) McDonnell Douglas

The overwhelming majority of discrimination cases involve allegations of disparate treatment, or intentional discrimination against a member of a protected class. Disparate treatment cases fall within one of two categories: "pretext" cases and "mixed motive" cases. The plaintiff may choose which proof scheme to use. *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243 (4th Cir. 2015).

In pretext cases, the employee seeks to prove that the employer's justification for an adverse employment action was, in reality, a pretext for a decision motivated by unlawful discrimination. The four-step framework for analyzing pretext cases was established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), and refined in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). The *McDonnell Douglas* proof scheme applies to Title VII, 42 U.S.C. § 1981 (§ 1981), ADEA, and ADA claims.⁵ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513 (2003) (noting courts of appeals have consistently used *McDonnell Douglas* approach in ADA cases); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000) (assumed applicable to ADEA); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996) (same); *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989) (applies to § 1981 actions); *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156 (4th Cir. 1997) (applies to ADA claims). The *McDonnell Douglas* burden shifting

⁵ Remember that *McDonnell Douglas* is a proof scheme. The Supreme Court held that a plaintiff need not plead specific facts that establish a prima facie case under the *McDonnell Douglas* framework; an employment discrimination complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992 (2002); see also *Miller v. Carolinas HealthCare Sys.*, No. 13-1856 (4th Cir. Mar. 13, 2014) (unpubl.); *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342 (4th Cir. 2005) (FLSA claim sufficiently stated). However, the complaint must set forth sufficient facts to at least allege each necessary element of the claim. *Bass v. E.I. du Pont de Nemours & Co.*, 324 F.3d 761 (4th Cir. 2003); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418 (4th Cir. 2005) (one of the elements of such a claim is failure to exhaust administrative remedies). The requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), also apply to Rule 12(b)(6) motions in the employment context such that courts should not accept conclusory allegations that amount to a mere formulaic recitation of the elements of a claim. Instead, the allegations in the complaint must include enough factual matter that, if true, plausibly suggests an entitlement to relief. See *McCleary-Evans v. Md. DOT*, 780 F.3d 582 (4th Cir. 2015) (while not overruling *Swierkiewicz*, *Twombly/Iqbal* altered the criteria for determining the sufficiency of a complaint); see also *Spencer v. Va. State Univ.*, 224 F. Supp. 3d 449 (E.D. Va. 2016); *Chamblee v. Old Dominion Sec. Co.*, No. 3:13cv820 (E.D. Va. Apr. 11, 2014).

Noting a split in authority, a federal court judge has held that the *Twombly/Iqbal* standard does not apply to the pleading of affirmative defenses, so that such pleadings are sufficient if they give the plaintiff fair notice of the nature of the defense. *Grant v. Bank of Am.*, No. 2:13cv342 (E.D. Va. Feb. 25, 2014).

framework does not apply, however, to claims supported by direct evidence. *Stewart v. MTR Gaming Grp., Inc.*, No. 13-1775 (4th Cir. Aug. 13, 2014) (unpubl.).

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. The elements of the prima facie case will depend on the statutory basis of the discrimination claim. The Fourth Circuit has held that under this framework a plaintiff relying on indirect evidence must establish a prima facie case of discrimination by showing: (1) he is a member of a protected class; (2) his job performance was satisfactory; (3) he suffered an adverse employment action; and (4) similarly-situated employees outside his protected class received more favorable treatment. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004) (en banc).

The fourth prong of *McDonnell Douglas* is not absolute. In cases where the plaintiff shows the firing and replacement hiring decisions were made by different decision makers, the plaintiff still can make out a prima facie case without showing that his replacement was someone outside the protected class. *Miles v. Dell, Inc.*, 429 F.3d 480 (4th Cir. 2005). Noting a split among the circuits, a federal district court held that in a reverse discrimination case the fourth prong does not require any enhanced showing that the employer had invidious reasons for discriminating against majority groups. *McNaught v. Va. Cmty. Coll. Sys.*, 933 F. Supp. 2d 804 (E.D. Va. 2013). In *Guessous v. Fairview Prop. Investments, LLC*, 828 F.3d 208 (4th Cir. 2016), the Fourth Circuit held that even though no one was hired to replace the discharged employee, the fourth prong was met when the employee alleged that her job duties were absorbed by employees not in the protected class.

In *Scott v. Montgomery County School Board*, 963 F. Supp. 2d 544 (W.D. Va. 2013), a federal district court held that the *McDonnell Douglas* framework does not “neatly fit” a claim where an employee alleges discrimination because of not sharing a supervisor’s religious beliefs. The court adopted a modified framework, with no requirement of proof that the employee is a member of a protected class or was replaced by someone outside the protected class. Instead, the plaintiff must prove (1) some adverse employment action; (2) satisfactory job performance; and (3) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee’s failure to hold or follow her employer’s religious beliefs.

In any setting the burden of establishing a prima facie case is usually “not onerous.” *Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981). The plaintiff meets the burden “by proving a set of facts which would enable the fact-finder to conclude, in the absence of any further explanation, that it is more likely than not that the adverse employment action was the product of discrimination.” *Ennis v. Nat’l Ass’n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995); see also *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996) (the plaintiff satisfied the “relatively easy test” of showing that she was a qualified applicant rejected under circumstances that give rise to an inference of unlawful discrimination). But see *Mumpower v. City of Bristol*, No. 1:13cv74 (W.D. Va. Mar. 14, 2014) (mere fact that an employee worked for a period of time (five or more years) before being terminated does not establish for purposes of the plaintiff’s prima facie case that work performance was satisfactory at the time of termination).

As part of the prima facie case, the employee must show that he or she suffered an adverse employment action. Adverse employment actions negatively affect the terms, conditions, and/or benefits of employment and are generally taken to include failure to hire, failure to promote, demotion, disciplinary action, and actual or constructive discharge. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342 (2004); see also *Perkins v. Int’l Paper Co.*, 936 F.3d 196 (4th Cir. 2019) (hostile treatment is not an adverse employment action); *Thweatt v. Prince George Cnty. Sch. Bd.*, No. 3:21cv258-HEH (E.D. Va. Sep. 3, 2021) (reprimand letters do not rise to level of adverse employment action). An adverse employment action may be the discriminatory denial of a non-contractual employment benefit and can even be taken against a former employee. *Gerner v. Cnty. of*

Chesterfield, 674 F.3d 264 (4th Cir. 2012) (alleged discrimination in offering of severance packages); see also *Koenig v. McHugh*, No. 3:11cv00060 (W.D. Va. Mar. 26, 2012) (in Title VII discriminatory discipline case, counseling letter may constitute adverse employment action).

If the plaintiff claims that he or she was constructively discharged, the plaintiff must show working conditions so intolerable that a reasonable person would have felt compelled to resign. *Evans v. Int'l Paper Co.*, 936 F.3d 183 (4th Cir. 2019); see also *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004) (dissatisfaction with work assignments and feeling of being unfairly criticized does not create intolerable working conditions); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180 (4th Cir. 2004) (professional and personal tensions do not make a workplace intolerable). Within the context of an ADEA claim, the Fourth Circuit has held that the employer's withdrawal of voluntary employment benefits does not create "intolerable" working conditions amounting to a constructive discharge for purposes of showing a prima facie case: "The withdrawal of gratuitous benefits simply cannot make continued employment so intolerable that an employee would be compelled to resign." *Blistein v. St. John's Coll.*, 74 F.3d 1459 (4th Cir. 1996); cf. *Bauer v. Holder*, 25 F. Supp. 3d 842 (E.D. Va. 2014) (finding adverse employment action through constructive discharge), *rev'd on other grounds sub nom.*, *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016).

To state a claim of constructive discharge, the plaintiff must also demonstrate "the deliberateness of the employer's actions, motivated by discriminatory bias." *Atkins v. Smyth County Sch. Bd.*, 382 F. Supp. 3d 506 (W.D. Va. 2019). Thus, the plaintiff's claim did not survive a motion to dismiss when she alleged the school board failed to respond to her complaints about an aggressive co-worker; even assuming the working conditions were objectively intolerable, the plaintiff alleged the board did not act on her complaints because it did not believe the conduct constituted harassment. This is not consistent with a claim of constructive discharge, where she would need to show that the school board's actions were intended to force her to quit.

If the plaintiff establishes a prima facie case of discrimination under *McDonnell Douglas*, "the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action; only the burden of production, not persuasion, shifts to the defendant." *Blankenship v. Warren Cnty. Sheriff's Dep't*, 939 F. Supp. 451 (W.D. Va. 1996); *Henson v. Liggett Group, Inc.*, 61 F.3d 270 (4th Cir. 1995). Frequently the employer can focus on the performance or conduct of the plaintiff. "Job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision." *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996). For example, the inability to operate a machine or to perform a task fundamental to job performance is a sufficient nondiscriminatory reason for discharge or denial of a promotion. *Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281 (4th Cir. 1985). In a failure to promote case under the ADEA, the Fourth Circuit accepted the employer's statement that it chose a younger worker over the plaintiff because the younger worker possessed better communications skills, better leadership qualities, and a faster learning aptitude. *Grayton v. Shalala*, No. 96-1562 (4th Cir. Apr. 16, 1997) (unpubl.); *Booth v. Maryland*, Case No. 08-1748 (4th Cir. 2009) (unpubl.) (Rastafarian correctional officer failed to provide evidence to establish discharge for his religious dreadlocks rather than for poor work performance and misconduct). In a failure to hire case under the ADEA, a district court held that a belief that an applicant is overqualified is a legitimate, non-discriminatory reason for failure to hire. *Buckner v. Lynchburg Redev. & Hous. Auth.*, 262 F. Supp. 3d 373 (W.D. Va. 2017). But see *Prudencio v. Runyon*, 986 F. Supp. 343 (W.D. Va. 1997) (stating an "error" had occurred without explanation not enough as a matter of law to establish a legitimate nondiscriminatory reason). The presumption of discrimination "drops out of the picture" once the defendant meets its burden of production. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993); see also *Whittaker v. David's Beautiful People, Inc.*, No. 8:14cv02483 (D. Md. Feb. 4, 2016) (plaintiff's evidence of harassment based on national

origin and protected action insufficient when she could not show legitimate, non-discriminatory reason for her termination was a lie).

If the employer succeeds in showing a nondiscriminatory reason for the action taken, the burden shifts to the plaintiff to demonstrate by a preponderance of the evidence that (i) the reason offered was false and (ii) that the real reason for the adverse action was discriminatory. The Fourth Circuit has stated that “especially relevant” to a showing of pretext would be evidence that other employees who were similarly situated to the plaintiff (but for the protected characteristic) were treated more favorably. *Laing v. Fed. Express Corp.*, 703 F.3d 713 (4th Cir. 2013). While a plaintiff is not required as a matter of law to point to a similarly-situated comparator to succeed on a discrimination claim, comparator evidence is more objective in nature than a free-form evaluation of the “constellation” of contextual considerations that might inform whether a particular workplace decision was unlawfully motivated. *Id.* In cases where an employer adduces a nondiscriminatory reason for discharging the plaintiff and comparator evidence does not exist to rebut that explanation, the plaintiff must be able to point persuasively to some other form of evidence demonstrating that the employer’s explanation was a mere pretext for discrimination. See, e.g., *Fox v. Leland Vol. Fire/Rescue Dep’t, Inc.*, No. 15-1364 (4th Cir. May 5, 2016) (unpubl.) (“[D]ifferent explanations for termination, provided at different times, are ‘in and of themselves, probative of pretext’”). It is the plaintiff’s burden to demonstrate that the comparators are “similar in all relevant respects” to the employee. *Haywood v. Locke*, No. 09-1604 (4th Cir. July 6, 2010); *Emami v. Bolden*, 241 F. Supp. 3d 673 (E.D. Va. 2017). To establish a valid comparator, the plaintiff must produce evidence that the plaintiff and comparator dealt with the same supervisor, were subject to the same standards, and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it. *Haynes v. Waste Connections, Inc.*, 922 F.3d 219 (4th Cir. 2019); see also *Merriweather v. Shelter House*, No. 1:16-cv-00577 (E.D. Va. Jan. 17, 2017) (second-level supervisor of plaintiff not comparable); *Chapman v. Wal-Mart, Inc.*, No. 5:20cv00105 (W.D. Va. June 10, 2021) (manager positions of different departments within store not sufficiently comparable).⁶

Merely showing that the employer’s justification is false does not necessarily mean that the employee is entitled to prevail. See, e.g., *Masterson v. AAAA Self Storage Mgmt. Grp., LLC*, No. 2:12cv697 (E.D. Va. Jan. 17, 2014) (employer incorrectly believed that employee submitted inflated mileage reimbursement forms adequate to prove a non-pretextual reason for terminating her employment). The fact-finder may still determine “that the defendant’s challenged conduct is pretextual, but does not constitute invidious discrimination.” *Jiminez v. Mary Washington Coll.*, 57 F.3d 369 (4th Cir. 1995). Even if the reason given is impermissible, there is no employment discrimination claim if the action was not taken because of the employee’s race. *Lightner v. City of Wilmington*, 545 F.3d 260 (4th Cir. 2008) (white male police officer asserting claims of race-based discipline defeated own claim by speculating in deposition that reason for discipline may have been his supervisors’ resentment that plaintiff initiated an internal affairs investigation against him; negated inference of discrimination); *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004) (employee

⁶ Note that a magistrate judge granted a Title VII plaintiff’s motion to compel discovery of all documents regarding charges, lawsuits, or administrative complaints of sex discrimination, including sexual harassment or retaliation, filed within the previous five years by any current or former municipality employee. *Berry v. Town of Front Royal*, No. 5:21-cv-00001 (W.D. Va. Oct. 20, 2021). The court held that the records “are relevant to discerning Defendant’s enforcement of its sexual harassment policy, its handling of investigations into alleged sexual harassment, and whether it acted with discriminatory or retaliatory intent.” To the extent such information was discussed with the town’s outside counsel, the attorney-client privilege was waived because, by relying on outside counsel to assist with the investigation and advise about what remedial measures were necessary, the town put its communications with her “at issue.” The district court later overruled the town’s objections to the magistrate’s order, and ordered the town to produce the investigative materials. *Brown v. Town of Front Royal*, No. 5:21-cv-00001 (W.D. Va. May 3, 2022).

demoted because of speech related to racial discrimination, but not because of her race). A court or jury is permitted, however, to infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000); *see also Westmoreland v. TWC Admin. LLC*, 924 F.3d 718 (4th Cir. 2019) (plaintiff proved at trial that employer's reason for termination was implausible and thus a pretext); *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289 (4th Cir. 2010) (sufficient evidence to avoid summary judgment that physical conditioning test was a pretext for sex discrimination); *Rowe v. Marley Co.*, 233 F.3d 825 (4th Cir. 2000) (no pretext proven).

Plaintiffs may attempt to prove pretext by introducing evidence of statements made by the employer or agents of the employer remarking negatively on the plaintiff's race, sex, or age. Such allegedly discriminatory statements can be indicative of discrimination, but isolated, remote statements are not probative of discriminatory intent. *Henson v. Liggett Group, Inc.*, 61 F.3d 270 (4th Cir. 1995). Further, to constitute probative evidence any statement must relate to a "particular person, employment decision, or pattern of decisionmaking." *Id.*; *see also EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992) (noting there was no nexus between the alleged discriminatory statements and any employment decisions made by the employer). *But see Rush v. Va. Dept. of Transp.*, 208 F. Supp. 2d 624 (W.D. Va. 2002) (evidence of sexism, even if unrelated to hiring decision, is relevant to discrimination in hiring claim). Inconsistent explanations by the employer are also probative of whether the reason was a pretext. *Fox v. Leland Vol. Fire/Rescue Dep't, Inc.*, No. 15-1364 (4th Cir. May 5, 2016) (unpubl.); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001).

In *Dockins v. Benchmark Communications*, 176 F.3d 745 (4th Cir. 1999), the Fourth Circuit ruled that the employee failed to show that the supervisor's and co-workers' remarks and inquiries regarding his health were connected to decisions regarding his employment. The court also noted that unlike statements regarding race or gender, comments regarding age do not create the same inference of animus as most everyone will enter the protected age group at some point in their lives. *See also Cramer v. Intelidata Techs. Corp.*, No. 97-2775 (4th Cir. Dec. 31, 1998) (unpubl.) (no nexus between discriminatory statements and employment decision process).

In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 128 S. Ct. 1140 (2008), the U.S. Supreme Court unanimously held that so-called "me too" testimony of non-party employees about discrimination against them by decision makers other than those who made the decision at issue in the case may or may not be probative. The trial court is allowed to determine on a case-by-case basis whether the evidence is admissible. The same principle may apply to permit employers to introduce evidence from other employees in the protected class to indicate that they were not discriminated against by allegedly discriminating decision makers.

The Fourth Circuit held that the discriminatory animus of a subordinate who is not the employment action decision maker cannot provide the necessary evidence of discrimination even if that person exercises "substantial influence" in the employment decision. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc). Rather, the biased subordinate employee must be the actual decision maker for the employer or be shown to possess such authority as to be viewed as the one principally responsible for the decision. This decision is supported by the Supreme Court's decision in *Vance v. Ball State University*, 570 U.S. 421, 133 S. Ct. 2434 (2013), which held that for purposes of Title VII vicarious liability for supervisor harassment, the supervisor must have authority to take tangible employment actions against the victim; i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See also Ray v. Int'l Paper Co.*, 909 F.3d 661 (4th Cir. 2018) (loss of voluntary overtime

work may be a tangible employment action); *Harris v. Powhatan Cnty. Sch. Bd.*, No. 12-2091 (4th Cir. Sep. 17, 2013) (unpubl.) (in determining whether a school board's decision to eliminate a position was a pretext for age discrimination, evidence of the superintendent's motives was relevant because she was principally responsible for board's decision).

If the plaintiff was hired and subsequently discharged by the same person, there is a strong inference that the employer's justification is not pretextual. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996); *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991); *DeJarnette v. Corning, Inc.*, 133 F.3d 293 (4th Cir. 1998) (hired with knowledge that employee was pregnant therefore, no discrimination in firing); *Vercelli v. World Courier Inc.*, No. 1:11cv944 (E.D. Va. Aug. 10, 2012) (no age discrimination when same person hired and fired employee within sixteen months). *But see Adams v. Greenbrier Oldsmobile*, No. 97-1544 (4th Cir. Jan. 28, 1999) (unpubl.) (the *Proud* inference that arises when the employee is hired and fired by the same person does not apply when the employee produces compelling evidence of discrimination).

In a failure to hire or promote case the plaintiff must show that he or she was better qualified for the job than the person selected. *See Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281 (4th Cir. 1985) (an employee is not necessarily better qualified because of longer service or more practical experience). Also, a pretext for discrimination is not necessarily shown merely because the court disagrees with the employer's assessment of the employees' qualifications. *See Wileman v. Frank*, 979 F.2d 30 (4th Cir. 1992) (finding that the employer's justifications were not "so unworthy of credence as to support a finding of discriminatory intent"). Moreover, proof that an employee's performance was comparable to that of co-workers is *not* proof that the performance met the employer's legitimate job performance expectations. *King v. Rumsfeld*, 328 F.3d 145 (4th Cir. 2003) (noting, however, that co-workers could qualify as expert witnesses regarding the employer's legitimate expectations and whether an employee was meeting them).

6-1.03(b) Mixed Motive

In the seminal mixed motive case, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), the Supreme Court held that if an employee produced direct evidence of an impermissible motive behind an employment decision, the employer could avoid liability by demonstrating that it would have reached the same employment decision absent any discrimination. "The employer ... must show that its legitimate reason, standing alone, would have induced it to make the same decision."

The *Price Waterhouse* ruling was significantly modified by the Civil Rights Act of 1991. Pursuant to 42 U.S.C. § 2000e-2(m), an employer can no longer avoid liability by showing that it would have made the same decision for nondiscriminatory reasons. The 1991 amendment states that an unlawful employment practice is established when the plaintiff shows that race, color, religion, sex, or national origin "was a motivating factor for any employment practice, even though other factors also motivated the practice." Employers now violate discrimination laws when an impermissible motive plays an actual role in an employment decision, even if the employer can show other considerations that would independently justify the action taken.⁷ If, however, the employer can still show that it would have taken the same action in the absence of the impermissible motivating factor, the court may only grant declaratory and injunctive relief, attorney's fees, and costs. The

⁷ The Supreme Court has held that the mixed motive analysis does not apply to ADEA cases against private employers or state and local governments; the plaintiff must establish that age was the "but-for" cause of the adverse action. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009). *But see Babb v. Wilkie*, 589 U.S. ___, 140 S. Ct. 1168 (2020) (mixed-motive standard applies to age discrimination claims against federal employers; personnel decisions must be "untainted" by any consideration of age). The Fourth Circuit has construed the reasoning of *Gross* to apply to ADA claims. *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228 (4th Cir. 2016) (ADA violation does not occur when an employer acts with mixed motives; a "but-for" causation required).

court cannot award damages, reinstatement, hiring, or promotion. 42 U.S.C. § 2000e-5(g)(2)(B).

The 1991 Act did not include the “direct evidence” requirement imposed by *Price Waterhouse*. Accordingly, a plaintiff may meet his burden of persuasion by demonstrating through circumstantial or direct evidence that an impermissible criterion was a motivating factor in the employment decision. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003); *see also Rowland v. American Gen. Fin., Inc.*, 340 F.3d 187 (4th Cir. 2003) (follows *Costa*). *Costa* overruled longstanding Fourth Circuit precedent. *See, e.g., Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995).⁸ There is no requirement that an employee’s testimony be corroborated in order to apply the mixed motive framework. *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160 (4th Cir. 2004).

For Title VII cases, actual knowledge of the protected status of an employee or prospective employee is not required. Thus, an employer may violate Title VII if motivated by a desire to avoid hiring a pregnant woman, a person of a certain nationality, or practitioner of a certain religion and merely suspects that an applicant possesses that attribute. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028 (2015).

6-1.03(c) Disparate Impact

While discriminatory intent is the touchstone for disparate treatment cases, disparate impact cases focus upon discriminatory consequences. Instead of showing a discriminatory purpose, the plaintiff in a disparate impact case need only show that a facially neutral employment practice has a discriminatory impact, or a substantially disproportionate burden, on members of a protected group. If that showing is made, use of the procedure is unlawful unless it is shown to be valid or otherwise required by business need. Under a disparate impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer’s subjective intent to discriminate that is required in a disparate treatment case. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513 (2003); *United States v. Cnty. of Fairfax*, 629 F.2d 932 (4th Cir. 1980); *see also Davey v. City of Omaha*, 107 F.3d 587 (8th Cir. 1997) (reclassification of jobs had a viable business justification).

The disparate impact proof scheme is available for Title VII, ADA, and ADEA claims. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513 (2003); *Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536 (2005) (ADEA disparate impact claim has narrower scope).

The burden of proof in a disparate impact case is set forth in the Civil Rights Act of 1991, which states that an unlawful employment practice is established if the employee demonstrates that the employer:

uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

⁸ With its decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), the Supreme Court effectively overturned Fourth Circuit precedent that the burden-shifting and direct-evidence requirements of *Price Waterhouse* (setting forth the mixed motive proof standard) continue to apply to ADEA claims; *e.g., EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160 (4th Cir. 2004) and *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004) (en banc).

42 U.S.C. §2000e-2(k)(1)(A). The plaintiff may also recover by showing that the employer has refused to adopt alternative employment practices that do not have a similar discriminatory impact but also serve the employer's legitimate interest. *Id.*

A prima facie case is therefore made when the plaintiff identifies "a seemingly neutral practice that has a significant adverse impact on persons of a protected class." *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D. Va. 1995), *aff'd without op.*, 86 F.3d 1151 (4th Cir. 1996); *see also Frazier v. Bentsen*, No. 95-1290 (4th Cir. Aug. 8, 1996) (unpubl.) (the plaintiff must (1) identify a specific employment practice that is challenged and (2) show causation). The disparate impact theory can be applied to both objective and subjective employment selection methods, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S. Ct. 2777 (1988), but the required policy or practice must be more than the occurrence of sporadic or isolated discriminatory acts. *Wright v. Nat'l Archives & Records Serv.*, 609 F.2d 702 (4th Cir. 1979). Causation is frequently shown by statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants . . . because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S. Ct. 2777 (1988).

Employers may not make race, age, or disability conscious decisions out of concern for disparate impact liability absent a "strong basis in evidence" that they would indeed be liable under that theory of proof if they did not attempt to "correct" for such factors. *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658 (2009). Therefore, employers must exercise extreme caution in establishing criteria for promotions, reductions-in-force, and other large-scale employment actions.

Recovery in a disparate impact case is limited to traditional Title VII remedies, as the enhanced remedies provided by the Civil Rights Act of 1991 specifically exclude disparate impact cases. 42 U.S.C. § 1981a(a)(1).

ADEA disparate impact claims have a narrower scope than Title VII and ADA claims. Unlike Title VII, the ADEA provides a defense to an "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (the "RFOA" provision). Moreover, as the 1991 Civil Rights Amendments do not apply to the ADEA, the burden historically remained solely on the employee to isolate, identify, and prove a specific employment practice allegedly responsible for observed statistical disparities. *Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536 (2005). The employer's burden was merely one of production of evidence to indicate RFOA supported the practice. However, in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 128 S. Ct. 2395 (2008), the U.S. Supreme Court modified the proof standard to require that an employer defending an ADEA disparate impact claim bear the burden of proof, rather than a mere burden of production of evidence, that the decision was motivated by RFOA.

Interestingly, in *DiCocco v. Garland*, 18 F.4th 406 (4th Cir. 2021), the court determined that the ADEA's federal-sector provision recognizes causes of action for disparate-treatment (and not disparate-impact) claims only. However, the court then granted the plaintiff's petition for rehearing en banc. No. 20-1342 (4th Cir. Mar. 21, 2022). In its briefing regarding the petition for rehearing, the government initially maintained its position that the court's holding was correct, but later filed a letter stating that it had changed its position and had determined that disparate-impact claims *are* cognizable against federal employers. Therefore, the court cancelled plans for the rehearing and remanded the plaintiff's Title VII and ADEA claims for consideration by the district court in the first instance. *DiCocco v. Garland*, 52 F.4th 588 (4th Cir. 2022).

6-1.04 Retaliation Claims

See the EEOC [guidance](#) on retaliation claims.

6-1.04(a) Title VII, § 1981, ADEA, Rehabilitation Act, and ADA

Federal employment discrimination laws forbid retaliation against an employee because he has opposed any unlawful employment practice or because he has participated in any manner in an investigation, proceeding, hearing, or litigation. 42 U.S.C. § 2000e-3 (Title VII); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001) (§ 1981); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794; 42 U.S.C. § 12203 (ADA); *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649 (E.D. Va. 1999) (anti-retaliation statute in Title VII applies in ADA cases).

Anti-retaliation provisions should be construed to cover a broad range of employer conduct but, unlike the substantive provisions, evidence of adverse employment action is not required. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) (Title VII) (rejecting standards of prior Fourth Circuit opinions). While the action need not be related to the terms and conditions of employment, it must be sufficiently materially adverse such that it might dissuade a reasonable worker from making or supporting a charge of discrimination. *Id.*; see also *Emami v. Bolden*, 241 F. Supp. 3d 673 (E.D. Va. 2017) (noting courts confuse the retaliation requirement of materially adverse action with the *McDonnell Douglas* requirement of adverse employment action and holding a performance improvement plan might constitute a materially adverse action). The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces a nontrivial injury or harm. *Burlington, supra*. Adverse employment action against third parties could constitute retaliation if it would dissuade a reasonable worker from making or supporting a charge of discrimination. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863 (2011) (retaliation against fiancé of complaining employee actionable).

An employee is protected from retaliation when reporting an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc) (overruling *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006)).

The U.S. Supreme Court has confirmed the availability of claims for retaliation for assertion of rights protected by 42 U.S.C. § 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951 (2008).

6-1.04(a)(1) Protected Activity

There are two categories of protected activity: (1) opposition to an unlawful employment practice or (2) participation in an "ongoing investigation or proceeding." Opposition activity occurs when an employee communicates to the employer a belief that the employer has engaged in a form of employment discrimination, and the discrimination is either actually unlawful or the employee reasonably believes it to be unlawful. *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015).

Opposition activity should be interpreted broadly and encompasses using informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities. *Id.* (conduct should be evaluated holistically, not as discrete acts); *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253 (4th Cir. 1998); cf. *Lambert v. Sheetz Inc.*, No. 5:13cv96 (W.D. Va. Mar. 31, 2015) (merely stating that another employee's termination was "wrongful" not sufficiently oppositional). Deciding an issue of first impression in the Fourth Circuit, the court sided with the Sixth and Eighth Circuits to hold that "an employee engages in protected activity when the employee asks a supervisor to stop his sexually harassing behavior." *Owen v. County of Franklin*, 358 F. Supp. 3d 545 (W.D. Va. 2019).

Under the opposition prong, courts are to balance the purpose of the Act to protect persons engaging in reasonable activities opposing discrimination against the desire not to tie employers' hands in selection and control of personnel. *Villa v. CavaMezze Grill, LLC*, 858

F.3d 896 (4th Cir. 2017); *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981). The Fourth Circuit declined to adopt a district court's application of a rebuttable presumption that activity that constitutes a breach of an employee's obligation of honest and faithful service is not protected under the opposition clause. *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253 (4th Cir. 1998). There must at least be a reasonable belief, however, that the employment practice is actually unlawful. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508 (2001) (per curiam); *EEOC v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir. 2005). The opposition clause does not protect employees' pretending to oppose Title VII violations by intentionally fabricating allegations. *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896 (4th Cir. 2017). Protection as "opposition activity" extends to "an employee who speaks out about discrimination in response to employer questioning during the course of an internal investigation *not* prompted by, or conducted pursuant to, a discrimination complaint. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 129 S. Ct. 846 (2009). As long as an employee complains to the employer or participates in an employer's informal grievance procedure in an orderly and nondisruptive manner, the employee's activities are entitled to protection.

The "manager rule" has been applied in some federal circuits in the context of retaliation claims under the FLSA to hold that an employee whose regular duties encompass counseling and communicating complaints cannot be engaged in opposition activity. Without expressing whether such a rule is appropriate in FLSA cases, the Fourth Circuit has held that it is not applicable in Title VII cases, reasoning that conduct protected by the FLSA is more constricted than the broad range of conduct protected by Title VII. *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015).

Participation activity encompasses making a charge, assisting, testifying, or participating in any manner in an investigation, proceeding, or hearing. The Fourth Circuit refused to adopt a balancing test, which is applicable to the opposition prong, for the participation prong of retaliation. *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411 (4th Cir. 1999). In *Netter v. Barnes*, 908 F.3d 932 (4th Cir. 2018), the county employee provided the EEOC with confidential personnel files of other employees. The appellate court found that this was not protected participation activity because it was illegal under North Carolina law, but it explicitly refused to hold that any disclosure of information in violation of an employer's confidentiality policy falls beyond the scope of the participation clause.

Generally, participation in an employer's internal investigation is not considered protected participatory conduct, however, if the internal investigation is instigated because of knowledge of an EEOC charge, then the participation is protected. *Atkins v. Va. Dep't of Transp.*, No. 1:13cv57 (W.D. Va. Dec. 19, 2013).

6-1.04(a)(2) Causation Standard

Finding that the 1991 Civil Rights Amendments do not apply to Title VII retaliation claims, the Supreme Court held that retaliation claims must be proved according to traditional principles of but-for causation (proof that the defendant's conduct did in fact cause the plaintiff's injury), not the mixed motive proof scheme (that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives for the decision) that is statutorily mandated for what the Court calls "status-based discrimination." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517 (2013). The employee must prove that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. See *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208 (4th Cir. 2016) (even though there was evidence of lack of work, jury could still conclude that retaliation for protected activity was the "final straw" motivating termination).

