RECENT FEDERAL CASES
OF INTEREST TO GOVERNMENTAL ENTITIES

TEXAS CITY ATTORNEYS ASSOCIATION
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I. FIRST AMENDMENT

American Humanist Assoc. v. Birdville I.S.D.* –F.3d – No. 15-11067 c/w 16-11220 (5th Cir., March 20, 2017*)

AHA and Isaiah Smith filed suit against the school district, alleging that the school district's policy of inviting students to deliver statements, which can include invocations, before school-board meetings violated the First Amendment's Establishment Clause. The district court granted summary judgment for the school district. The court agreed with the district court that the practice falls more nearly within the recently reaffirmed legislative-prayer exception to the Supreme Court's Establishment Clause jurisprudence and that the school board was more like a legislature than a school classroom or event where the board is a deliberative body, charged with overseeing the district's public schools and other tasks. In *Town of Greece v. Galloway*, the Supreme Court stated unequivocally that the legislative-prayer exception in *Marsh v. Chambers* extends to prayers delivered at town-board meetings. In this case, the court concluded that the school board was no less a deliberative legislative body than was the town board in *Galloway*.

***Moss v. Harris County Constable Precinct One; Alan Rosen; and Harris County,* –F.3d – No. 16-20113 (5th Cir., March 15, 2017)**

Plaintiff filed suit against his former employer, Harris County, after Constable Alan Rosen terminated plaintiff's employment while he was on leave recovering from back surgery. Plaintiff alleged discrimination and retaliation claims under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., and the Texas Labor Code (TLC), as well as a First Amendment retaliation claim under 42 U.S.C. 1983.

Prior to his termination in April 2013, Moss had worked as a deputy constable for Harris County Precinct One for sixteen years. In 2012, Constable Alan Rosen was seeking elected office as Constable for Harris County Precinct One. In August 2012, at least one of Rosen's political opponents informed Moss of a potential chemical leak at a company in which Rosen had an ownership interest. Moss investigated the matter, took pictures, and upon the request of his supervisor discussed the matter with the Houston Chronicle newspaper. He also told at least one co-worker that he was not supporting Rosen for constable, and told several co-workers about the potential chemical leak, a possible "cover up," and that Rosen had not completed all of his law enforcement classes.

At some point after the investigation into the potential chemical leak began, Rosen was made aware of the complaint against his company. Rosen allegedly discussed the matter with Deputy Joe Danna, who was one of Rosen's political opponents, asking why Moss was so upset over "a little chemical spill" that had already been cleaned up, and claiming that Moss was "out of control" and Deputy Danna needed to do something about it. Moss also alleged that a Rosen supporter called him and told him not to get involved in Rosen's election bid for constable.

While all of this was happening, Moss told a Precinct One human resources representative that he needed back surgery to treat a persistent back condition stemming from an earlier job. He took leave under the FMLA in November of 2012, but remained on leave after his FMLA expired. In January 2013, Moss's doctor instructed him and his employer that Moss could not return to work for another six months. During his leave, Moss discussed with Lieutenant Lui the possibility of moving to a light duty position, but there is no evidence that Moss was ever offered a light duty job.

Rosen was eventually elected constable and took office on January 1, 2013. On March 25, 2013, Moss sent a letter to Constable Rosen requesting to retire effective May 31, 2013. In response, on April 16, 2013, Rosen terminated Moss by letter, claiming that Moss had "exhausted all of [his] FMLA comp time, sick time, vacation time and all other acquired time."

Moss's termination was reported to the Texas Commission on Law Enforcement as a "general discharge" rather than an "honorable discharge," which Moss disputed but did not appeal. Moss was also denied retirement benefits following his termination.

The district court granted summary judgment to the County. The Court affirmed the judgment concluding that, because plaintiff failed to provide evidence showing any available reasonable accommodations that would have enabled him to perform the essential functions of his job, he cannot establish that he was qualified under the ADA at the time of his termination; because Plaintiff failed to raise a material issue of fact on the question of whether he was qualified for his job under the ADA, he also failed to make out a prima facie retaliation claim under the ADA; the district court properly dismissed Plaintiff's Title II claims where Plaintiff presented no evidence that Harris County discriminated against him outside of the employer–employee context, or that Harris County was not a covered entity under the ADA; and, to the extent Plaintiff was not speaking as an employee, he failed to provide evidence showing that he was terminated because of his protected speech under the First Amendment.

***Grisham v. City of Fort Worth,* –F.3d – No. 15-10960 (5th Cir., September 19, 2016)**

Plaintiff, an evangelical Christian, filed suit against the City, alleging that he was denied his First Amendment right to hand out religious literature at a public festival. The parties entered into a consent decree where the City agreed to pay Plaintiff a dollar in nominal damages and where, among other provisions, the City was prohibited from interfering with Plaintiff's free speech rights or other individuals at future public events in downtown Ft. Worth. Left unresolved was the question of attorney's fees. So Grisham filed an opposed motion for fees, which the district court denied. It did so based on its belief that other than the award of nominal damages, nothing in the consent order changed the legal relationship between the parties (the court alternatively denied fees on the ground that the request was unreasonable). Because a Plaintiff is a prevailing party when nominal damages are awarded, and this case does not present the special circumstances in which a prevailing civil rights Plaintiff may be denied fees altogether, the Court vacated the order denying fees and remanded for an assessment of the reasonableness of the fee request.

***Howell v. Town of Ball,* –F.3d – No. 15-30552 (5th Cir., July 1, 2016)**

Plaintiff, a former police officer for the town, filed suit against the town and several individual Defendants, alleging that Defendants violated his First Amendment rights when they terminated him for cooperating with an FBI investigation of public corruption. Plaintiff also asserted a claim under the False Claims Act, 31 U.S.C. 3730(h), alleging that he was fired in violation of the Act's whistleblower protections. On appeal, Plaintiff challenged the district court's grant of summary judgment dismissing his First Amendment retaliation claims against all Defendants and dismissing his FCA claims against the individual Defendants. The town cross-appealed the denial of summary judgment with respect to the FCA claim against it.

The Court found that the district court erred in holding that Plaintiff's involvement in the FBI investigation was not entitled to First Amendment protection. Although the Court held that Plaintiff asserted a violation of his right of free speech, the Court held that the right at issue was not "clearly established" at the time of his discharge. Therefore, the Court affirmed the dismissal of the individual Defendants on the basis of qualified immunity. However, the Court reversed and vacated the grant of summary judgment for the town because Plaintiff has demonstrated a viable claim of municipal liability under *Monell v. Department of Social Services*. The Court also dismissed the town's cross-appeal for lack of appellate jurisdiction. Finally, the Court affirmed the district court's dismissal of the FCA claims against the individual Defendants

II. FOURTH AMENDMENT

***United States v. Escamilla, Jr.* –F.3d – No. 16-40333 (5th Cir., March 29, 2017)**

Defendant was convicted of conspiring to possess and possessing with the intent to distribute marijuana and heroin. On appeal, defendant argued that the district court erroneously failed to suppress incriminating evidence that government agents obtained from an allegedly unconstitutional stop and ultimate arrest. The court held that much of the agents' conduct was reasonable and thus constitutional. However, the court held that the district court erred by admitting evidence obtained from an unconstitutional, post-arrest search of a cell phone in defendant's possession. The court found that defendant voluntarily consented to a search of the phone in his possession during the lawful vehicle stop. The court explained that the DEA agent's post-arrest manual search of the phone at the Border Patrol station was a distinct search requiring independent justification. Because the error was harmless, the court affirmed the judgment.

The facts of this case reveal that on December 4, 2014, border patrol agents patrolled the privately owned OKM Ranch, an area commonly cut through by smugglers. The "legitimate traffic" through the ranch is primarily oil industry workers. Around 6:30 a.m., the agents investigated two vehicles thought to be used for smuggling. When the agents activated their lights to stop one of the vehicles, the other sped away, leading them to believe it was carrying contraband. The agents called in the fleeing vehicle requesting assistance from other nearby agents to track it down.

The agents approached the vehicle they had pulled over, which was driven by Escamilla, and noticed various conditions that led them to believe that the truck did not belong to an oil worker. When the agents questioned Escamilla he appeared nervous. Upon checking Escamilla's license, it was discovered that he had "a narcotics case" on his record. Escamilla then agreed to let the agents search his vehicle. During the search, the agents discovered multiple items that corroborated their suspicion that the vehicle was being used for illegal activities. After searching the truck, the agents requested to search Escamilla's phone and Escamilla silently handed it over. It was returned to Escamilla after a brief search of the contacts. The agents then requested that Escamilla allow a dog to sniff his vehicle and Manuel consented. The dog alerted, but it was not a solid alert.

At this point, the agents overheard radio traffic regarding the fleeing vehicle in which marijuana and black tar heroin was found by another agent. This was 24 minutes after Escamilla's initial stop. Based on Escamilla's connection with the fleeing vehicle, he was arrested. Escamilla's phone as well as a broken phone recovered from the fleeing vehicle was both searched for contact numbers. When Escamilla claimed his property he did not claim the phone stating the it was not his and he only used it to call his girlfriend. The phones were subsequently searched for contacts, pictures, and videos. On neither occasion was a search warrant obtained. The agents claimed they relied upon Escamilla's consent given during the agents' initial stop.

The information obtained from the phones resulted in Escamilla being charged for drug possession and conspiracy. The district court held during the stop, Escamilla voluntarily consented to a search of the phone in his possession, which encompassed the agent's manual search at the station, and that Escamilla had abandoned any expectation of privacy in the phone when he disclaimed ownership of it, which justified the subsequent search. A jury found Escamilla guilty on all counts and Escamilla appealed.

The Court found that Escamilla's initial consent to search the phone ended when the agents returned it to him. Escamilla's consent did not extend to the second and third search of the phone. Therefore, warrants or some exception to the warrant requirement were required for these searches. The evidence linked to these searches should have been suppressed.

However, the Court agreed with the district court when it held that Escamilla abandoned any privacy interest he had in the phone when he did not claim it as his property and therefore could not challenge this search. The district court's judgment was affirmed because the evidence obtained in the unconstitutional search was duplicative of other admissible evidence.

***Mabry v. Lee County,* –F.3d – No. 16-60231 (5th Cir., February 21, 2017)**

Plaintiff, T.M.'s mother, filed suit against the County and others after T.M., a middle school student, was arrested for a fight on school property, taken to a juvenile detention center, and subjected to a strip and cavity search. Plaintiff alleged, inter alia, that the strip and cavity search violated T.M.'s Fourth Amendment rights. The district court granted partial summary judgment for the County on the Fourth Amendment claim. Plaintiff appealed on a single issue: whether the district court erred in determining that Mabry failed to create a genuine issue of material fact that the Center's search of T.M. violated T.M.'s Fourth Amendment rights.

The Court affirmed the judgment relying on three cases: *Bell v. Wolfish*, *Safford v. Redding*, and *Florence v. Board of Chosen Freeholders*. *Bell v. Wolfish* provided a balancing test for application in the determination of whether a search is reasonable:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Safford v. Redding addressed the constitutionality of strip searches of minor students by school officials on school property. The *Safford* court held that when assessing the constitutionality of "searches by school officials[,] a 'careful balancing of governmental and private interests suggests that the public interest is best served'" by applying "a standard of reasonable suspicion." In addition to having reasonable suspicion to conduct a search, school officials must also narrow the scope of the search such that "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Important to this matter, the *Safford* court emphasized that the Fourth Amendment's interest-balancing calculus outlined in *Bell* is necessarily different when applied to minors, in part because "adolescent vulnerability intensifies the patent intrusiveness" of a strip search.