Construing *Nassar*, the Fourth Circuit held that while that case altered the causation standard under a mixed motive theory of liability for retaliation, it did not affect the retaliation analysis under the *McDonnell Douglas* framework (see section 6-1.03(a)), as

that framework incorporates a but-for causation requirement. *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243 (4th Cir. 2015) (noting split in circuits and characterizing as dicta the statement to the contrary in *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202 (4th Cir. 2014)); see also *Carroll v. Salon Del Sol Inc.*, No. 7:15cv497 (W.D. Va. Dec. 29, 2016) (construing *Foster*).

The application of *Nassar* to ADEA and § 1981 claims is not clear, though the Court has already held that the mixed motive proof scheme is not available for status-based discrimination claims against private employers and state and local governments under the ADEA. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), discussed in section 6-4.04. In *Comcast Corp. v. National Ass’n of African-American Owned Media*, 589 U.S. ___, 140 S. Ct. 1009 (2020), the Court held that claims of racial discrimination under § 1981 are subject to the “ancient” and “simple” burden of proof standard governing torts, that of direct or “but-for” causation.

Protections against retaliation extend to former employees. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843 (1997).

The materially adverse action must take place in close proximity to the protected activity, or the plaintiff must present other relevant evidence to establish causation. *Perry v. Kappos*, No. 11-1476 (4th Cir. May 17, 2012) (unpubl.) Temporal proximity alone can establish prima facie causation. *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643 (4th Cir. 2021) (citing *Strothers v. City of Laurel*, 895 F.3d 317 (4th Cir. 2018)). While there is no bright-line test, a ten-week delay between the protected activity and adverse action is “sufficiently long so as to weaken significantly the inference of causation.” *King v. Rumsfeld*, 328 F.3d 145 (4th Cir. 2003) (nonetheless holding prima facie causation alleged because academic school year a natural decision point); cf. *Wilcox v. Lyons*, 970 F.3d 452 (4th Cir. 2020) (two-and-a-half month delay, combined with disproportionate response to minor infraction suggesting pretext for firing, sufficient to state Title VII retaliation claim); *McMillian v. King & Queen Cnty. Sch. Bd.*, No. 3:20CV271 (E.D. Va. Sep. 15, 2020) (in context of motion to dismiss, plaintiff established causation nexus when there were four discrete incidents of retaliatory animus during the fifteen-month period between protected activity and firing). Evidence of recurring retaliatory animus during the intervening period can be sufficient to establish causation. *Lettieri v. Equant, Inc.*, 478 F.3d 640 (4th Cir. 2007); see also *Tutt v. Wormuth*, No. 19-2480 (4th Cir. Sep. 8, 2021) (allegations of fifteen-to sixteen-month gap between protected activity and permanent reassignment, coupled with repeated comments by supervisor regarding plaintiff’s protected activity and events occurring prior to adverse action, were sufficient to satisfy causation and survive 12(b)(6) motion). Additionally, if the plaintiff alleges a valid reason for the employer’s delay between the protected activity and the adverse action, the presumption of a causal link is reestablished. *Reardon v. Herring*, 201 F. Supp. 3d 782 (E.D. Va. 2016) (employer delayed attorney’s termination to allow her to complete work on two matters in litigation); see also *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807 (E.D. Va. 2016) (“first opportunity” and “continuing animus” justified temporal delay in taking action).

6-1.04(a)(3) Damages

There is disagreement as to whether compensatory or punitive damages are available for a retaliation claim under the ADA. See *Rhoads v. FDIC*, No. 03-2373 (4th Cir. Apr. 16, 2004); *Akbar-Hussain v. ACCA Inc.*, No. 1:16cv132 (E.D. Va. Jan. 17, 2017); *Evans v. Larchmont Baptist Church Infant Care Ctr. Inc.*, 956 F. Supp. 2d 695 (E.D. Va. 2013); *Lucas v. Henrico Cnty. Sch. Bd.*, 822 F. Supp. 2d 589 (E.D. Va. 2011).

6-1.04(b) FLSA and Equal Pay Act

The FLSA (including the Equal Pay Act (EPA)) provides that it is unlawful:

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be

instituted any proceeding under or related to this [chapter], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

The scope of the statutory term “filed any complaint” includes an oral, as well as written, complaint as long as it constitutes an assertion of rights protected by the statute and a call for their protection. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 131 S. Ct. 1325 (2011). The Court left unresolved whether the complaint must be made to a governmental agency. Although an employment offer had been made and paperwork completed, plaintiff could not assert a retaliation claim because he was not formally an employee. *Dellinger v. Sci. Applications Int’l Corp.*, 649 F.3d 226 (4th Cir. 2011).

See also *Liverett v. Torres Advanced Enter. Sols., LLC*, 192 F. Supp. 3d 648 (E.D. Va. 2016); *Thurston v. Louisa Cnty. Sch. Bd.*, No. 99-1521 (W.D. Va. Mar. 22, 1999) (restriction on overtime not retaliatory adverse employment action), *aff’d*, No. 99-1521 (4th Cir. Oct. 22, 1999).

6-1.04(c) FMLA

It is unlawful for any employer to discharge or in any other manner discriminate against any individual because such individual (1) filed any charge or instituted or caused to be instituted any proceeding, under or related to the Family Medical Leave Act; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or (3) testified, or is about to testify, in any inquiry or proceeding relating to any right provided under subchapter I of the Act. 29 U.S.C. § 2615. See, e.g., *Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998); *Settle v. S.W. Rodgers Co.*, 998 F. Supp. 657 (E.D. Va. 1998), *aff’d*, 182 F.3d 909 (4th Cir. 1999). Retaliation claims brought under the FMLA are analogous to those brought under Title VII. A plaintiff must prove engagement in a protected activity, an adverse employment action, and a causal link between the two. *Adams v. Anne Arundel Cnty.*, 789 F.3d 422 (4th Cir. 2015).

While the FMLA does not specifically provide that it is unlawful to discharge an employee in retaliation for requesting or receiving FMLA leave, the Fourth Circuit has held that 29 U.S.C.A. § 2615(a)(2), which states that “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this [subchapter],” is the basis for a retaliation claim for asserting FMLA rights. A retaliation claim is evaluated using the *McDonnell Douglas* standard. *Sharif v. United Airlines*, 841 F.3d 199 (4th Cir. 2016); *Yashenko v. Harrah’s NC Casino Co.*, 446 F.3d 541 (4th Cir. 2006); see also *Waag v. Sotera Def. Solutions, Inc.*, 857 F.3d 179 (4th Cir. 2017) (although close temporal connection between leave and termination, financial hardship caused by federal government’s sequestration was a legitimate reason for layoffs); *Rodriguez v. Reston Hosp. Ctr. LLC*, No. 1:16-cv-623 (E.D. Va. Feb. 28, 2017) (termination two months after return to work satisfied temporal proximity requirement for FMLA retaliation claim).

The Fourth Circuit has also held that 29 C.F.R. § 825.220(c), which states that employers are prohibited from discriminating against employees or prospective employees who have used FMLA leave and that employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, is a basis for a retaliation action. *Dotson v. Pfizer, Inc.*, 558 F.3d 284 (4th Cir. 2009); see also *Downs v. Winchester Med. Ctr.*, 21 F. Supp. 3d 615 (W.D. Va. 2014) (regulation is basis for FMLA retaliation claim, not FMLA interference claim); *Battle v. City of Alexandria*, No. 1:14cv1714 (E.D. Va. Apr. 14, 2015) (demotion is retaliation claim, not interference claim).

6-2 TITLE VII OF THE CIVIL RIGHTS ACT

6-2.01 Scope

In pertinent part, Title VII makes it unlawful for an employer:

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual 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. The act applies to employers of fifteen or more employees only. 42 U.S.C. § 2000e(f). Unlike with the ADEA and FLSA, the employee numerosity requirement applies to state and local governments. *Mount Lemmon Fire Dist. v. Guido*, 586 U.S. ___, 139 S. Ct. 22 (2018); see also *Leuenberger v. Spicer*, No. 5:15cv36 (W.D. Va. Jan. 28, 2016) (county not joint employer with commonwealth attorney's office for purposes of reaching the fifteen-employee requirement).

Congress constitutionally abrogated Eleventh Amendment protection against Title VII suits versus state employers. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (1976). However, a suit to enforce a settlement of a Title VII discrimination suit is barred by the Eleventh Amendment. *Frahm v. United States*, 492 F.3d 258 (4th Cir. 2007); *Kaplan v. James*, 25 F. Supp. 3d 835 (E.D. Va. 2014).

Title VII has been used to prohibit discrimination in job advertisements, recruitment, pre-employment investigations, and interviews, and virtually every aspect of the employment relationship, including conduct after the termination of employment such as the failure to provide references. It also protects employees from retaliation for exercising any right provided by the statute. The Supreme Court, in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006), abrogated the Fourth Circuit's determination (see, e.g., *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001)) that, in order for a retaliation claim to lie, a plaintiff must have been subjected to an adverse employment action. After *Burlington*, a plaintiff, in order to succeed on a retaliation claim, "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." In other words, while there is no need for an adverse employment action after *Burlington*, it is as critically important, even now, "to separate significant from trivial harms. Title VII . . . does not set forth a general civility code for the American workplace." *Id.* Thus, this concept of viewing the contested conduct from the standpoint of a "reasonable employee" provides an objective standard, which "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* (noting "the need for objective standards in other Title VII contexts"); see, e.g., *Emami v. Bolden*, 241 F. Supp. 3d 673 (E.D. Va. 2017) (the correct measure is "materially adverse action," not an "adverse employment action;" merely placing an employee on a Performance Improvement Plan, without actually executing the PIP is not a materially adverse action); *Kelly v. Boeing Co.*, No. 1:16cv00196 (E.D. Va. Dec. 12, 2016) (employer excluding employee from job-related meetings and giving employee non-job-related functions in favor of job-related functions not actionable "because Plaintiff did not suffer a demotion, pay decrease, or performance-based discipline").

The Fourth Circuit assumed, without deciding, that Title VII allows indirect liability for an employer's interference with an individual's employment with third parties, but held that under such a claim, the third-party employment relationship must fall within agency principles. *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186 (4th Cir. 1998) (no liability for interference with doctor/patient, doctor/hospital, or doctor/insurance company relationships).

Title VII applies to public and private employers, employment agencies, and labor organizations. See *Good v. Fairfax Cnty.*, No. 1:14cv1350 (E.D. Va. Dec. 19, 2014) (Title VII case; county was co-employer of deputy sheriff when county police exercised sufficient control over employee's work conditions). Independent contractors, however, may not bring a Title VII claim against those who hire them. 42 U.S.C. 2000e(f); *Farlow v. Wachovia Bank*, 259 F.3d 309 (4th Cir. 2001) (listing factors that distinguish independent contractor from employee). It also does not apply to undocumented aliens. In *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc) (8-4), the Fourth Circuit held that an alien who lacks the documentation required to work in the United States is unqualified for employment and thus cannot establish a prima facie case of hiring discrimination. The court held that the Immigration Reform & Control Act of 1986 congressionally overrode the holding of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S. Ct. 2803 (1984). The reasoning in the case should apply to all federal employment laws. See, e.g., *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999). But see *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (citing cases where certain types of damages have been allowed); *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 66 (4th Cir. 2016) (district court erred in denying EEOC subpoena; undocumented status does not affect EEOC's authority to investigate charge of discrimination by undocumented alien).

A federal district court has held that an employee of "European" heritage can assert a claim for national origin discrimination. *McNaught v. Va. Cmty. Coll. Sys.*, 933 F. Supp. 2d 804 (E.D. Va. 2013).

In a watershed decision, the U.S. Supreme Court held in 2020 that an employer discriminates "because of" the individual's sex—in violation of Title VII—when it fires that person for being gay or transgender. *Bostock v. Clayton Cnty.*, 590 U.S. ___, 140 S. Ct. 1731 (2020); see also *Monegain v. Dep't of Motor Vehicles*, 491 F. Supp. 3d 117 (E.D. Va. 2020) (transgender woman stated Equal Protection claim when she alleged DMV prohibited her from wearing clothes consistent with her gender identity); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (Equal Protection Clause and Title IX "protect transgender students from school bathroom policies that prohibit them from affirming their gender"). *Bostock* was consistent with an EEOC ruling in 2015 that Title VII covers sexual orientation discrimination, *Complainant*, EEOC DOC 0120133080, 2015 WL 4397641 (July 16, 2015), but overrules Virginia courts that had not interpreted Title VII in that way. See *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) and *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807 (E.D. Va. 2016). Previously, federal courts had extended Title VII to reach discrimination based on gender norms or sexual stereotyping, *Henderson v. Labor Finders of Va. Inc.*, No. 3:12cv600 (E.D. Va. Apr. 2, 2013), but not sexual orientation or transgender status.

In *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), the Fourth Circuit held that gender-normed fitness tests did not violate Title VII because they imposed equal burdens of compliance on men and women. The FBI had different fitness standards for its male and female agents. As men and women are not physiologically the same, an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness for each.

The Fourth Circuit has held that Title VII cases may not be brought against the federal government in state courts, as the statute only refers to waiver of immunity in federal courts and the abrogation of the United States' sovereign immunity can only occur if there is an unequivocal waiver contained in a statutory provision. *Bullock v. Napolitano*, 666 F.3d 281 (4th Cir. 2012).

6-2.02 The Elements of a Title VII Case

The "disparate treatment" (or "intentional discrimination") provision and the "disparate impact" provision are the only causes of action under Title VII. *EEOC v. Abercrombie & Fitch*

Stores, Inc., 575 U.S. 768, 135 S. Ct. 2028 (2015). See also section 6-1.03. However, Title VII case law addressing pregnancy, religion, and workplace harassment deserves additional discussion.

Title VII is not a proper basis for an action alleging a violation of Virginia public policy (a “Bowman” claim). *Jones v. HCA*, 16 F. Supp. 3d 622 (E.D. Va. 2014). See Chapter 7, State Law Employment Issues, section 7-4.

6-2.02(a) Failure to Accommodate

6-2.02(a)(1) Pregnancy

The Pregnancy Discrimination Act, enacted by Congress in 1978, amended Title VII by including discrimination on the basis of pregnancy, childbirth, or related medical conditions within the definition of sex discrimination. In interpreting the Act’s provision that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work,” the Supreme Court held that the standard *McDonnell Douglas* analysis applied. *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 135 S. Ct. 1338 (2015); see also section 6-1.03(a). In determining whether an employer’s legitimate, nondiscriminatory reason for not accommodating a pregnant worker is pretextual, a plaintiff may 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, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg et seq., went into effect on June 27, 2023, and will be analyzed in future editions of this Handbook.

6-2.02(a)(2) Religion

Because of the way religion is defined in Title VII, in cases of religious discrimination, the employee can seek to recover for the employer’s “failure to accommodate” religious expression or conduct, if accommodation would not cause undue hardship. In *Groff v. DeJoy*, ___ U.S. ___, 143 S. Ct. 2279 (2023), the Supreme Court explained that in order for an employer to show “undue hardship” it must show that “the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.”

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028 (2015), the employer asserted that disparate treatment because of a person’s religion could not be shown absent actual knowledge of a need for accommodation. The Supreme Court held that a plaintiff need only show that the need for accommodation was a motivating factor of the employer’s employment action. The Court noted that while other antidiscrimination statutes impose a knowledge requirement (e.g., ADA requires accommodations for “known” physical or mental limitations), Title VII does not. Stating that its rule was “straightforward,” the Court held that an “employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” The Court also held that Title VII requires otherwise-neutral policies to give way to the need for an accommodation. See also *Chalmers v. Tulon Co.*, 101 F.3d 1012 (4th Cir. 1996).

An employer cannot question the plausibility of a religious belief (employee stated religious beliefs would not let him use a biometric scanner) if it is sincerely held; reasonable accommodation must be made. *EEOC v. Consol. Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017).

6-2.02(b) Liability for Workplace Harassment

In disparate impact and treatment cases, Title VII liability attaches to discriminatory actions taken by the employer. In contrast, liability can be imposed in harassment cases for the employer’s inaction. While sexual harassment cases are the most prevalent, harassment

can be alleged by a person in any of the protected categories under Title VII. See, e.g., *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126 (4th Cir. 1995) (national origin harassment); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001); *Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994) (racial harassment). Same-sex harassment is actionable under Title VII as harassing conduct and need not be motivated by sexual desire to support a claim of discrimination based on sex. *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 118 S. Ct. 998 (1998). However, in an en banc, per curiam decision, the Fourth Circuit by a 6-6 vote upheld a district court's holding that white male police officers do not have standing to assert hostile environment claims regarding conduct directed at black and female officers. *Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir. 1998).

In the context of sex discrimination, harassment is actionable where it (i) creates an offensive or hostile work environment, or (ii) where sexual consideration is demanded in exchange for job benefits (quid pro quo sexual harassment). *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986).

6-2.02(b)(1) Hostile Work Environment

In order to prevail on a hostile work environment claim, the employee must prove (1) that harassment was "because of" "sex" (or "race," etc.), (2) that the harassment was unwelcome, (3) that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, and (4) that some basis exists for imputing the liability to the employer. *Parker v. Reema Consulting Servs.*, 915 F.3d 297 (4th Cir. 2019); *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000). In *Parker*, the Fourth Circuit held that allegations that an employer was involved in a false rumor that a female employee slept with her male boss to obtain promotion could give rise to employer's liability under Title VII for discrimination "because of sex" and that a jury could find that the negative effects of the rumor were severe and pervasive.

The plaintiff's own comments and actions may be relevant in determining whether the conduct in question was unwelcome. *Phillips v. Lynchburg Fire Dep't*, No. 6:16cv63 (W.D. Va. June 5, 2017) (evidence of complaining to supervisors demonstrates comments and conduct unwelcome). *Compare Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), with *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987); see also *Martin v. MCAP Christiansburg, LLC*, 143 F. Supp. 3d 442 (W.D. Va. 2015) (court denied summary judgment on "unwelcomeness" despite evidence that plaintiff visited alleged harasser's home several times and had an on-again, off-again relationship); *LaChance v. Town of Blacksburg*, No. 98-0550-R (W.D. Va. June 21, 1999) (no material evidence conduct based on gender animus).

The question of whether there is a hostile working environment requires an examination of all relevant circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993)). The Supreme Court has stated that in hostile environment cases, the continuing violation doctrine has more vitality than where the acts of discrimination are discrete (such as termination, promotion, etc.). *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002); see also *McKinnish v. Brennan*, No. 14-2092 (4th Cir. Nov. 6, 2015) (unpubl.) (summary judgment upheld because employee failed to report offending text and photo messages and because routine changes in routes and schedules produced "only a scintilla" of evidence of tangible employment action). See section 6-1.02(d). The conduct complained of should be judged under a totality of the circumstances test, not in the disaggregate. *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179 (4th Cir. 2000). Whether the harassment is sufficiently severe or pervasive is "quintessentially a question of fact." *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202 (4th Cir. 2014) ("close question" as to whether harassment was sufficiently hostile should not be

resolved on summary judgment); *Amirmokri v. Baltimore Gas & Electric Co.*, 60 F.3d 1126 (4th Cir. 1995).

Disagreement with management decisions do not rise to the level of a hostile work environment. *Spida v. BAE Sys. Info. Solutions*, No. 1:16cv979 (E.D. Va. Dec. 13, 2016) (no hostile work environment when employer used termination threats, attempted to force relocation, delayed decision on a request for an accommodation, restructured employee's unit and forced her to reapply for new jobs and demoted employee to part-time status).

Crude and "boorish" behavior, or sexual content and connotations, alone, are not enough to establish actionable sexual harassment; exposure to such conduct must occur under circumstances that constitute disadvantageous terms or conditions of employment for one sex to which members of the other sex are not exposed. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998 (1998). Sexually explicit behavior, especially when combined with "personal gender-based remarks," physically threatening behavior, and a disparity of power between the aggressor and victim, can create an abusive and hostile work environment. *Miller v. Mediko, Inc.*, No. 5:20-CV-00003 (W.D. Va. Sep. 3, 2021), *reh'g granted in part and denied in part*, No. 5-20-CV-00003 (W.D. Va. March 31, 2022).

A hostile work environment was demonstrated in the following cases: *Strothers v. City of Laurel*, 895 F.3d 317 (4th Cir. 2018) (making employee come to work five minutes early, request permission to use restroom, and changing dress code for the plaintiff was sufficiently severe and pervasive to make a prima facie case); *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc) (sufficient evidence that constant sexually explicit banter was gender-related); *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326 (4th Cir. 2010) (finding the city had an "obligation" to intercede given the history of sexual harassment in the city agency, the presence of few women at the agency, and the superior's actual knowledge of some of the objectionable conduct); *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000) (pervasive gender-based intimidation, ridicule, and insult sufficient); *EEOC v. Central Wholesalers, Inc.*, 573 F.3d 167 (4th Cir. 2009) (steady stream of race and gender-based conduct and insults over two-month period sufficiently severe and pervasive to constitute hostile environment); *cf. EEOC v. Fairbrook Med. Clinic*, 609 F.3d 320 (4th Cir. 2010) (simple teasing, offhand comments, and off-color jokes, while regrettable, do not cross the line into actionable misconduct); *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766 (4th Cir. 1997) (conduct that is only mildly offensive, unpleasant, and cruel does not as a matter of law create a hostile environment); *Sowash v. Marshalls of MA, Inc.*, No. 21-1656 (4th Cir. June 23, 2022) (unpubl.) (supervisor's hugs, touching employee's arm, kiss on the cheek, occasional compliments about her appearance do not constitute severe and pervasive harassment); *see also Bland v. Fairfax Cnty.*, No. 1:10cv1030 (E.D. Va. May 3, 2011) (because respect for co-workers is a safety aspect of employment as a firefighter, atmosphere of hostility is inherently more severe than other work environments).

An isolated incident of harassment, if extremely serious, can create a hostile work environment. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc) (extensive discussion of elements of a hostile environment claim); *cf. Smith v. Cnty. of Culpeper*, No. 98-003-C (W.D. Va. Dec. 23, 1998) (comment not objectively severe; general atmosphere admittedly not subjectively offensive), *aff'd*, 191 F.3d 448 (4th Cir. 1999).

For race cases, *see Perkins v. Int'l Paper Co.*, 936 F.3d 196 (4th Cir. 2019) (two incidents separated by years not pervasive; experiences of third parties that were unknown to plaintiff should not be considered); *Dragulescu v. Va. Union Univ.*, 252 F. Supp. 3d 551 (E.D. Va. 2017) (evidence of race discrimination by historically black university "not particularly overwhelming" when black male decision-maker increased ratio of black professors to white professors on search committee while dropping white female plaintiff from committee, lamented the lack of "black faces" in faculty senate and called plaintiff a

"white trailer trash whore" a week after recommending her non-renewal); *Merriweather v. Shelter House*, No. 1:16cv577 (E.D. Va. Jan. 17, 2017) (being forced to shred documents, denial of request to morning shift, and being counseled for making an inappropriate comment did not rise to the level of actionable adverse employment actions); *Tate v. Home Depot*, No. 4:16cv22 (W.D. Va. Jan. 4, 2017) (use of two racial slurs survives motion to dismiss); *Callahan v. Prince William Cnty. Pub. Schs.*, No. 1:16cv167 (E.D. Va. Dec. 5, 2016) (statements that plaintiff did not speak "black" and that it was difficult to find "uneducated people living in the woods" were racially innocuous; court noted that the Eastern District of Virginia imposes a higher standard for reverse discrimination cases, although it also noted the Fourth Circuit has not embraced that approach specifically); *Watson v. Shenandoah Univ.*, No. 5:14cv22 (W.D. Va. Nov. 14, 2016) (plaintiff failed to establish prima facie case of race discrimination in light of "bevy of evidence" showing poor work performance but even if she had, failed to show defendants' actions were pretextual), *aff'd*, No. 17-1588 (4th Cir. Oct. 26, 2017); *Lewis v. Sch. Bd. of Va. Beach*, No. 2:15cv321 (E.D. Va. Sep. 12, 2016) (statement that "without [proficiency in] Microsoft Word . . . Plaintiff would only be qualified to work as a Bus Driver, Kitchen Staff, or Custodian" insufficient to constitute adverse employment action).

For religion-based discrimination, see *Rayyan v. VDOT*, No. 17-1132 (4th Cir. Feb. 13, 2018) (unpubl.) (derogatory statements were "stray remarks" and lacked a nexus to employee's dismissal); *Smith v. Be Printers Americas*, No. 5:16cv60 (W.D. Va. Aug. 29, 2017) (statements questioning whether Christians can be effective workers and that "church folks" were overly sensitive sufficient to support a claim for discriminatory discharge, but for the purpose of establishing an objectively offensive environment, were deemed "mere offensive utterances").

Proper evaluation of hostile work environment claim includes consideration of harassing conduct directed to persons other than plaintiff, as the relevant question is the nature of the workplace environment as a whole. *Ziskie v. Mineta*, 547 F.3d 220 (4th Cir. 2008).

6-2.02(b)(2) Quid Pro Quo

In cases of quid pro quo sexual harassment, the plaintiff must show that he or she (i) belongs to a protected group; (ii) was subjected to unwelcome sexual harassment; (iii) the harassment complained of was based on sex; and (iv) the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998). To be quid pro quo sexual harassment, the threat of adverse employment action must actually be carried out; if unfulfilled, then it is analyzed as a hostile environment claim. *Id.* In *Crockett v. Mission Hospital, Inc.*, 717 F.3d 348 (4th Cir. 2013), the court found that a seven-day suspension was not a tangible adverse employment action caused by the supervisor's sexual harassment for three distinct reasons, each of which independently supported the finding: (1) other than stating the supervisor has done something "horrific," the employee did not disclose what had been done; (2) suspension was based on repeated disallowed cell phone usage, and although the supervisor was the one who reported the latest misuse, he was not responsible for the decision to suspend the employee; and (3) the employee suffered no pecuniary loss and did not prove the suspension was without pay. A tangible employment action must amount to demotion or reassignment with significantly different job responsibilities; assignment of extra work is not sufficient. *Reinhold v. Comm.*, No. 3:96cv82 (E.D. Va. Nov. 25, 1998); *cf. Cobbs v. First Transit Co.*, No. 6:16cv15 (W.D. Va. Dec. 16, 2016) (loss of optional light duty work in lieu of workers' compensation tangible employment action). Constructive discharge (where the offending behavior creates working conditions so intolerable that a reasonable person would feel compelled to resign) can constitute a tangible employment action if the offending conduct by a supervisor was an official act. *Pa. State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342 (2004).

6-2.02(b)(3) Vicarious Liability for Workplace Harassment

Once the elements of either type of sexual harassment have been proved, the Supreme Court has held that an employer can be held vicariously liable for the harassing acts of a supervisor, regardless of the type of harassment claim, even if the employer was not aware of them. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998). If quid pro quo harassment was proved, the employer is vicariously liable. If, however, there was no tangible adverse employment action (i.e., a hostile environment claim), then the employer may raise the affirmative defense addressed below. But see *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177 (4th Cir. 1998), in which the Fourth Circuit stated in dicta that even if there has been a tangible adverse employment action, the *Ellerth* affirmative defense is still available if the employer can show the adverse action was not taken *because of* the employee's refusal to submit to sexual harassment. See also *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261 (4th Cir. 2001) (raise and promotion do not amount to tangible employment action when not quid pro quo for sexual favors). In a constructive discharge case, when an official act does not underlie the constructive discharge, the affirmative defense is available to the employer. *Pa. State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342 (2004).

The Court in *Ellerth* and *Faragher* relied on the principles of agency law. While the Court also stated that vicarious liability exists under agency principles for intentional torts committed within the scope of the employee's employment, it noted that sexual harassment is usually not considered within the scope of employment. But see *Plummer v. Ctr. Psychiatrists, Ltd.*, 252 Va. 233, 476 S.E.2d 172 (1996) (sexual assault within scope of employment).

Left open in *Ellerth* and *Faragher* was who qualifies as a "supervisor" for whose harassment an employer may be held vicariously liable. In *Vance v. Ball State University*, 570 U.S. 421, 133 S. Ct. 2434 (2013), the Supreme Court held that an employee is a "supervisor" for purposes of vicarious liability under Title VII of the Civil Rights Act only if he is empowered by the employer to take tangible employment action against the victim; i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. The Court specifically disapproved of the Fourth Circuit's broader definition as stated in *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010) (ability to direct activities and understanding of job roles may indicate who is a supervisor).

With regard to co-worker sexual harassment, the employer is liable only if it was negligent in controlling working conditions. *Vance v. Ball State Univ.*, 570 U.S. 421, 133 S. Ct. 2434 (2013); *Mikels v. City of Durham*, 183 F.3d 323 (4th Cir. 1999) (the employer is only liable for its own negligence; i.e., it knew or should have known of the harassment and failed to act). An employer may be charged with constructive knowledge of co-worker harassment when it fails to provide reasonable procedures for victims to register complaints. *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc).

The Fourth Circuit adopted the same negligence standard for third-party harassment as that of co-worker harassment: the harassment will be imputed to the employer if it knew or should have known of the harassment and failed to take prompt remedial action. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014); see also *Webster v. Chesterfield Cnty. Sch. Bd.*, 38 F.4th 404 (4th Cir. 2022) (holding student-on-teacher discrimination can give rise to employer liability, but finding discrimination not severe or pervasive enough to create a hostile environment); *Deen v. Shenandoah Cnty. Pub. Schs.*, No. 5:16cv79 (W.D. Va. July 12, 2017) (same).

6-2.02(b)(4) Affirmative Defense

For a hostile environment claim, the employer may raise as an affirmative defense that (1) the employer exercised reasonable care to prevent and correct promptly any sexually

harassing behavior (which burden may be met by an adequately disseminated anti-harassment policy with an effective complaint procedure) and that (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); see, e.g., *McKinney v. G4S Gov't Sols. Inc.*, No. 16-1498 (4th Cir. Oct. 19, 2017) (unpubl.) (extensive discussion of the application of the affirmative defense).

While *Ellerth* and *Faragher* each specifically dealt with claims of sexual harassment, the holdings therein apply with equal force to other types of harassment claims under Title VII. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001).

6-2.02(b)(4)(i) Reasonable Care by Employer

In *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000), the court held that the employer failed the first prong of the affirmative defense because its policy was not effectual and its investigation was inadequate. The employer's response must be proportional to the seriousness of the underlying conduct in terms of promptness, remedial measures taken, and the effectiveness of those measures. *Pryor v. United Air Lines, Inc.*, 791 F.3d 488 (4th Cir. 2015).

6-2.02(b)(4)(ii) Unreasonable Failure by Employee

Failure to follow a complaint procedure will normally suffice to satisfy the employer's burden under the second element of the defense. *Crockett v. Mission Hosp., Inc.*, 717 F.3d 348 (4th Cir. 2013) (employee would not disclose details of what happened to investigators). In *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999), the employer met the first prong and then showed that the employee "failed to avoid harm" by intentionally placing herself in a situation that was risky. See also *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261 (4th Cir. 2001) (failure to report until after three months of incidents unreasonable); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001) (a generalized fear of retaliation does not justify failure to report harassment); *Speight v. Albano Cleaners Inc.*, 21 F. Supp. 2d 560 (E.D. Va. 1998) (same). Compare with *Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp. 2d 601 (W.D. Va. 1998), where despite having an express policy and undertaking a prompt and effective investigation, the employer was liable because the employee did not unreasonably fail to take advantage of corrective opportunities.