In *Florence v. Board of Chosen Freeholders*, the court reiterated the *Bell* balancing test but emphasized that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." Rather than directly applying *Bell's* holistic balancing test, the court applied a more deferential Fourth Amendment calculus. The court stressed the deference owed to correctional officials in designing search policies to ensure safety and set a high hurdle for inmates challenging the constitutionality of searches. The court concluded that, in the correctional context, the burden is on the plaintiff to prove with substantial evidence that the challenged search does not advance a legitimate penological interest.

The Court applied the deferential test in *Florence v. Board of Chosen Freeholders* because the deference given to correctional officials in the adult context applies to correctional officials in the juvenile context as well. Applying *Florence*, the Court concluded that Plaintiff failed to make a substantial showing that the Center's search policy is an exaggerated or otherwise irrational response to the problem of Center security. Accordingly, the court affirmed the judgment.

Turner v. Driver, **–F.3d – No. 16-10312 (5th Cir., February 16, 2017)**

Plaintiff's suit stemmed from his arrest after he was video recording a police station from a public sidewalk and refused to identify himself to officers. The officers ultimately handcuffed him and placed him in the back of a patrol car. The officers' supervisor, Defendant-Appellee Lieutenant Driver, arrived on scene and, after Driver checked with the arresting officers and talked with Turner, the officers released Turner. Plaintiff filed suit against all three officers and the City of Fort Worth under 42 U.S.C. § 1983, alleging violations of his First and Fourth Amendment rights. Each officer filed a motion to dismiss, insisting that he was entitled to qualified immunity on Turner's claims. The district court granted the officers' motions, concluding that they were entitled to qualified immunity on all of Turner's claims against them.

The Court concluded that all three officers are entitled to qualified immunity on the First Amendment claim because there was no clearly established First Amendment right to record the police at the time of plaintiff's activities. The Court explained for the future that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions. The Court refused to conclude that, when viewed in light of the totality of the circumstances, the arresting officers' initial questioning or detention of Plaintiff before he was handcuffed was objectively unreasonable in light of clearly established law. Therefore, Grinalds and Dyess were entitled to qualified immunity on Plaintiff's claim that they violated his Fourth Amendment right to be free from detention absent reasonable suspicion. However, the court concluded that no objectively reasonable person in these officers' position could have believed that there was probable cause to arrest Plaintiff and thus they were not entitled to qualified immunity on Plaintiff's Fourth Amendment claim that the officers violated his right to be free from warrantless arrest absent probable cause. Finally, Lieutenant Driver is entitled to qualified immunity on Plaintiff's Fourth Amendment claims where Driver acted objectively reasonably in light of the circumstances.

Cooper v. Brown, **–F.3d – No. 16-60042 (5th Cir., December 27, 2016)**

Plaintiff filed suit against defendant under 42 U.S.C. 1983, alleging that defendant's use of force was objectively unreasonable under the Fourth Amendment.

Jacob Cooper was pulled over in April of 2013 on suspicion of driving under the influence. A portable breath test was administered and when the arresting officer returned to his patrol vehicle, Cooper fled on foot and hid in between two houses. Because there was a passenger in his squad car, and DUI is a misdemeanor offense, the officer decided not to pursue Cooper. Instead, he radioed for backup, providing Cooper's description and explaining that he was a DUI suspect and on foot. Brown was one of the officers to respond, arriving with his police dog Sunny, a Belgian Malinois (despite a K9 unit not being requested and not usually utilized for a misdemeanor).

Upon entering the residential neighborhood with Brown, Sunny discovered Cooper in his hiding place and bit him on the calf. The parties dispute whether Sunny initiated the attack or whether, instead, Brown ordered it. Nonetheless, the facts following the initial bite are undisputed: Sunny continued biting Cooper for one to two minutes. During that time, Cooper did not attempt to flee or to strike Sunny. Brown instructed Cooper to show his hands and to submit to him. At the time of that order, Cooper's hands were on Sunny's head. Brown testified that he could see Cooper's hands and could appreciate that he had no weapon. Brown then ordered Cooper to roll onto his stomach. He complied, and Brown handcuffed him. But he did not order Sunny to release the bite until after he had finished handcuffing Cooper. As a result of the bite, Cooper suffered years of severe pain from lower-leg injuries that required multiple

surgeries, including reconstruction and skin grafts.

The district court granted plaintiff's motion for summary judgment and denied defendant qualified immunity. It determined that Brown's use of the police dog was objectively unreasonable, given that Cooper was not actively resisting arrest and was suspected of only a misdemeanor DUI. It further decided that Cooper's right was clearly established.

The Court affirmed the judgment concluding that, under the facts in this record, permitting a police dog to continue biting a compliant and non-threatening arrestee is objectively unreasonable. Because it was clearly established that Brown's conduct constituted excessive force in violation of the Fourth Amendment, the Court affirmed the order denying qualified immunity.

***Orr v. Copeland*, –F.3d – No. 16-50023 (5th Cir., December 22, 2016)**

Ahmede Bradley and Officer Eric Copeland were involved in a fight that ended with Copeland firing three shots at Bradley, killing him. Plaintiffs, Bradley's heirs, filed suit under 42 U.S.C. 1983, alleging that Copeland violated Bradley's Fourth Amendment rights, used excessive force, and used unlawful lethal force.

Officer Copeland pulled over a vehicle driven by Bradley. When he approached Bradley, Officer Copeland noticed several things that suggested to him that Bradley might be a narcotics trafficker. When Officer Copeland asked Bradley to exit the vehicle, he refused, rolled up his window, and drove off at high speed. Copeland gave chase believing that Bradley was involved in serious drug crimes. The pursuit lasted less than a minute after which Bradley fled on foot. The foot chase and physical altercation that followed lasted two minutes and thirty-three seconds, ending when Copeland fired three shots into Bradley's chest, killing him. Although Copeland's dashcam and microphone continued to record as the events unfolded, the majority of the fight took place off-camera. Officer Copeland provided his account of the incident, which was supported by two witnesses who called 911. Plaintiffs dispute Copeland's version of facts despite none of them witnessing the events.

Copeland moved for summary judgment on qualified immunity grounds. The district court denied the motion, finding that in the absence of video evidence, the third-party, eyewitness accounts could not be credited until subject to cross examination. Officer Copeland timely appealed the district court's denial of qualified immunity. The Court held that the district court erred in holding that—in the absence of video evidence—eyewitness testimony should not be considered for summary judgment purposes until subject to cross examination. In this case, giving full weight to the undisputed eyewitness testimony, the Court concluded that plaintiffs' Fourth Amendment argument is waived; Copeland's conduct prior to the shooting was neither excessive nor unreasonable; and because Plaintiffs have failed to demonstrate a constitutional violation, the Court held that they have failed to satisfy their burden of showing that Copeland is not entitled to qualified immunity. Accordingly, the court reversed and held that Copeland is entitled to qualified immunity.

***United States v. Ramirez*, –F.3d – No. 15-40887 (5th Cir., October 14, 2016)**

Defendant conditionally plead guilty to one count of transporting an illegal alien. On appeal, defendant challenged the denial of his motion to suppress evidence obtained during a traffic stop, contending that the Border Patrol agent who stopped his truck did so without reasonable suspicion.

About 9:30 p.m. on a Wednesday, Border Patrol Agent Ricardo Espinel was sitting in his patrol car in the median of U.S. Highway 77 approximately forty-five miles north of the Mexican border, several miles south of the Sarita immigration checkpoint, facing the northbound lanes, which were illuminated by his headlights. Espinel had been an agent for six years and had been patrolling this stretch of

Highway 77 near Raymondville, Texas, for more than nine months. The highway is a known alien smuggling route on which Espinel had made over 150 alien arrests. He knew that Tuesday, Wednesday, and Thursday nights saw the most smuggling activity, with human smugglers dropping off aliens south of the Sarita checkpoint, typically using SUVs or pickups because they can hold a large number of persons. Espinel saw Ramirez drive by in a Ford F-150 pickup; he noticed that Ramirez "kind of like ducked down, kind of hiding behind his hand" as he passed; and he saw three or four passengers in the back of the truck, who also "kind of like ducked down or kind of like laid down" when they saw him. Espinel pursued Ramirez. As he approached from behind, he saw heads in the back popping up and down and observed Ramirez swerve to the right and then kind of correct. Espinel turned on his emergency lights and pulled Ramirez over. As he was stopping, Espinel saw two passengers get out of the truck and run away; he secured Ramirez and the four remaining passengers—at least two of whom turned out to be illegal aliens.

The Court affirmed the district court's denial of the motion to suppress evidence concluding that the border patrol agent had reasonable suspicion to stop defendant's truck where the experienced agent spotted defendant's truck well south of the Sarita checkpoint, the agent observed defendant and his passengers behaving unusually, and the agent saw defendant driving a type of vehicle that is known to be popular among smugglers and on a highway and at a time that is similarly known to be popular among them. Accordingly, the court affirmed the judgment.

***United States v. Turner,* –F.3d – No. 15-50788 (5th Cir., October 13, 2016)**

Defendant conditionally plead guilty to aiding and abetting the possession of unauthorized access devices. On appeal, defendant challenged the district court's denial of his motion to suppress evidence of gift cards. The central issue in this case is whether a law enforcement officer's scanning of the magnetic stripe on the back of a gift card is a search within the meaning of the Fourth Amendment.

Defendant Turner was a passenger in a vehicle that was stopped. After running his identification card, it was discovered that Turner had a warrant for his arrest. When the officer asked Turner to exit the vehicle, he noticed an opaque bag partially protruding from the front passenger seat that appeared to have been concealed. Turner was placed in the back of the patrol car. Meanwhile, the officer asked the driver of the vehicle what was inside the bag. The driver handed the bag to the officer and indicated that he and Turner had purchased gift cards. There bag contained approximately 100 gift cards that, according to the driver, he and Turner had purchased from an individual trying to make money. The officer seized the gift cards as evidence of suspected criminal activity. He later, without obtaining a search warrant, swiped the gift cards with his in-car computer. Unable to make use of the information shown, the officer turned the gift cards over to the Secret Service. A subsequent scan of the gift cards revealed that at least forty-three were altered, meaning the numbers encoded in the card did not match the numbers printed on the card.

The Court agreed with the district court that Defendant may challenge the seizure of the gift cards; the facts support probable cause to believe the gift cards were contraband or evidence of a crime and, therefore, seizure was proper; and the Court joined its sister circuits in holding that a law enforcement officer's scanning of the magnetic stripe on the back of a gift card is not a search within the meaning of the Fourth Amendment. The Court concluded that society does not recognize as reasonable an expectation of privacy in the information encoded in a gift card's magnetic stripe.

***United States v. Toussaint,* –F.3d – No. 15-30748 (5th Cir., September 22, 2016)**

The United States appealed the district court's order suppressing evidence seized in a traffic stop.

Over a wiretap, an FBI agent heard the suspected leader of a drug trafficking organization give permission to kill an individual known as "Tye" or "Todd." The individual's location and vehicle make were also overheard. The agent advised local authorities of the situation which resulted in the traffic stop of Defendant who was traveling 35 miles per hour in a 20 mile per hour zone. Defendant exited the vehicle and quickly fled on foot. He was caught, arrested, provided Miranda, and searched incident to arrest. A 9 mm pistol and a bag with rocks of crack cocaine were found. Defendant was taken to the sheriff's investigations bureau and interviewed at which time he was informed of the potential threat on his life. The time that lapsed between the threat and the arrest was approximately 45 minutes.

Defendant was subsequently charged with relation to the items found on him in the search incident to arrest. Defendant moved to suppress the fruits of the traffic stop as well as the statements he made to police when he was brought in to the sheriff's investigations bureau. The government contested the motion on two grounds: (1) that the stop was legal under the exigent-circumstances exception because of the threat on Toussaint's life, and (2) that the speeding violation provided the officers with enough reasonable suspicion to make the stop.

The district court granted the motion to suppress on both grounds. It determined that while exigent circumstances existed when the initial threat overheard on wiretap was first intercepted, none existed when the officers encountered Defendant forty-five minutes later. Additionally, the district court found that the detective and his fellow officers' response to the threat was unreasonable, criticizing their lack of urgency and questioning whether they actually believed Defendant was in need of emergency help. The Court overruled the district court concluding that there was an objectively reasonable basis for believing that the emergency had not ended. The Court noted that the main thrust of the district court's theory was not that there was no objectively reasonable basis for concluding an emergency existed, but rather that the officers' subjective actions indicate they did not think one existed. The Court found this to be error. Because under the objective facts the emergency had not dissolved after 45 minutes, the Court concluded that the officers' actions, taken as a whole, were a reasonable response to the emergency. Accordingly, the court reversed and remanded.

III. FAIR HOUSING ACT

***Bank of America Corp. v. City of Miami,* 15-1111, -- S.Ct. -- (May 1, 2017)**

This is a Fair Housing Act case in which the U.S. Supreme Court held the City of Miami is an "aggrieved person" under the FHA in order to bring suit against two Banks to enforce anti-discrimination regulations.

The FHA prohibits, among other things, racial discrimination in connection with real-estate transactions and grants any "aggrieved person" the ability to file a civil suit under the Act for damages. The City of Miami claims that two banks, Bank of America and Wells Fargo, intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers thereby frustrating the City's anti-discriminatory initiatives and caused a disproportionate number of foreclosures which affected property values and taxes. The Banks filed dispositive motions, which were granted by the trial courts, in part under a theory the City has no standing to bring suit as an aggrieved person. Additionally, they alleged no proximate cause to any stated injury. The intermediate courts reversed and the Banks appealed.

To have constitutional standing a plaintiff must have an "injury in fact" which is "fairly traceable" to the defendant. Given the broad range of purpose behind the FHA, Congress intended the scope of "aggrieved person" to also be extremely broad. While the Court expressly noted it was not adopting the interpretation given by the Banks, it held that even if such an interpretation of "aggrieved person" were correct, the City qualified. The Court focused on the foreclosures and vacancies alleged which hindered the City's efforts to create an integrated and stable neighborhood,

maintain property values, and prevent the diminution of property-tax revenues. As a result, the City properly alleged an injury in fact. The Court then noted the intermediate courts erred by holding proximate cause is satisfied by foreseeability only. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, "'be expected to cause ripples of harm to flow'" far beyond the defendant's misconduct. Nothing in the FHA shows intent to provide a remedy only for any foreseeable result of an FHA violation. Instead the FHA functions more like a tort and the proximate cause analysis should also function as such. However, the Court declined to rule on whether proximate cause exists under the facts of the case, instead remanding with instructions to the intermediate courts to analyze.

The concurrence and dissent held that Miami's injuries fall outside the FHA's zone of interests. Additionally, that the injuries alleged would still be too remote to satisfy the FHA's proximate cause requirement, even if they did fall within the zone.

IV. SECTION 1983

Hamilton v. Kindred, –F.3d – No. 16-40611 (5th Cir., January 12, 2017)

This is an interlocutory appeal in a suit involving alleged unlawful body cavity searches of two women. The trial court denied Deputy Kindred's claim of qualified immunity. The question presented to the Fifth Circuit Court was whether an officer present at a scene can be liable as a bystander for not intervening in cases that do not involve excessive force (in this case, to prevent the body cavity searches).

On Memorial Day weekend in 2012, Hamilton and Randle, were pulled over by DPS Officer Turner for speeding. Turner smelled marijuana and asked the women to exit the vehicle. Both were wearing bikini bathing suits with shorts. Turner did not allow the women to cover themselves before exiting the vehicle. Turner believed he saw one of the women stick something into the front of her shorts. He used his radio to request help from local law enforcement and a female officer to conduct a search of the women. While he waited, he conducted a search of the vehicle. A female Sheriff's deputy, Bui, and another male deputy, Kindred, arrived on scene. Bui searched the women (including body cavity searches of the vagina and anus) while the male officers stood behind the patrol car. Other than being present, Kindred did not engage with the women. No drugs were found. Both women sued all three officers under §1983 with relation to the invasive cavity searches in violation of their Fourth Amendment rights to be free from unreasonable searches and seizures. Kindred moved for summary judgment, arguing that he was entitled to qualified immunity because, at the time of the incident, bystander liability was not clearly established in the Fifth Circuit in cases not involving excessive force. Kindred argued only a search occurred, which, even if improper, does not attribute bystander liability to him. The trial court denied the motion finding that the plaintiffs had asserted an excessive force claim. Kindred filed this interlocutory appeal.

The excessive force claim is the center of the opinion as it ties the bystander liability aspects to Kindred for his presence. For an excessive force claim, a plaintiff must then "show that she suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." The 5th Circuit agreed both women properly plead sufficient facts that, if taken as true, could qualify as excessive force. Excessive force is unconstitutional during such a seizure (an investigatory stop) and a strip or body cavity search can fall within the Fourth Amendment. The court also held the Plaintiffs did not waive their bystander claims in any of the pleadings despite never using the words "excessive force." The Court then restated the elements of bystander liability: "[A]n officer may be liable under § 1983 under a theory of bystander liability where the officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." The Court commented that at the

time of the incident, it was clear law that an officer could be held liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm. While the district court found that "there [was] a serious dispute as to the material facts" regarding each element of bystander liability, the Court held it did not have jurisdiction to review a determination factual disputes exist as this was simply an interlocutory appeal. Therefore, the appeal was dismissed.

Alexander v. City of Round Rock, , – F.3d – No. 16-50839 (5th Cir., April 18, 2017)

This is a §1983 unlawful arrest/excessive force case in which the Fifth Circuit affirmed-in-part and reversed-in-part an order granting the arresting officers' motion to dismiss, holding that the officers were potentially liable for forcibly removing a driver from a car after he stopped to feed a stray cat.

Officer Marciano Garza pulled over Lionel Alexander in a hotel parking lot after observing what he perceived as suspicious activity. According to Alexander, he was staying in the hotel and upon returning from the grocery store he saw and attempted to feed a stray cat in the nearby bushes, which he ultimately never found. He returned to his car and proceeded to drive toward his room. Officer Garza initiated a stop and inquired what Alexander was doing in the bushes. Alexander provided his driver's license but informed the officer he would not answer any questions. Garza called for backup and continued to question him regarding his activities. After backup arrived, Garza asked Alexander to exit his vehicle. When Alexander asked why he was being instructed to exit, the officers forcibly removed him from the vehicle, pinned him face down on the ground, and "mashed" his face into the concrete. Alexander was handcuffed and sat on the curb and asked again if he wanted to talk. Alexander refused using an unidentified expletive. The officers then shackled Alexander's legs. Alexander claimed that throughout the ordeal he sustained injuries to his body including his mouth and that he never physically resisted the officers in any way.

Alexander was then informed he was being arrested for uttering an expletive in public, which Garza asserted amounted to disorderly conduct. The officers then searched Alexander's person and vehicle, finding nothing illegal or suspicious. In Garza's formal police report, he did not list Alexander as being arrested for disorderly conduct, but for resisting a search in violation of Texas Penal Code §38.03(a). Alexander was never charged with a crime and thereafter sued the officers and the City asserting claims under 42 U.S.C. § 1983 and various provisions of the Texas Constitution. The officers moved to dismiss all claims, asserting that they were entitled to qualified immunity which the trial court granted. Alexander appealed arguing that the officers are liable for: (1) unlawfully detaining him; (2) arresting him without probably cause; (3) retaliating against him for exercising his First and Fifth Amendment rights; and (4) using excessive force against him.

Under the unlawful detention claims, if a law enforcement officer can point to specific and articulable facts leading him to reasonably suspect that a particular person is committing, or is about to commit, a crime, the officer may briefly detain the individual for investigation. This standard still requires at least a minimal level of objective justification for making the stop. Taking all of Alexander's well-pleaded allegations as true and drawing all inferences in his favor under a Rule 12(b)(6) standard, the 5th Circuit held Alexander properly articulated a potential claim for unlawful detention. Under an unlawful arrest claim, Penal Code §38.03(a) provides that a person commits an offense if he intentionally prevents or obstructs a law enforcement officer from effecting an arrest, search, or transport, by means of force against the officer or another. However, the allegations assert Alexander was entirely passive and did not physically resist. Refusing to answer questions does not qualify. Further, using a vehicle as a barrier to a search "both strains credulity and runs counter to Texas precedent" as qualifying as resistance. Under the facts

alleged, there was no probable cause to arrest Alexander for resisting a search under Texas law and no objectively reasonable officer would conclude that such probable cause exists. Further, the injuries sustained were not *de minimus* and exceeded the reasonable force necessary under the circumstances. However, since Alexander was never tried, his 5th Amendment right against self-incrimination was not violated. Additionally, by the time Alexander used his 1st Amendment right to utter a curse word, he had already been removed from the car and was being placed under arrest. Therefore, the officers could not retaliate against him for exercising such right.

The 5th Circuit made it a point to state the Rule 12 standards are based only on the allegations and the officers have the right to file further motions and evidence to dispute the facts alleged.

***Heath v. Southern University System,* –F.3d – No. 16-30625 (5th Cir., March 8, 2017)**

Plaintiff was a math professor at Southern University's New Orleans campus. When Mostafa Elaasar became her supervisor in 2003, Plaintiff alleged he engaged in a campaign of harassment that continued through the filing of this lawsuit a decade later. Plaintiff sued the University under Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq., and the supervisor individually under section 1983. Although Heath's allegations cover a substantial period of time, the trial court believed it could only consider the conduct occurring within 300 days of Heath's filing of a complaint with the EEOC for the Title VII claims and within one year of filing the lawsuit for the section 1983 claims. Looking only at the conduct occurring during this narrow timeframe, the magistrate judge granted summary judgment for Defendants.

Principally at issue on appeal was whether the continuing violation doctrine required consideration of a lengthier period of time in evaluating the merit of Plaintiff's claims. Like the Tenth Circuit, the Court expressly recognized that the Court's post-*National R.R. Passenger Corp. v. Morgan* test for the continuing violation doctrine has long implicitly acknowledged that Morgan overruled the Court's prior cases to the extent they held that the continuing violation doctrine does not apply when an employee was or should have been aware earlier of a duty to assert her rights. Therefore, the Court held that the magistrate judge erred by using this factor to prevent Plaintiff from showing a continuing violation that would enable her to support her harassment claim with conduct occurring more than 300 days before she filed her EEOC charge. The Court further concluded that Morgan's disclaiming of an "on notice" inquiry should also apply to section 1983 hostile work environment claims; concluded that Plaintiff has alleged a continuing course of conduct dating back to her return from leave in 2011; remanded for the magistrate judge to evaluate the full scope of the allegedly harassing conduct; and affirmed the dismissal of the Title VII retaliation claim. Accordingly, the court affirmed in part, reversed in part, and remanded for further proceedings.