6-2.03 Joint Employer Liability

Holding that an employee can have multiple employers for Title VII purposes, the Fourth Circuit adopted the "hybrid" test for determining if there is joint employment. The test considers both the common law of agency and the economic realities of employment. *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404 (4th Cir. 2015) (temporary employment agency employees also employees of business to which they are assigned; noting split in circuits between the "control" test, "economic realities" test, and "hybrid" test). The common-law element of control remains the "principal guidepost" and the factors to be considered are (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship. The first three factors are the most important but not determinative. A federal district court found that a county was not the joint employer of local department of social services employee. *Ross v. Cnty. of Franklin*, No. 7:14cv512 (W.D. Va. Nov. 19, 2015).

A franchisor is not necessarily a joint employer simply because it holds enormous power and influence over the franchisee; the operative factor is the franchisor's power over the employee at issue. *Wright v. Mountain View Lawn Care, LLC*, No. 7:2015cv224 (W.D. Va. Mar. 11, 2016); *see also Greene v. Harris Corp.*, No. 14-1601 (4th Cir. June 22, 2016) (unpubl.) (contract between employer and client did not give the client sufficient control over terms and conditions of employment to constitute a joint employer). For a jury instruction and explanation on constructive joint employer liability, *see Crump v. U.S. Dep't of the Navy*, No. 2:13cv707 (E.D. Va. Mar. 3, 2016). *See also Taylor v. Cardiology Clinic, Inc.*, 195 F. Supp. 3d 865 (W.D. Va. 2016) (discussing whether a shareholder-director is an employee or an employer for purposes of Title VII liability).

The National Labor Relations Board issued a decision on August 27, 2015, in [Case 32-RC-109684](#), holding that two or more entities are "joint employers" of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they show or co-determine those matters governing the essential terms and conditions of employment.

6-2.04 Individual Liability

Supervisors cannot be held liable in their individual capacities for Title VII violations because they do not fit within the definition of "employer." *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177 (4th Cir. 1998); *Taguinod v. Amazon.com Inc.*, No. 3:16cv869 (E.D. Va. Dec. 15, 2016), *aff'd*, No. 18-1305 (4th Cir. May 30, 2018); *Lee v. Va. Beach Sheriff's Office*, No. 2:13cv109 (E.D. Va. Apr. 14, 2014); *Norman v. City of Roanoke*, No. 7:04cv00278 (W.D. Va. Oct. 25, 2004).

6-2.05 Remedies

Under § 2000e-5(g) of Title VII a federal district court has broad equitable discretion to fashion remedies to make the plaintiff whole, including declaratory and injunctive relief, reinstatement or hiring, back pay, front pay, attorney's fees, and costs. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 121 S. Ct. 1946 (2001); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251 (1976); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994); *see Cherry v. Champion Int'l*, 186 F.3d 442 (4th Cir. 1999) (costs cannot be denied prevailing party because of comparative economic power of parties or because suit was in public interest). Back pay may not accrue from a date more than two years prior to the filing of a charge with the EEOC. 42 U.S.C. § 2000e-5(g)(1). Back pay damages should not be tolled merely because the position for which the employee was not hired became open again. *Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639 (4th Cir. 2002). The recovery of lost wages and reinstatement may also be limited in cases where the employer discovered evidence after the discriminatory action that would have justified the discharge of the employee. *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995).

The Civil Rights Act of 1991 significantly expanded the remedies available to a Title VII plaintiff by authorizing compensatory damages and, except in cases against government agencies and political subdivisions, punitive damages. 42 U.S.C. § 1981a (a)-(b); *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S. Ct. 2118 (1999) (discussing standard for awarding punitive damages); *see also Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc); *Corti v. Storage Tech. Corp.*, 304 F.3d 336 (4th Cir. 2002); *Anderson v. G.D.C., Inc.*, 281 F.3d 452 (4th Cir. 2002); *see generally Lee v. Va. Beach Sheriff's Office*, No. 2:13cv109 (E.D. Va. Apr. 14, 2014). Compensatory damages pursuant to § 1981a include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses but not back pay or any other type of relief authorized by Title VII. 42 U.S.C. § 1981a (b)(2)-(3). The statute establishes a cap on the amount of compensatory damages that may be recovered. The cap ranges from \$50,000 to \$300,000, depending on the number of people employed by the defendant. The § 1981a(b) statutory cap on compensatory damages applies to the complaining party, not per count. *Hall v. Stormont Trice Corp.*, 976 F. Supp. 383 (E.D. Va. 1997). If the plaintiff seeks compensatory or punitive damages, any party may demand a

trial by jury. 42 U.S.C. § 1981a(d). Front pay, i.e., money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement, is an equitable remedy authorized by Title VII itself, and not a compensatory damage authorized by the 1991 Civil Rights Act Amendments, and thus the statutory cap on the amount does not apply. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 121 S. Ct. 1946 (2001).

There is disagreement as to whether compensatory or punitive damages are available for a retaliation claim. See *Rhoads v. FDIC*, No. 03-2373 (4th Cir. Apr. 16, 2004) (ADA claim); *Evans v. Larchmont Baptist Church Infant Care Ctr. Inc.*, 956 F. Supp. 2d 695 (E.D. Va. 2013); *Lucas v. Henrico Cnty. Sch. Bd.*, 822 F. Supp. 2d 589 (E.D. Va. 2011).

An award of attorney's fees to the prevailing party is authorized by 42 U.S.C. § 2000e-5(k). A prevailing defendant may recover attorney's fees only if the court finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 6 (1978). It is not necessary to have a favorable decision on the merits to be a prevailing party. *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 136 S. Ct. 1642 (2016) (remanding to the court of appeals EEOC claim that a preclusive judgment is required for the defendant to be a prevailing party); see also *Reyazuddin v. Montgomery Cnty.* 988 F.3d 794 (4th Cir. 2021) (employee was prevailing party when jury found employer had failed to accommodate her disability in violation of Rehabilitation Act, even though employer eventually accommodated her and lower court did not issue injunction); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014) (attorney's fees awarded because lawsuit was moot at its inception); *EEOC v. Great Steaks, Inc.*, 667 F.3d 510 (4th Cir. 2012) (attorney's fees not awarded); *Baiden-Adams v. Forsythe Transp. Inc.*, 988 F. Supp. 2d 584 (E.D. Va. 2013) (no attorney's fees when dismissed for failure to exhaust administrative remedies). The most critical factor in determining the reasonableness of a fee award is the degree of success obtained. If the prevailing party recovered only nominal damages, the only reasonable fee is usually no fee at all. *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566 (1992). The Fourth Circuit has held, however, that even when nominal awards are made, the extent of the relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served can justify significant legal fees. *Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2005).

Title VII does not provide federal court jurisdiction for a suit solely to recover attorney's fees for work performed in settling the matter at the administrative level. *Chris v. Tenet*, 221 F.3d 648 (4th Cir. 2000).

6-3 SECTION 1981 OF THE CIVIL RIGHTS ACT

6-3.01 Scope

42 U.S.C. § 1981 provides, in relevant part, that all persons in the United States "shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." In holding that a claim of racial harassment was not actionable under § 1981, the Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), ruled that the statute applied only to conduct at the initial formation of the contract and conduct that interfered with the right to enforce established contractual obligations. It was not, concluded the Court, a general proscription of discrimination in the workplace.

The *Patterson* decision was effectively overturned by the Civil Rights Act of 1991, which, inter alia, expanded the definition of the phrase "make and enforce" contracts to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Section 1981 now extends to all aspects of the employment relationship. See *Dennis v. Cnty. of Fairfax*, 55 F.3d 151 (4th Cir. 1995).

6-3.02 Persons Protected

Subdivision (c) of the statute states that rights under § 1981 are protected from both “nongovernmental discrimination and impairment under color of State law.” Both public and private sector employees can therefore utilize the statute.

In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022 (1987), the Court held that persons of Arabian ancestry were protected by § 1981 because the statute applied to all “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.” See also *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208 (4th Cir. 2016); *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D. Va. 1995) (recognizing that Hispanic individuals may have a § 1981 cause of action), *aff’d without op.*, 86 F.3d 1151 (4th Cir. 1996).

The protections of 42 U.S.C. § 1981 apply to at-will employees; the relationship is contractual even if the employee can be fired at-will. While dismissing an at-will employee is not a violation of contractual rights, breach of contractual rights is not a predicate to a § 1981 claim. *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015 (4th Cir. 1999).

In a case of first impression, the Second Circuit Court of Appeals held that the protections of 42 U.S.C. § 1981 extend to non-citizens asserting discrimination on American soil. *Ofori-Tenkorang v. Am. Int’l Group, Inc.*, 460 F.3d 296 (2d Cir. 2006). In *Ofori-Tenkorang*, the court reasoned that the plain language of the statute made it apparent that its protections extend to non-citizens since § 1981 expressly applies to “persons within the jurisdiction of the United States” and does not include the limited language of the Civil Rights Act of 1866, which states “all persons born in the United States and not subject to any foreign power.” *Id.*

6-3.03 Elements of a Cause of Action

Section 1981 jurisprudence borrows heavily from the case law developed under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983. In a § 1981 action, the plaintiff must prove intentional or purposeful discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989). “Intent may be proved from disparate impact, departures from procedural norms, a history of discriminatory actions, and other relevant facts.” *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D. Va. 1995). A poor evaluation is not evidence of a violation unless there is evidence the evaluation was dishonestly given because of racial animus. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274 (4th Cir. 2000). A hostile work environment claim has the same elements as such a claim under Title VII (see section [6-2.02\(b\)\(1\)](#)). *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001).

The same framework of proof applicable to Title VII cases, as first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), also governs § 1981 claims. See section [6-1.03](#). When the plaintiff alleges a discriminatory disciplinary action, a prima facie case is made when the employee shows that (1) he or she is a member of a protected class; (2) the prohibited conduct in which the plaintiff engaged was comparable in seriousness to the misconduct of employees outside of the protected class; and (3) the adverse employment action against the plaintiff was more severe than that given to employees outside of the class. *Spratley v. Hampton City Fire Dep’t*, 933 F. Supp. 535 (E.D. Va. 1996); *Lewis v. Va. Baptist Homes, Inc.*, No. 95-0071 (W.D. Va. Nov. 19, 1996).

Since the standards of proof are the same, if the plaintiff fails to meet the burden of proving a violation of Title VII, the § 1981 cause of action must also fail as a matter of law. *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D. Va. 1995); *Wilder v. Se. Pub. Serv. Auth.*, 869 F. Supp. 409 (E.D. Va. 1994), *aff’d without op.*, 69 F.3d 534 (4th Cir. 1995).

6-3.04 Defenses

Claims under § 1981 that were made possible by the Civil Rights Act of 1991 (see section 6-3.01) are subject to the four-year federal catchall statute of limitations, 28 U.S.C. § 1658. *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836 (2004). Section 1658 provides that the limitations period for a civil action arising under an Act of Congress enacted after the date of the section's enactment (December 1, 1990) is four years, if a limitations period is not otherwise provided by law. The Court in *Donnelley* held that the catchall limitations period applies only to causes of action that were not available until after § 1658 was enacted but that the cause of action can arise from an amendment to a statute that existed prior to the enactment of § 1658. While the Court recognized that it might be difficult to determine whether a particular claim arose under the amended or the unamended version of a statute, it found the making of such determinations well within judicial ken. See also *James v. Circuit City Stores, Inc.*, 370 F.3d 417 (4th Cir. 2004) (following *Jones*). Presumably, claims that arise from the initial formation of the contract (i.e., the statute as interpreted in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989)), would be governed by the two-year Virginia statute of limitations for personal injury actions. See *Williams v. Enter. Leasing Co.*, 911 F. Supp. 988 (E.D. Va. 1995).

Technically, an employee "cannot separately state a claim against a municipality under § 1981." *Richardson v. City of Hampton*, No. 4:95cv160 (E.D. Va. May 30, 1996); accord *Childress v. City of Richmond*, 907 F. Supp. 934 (E.D. Va. 1995), *aff'd on different grounds*, 134 F.3d 1205 (4th Cir. 1998). When suit is brought against a city, county, or town, 42 U.S.C. § 1983 "is the exclusive federal remedy for violation of the rights guaranteed in § 1981." *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 109 S. Ct. 2702 (1989). Similarly, § 1981 rights against the state can be enforced only under § 1983, and Eleventh Amendment immunity bars § 1981 and § 1983 claims against the state. *McCurdy v. Va. Dep't of Corr.*, No. 2:16cv17 (W.D. Va. Dec. 7, 2016). As in any § 1983 action, a governmental entity can also be held liable for a violation of § 1981 only if the plaintiff demonstrates that the alleged discriminatory actions were taken pursuant to an official governmental custom or policy. *Dennis v. Cnty. of Fairfax*, 55 F.3d 151 (4th Cir. 1995); *Wilder v. Se. Pub. Serv. Auth.*, 869 F. Supp. 409 (E.D. Va. 1994). Generally, one occurrence of alleged discrimination is not sufficient to constitute a "policy" or "custom." *Williams v. City of Charlottesville Sch. Bd.*, 940 F. Supp. 143 (W.D. Va. 1996). Based on dicta in the Supreme Court's decision in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453 (2005), a federal district court held that a § 1983 claim premised upon a § 1981 post contract formation violation is governed by the four-year limitations period of 28 U.S.C. § 1658 rather than the period applicable to § 1983 actions. *Mveng-Whitted v. Va. State Univ.*, 927 F. Supp. 2d 275 (E.D. Va. 2013), *aff'd*, No. 13-2238 (4th Cir. May 1, 2014).

Likewise, an agent of a corporation, even when he/she is (1) the sole shareholder; (2) president of the corporation; (3) has signed the contract; and (4) can show direct harm from the other parties' discriminatory misconduct, cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246 (2006) ("Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else's.")

A government official sued as an individual may have absolute immunity under § 1981 for legislative actions, but legislative immunity does not apply to the public body. *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996). Improper motives of legislators, however, cannot be used to strike down an otherwise valid enactment. *Kensington Vol. Fire Dep't, Inc. v. Montgomery Cnty.*, 684 F.3d 462 (4th Cir. 2012). Individuals may also be entitled to a qualified immunity from civil liability if the challenged conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. Since § 1981 liability requires intentional discrimination and arises most often in cases of racial discrimination, it may be difficult to argue that the right violated was not "clearly

established." See, e.g., *Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996) (qualified immunity was not available in a suit challenging the application of a county affirmative action program under §§ 1981 and 1983).

6-3.05 Remedies

The plaintiff in a § 1981 action may be entitled to "both equitable and legal relief, including compensatory, and under certain circumstances, punitive damages." *Stephens v. S. Atl. Cannery, Inc.*, 848 F.2d 484 (4th Cir. 1988) (quoting *Johnson v. Ry. Express Agency*, 421 U.S. 454, 95 S. Ct. 1716 (1975)). As in any § 1983 suit, cities and counties are immune from an award of punitive damages for a violation of § 1981. *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986). Attorney's fees for a prevailing plaintiff may be awarded pursuant to 42 U.S.C. § 1988.

6-4 AGE DISCRIMINATION

6-4.01 Scope and Jurisdiction

The Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., was enacted on December 15, 1967, and became effective June 12, 1968, to prohibit employment discrimination based on age, which had not been prohibited under Title VII of the Civil Rights Act of 1964.

The ADEA prohibits adverse employment actions taken against an employee on the basis of age. To establish an ADEA claim, a plaintiff must show (1) that he is an employee covered by the Act; (2) that he has suffered an unfavorable employment action by an employer covered by the Act; and (3) that absent the employer's age-based discriminatory intent, the adverse employment action would not have occurred. *Currence v. Biggers Bros.*, 91 F.3d 129 (4th Cir. 1996) (unpubl.); *Fink v. Western Elec. Co.*, 708 F.2d 909 (4th Cir. 1983).

Assuming, without deciding, that a "hostile work environment" age discrimination claim could be made, the Fourth Circuit delineated the necessary elements: (1) plaintiff is at least forty years old; (2) harassment of plaintiff is based on age; (3) harassment unreasonably interfered with plaintiff's work, creating an objectively and subjectively hostile or offensive environment; and (4) a basis exists for imputing liability to the employer. *Burns v. AAF-McQuay, Inc.*, 166 F.3d 292 (4th Cir. 1999) (holding hypothetical elements not met); *accord Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998).

In the Fourth Circuit, the ADEA provides exclusive relief for all claims of age discrimination in employment. *Zombro v. Balt. City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989).

The ADEA establishes an administrative procedure for enforcement that must be followed before a claimant is authorized to file a private cause of action. See section [6-1.02](#).

6-4.02 Covered Persons

6-4.02(a) Employees

By the terms of 29 U.S.C. § 631, the operation of the ADEA is limited to individuals who are at least forty years of age. The Supreme Court held: "[t]his language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996). However, while it forbids discriminatory preference for the young over the old, it does not prohibit favoring the old over the young. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 124 S. Ct. 1236 (2004) (company can discriminate in providing better benefits to older workers).

29 U.S.C. § 630(f) defines the term “employee” to include anyone who is employed, except:

- a. any person elected to public office in a state or political subdivision;
- b. any person chosen by the elected official for his or her personal staff;
- c. a policymaking appointee of the elected official; and
- d. an elected official’s immediate advisor with respect to constitutional or legal powers of the office.

These exceptions do not apply to state and local government employees who are subject to civil service laws of the jurisdiction.

Employees are protected under the ADEA if they are at least forty years of age. However, according to 29 U.S.C. § 631(c), the ADEA does not prohibit compulsory retirement of an employee who is sixty-five years of age or older and who was a bona fide executive or high policymaking employee for at least two years prior to retirement, so long as that employee is entitled to immediate non-forfeitable annual retirement benefits amounting to at least \$44,000. Generally, in the Fourth Circuit, the ADEA does not apply to illegal aliens. *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999), following *Egbuna v. Time-Life Libraries*, discussed in section 6-2.01. But see *Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (citing cases where certain types of damages have been allowed). Nor does it cover foreign nationals who apply in foreign countries for jobs in the United States. *Reyes-Gaona v. N.C. Growers Ass’n*, 250 F.3d 861 (4th Cir. 2001). The ADEA does apply to apprentices, *EEOC v. Seafarers Int’l Union*, 394 F.3d 197 (4th Cir. 2005), but not to volunteers, *Blankenship v. City of Portsmouth*, 372 F. Supp. 2d 496 (E.D. Va. 2005) (volunteer auxiliary deputy sheriff). The Supreme Court has held that the First Amendment bars adjudication of employment discrimination cases, including those arising under ADEA, between an employee and a religious institution when the employee’s position was central to the church’s core religious mission; such disputes should be resolved by the church itself. See *Hasanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 132 S. Ct. 694 (2012) (establishing “ministerial exception” to various employment laws); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049 (2020) (applying *Hasanna-Tabor* to bar discrimination suits by religious school teachers).

6-4.02(a)(1) State Court Judges

The Supreme Court has held that state court judges are not included in the exceptions to the term “employee” and, therefore, constitutional provisions mandating the retirement of state court judges at certain ages do not automatically violate the ADEA. *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395 (1991).

6-4.02(a)(2) Firefighters and Law Enforcement Officers

29 U.S.C. § 623(j) makes special provision for the hiring and retention of firefighters and law enforcement officers by local government employers. The subsection generally provides that employers can continue to follow mandatory age limitations of at least fifty-five years of age and refuse to hire or force the retirement of firefighters and law enforcement officers on that basis so long as they are following bona fide hiring and retirement plans that are not subterfuges to evade the purposes of the ADEA.

6-4.02(b) Employer

29 U.S.C. § 630 defines the term “employer” to include anyone engaged in an industry affecting commerce who employs at least twenty people. In 1974, Congress expanded the definition of employer to specifically include state and local governments. The Supreme Court held this extension of the definition to be a valid exercise of congressional powers under the Commerce Clause. *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054 (1983);

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631 (2000) (holding, however, that there was no authority under the Commerce Clause or § 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity from suit); *McCray v. Md. DOT*, 741 F.3d 480 (4th Cir. 2014) (sovereign immunity bars an ADEA suit versus a state or state agency). The limitation of employment of at least twenty people does not apply to state or local governments. *Mount Lemmon Fire Dist. v. Guido*, 586 U.S. ___, 139 S. Ct. 22 (2018).

The Fourth Circuit has held that the ADEA's definition of "employer" prevents the assessment of liability against individual employees. Instead, the Fourth Circuit held that the doctrine of respondeat superior applies to hold employers responsible for the discriminatory acts of individual employees. *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994). The discriminatory animus of a subordinate who is not the employment action decision maker, however, cannot provide the necessary evidence of discrimination even if that person exercises "substantial influence" in the employment decision. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc). Rather, the biased subordinate employee must be the actual decision maker for the employer or be shown to possess such authority as to be viewed as the one principally responsible for the decision.

6-4.03 Employer's Obligations

6-4.03(a) Posting Notice of Act

In addition to prohibiting discrimination on the basis of age, the ADEA affirmatively requires employers to post notice of the provisions of the Act, in a form acceptable to EEOC, in conspicuous places on its premises. 29 U.S.C. § 627.

6-4.03(b) Recordkeeping; EEOC Regulations

29 U.S.C. § 626(a) authorizes EEOC to promulgate regulations requiring employers to keep any records EEOC deems "necessary or appropriate for the administration of this Act" Those regulations can be found at 29 C.F.R. Part 1627, and they require employers to make payroll or other records for each employee that contain the employee's name, address, date of birth, occupation, rate of pay, and compensation earned each week. These records must be kept for at least three years. 29 C.F.R. § 1627.3(a).

Further, if an employer routinely creates other personnel records about its employees, those records must be kept for at least one year from the date of any personnel action to which those records relate. "Personnel records" include job applications and resumes, information about promotion, demotion, transfer, selection for training, layoff, recall, or discharge, job orders submitted to employment agencies or labor organizations, employment tests, physical examination results, and job advertisement. 29 C.F.R. § 1627(b)(1). Employers are also required to keep records of employee benefit plans, along with written descriptions of any seniority or merit plans, during the life of the plan and for one year after the plan expires. 29 C.F.R. § 1627.3(b)(2).

Finally, if EEOC commences an enforcement action against an employer, it must require the employer to retain its personnel and employee benefit/seniority/merit plan information that is relevant to the enforcement action until final disposition of the enforcement action. 29 U.S.C. § 1627.3(c).

6-4.04 Proof Scheme

In order to prevail, an ADEA plaintiff must prove that "but for" the employer's discriminatory motive, the employer would not have taken the action that injured the employee. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982). *But see Babb v. Wilkie*, 589 U.S. ___, 140 S. Ct. 1168 (2020) (mixed-motive standard applies to age discrimination claims against federal employers). This can be demonstrated by direct or indirect proof. *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231 (4th Cir. 1991). The Supreme Court made clear in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), that

the mixed-motive proof scheme is unavailable under the ADEA, as it applies to private employers and state and local governments. Over vigorous dissent, the majority in *Gross* examined as a threshold question whether the mixed-motive theory applied in an ADEA case, and concluded that it did not, finding that the ADEA language is not the same as that used in Title VII. The Court reasoned that the Civil Rights Act of 1991 addressed the mixed-motive theory in the application of Title VII only, not the ADEA. Therefore, under the ADEA, unlike Title VII, mixed-motive discrimination claims are not permitted except against the federal government. *Babb v. Wilkie*, 589 U.S. ___, 140 S. Ct. 1168 (2020). Private-sector and state and local government employees are limited to proving their claims by demonstrating that age is the “but-for” cause of their employer’s actions, without regard to elements of direct proof of age bias. The *Gross* decision, therefore, effectively overturns mixed-motive analyses in such cases as *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160 (4th Cir. 2004) and *Hill v. Lockheed Martin Logistics Management*, 354 F.3d 277 (4th Cir. 2004) (en banc). See, e.g., *Jernagin v. McHugh*, No. 1:12cv1285 (E.D. Va. Feb. 18, 2014) (although plaintiff proved age bias by a supervisor, she failed to prove that “but for” that bias she would not have been terminated as the biased supervisor did not play a sufficient role in the decision-making).

6-4.04(a) McDonnell Douglas Scheme

When an ADEA plaintiff has no direct proof of discrimination—for example, an employment policy that discriminates on its face on the basis of protected ages, or statements by the employer amounting to an admission of discriminatory intent—the plaintiff is entitled to try to prove his or her case through the familiar *McDonnell Douglas v. Green* scheme of proof established to indirectly prove Title VII cases. *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996) (the Court assumed that *McDonnell Douglas* is applicable in ADEA cases). See section 6-1.03(a). A reasonable belief that an applicant is overqualified is a legitimate, non-discriminatory reason for failure to hire. *Buckner v. Lynchburg Redev. & Hous. Auth.*, 262 F. Supp. 3d 373 (W.D. 2017).

Until the Supreme Court’s decision in *O’Connor v. Consolidated Coin Caterers*, courts in the Fourth Circuit had been requiring plaintiffs to show that they had been disadvantaged in favor of workers younger than forty, outside the protected class, in order to make the case. However, in *O’Connor*, the Supreme Court held that this is not a required or even logical element of the prima facie case in an ADEA claim. The critical question, in the Court’s view, was whether the employee was disadvantaged in favor of someone significantly younger, regardless of whether that person was over or under age forty. A significant difference in age could indicate that the employer did not treat age in a neutral fashion when making the decision, which is the appropriate third element of the case. In *DeBord v. Washington County School Board*, 340 F. Supp. 2d 710 (W.D. Va. 2004), the court held that a difference of seven years was insufficient to meet the test of “substantially younger” when both employees were in the protected class and there were little other indicia of age discrimination.

The Fourth Circuit has held that where an employer advertised notice of job vacancies with language looking for “young and energetic persons with outgoing personalities” for the positions from which plaintiffs were discharged, a jury was entitled to find that plaintiffs proved that the employer acted with an age-discriminatory motive toward plaintiffs. *EEOC v. Marion Motel Assocs.*, 961 F.2d 211 (4th Cir. 1992) (unpubl.).

Note that the U.S. Supreme Court has stated that use of age as a factor in determining retirement plan benefit levels does not necessarily violate the ADEA. *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 128 S. Ct. 2361 (2008). In *EEOC v. Baltimore County*, 747 F.3d 267 (4th Cir. 2014), however, employees successfully proved that a county’s retirement plan that based employee contribution percentages on age was facially discriminatory in violation of the ADEA. The plan provided for benefits based on age or years of service. Because a forty-year-old and a sixty-year-old who each retired after twenty years

of service would receive the same benefits, but the sixty-year-old would have had to contribute at a higher rate, the court found that the plan treated older employees at the time of enrollment less favorably than younger employees "because of" their age. The Fourth Circuit distinguished *Kentucky Retirement* as addressing whether "pension status" was a "proxy for age" while there was no question in *Baltimore County* that the county's plan was based on age.

6-4.04(b) Modified Indirect Proof Scheme for RIF Cases

In a reduction-in-force (RIF) case, the Fourth Circuit applies a modified version of the *McDonnell Douglas* standard:

1. the employee was protected by the ADEA;
2. he was selected for discharge or demotion from a larger group of candidates;
3. he was performing at a level substantially equivalent to the lowest level of those of the group retained; and
4. that employer did not treat the protected status neutrally; there were other circumstances giving rise to an inference of discrimination; or, if performance was the announced decisive factor, that the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which he was performing.

Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993); *Andrezyski v. Kmart Corp.*, 358 F. Supp. 2d 511 (W.D. Va. 2005). This modified proof scheme was applied in *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996), in which the employer, facing the need to reduce its staff over the long term to operate within budget constraints, decided to reduce post-retirement health benefits and gave the plaintiff the option for early retirement before the effective date of the reduction of benefits. See also *Dugan v. Albemarle Cnty. Sch. Bd.*, 293 F.3d 716 (4th Cir. 2002) (even if RIF policy was misapplied, no evidence it was for a discriminatory reason); *Marlow v. Chesterfield Cnty. Sch. Bd.*, 749 F. Supp. 2d 417 (E.D. Va. 2010) (evidence existed in the RIF of the technology education teachers to suggest that the RIF reflected age bias on the part of the decision-maker); *Waters v. Logistics Mgmt. Inst.*, No. 16-2353 (4th Cir. Feb. 9, 2018) (unpubl.) (no ADEA violation when plaintiff's position was terminated during restructuring, even though younger workers assumed many of the duties).

6-4.05 Affirmative Defenses

The employer in an ADEA claim need not rely upon the plaintiff's anticipated failure to produce direct evidence or failure to meet the *McDonnell Douglas* proof scheme to defend the case; several affirmative defenses are available.

6-4.05(a) Express Defenses

The ADEA itself provides several exceptions to the general proscription against age discrimination in employment; the existence of any of these exceptions can be asserted and proved as an affirmative defense.

Note that if the employer tries to prove the existence of any of these exceptions as an affirmative defense, the employer will bear the burden of proof on that affirmative defense. *EEOC v. Baltimore & Ohio R.R.*, 632 F.2d 1107 (4th Cir. 1980).⁹

6-4.05(a)(1) Age as Bona Fide Occupational Qualification

Under 29 U.S.C. § 623(f)(1), an employer may discriminate among employees based on age if age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business.

The Virginia Attorney General has encapsulated the inquiry into this affirmative defense:

The courts have adopted a two-pronged test for determining when age is a BFOQ. Under this test, an employer must first prove the existence of job qualifications “reasonably necessary to the essence of its business.” . . . The employer must next prove that he has reasonable cause, i.e., a factual basis, for believing that either (a) all or substantially all persons in the excluded age group would be unable to perform safely and efficiently the duties of the job involved, or (b) that it is impossible or impractical to make individualized determinations of the capabilities of persons in the excluded group. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

1989 Op. Va. Att’y Gen. 212 (other citations omitted). In *Western Air Lines*, 472 U.S. 400, 105 S. Ct. 2743 (1985), the Supreme Court indicated the factual considerations relevant to determining whether age is a BFOQ, which must be supported by a particularized factual showing of:

1. the nature of the tasks required by the job;
2. the physiological and psychological traits required to perform those tasks;
3. the availability of those traits among persons in the targeted age group;
4. the actual capabilities of persons in the targeted age group; and
5. the ability to detect disease or a precipitous decline in the faculties of employees in the targeted group.

See also *Johnson v. Mayor of Baltimore*, 472 U.S. 353, 105 S. Ct. 2717 (1985).

6-4.05(a)(2) Reasonable Factors Other Than Age

Under 29 U.S.C. § 623(f)(1), an employer may also differentiate among employees where the differentiation is based on reasonable factors other than age (“RFOA”), although it may disproportionately affect older workers. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), the Supreme Court held that where an employment decision was based on years of service, as distinguished from age, the employer has not violated the ADEA. In *Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536 (2005), the Court held that factors

⁹ To date, case law does not resolve the apparent conflict between this principle and the holding of *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993), *on remand*, 2 F.3d 264 (8th Cir. 1993). Under *St. Mary’s Honor Center*, the employer could assert one of 29 U.S.C. § 623(f)’s conditions as a legitimate nondiscriminatory reason under the *McDonnell Douglas* scheme, and the employer bears only a burden of production under those circumstances, not the burden of proof. However, if the employer voluntarily assumes the burden of proof on the existence of one of these conditions at the summary judgment stage of the litigation, which is the most conservative approach to defending a discrimination case, the distinction between the two approaches makes no practical difference.

need only be reasonable; it was not necessary that the employer show that there were no other ways for the employer to achieve its goals that did not result in a disparate impact on older workers. A plurality in *Smith* implied that RFOA is a defense only to disparate impact claims.

However, an employee retirement benefit plan requiring older enrollees to contribute a higher percentage of their salaries is impermissible age-based discrimination, even if they tend to contribute for a shorter time and retire sooner than their younger counterparts. *EEOC v. Baltimore Cnty.*, 747 F.3d 267 (4th Cir. 2014). The Fourth Circuit held that the ADEA's safe harbor provision that authorizes a retirement plan to subsidize a portion of early retirement did not apply because it did not allow "employers to impose contribution rates that increase with the employee's age at the time of plan enrollment."

6-4.05(a)(3) Employees in Foreign Workplaces

Subsection (f)(1) of 29 U.S.C. § 623 also provides an exception to the anti-age discrimination provisions of the ADEA for employees in a workplace in a foreign country, where compliance with the ADEA would cause a violation of the laws of the country in which the workplace is located.

6-4.05(a)(4) Bona Fide Seniority System

Pursuant to 29 U.S.C. § 623(f)(2), employers may treat workers differently based on age, where the treatment is required in order to comply with the provisions of a bona fide seniority system. This exception is subject to two provisos: the seniority system cannot be used as a subterfuge for age discrimination, and the employer cannot refuse to hire an applicant or force the involuntary retirement of an employee based on age, regardless of the provisions of the seniority plan.

A retirement plan has been held to be part of a "bona fide" seniority system when it has been proven to actually exist and provide benefits. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S. Ct. 444 (1977) (a case upholding mandatory retirement based on age before the ADEA was amended to prohibit this).

6-4.05(a)(5) Good Cause

29 U.S.C. § 623(f)(3) provides that an employer may discipline or discharge an individual for good cause, even though that decision affects a protected employee.

6-4.05(b) Failure to Follow Required Administrative Procedures

As a procedural prerequisite to filing suit, the ADEA requires a potential plaintiff to first file an administrative claim with the EEOC¹⁰ within 180 days after the alleged unlawful action occurred, or 300 days in a deferral state. 29 U.S.C. § 626(d); see section [6-1.02](#).

6-4.05(b)(1) Statute of Limitations for Litigation

As the ADEA incorporates the statute of limitations of the Portal-to-Portal Act (29 U.S.C. §§ 255 and 259), the statute of limitations for a violation of the ADEA is two years from the date of injury, or three years in the case of a willful violation of the act.

To determine whether a violation was "willful" for purposes of determining which statute of limitations applies, courts will apply the test established by the Supreme Court in *TWA, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S. Ct. 1677 (1988), that the employer must have known or recklessly disregarded the question of whether its conduct violated the ADEA. *Pfaff v. Food Lion*, 851 F.2d 106 (4th Cir. 1988).

¹⁰ Initially, the ADEA required that such claims be filed with the Secretary of Labor; however, in 1978, an Executive Order was entered transferring age discrimination enforcement functions to the EEOC. (Sec. 1-101 of Ex. Or. No. 12106 of Dec. 28, 1978, 44 F.R. 1053).

6-4.05(b)(2) Waiver

In *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20, 111 S. Ct. 1647 (1991), the court noted that employees may settle claims under the ADEA as it was originally written without EEOC involvement. Where employees have waived their rights under the ADEA as part of such a settlement, the employer can assert that waiver as an affirmative defense if the employee subsequently files suit.

The Fourth Circuit subsequently held: "There is no dispute among the circuits that employees may validly waive their federal ADEA rights in private settlements with their employers, provided that their consent to a release is both knowing and voluntary." *O'Shea v. Com. Credit Corp.*, 930 F.2d 358 (4th Cir. 1991). The Fourth Circuit went on to hold in *O'Shea* that the validity of any release of ADEA rights should be determined under ordinary contract principles, as established by the law of the state in which the waiver was allegedly made. Even if a release is voidable under state contract law, it nevertheless becomes effective if the employee later ratifies it by accepting any benefits conferred by the release agreement. The most common example, and the fact pattern of *O'Shea*, involved the employee's written acceptance of a severance package in return for a release of ADEA rights, and the employee's subsequent actual acceptance of severance benefits. *See also Bala v. Va. Dep't of Conservation*, No. 14-1362 (4th Cir. June 25, 2015) (settlement agreement pursuant to grievance procedure bars Title VII retaliation claim).¹¹

The Older Workers Benefit Protection Act (OWBPA) added a section, 29 U.S.C. § 626(f)(1)(A)-(H), to the ADEA, which established minimum criteria for valid waivers of rights under the ADEA. Those include a requirement that the waiver be in writing, that it be phrased in language calculated to be understood by the employee, and that it refer specifically to rights under the ADEA. Additionally, an employee must be given either twenty-one or forty-five days to consider the release and a period of seven days after execution of the release to revoke the release. *Id.*; see EEOC [guidance](#) on waivers.

The U.S. Supreme Court in *Oubre v. Entergy Operations Inc.*, 522 U.S. 422, 118 S. Ct. 838 (1998), held that release of ADEA claims that did not meet the requirements of the Older Workers Benefit Protection Act were unenforceable and that the employee's failure to return the severance pay did not constitute ratification or create equitable estoppel on the issue of the validity of the release of the ADEA claims. *But see Adams v. Moore Bus. Forms, Inc.*, 224 F.3d 324 (4th Cir. 2000) (*Oubre* does not control whether retention of pay constitutes ratification under state law).

6-4.06 Remedies for ADEA Violations**6-4.06(a) Wage Benefits**

Plaintiffs who successfully prove that employment incidents or practices violate the ADEA are entitled to recover money damages equal to the wages they would have received had the discriminatory incident not occurred or the practice not existed. Unlike with Title VII, but consistent with the FLSA, the award of back pay is not discretionary, even if there has been an unreasonable delay in bringing suit. *EEOC v. Baltimore Cnty.*, 904 F.3d 330 (4th Cir. 2018).

This right of recovery is, however, subject to a discharged or not-hired plaintiff's duty to mitigate by seeking alternative employment both before and after judgment on the ADEA claim. *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114 (4th Cir. 1983). A wrongfully discharged employee is not, however, required to accept employment that is located an

¹¹ Note, however, that in *Passaro v. Commonwealth*, 935 F.3d 243 (4th Cir. 2019), the Fourth Circuit held that a Title VII suit was not barred by the claim preclusive effect of a state court judgment upholding an administrative grievance outcome. In dicta it noted that if the grievance process addressed and decided the discriminatory issues, then issue preclusion might apply.

unreasonable distance from his home. *Florence Printing Co. v. NLRB*, 376 F.2d 216 (4th Cir. 1967).

6-4.06(b) Liquidated (Double) Damages

29 U.S.C. § 626(b) provides that liquidated damages are available for willful violations of the ADEA to the same extent that they are available under the Fair Labor Standards Act. Therefore, willful violations of the ADEA are punishable with double damages.

For the purposes of assessing whether discriminatory policies and individual employment decisions are “willful” violations, courts will determine whether the employer acted with knowledge or with reckless disregard for the matter of whether its conduct was prohibited by the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993); see also *Burns v. AAF-McQuay, Inc.*, No. 94-0049-H (W.D. Va. Dec. 23, 1997) (liquidated damages are available only if employee suffered pecuniary damage as a result of an alleged ADEA violation), *aff’d on other grounds*, 166 F.3d 292 (4th Cir. 1999).

6-4.06(c) Other Money Damages

6-4.06(c)(1) Prejudgment Interest

Prejudgment interest is available to a prevailing plaintiff, unless the plaintiff obtains an award of liquidated damages. *Hamilton v. 1st Source Bank*, 895 F.2d 159 (4th Cir. 1990), *aff’d in relevant part*, 928 F.2d. 86 (4th Cir. 1990) (en banc).

6-4.06(c)(2) Damages for Pain and Suffering

Damages for pain and suffering are not available in an ADEA case. *Comm’r v. Schleier*, 515 U.S. 323, 115 S. Ct. 2159 (1995); *Taylor v. Home Ins. Co.*, 777 F.2d 849 (4th Cir. 1985); *Cyr v. Perry*, 301 F. Supp. 2d. 527 (E.D. Va. 2004).

6-4.06(d) Injunctive Relief

By its terms, 29 U.S.C. § 626(b) contemplates that a successful plaintiff in an ADEA case can obtain injunctive relief: “the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion”

The starting point in reviewing an employee’s claim for equitable relief is the principle that the prevailing plaintiff is entitled to “the most complete relief possible.” However, the Fourth Circuit has determined that equitable jurisdiction under the ADEA does not include the power to order an employer to displace an innocent incumbent employee in order to hire or reinstate an ADEA claimant. *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114 (4th Cir. 1983). Therefore, a reinstatement injunction in a situation where no appropriate vacancy exists should order the employer to place the employee in the first available vacancy, and will likely make an award of front pay to the employee until reinstatement. A court may not enter an injunction reinstating the plaintiff if the employer can demonstrate that it would cause a serious adverse effect on the employer’s operations.

We recognize, of course, that reinstatement particularly at the level of an executive position may be entirely inappropriate where the evidence reflects hostility between the parties and the position involved demands a high degree of cooperation.

Id.

6-4.06(e) Attorney’s Fees and Costs

Because 29 U.S.C. § 626(b) incorporates the relief provisions of the Fair Labor Standards Act, which in 29 U.S.C. § 216(b) permit a successful plaintiff to recover reasonable attorney’s fees and costs, they are likewise available to a prevailing ADEA plaintiff. See, e.g., *Spangler v. Colonial Ophthalmology*, 235 F. Supp. 2d 507 (E.D. Va. 2002) (applying lodestar method to calculate award of attorney’s fees to ADEA plaintiff).

6-5 THE REHABILITATION ACT AND ADA

6-5.01 Overview

In 1973, the Rehabilitation Act, 29 U.S.C. § 701 et seq., was enacted to promote employment opportunities for individuals with disabilities in both the public and private sectors. It expressly prohibited, and continues to prohibit, employment discrimination against persons with disabilities, by any program or activity receiving federal funds or conducted by any executive agency or the Postal Service. Further, the EEOC has adopted implementing regulations under the Rehabilitation Act that expressly prohibit employment discrimination by federal government contractors. 41 C.F.R. § 60-741.

On July 1, 1994, the provisions of the Americans with Disabilities Act of 1990 became effective with respect to all employers covered by Title VII of the Civil Rights Act of 1964 (those employing fifteen or more employees and engaging in an industry affecting commerce).¹² Title I¹³ of the ADA prohibits employment discrimination against persons with disabilities, thus extending the anti-discrimination provisions of the Rehabilitation Act to all private employers as well as public employers. In the Fourth Circuit's view, the ADA "codified much of the case law and the implementing regulations developed under the Rehabilitation Act. The overlap between the two statutes is substantial." *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995).

In *Myers*, the Fourth Circuit recognized the provision of the ADA specifying that administrative complaints filed under either statute be dealt with in a manner that prevents imposition of inconsistent or conflicting standards for the same requirements. See 42 U.S.C. 12117(b); 29 U.S.C. § 793(e); 29 U.S.C. § 794(d). The Fourth Circuit relies on precedent established under the Rehabilitation Act in deciding ADA cases. See *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209 (4th Cir. 1994).

Because, as the Fourth Circuit found in *Myers*, "whether suit is filed against a federally funded entity under the Rehabilitation Act or against a[n] . . . employer under the ADA, the substantive standards for determining liability are the same," this outline will treat issues of liability and defense arising under both together, following a brief description of the provisions of the two Acts.

6-5.02 Provisions of the Rehabilitation Act

6-5.02(a) Affirmative Action Obligations

6-5.02(a)(1) Scope, Covered Employers

29 U.S.C. § 793 covers those entities (including local governments) having contracts with the federal government, or subcontracts with government contractors, exceeding \$10,000 to supply goods or services. Unlike the ADA, coverage is not limited to employers with fifteen or more employees. *Justus v. Clinch Indep. Living Servs.*, No. 1:00cv00099 (W.D. Va. July 19, 2001) (unpubl). Pursuant to this section, such federal contracts and subcontracts must include a provision requiring the contractor to take affirmative action to employ and advance in employment qualified individuals with disabilities.

Under EEOC regulations adopted to implement the Rehabilitation Act, federal contracts and subcontracts must include a provision stating that the contractor will not discriminate against individuals with physical or mental disabilities who are qualified to

¹² Under the Virginians with Disabilities Act, Va. Code § 51.5-1 et seq., which proscribes discrimination in employment practices and applies to *any* employer in Virginia except those covered by the Rehabilitation Act, even local governments or other public entities with fewer than fifteen employees are prohibited from discriminating against an otherwise qualified person with a disability *solely* because of the disability.

¹³ Public employees cannot use Title II of the ADA to bring employment discrimination claims against their employers. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407 (4th Cir. 2015) (noting split in circuits).

perform the job in which they have been placed or for which they have applied. 41 C.F.R. § 60-741.5. Federal contractors and subcontractors with contracts in excess of \$10,000 are prohibited from discriminating against individuals with disabilities. See 29 U.S.C. § 793; 41 C.F.R. § 60-741.21.

In 1990, the Fourth Circuit determined that an entire state university system qualified as a “federal contractor” such that all the campuses were subject to affirmative action requirements, even though only eleven out of sixteen campuses received federal contracts. The court ruled that the university system was a single agency of which non-contracting campuses were merely constituent parts. *Bd. of Governors of Univ. of N.C. v. U.S. Dep’t of Labor*, 917 F.2d 812 (4th Cir. 1990).

The joint employer doctrine adopted by the Fourth Circuit in a Title VII case applies to Rehabilitation Act claims. *Crump v. TCoombs & Assocs., LLC*, No. 2:13cv707 (E.D. Va. Sep. 22, 2015); see section 6-2.03.

6-5.02(a)(2) Enforcement

The Fourth Circuit has held that 29 U.S.C. § 793 does not create or imply a private cause of action for discrimination on the basis of disability against federal contractors. *Wilson v. Amtrak Nat’l R.R.*, 824 F. Supp. 55 (D. Md. 1992), *aff’d* 993 F.2d 230 (4th Cir. 1993); *Painter v. Horne Bros., Inc.*, 710 F.2d 143 (4th Cir. 1983). Therefore, enforcement of this section is limited to the administrative procedure established in the statute itself. An aggrieved individual may file a complaint against a contractor with the Department of Labor. 29 U.S.C. § 793(b). The Office of Federal Contract Compliance (OFCCP) conducts an investigation and if it finds a violation, it attempts conciliation. If conciliation fails, the Director of OFCCP can either seek an injunction in court or hold an administrative hearing, which may result in the contractor losing the contract and being debarred from future contracts with the federal government.

6-5.02(b) Discrimination in Federally Assisted Programs

6-5.02(b)(1) Scope, Covered Employers

29 U.S.C. § 794 provides: “No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of her or his disability handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” To the extent that local governments receive federal funds to support any of their activities or programs, they are subject to the provisions of § 794.

The Fourth Circuit has held that third-party beneficiaries of programs receiving federal funding are not “activit[ies] receiving federal financial assistance.” *Disabled in Action v. Mayor of Baltimore*, 685 F.2d 881 (4th Cir. 1982) (baseball club’s benefit from federal subsidy of stadium does not subject it to Rehabilitation Act).

6-5.02(b)(2) Enforcement

Although the Supreme Court avoided directly deciding the question of the availability of a private right of action in any program or activity receiving federal financial assistance, see *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S. Ct. 1248 (1984), the Fourth Circuit has held that a private right of action exists. *Davis v. Se. Cmty. Coll.*, 574 F.2d 1158 (4th Cir. 1978), *rev’d on other grounds*, 442 U.S. 397, 99 S. Ct. 2361 (1979).

The Fourth Circuit has held that the statute of limitations for such an action is one year, based on the one-year statute of limitations provided under the most analogous state provision, the Virginians With Disabilities Act, Va. Code § 51.5-1 et seq. *Wolsky v. Med. Coll. of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993) (following the holding of *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985)). *But see* the discussion of *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836 (2004), in section 6-3.04.

A claimant who seeks legal remedies for a violation of 29 U.S.C. § 794, in the form of monetary damages, as distinguished from purely equitable relief, is entitled to a jury trial. *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994).

6-5.03 Provisions of the Americans with Disabilities Act

6-5.03(a) Scope, Covered Employers

In general, Title I of the ADA prohibits all employers from discriminating against employees who have disabilities covered by the Act. 42 U.S.C. § 12112. Since July 1994, the coverage of the ADA has extended to every employer covered by Title VII of the Civil Rights Act of 1964 (those employing fifteen or more employees¹⁴ over a defined period).¹⁵ If a person with a disability can perform the essential functions of a job, the employer is prohibited from discriminating against that employee because of the disability. If a person with a disability can perform the essential functions of a job if the employer can provide a reasonable accommodation to the employee without suffering undue hardship, the employer must do so.

The ADA Amendments Act (ADAAA), Public Law No. 110-325 (2009), expanded the interpretation of the ADA's coverage that has been narrowly construed by courts for many years. The ADAAA's specific application is described in the affected areas of treatment, set forth below. The ADAAA does not apply retroactively. *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143 (4th Cir. 2012).

The Eleventh Amendment precludes private suits under Title I of the ADA in federal courts against state employers for money damages. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001); *McCray v. Md. DOT*, 741 F.3d 480 (4th Cir. 2014) (sovereign immunity bars an ADA suit versus a state or state agency). However, a plaintiff may still sue a state officer for reinstatement. *Allen v. Coll. of William & Mary*, 245 F. Supp. 2d 777 (E.D. Va. 2003).

The joint employer doctrine adopted by the Fourth Circuit in a Title VII case applies to ADA claims. *Crump v. TCoombs & Assocs. LLC*, No. 2:13cv707 (E.D. Va. Sep. 22, 2015); see also section 6-2.03.

6-5.03(b) Employer's Affirmative Obligations

6-5.03(b)(1) Posting Notices

42 U.S.C. § 12115 requires employers to post notices in an accessible format to applicants and employees advising them of their rights under Title I of the ADA, in the manner prescribed in Title VII.

6-5.03(b)(2) Confidential Treatment of Medical Records

Where employers are permitted to conduct medical testing or inquiries of employees or applicants, EEOC regulations require employers to maintain the records of that testing in a confidential manner. 29 C.F.R. § 1630.14. Medical information may not be disclosed, although an employee's supervisors can be notified of restrictions and accommodations necessary for the employee and first aid personnel can be informed of any potential need for emergency treatment for the employee. See *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir.

¹⁴ The threshold number of employees for application of the ADA is an element of a plaintiff's claim for relief, not a jurisdictional issue. *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143 (4th Cir. 2012) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235 (2006)).

¹⁵ Religious institutions are exempt to the extent that the First Amendment bars adjudication of employment discrimination cases, including those arising under the ADA, between an employee and a religious institution when the employee's position was central to the church's core religious mission. See *Hasanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 132 S. Ct. 694 (2012) (establishing "ministerial exception" to various employment laws); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049 (2020) (applying *Hasanna-Tabor* to bar discrimination suits under ADEA and ADA by religious school teachers).

2019). In *EEOC v. Overnite Transportation Co.*, No. 7:01cv00076 (W.D. Va. Nov. 30, 2001) (unpubl.), the court held that the disclosure of the employee's back injury and workers' compensation claim did not violate the Act because the employer did not learn the medical information from confidential medical records or medical examinations.

6-5.03(c) Enforcement

According to 42 U.S.C. § 12117, the ADA is to be enforced in precisely the same way as Title VII is enforced. Therefore, an ADA claimant is required to file a charge with EEOC within the time period prescribed for Title VII charges before filing a private action. See section 6-1.02.

The Fourth Circuit has not addressed the question of which statute of limitations—the two-year statute that normally applies to Title VII actions, or the one-year statute of limitations provided by the Virginians With Disabilities Act (Va. Code § 51.5-46(B))—applies to a private cause of action brought under the ADA. A district court held that the statute of limitations is the one-year limit provided by the Virginians With Disabilities Act. *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998); *Lewis v. Aetna Life Ins. Co.*, 993 F. Supp. 382 (E.D. Va. 1998), *rev'd on other grounds*, 180 F.3d 166 (4th Cir. 1999). The cause of action accrues when plaintiff receives final and definite notice of discriminatory acts, not when the effects of the decision are felt. *Id.*; see also the discussion of *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836 (2004), in section 6-3.04.

6-5.04 Analytical Framework for Determining Liability

At the outset, a claimant under the ADA or the Rehabilitation Act is required to prove that the defendant knew of the claimant's disability or perceived the claimant as disabled. If a defendant is not aware of the disability when the adverse action is taken, the plaintiff cannot prove his or her prima facie case. *Tan v. Runyon*, 91 F.3d 133 (4th Cir. 1996) (unpubl.). Additionally, if the employee cannot perform the essential functions of the job even with a reasonable accommodation, then the defendant who took adverse action has not violated the ADA or the Rehabilitation Act. *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995).

The Fourth Circuit has developed two alternative frameworks to establish violations under the ADA (and, therefore, for Rehabilitation Act claims) depending upon whether the employer denies reliance on the disability in making its adverse employment decisions. *Benson v. E.I. du Pont de Nemours & Co.*, 182 F. Supp. 2d 527 (W.D. Va. 2002). If the employer denies reliance on the disability and instead offers other reasons for its adverse action, the burden-shifting scheme established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), is employed. *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995). Under this approach, a plaintiff must first present evidence that establishes a prima facie case of discrimination. A plaintiff can establish a prima facie case of discrimination under *McDonnell Douglas* by showing that (1) the plaintiff is in the protected class; (2) the plaintiff was discharged (or subject to an adverse employment action); (3) the plaintiff, at the time of the adverse employment action, was performing at a level that met the employer's legitimate business expectations; and (4) the discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Benson v. E.I. du Pont de Nemours & Co.*, 182 F. Supp. 2d 527 (W.D. Va. 2002). If the plaintiff satisfies the initial burden of establishing a prima facie case, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the employment decision. When such a non-discriminatory reason has been put forward, the inference of discrimination disappears and the plaintiff must prove, by a preponderance of the evidence, that the reasons proffered by the defendant were a pretext for intentional discrimination.

On the other hand, when the employer relies upon the disability in making the employment decision, an alternate three-pronged test, developed in *Tyndall v. National Education Centers*, 31 F.3d 209 (4th Cir. 1994), must be employed to determine whether

the adverse employment action was unlawful. Under this three-pronged test, a plaintiff must establish that (1) the plaintiff has a disability; (2) the plaintiff is a qualified individual; and (3) in discharging the plaintiff (or in taking the adverse employment action), the employer discriminated against the plaintiff because of a disability.¹⁶ *Benson v. E.I. du Pont de Nemours & Co.*, 182 F. Supp. 2d 527 (W.D. Va. 2002).

In addition to the two alternative frameworks set forth above, the Fourth Circuit has expressly held that a hostile environment claim exists under the ADA. Based on Title VII methodology, an ADA plaintiff must prove the following to establish a hostile work environment claim: (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer. *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4th Cir. 2001).

The Fourth Circuit has held that the “mixed-motive” causation standard is not available for ADA cases, applying the Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), which held that such a causation standard is not available in ADEA cases. As with ADEA cases, the plaintiff must show that the disability was a “but-for” cause of the adverse employment action. *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228 (4th Cir. 2016).

For online resources, see the [Job Accommodation Network](#), a service of the U.S. Office of Disability Employment Policy, which provides free and confidential guidance on workplace accommodations and disability employment issues, and the U.S. Department of Labor’s [Enforcement Guidance on Reasonable Accommodation and Undue Hardship](#).

6-5.05 Definitions of Key Terms Under the Rehabilitation Act and the ADA

6-5.05(a) Discrimination

6-5.05(a)(1) Generally

Both the Rehabilitation Act and the ADA prohibit employment discrimination. The ADA specifically defines the prohibited discrimination to include discrimination with regard to job application procedures, hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a); *see also* 42 U.S.C. § 12112(b) (more specific listing of what is prohibited); *cf. Bailey v. City of Chesapeake*, No. 2:13cv333 (E.D. Va. Oct. 16, 2013) (volunteer policeman not an employee under ADA).

The Fourth Circuit has held that employers may discharge or otherwise discipline employees for misconduct, regardless of whether it is attributable to a mental disability. *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993); *Pence v. Tenneco Auto. Operating Co.*, No. 05-1582 (4th Cir. Mar. 7, 2006) (unpubl.) (even if employer regarded employee as disabled, the employee’s termination was justified due to violation of rule prohibiting employees from making threats).

The Supreme Court upheld an employer’s policy not to rehire an employee who was discharged for violating rules of conduct—specifically, a previous positive test for cocaine. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513 (2003). The Court found that the company consistently followed its unwritten policy, which was clear and unambiguous, not to rehire an employee who left due to workplace misconduct. *Id.* This policy not to rehire employees who left the company due to workplace misconduct was not limited to drug-related misconduct. *Id.*

¹⁶ Note that in *Tyndall*, the Fourth Circuit found that where the same person that hired the plaintiff, with knowledge of her disability, later fired the plaintiff, a strong inference of non-discrimination is created, which the plaintiff must produce adequate evidence to overcome.

A public entity's long-term disability plan is not required to provide equal benefits for mental and physical disabilities nor does the ADA require health or disability plan sponsors to justify risk classifications with actuarial data. *Rogers v. Dep't of Health*, 174 F.3d 431 (4th Cir. 1999).

6-5.05(a)(2) Medical Testing or Inquiry

The EEOC regulations implementing the ADA generally prohibit the use of pre-employment medical examinations or inquiries for applicants or medical examinations or inquiries for employees to determine whether applicants or employees have disabilities. 29 C.F.R. § 1630.13. At the pre-offer stage, employers *may not* ask questions designed to elicit information about disability, including the applicant's workers' compensation history, whether an applicant has a disability, how the applicant became disabled, the prognosis for the disability, or how often the applicant would require leave for treatment. 29 C.F.R. Part 1630, Appendix, *Interpretive Guidance on Title I of the Americans with Disabilities Act*. The plaintiff must establish that actual injury occurred as a result of the illegal questions. *Whindleton v. Coach Inc.*, No. 3:13cv55 (E.D. Va. Jan. 30, 2015) (noting split in authority regarding whether emotional distress resulting from being asked improper questions is a cognizable injury).

However, the EEOC regulations provide specific exceptions to the general prohibition to permit an employer to inquire as to an applicant's ability to perform job-related functions, and to ask an applicant to demonstrate how he or she will perform those functions with or without reasonable accommodation. A medical examination or inquiry can be required *only* after the employer has made an employment offer to an applicant. The offer may be conditioned upon the results of the examination/inquiry, provided all employees in that job category are subjected to the same examination/inquiry regardless of disability. 29 C.F.R. § 1630.14. These pre-employment medical examinations and inquiries need not be job-related. However, if an employer rejects an applicant after a disability-related question or medical examination, the employer must show that the rejection was "job-related and consistent with business necessity." 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.10, 1630.14(b)(3).

Further, employers are permitted to make job-related medical examinations or inquiries of existing employees, and they are permitted to provide their employees with voluntary medical examinations and histories as part of an employee health program available to employees at the work site. *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019) (referral to an employee assistance plan is job-related and consistent with business necessity). An employer may require a disabled employee to undergo an independent medical examination if it has an objectively reasonable basis to believe the employee's medical condition will impair his ability to perform the essential functions of his job or performing the functions of the job will pose a direct threat to the employee's safety or the safety of others. *EEOC v. McLeod Health, Inc.*, 914 F.3d 876 (4th Cir. 2019) (no summary judgment for employer because jury could conclude there was no direct threat of injury despite a history of recent falls); *Leonard v. Electro-Mechanical Corp.*, 36 F. Supp. 3d 679 (W.D. Va. 2014) (an employee's refusal to undergo such an exam may form a legitimate, nondiscriminatory basis for termination); see also *Coffey v. Norfolk S. Ry. Co.*, 23 F.4th 332 (4th Cir. 2022) (employer's request for medical records following train engineer's positive tests for amphetamines and codeine did not violate ADA because request was job-related, objectively reasonable, and consistent with its business need of complying with federal regulations. Moreover, if a medical exam request is in compliance with the ADA, it cannot constitute a violation of the Family and Medical Leave Act, even though that Act states that fitness for duty certification is established by a simple statement of the employee's ability to return to work. *Porter v. U.S. Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997); see also *Wyland v. Boddie-Noell Enters.*, No. 95-0436-R (W.D. Va. Jan. 9, 1998) (employer may require drug testing if it is job-related and necessary for a business purpose), *aff'd*, 165 F.3d 913 (4th Cir. 1998).

6-5.05(a)(3) Physical Requirements

In *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139 (1999), the Supreme Court ruled that a physical requirement (such as 20/20 vision for commercial airline pilots), standing alone, does not violate the ADA. Employers may prefer some physical attributes over others and accordingly, establish physical criteria. An employer can decide that impairment makes a person less than ideally suited for a job, so long as the impairment is not a "substantially limiting" one. The ADAAA provides that the term "substantially limits" must be interpreted consistently with the "findings and purposes" of the Act, which are set forth as a list of general and specific requirements establishing a less demanding standard than previously applicable. The ADAAA further provides that it is to be construed "in favor of broad coverage" of individuals by the Act.

6-5.05(b) Individual With a Disability

An "individual with a disability" and "disability" are defined for the purposes of the prohibition on employment discrimination as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B); 42 U.S.C. § 12102(2). The EEOC regulations define many of the relevant terms in this definition. 29 C.F.R. § 1630.2. Significantly, the ADAAA negated the effect of *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139 (1999), which had limited the ADA's protection for employees and job applicants whose disabilities could be "mitigated" by medication, treatment, or assistive devices. Thus, the ADAAA restored the pre-*Sutton* requirement that impairment be determined without considering the extent to which mitigation measures actually correct the impairment. *See also Young v. UPS*, 707 F.3d 437 (4th Cir. 2013) (although the ADA advises an employer to initiate "an informal, interactive process" when determining whether an individual with a disability needs an accommodation, no such counsel applies to the determination of whether an employee is disabled in the first instance), *rev'd on other grounds*, 575 U.S. 206, 135 S. Ct. 1338 (2015).

The ADAAA further clarifies that impairments that are episodic or in remission may be considered disabilities if they would substantially limit a major life activity when active.

6-5.05(b)(1) Impairment

A physical impairment is defined as any physiological disorder, or condition, or cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs) cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. The U.S. Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998), held that a person with asymptomatic HIV is a person with a disability. The Court held that even without symptoms, HIV impairs bodily well-being and that the impairment substantially limits the major life activity of reproduction because of fear of transmittal.

Generally, homosexuality, gender identity disorders not resulting from physical impairments, and transsexualism are not "impairments" for purposes of the ADA. 42 U.S.C. § 12211(b)(1). In *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *cert. denied*, No. 22-633 (U.S. June 20, 2023), the Fourth Circuit held that gender dysphoria, defined as clinically significant distress caused by an incongruence between gender identity and assigned sex, is not equivalent to gender identity disorders. The court further held that the plaintiff had sufficiently pled facts that, even if gender dysphoria were a gender identity disorder, hers resulted from a physical impairment.

A mental impairment is defined as any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1603.2(h).

6-5.05(b)(2) Temporary Conditions

In light of the ADAAA directive to interpret the ADA in favor of broad coverage, the Fourth Circuit held that temporary conditions, even those expected to completely heal, may be an actual disability if they are “sufficiently severe.” *Summers v. Altarum Inst., Corp.*, 740 F.3d 325 (4th Cir. 2014); *see also Young v. UPS*, 575 U.S. 206, 135 S. Ct. 1338 (2015) (noting without expressing an opinion as to their validity that under current EEOC regulations, a pregnancy that results in lifting restrictions may constitute a disability).