V. QUALIFIED IMMUNITY

***Griggs v. Brewer,* –F.3d – No. 16-10221 (5th Cir., October 28, 2016)**

This is a qualified immunity/excessive force claim where the U.S. 5th Circuit affirmed the granting of the officer's qualified immunity defense.

Officer Charley Brewer conducted a routine traffic stop of a vehicle driven by Tanner Griggs after Griggs ran a red light. The video dashboard captured most of the incident. After examining and performing a field sobriety test on Griggs, Officer Brewer attempted to arrest him for driving while intoxicated. Griggs lurched to the side and said "no, no." Brewer immediately performed a "takedown" maneuver and threw Griggs face-down onto the nearby grass and landed on top of him. Even while handcuffed, Griggs kicked and struggled when officers attempted to put him in the patrol car. During the struggle, detailed in the opinion, Officer Brewer punched Griggs with a closed

fist to the back of his head in order to subdue Griggs. After finally getting Griggs into the patrol car (where another struggle ensued) he was transported to the jail facility where officers determined he had a blood-alcohol level of three times the legal limit. Griggs later brought these claims against Officer Brewer in his individual capacity under 42 U.S.C. §1983 asserting he used excessive force in effecting the arrest. The trial court granted Officer Brewer's summary judgment motion based on qualified immunity. Griggs appealed.

When analyzing qualified immunity, Courts ask whether "the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." While Griggs argued a jury could believe he was not actually resisting arrest, the court determined that was not the proper inquiry. The evaluation must be based on what a reasonable officer would perceive was happening, not what is ultimately determined to have happened. After analyzing the facts the court determined a reasonable officer could perceive Griggs was resisting and restraint techniques were needed. Further, the court held "Officer Brewer's conduct in executing the initial takedown was not constitutionally unreasonable in the light of clearly established law. Or, stated differently, our precedent does not clearly establish that this 'takedown' maneuver—against a drunken, erratic suspect who is resisting arrest—is constitutionally unreasonable." Brewer's actions "may not have been as restrained as we would like to expect from model police conduct, but qualified immunity 'protect[s] officers from the sometimes hazy border between excessive and acceptable force.'" "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly break the law." Finally, the Court held "Griggs points to no authority establishing that it was unreasonable for an officer to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect." As a result, the trial court did not error in granting Brewer's summary judgment motion.

***Ray White, et al. v. Daniel T. Pauly,* 580 U.S. ____ (2017)**

This is an excessive force, police shooting case where the United States Supreme Court granted an officer's qualified immunity defense. The case addresses the situation of an officer who – having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers – shoots and kills an armed occupant of the house without first giving a warning.

Three officers became involved in an incident which started with a road rage encounter between motorists, one being Daniel Pauly. The event was brief and non-violent. Daniel Pauly left the scene and drove a short distance to a secluded house where he lived with his brother, Samuel Pauly. Officers Mariscal and Truesdale left the scene to confront Daniel Pauly, while Officer White remained behind in case the Daniel Pauly returned. Officer White was later called to assist Officer's Mariscal and Truesdale at the home of the Pauly brothers where Officers Mariscal and Truesdale had tracked down the Pauly brothers and approached the house with caution to maintain officer safety.

The Pauly brothers claimed they did not hear Officer's Mariscal and Truesdale identify themselves and thought trespassers were trying to enter their house. The confrontation escalated, but had not yet resulted in gunfire. As Officer White arrived on scene, he witnessed the other two officers under cover, heard someone he did not know yell from the house "[w]e have guns" and saw someone (Samuel Pauly) point a weapon in his direction from the house. Officer Mariscal fired a shot which missed, but two to three seconds later Officer White shot and killed Samuel Pauly. The trial court and 10th Court of Appeals denied his qualified immunity defense.

The Court first noted that it must examine the facts as they were known to Officer White at the time, not any other evidence of facts which may have occurred but which he was unaware. Qualified immunity attaches when an official's conduct "does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." It protects "'all but the plainly incompetent or those who knowingly violate the law.'" The Court reiterated the longstanding principle that "clearly established law" should not be defined "at a high level of generality." It must be "particularized" to the facts of the case. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here. As a result, the trial court and court of appeals improperly analyzed the qualified immunity defense because the record showed that Officer White did not violate clearly established law. The order of denial was vacated and the case was remanded.

This is a per curiam opinion. However, Justice Ginsburg concurred on the understanding that the order does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal after analysis. She believes fact questions may exist as to their entitlement to qualified immunity.

***Salazar-Limon v. City of Houston,* 15-1406, -- S.Ct. -- (April 24, 2017)**

Justices Samuel Alito and Sonia Sotomayor both filed opinions regarding the court's announcement that it would not review *Salazar-Limon v. City of Houston*, an excessive-force claim by a man who was shot and seriously injured by a police officer during a traffic stop. The police officer contended that he shot at Salazar-Limon only after Salazar-Limon turned and reached for his waistband, which the officer interpreted as an effort to pull out a gun. Salazar-Limon did not state in his deposition or in an affidavit that he did not reach for his waist, but did claim that he was unarmed and was shot in the back almost immediately after the officer told him to stop walking away. Based on the police officer's testimony regarding Salazar-Limon reaching for his waistband and Salazar-Limon's lack of evidence to the contrary, a federal district court granted him qualified immunity, and the court of appeals affirmed.

Joined by Justice Ruth Bader Ginsburg, Sotomayor dissented from the denial of certiorari. Because Salazar-Limon's case "turns in large part on what Salazar-Limon did just before he was shot," Sotomayor explained, "it should be obvious that the parties' competing accounts of the event preclude" the lower court from entering a judgment for the police officer based solely on the record, without a trial. What's more, Sotomayor complained, the court had not treated the victims of police misconduct as well as it had treated the officers: "We have not hesitated to summarily reverse courts for wrongly denying the protection of qualified immunity in cases involving the use of force," she observed, but "we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases."

Justice Clarence Thomas joined Alito's opinion concurring in the denial of review. Alito agreed that Salazaro-Limon's case was "undeniably … tragic," and that "we have no way of determining what actually happened in Houston on the night Salazar-Limon was shot." But, he emphasized, "regardless of whether the petitioner is an officer or an alleged victim of police misconduct, we rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case."

***Needham v. Lewis,* 16-881, -- S.Ct. -- (April 24, 2017)**

The Supreme Court declined to review this matter on appeal from the Sixth Circuit Court of Appeals. The issues presented to the Supreme Court were: (1) whether, viewing the evidence from the officer's perspective at the time of the incident as shown in the dashboard video, a reasonable officer could have believed that the decedent posed an imminent threat of serious harm to the officer or others in the vicinity; and (2) whether, at the time of the incident, the law clearly established in a particularized sense, considering the evidence available including the dashboard video, that the use of deadly force was unlawful in this situation.

The Sixth Court of Appeals ruled that the lawsuit against the police officer who fatally shot a fleeing suspect could move forward, upholding the lower court's decision not to grant summary judgment to Needham based on claims of immunity.

The underlying lawsuit was filed by the family of the decedent who was shot and killed during a traffic stop. The stop and shooting were recorded on dash-cam video. The decedent was a passenger in the back seat of the stopped car. The driver was eventually removed from the vehicle and her young daughter was also removed from the vehicle. After the front passenger was removed from the vehicle, the video shows the vehicle began to shake and the back seat passenger (Lewis) moving into the driver's seat. Lewis started the car and attempted to flee from the scene. Needham, who was outside the view of the dash-cam as the other officer was removing the vehicle's occupants, can be seen in the video running in front of the car with his hand near his pistol. Needham yells, "Stop, police," but the car, which police said was driven by Lewis at that point, can be seen in the video beginning to move forward toward Needham. Needham sidesteps the car and fires two shots into the vehicle. The car made a U-turn in the road before jumping the curb and coming to rest in some trees, according to a police report. Lewis died as a result of the gunshot wounds.

The appeals judges ruled that "[t]he dash-cam video does not conclusively show that a reasonable officer would have believed Lewis posed an imminent threat of serious physical harm to Needham or others in the vicinity. Rather, viewed in the light most favorable to the Estate, it shows that Lewis--who was not suspected of any violent crime--was merely trying to flee a traffic stop in a vehicle, which alone is not sufficient to justify the use of deadly force." The judges in the majority opinion, therefore, found that a reasonable jury could find that Needham used excessive force in violation of the Fourth Amendment, particularly since the video shows Needham lower his weapon as he jumped from the vehicle's path. "Moreover, the video strongly suggests--and Needham appears to concede--that Needham fired into the driver's side window," the majority opinion states. "This fact and Needham's position at the side of the car suggest he was clear of the vehicle and not in danger when he fired his weapon. Needham contends he fired through the driver's side window only because at the time, he was 'trying to dodge the vehicle.'"

Appeals Judge Alice M. Batchelder authored a dissent opinion agreeing with the request. Judge Batchelder believed that "[i] n refusing to grant such immunity here, the majority adds confusion not only to law of this circuit, but also to the difficult task faced by law enforcement in applying what we say is clearly established law," Batchelder wrote. "How exactly we expect them to conform their actions to the rule purportedly applied in this case is beyond me. I suppose they will conclude that they must stand idly by, obstructing would-be escapees with nothing more than entreaties to stop. That is not the law, nor should it be." Batchelder went on to point out "[t]he majority stresses the fact that Needham lowered his gun as having some significance on this point. But they ignore the context: the video, again with indisputable clarity, reveals that Needham lowered his weapon and began moving out of the car's path as soon as Lewis began driving

away and that he raised it again only after Lewis began to swerve toward him."

***Lewis v. Vasquez,* 16-805, -- S.Ct. -- (April 17, 2017)**

The Supreme Court declined to review this matter on appeal from the Tenth Circuit Court of Appeals. The issues presented to the Supreme Court were: (1) Whether the U.S. Court of Appeals for the 10th Circuit, in a divided 2-1 decision, incorrectly narrowed qualified immunity and failed to faithfully apply the Supreme Court's precedents when it held that officers clearly lacked reasonable suspicion for the brief detention of a driver after a valid traffic stop until a drug detection dog arrived and alerted to the driver's car; and (2) whether the 10th Circuit erred by doing precisely what the Supreme Court instructed lower courts not to do in *United States v. Arvizu*, which was to use a divide-and-conquer approach to reasonable suspicion and proceed to dismiss individual factors as innocuous in isolation rather than consider all factors collectively, i.e., the totality of the circumstances.

In *Vasquez v. Lewis*, a Colorado motorist brought a claim under 42 U.S.C. § 1983, asserting that two Kansas police officers violated his Fourth Amendment right against unreasonable searches and seizures by detaining him and searching his automobile without reasonable suspicion. Based upon Plaintiff Vasquez's residency of Colorado, among other factors, the officers conducted a search of Vasquez's vehicle under suspicion of drug trafficking. The district court held that Vasquez's asserted constitutional right was not established and, therefore, the officers were entitled to qualified immunity. The Tenth Circuit Court of Appeals disagreed, and reversed and remanded for further proceedings. Of particular importance in *Vasquez* was the Court's decision to formally eliminate state residency as a consideration (absent extraordinary circumstances) in the context of determinations of reasonable suspicion in vehicle searches and seizures.

Among the factors that the officers found to give rise to a reasonable suspicion of illegal conduct were that Vasquez was driving alone late at night, he had a blanket and pillow in the back seat of his car, he was driving on I-70 (which is "a known drug corridor"), he appeared nervous, and that he was a resident of Colorado. On Appeal, the officers argued that under the totality of the circumstances, these factors were sufficient to give rise to a reasonable suspicion of criminal activity. The Court did not believe that the factors cited by the officers gave rise to a particularized and objective basis for a reasonable suspicion that Vasquez was engaging in illegal activity. The Court took care to address the factor that they found "most troubling" – that the Plaintiff was a resident of Colorado. In conclusion, the Court noted, "it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists . . . ." This decision thus requires that, absent clear extraordinary evidence, "use of state residency as a justification for fact of or continuation of a traffic stop is impermissible under the Fourth Amendment."

***Lincoln v. Barnes,* –F.3d – No. 16-10327 (5th Cir., April 20, 2017)**

This case arises out of the unfortunate police shooting of John Lincoln during a SWAT team operation at his mother's residence. Earlier in the evening, Kelly Lincoln called the police to report her that her mentally disturbed brother, John Lincoln, was armed in their mother's Colleyville, Texas, residence with his 18-year-old daughter, Erin Lincoln. A large SWAT team, including officers from both the Colleyville and North Richland Hills police departments arrived and surrounded the home. Erin advised that officers that she was not in danger, but that the police presence was upsetting her father, who repeatedly opened the front door to yell at the police while holding a gun. Every time he opened the door, Erin was standing immediately next to him. The last time John opened the door, three officers opened fire, killing him and narrowly missing Erin, who was standing by his side.

Erin fell to the ground next to her father's body. She was then forcibly removed, placed in handcuffs, and put in the backseat of a police vehicle. Although she did not fight, struggle, or resist, she did ask the officer why she was being taken into custody and made it known that she wanted to remain with her father. Despite Kelly Lincoln's protests, Erin remained in custody. She was held in the back of a patrol car for two hours after which she was transported to the police station where she was interrogated for five hours and forced to write out a statement. Only after the officers obtained her statement was Erin permitted to leave with Kelly. Erin was never charged with any crime.

Erin and Kathleen, individually and as representatives of the estate of John Lincoln, sued the Cities of Colleyville and North Richland Hills, Texas, and several officers involved in the incident, including Barnes. They asserted a variety of constitutional claims under 42 U.S.C. § 1983 stemming from the shooting and Erin's subsequent detention. In pertinent part, Erin asserted that Barnes and Meeks violated her Fourth Amendment right to be free from unreasonable seizure when they took her into custody without a warrant, probable cause, or justifiable reason and interrogated her against her will for many hours, refusing her access to her family, including Kelly Lincoln.

On appeal, Barnes challenged the district court's denial of qualified immunity. The question before the Court is whether Erin's detention at the police station for the purposes of questioning her as a witness to her father's shooting and obtaining her statement satisfied the Fourth Amendment's "reasonableness" requirement. The Court concluded that it did not and that police violate the Fourth Amendment when, absent probable cause of the individual's consent, they seize and transport a person to the police station and subject her to prolonged intervention. Because the right was clearly established at the time of the violation, the Court affirmed the judgment.

While "the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime," Lidster, 540 U.S. at 425, "[a]bsent special circumstances, the person approached may not be detained . but may refuse to cooperate and go on his way," Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring); see also Florida v. Royer, 460 U.S. 491, 497–98 (1983). Any further detention of such individual constitutes a seizure under the Fourth Amendment, which must satisfy the Fourth Amendment's "reasonableness" requirement. Lidster, 540 U.S. at 426–27. As a general matter, the detention of a witness that is indistinguishable from custodial interrogation requires no less probable cause than a traditional arrest. Dunaway, 442 U.S. at 216; Davis, 394 U.S. at 726–28.

***Hanks v. Rogers*, –F.3d – No. 15-11295 (5th Cir., April 5, 2017)**

Plaintiff filed suit under 42 U.S.C. 1983, alleging that defendant used excessive force against him in violation of the Fourth Amendment. The district court granted summary judgment to defendant based on qualified immunity. The court held that plaintiff met his burden of rebutting defendant's qualified immunity defense.

On the evening of February 26, 2013, Hanks was driving slowly along Interstate 30 in Grand Prairie, Texas. Hanks hoped to find his cellular telephone on the shoulder of the road—Hanks accidentally left the phone on top of his car at the outset of his trip, and, upon realizing his mistake, aimed to find where the phone slid off along the roadway. Officer Rogers, a member of the Grand Prairie Police Department, observed Hanks driving with his vehicle's hazard lights engaged and approximately 20 miles per hour under the interstate speed limit. Rogers turned on his patrol car's emergency lights, and Hanks immediately pulled his car onto the shoulder of the interstate. Officer Rogers asked Hanks for his license and insurance and subsequently instructed Hanks to "step out of the vehicle and come to the back." Hanks did not immediately exit his vehicle. Instead, he questioned the basis for Officer Rogers's instruction. Hanks eventually exited the vehicle after additional instructions to do so. The situation between the officer and Hanks

continued with various requests by the Officer and Hanks continued inquiry as to the reason for the requests and whether he was under arrest. The encounter eventually led to Officer Rogers taking down Hanks despite Hanks offering no resistance.

Later, while sitting in Officer Rogers's patrol car, Hanks requested medical care. Officer Rogers issued Hanks a traffic citation, and medics transported Hanks to Baylor Medical Center for treatment to his upper back, neck, head, and ribs. The Grand Prairie Police Department subsequently conducted an investigation that led to Officer Rogers's indefinite suspension. The department's investigation concluded that Officer Rogers's actions were not objectively reasonable to bring the incident under control considering Mr. Hanks' lack of resistance. The department's investigation also identified Hanks as a "compliant subject."

The Court reasoned that under the circumstances in this case, a reasonable officer on the scene would have known that suddenly resorting to physical force as Officer Rogers did would be clearly excessive and clearly unreasonable. It further determined that plaintiff presented no immediate threat or flight of risk; and plaintiff offered, at most, passive resistance, including asking whether he was under arrest.

As such, the Court concluded that plaintiff alleged facts which, when viewed in the manner most favorable to him, would establish a violation of plaintiff's Fourth Amendment right to be free from excessive force during a seizure. The Court also concluded that the constitutional right at issue was clearly established at the time of the incident, and that defendant's conduct was objectively unreasonable in light of then-existing clearly established law. Accordingly, the court reversed and remanded.

***Surratt v. McClarin,* –F.3d – No. 16-40486 (5th Cir., March 14, 2017)**

After Lesa Ann Surratt died as a result of complications of asphyxia due to airway obstruction by a plastic bag, her sister filed suit against defendants for excessive force, unreasonable search and seizure, violation of due process, and conspiracy, as well as Texas state-law claims for wrongful death, assault and battery, and breach of fiduciary duty.

Officers pulled over Surratt for a traffic violation. The stop was pretextual. Earlier that day, the officers had been informed that Surratt was in possession of narcotics. Surratt and her passenger were both arrested, handcuffed, and placed in the back of a patrol car where they were secured with seatbelts. The officers returned to the suspect's vehicle to retrieve personal effects and briefly left the suspects in the patrol car alone and unsupervised. During this time, Surratt managed to free her right hand from her handcuffs, pull a small baggy of narcotics from underneath her skirt, and place it in her mouth. When the officers returned to the vehicle, they noticed Surratt's skirt was up and believed she was trying to hide something. The officers instructed Surratt to open her mouth and less than four seconds later, one of the officers pressed his forearm against Surratt's left jawline and neck while the other officer pressed his thumb into the back of her right jawline to try and force her to open her mouth. Surratt fought back and the officers continued to try and pry her mouth open.

Surratt was unresponsive and having a seizure by the time the officers were able to remove her from the car. An ambulance was called and the plastic baggie was removed from her throat with forceps. Surratt died thirteen days later due to complication of asphyxia due to airway obstruction by plastic bag."

The district court granted Defendants' motion for summary judgment based on qualified immunity despite its belief that the officers violated Surratt's Fourth Amendment right to be free from excessive force because it held that the officers' actions were not objectively unreasonable in light of clearly established law at the time of the incident. The Court affirmed the judgment concluding that assuming without deciding that the officers' conduct violated Surratt's constitutional rights, Plaintiff failed to demonstrate that the officers

acted objectively unreasonable in light of clearly established law at the time of the incident. In this case, no previous law has provided guidance regarding what was precisely reasonable and what was unreasonable regarding the use of force to an individual's throat where the individual appeared to be concealing something in their mouth.

***Hyatt v. Thomas,* –F.3d – No. 15-10708 (5th Cir., November 18, 2016)**

The family of Jason Hyatt filed suit against Officer Brianna Thomas, alleging a 42 U.S.C. 1983 claim related to Hyatt's suicide while in police custody.

On December 10, 2012, appellant Randi Hyatt, Jason Hyatt's wife, received a call from Hyatt's coworkers, who informed her that her husband had left work unexpectedly and that they were concerned about his wellbeing. Randi called 911 and informed Thomas, a Callahan County, Texas jailer and dispatcher, that her husband was suicidal and had a history of suicide attempts. Officers were dispatched to perform a welfare check. Hyatt was soon located and placed under arrest under suspicion of driving while intoxicated. When Thomas called Randi to inform her that Hyatt had been stopped and to give her his location, Randi again stated that her husband was suicidal. Randi arrived while her husband was being arrested and informed the arresting officers that Hyatt "had tried to commit suicide before and needed to be watched."

Hyatt was taken to the Callahan County jail, where Thomas, who was trained in the assessment of suicide risk and screening for mental health issues of inmates, booked him and completed a "Screening Form for Suicide and Medical and Mental Impairments." Hyatt reported being depressed and previous suicide attempts, but denied having suicidal thoughts on this day. Despite this, Thomas observed Hyatt in a generally good mood and did not consider him a suicide risk. Regardless, Thomas refused to issue Hyatt certain items that could be used to attempt suicide.

Hyatt was issued a standard jail uniform and placed in a cell under video surveillance. However, a blind spot in surveillance-camera coverage prevented officers from seeing the toilet area of the cell. When Thomas's shift ended, she informed her shift relief, Jailer Charles Turner, about Hyatt's intoxication and history of suicide attempts and advised him "of the need to keep an eye out for suspicious behavior." Turner checked on Hyatt throughout the night and in the morning and reported that Hyatt appeared normal. Turner was relieved by Mark Admire the next morning. Turner told Admire that Hyatt had been booked for DUI and that his family would be in soon to "bond him out of jail." About an hour later, Admire discovered that Hyatt had hanged himself in the cell bathroom with a plastic garbage bag. He was later pronounced dead.

The district court concluded that no genuine issue of material fact precluded Thomas from being entitled to qualified immunity. The family of Jason Hyatt appeals the district court's grant of summary judgment in favor of Officer Brianna Thomas on their § 1983 claim related to Hyatt's suicide while in police custody. The Court affirmed the judgment holding that, while not ideal, Thomas's failure to exercise even greater care to avoid Hyatt's suicide did not amount to deliberate indifference. Thomas took measures to prevent Hyatt's suicide: she withheld from him the most obvious potential ligature, placed him under video surveillance, and directed her relieving officer to keep a close watch over him. It found that Thomas responded reasonably to Hyatt's known suicide risk, she was not deliberately indifferent, and thus was entitled to qualified immunity.