6-5.05(b)(3) Major Life Activities

In *Sutton*, 527 U.S. 471, 119 S. Ct. 2139 (1999), the Supreme Court assumed, without deciding, that working is a major life activity, but observed that including working in the definition of major life activity could potentially make the ADA circular. Targeting this aspect of *Sutton*, the ADAAA expands the list of “major life activities” which, if substantially limited, constitute protected disabilities, including several activities previously rejected by courts as major life activities, e.g., eating, sleeping, lifting, bending, reading, concentrating, working, etc., and bodily functions such as the immune system, digestive, bowel, bladder, neurological, brain, and reproductive functions. See 29 C.F.R. § 1630.2(i). In *Jacobs v. North Carolina Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015), the court of appeals upheld an EEOC regulation that stated that “interaction with others” was a major life activity such that a person suffering from social anxiety disorder was disabled. *See also Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014) (distinguishing “interacting with others” from “mere trouble getting along with coworkers”).

6-5.05(b)(4) Substantially Limits

“Substantially limits,” as redefined in the ADAAA, means “materially restricts,” rather than “prevents or severely restricts” as previously defined. Additionally, the ADAAA establishes that an impairment that substantially limits one major life activity does not have to limit others to be deemed a disability. Thus, the ADAAA negates the effect of *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002) (holding that when the major life activity is the performance of manual tasks, 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; not just an inability to perform tasks associated with a specific job).

An injury that only moderately affects a major life activity, absent additional evidence, is not a substantial limitation. *Swann v. US Foods, Inc.*, No. 1:14cv1409 (E.D. Va. June 17, 2015) (slight limp due to leg surgery and wrist injury requiring three weeks’ light duty did not substantially impair ability to work).

The EEOC provides the following factors to consider in determining whether an individual is substantially limited in the performance of a major life activity:

- The term “substantially limits” requires a lower degree of functional limitation than the standard previously applied by the courts. An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability.
- The term “substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADAAA.
- With one exception (“ordinary eyeglasses or contact lenses”), the determination of whether an impairment substantially limits a major life

activity is made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids.

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- In keeping with Congress's direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.

29 C.F.R. § 1630.

When the major life activity is working, EEOC guidance provides that an individual can prove a disability by showing that an impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. While this language is very similar to pre-ADAAA regulations, the EEOC states the determination of coverage should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits the major life activity of working than was applied prior to the ADAAA. Accordingly, the terms "class of jobs" and "broad range of jobs in various classes" should be applied in a more straightforward and simple manner than they were applied by the courts prior to the ADAAA. 29 C.F.R. § 1630, Appendix. The EEOC expressly found that the Fourth's Circuit's decision in *Taylor v. Federal Express Corp.*, 429 F.3d 461 (4th Cir. 2005) (thirty-pound lifting restriction does not substantially limit ability to work) was overly strict. Thus, pre-ADAAA cases should be reviewed carefully before they are relied on.

See *Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001) (hand tremor did not substantially limit work); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996) (twenty-five pound weight-lifting restriction did not "substantially limit" the plaintiff in a major life activity); *Wyland v. Boddie-Noell Enters.*, No. 95-0436-R (W.D. Va. Jan. 9, 1998) (no major life activity impaired when restricted from extensive driving), *aff'd*, 165 F.3d 913 (4th Cir. 1998). An inability to perform overtime work, standing alone, is not a substantial limitation under the ADA. *Boitnott v. Corning Inc.*, 669 F.3d 172 (4th Cir. 2012). In *Pollard v. High's, Inc.*, 281 F.3d 462 (4th Cir. 2002), the court found that obtaining a new job was evidence that an impairment was not substantially limiting. See also *Papproth v. E.I. du Pont de Nemours & Co.*, 359 F. Supp. 2d 525 (W.D. Va. 2005) (condition that simply affects or compromises an individual's ability to perform major life activities is insufficient to establish a disability). In *Heiko v. Colombo Savings Bank*, 434 F.3d 249 (4th Cir. 2006), the Fourth Circuit held that an employee who suffered near complete kidney failure rose to the level of limitation of the major life activity of elimination of bodily waste. The court concluded that the kidney failure was not temporary in nature, due in part to the fact that a kidney transplant was speculative at best.

6-5.05(b)(5) Record of Impairment

This term means that the individual either has a history of or has been misclassified as having a physical or mental impairment that substantially limits one or more major life activities. 29 C.F.R. § 1630.2(k).

6-5.05(b)(6) Regarded as Having an Impairment

Under the ADAAA this term means that an individual (i) has an impairment that does not substantially limit him or her but is treated by a covered entity as being substantially limited, (ii) has an impairment that results in a substantial limitation only because of the attitudes of others toward the impairment, or (iii) has no impairment but is treated by a covered entity as having a substantially limiting impairment. 29 C.F.R. § 1630.2(l); see *Coursey v. Univ. of Md.*, No. 13-1626 (4th Cir. July 1, 2014) (unpubl.) (an employee demonstrating

possible mental instability is not “regarded as” disabled simply because the employer required a mental health evaluation prior to returning to work).

6-5.05(c) Qualified Individual With a Disability

6-5.05(c)(1) Statutory and Regulatory Definition

The ADA defines a “qualified individual with a disability” as a person who satisfies the requisite skill, experience, education, and other job-related requirements of the job in question and who, either with or without reasonable accommodation, can perform the essential functions of that job. 42 U.S.C. § 12111(8); *see also* 29 C.F.R. § 1630.2(m). A former employee is not a “qualified individual” entitled to ADA protections when no reasonable accommodation, consistent with his doctor’s orders, would have enabled him to perform the essential functions of the job. *Elledge v. Lowe’s Home Ctrs., LLC*, 979 F.3d 1004 (4th Cir. 2020).

6-5.05(c)(1)(i) Essential Function of the Job

The ADA also provides that the employer’s judgment of which functions are essential must be considered, and if an employer has prepared a written description before advertising or interviewing applicants for the job, that written description must be considered evidence of the essential functions of the job. 42 U.S.C. § 12111(8); *see Klik v. Verizon Va. Inc.*, No. 6:15cv02 (W.D. Va. Mar. 8, 2016), *aff’d*, No. 16-1395 (4th Cir. Oct. 12, 2016).

6-5.05(c)(2) Conditions Rendering Employees Unqualified

6-5.05(c)(2)(i) Condition Resulting in Excessive Lateness/Absence

An employee with excessive absences in a job that requires regular attendance is not otherwise qualified. *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997); *see also Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019) (can terminate employment even if attendance problem related to depression); *Wilder v. Se. Pub. Serv. Auth.*, 869 F. Supp. 409 (E.D. Va. 1994) (ADA claimant was not a “qualified employee” even though he had a qualifying disability and even though some of those absences were attributable to his disability because a regular and reliable level of attendance was a necessary element of the job), *aff’d*, 69 F.3d 534 (4th Cir. 1995). However, if an employee has excessive absenteeism and still receives good reviews and performance-based increases in pay, it may be difficult to later contend that the employee is unqualified due to excessive absenteeism. *See Pettus v. Am. Safety Razor Co.*, No. 5:99cv000103 (W.D. Va. Mar. 29, 2001) (evidence of frequent absenteeism did not make employee unqualified when reviews stated work was satisfactory).

6-5.05(c)(2)(ii) Communicable Diseases

In *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987), the Supreme Court addressed the question of whether reasonable accommodation could be made to account for the risks posed by an employee with a communicable disease (in that case, tuberculosis), such that the employee would still be a qualified individual with a disability. In *Arline*, the Court articulated a four-pronged test to be used in determining whether an individual poses a significant risk to the health or safety of others:

- (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. (internal quotation marks omitted). The Court held that these factors should be applied, giving strong deference to available medical evidence on these points, to determine whether a person with a contagious disease is truly an “otherwise qualified individual” protected by federal anti-discrimination provisions.

Using the Supreme Court's *Arline* analysis, the Fourth Circuit has concluded that no reasonable accommodation could be made to eliminate the risk of infection from a neurosurgeon who was HIV positive. Therefore, the hospital's termination of the surgeon's employment did not violate the ADA or the Rehabilitation Act. *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995). In *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998), the Supreme Court remanded the issue of whether a significant risk of transmission existed.

6-5.05(c)(2)(iii) Diabetes

In *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), the Fourth Circuit held that plaintiff's diabetes, which made him vulnerable to a sudden loss of consciousness, made him unqualified to perform his duties as a bus driver.

6-5.05(c)(2)(iv) Epilepsy

Where it was an essential function of the employee's job as a shoe salesman to provide security, requiring him to exercise uninterrupted vigilance for discrete periods of time, the employee's epilepsy, which made him vulnerable to sudden seizures, made him unqualified for his position and thus not protected by the ADA. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997).

6-5.05(c)(2)(v) Paranoid Personality Disorder

Where the plaintiff, a deputy federal marshal, who was armed in order to perform the essential functions of his job, was diagnosed with paranoid personality disorder, and where the psychiatric evidence in the record demonstrated that, if he continued to serve in that position, his mental disorder rendered him a threat to himself and others, the Fourth Circuit concluded that he was not an "otherwise qualified individual" for the position of deputy marshal. *Lassiter v. Reno*, 86 F.3d 1151 (4th Cir. 1996) (unpubl.).

6-5.05(c)(3) Current, Illegal Drug Use

42 U.S.C. § 12114 specifically excepts employees engaged in current, illegal drug use from the definition of "qualified individual with a disability." An employer may, therefore, take action against an employee based on illegal drug use without violating the ADA. An employee who has used drugs in the relatively recent past and who cannot be said to have stopped using them permanently meets the definition of a "current" illegal drug user. *Shafer v. Preston Mem. Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997).

However, an employee who used drugs in the past, has successfully completed a drug rehabilitation program, and is not actively using illegal drugs is covered by the Act. An employer may not take action against him or her based on past illegal drug use. Further, employees participating in supervised drug rehabilitation programs and no longer using illegal drugs are covered employees.

Employers may institute reasonable procedures, including testing requirements to ensure that employees who have used illegal drugs in the past have stopped using.

Employers are specifically authorized under the ADA to prohibit the use of illegal drugs and alcohol in the workplace and prohibit employees from working under the influence of illegal drugs or alcohol. Employers may hold employees engaging in the use of illegal drugs or alcohol to the same qualification standards for performance and behavior as exist for other employees, even if the individuals' failure to meet those standards is related to the use of drugs or alcohol. See discussion of *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045 (2002), on remand 336 F.3d 1023 (9th Cir. 2003) (court upheld employer refusing to rehire employee who left company because of positive drug screen based on employer's policy not to rehire employees who left company for workplace misconduct), in section 6-5.06(b).

6-5.05(d) Essential Job Functions

Neither the ADA nor the Rehabilitation Act defines this term, but it is defined in the EEOC implementing regulations. According to the EEOC, essential job functions are fundamental job duties of the employment position. The term does not include marginal functions.

A job function can be considered essential for any of several reasons, not limited to (i) the reason the position exists is to perform that function, (ii) the limited number of employees available among whom that function can be distributed, or (iii) the function is highly specialized so that the employee in the position is hired for his or her expertise or ability to perform that function.

Evidence of whether a function is essential can include (i) the employer's judgment as to whether it is essential, (ii) written job descriptions prepared before the job was advertised and filled, (iii) the amount of time spent on the job performing the function, (iv) the consequences of not requiring the incumbent to perform the function, (v) the work experience of past employees in the job, (vi) the current work experience of employees in similar jobs. 29 C.F.R. § 1630.2(n); see *Stephenson v. Pfizer*, No. 14-2079 (4th Cir. Mar. 2, 2016) (unpubl.) (jury question as to whether driving or merely "traveling" was essential function of the job of salesperson such that hiring a driver might be a reasonable accommodation).

See also *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407 (4th Cir. 2015) (triable issue as to whether ability to operate new county software was an essential job function); *EEOC v. Womble Carlyle Sandridge & Rice*, No. 14-1958 (4th Cir. June 26, 2015) (unpubl.) (ability to perform heavy lifting an essential requirement of job and ability to work around it most times did not render it marginal); *Wilburn v. City of Roanoke*, No. 7:14cv255 (W.D. Va. Aug. 4, 2015) (triable issue as to whether ability to make a forcible arrest was an essential function of requested accommodation of desk duty by police officer with a disability) (after a trial, judgment as a matter of law that it was (W.D. Va. Aug. 27, 2015)); *Lusby v. Metro. Wash. Airport Auth.*, 187 F.3d 630 (table) (4th Cir. 1999) (unpubl.) (emergency response essential function of assistant fire marshal); *Duffy v. Al Packer Ford, Inc.*, No. 96-1723 (4th Cir. Mar. 11, 1997) (unpubl.); *Thomas v. Suntrust Mortg. Co.*, No. 1:13cv428 (E.D. Va. Jan. 15, 2014) (absent unusual circumstances, attendance at the workplace is an essential function of the job and indefinite work at home privileges are not a reasonable accommodation), *aff'd*, No. 14-1138 (4th Cir. July 2, 2014).

6-5.05(e) Reasonable Accommodation

Illegal discrimination includes an employer's failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The employee bears the burden of proof to show that the accommodation is reasonable on its face, i.e., ordinarily or in the run of cases. To defeat that showing, the employer must show special, case-specific circumstances that demonstrate undue hardship. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002). The Fourth Circuit stated that for a plaintiff to establish a prima facie case against his employer for failure to accommodate under the ADA, the plaintiff must show: (1) that he was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the employer refused to make such accommodations. *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013).

6-5.05(e)(1) Definition

The EEOC has defined reasonable accommodation to mean modifications or adjustments to a job application process, work environment, or other things to enable a qualified applicant with a disability to be considered for a position or to perform the essential job functions of a position. 29 C.F.R. § 1630.2(o).

According to the ADA, “reasonable accommodations” may include (1) making existing facilities used by employees readily accessible and usable by individuals with disabilities, and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for persons with disabilities. 42 U.S.C. § 12111(9); see, e.g., *Smith v. Loudoun Cnty. Pub. Sch.*, No. 15cv956 (E.D. Va. Feb. 18, 2016) (employer denied summary judgment because it provided no evidence that a full-time, live translator and a video-relay phone are not reasonable accommodations when they were provided previously in a deaf teacher’s classroom and were paid for by a federal grant), *aff’d*, No. 16-2435 (4th Cir. Mar. 1, 2018). The Fourth Circuit held that reassignment to a job with the same salary and benefits may not be reasonable if it does not consist of meaningful work. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407 (4th Cir. 2015). A federal district court held an employee stated a claim for denial of reasonable accommodation when the employee was not awakened at work as he had requested when he fell asleep because he had a condition that made it difficult for him to sleep at night. *Riddle v. Hubbell Lighting Inc.*, No. 7:12cv488 (W.D. Va. July 19, 2013).

Once an employer’s responsibility to provide a reasonable accommodation is triggered, it may be necessary for the employer to engage in an “interactive process” to determine the appropriate accommodation under the circumstances. 29 C.F.R. § 1630.2(o)(3). An employee cannot base a denial of reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process. Rather, the employee must demonstrate that the employer’s failure to engage in the interactive process resulted in the failure to identify an appropriate accommodation for the disabled employee. *Crabill v. Charlotte Mecklenburg Bd. of Educ.*, No. 10-1553 (4th Cir. 2011) (unpubl.); *Vannoy v. Fed. Reserve Bank*, No. 3:13cv797 (E.D. Va. Nov. 17, 2014), *rev’d on other grounds*, 827 F.3d 296 (4th Cir. 2016); see also *Young v. UPS*, 707 F.3d 437 (4th Cir. 2013) (although the ADA advises an employer to initiate “an informal, interactive process” when determining whether an individual with a disability needs an accommodation, no such counsel applies to the determination of whether an employee is disabled in the first instance), *rev’d on other grounds*, 575 U.S. 206, 135 S. Ct. 1338 (2015).

As the ADA has been interpreted in the Fourth Circuit, employers are not required to provide reasonable accommodation to employees they do not know are disabled, and they have no affirmative obligation to provide a reasonable accommodation when the employee has not requested one. *Huppenbauer v. May Dep’t Stores Co.*, 99 F.3d 1130 (4th Cir. 1996) (unpubl.); *Wilder v. Se. Pub. Serv. Auth.*, 869 F. Supp. 409 (E.D. Va. 1994), *aff’d*, 69 F.3d 534 (4th Cir. 1995). Further, the employer is not required to provide an accommodation that the employee has not described with reasonable specificity. *Carrozza v. Howard Cnty.*, 45 F.3d 425 (4th Cir. 1995) (unpubl.).

Moreover, it has been held that an employer is not obligated to give an employee a specific accommodation requested by the employee. The employer is required only to offer that accommodation which is reasonable. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407 (4th Cir. 2015). In a case that assumed that a police sergeant’s inability to work the night shift was a disability, the city reasonably accommodated by offering the employee a “non-sworn” day job; the city had no obligation to offer a comparable sergeant’s job on the day shift. *Williams v. City of Charlotte*, 899 F. Supp. 1484 (W.D.N.C. 1995).

Good-faith efforts to make a reasonable accommodation will shield a defendant from compensatory damages. 42 U.S.C. § 1981a(a)(3); see *Szedlock v. Tenet*, 139 F. Supp. 2d 725 (E.D. Va. 2001) (jury finding of no good faith), *aff’d*, Nos. 01-1867, 01-1902 (4th Cir. Apr. 3, 2003).

6-5.05(e)(2) Accommodations That Are Not Required

The Fourth Circuit has spoken on the issue of an employer's duty to reasonably accommodate in narrow terms, stating that:

This circuit has made it clear, however, that the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position.

Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995). *But see Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996) (clarifying that *Myers* does not stand for conclusion that "reassignment to a vacant position can *never* be a reasonable accommodation").

6-5.05(e)(2)(i) Reassignment to Vacant Position Over More Qualified Applicants

Rejecting EEOC guidance that reassignment is always required as an accommodation of last resort, even over more qualified applicants, and the opinions so holding of non-Fourth Circuit courts of appeals, a federal district court held in *United States v. Woody*, No. 3:16cv127 (E.D. Va. Nov. 22, 2016), that reassignment is unreasonable, and therefore not mandated, if it requires the employer to deviate from an established policy of hiring the most qualified applicant. It noted that to do so would elevate the ADA to an affirmative action statute instead of an equal opportunity one. In two later cases, the Fourth Circuit clarified that while reassignment remains a permissible accommodation, it is strongly disfavored. *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004 (4th Cir. 2020) (employer not required to reassign disabled former director to one of two open directorship positions when it hired other applicants for those roles consistent with its disability-neutral, best-qualified hiring system); *Wirtes v. City of Newport News*, 996 F.3d 234 (4th Cir. 2021) (reiterating holding of *Elledge* and stating that unilateral assignment to vacant position is "strongly disfavored when an employee can still do their current job with the assistance of a reasonable accommodation"). When the employee objects to reassignment as an accommodation, courts should "consider whether other reasonable accommodations exist that permit the employee to perform the essential functions of their current position." *Id.*

6-5.05(e)(2)(ii) Retraining

In *Riley v. Weyerhaeuser Paper Co.*, 898 F. Supp. 324 (W.D.N.C. 1995), *aff'd in unpublished disposition*, 77 F.3d 470 (4th Cir. 1996), the district court found that an employer was not required to retrain an employee to satisfy its obligation to provide a reasonable accommodation. It is important to note that in that case, the employer made significant efforts to identify a reasonable accommodation for the employee, short of retraining him.

6-5.05(e)(2)(iii) Permanent Light Duty or Creation of New Position

An employer is not required to create another job for an employee who is no longer qualified to perform the duties of the job by virtue of a disability, unless the employer normally provides such alternative employment under its existing policies. *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987) (citing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987)); *see also Purdue v. Sanofi-Aventis U.S., LLC*, 999 F.3d 954 (4th Cir. 2021) (employer not required to create a job-sharing position that did not previously exist).

In holding that the U.S. Postal Service was under no duty to accommodate a postal worker's disability by assigning him to permanent light duty, the Fourth Circuit in *Carter*, bluntly held that "[t]he case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment." *Id.*; *see also Champ v. Baltimore Cnty.*, 91 F.3d 129 (4th Cir. 1996) (unpubl.).

6-5.05(e)(2)(iv) Granting Leave So That Employee's Health Can Improve

In *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), the plaintiff, who was suffering from diabetes, cardiovascular disease, and hypertension, and who had already taken all his earned sick and annual leave, demanded that the employer, Frederick County, Maryland, accommodate his disability by granting him unlimited leave with pay, until such time as he could resolve his medical difficulties.

The Fourth Circuit held:

that reasonable accommodation does not require the County to wait indefinitely for Myers' medical conditions to be corrected, especially in light of the uncertainty of cure Nor do we think that the County was bound by the reasonable accommodation requirement to grant Myers paid leave in excess of his annually scheduled amount.

Id.; cf. *Sowers v. Bassett Furniture Indus., Inc.*, No. 4:19cv00039 (W.D. Va. Jan. 27, 2021) (a policy that requires an employee to be "100% healed" before returning to work "could reasonably interfere with an individual's rights under the ADA by effectively coercing them not to make a request for an accommodation because any such request would be denied").

In *Wilson v. Dollar General Corp.*, 717 F.3d 337 (4th Cir. 2013), the court held that for leave to be a reasonable accommodation, an employee must show that had he been granted leave, at the point at which he would have returned from leave, he could have performed the essential functions of his job. In leave cases, the accommodation must be for a finite period of leave. Once that period lapses, it then becomes apparent whether the withheld accommodation would have been successful or futile. Evidence indicating that after the individual's proposed return date, the individual became unable to work, is untethered to the initial request.

The EEOC has released [guidance](#) that states unpaid leave can be a reasonable accommodation. Reasonable accommodation does not require an employer to provide *paid* leave beyond what it provides as part of its paid leave policy.

6-5.05(e)(2)(v) Job Restructuring, Stress Reduction, Exemption From Evaluation Requirements

The employer's duty of reasonable accommodation does not include a duty to restructure a job to distribute the essential functions a disabled employee cannot perform to other employees, nor is the employer required to hire additional staff to assist the employee in performing those functions. *Carrozza v. Howard Cnty.*, 45 F.3d 425 (4th Cir. 1995) (unpubl.); *Reigel v. Kaiser Found. Health Plan*, 859 F. Supp. 963 (E.D.N.C. 1994).

In *Carrozza*, the Fourth Circuit quoted the Sixth Circuit's decision in *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437 (6th Cir. 1991), for the proposition that the employer is not required to provide a stress-free environment or immunize an employee from legitimate job-related criticism offered in periodic evaluations under its obligation to provide a reasonable accommodation for disability.

6-5.05(e)(2)(vi) Waiver of Professional Certifications or Academic Requirements

An employer is not required to waive a "waivable" physical regulatory requirement when there is no evidence the requirement was inappropriate for the job. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999). Where a professional certification or academic requirements effectively measure an employee's ability to perform essential job functions, an employer is not required to waive a certification or other academic requirements for a disabled employee. *Pandazides v. Va. Bd. of Educ.*, 804 F. Supp. 794 (E.D. Va. 1992), *rev'd on other grounds*, 13 F.3d 823 (4th Cir. 1994).

6-5.05(e)(2)(vii) Abandonment of Legitimate Company Policy

With regard to seniority policies, the Supreme Court held that in the ordinary run of cases, it is not a reasonable accommodation to supersede a company's seniority policy. Nonetheless, an employee may show that special circumstances warrant a finding that, despite the presence of a seniority system, the requested accommodation is reasonable on the particular facts. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002). For example, the employee might show that exceptions to the policy are routinely made. This opinion goes further than the analysis used by the Fourth Circuit in *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company seniority policy).

6-5.05(e)(2)(viii) Telecommuting

While the Fourth Circuit has not addressed telecommuting as a reasonable accommodation, the Sixth Circuit, sitting en banc, held that physical presence in the workplace is still a necessary component of most jobs. *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) ("[N]o record evidence—none—shows that a great technological shift has made this highly interactive job one that can be effectively performed at home.")

6-5.05(f) Undue Hardship

The ADA defines this term to mean significant difficulty or expense, when considered in light of several factors. These factors include (1) the nature and cost of the needed accommodation, (2) the overall financial resources of the facility involved in providing the accommodation, the number of persons employed at that facility, and the impact of the accommodation on the operation of the facility, (3) the overall financial resources of the covered entity as a whole, the overall size of the business of the covered entity with respect to the number of its employees, the number, type, and location of its facilities, and (4) the type of operation of the covered entity, including the composition, structure and functions of the workforce of the entity, the geographic separateness, administrative, or fiscal relationship of the facilities in question to the covered entity. 42 U.S.C. § 12111(10); see *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407 (4th Cir. 2015) (cost alone cannot be decisive).

6-5.06 Defenses**6-5.06(a) Title VII Defenses**

Due to the fact that the analytical framework for the Rehabilitation Act and ADA claims is the same as that of Title VII claims, the defenses available under Title VII are available to ADA and Rehabilitation Act defendants.

In dicta in *Doe v. University of Maryland Medical Systems Corp.*, 50 F.3d 1261 (4th Cir. 1995), the Fourth Circuit stated that under the ADA, like the Rehabilitation Act, the employment decision had to be based "solely" on the disability. In *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999) (construing Title II with reasoning applicable to Title I), the court rejected that limitation for the ADA and made it clear that Title VII "mixed motive" defenses apply. The Fourth Circuit in *Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454 (4th Cir. 2012), while noting that the Rehabilitation Act and ADA were normally construed congruently, held that to succeed on a claim under the Rehabilitation Act, the plaintiff must establish he was excluded "solely by reason of" his disability while the ADA requires only that the disability was "a motivating cause" of the exclusion. See section [6-1.03\(b\)](#).

As with Title VII, there is no individual liability for persons not meeting the definition of employer under the ADA. *Id.*; see *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177 (4th Cir. 1998); see also *Bracey v. Buchanan*, 55 F. Supp. 2d 416 (E.D. Va. 1999).

A person who applies for and receives Social Security disability benefits is not judicially estopped from claiming in an ADA action that he is able to perform the essential

functions of job. The plaintiff is required, however, to show how the claims are consistent (e.g., while unable to work in general, can work with reasonable accommodation). *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999); see also *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373 (4th Cir. 2000) (following *Cleveland*); *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4th Cir. 2001) (same).

An ADA cause of action accrues on the date the alleged unlawful practice occurs; thus, cause of action accrued on the date the employee was told he would be dismissed, not when discharge became effective. *Martin v. Sw. Va. Gas Co.*, 135 F.3d 307 (4th Cir. 1998).

6-5.06(b) Additional Statutory Defenses

42 U.S.C. § 12113 provides that when an employer's use of qualification standards, tests, or selection criteria is challenged under the ADA because it tends to screen out or otherwise deny a job to a person with a disability, the employer may defend that use of standards, tests, or criteria as being job-related or consistent with business necessity, and it cannot ascertain those qualifications in any other way.

The employer may include as part of its qualification standards a requirement that a person not pose a direct threat to the employee or to the health or safety of others in the workplace. See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045 (2002), on remand 336 F.3d 1023 (9th Cir. 2003) (noting that the health or safety inquiry must be an individualized assessment). Further, employers are permitted to rely on the list of infectious diseases compiled by the Secretary of Health and Human Services in refusing to permit individuals with those diseases to serve in jobs involving food handling.

By regulation, the EEOC carries this defense one step further, allowing an employer to screen out a potential worker with a disability, not only for risks that he would pose to others in the workplace, but for risks on the job to his own health or safety as well. 29 C.F.R. § 1630.15(b)(2). The Supreme Court in *Chevron* upheld this regulation as a valid exercise of rulemaking.

6-5.07 Remedies

6-5.07(a) Rehabilitation Act

The Fourth Circuit held in *Pandazides v. Virginia State Board of Education*, 13 F.3d 823 (4th Cir. 1994), that 29 U.S.C. § 794 provides successful plaintiffs under the Rehabilitation Act with "the full panoply of legal remedies" in addition to equitable relief, available to plaintiffs under Title VII. Those remedies are discussed in section [6-2.05](#).

6-5.07(b) ADA

42 U.S.C. § 12117(a) provides that the remedies provided for violations of Title VII of the Civil Rights Act of 1964 are equally available for violations of the ADA. Those remedies are discussed in section [6-2.05](#). In *Riffey v. K-VA-T Food Stores, Inc.*, 284 F. Supp. 2d 396 (W.D. Va. 2003), the court held that evidence of workers' compensation payments for the injury allegedly resulting from a failure to reasonably accommodate a disability was admissible to offset any medical liability.

6-6 GENETIC INFORMATION NONDISCRIMINATION ACT

The Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law No. 110-233, 42 U.S.C. § 2000ff, prohibits discrimination in the workplace against employees based on their own or their family members' genetic information. Employers are specifically prohibited from acquiring genetic information, using such information in employment decisions, disclosing genetic information, or retaliating against employees who exercise GINA rights.

"Genetic information" is defined by GINA as (1) an individual's genetic tests; (2) the genetic tests of family members; and (3) the manifestation of a disease or disorder in family members of such individual.

GINA borrows from Title VII of the Civil Rights Act of 1964 its definitions of employers and employees, and family members are those persons who are considered "dependents" under the Health Insurance Portability and Accountability Act (HIPAA), as well as first-, second-, third-, and fourth-degree relatives. GINA also employs the enforcement and remedial scheme of Title VII. See *Bailey v. City of Chesapeake*, No. 2:13cv333 (E.D. Va. Nov. 20, 2013) (volunteer policeman not an employee under GINA).

GINA's employment provisions took effect November 21, 2009. As the GINA enforcement agency, the EEOC issued implementing regulations at 29 C.F.R. §§ 1635.1 – 1635.12.

6-7 THE FAMILY AND MEDICAL LEAVE ACT

6-7.01 Scope

The Family and Medical Leave Act (FMLA or the Act), 29 U.S.C. § 2601 et seq., grants certain employees the right to take leave from employment for any one of four reasons that are specified in the Act. Detailed regulations adopted by the Department of Labor that interpret and implement the Act are found at 29 C.F.R. § 825.100 et seq. A review of these regulations is strongly encouraged for a full understanding of an employer's obligations under this Act.

6-7.02 Eligible Employees and Covered Employers

Employees who are covered by the provisions of the FMLA are those who have been employed (i) for at least twelve months by the employer from whom leave is requested; and (ii) for at least 1,250 hours of service with such employer during the previous twelve-month period. 29 U.S.C. § 2611(2)(A); see *Osei v. Coastal Int'l Sec. Inc.*, 69 F. Supp. 3d 566 (E.D. Va. 2014) (addressing FMLA liability of successor in interest). An employee who has not been employed by the employer for twelve months is not entitled to the FMLA's protections. See *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997) (holding invalid a federal regulation that could have the effect of making an employee eligible for FMLA leave before the completion of twelve months of service). But see *Babcock v. BellSouth Advert. & Publ'g*, 348 F.3d 73 (4th Cir. 2003) (employee who left work for medical reasons just before being employed for twelve months still eligible employee because considered an unexcused absence (not leave) beyond twelve-month period). The Act does not apply extraterritorially to employees of U.S. companies working overseas. *Souryal v. Torres Advanced Enter. Sols.*, 847 F. Supp. 2d 835 (E.D. Va. 2012).

See also *Hughes v. Musselman Hotels Mgmt. LLC*, No. 3:16cv708 (E.D. Va. Nov. 4, 2016) (adopting FLSA line of decisions regarding whether employee was an independent contractor; see section 6-8.02(a)(4)); *Quintana v. City of Alexandria*, No. 16-1630 (4th Cir. June 6, 2017) (unpubl.) (city deemed not merely a joint employer, but the primary employer in an FMLA interference and retaliation claim, as claimant was initially employed by city and city continued to control claimant's compensation, title, schedule, job function, supervision, performance evaluation and termination even after it characterized a third-party contractor as claimant's employer).

While all political subdivisions are employers under the Act, see 29 U.S.C. § 2611(4)(A)(iii), and thus are required to post FMLA notices and follow all the employer requirements, leave entitlement of the employee is limited to employers of more than fifty as the term "eligible employee" is defined to exclude any employee who is employed at a worksite where there are less than fifty employees, if the total number of employees within seventy-five miles of that worksite is less than fifty. 29 U.S.C. § 2611(2)(B). Some small

and remote public agencies and constitutional officers may therefore be exempt from many of the Act's requirements.

Recognizing that there is a split in circuit authority and that the Fourth Circuit has declared it to be an open question, federal district courts have held that public employee supervisors can be sued individually under the FMLA. *Corbett v. Richmond Metro. Transp. Auth.*, 203 F. Supp. 3d 699 (E.D. Va. 2016); *Ainsworth v. Loudoun Cnty. Sch. Bd.*, 851 F. Supp. 2d 963 (E.D. Va. 2012); *Weth v. O'Leary*, 796 F. Supp. 2d 766 (E.D. Va. 2011); *Jones v. Sternheimer*, 387 F. App'x 366 (4th Cir. 2010) (open question). The Act also contains "special rules" regarding leave and reinstatement for eligible employees of local educational agencies. 29 U.S.C. § 2618. The FMLA expressly abrogates Eleventh Amendment immunity, and the abrogation is pursuant to the power granted Congress under section 5 of the Fourteenth Amendment. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972 (2003). Compare *Bd. of Trustees v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001) (ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000) (ADEA); and *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999) (FLSA), all holding that Congress did not have the power to abrogate the Eleventh Amendment. But see *Coleman v. Md. Court of Appeals*, 566 U.S. 30, 132 S. Ct. 1327 (2012), affirming by a plurality vote the Fourth Circuit's decision, 626 F.3d 187 (4th Cir. 2010), which distinguished leave under the family-care provisions of the FMLA at issue in *Hibbs* from leave under the Act's self-care provisions and holding that the state's immunity was not abrogated with regard to the self-care provisions, as gender discrimination was not a significant motivation for the congressional enactment of those provisions of the Act.

6-7.03 Leave Entitlement

Section 2612 of the Act provides that an eligible employee is entitled to a total of twelve workweeks of leave during any twelve-month period for one or more of the following:

- a. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
- b. Because of the placement of a son or daughter with the employee for adoption or foster care;
- c. In order to care for the spouse, or a son, daughter, or parent,¹⁷ of the employee, if such spouse, son, daughter, or parent has a serious health condition; and
- d. Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

With respect to leave entitlement listed in subsection (c) above, the term "care for" does not have to be connected with "ongoing medical treatment." *Ballard v. Chicago Park Dist.*, 741 F.3d 838 (7th Cir. 2014) (daughter's accompaniment of her mother, a hospice patient, to Las Vegas to provide caretaking services fell within the statute's "care for" provision).

If a husband and wife are employed by the same employer, the aggregate amount of leave may be limited to twelve weeks when leave is for a birth, placement for adoption or foster care, or to care for a sick parent. 29 U.S.C. § 2612(f).

The National Defense Authorization Act (NDAA), Public Law No. 110-181, amended the Act to permit a "spouse, son, daughter, parent, or next of kin to take up to 26 workweeks

¹⁷ See *Abousaidi v. Mattress Discounters Corp.*, No. 1:05cv1142 (E.D. Va. Dec. 8, 2005) (FMLA applies to care of grandparent only if grandparent stood *in loco parentis* and employee had obligation to inform employer of the relationship).

of leave during a single 12-month period" to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is in outpatient status or is otherwise on the temporary disability retired list for a serious injury or illness. The service member must have a serious injury or illness incurred in the line of duty on active duty, as determined by the Department of Defense, which may render him medically unfit to perform his duties. Employers may require certification of the need for this so called "military caregiver leave" from specific military healthcare providers. Employers may not, however, seek second medical opinions as to need for leave. Also, there is a separate determination of a year for application of this benefit. It begins with the first date of caregiver leave and ends twelve months later. The leave may be taken intermittently or in a single block. The employee must follow existing FMLA notice rules. 29 C.F.R. § 825.112, 29 C.F.R. § 825.122, 29 C.F.R. § 825.127, and 29 C.F.R. § 825.310.

The NDAA further amended the FMLA to allow employees to take leave for "any qualifying exigency" arising out of the fact that an immediate family member (spouse, son, daughter, or parent) is on active duty or has been notified of an impending call to active duty with notice of seven calendar days or less. In this instance, leave can be taken for a period of seven calendar days beginning on the date that the military member is notified of the call to duty. Qualifying exigency leave is also available to attend military events and related activities, such as official ceremonies or programs related to active duty or the call to active duty, as well as for such matters as financial and legal tasks arising from deployment, counseling related to deployment and other purposes arising from deployment as may be agreed upon by the employee and employer. Employers may require certification for qualified exigency leave by production of a copy of the service member's active-duty orders. General FMLA leave notice requirements do not apply to this type of leave. 29 C.F.R. § 825.112, 29 C.F.R. § 825.122, 29 C.F.R. § 825.126, and 29 C.F.R. § 825.309.

FMLA leave is unpaid. However, the employee may elect, or the employer may require, the substitution of any accrued paid vacation, personal, family, or medical or sick leave as offered by the employer, concurrently with any job-protected FMLA leave the employee is entitled to. 29 C.F.R. § 825.207.

Leave for a birth, adoption, or foster care placement may not be taken intermittently or on a reduced leave schedule unless the employee and employer agree otherwise. When the leave is for the serious health condition of the employee or a family member, leave may be intermittent or on a reduced leave schedule "when medically necessary." 29 U.S.C. § 2612(b); see *Ranade v. BT Ams. Inc.*, No. 1:12cv1039 (E.D. Va. Oct. 28, 2013) (no violation of FMLA when employer offered reduced time in blocks instead of complete flex time), *aff'd*, No. 13-2428 (4th Cir. Aug. 5, 2014). If such intermittent or reduced leave is foreseeable based on planned medical treatment, the employer may temporarily transfer the employee to another position that has equivalent pay and benefits and that better accommodates recurring periods of leave than the employee's regular position. 29 U.S.C. § 2612(b).

In some instances when the need to take leave is foreseeable, the employee must give the employer at least thirty days' notice and make a reasonable effort to schedule the leave so as not to disrupt unduly the operations of the employer. 29 U.S.C. § 2612(e). The employee is not required to specify that the notice or request for leave is covered by the FMLA or to even mention the Act. 29 C.F.R. § 825.303(b); *Hannah P. v. Coats*, 916 F.3d 327 (4th Cir. 2019) (no "magic words" are required and once the employer is on notice of the employee's need to take potentially FMLA-qualifying leave, "the responsibility falls on the employer to inquire further"). Nor is there a requirement that an employee be diagnosed with a serious health condition before becoming eligible for FMLA leave or that he know the exact dates or duration of the leave he will take. *LaMonaca v. Tread Corp.*, 157 F. Supp. 3d 507 (W.D. Va. 2016). However, the notice provided must be adequate to put the employer

on notice that FMLA leave is at issue. In *Hanna P. v. Coats*, 916 F.3d 327 (4th Cir. 2019), the Fourth Circuit held disclosure of a potentially FMLA-qualifying circumstance and an inquiry into leave options is sufficient to create a material question of fact regarding whether an employee triggered her employer's FMLA obligations. The employer's awareness of the employee's depression and a request for leave raised a reasonable question as to whether the employee had put the employer on notice that FMLA leave might be sought. In *Braganza v. Donahoe*, No. 1:13cv848 (E.D. Va. July 29, 2014), the court held that notice that was sent by a third party, only stated that the employee "was unable to work due to illness," and gave no anticipated date of return was inadequate to trigger FMLA protection. It is the employer's responsibility to designate leave as FMLA leave and to so notify the employee. 29 C.F.R. § 208.¹⁸ However, if the employee never attempts to use designated FMLA leave time, she cannot state an FMLA claim. *Riddle v. Hubbell Lighting Inc.*, No. 7:12cv488 (W.D. Va. July 19, 2013).

The Supreme Court struck down as contrary to the substantive purpose of the Act the regulatory penalty for failure to designate the leave as FMLA. The enabling regulations at 29 C.F.R. § 825.700 provided that undesignated leave did not count toward the twelve-week entitlement. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S. Ct. 1155 (2002) (5-4). The Court implied that the remedy for failure to designate leave (assuming such failure can be a violation of the Act) must be tied to any prejudice the employee suffered because of the failure. See *Moticka v. Weck Closure Sys.*, 183 Fed. Appx. 343 (4th Cir. 2006) (holding that the employee was not prejudiced by her employer's alleged failure to tell her she was expending her FMLA leave at the same time she was using her short-term disability leave where she received all the leave to which she was entitled, and she was allowed to stay out of work for thirty-four weeks); *Miller v. Personal-Touch of Va., Inc.*, 342 F. Supp. 2d 499 (E.D. Va. 2004) (FMLA is not intended to enable an employee to sue for failure to give notice, unless such failure impeded the exercise of FMLA rights), *aff'd*, No. 05-1461 (4th Cir. Oct. 19, 2005); see also *Rhoads v. Fed. Dep. Ins. Corp.*, 257 F.3d 373 (4th Cir. 2001) (adequate notice and certification alone do not entitle employee to FMLA leave; must prove serious health condition). The *Ragsdale* ruling has now been incorporated into Department of Labor regulations. 29 C.F.R. § 825.301.

All the employer notice requirements of the FMLA are consolidated into a "one-stop" regulatory section. Employers are required to provide employees with a general FMLA rights notice (e.g., by poster or handbook provision), an eligibility notice, and a designation of FMLA leave notice. The employer has five business days to provide any of the notices required. See 29 C.F.R. § 825.300. If an employee is prejudiced by a notice violation, then he is entitled to relief for interference with FMLA rights. *Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016) (evidence employee may have structured leave differently if notice of rights was sufficient). But see *White v. Metro. Wash. Airports Auth.*, No. 1:16cv670 (E.D. Va. May 5, 2017) (though employer's FMLA designation letter did not include notice of need for a return-to-duty certification, employee was plainly put on notice of that need and therefore was not prejudiced by employer's failure to comply with the regulations), *aff'd*, No. 17-1563 (4th Cir. Oct. 5, 2017).

In *Perry v. Isle of Wight County*, No. 2:14cv204 (E.D. Va. Aug. 10, 2017), the district court found that the county's FMLA leave notices together provided that an employee had four business days to notify the employer of any changed circumstances that extended FMLA leave. Thus, if the leave terminated on a Thursday, on which date the employee was told by a doctor to extend the leave by one day, and the employee returned to work on Monday,

¹⁸ The Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S. Ct. 1155 (2002), expressed some doubt as to whether requiring individualized designation and notification by the employer of leave as FMLA leave was a valid exercise of regulatory power.

it was a violation of FMLA to terminate the employee for failure to return to work after FMLA leave ended as four business days had not passed from the Thursday.

6-7.04 Serious Health Conditions

One frequent source of dispute in FMLA cases is whether a particular malady falls within the category of a "serious health condition." The Act defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). A detailed guideline for determining what is a "serious health condition" is also set forth in 29 C.F.R. § 825.114 (noting, *inter alia*, that the common cold, flu, earaches, upset stomachs, non-migraine headaches and routine dental problems usually do not qualify for FMLA leave, 29 C.F.R. § 825.114(c)). "Continuing treatment" is regulatorily defined as missing three consecutive days of work with treatment two or more times with a health care provider or one such treatment that results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. § 825.114(a)(2). The Department of Labor further refined these provisions in rulemaking which provides that the visit to a health care provider must occur within seven days of the first day of incapacity and, where applicable, the two subsequent visits to a health care provider must occur within thirty days of the beginning of the period of incapacity. 29 C.F.R. §§ 825.113 to 825.115. A federal district court held that an employer's policy that is more generous in its definition of a "serious health condition" than the regulations is not enforceable under the FMLA. It found that 29 C.F.R. § 700, which provides that an "employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA" is intended to ensure that the FMLA is not interpreted to abrogate any currently existing employee-benefit plan. *Lusk v. Va. Panel Corp.*, No. 5:13cv079 (W.D. Va. Apr. 4, 2014).

In *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001), the Fourth Circuit held that an employee who missed three days of work and visited a doctor twice in three days for "flu" met the requirements for a serious health condition, holding that meeting the objective criteria of three days and two visits negated the presumption that flu did not qualify for FMLA leave. The court also found that "treatment" includes merely diagnosis and monitoring.

Courts have found a "serious health condition" in the following cases: *George v. Associated Stationers*, 932 F. Supp. 1012 (N.D. Ohio 1996) (chicken pox); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D.N.Y. 1996) (miscarriage); and *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995) (child's throat and upper respiratory infection). A "serious health condition" was not found in the following cases: *Braganza v. Donahoe*, No. 1:13cv848 (E.D. Va. July 29, 2014) (alleged bronchitis not requiring inpatient care); *Reich v. Standard Register Co.*, No. 96-0284-R (W.D. Va. Jan. 17, 1997) (arthritic problem of feet and legs); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114 (W.D. Va. 1996) (sinobronchitis); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995) (gastroenteritis and upper respiratory infection); *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253 (N.D. Miss. 1995) (food poisoning), *aff'd*, 74 F.3d 91 (5th Cir. 1996); and *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994) (child's ear infection).

Whenever leave is sought for a serious health condition, the employer may require a written certification from the treating health care provider. An employee's failure to provide such certification can negate an employer's FMLA obligations. *Ahmed v. Salvation Army*, No. 13-1122 (4th Cir. Dec. 31, 2013) (unpubl.). The contents of a "sufficient certification" are set forth in 29 U.S.C. § 2613(b). If the employer has reason to doubt the validity of the certification, a second opinion may be required, and a subsequent third opinion if necessary to resolve a disagreement between the first two. Subsequent recertifications may also be required "on a reasonable basis." 29 U.S.C. § 2613(e); see

Rhoads v. Fed. Dep. Ins. Corp., 257 F.3d 373 (4th Cir. 2001) (employer not required to seek second or third opinion in order to challenge whether health condition was serious). An employer may contact a health care provider directly for clarification of the medical certification of a serious health condition provided the contact is not made by the employee's direct supervisor, but by someone unassociated with the employee's direct work such as, a human resources representative. The employer must make the request in writing and give the employee seven calendar days to cure information deficiencies. Employers may request a new medical certification each leave year, and may request recertification of an ongoing condition every six months in connection with absence. 29 C.F.R. §§ 825.305 to 825.308.

Note that entitlement to FMLA leave is procedural—an employee is entitled to leave if specified criteria are met. Entitlement to accommodation under the ADA, by contrast, is much more subjective and fact specific. When FMLA leave is sought, an employer should also consider whether ADA considerations are present. See section 6-5.05(e).

6-7.05 Protection of Employment and Benefits During Leave

Pursuant to § 2614 of the Act any eligible employee who takes FMLA leave for the intended purpose of the leave shall be entitled:

- a. to restoration to his or her former job on return from the leave, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment;
- b. to continued coverage under any group health plan for the duration of the leave, at the level and under the conditions coverage would have been provided if leave had not been taken.

An employee's entitlement to benefits other than group health benefits during FMLA leave is determined by the employer's established policy for providing such benefits when the employee is on other forms of paid or unpaid leave. 29 C.F.R. § 825.209. The taking of FMLA leave may not be used as a negative factor in employment actions such as hirings, promotions, or disciplinary actions, and FMLA leave cannot be counted under "no fault" attendance policies. See *George v. Associated Stationers*, 932 F. Supp. 1012 (N.D. Ohio 1996); 29 C.F.R. § 825.220. Restoration to an "equivalent position" is not satisfied by the employee receiving full pay during a suspension after leave, as a suspension does not involve the employee undertaking the same or substantially similar duties and responsibilities as required by regulation. *Laing v. Fed. Express Corp.*, 703 F.3d 713 (4th Cir. 2013).

Reinstatement to the same or equivalent position is required even if the employee has been replaced or the position has been restructured to accommodate the employee's absence. 29 C.F.R. § 825.214; see *Waag v. Sotera Def. Sols., Inc.*, 857 F.3d 179 (4th Cir. 2017) (equivalent position's duties do not have to be identical to that of former position). On the other hand, an employee has no greater right to reinstatement or to other benefits under FMLA than if the employee had been continuously employed during the FMLA leave period. Thus, an employee does not have an absolute right under FMLA to be restored to his prior job after taking approved leave. *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541 (4th Cir. 2006). He may be discharged if he would have been discharged if he had not taken leave. *Id.* Therefore, if the employee is laid off or his position eliminated during FMLA leave and the employee's employment is terminated, the responsibilities of the employer under the Act to continue FMLA leave, to maintain group health plan benefits, and to restore the employee to his former job cease at the time the employment is terminated. 29 C.F.R. § 825.216; see *Kariotis v. Navistar Int'l Transp. Corp.*, 951 F. Supp. 144 (N.D. Ill.) (refusal to reinstate employee terminated for fraud was not a violation of the FMLA), *aff'd in relevant part*, 131 F.3d 672 (7th Cir. 1997).

Under some circumstances, reinstatement may be denied to certain high-level or key employees who take FMLA leave if (i) denial is necessary to prevent substantial and grievous economic injury to the employer's operations; (ii) the employer notifies the employee of the intent to deny reinstatement at the time the employer determines that such injury will occur; and (iii) in any case in which leave has started, the employee elects not to return to work after receiving such notice. 29 U.S.C. § 2614(b). The required contents of such a notice are described at 29 C.F.R. § 825.219. Note that the employer must determine that substantial and grievous economic injury will result from reinstatement, rather than from the FMLA leave itself. Health plan benefits continue for the duration of FMLA leave, regardless of whether the employer determines that the employee will not be reinstated.

Reinstatement also may not be feasible if there is "such animosity between the parties that any potential employer-employee relationship was irreparably damaged; . . . or when there was no comparable position available." In such circumstances, front pay is an available equitable remedy. *Duke v. Uniroyal, Inc.*, 928 F.2d 1413 (4th Cir. 1991); see also *Hunter v. Town of Mocksville*, 897 F.3d 538 (4th Cir. 2018); *Perry v. Isle of Wight County*, No. 2:14cv204 (E.D. Va. Aug. 10, 2017).

6-7.06 Enforcement

The FMLA prohibits any employer from interfering with, restraining, or denying the exercise of any right provided by the Act. It is also unlawful for an employer to discharge or discriminate against any person for opposing any practice made unlawful under the Act, for filing a charge under the Act, or for testifying or providing information in any proceeding under the Act. 29 U.S.C. § 2615. Public officials can be held individually liable under the FMLA. *Weth v. O'Leary*, 796 F. Supp. 2d 766 (E.D. Va. 2011) (noting conflicting circuit court opinions). An employee of a business, for example a manager, is not personally liability under the FMLA unless such employee also meets the definition of an "employer." *Carter v. Rental Uniform Serv.*, 977 F. Supp. 753 (W.D. Va. 1997). Recognizing that there is a split in circuit authority and that the Fourth Circuit has declared it to be an open question, two federal district courts have held that public employee supervisors can be sued individually under the FMLA. *Ainsworth v. Loudoun Cnty. Sch. Bd.*, 851 F. Supp. 2d 963 (E.D. Va. 2012); *Weth v. O'Leary*, 796 F. Supp. 2d 766 (E.D. Va. 2011); *Jones v. Sternheimer*, No. 09-2242 (4th Cir. July 6, 2010) (unpubl.) (open question).

If any of the above-referenced prohibitions are violated, an employee may file suit in any federal or state court. To establish unlawful interference with an entitlement to FMLA benefits, an employee must prove that: (1) he was an eligible employee; (2) the employer was covered by the statute; (3) he was entitled to leave under the FMLA; (4) he gave adequate notice of intention to take leave; and (5) the employer denied FMLA benefits to which the employee was entitled. Requesting a second medical opinion, requiring attendance at a disciplinary conference, and verbal and written reprimands did not constitute interference with leave. *Adams v. Anne Arundel Cnty.*, 789 F.3d 422 (4th Cir. 2015). Although an employee stated that workload pressure made him delay his leave and conduct some work during the leave, the employer did not interfere with the leave as it did not require those actions. *Sumner v. Mary Washington Healthcare Physicians*, No. 3:15cv42 (E.D. Va. May 28, 2015; Sep. 30, 2016). Involuntary placement of an employee on FMLA leave does not give rise to an interference claim unless the employee is unable to take future FMLA leave. *Leonard v. Electro-Mechanical Corp.*, No. 1:13cv00029 (W.D. Va. Apr. 9, 2014). Nor does denial of an FMLA request establish interference if the requester suffered no monetary loss as a result of the denial. *Shetty v. Hampton Univ.*, 4:12cv158 (E.D. Va. Jan. 24, 2014). A plaintiff must also show prejudice. *Downs v. Winchester Med. Ctr.*, 21 F. Supp. 3d 615 (W.D. Va. 2014). For a discussion on the difference between interference and retaliation, see *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016).

For a discussion of retaliation claims based on FMLA, see section [6-1.04\(c\)](#).

The potential damages in such an action may include the amount of any wages, salary, benefits, or other compensation lost as a result of the violation, plus interest at the prevailing rate. In cases where there is no such loss, the employee may recover any actual monetary losses sustained as a direct result of the violation, up to a sum equal to twelve weeks of wages, plus interest. Unless the employer can prove to the satisfaction of the court that the violation was in good faith, and that the employer had reasonable grounds for believing that it was not in violation of the Act, the court may double the amount of the compensatory recovery as liquidated damages. The statute also authorizes equitable relief, such as reinstatement or promotion. 29 U.S.C. § 2617(a). In *Perry v. Isle of Wight County*, No. 2:14cv204 (E.D. Va. Aug. 10, 2017), the district court awarded lost salary, front pay, and liquidated damages. The court held the employee was entitled to liquidated damages as good faith could not be shown. The employer was aware that leave might be extended, had a policy that allowed four business days for notification of need to extend leave, and routinely warned other employees of leave expiration dates, yet the employment was terminated at the first opportunity that the employer believed leave had ended. An action for damages or injunctive relief may also be brought by the Secretary of Labor.

The Fourth Circuit upheld a Department of Labor regulation, 29 C.F.R. § 825.220(d), that prohibits the waiver or release of FMLA rights. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), *reaff'd on reh'g*, No. 04-1525 (4th Cir. July 3, 2007). The court held the prohibition applies to both retrospective and prospective waivers of FMLA rights, including the waiver of substantive FMLA rights and proscriptive rights, i.e., the right not to be discriminated or retaliated against for exercising substantive FMLA rights. However, regulations effective in January 2009 provide that employees may voluntarily settle or release FMLA claims without court or regulatory agency approval, clarifying that only prospective waivers/releases of FMLA claims are prohibited. 29 C.F.R. § 825.220.

Damages for emotional distress are not available under FMLA. Assuming violation of the Act, summary judgment for defendant was nonetheless appropriate when no monetary damages were proved and there was no entitlement to injunctive relief. Nominal damages are not appropriate when defendant proved no actual damages. *Dawson v. Leewood Nursing Home*, 14 F. Supp. 2d 828 (E.D. Va. 1998).

Section 2617(a)(3) of the FMLA provides that the court "shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee" and other costs to be paid by the defendant. While attorney's fees are mandatory, the most critical factor is the degree of success obtained, and district courts have broad discretion with regard to the amount. *McDonnell v. Miller Oil Co.*, 134 F.3d 638 (4th Cir. 1998).

The FMLA is silent on the question of whether the plaintiff is entitled to a jury trial. Front pay is an equitable remedy that must be decided by a court, not a jury. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998); *see also Helmly v. Stone Container Corp.*, 957 F. Supp. 1274 (S.D. Ga. 1997) (jury trial ordered except on the equitable question of whether reinstatement was appropriate); *Souders v. Fleming Cos.*, 960 F. Supp. 218 (D. Neb. 1997) (a jury could consider questions of liability and back pay, but the court would resolve issues of reinstatement and front pay).

The statute of limitations for an FMLA action is two years after the date of the last event constituting the alleged violation, or three years from that date if it is a willful violation. 29 U.S.C. § 2617(c); *see Avent v. Kraft Foods Global Inc.*, No. 3:11cv37 (E.D. Va. Aug. 16, 2012) (mere improper calculation of leave does not amount to willfulness); *Baradell v. Bd. of Social Servs. of Pittsylvania Cnty.*, 970 F. Supp. 489 (W.D. Va. 1997) (FMLA claim barred by the statute of limitations). If an employee is discharged, the statute begins to run on the date employment is terminated, rather than on subsequent occasions when the employer declines to rehire the plaintiff for comparable jobs. *Wenzlaff v. NationsBank*, 940 F. Supp. 889 (D. Md. 1996); *see Battle v. City of Alexandria*, No. 1:14cv1714 (E.D. Va. Apr. 14, 2015) (demotion is retaliation claim, not interference claim,

and cannot extend accrual of interference claim). If the employee alleges sufficient facts to support an FMLA violation, a general allegation of willfulness is sufficient to trigger the three-year limitations period. The employee is not required to allege facts indicating willfulness. *Id.*; *Settle v. S.W. Rodgers, Co.*, 998 F. Supp. 657 (E.D. Va. 1998), *aff'd*, 182 F.3d 909 (4th Cir. 1999).

There are a variety of obligations placed on the employer by the Act and the implementing regulations, such as recordkeeping, 29 U.S.C. § 2616(b) and 29 C.F.R. § 825.500; posting notices of rights under the Act, 29 U.S.C. § 2619; and specifying employee rights under the Act in the employee handbook, 29 C.F.R. § 825.301. The failure to comply with these requirements does not give rise to a private cause of action. See *Jessie v. Carter Health Care Ctr., Inc.*, 926 F. Supp. 613 (E.D. Ky. 1996) (no cause of action for violation of notice requirements). A civil action by an employee is available only to redress conduct that is in violation of the prohibitions in 29 U.S.C. § 2615.

6-8 FAIR LABOR STANDARDS ACT (FLSA)

6-8.01 Scope and Jurisdiction

The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., was enacted in 1938 and amended in 1974 to include state and local government employees.¹⁹ The Act sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employees who are covered by the Act. The test for employment under the Act is one of economic reality, i.e., whether the individual in question undertook the activities in expectation of compensation. *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 105 S. Ct. 1953 (1985); see also *Shaliehsabou v. Hebrew Home*, 369 F.3d 797 (4th Cir. 2004). The FLSA has been held to be remedial in nature and is liberally construed. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006). The Fourth Circuit has held that the failure to pay required FLSA compensation is a "wrongful act." *Republic Franklin Ins. Co. v. Albemarle Cnty. Sch. Bd.*, 670 F.3d 563 (4th Cir. 2012) (insurance coverage case).

The U.S. Department of Labor (DOL) has issued extensive rules and regulations found at 29 C.F.R. § 500 et seq. and also issues "opinion letters" which, when followed by the employer, will act as a defense in a subsequent enforcement action. 29 U.S.C. § 259. Helpful to understanding the application of the Act to public agencies is the publication "[State and Local Government Employees under the Fair Labor Standards Act](#)," published by DOL's Wage and Hour Division. The "[Field Operations Handbook](#)," another useful publication, is available along with DOL [opinions](#).

The Eleventh Amendment and a state's inherent right of sovereign immunity protect a state from being sued for damages under FLSA in federal or state court. *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999) (5-4); see also *Abril v. Virginia*, 145 F.3d 182 (4th Cir. 1998) (the Eleventh Amendment bars state employees from seeking enforcement of FLSA against the state in federal court); *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871 (2000) (sovereign immunity against FLSA suit by state employees in state court); *Martin v. Wood*, 772 F.3d 192 (4th Cir. 2014) (although state supervisory employees were sued in their individual capacities, substance of suit indicates state was the real party in interest and Eleventh Amendment immunity applies). The Supreme Court has made clear that the Eleventh Amendment immunity does not protect local governments. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001); see also *Lewis v. City of Richmond*, 3:14cv00213 (E.D. Va. Aug. 8, 2014) (city's department of social services does not function

¹⁹ In *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465 (1976), the Supreme Court held that due to the Tenth Amendment, FLSA minimum wage and overtime provisions were inapplicable to state and local government functions. Nonetheless, the FLSA still applied to proprietary functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005 (1985), the Court resolved the ambiguities between governmental and proprietary functions and held that the FLSA applied to state and local governments in toto.

as an arm of the state); *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (Eleventh Amendment does not prohibit FLSA suit against school board because school board is not an arm of North Carolina).

6-8.02 Covered Employees

Although the Supreme Court held that the FLSA applies in toto to state and local government employers, the FLSA nevertheless does not apply to all state and local government officers and employees. Employees may be partially or totally exempt from certain provisions of the Act. See *Jones v. Town of Lovettsville*, 48 Va. Cir. 362 (Loudoun Cnty. 1999) (FLSA does not apply when employee is not legally authorized for employment).

The Fourth Circuit has adopted a different joint employer test for FLSA purposes than that adopted for other employment statutes, see section 6-2.03, as the FLSA defines the terms “employee” and “employer” more broadly. The court set forth a six-factor non-exhaustive test in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017):

1. Whether the putative joint employers jointly share the power to directly or indirectly supervise the workers;
2. Whether the putative joint employers jointly share the power to directly or indirectly hire or fire the worker or modify the conditions of employment;
3. The degree of permanency and duration of the relationship between the putative joint employers;
4. Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
5. Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
6. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

The test focuses on the relationship between the putative joint employers rather than the relationship between the worker and the putative joint employer. Thus, two entities that do not individually employ a worker within the meaning of the FLSA may still have to comply with the FLSA if their combined influence over the essential terms and conditions of the worker's activities gives rise to an employer-employee relationship. See also *Hall v. DirectTV, LLC*, 846 F.3d 757 (4th Cir. 2017).

6-8.02(a) Excluded Employees

The employees who do not fall within the reach of the FLSA include elected officials and their personal staff, policy-making appointees, legal advisors, legislative employees, bona fide volunteers, independent contractors, prisoners, and certain trainees. 29 U.S.C. § 203.

6-8.02(a)(1) *Elected Officials, Personal Staff, Policy-Making Appointees and Legal Advisors*

A duly elected official who is not subject to the civil service laws of the state or local jurisdiction is not an employee under the Act. 29 U.S.C. § 203(e)(2)(c). Furthermore, 29 C.F.R. § 553.11(b) provides that personal staff of an elected official (“persons who are under

the *direct supervision* of the selecting elected official and have *regular contact* with such official”) are also excluded from coverage. DOL takes a very narrow view of who is covered by the personal staff exclusion. See *Nichols v. Hurley*, 921 F.2d 1101 (10th Cir. 1990); *Brewster v. Barnes*, 788 F.2d 985 (4th Cir. 1986); *Brewster v. Shockley*, 554 F. Supp. 365 (W.D. Va. 1983).