***Brinsdon v. McAllen I.S.D.,* –F.3d – No. 15-40160 (5th Cir., August 9, 2016)**

Brenda Brinsdon was a student at McAllen Achieve Early College High School in McAllen ISD. On the first day of Spanish class, the teacher assigned the students to memorize and recite in Spanish the Mexican Pledge of Allegiance and the Mexican National Anthem by the following Friday. Brinsdon, who is of mixed American and Mexican heritage, objected

to the assignment, stating that she believed that pledging her allegiance to a different country was wrong. Without permission, Brinsdon recorded her class reciting the Mexican Pledge and a subsequent media flurry ensued. Eventually, the school removed Brinsdon from class and allowed her to complete the class by self-studying in the principal's office and graduated from high school. Plaintiff filed suit requesting an injunction, a declaratory judgment, and nominal damages under Section 1983 alleging that defendants violated her First Amendment rights when it compelled her to recite the Mexican Pledge of Allegiance and that it retaliated against her when it removed her from class. Brinsdon also argued that she endured disparate treatment in violation of the Equal Protection Clause when she was removed from class.

The district court entered summary judgment on some of Plaintiff's claims and, after trial, entered judgment as a matter of law for defendants. The Court affirmed the judgment concluding that because Plaintiff has graduated from high school, her only surviving claim was for nominal damages arising from the alleged violation of her rights; Plaintiff failed to demonstrate the existence of an official policy or that the District had knowledge of the assignment, and thus judgment as a matter of law was proper for the District on municipal liability for any constitutional violation that may have arisen from the assignment or subsequent actions; the Court's ruling also applied to the claims against the District for retaliation and violation of Equal Protection; qualified immunity was properly granted to defendant teacher and defendant principal on the claim they violated Plaintiff's First Amendment rights when they removed plaintiff from class; and, likewise, Plaintiff's equal protection claim failed.

***County of Los Angeles,* California v. Mendez, 581 U.S. ____ (2017)**

The Los Angeles County Sheriff's Department received word from a confidential informant that a potentially armed and dangerous parolee-at-large had been seen at a certain residence. While other officers searched the main house, Deputies Conley and Pederson searched the back of the property where, unbeknownst to the deputies, respondents Mendez and Garcia were napping inside a shack where they lived. Without a search warrant and without announcing their presence, the deputies opened the door of the shack. Mendez rose from the bed, holding a BB gun that he used to kill pests. Deputy Conley yelled, "Gun!" and the deputies immediately opened fire, shooting Mendez and Garcia multiple times. As a result, Mendez required amputation of his right leg below the knee, and Garcia was shot in the back. Officers did not find the parolee in the shack or elsewhere on the property.

Mendez and Garcia sued Conley and Pederson and alleged that the deputies, in their official capacity, deprived them of their Fourth Amendment rights by performing an unjustified warrantless search and that the deputies failed to adhere to the knock-and-announce rule, which requires that officers announce their presence before they enter a home. The district court found for Plaintiffs on both these allegations and also held that, although the officers' use of force was reasonable under the circumstances, they were liable for the shooting under the Ninth Circuit's provocation rule. That rule holds an officer liable for use of deadly force where the officer intentionally or recklessly provokes a violent confrontation via a Fourth Amendment violation. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's determination that the search violated the Fourth Amendment but reversed the knock-and-announce rule holding because there was no controlling Ninth Circuit precedent on whether officers must announce themselves again at a separate residence on the same property. The appellate court also held that the officers were liable under the provocation rule because their unjustified search of the occupied shed led to the shooting.

The questions before the Court are (1) whether an officer can be found liable under the Ninth Circuit's provocation rule where it is determined that the officer's use of force was reasonable and not excessive, and (2) whether an

incident that leads to a reasonable use of force negate a prior Fourth Amendment unlawful entry violation. The Court rejected the Ninth Circuit's "provocation rule" which automatically imposed excessive force liability if an officer's use of force was prompted by an earlier constitutional violation (i.e. an unlawful entry), but expressly left open the question of whether 1) an officer's conduct prior to the use of force is factored into the totality of circumstances inquiry, and 2) whether an earlier constitutional violation such as an unlawful entry could be viewed as proximately causing an injury resulting from an officer's use of force.

VI. BIVENS SUIT

***De La Paz v. Coy, et al.*, 786 F.3d 367 (5th Cir. 2015)**

Customs and Border Patrol ("CBP") agents apprehended Daniel Frias and Alejandro Garcia de la Paz, both illegal aliens, in separate incidents miles from the U.S.-Mexico border, in the heart of Texas. Both allege that the agents stopped them only because they are Hispanic. Represented by the same attorney, both filed *Bivens* suits against the arresting agents, alleging Fourth Amendment violations. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court created a damage remedy against individual federal law enforcement officers who allegedly conducted a warrantless search of a suspect's home and arrested him without probable cause. The cause of action, the Court said, flowed from the necessity to enforce the Fourth Amendment in circumstances where the victim had no effective alternative remedy. Bivens established that, in certain circumstances, "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."

On appeal, both cases presented the same fundamental question of first impression: can illegal aliens pursue Bivens claims against CBP agents for illegally stopping and arresting them? The Fifth Circuit concluded that Bivens actions are not available for claims that can be addressed in civil immigration removal proceedings. The Supreme Court has explained that federal courts may not step in to create a *Bivens* cause of action if "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."

Here, the court found Congress through the Immigration and Nationality Act (INA) and its amendments has indicated that the Court's power should not be exercised. The INA's comprehensive regulation of all immigration related issues combined with Congress's frequent amendments shows that the INA is "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." Such a system "should [not] be augmented by the creation of a new judicial remedy." Thus, the Fifth Circuit held that that these plaintiffs cannot pursue *Bivens* suits against the agents for allegedly illegal conduct during investigation, detention, and removal proceedings.

VII. ADA

***Fry v. Napoleon Community Schools, 15-497*, -- S.Ct. -- (February 22, 2017)**

The Frys' daughter, E.F., was born with cerebral palsy and was prescribed a service dog to assist with everyday tasks. Her school, which provided her with a human aide in accordance with her Individualized Education Plan (IEP) under the Individuals with Disabilities Education Act (IDEA), did not allow her to bring her service dog to school. The Frys sued the school, the principal, and the school district and argued that they violated the Americans with Disabilities Act (ADA), the Rehabilitation Act, and state disabilities laws. The district court granted the defendants' motion to dismiss because the claims necessarily implicated the IDEA, which required plaintiffs to exhaust all administrative remedies before suing under the ADA and Rehabilitation Act. The Frys appealed and argued that the exhaustion requirement did not apply because they were seeking damages,

which is not the sort of relief the IDEA provided. The U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal and held that the Frys' claims were essentially educational, which are precisely the sort of claims the IDEA was meant to address, and therefore the exhaustion requirement applied.

The question for the Court was whether the Individuals with Disabilities Education Act's requirement that plaintiffs exhaust administrative remedies before suing under the Americans with Disabilities Act and the Rehabilitation Act apply to plaintiffs seeking damages, which are not available under the Individuals with Disabilities Education Act.

The Court determined that the Individuals with Disabilities Education Act (IDEA) does not require that a plaintiff exhaust administrative remedies before suing under the Americans with Disabilities Act if the plaintiff's claims are not based in, and seeking relief for, the denial of a free and appropriate public education (FAPE). The Court held that the plain language of the exhaustion requirement in the IDEA only applies to remedies that are "available" under that statutory scheme, which is entirely structured around ensuring the provision of FAPE. If a lawsuit is not seeking relief for the denial of FAPE, then it is not seeking an available remedy under the IDEA, and the exhaustion requirement does not apply. Therefore, in determining whether the plaintiff must exhaust administrative remedies, courts must examine the substance of the plaintiff's complaint to determine whether the plaintiff is seeking relief for a denial of FAPE. Although this examination must do more than look at how the plaintiff labels the relief she seeks, it does not require that the court determine the plaintiff could have sought such relief. In this case, the Frys' complaint alleges only disability-based discrimination and makes no allegations about the denial of FAPE, but the Court did not foreclose the possibility that a more in-depth examination would reveal something different.

***Acker v. General Motors, LLC,* –F.3d – No. 16-11174 (5th Cir., April 10, 2017)**

Plaintiff is a General Motors, L.L.C. ("GM") employee who was approved for intermittent FMLA leave but on several occasions was absent from work and did not follow company protocol for requesting FMLA leave. He suffered several weeks of disciplinary unpaid layoff. He sued GM for FMLA interference and retaliation and for disability discrimination under the Americans with Disabilities Act ("ADA") and the Texas Commission on Human Rights Act ("TCHRA"). The district court entered summary judgment for GM. The court concluded that the FMLA and accompanying regulations require employees to follow their employer's "usual and customary" procedures for requesting FMLA leave absent "unusual circumstances." In this case, plaintiff failed to demonstrate that there were unusual circumstances arising from his condition that prevented him from complying with GM's call-in policy. Therefore, plaintiff failed to raise a fact issue for FMLA interference. The court also concluded that plaintiff failed to make a prima facie case of FMLA retaliation where he has not shown how his disciplinary leave was caused by his attempts to seek protection under the FMLA instead of his failure to follow GM's attendance and absence approval process; plaintiff failed to demonstrate that GM denied him a reasonable accommodation under the ADA; and plaintiff's Texas law claim also failed. Accordingly, the court affirmed the judgment.

The Fifth Circuit affirmed the district court's decision because the FMLA and accompanying regulations require employees to follow their employer's "usual and customary" procedures for requesting FMLA leave absent "unusual circumstances," 29 C.F.R. § 825.303(c).

***Magee v. Coca-Cola Refreshments USA Inc.*, –F.3d – No. 15-31018 (5th Cir., August 15, 2016)**

Plaintiff, on behalf of himself and others similarly situated, filed suit against Coca-Cola, alleging claims under Title III of the Americans

with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. Plaintiff alleged that Coca-Cola owns and operates glass-front vending machines in public spaces and that those machines are not accessible to him and others who are blind. The district court dismissed the complaint, holding that Coca-Cola's vending machines are not themselves "places of public accommodation." Based on the unambiguous language of 42 U.S.C. 12181(7)(E), the Court concluded that Coca-Cola's vending machines are not "sales establishments" under the plain meaning of that term and therefore are not "places of public accommodation" under Title III of the ADA. Therefore, the Court need not consider whether the vending machines are "facilities" under 28 C.F.R. 36.104. The Court noted that its conclusion comports with the statute's legislative history and the DOJ's guidance. The Court acknowledged the limits of its holding and noted that vending machines may very well be subject to various requirements under the ADA by virtue of their being located in a hospital or a bus station, both of which are indisputably places of public accommodation. However, Plaintiff only sued Coca-Cola in this case. Accordingly, the court affirmed the judgment.