Policy-making appointees of elected officials (e.g., members of boards and commissions) are also excluded from the Act provided the individual is outside the civil service laws. This exception applies to only those individuals who make and formulate policy. See *EEOC v. North Carolina*, 21 E.P.D. (CCH ¶ 30-441) (W.D.N.C., 1979). Legal advisors to elected officials are also not covered under the Act. 29 U.S.C. § 203(e)(2)(C)(V); *Wall v. Coleman*, 393 F. Supp. 826 (S.D. Ga. 1975).²⁰

6-8.02(a)(2) Volunteers

Volunteers are excluded from the FLSA provided they are in fact bona fide volunteers. 29 U.S.C. § 203(e)(4)(A) provides that the term “employee” does not include any individual who volunteers to perform services for a public agency that is a state, a political subdivision of a state, or an interstate governmental agency if (1) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (2) such services are not the same type of services which the individual is employed to perform for such public agency. See *Purdham v. Fairfax Cnty. Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011) (public school employees who receive stipends to coach school sports are volunteers and not entitled to overtime).

An individual who is not employed by the public entity may volunteer any type of service so long as the services are rendered without any promise or expectation of compensation. Volunteers may be reimbursed for *expenses*, *reasonable benefits*, and *nominal fees* or a combination of all three without losing their volunteer status. 29 C.F.R. §§ 553.104(b) and 553.106. A particular problem may arise when an individual employed by a public agency volunteers to perform similar work in a related public agency or for services not of the same type as performed in his or her employment. In *Benshoff v. City of Virginia Beach*, 9 F. Supp. 2d 610 (E.D. Va. 1998), *aff’d*, 180 F.3d 136 (4th Cir. 1999), the court held that firefighters who joined privately organized volunteer rescue squads were volunteers. *Cf. Todaro v. Township of Union*, 40 F. Supp. 2d 226 (D.N.J. 1999). There are particular requirements for public safety employees who volunteer their services. See 29 U.S.C. § 203(e)(4)(a).

6-8.02(a)(3) Nonprofit

Certain nonprofit agencies are not covered by the FLSA if they do not engage in commercial activities in competition with other commercial enterprises. A nonprofit agency does not become a public agency covered by the FLSA merely by virtue of public funding, public input into membership of agency, or the government acting as fiscal agent for the nonprofit. *Briggs v. Chesapeake Volunteers in Youth Servs.*, 68 F. Supp. 2d 711 (E.D. Va. 1999).

6-8.02(a)(4) Independent Contractors

An individual may perform services for an employer as an independent contractor; however, the mere designation of an individual as an independent contractor will not elevate that relationship to such status. The courts have repeatedly held that the title that the parties give to their relationship is not controlling. The determination is very fact specific and courts, the Internal Revenue Service, and the Department of Labor all use the “economic reality

²⁰ See also *Kavanagh v. City of Phoenix*, 87 F. Supp. 2d 958, *aff’d*, 25 Fed. Appx. 516 (9th Cir. 2001), holding that legal advisors to the police department, although not exempt under the Act, were exempt from the overtime provisions of the Act under the administrative and executive exemptions. See also *Grandits v. United States*, 66 Fed. Cl. 519 (Cl. Ct. 2005), holding that head of policy department’s legal unit was also exempt under the professional exemption.

test” to determine whether an individual is an independent contractor or an employee. The Fourth Circuit adopted a six-factor test that has been used by other courts. The six factors are: (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker’s opportunities for profit or loss dependent on his managerial skill; (3) the worker’s investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the performance of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer’s business. *Walsh v. Med. Staffing of Am., LLC*, 580 F. Supp. 3d 216 (E.D. Va. 2022) (“Defendants exercise extensive control over the nurses’ manner of work, and therefore, employ the nurses under the FLSA”), *vacated and remanded on other grounds, Su v. Med. Staffing of Am., LLC*, No. 22-1290 (4th Cir. May 31, 2023); *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235 (4th Cir. 2016); *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62 (4th Cir. 2016); *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006) (citing *United States v. Silk*, 331 U.S. 704, 67 S. Ct. 1463 (1947)). As the Fourth Circuit emphasized, the verb “employ” under the FLSA is to be read expansively to mean to “suffer or permit to work,” and the definitions are intended to cover some workers who might not be deemed employees under agency principles. *Id.*

6-8.02(b) Exempt Employees

Exempt employees are those who are not covered by specific provisions of the FLSA, such as the overtime and minimum wage requirements, but are nonetheless covered by other provisions, such as the recordkeeping requirements and equal pay. The major categories of exempt personnel include “white collar” exemptions for executive, administrative, and professional employees, certain computer employees, certain highly compensated employees, and also certain seasonal recreational employees. 29 U.S.C. § 213. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.²¹ The employer must prove the application of the exemption by clear and convincing evidence. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688 (4th Cir. 2009); *see also Herrera v. TBC Corp.*, 18 F. Supp. 3d 739 (E.D. Va. 2014) (noting split in circuits regarding burden of proof).

6-8.02(b)(1) Requirements for “White Collar” Exempt Status

There are two tests used to determine whether an employee meets the requirements for the executive, administrative, or professional exemption: “Salary Basis” test and “Duties” test.

6-8.02(b)(1)(i) Salary Basis Test

Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation, the salary, each pay period on a weekly, or less frequent, basis. The minimum amount of salary must be \$684 per week or \$35,568 per year.²² The salary cannot be reduced because of variations in quality or quantity of the employee’s work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. A “fee basis” means the employee is paid an agreed sum for a single job

²¹ DOL’s [website](#) provides extensive information on the regulations and the agency rulemaking comments. The Preamble to the “Fair Pay” regulations is very helpful for applying the “white collar” regulations. See [69 Fed. Reg. 22121 \(Apr. 23, 2004\)](#).

²² 29 C.F.R. 541.600; [Fact Sheet #17G](#): Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA).

regardless of the time required for its completion. To determine if the fee amount paid to the employee meets the minimum salary amount, the time worked on the job and the fee payment must be at a rate that would amount to at least \$684 per week if the employee worked forty hours, e.g., \$350 fee for twenty hours of work would meet the test because it would equate to \$700 per forty hours worked. 29 C.F.R. § 541.605.

The general rule is that if the employer makes deductions from the salary, e.g., for the idle time, the employee is not being paid a salary. Certain deductions from salary are allowed under 29 C.F.R. §§ 541.602 and 541.710: (1) absences for one or more full days for personal reasons, other than sickness or disability; (2) absences for one or more full days as a result of sickness or disability (including work-related accidents) and a deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for such loss of salary;²³ (3) leave taken pursuant to the Family and Medical Leave Act; (4) a full day or more of unpaid disciplinary suspension; (5) unpaid leave as a penalty for major safety violations; (6) an absence for the entire week; or (7) deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Deductions from salary cannot be made for absences required by the employer or for jury duty, attendance as a witness, or temporary military duty, but offsets from fees or salaries received are allowed. 29 C.F.R. § 541.602(b)(3).

The effect of improper deductions is specifically addressed in the regulations. 29 C.F.R. § 541.603. The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. Section 541.603(c) provides a "Window of Correction" so that isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

The regulations also have a safe harbor clause. If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good-faith commitment to comply in the future, the employer will not lose the exemption for any employee unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. 29 C.F.R. § 541.603(d). DOL has published a model "safe harbor" [policy](#).

6-8.02(b)(1)(ii) Duties Tests

In addition to meeting the salary test, the employee's duties must fall within one of the requirements listed below.²⁴ An employee is exempt based on the *type* of work performed,

²³ For public employees, absences for personal reasons or because of illness or injury of less than one work day may be made pursuant to a bona fide plan, policy, or practice. Also, when accrued leave is not used by an employee because (1) permission for its use has not been sought or has been sought and denied; (2) accrued leave has been exhausted; or (3) the employee chooses to use leave without pay, such deductions from pay are permissible.

²⁴ The "long" and "short" duties tests are no longer used. Also, there is no longer the requirement under the "white collar" exemption that no more than 20 percent of the work be "non-exempt" activities. In *Counts v. South Carolina Electric & Gas Co.*, 317 F.3d 453 (4th Cir. 2003), the court held

not whether business practice or applicable law requires a particular position to exist. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688 (4th Cir. 2009).

6-8.02(b)(1)(ii)(a) Executive Exemption

To qualify for the executive employee exemption (29 C.F.R. § 100 et seq.), all of the following tests in addition to the salary test must be met: (1) the employee's primary duty must be management, or managing a customarily recognized department or subdivision; (2) the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (3) the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. *See also* 29 C.F.R. § 541.105.

Although decided under the former regulations, the Fourth Circuit's analysis of the executive duties exemption is helpful for an understanding of "managerial responsibilities." *See Jones v. Va. Oil Co.*, No. 02-1631 (4th Cir. July 23, 2003); *see also Martin v. Yokohama Tire Corp.*, No. 7:11cv244, 7:11cv467 (W.D. Va. Nov. 12, 2013) ("particular weight" given if employee's opinions regarding status of other employees considered even if not followed). Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. 29 C.F.R. 541.106(a); *see Walsh v. Logothetis*, No. 3:13cv401 (E.D. Va. Jan. 21, 2014) (unpaid overtime claims dismissed by court on its own initiative because employee performed exempt executive functions as well as administrative functions), *aff'd*, No. 14-1166 (4th Cir. July 11, 2014).

6-8.02(b)(1)(ii)(b) Administrative Duties Test

To qualify for the administrative employee exemption, in addition to meeting the salary test, both of the following must be met: (1) the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers²⁵; and (2) the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.²⁶ 29 C.F.R. § 541.200. The regulations specifically provide that public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists, and similar employees, generally do not meet the duties requirements for the administrative exemption. 29 C.F.R. § 541.203(j).

6-8.02(b)(1)(ii)(c) Professional Exemption

To qualify for the professional exemption, in addition to meeting the salary test all of the following must be met: (1) the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced

that in determining exempt status, the FLSA does not incorporate a workweek by workweek measure (the court rejected the employees' argument that on the workweeks in which they engaged primarily in nonexempt activities they should receive overtime compensation for the hours worked over forty).

²⁵ *See Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111 (4th Cir. 2015) (extensive discussion of what "directly related" to business operations means; holding insurance claims investigators not exempt).

²⁶ The exercise of discretion and judgment means the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. 29 C.F.R. § 541.202.

knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.300.

Different formulations apply to “learned professionals,” 29 C.F.R. § 541.301; “creative professionals,” 29 C.F.R. § 541.302; teachers, 29 C.F.R. § 541.303; and lawyers and doctors, 29 C.F.R. § 541.304. The salary basis test does not apply to teachers, lawyers, or doctors. 29 C.F.R. § 541.600(e). Computer employees are exempt under 29 C.F.R. § 541.400 et seq.

6-8.02(b)(1)(ii)(d) Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$107,432 or more (which must include at least \$684 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard tests for exemption. 29 C.F.R. § 541.601. The exemption does not apply to “blue collar” workers no matter how highly paid they might be. 29 C.F.R. §§ 541.3 and 541.601.

6-8.02(b)(2) Seasonal Recreational Employees

The FLSA contains a separate exemption from the minimum wage and overtime requirements in 29 U.S.C. § 213(a)(3) for any employee who is employed by an establishment that is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center if (1) it does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year its average receipts for any six months of such year were not more than 33 1/3 percent of its average receipts for the other six months of such year. This exemption may apply to publicly owned or operated swimming pools, golf courses, parks, etc.²⁷

The Department of Labor will generally consider each recreational facility a separate “establishment” for determining its status for application of the two-pronged test. The seasonal employees must work at the recreational establishment so employees who work for the parks and recreation department at the central office are not covered by this exemption.

6-8.02(c) First Responder Regulation

Police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and similar employees (first responders) who perform work such as preventing, controlling, or extinguishing fires of any type; rescuing fire, crime, or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining, and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and other similar work are not exempt and thus are protected by the minimum wage and overtime provisions of the FLSA. 29 C.F.R. § 541.3(b).

First responders generally do not qualify as exempt executives because their primary duty is not management. They are not exempt administrative employees because their primary duty is not the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.

²⁷ The Department of Labor has also taken the position that publicly operated recreational facilities whose operating costs are met primarily with taxes, as opposed to user fees, would not meet the second prong of the test. See Wage Hour Opinion Letters, Feb. 14, 1975 and Sept. 10, 1974.

Similarly, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.

The Fourth Circuit has held that management-like tasks undertaken in conjunction with, or directly related to, primary first responder duties do not turn a first responder into an exempt executive or administrator. Thus, even though fire captains can spend more of their *time* undertaking management duties, because their primary *duty* is fighting fires they are not exempt. *Morrison v. Cnty. of Fairfax*, 826 F.3d 758 (4th Cir. 2016). By contrast, Battalion Chiefs, whose duties included staffing, supervision, administration, budgeting, and hiring, are exempt from the FLSA's overtime pay requirements because their managerial responsibilities far outweighed any non-exempt duties they performed. *Emmons v. City of Chesapeake*, 982 F.3d 245 (4th Cir. 2020). Moreover, the Battalion Chiefs acted relatively free from direct supervision and spent little time fighting fires, responding to particularly complex emergency calls only. *Id.* (discussing characteristics of an "executive" who is exempt from FLSA overtime requirements per 29 C.F.R. § 541.100(a)). Considering "the character of the employee's job as a whole," the court concluded that the Battalion Chiefs were executives not entitled to overtime pay.

6-8.03 Overtime

6-8.03(a) Hours Worked

The FLSA does not define "work" but does define the workweek as including "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." 29 C.F.R. § 785.7. The U.S. Supreme Court held that an employee must be compensated for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Tenn. Coal, Iron R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S. Ct. 698 (1944). The Portal-to-Portal Act limited the implications of such language by clarifying that travel time and activities which are "preliminary to or postliminary to" the principal activities of employment are not compensable. 29 U.S.C. § 254(a). An activity is "integral and indispensable" to the principal employment activities if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 135 S. Ct. 513 (2014). An employee who continues to work after his normal hours with the knowledge or implied consent of the employer is entitled to be compensated for that time and to have it count toward the number of hours worked during the workweek for overtime purposes. See 29 C.F.R. § 785 et seq. Employers may not use a blended rate (combination of regular rate and overtime rate) to pay employees for whom overtime is regularly expected. *U.S. Dep't of Lab. v. Fire & Safety Investigation Consulting Servs.*, 915 F.3d 277 (4th Cir. 2019).

6-8.03(a)(1) Compensable Time

All "hours worked" are compensable. Commuting time from the employee's home to the place of employment is not counted as hours worked.

Travel time during the workday is counted as hours worked if it is a part of the employee's "principal activity." 29 C.F.R. § 785.38. Any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S. Ct. 514 (2005) (donning and doffing of specialized protective gear and time spent walking to worksite after and before such donning and doffing is covered by FLSA); see also *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036 (2016) (representative proof from a sample, based on an expert witness' estimation of average time that employees spent donning and doffing protective gear, was a permissible means of establishing damages of a class of employees); *Perez v. Mountaire Farms*, 650 F.3d 350

(4th Cir. 2011) (donning and doffing of protective gear pre-and post-work is compensable but donning and doffing for meal breaks is not). Donning and doffing of protective gear classifies as “changing clothes” and thus, may be excluded from hours worked pursuant to a collective bargaining agreement. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 134 S. Ct. 870 (2014). In general, all hours worked by the employee within his normal working hours are compensable if they are for the employer’s benefit. However, if the employee has been completely relieved of duty, the waiting time need not be counted as work time. 29 C.F.R. § 785.16.

There are special rules for out-of-town and overnight travel. See 29 C.F.R. §§ 785.39 to 785.41.

Hours worked do not include insubstantial or insignificant amounts of time for pre-shift or post-shift activities under the “de minimis rule” set forth in 29 C.F.R. § 785.47. This rule allows only a very few minutes to be excluded.

6-8.03(a)(2) “On-Call Time”

“On-call time” will not be compensable if the employee is allowed to leave the employer’s premises and is not overly restricted in his use of the time. 29 C.F.R. § 785.17. No single fact will be determinative, but the facts likely to be considered are: (1) physical restrictions placed on the employee while on call; (2) required response time; (3) percentage of calls expected to be returned by the employee; (4) frequency of actual calls; and (5) disciplinary action, if any, taken against an employee who fails to respond. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944); *Gilligan v. City of Emporia, Kan.*, 986 F.2d 410 (10th Cir. 1993); *Renfro v. City of Emporia, Kan.*, 948 F.2d 1529 (10th Cir. 1991); *Sarmiento v. City of Denver*, 82 F.3d 426 (10th Cir. 1996).

6-8.03(a)(3) Break and Meal Periods

Break and meal periods are addressed in 29 C.F.R. §§ 785.18 and 785.19. Whether the time allotted for breaks and meals is noncompensable depends upon whether the following conditions are met: (1) the meal period is thirty minutes or more (the break period is twenty minutes or more); (2) the employee is completely relieved of all duties;²⁸ and (3) the employee must be free to leave the duty post, but not necessarily leave the worksite.

The Fourth Circuit held in *Roy v. County of Lexington*, 141 F.3d 533 (4th Cir. 1998), that the mealtimes of emergency medical service employees were excludable from compensatory time when the employees were not required to consume meals on the premises (although they had an emergency response time of two minutes).

6-8.03(a)(4) Sleep Time

For employees whose shift is less than twenty-four hours, periods during which the employee is permitted to sleep are still considered working time. 29 C.F.R. § 785.21. For employees who are required to be on duty twenty-four or more hours, the employer may exclude bona fide meal periods and up to eight hours of regularly scheduled sleep time provided that: (1) there is an express or implied agreement with the employee excluding sleeping time; (2) adequate sleeping facilities are provided by the employer; and (3) the sleep period is at least five hours. See *Roy v. Cnty. of Lexington*, 141 F.3d 533 (4th Cir. 1998) (sleep time of emergency medical service employees are excluded work hours when the employees got five hours of sleep out of the allotted eight).

²⁸ Notwithstanding the requirement that the employee be relieved from “all” duties, a number of courts have held that the meal time will be noncompensable if the employee is relieved of all “substantial” duties. See *Hill v. United States*, 751 F.2d 810 (6th Cir. 1984) (postal worker); *Agner v. United States*, 8 Cl. Ct. 635 (1985) (security guards), *aff’d*, 795 F.2d 1017 (Fed. Cir. 1986); *Armitage v. City of Emporia*, 982 F.2d 430 (10th Cir. 1992) (police detectives).

The required agreement must be voluntary. *Johnson v. City of Columbia*, 949 F.2d 127 (4th Cir. 1991). The court held that the agreement was signed under duress when the firefighters were required to sign an agreement permitting the deduction of sleep time or be terminated.

6-8.03(a)(5) Training

Time spent in training programs while on the job is counted as hours worked. 29 C.F.R. §§ 785.27 through 785.33. Training will not be considered work time if: (1) attendance occurs outside the employee's regular working hours; (2) attendance is voluntary; (3) the employee does no work while being trained; and (4) the training is not directly related to the employee's job.

Even if the training program is directly related to the employee's present job, it may still be exempt if it corresponds to training offered by an independent, bona fide institution of learning. 29 C.F.R. § 785.31.

6-8.03(a)(6) Travel Time

Commuting time, even when the employee is required to travel to different sites, is not counted as hours worked. 29 C.F.R. § 785.35. However, in an emergency situation, such as when the employee is called out from home, the commuting time is counted as hours worked. 29 C.F.R. § 785.36. Overnight travel away from home has special rules. 29 C.F.R. § 785.39. Also, all time in which the employee is required to perform work is counted as hours worked.

6-8.03(a)(7) Shift Substitution

An employee of a public agency may agree to substitute a shift (or partial shift) with another employee without the hours counting as hours worked. When such substitutions occur, each employee will be treated as if his normal hours were worked. The substitution must be done voluntarily without coercion from the employer, agreed to by the employees, and approved by the employer. The agreement does not have to be in writing; the employer may approve the agreement in "whatever manner is customary." 29 C.F.R. § 553.31.

6-8.03(a)(8) Canine Care

The hours that a police officer spends caring for police dogs at home on workdays and on weekends and holidays are compensable. See *Truslow v. Spotsylvania Cnty. Sheriff*, 783 F. Supp. 274 (E.D. Va. 1992), *aff'd without opinion*, 993 F.2d 539 (4th Cir. 1993); *Levering v. District of Columbia*, 869 F. Supp. 24 (D.D.C. 1994). The compensability of the time is determined by the recording of the hours spent in actively caring for the dog or pursuant to a compensation agreement with the officer for the time spent caring for the dog. See 29 C.F.R. § 785.23. If reasonable, such an agreement will be upheld by the courts. *Garofolo v. Donald B. Heslep Assocs.*, 405 F.3d 194 (4th Cir. 2005); *Holzapfel v. Town of Newburgh*, 145 F.3d 516 (2d Cir. 1998); *see also Leever v. Carson City*, 360 F.3d 1014 (9th Cir. 2004) (agreement was not reasonable because the additional compensation (sixty dollars biweekly) was equivalent to only one hour of pay per week).

The Second Circuit has held that the time spent by the police officer commuting with the police dog is not compensable even if the dog did occasionally require some care during the commute. The court held that commuting was not work and that the time spent during the commute in caring for the dog was de minimis. *Reich v. New York Transit Auth.*, 45 F.3d 646 (2d Cir. 1995).

6-8.03(a)(9) Security Screening

Security screening is not an integral and indispensable part of the principal activity of stocking warehouse shelves and therefore is not compensable. *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 135 S. Ct. 513 (2014).

6-8.04 Special Rules for Public Employers of Police and Firefighters

29 C.F.R. § 553.200 provides a *complete exemption* from the overtime pay requirements for any employee of a public employer who is employed in fire protection activities or law enforcement, including security personnel in correctional institutions, if the public agency employs fewer than five employees in fire protection or law enforcement during the workweek.²⁹

The exemption is determined on a workweek basis and is determined separately for fire protection and law enforcement. Thus, if a locality employs, during any particular workweek, fewer than five employees engaged in law enforcement activities but seven employees engaged in fire protection, it could claim the exemption for only the law enforcement employees.

No distinction is made between full-time and part-time employees or between those employees who are “on duty” and those who are on leave status.

6-8.04(a) Partial Overtime Exemption for Police and Fire Departments

In addition to the special exemption for small departments, § 207(k) of the FLSA provides a partial exemption from the overtime pay requirements for any employee of a public employer who is employed in fire protection activities or law enforcement, including security personnel in correctional institutions. The exemption is only from the overtime requirements that require a forty-hour workweek and the minimum wage requirements are still in effect. See also 29 C.F.R. § 553.201.

The partial exemption allows the public employer to declare a work period of not less than seven consecutive days nor more than twenty-eight consecutive days. The work period can be of any length within those limits and need not correspond to any pay period. The hour limits in effect for fire protection employees are fifty-five hours for a seven-day work period and increasing to 212 hours for a twenty-eight-day period. The corresponding hours for law enforcement personnel are forty-three and 171 respectively.³⁰ 29 C.F.R. § 553.230. The length of the pay period and the starting date are to be noted on the payroll records. 29 C.F.R. § 553.50; see *Martin v. Coventry Fire Dist.*, 981 F.2d 1358 (1st Cir. 1992). The § 207(k) work period must be affirmatively established and may not be enforced retroactively in order to avoid FLSA liability. *Taylor v. Cnty. of Fluvanna*, 70 F. Supp. 2d 655 (W.D. Va. 1999).

The Virginia Gap Pay Act requires that fire protection and law enforcement³¹ employees be paid overtime for all hours of work between the FLSA maximum and the hours for which an employee receives his salary, or if paid on an hourly basis, the hours for which the employee receives hourly compensation (gap pay). Paid leave taken by a fire protection or law enforcement employee counts as hours of work. Va. Code § 9.1-701. All hours that such an employee works or is in a paid status during his regularly scheduled work hours counts as hours of work. Va. Code § 9.1-703. In *Bailey v. County of Loudoun*, 288 Va. 159, 762 S.E.2d 763 (2014), sheriff’s deputies challenged three employment practices designed to avoid the “gap pay” overtime. The Virginia Supreme Court held that any and all hours worked during the gap period must be compensated at the overtime rate and thus a practice

²⁹ To qualify for the small department exemption as an employee “engaged in fire protection activities,” or “law enforcement activities,” the employee must meet the same requirements as employees for the partial exemption. See 29 C.F.R. §§ 553.210 and 553.211(a).

³⁰ Some public employers employ public safety employees that perform the functions of both police and firefighters. 29 C.F.R. 553.213 specifically addresses this issue. Such dual assignment will not defeat the exemption provided that the activities performed meet the tests set forth in §§ 553.210 and 553.211.

³¹ Applies only to employers of one hundred or more law enforcement employees. See *Bailey v. City of Franklin*, 95 Va. Cir. 241 (Southampton Cnty. 2017).

of offsetting overtime hours against any sick leave taken in the same pay period violated the Act as did a practice that allowed deputies to voluntarily exchange their gap overtime hours for compensatory leave at a later time at the regular hourly rate. The Court found, however, that a practice of curtailing a deputy's regularly scheduled work hours when to work the full schedule would mean the deputy would be entitled to overtime (force flexing) was permissible under the Act.

The definition of "fire protection employee" and "law enforcement employee" specified in Va. Code § 9.1-700 is the same as those terms are defined in 29 C.F.R. §§ 553.210 and 553.211, respectively.³² Employees of police and fire departments who do not meet the definitional tests must be compensated pursuant to the normal forty-hour workweek established by the employer pursuant to § 201(a) of the FLSA. A federal district court has held that the state's more stringent overtime threshold is not preempted by the FLSA. *Rogers v. City of Richmond*, 851 F. Supp. 2d 983 (E.D. Va. 2012). Another district court exercised supplemental state law jurisdiction in a class action suit by city police officers alleging violations of the overtime provisions of the FLSA and the state law gap pay provisions. *Winingear v. City of Norfolk*, No. 2:12cv560 (E.D. Va. Oct. 16, 2013). A settlement of the claims in the amount of \$3,200,000, including attorney's fees, was subsequently approved by the court by order dated July 14, 2014.

The employee who meets the definitional test will qualify regardless of his status as "trainee," "probationary," or "permanent," or of his rank. Such an employee may be assigned to support activities as set forth in 29 C.F.R. § 553.211(g) without losing his status. In *Schmidt v. County of Prince William*, 929 F.2d 986 (4th Cir. 1991), the court held that firefighters who met the definitional test and who were detailed to the communications division for familiarization and training purposes did not lose their status as firefighters even though the detail lasted for a year or more.

6-8.04(b) Fluctuating Hours

The employer and employee may enter into an agreement establishing a fixed salary for fluctuating hours. Such an agreement is authorized under 29 C.F.R. §§ 778.402 through 778.414 if: (1) there is a specific agreement (29 C.F.R. § 778.407); (2) the employee's duties necessitate irregular hours of work (20 C.F.R. § 778.406); (3) the weekly overtime compensation is guaranteed; and (4) the guaranteed hours do not exceed sixty in a workweek. The additional overtime pay is one-half of regular pay for each hour worked. 29 C.F.R. § 778.114. Emergency medical service personnel who worked a nine-day regularly recurring cycle of hours worked fluctuating hours for purposes of application of one-half overtime pay despite the fact that hours were regular, fixed, and perpetual. *Flood v. New Hanover Cnty.*, 125 F.3d 249 (4th Cir. 1997); *accord Griffin v. Wake Cnty.*, 142 F.3d 712 (4th Cir. 1998).

It is the employer's burden to prove there was a clear and mutual understanding that the fixed salary applied whether more or fewer hours were worked. However, the explanation need not be in writing nor must overtime be explained. *Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997); *see also Roy v. Cnty. of Lexington*, 141 F.3d 533 (4th Cir. 1998) (need not show employee understood manner by which overtime was calculated or understood aspects of compensation other than would receive fixed salary for straight time worked); *accord Griffin v. Wake Cnty.*, 142 F.3d 712 (4th Cir. 1998).

6-8.04(c) Twenty Percent Limitation on Nonexempt Work (80/20 Rule)

To meet either the small employer or the § 207(k) partial overtime exemption, the regulations provide a limitation that an exempt fire protection or law enforcement employee

³² "Fire protection employee" includes emergency medical services personnel who are trained in fire suppression and employed by a government's fire department. Security personnel who work in a correctional facility also fall within the law enforcement exemption. 29 C.F.R. § 553.211(g).

may not engage in more than 20 percent nonexempt work. If the employee spends more than 20 percent of his or her time in nonexempt activities, he or she will not be considered an employee engaged in law enforcement or fire protection activities. 29 C.F.R. § 553.212.

Law enforcement and fire protection personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. Such work will not affect their exempt status with respect to their regular employment. In addition, the hours worked are not counted as hours worked for overtime purposes on their regular job, nor are they counted in determining the 20 percent limitation. See *West v. Anne Arundel Cnty.*, 137 F.3d 752 (4th Cir. 1998).

6-8.04(d) Emergency Medical Service Employees

There has been a great deal of controversy over the eligibility of emergency medical service (EMS) employees for the § 207(k) partial exemption. Among the issues is the application of the 80/20 Rule to emergency medical technicians (EMTs) who do not spend at least 80 percent of their time "fighting fires." Compare *West*, 137 F.3d 752, with *Lang v. City of Omaha*, 186 F.3d 1035 (8th Cir. 1999).

The definition of an employee engaged in fire protection includes "a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous material worker, who (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or state, and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property or the environment is at risk." 29 C.F.R. §§ 553.210 and 553.212. Medical services performed at non-fire emergencies incident to or in conjunction with fire suppression activities are considered exempt work. *Adams v. City of Norfolk*, 274 F.3d 148 (4th Cir. 2001). Employees of a public agency other than a fire department are not engaged in fire protection, for purposes of the § 207(k) partial exemption, even if their work is substantially related to firefighting. See Public Law 106-151, 113 Stat. 1731 (1999); 29 U.S.C. 203(y) (amending FLMA definition of fire protection employee to require employment by fire department).

6-8.04(e) Recoupment of Training Costs

The practice of recouping training costs from employees who resign within a specified period of time is permissible, but care must be taken not to violate the minimum wage and overtime provisions of the FLSA. *Heder v. City of Two Rivers*, 295 F.3d 777 (7th Cir. 2002).

6-8.04(f) Volunteer Fire & Rescue Squads

The hours that firefighters freely volunteer to staff independent volunteer rescue squads do not count as hours worked. In a very fact specific case, a locality's minimal financial contributions to the volunteer organization, its general oversight of the provision of emergency medical services, and a central communications center, were not enough to establish an employer/employee relationship. *Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999). In a [letter opinion](#) to Montgomery County, Maryland, dated June 5, 2002, the DOL stated that "FLSA does not require career firefighters [to be paid] if they volunteer, freely and without coercion, to provide services to the non-profit fire and rescue corporations" This is true whether they are providing services as a firefighter or as an emergency medical technician." However, in another [opinion](#) dated February 29, 2008, the DOL stated a paid employee of a volunteer fire company may not volunteer to perform the same services he is paid to perform for the same employer after his regular week of work.

6-8.05 Compensatory Time

The FLSA provides that state and local governments, but not private employers, may provide compensatory time in lieu of a monetary payment for overtime if there is a collective bargaining agreement, employment agreement, or memorandum of understanding. If it

was the employer's practice prior to April 15, 1985, to pay existing employees compensatory time, then that practice shall suffice as an "understanding" and permit the continued use of comp time. It appears that public employers may require *new* employees to agree to the use of comp time as a condition of employment. See 29 C.F.R. § 553.23(c) and 29 C.F.R. § 553.20; 29 U.S.C. § 207(o). Like overtime pay, compensatory time is calculated at one and one-half hour for each hour of overtime worked.

The requirement of an agreement has raised some controversy in states that prohibit public employers from engaging in collective bargaining. The Fourth Circuit addressed the issue in *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) and the Supreme Court in *Moreau v. Klevenhagen*, 508 U.S. 22, 113 S. Ct. 1905 (1993), and held that the FLSA was not intended to disregard state and local laws in determining a "representative" for purposes of entering into a compensatory time agreement. In states that prohibit collective bargaining it now appears that the public employer may enter into individual compensatory time agreements.

An employee has the right to use the compensatory time earned and cannot be coerced to accept more compensatory time than the employer can realistically allow the employee to use. When the use of compensatory time is requested, the employer must grant its use within a reasonable time of the request unless such use will "unduly disrupt" operations. 29 C.F.R. § 553.25. The employer may cash in the compensatory time earned at the employer's option and at termination of employment the employee must be paid at his then regular hourly rate of pay for any unused compensatory time. 29 C.F.R. §§ 553.26 and 553.27.

Nothing in the FLSA or its implementing regulations prohibits a public employer from compelling the use of compensatory time, even in the absence of an agreement. *Christensen v. Harris Cnty.*, 529 U.S. 576, 120 S. Ct. 1655 (2000).

6-8.06 Enforcement

There are generally three ways in which the FLSA can be enforced. An aggrieved employee can file suit, the Secretary of Labor can file suit, or the Department of Justice can bring a criminal prosecution for willful violations. An employer may not bring a declaratory action seeking a determination that it has not violated the FLSA despite threatened litigation that it has. *Microstrategy Inc. v. Convisser*, No. 1:00cv453 (E.D. Va. May 2, 2000).

6-8.06(a) Private Actions

Individual employees can enforce the FLSA by bringing private actions against their employers. These employees may sue for violations of the minimum wage and overtime provisions, but they are not permitted to sue for record keeping violations. If the employee is successful, the employee may recover "unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The proper calculation for overtime when the employees are paid a weekly salary is 50 percent of the regular rate for all hours worked over forty in a given workweek. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351 (4th Cir. 2011). Successful employees may also recover reasonable attorney's fees and costs of the action. *Id.*; see *Gregory v. Belfor USA Grp., Inc.*, No. 2:12cv11 (E.D. Va. Feb. 4, 2014) (court approved attorney fees more than triple settlement amount). While liquidated damages are the norm, a showing of good faith or reasonable grounds for belief of not violating the Act can negate the imposition of liquidated damages. *Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997); see also *Roy v. Cnty. of Lexington*, 141 F.3d 533 (4th Cir. 1998) (no liquidated damages when relied on advice of attorney). But see *Loveless v. John's Ford Inc.*, No. 05-1868 (4th Cir. May 9, 2007) (unpubl.) (an award of liquidated damages is mandatory upon a finding of willfulness); *Taylor v. Cnty. of Fluvanna*, 70 F. Supp. 2d 655 (W.D. Va. 1999) (insufficient budget to meet public safety concerns and FLSA requirements not sufficient reason to justify knowing violation).

In determining whether an employee had alleged a prima facie case against his employer, a federal district court used the lenient “Maryland approach,” which requires a plaintiff only to plead that (1) he worked overtime hours without compensation; and (2) that the employers knew or should have known that he worked overtime, but failed to compensate him for it. *Rodriguez v. F & B Sols., LLC*, 20 F. Supp. 3d 545 (E.D. Va. 2014).

6-8.06(b) Actions by the Secretary

The Secretary of Labor can enforce the FLSA by bringing suit on behalf of an employee. Much like the employee’s suit, the Secretary may sue for violations of the minimum wage and overtime provisions. In addition, the Secretary may sue for violations of the recordkeeping provisions. 29 U.S.C. § 217. In terms of damages, the Secretary can recover unpaid minimum wages and overtime plus liquidated damages, and the Secretary may seek injunctive relief. See, e.g., *Walsh v. Med. Staffing of Am., LLC*, 580 F. Supp. 3d 216 (E.D. Va. 2022)³³ (finding defendant willfully violated FLSA, ordering calculation of back pay and liquidated damages, and enjoining employer from committing further violations of the FLSA). The Secretary may not recover attorney’s fees.

6-8.06(c) Department of Justice

According to 29 U.S.C. § 216(a), employers who “willfully” violate the FLSA are subject to criminal penalties. Upon the first conviction, the employer is subject to a fine of up to \$10,000. *Id.* If the employer is convicted a second time, the employer is subject to another fine and imprisonment for up to six months.

6-8.06(d) Statute of Limitations

The statute of limitations differs depending on whether the suit is civil or criminal. If the suit is civil, there is a limitation period of two years. However, if the defendant in a civil suit acted “willfully,” the limitations period is extended to three years. 29 U.S.C. § 255; see *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351 (4th Cir. 2011) (willfulness requires knowledge or reckless disregard as to whether conduct violates FLSA); *Smith v. Central Sec. Bureau, Inc.*, 231 F. Supp. 2d 455 (W.D. Va. 2002) (evidence of willfulness precludes summary judgment). If the action brought against the defendant is criminal, the limitation period is five years.

6-8.07 Retaliation

For retaliation to exist, the plaintiff must have engaged in protected activity. The employer must be put on notice of an alleged violation, which requires a level of formality beyond simply “letting off steam.” *Romero v. Granite Center LLC*, No. 1:16cv1039 (E.D. Va. June 19, 2017).

6-9 EQUAL PAY ACT

6-9.01 Scope

When enacted, the purpose of the Equal Pay Act was to correct specific deficiencies in the Fair Labor Standards Act.³⁴ In particular, the Fair Labor Standards Act failed to ensure equal pay between males and females and failed to curtail the economic and social impacts from gender-based wage discrimination. See generally *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223 (1974). To correct those deficiencies, Congress enacted the Equal Pay Act, added it to the Fair Labor Standards Act, and prohibited employers from engaging in any gender-based wage discrimination when equal work was involved. 29 U.S.C. § 206(d).

³³ *Walsh* was vacated and remanded on other grounds, *Su v. Med. Staffing of Am., LLC*, No. 22-1290 (4th Cir. May 31, 2023). Upon remand, the district court granted, once again, the plaintiff’s motion for injunctive relief. *Walsh v. Med. Staffing of Am., LLC*, Nos. 2:18-cv-226 and 2:19-cv-475 (E.D. Va. Sept. 7, 2023).

³⁴ Equal Pay claims may also be brought under Title VII.

Although the Equal Pay Act is an addition to the minimum wage and overtime provisions of the Fair Labor Standards Act, Congress used a separate constitutional basis for applying the Equal Pay Act to states and local governments. In its simplest terms, when Congress applied the Fair Labor Standards Act to the states, it used the Commerce Clause. On the other hand, when Congress applied the Equal Pay Act to the states, it used its power to enforce the Fourteenth Amendment. *Usery v. Charleston Cnty. Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977). As explained in the discussion of the Fair Labor Standards Act (see section 6-8), because Congress relied on the Commerce Clause to apply the FLSA to the states, that Act is being subjected to attack. However, because Congress relied on a separate basis of Constitutional power for the Equal Pay provisions, those provisions are much less susceptible to a jurisdictional attack by the local governments. See *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972 (2003) (FMLA expressly abrogates Eleventh Amendment immunity pursuant to Congress's power under § 5 of the Fourteenth Amendment); compare *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997) and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000) (Section 5 enforcement of Fourteenth Amendment rights requires "congruence and proportionality" between injury to be prevented and means adopted by Congress).

6-9.02 Plaintiff's Required Proof

Under the Equal Pay Act, the plaintiff bears the burden of establishing, by a preponderance of the evidence, a prima facie case. To establish a prima facie case, the plaintiff must show (1) receipt of lower pay than a counterpart of the opposite sex, (2) for performing equal work on jobs requiring equal skill, effort, and responsibility (3) under similar working conditions. *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019); see also *Strag v. Bd. of Trs.*, 55 F.3d 943 (4th Cir. 1995). Establishing the prima facie case invariably involves comparing the plaintiff's job and wages with those of another similarly situated employee in the same establishment. The EEOC has defined an establishment as a distinct physical place of business. When comparing wages of similarly situated male and female employees, the base rate of pay should be used, not including sales commissions. *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643 (4th Cir. 2021).

However, as a prerequisite to engaging in a comparison of jobs and wages, the plaintiff must identify a particular "comparator," not just a hypothetical or "composite" employee. *Houck v. Va. Polytechnic Inst.*, 10 F.3d 204 (4th Cir. 1993). Moreover, once the plaintiff specifically identifies a particular comparator, the comparison of jobs must proceed "factor by factor." *Id.* A plaintiff must prove that she and the comparator had "equal jobs, not just that they all performed vaguely related tasks using nominally comparable skills. That is, there must be evidence showing the jobs were equal in the strict sense of involving "virtually identical" work, skill, effort, and responsibility, not in the loose sense of having some comparative value." *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019) (emphasis in original); see also *Moser v. Pizza Hut*, No. 97-0046-D (W.D. Va. Apr. 9, 1998) (male not good comparator when responsible for producing larger amount of revenue and had more job responsibilities). In *United States EEOC v. Maryland Insurance Administration*, 879 F.3d 114 (4th Cir. 2018), the Fourth Circuit found that for purposes of a prima facie case, the plaintiff met the burden if she identified a single male comparator with substantially similar duties who was paid more. The employer's argument that other male employees with similar duties were paid less than the female and that the discrepancies were due to background experience, professional designations, and licenses or certifications were only relevant to the employer's affirmative defense.

To determine whether an employee's work is "virtually equal" to that of a comparator, courts look beyond a job's title or formal description and examine the nature of the actual duties performed. In particular, courts should determine whether the jobs compared have a "common core" of tasks. *Brewster v. Barnes*, 788 F.2d 985 (4th Cir. 1986); see also *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282 (4th Cir. 1974). In *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611 (E.D. Va. 2003), the court held that a

full-time employee can constitute the comparator for a part-time employee if the tasks, duties, and responsibilities are essentially similar. Conversely, employees with the same titles and only the most general similar responsibilities are not considered “equal” under the EPA absent equal skills and equal responsibility. *Evans v. Int'l Paper Co.*, 936 F.3d 183 (4th Cir. 2019); *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019); *Wheatley v. Wicomico Cnty.*, 390 F.3d 328 (4th Cir. 2004); *Wyatt v. Steidel*, No. 3:14cv64 (E.D. Va. Mar. 3, 2015) (having same title in city department does not necessarily equate to equal skills and responsibilities), *aff'd*, No. 15-1334 (4th Cir. July 23, 2015).

If an employee is required to perform extra tasks, and the extra tasks create variations in skill, effort, and responsibility, a wage differential may be supported between otherwise equal jobs. *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282 (4th Cir. 1974). Likewise, if one job involves increased pressure or responsibility, a wage differential may be supported. *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791 (E.D. Va. 1980), *aff'd mem.*, 661 F.2d 922 (4th Cir. 1981).

Aside from the tasks and duties performed by the employee, a court must also ascertain whether the two jobs in question are performed under similar “working conditions.” 29 U.S.C. § 206(d)(1). The term “working conditions” as used in the Act does not refer to the time of day at which each job is performed. *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223 (1974). Instead, the term *working conditions* encompasses two subfactors: the “surroundings” and “hazards” encountered by the employee while working. *Id.*

6-9.03 Defendant's Burden

Once the plaintiff sufficiently establishes a prima facie case of salary discrimination, the burden then shifts to the employer to prove, by a preponderance of the evidence, that the pay differential is justified by the existence of a statutory exception. *Strag v. Bd. of Trs.*, 55 F.3d 943 (4th Cir. 1995). According to § 206(d)(1), there are four valid reasons an employer can engage in wage “discrimination:” (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any factor other than sex. At the outset, one should note that when asserting an exception under § 206(d)(1), “the burden on the employer . . . is a heavy one.” *EEOC v. Whitin Mach. Works, Inc.*, 635 F.2d 1095 (4th Cir. 1980); *see Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994) (unlike Title VII, once the prima facie case is made, the burden of “production and persuasion” shifts to the defendant). An employer must submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity. *EEOC v. Md. Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018).

Applying Virginia procedural law to the federal cause of action, the Virginia Supreme Court held that because the four statutory defenses under the Equal Pay Act are express exceptions contained within the statute that creates the cause of action, thus resulting in little risk of prejudice or surprise, the right to assert those affirmative defenses is not waived even if they are not pled in the answer to the claim. *New Dimensions, Inc. v. Tarquini*, 286 Va. 28, 743 S.E.2d 267 (2013).

6-9.03(a) Seniority Systems

Under the first statutory exception, an employer may escape liability by proving that a wage differential is the result of a seniority system, not some gender-based criteria. In the Fourth Circuit, defenses based on seniority systems have not been extensively litigated. *Pierce v. Duke Power Co.*, 811 F.2d 1505 (4th Cir. 1987) (unpubl.). By and large, however, to successfully assert the seniority exception the employer need only prove that a wage differential is the result of a *bona fide* seniority system. *See generally EEOC v. Whitin Mach. Works, Inc.*, 635 F.2d 1095 (4th Cir. 1980).

6-9.03(b) Merit System

Under the second exception, an employer may defend a wage differential by claiming that the differential is the result of a merit system. Under this exception, the employer is given an opportunity to prove that one employee has a higher wage than another because the former has achieved certain standards or goals.

When asserting this defense, a few rules are worthy of note. For example, a valid merit system need not be in writing to fall within the statutory exception; it must, however, be an organized and structured procedure with systematic evaluations and predetermined criteria. *Grove v. Frostburg Nat'l Bank*, 549 F. Supp. 922 (D. Md. 1982). If the merit system is not in writing, the employees must be aware of it, and it must not be based on sex. *EEOC v. Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980). Finally, merit systems may apply to existing employees, as well as those recruited from outside the company. *Id.*

6-9.03(c) Production Quality/Quantity

Under the third exception, an unequal compensation system qualifies for the affirmative defense of quantity/quality of production, if the employer determines bonuses, commissions, or salaries according to performance-based criteria or other objectively verifiable means. *Diamond v. T. Rowe Price Assocs. Inc.*, 852 F. Supp. 372 (D. Md. 1994).

6-9.03(d) Factors Besides Gender

An employer may utilize the last exception under § 206(d)(1), if it can show that a wage differential is based on any other factor besides gender. This "other than sex" exception is broad. *Reece v. Martin Marietta Techs., Inc.*, 914 F. Supp. 1236 (D. Md. 1995). Nonetheless, this last exception is by no means a catchall exclusion.

When asserting the defense, the employer must show that gender does not provide even a partial basis for a wage differential. For example, in *Futran v. Ring Radio*, 501 F. Supp. 734 (N.D. Ga. 1980), a female talk show host was paid considerably less than her male counterpart, even though the two hosts performed substantially similar work. When the female brought suit under the Equal Pay Act, the employer claimed that the male received a higher wage because he had better job potential and possessed superior job stability. However, evidence also showed that the female was paid a lower wage because there was a surplus of women in the radio market. In other words, because there was a surplus of women in the market, women in general had an inferior bargaining position with employers; thus, enabling radio stations to offer females less money than males while maintaining viable female recruiting methods. The court held that, even though the employer had some legitimate reasons, and even though it was the overall market that contributed to the plaintiff's reduced bargaining position, gender played at least a part in the plaintiff's lower wages. As such, the "other than sex" exception did not apply.

Put in its simplest terms, when asserting the "other than sex" exception, the fact that women may have a lower market value in a particular field will not support a wage differential. See also *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223 (1974); *Strag v. Bd. of Trs.*, 55 F.3d 943 (4th Cir. 1995); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999) (different job experience, prior salary levels, and circumstances surrounding hiring justify different pay levels for same job); *Moser v. Pizza Hut*, No. 97-0046-D, (W.D. Va. Apr. 9, 1998) (differential in pay is justified by a change in salary pay scale unrelated to gender).

The last two defenses under § 206(d)(1) may overlap. *Diamond v. T. Rowe Price Assocs. Inc.*, 852 F. Supp. 372 (D. Md. 1994).

6-9.03(e) Waiver

A waiver of rights under the Equal Pay Act must be knowingly and voluntarily made. Ordinary contract principles under state law should be used to assess the validity of a waiver

as opposed to a totality of the circumstances. *Todd v. Blue Ridge Legal Servs.*, 175 F. Supp. 2d 857 (W.D. Va. 2001); cf. ADEA waiver requirements, section [6-4.05\(b\)\(2\)](#).

6-9.04 Enforcement

There are two methods by which the Equal Pay Act is enforced. The first is by administrative means, through the EEOC. The second method is by judicial means, through the private plaintiff. Typically, an aggrieved employee begins with administrative means and then, if necessary, resorts to judicial means. Nonetheless, an aggrieved employee is not required to exhaust all administrative remedies before filing suit.

The statute of limitations for filing suit under the Equal Pay Act is two years. 29 U.S.C. § 255. If an employer “willfully” violates the Act, the limitations period is extended to three years. *Id.* The limitation period begins to run when the cause of action accrues. However, if a plaintiff was continually paid lower wages, she may claim a continuing violation of the Act and escape the limitations period. *Jenkins v. Home Ins. Co.*, 635 F.2d 310 (4th Cir. 1980). In the latter case, the limitations period would not begin to run until the last violation.

If a plaintiff proves that an employer has violated the Act, the plaintiff is entitled to compensatory damages. See, e.g., *Lovell v. BBNT Sols., LLC*, 299 F. Supp. 2d 612 (E.D. Va. 2004) (plaintiff’s damages limited to differential after hiring of comparator because that is point that injury occurred).

In addition, employers in violation of the Act will be liable for liquidated damages, equal to, and in addition to, compensatory damages, unless the employer demonstrates to the court that the act or omission giving rise to the violation was in good faith. 29 U.S.C. § 260. Under this rule, the delinquent employer has the “plain and substantial burden of persuading the court . . . that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.” *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994).

6-10 PRIVACY ISSUES: THE FOURTH AMENDMENT

6-10.01 Constitutional Limitations

Unlike private employers, public officials are accountable to the Fourth Amendment’s prohibition on illegal search and seizures. *O’Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987) (plurality opinion). Public employers, therefore, must be careful when (1) implementing drug testing programs for their employees and (2) searching employee offices, desks, and computers. See also Chapter 19, 42 U.S.C. § 1983, section [19-6.04\(d\)](#).

6-10.01(a) Drug Testing

Testing for drugs or alcohol in the workplace is a sensitive topic for many employers and employees. It typically involves taking a sample of urine or blood from an employee. “[T]he collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . [and] these intrusions must be deemed searches under the Fourth Amendment.” *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602, 109 S. Ct. 1402 (1989). It is well established that a urinalysis drug test required by a government employer for the purpose of detecting illegal drug use is a search subject to the Fourth Amendment and therefore must be reasonable. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989); *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602, 109 S. Ct. 1402 (1989).

However, the Supreme Court has recognized a “special needs” exception to the warrant and probable cause requirements of the Fourth Amendment. When “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,” it will be dispensed with. *Skinner v. Ry. Labor Exec. Ass’n*, 489

U.S. 602, 109 S. Ct. 1402 (1989) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164 (1987)). This “special needs” exception permits drug testing of employees in safety-sensitive positions, pursuant to a random or uniform selection process, and does not require probable cause or even reasonable suspicion that an employee might be impaired. *Von Raab, supra* (U.S. Customs Service regulations that required drug testing of Customs officials being promoted to sensitive drug enforcement position did not violate Fourth Amendment); *Skinner, supra* (Federal Railroad Administration regulations allowing post-accident and reasonable suspicion tests did not violate the Fourth Amendment when there was a need for public safety). In *Carroll v. City of Westminster*, 233 F.3d 208 (4th Cir. 2000), the Fourth Circuit extended the *Von Raab* reasoning to local police officers. Since the officer had consented at the time of employment to suspicionless drug testing, he did not have to be warned that a urinalysis would include drug testing. The court also found that individualized suspicion existed as well. *See also Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (suspicionless drug testing not constitutionally permissible when primary purpose was for law enforcement).

In the absence of a “special needs” random or uniform selection process, drug testing of a government employee does not require a warrant, but must be based on “individualized suspicion,” i.e., a reasonable suspicion that the employee was engaging in unlawful activity involving controlled substances. *Hassell v. City of Chesapeake*, 64 F. Supp. 2d 573 (E.D. Va. 1999) (smell of marijuana by co-worker coupled with sensitive position justifies warrantless testing), *aff’d*, No. 99-2304 (4th Cir. Sep. 18, 2000); *Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996), *affirming*, 917 F. Supp. 760 (D.N.M. 1994) (employer had reasonable suspicion to test employee who had referred himself to health center, warned supervisors that he might become violent if provoked, and lost his temper and engaged in altercation while in uniform); *compare Workman v. Va. Dep’t of Corr.*, 82 Va. Cir. 160 (City of Chesapeake 2011) (no individualized suspicion when second drug test followed inconclusive first test by three months and was conducted to satisfy human resources department audit); *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) (discharge of police officer for refusing to submit to suspicion-based drug test violated his Fourth Amendment right to be free from unreasonable search, since department had no evidence linking officer to drug use; test was based only on officer’s association with co-worker who was under surveillance for using narcotics); *Ford v. Dowd*, 931 F.2d 1286 (8th Cir. 1991) (search based upon unsubstantiated rumor that officer associated with drug dealers did not provide adequate basis under Fourth Amendment for reasonable suspicion that officer used illegal drugs, and officer was not selected for testing according to random or routine program that guarded against discriminatory or arbitrary selection); and *Pernell v. Montgomery Cnty. Bd.*, No. 15810 (Ohio Ct. App. Nov. 16, 1996) (odor of marijuana discovered in employee’s office and actual finding of marijuana in employee’s trash provide reasonable suspicion).

6-10.01(b) Offices and Work Stations

Government employees may have a legitimate expectation of privacy in their offices or in parts of their offices such as their desks or file cabinets, even against their supervisors. *See O’Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987) (plurality opinion); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000). In order to prove a legitimate expectation of privacy against supervisors, an employee must show that his subjective expectation of privacy is objectively reasonable. *See California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625 (1988). Accordingly, office practices, procedures, or regulations announcing that the employer considers certain areas to be open to employer inspection at will, or discouraging employees from keeping personal effects in their workspaces may reduce legitimate privacy expectations.

In *O’Connor*, the Court held that when a government employer conducts a warrantless search pursuant to an investigation of work-related misconduct, the Fourth Amendment will be satisfied if the search is reasonable in its inception and its scope.

6-10.01(c) Computers & Communications Devices

The U.S. Supreme Court considered a case where, after receiving large text messaging bills for pager services for employees, a city police department reviewed the text messages and subsequently disciplined an employee for texting messages of a personal and sexually explicit nature. The employee challenged the review of his messages as a violation of his Fourth Amendment privacy rights. Leery of making a broad holding concerning employees' privacy expectations vis-a-vis employer-provided technological equipment, the Supreme Court assumed that a warrantless Fourth Amendment search had occurred and that the employee had an expectation of privacy regarding the text messages. *City of Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619 (2010). When conducted for a non-investigatory, work-related purpose, or for the investigation of work-related misconduct, a government employer's warrantless search is reasonable if it is justified at its inception and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search. The *Quon* Court held that the city's search of the messages was reasonable under this standard.

In *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), the circuit court determined that warrantless remote searches of an employee's computer did not violate the Fourth Amendment because the employer had a policy that (1) permitted use of the Internet for official purposes only and (2) stated that employee Internet usage was subject to monitoring and periodic audit. In light of this policy, the employee could not show that he had a legitimate expectation of privacy in his Internet usage (he was prosecuted for downloading child pornography). The court went on to hold, for the same reasons, that the employee had no reasonable expectation in the privacy of the computer hard drive, where the fruits of his illicit internet activity were stored. Indeed, the court spent more time on the question of whether the warrantless entry into the employee's office, where it concluded he had a legitimate expectation of privacy under *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987), was appropriate. The court of appeals concluded that it was, because entry into the office was the only practical means the employer had to retrieve the hard drive that the employer knew contained material that violated the employer's policies. "We consider that FBI's intrusion into Simons' office to retrieve the hard drive is one in which a reasonable employer might engage." *Simons, supra* (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995)).

There is a question whether an employee would have a reasonable expectation of privacy, recognized by the courts, in files on the hard drive of a workplace computer that the employee is permitted to password protect. In *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001), the circuit court held, in a somewhat different context (search by law enforcement, using a consent justification) that a warrantless search of such files violates the Fourth Amendment. The consent of another user of the same computer, who was not privy to the password, was insufficient to qualify as the necessary consent. Employers must exercise care to avoid violating the federal Stored Communications Act, 18 U.S.C. § 2701 (SCA) when seeking access to employee e-mails transmitted or received via personal e-mail accounts accessed via a work computer. The SCA makes it a crime to intentionally access "without authorization" or "in excess of authorization" a medium through which an electronic communication service is provided. The SCA is intended to protect e-mail and other electronic information stored on the internet. The SCA may also protect an employee from employer access to employees' personal web postings on blogs or social networking sites. In particular, employers should avoid using coercive or illicit means of gaining access to such information. Again, the best strategy for an employer who does not wish employees to store illegal or inappropriate material on workplace computers (or on the Web, to the extent the material is job-related) is to implement a policy to this effect and to state in that policy that employee use of these resources in the workplace, even with password protection, is subject to periodic audit by the employer. The policy should also cover social media and social networking sites to make clear, for instance, that employees may not use such means to unlawfully share confidential information or to harass co-workers.

6-10.02 Informational Privacy

Assuming without deciding that there is a constitutional right to informational privacy, and combined with the protections against public dissemination provided by the Privacy Act of 1974, the Supreme Court in *NASA v. Nelson*, 562 U.S. 134, 131 S. Ct. 746 (2011), found that questions regarding drug use asked in an employment background check were justified by the government's interests as employer and proprietor in managing its internal operations. The Court found the distinction between direct and contract employees did not require a different analytical approach.

Note that state law prohibits an employer, including a local government employer, from requiring that an employee or applicant disclose a username or password to any social media account or add anyone to a contact list. Va. Code § 40.1-28.7:5.

6-11 FIRST AMENDMENT**6-11.01 Employee Speech**

For a discussion of First Amendment employment issues, including employee speech, political activities, and other expressive behavior, see Chapter 19, 42 U.S.C. § 1983, sections [19-3.02\(e\)\(3\)](#) and [19-6.04\(b\)](#).

6-11.02 Political Activities**6-11.02(a) Political Affiliation**

For a discussion of First Amendment issues concerning the political affiliations of public employees, see Chapter 19, 42 U.S.C. § 1983, section [19-6.04\(c\)](#).

6-11.02(b) Partisan Political Activity

The Hatch Act, 5 U.S.C. § 7324, bars certain federal government employees from engaging in partisan politics. It also prohibits such activity by employees who are principally employed in connection with a federally financed activity. The Supreme Court has upheld the Hatch Act under the First Amendment as it applies to federal employees, in *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556 (1947), and *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880 (1973). The Act also applies to certain employees of state and local governments whose positions are primarily paid for by federal funds. In *Northern Virginia Regional Park Authority v. United States Civil Service Commission*, 437 F.2d 1346 (4th Cir. 1971), the Fourth Circuit upheld the Hatch Act as it applies to such employees engaged in activities which are federally financed, citing *Mitchell*.

6-12 MILITARY LEAVE RIGHTS OF PUBLIC EMPLOYEES**6-12.01 Scope**

Many employees of the Commonwealth serve with distinction in the armed forces of the nation and the Commonwealth. When these employees are called to full-time federal or state military service, they are required to leave their jobs, often for lengthy periods. Some face serious financial difficulties as they experience reductions in pay due to their military service. In response to the challenges facing employees called into federal or state military service, the General Assembly has enacted legislation in support of federal legislation to protect the employment rights of its citizens.

6-12.02 Reemployment Rights

Federal law protects employees called into active federal service against the loss of their civilian employment due to their military obligations. The rights of service members called to active duty are set out in the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 et seq. USERRA provides for prompt reinstatement of service members returning from active military service. *But see Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547 (E.D. Va. 2010) (employee who expressly and fully retires from civilian employment when called into active military service is not entitled to civilian

reemployment under USERRA). In addition to special protections against discharge, the Act also contains provisions that allow for continued health insurance coverage, accrual of seniority, training or retraining, and a return to a position of the same or similar employment status.

Federal courts lack jurisdiction over a USERRA claim brought by a private individual against a state employer. *Huff v. Sheriff, Cnty. of Roanoke*, No. 7:13cv257 (W.D. Va. Nov. 13, 2013, *on reconsideration*, Jan. 31, 2014) (noting unanimity among the circuits that have addressed the issue).

Virginia has adopted the protections set out in USERRA and extended them to employees of the Commonwealth called to state active-duty service. Virginia Code § 44-93 states, in part, that any employee of the Commonwealth or any political subdivision therein who is called into active service with the armed or reserve forces of the United States or National Guard “shall be entitled to leaves of absence from their respective duties, without loss of seniority, accrued leave, or efficiency rating, on all days during which they are engaged in federally funded military duty, to include training duty, or when called forth by the Governor pursuant to the provisions of Va. Code § 44-75.1 or § 44-78.1.”³⁵

An employee who is called to federal or state active-duty service must take the following steps to gain the protections provided by state and federal law. An employee may return to his previous position if the employee: (1) has provided prior notice, oral or written, of the military service to the employer; (2) has not exceeded five years of military leave during his current employment; (3) is honorably discharged from his period of military service; and (4) returns to work promptly within the prescribed statutory time periods.

Under the provisions of USERRA, and as adopted into Virginia law in Va. Code § 44-93, a service member must return to work within the following time periods:

- a. Period of military service up to thirty days—must report on next scheduled work day following return travel home plus eight-hour rest period;
- b. Period of military service is thirty-one days to 180 days—must report or reapply within fourteen days;
- c. Period of military service is 181 days or more—must report or reapply within ninety days.

Extensions may be available if the employee can show that a return within the above time periods was impossible or unreasonable, through no fault of the employee. Such an extension may be necessary where the service member has sustained service-related injuries. *See Huff v. Winston*, 292 Va. 426, 790 S.E.2d 226 (2016) (statute’s provisions regarding extensions apply until the time of reemployment; no right to two-year convalescence period after reemployment; duty to accommodate reemployment position because of service-related disability arises at time of reemployment); *see also Butts v. Prince William Cnty. Sch. Bd.*, 844 F.3d 424 (4th Cir. 2016) (requirement to provide an alternate position due to disability only applies if employer knows of disability at the time of reemployment).

6-12.03 Compensation and Benefits

Employees called into federal military service are entitled to fifteen days of paid leave per federal fiscal year but not more than fifteen days per deployment. Va. Code § 44-93. An employer may pay an employee called to military duty the difference between the

³⁵ In *Clark v. Virginia State Police*, 292 Va. 795, 793 S.E.2d 1 (2016), the Court held that the Commonwealth was protected by state sovereign immunity from private action suits to enforce USERRA. *See also* Va. Code § 40.1-28.7:6 (providing employment protection for volunteers of the Civil Air Patrol).

employee's regular pay and the military pay received during the employee's period of military service. The supplement will ensure that the total pay received by the employee is equal to the pay received before being activated for military duty.

The employee's military pay will consist of the basic military pay plus any allowances received. If an employee's gross military pay exceeds the employee's regular pay, a supplement will not be due to the employee.

Employees may elect under the Consolidated Omnibus Budget Reconciliation Act (COBRA) to continue their health plan coverage for up to twenty-four months or the duration of the military leave, whichever is shorter. Coordination should be made with the employee's human resource branch to make the appropriate elections prior to going on military leave.

6-12.04 Statute of Limitations

For federal causes of action under USERRA arising before 2008, the statute of limitations is the federal "catch-all" of four years. The Veterans' Benefit and Improvement Act of 2008 (VBIA), which eliminated the statute of limitations for USERRA claims ("there shall be no limit on the period for filing the complaint"), does not apply retroactively. *Baldwin v. City of Greensboro*, 714 F.3d 828 (4th Cir. 2013).