***Williams v. J.B. Hunt Transport, Inc.*, –F.3d – No. 15-20610 (5th Cir., June 20, 2016)**

Plaintiff filed suit against J.B. Hunt, alleging that he was terminated from his job as a tractor-trailer driver due to his disability and in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. When Plaintiff was hired by J.B. Hunt in June of 1999, he affirmed that he read and understood the company's policies, including that drivers meet all Federal and State requirements for certification and commercial driver licensing, including a current DOT medical physical. Due to medical issues in 2010, Plaintiff's DOT medical certification was rescinded. J.B. Hunt subsequently administratively terminated Plaintiff because of Plaintiff had not been medically certified to return to work.

The district court dismissed the claim for lack of subject matter jurisdiction. The court concluded that no statute requires that an ADA Plaintiff exhaust the 49 C.F.R. 391.47 process before filing a lawsuit and thus the district court should not have dismissed this ADA claim for lack of subject matter jurisdiction. The court affirmed the district court's dismissal, however, on alternative grounds concluding that Plaintiff could not establish a prima facie case of discrimination on the basis of disability. At the time he was terminated, Plaintiff was not certified under DOT medical standards; therefore, he was not qualified for his job under the ADA and summary judgment was appropriate.

VIII. TITLE VII

***Cabral v. Brennan*, –F.3d – No. 16-50661 (5th Cir., April 10, 2017)**

Plaintiff, a Mexican-American in his mid-40's, filed suit against the Postal Service under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. On appeal, plaintiff challenged the dismissal of his Title VII retaliation claim.

Plaintiff claimed that the Postal Service suspended him for two days because he complained of workplace discrimination and harassment. According to the postal service, though, Plaintiff was a difficult employee who engaged in various acts of insubordination and at one point struck a supervisor with a postal vehicle. Relevant here were actions taken after Plaintiff's return on September 3 from his suspension for the postal vehicle incident. When he returned, his supervisor allegedly began "badgering" him with questions. At one point, the supervisor asked the employee to produce a valid driver's license and he failed to do so. On September 9, his supervisors put him on leave out of concern that he was driving with a suspended driver's license (he admitted his license had been suspended for a DWI conviction). He was allowed to return two days later and was reimbursed for lost pay.

Affirming the dismissal of a postal employee's Title VII retaliation claim, the Fifth Circuit found that Plaintiff failed to show that his two-day suspension resulted in any physical, emotional, or economic harm, so the suspension was not a materially adverse employment action.

***Alkhawaldeh v. Dow Chemical Co.,* – F.3d – No. 16-50661 (5th Cir., March 17, 2017)**

Plaintiff filed suit against his employer, Dow, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq. The district court granted summary judgment for Dow.

Plaintiff began working for Dow in January of 2008. In October of 2009, Plaintiff received the lowest rating in his performance review. He was placed on a Performance Improvement Plan ("PIP") in order to determine whether his performance was capable of rehabilitation. Plaintiff vigorously protested his rating to no avail. He was terminated in October of 2010.

The Court affirmed the judgment concluding that plaintiff failed to produce any evidence that he was treated less favorably than others similarly situated outside of his protected class, and thus his Title VII discrimination claim failed as a matter of law. In regard to the retaliation claim, the Court concluded that no reasonable fact finder could conclude that Plaintiff would not have been fired but for his decision to engage in activity protected by Title VII. The Court explained that poor performance was not an activity protected by Title VII and, even assuming that Plaintiff completed the Performance Improvement Plan (PIP), his negative, post-PIP evaluation independently justified Plaintiff's termination.

***Outley v. Luke & Associates, Inc.,* – F.3d – No. 16-60223 (5th Cir., October 19, 2016)**

Plaintiff filed suit against Luke & Associates alleging race-based discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981.

Outley was contracted by Luke to provide inpatient pharmacy services at Keesler Air Force Base. The agreement provided, in part, that "if Luke should receive a request by the Government that the services of [Outley] be terminated for cause, then such services will be terminated in accordance with such request." On May 16, 2011; May 18, 2011; and July 14, 2011, three different issues arose with relation to Outley's work. In August 2011, Air Force staff notified Luke of their concerns regarding Outley's performance. Subsequently, the Air Force determined that Outley would no longer be permitted to work as an inpatient pharmacist. According to Luke, to avoid terminating Outley's contract, it proposed a transfer, and the Air Force and Outley agreed to a transfer in lieu of termination. Outley denies consenting to the arrangement. She was transferred to an outpatient pharmacy, then in December 2011 to a second outpatient pharmacy. Before that, in October, she requested a "merit adjustment raise." Luke informed her that it was unable to grant the request but that in January it would reassess after discussing her performance with the Air Force.

On August 11, 2011, Outley had emailed Colonel Richard McBride to notify him of "prejudices / double standards / hostility / harassment and being singled out in the workplace." McBride instructed Outley to "notify both your Contractor and EEO if you honestly feel you are working in a hostile environment." Outley filed a formal complaint with the Air Force on August 29, 2011, then sued, alleging race-based discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.2.

The district court entered summary judgment for Luke because Outley had not established a prima facie case of discrimination. It also found that Luke had provided legitimate, nondiscriminatory reasons for the transfer. With respect to retaliation, the court found that, even assuming that Outley had presented a prima

facie case, Luke had presented sufficient nondiscriminatory reasons.

The Court affirmed the district court's judgment concluding that Plaintiff failed to present any evidence sufficient to make a prima facie case of discrimination where she has not shown that any of the other employees shared her history of on-the-job violations or to create a fact issue regarding pretext. Even assuming that Plaintiff had shown a prima facie case, Luke provided legitimate, nondiscriminatory reasons for its decision. Likewise, Plaintiff's retaliation claim fails because Plaintiff failed to provide evidence that "but for" her complaints to the Air Force, Luke would have given a pay raise. Finally, the Court concluded that the district court did not abuse its discretion in denying the motion to compel.

Pullen v. Caddo Parish Sch. Bd., **– F.3d – No. 15-30871 (5th Cir., July 20, 2016)**

Plaintiff, an employee of the School Board, filed suit alleging that she was sexually harassed by another board employee, Timothy Graham, in violation of Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq. Graham was Pullen's supervisor for certain periods of the alleged harassment, but Pullen claims that the harassment continued after she had transferred to a different department.

The district court granted the board's motion for summary judgment. First, it addressed the period of harassment in which Graham was Pullen's supervisor. It held that the board had established that there were no material factual disputes regarding its entitlement to judgment on its *Ellerth/Faragher* affirmative defense. The district court held that the first prong of the test was satisfied because the board had put forward evidence that it had a detailed sexual-harassment policy that was posted on bulletin boards around the central office and was available online, and on which it trained the majority of its employees on a regular basis. The second prong was satisfied because Pullen's failure to report the alleged harassment for well over two years was unreasonable. Second, the district court addressed the period of harassment during which Graham was not Pullen's direct supervisor. It agreed with the board that Pullen had not put forth any evidence to indicate that management actually knew or should have known about the harassment. Thus, the district court granted summary judgment on the coworker-harassment claims.

The Court affirmed in part, reversed in part, and remanded. First, the Court concluded that there is a genuine dispute of material fact as to whether the School Board is entitled to immunity under the *Ellerth/Faragher* defense, which is an exception to the rule that an employer is strictly liable for a supervisor's harassment of an individual whom he or she supervises. The *Ellerth/Faragher* affirmative defense is an exception that is available to employers only when a plaintiff alleges sexual harassment by a supervisor but does not claim that the harassment resulted in a tangible employment action. The defense requires the employer to show that it exercised reasonable care to prevent and correct sexual harassment and that the employee unreasonably failed to take advantage of preventive or remedial opportunities provided by the employer. The Court concluded that the board did not meet its burden on the first element. The district court erred in holding that the board's efforts to prevent sexual harassment were reasonable as a matter of law. Plaintiff produced evidence that, if believed, would show that employees at the central office were not trained on sexual harassment, were not informed of the existence of a policy, were not shown where to find it, and were not told whom to contact regarding sexual harassment. The Court concluded that this would be a sufficient basis for a reasonable jury to find that the company did not take reasonable steps to prevent and remedy sexual harassment. Therefore, the court reversed as to this issue.

The Court also concluded that, because Plaintiff did not show the existence of a genuine dispute of material fact as to whether Graham was her supervisor in the third harassment period, the district court was correct to conclude that he was not; the Court rejected plaintiff's argument that using different liability standards for the distinct periods of harassment would

unduly confuse the jury; and, because Plaintiff does not have any properly presented and preserved argument for why the board knew or should have known about the harassment, she cannot make out a prima facie case under the standard for coworker sexual harassment.

Rogers v. Pearland, I.S.D., **–F.3d – No. 14-41115 (5th Cir., June 28, 2016)**

Plaintiff filed suit against the district, alleging a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Plaintiff twice applied for employment as a master electrician with the district and was rejected both times. The district court granted summary judgment for the district based on Plaintiff's failure to set forth a prima facie case of discrimination under either the disparate impact theory or the disparate treatment theory of discrimination.

Rogers, an African-American male, applied for employment as a master electrician with the School District on two occasions in 2011. The first time he applied, Rogers completed a web-based application wherein he failed to report his criminal history and certified that the information was true, correct, and complete. After the district completed a criminal history background check (to which Plaintiff consented), it discovered that Plaintiff had prior felony convictions that he failed to disclose. The matter was addressed with Rogers who provided no explanation for failing to disclose his convictions other than to state he had paid his debt to society. The district hired Rodney Taylor for the position. Mr. Taylor was an African-American male like Plaintiff.

Taylor subsequently left the position and Plaintiff again applied with the district, this time disclosing his criminal history. However, the School District informed Rogers that his lack of candor on the first application, along with the seriousness of his criminal history, rendered him ineligible for employment with the School District.

The Court concluded that, even if Plaintiff had adequately briefed the claim, he failed to establish a prima facie case for disparate impact where there is no evidence that the district maintained a policy of "excluding from consideration for employment all persons who have been convicted of a felony." In this case, Plaintiff failed to demonstrate that the district hired someone outside of his protected class or otherwise treated him less favorably than others similarly situated outside of his protected class. Plaintiff argued that another district employee, Russell Leon Alvis, was similarly situated as Plaintiff. The Court concluded, however, that Alvis's criminal history was not comparable to that of Plaintiff's where Alvis was convicted of delivery of marijuana and sentenced to 10 years' probation, and Plaintiff was convicted of at least three drug crimes for which he received a far more severe sentence than 10 years probation. Accordingly, the court affirmed the judgment.

IX. BATSON

Timothy Tyrone Foster v. Bruce Chatman, **-- S.Ct. – 2016 WL 2945233 (2016)**

In 1986, Timothy Tyrone Foster, an 18-year-old black man, was charged with murdering Queen White, an elderly white woman. At the trial, the prosecution used peremptory strikes against all four of the qualified black jurors. Pursuant to the Supreme Court's decision in *Batson v. Kentucky*, which prohibits the use of peremptory strikes on the basis of race, the defense objected to those strikes, and the burden shifted to the prosecution to prove that there were race-neutral explanation for the strikes. The prosecution provided reasons, and the trial court held that the reasons were sufficient. An all-white jury convicted Foster of murder and imposed the death penalty. Foster obtained the prosecutor's notes through an open records request. The notes included lists in which the black prospective jurors were marked with a "B" and highlighted in green; notations identifying black prospective jurors as "B#1," "B#2," and "B#3;" notations that ranked the black prospective jurors against each other in case the prosecution had to accept a black juror; and a strike list in which the five black panelists qualified to serve were they first five names in

the "Definite Nos" column. Some of the notes also directly contradicted the prosecution's "race-neutral" explanations for its strikes and its representations to the trial court.

Foster petitioned for a writ of habeas corpus in Butts County Superior Court and submitted a new *Batson* challenge based on the prosecutor's notes obtained through the Georgia Open Records Act. The court denied Foster's petition. The Georgia Supreme Court affirmed the denial of the writ. The U.S. Supreme Court granted certiorari and ruled that Foster showed purposeful discrimination in his *Batson* challenge.

X. DISCOVERY SANCTIONS

***Goodyear Tire & Rubber Co. v. Haeger*, 15-1406, -- S.Ct. -- (April 18, 2017)**

The Supreme Court ruled that a United States district court's inherent power to sanction a party for bad-faith conduct in discovery is limited to an award of only those attorney's fees that the innocent party would not have incurred but for the other party's misconduct. No. 15-1406, 2017 U.S. Lexis 2613 (Apr. 18, 2017). Although this case does not directly involve an insurance company, this same standard may be applied in bad-faith claims against insurers.

In the underlying case, the respondents (the Haegers) sued Goodyear Tire & Rubber Company, alleging that the failure of a Goodyear G159 tire caused their motorhome to swerve off the road and flip over. The Haegers' theory was based on the premise that the tire was not designed to withstand the level of heat that it generated when used on a motorhome at highway speeds. The Haegers repeatedly requested that Goodyear turn over internal test results for the G159, but the company's responses were slow and unrevealing in content. After several years of contentious discovery, marked by Goodyear's slow response to repeated requests for internal G159 test results, the parties settled the case for an undisclosed amount on the eve of the trial.

Several months after the case settled, the Haegers' lawyer learned, from a newspaper article, that in another case involving the G159 Goodyear had disclosed test results indicating that the tire got unusually hot at highway speeds. In correspondence, Goodyear conceded withholding the data even though the Haegers had requested (early and often) all testing data related to the G159 tires. The Haegers sought sanctions for discovery fraud, and they requested all attorney's fees and costs expended in the litigation.

The district court agreed that Goodyear had engaged in misconduct, and the court awarded the full $2.7 million in legal fees and costs that the Haegers had expended since Goodyear made its first dishonest discovery response. The court acknowledged that in a typical case sanctions are limited to the amount of legal fees caused by the misconduct. The court concluded, however, that Goodyear's conduct was so egregious that all legal fees and costs incurred after the first instance of dishonesty could be awarded without any need to find a causal link between those expenses and the sanctionable conduct.

Acknowledging that the Ninth Circuit may require a link between Goodyear's bad-faith conduct and the specific attorney's fees and costs, the district court issued a $2 million contingent award. The deduction of $700,000 was based on Goodyear's representation of the amount of fees that the Haegers had incurred developing claims against other defendants and proving their medical damages. A divided Ninth Circuit panel affirmed the $2.7 million award and concluded that the lower court acted properly in awarding the amount

that it reasonably believed that the plaintiffs had incurred during the time when Goodyear was acting in bad faith.

The United States Supreme Court granted certiorari in the matter because there was a split in authority among the circuits. In the opinion, the Supreme Court began by reiterating that an assessment of attorney's fees must be a compensatory, not punitive, sanction. (Citing Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994)). Sanctions are only compensatory if they are "calibrate[d] to [the] damages caused by" the bad-faith acts on which they are based. (Citing Workers v. Bagwell, 512 U.S. at 834). In exceptional cases, a court may avoid segregating individual expense items by shifting all of a party's fees, either from the start or the mid-point of a suit.

The Supreme Court determined that both the district court and the court of appeals failed to use the correct legal standard. The courts were required to analyze whether the attorney's fees would have been incurred had Goodyear not engaged in bad-faith conduct (the "but-for" standard). Here, however, the Haegers' failed to prove that (1) the litigation would have settled as soon as Goodyear divulged the heat-test results, or (2) Goodyear's non-disclosure "so permeated the suit as to make that conduct a but-for cause of every subsequent legal expense." Nor were the circumstances exceptional enough to warrant shifting all of the Haegers' fees from the date of Goodyear's first act of misconduct. The Court reversed the holding of the court of appeals and remanded the case to the district court to revise the attorney fee award to be consistent with its ruling.

XI. INDIVIDUALS WITH DISABILITIES EDUCATION ACT

***Endrew F. v. Douglas City School District,* 15-827, -- S.Ct. -- (March 22, 2017)**

Endrew F. is an autistic fifth grade student who was placed in private school because his parents believed his public school education was inadequate. Endrew was placed in Firefly Autism House and his parents sued for reimbursement of Endrew's private school tuition and related expenses pursuant to the Individuals with Disabilities Act (IDEA). IDEA provides that if a free public school cannot meet the educational needs of a disabled student, the student's parents may enroll their child in a private school and seek reimbursement for tuition and related expenses.

This case first went to an Administrative Law Judge (ALJ) for review. The ALJ rejected Endrew's parent's request for reimbursement concluding that Endrew's public school had provided him with "free appropriate public education" (FAPE) as required by the IDEA. The district court affirmed the ALJ's ruling and held that Endrew's parents failed to meet their burden to prove that Endrew was not provided with FAPE. The U.S. Court of Appeals for the Tenth Circuit affirmed.

The question for the Court was what level of educational benefits must school districts confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA).

The Court unanimously held in order to provide children with disabilities the free appropriate public education guaranteed by under the Individuals with Disabilities Education Act (IDEA), school districts must

offer children an Individualized Education Plan (IEP) that is reasonably calculated to enable each child to make progress appropriate for that child's circumstances. The Court further held that the inquiry into whether an IEP is reasonably calculated to allow a child to make progress is necessarily an intensive, fact-specific one and therefore neither the Court nor the statute could create a substantive standard. The Court's decision in *Board of Education of Hendrick Hudson Central School District v. Rowley* suggests that "appropriate progress" for most children would allow them to be fully integrated into the classroom and to advance from grade to grade. This requirement is substantially more than the "de minimus" benefit that the school district argued was all it was required to provide. However, the Court also held that the standard Endrew F.'s parents argued for was too rigorous and was similar to one that the Court had rejected in its decision in *Rowley*. In conducting its fact-intensive inquiry, a reviewing court should give deference to the expertise of school authorities but must still ensure that an IEP is reasonably calculated to enable each child to make progress appropriate for that child's circumstances.

XII. FAIR LABOR STANDARD ACT

***Starnes v. Wallace,* –F.3d – No. 15-41341 (5th Cir., February 24, 2017)**

Plaintiff filed suit against Defendants, alleging that the antiretaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., was violated when she was terminated after raising concerns about whether a coworker's pay complied with the FLSA.

LeAnn Starnes worked at Daybreak Ventures, L.L.C., a company that employs thousands of individuals to work at nursing homes in Texas. Starnes was a Risk Manager in the corporate office. Sometime in late October or early November of 2010, coworker Ludy Estrada complained to Starnes that Daybreak was not paying Estrada's husband Vincent, a maintenance worker, for his travel time or overtime. Starnes met with the Director of Human Resources on behalf of Estrada who was fearful of losing her job if she reported the violation. Starnes relayed her belief that Daybreak was violating the law by the way it was paying Vincent. She reiterated this belief on a later date to the President of Daybreak who assured her the situation would be resolved. The issue was ultimately resolved in late 2011 after Ludy went to the Director of Human Resources herself. Ten days later, Daybreak laid off five employees, including Starnes and Ludy, purportedly due to financial difficulties related to cuts in Medicaid reimbursement rates. One of the employees, the President's son, had already accepted another position with a different company before being "let go." Two other employees were soon rehired in different positions within Daybreak.

After discovery, Daybreak moved for summary judgment on liability under the FLSA. The district court denied the motion with respect to Ludy. It found that she had established a prima facie case of retaliation and that a jury could conclude that the "cost cutting" justification for her termination was pretextual primarily because she and Starnes were the only employees who wanted to stay, but were "permanently let go" as a result of the supposed downsizing. The district court reached a different result as to Starnes, finding that she could not establish a prima facie case for two reasons. First, it concluded she did not engage in protected activity because she did not act outside her job duties in reporting the wage dispute. Second, it concluded that she could not establish causation because more than a year

elapsed between her reporting activity and termination.

The Court concluded that there was a factual dispute about whether Plaintiff was stepping outside her ordinary role as Risk Manager and giving fair notice to Daybreak that she was asserting rights adverse to it; Plaintiff had established the causal link required to establish a prima facie case; and there was sufficient evidence from which a jury could conclude that Daybreak's reasons for firing plaintiff was a pretext for retaliation. The court also concluded that the district court erred by dismissing Plaintiff's request for emotional damages. Finally, the court agreed with the district court that the state statute does not provide protection to employees reporting FLSA violations. Accordingly, the court affirmed in part, reversed in part, and remanded.

***Pineda v. JTCH Apartments, LLC,* –F.3d – No. 15-10932 (5th Cir., December 19, 2016)**

Plaintiff and his wife filed suit against JTCH alleging retaliation claims based on JTCH's demand of back rent after the filing of Plaintiff's initial suit seeking unpaid overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.

Santiago Pineda and Maria Pena, a married couple, lived in an apartment owned by JTCH Apartments, L.L.C. and leased to Pena. Pineda did maintenance work in and around the apartment complex. As part of Pineda's compensation for this work, JTCH discounted Pena's rent. Pineda filed this lawsuit initially just seeking unpaid overtime under the FLSA. He sued JTCH and its owner and manager, Simona Vizireanu. Three days after Pineda served JTCH with the summons, he and his wife received a notice to vacate their apartment for nonpayment of rent. The amount JTCH demanded equaled the rent reductions Pena had received over the period of Pineda's employment. In response to the notice, the couple left the apartment. Pena then joined Pineda's suit, and the amended complaint included retaliation claims based on the back rent demanded after the filing of the lawsuit. See 29 U.S.C. § 215(a)(3).

Defendants obtained judgement as a matter of law on Pena's retaliation claim as she was a nonemployee and outside the protections of the FLSA. At the charge conference, Pineda unsuccessfully sought an instruction on emotional distress damages for his retaliation claim. The jury found for Plaintiff on both his overtime wage claim and his retaliation claim.

This appeal raises two questions about the retaliation provision of the Fair Labor Standards Act: Does the Act allow a retaliation victim to recover damages for emotional distress? Does the Act protect a nonemployee spouse from employer backlash? The Court held that FLSA's broad authorization of "legal and equitable relief" encompasses compensation for emotional injuries suffered by an employee on account of employer retaliation. The Court also concluded that the district court correctly dismissed the wife's retaliation claim because the FLSA only prohibits discharging or discriminating against an "employee."

XIII. EQUAL PROTECTION OF THE 14TH AMENDMENT

***Integrity Collision Center v. City of Fulshear,* –F.3d – No. 15-20560 (5th Cir., September 20, 2016)**

Integrity and Buentello filed suit against the City, alleging that its refusal to include them on the non-consent tow list

violated the Equal Protection Clause of the Fourteenth Amendment.

After withdrawing from Fort Bend County's program in April 2012, the city established its own non-consent tow list of private companies it calls upon to tow vehicles that are to be impounded. The police chief included only two companies, Riverside Collision and A&M Automotive, thus excluding Integrity and Buentello, which are towing companies operating in the county. There was no formal process for reaching that decision. Integrity and Buentello sued the city contending that the city had no rational basis for excluding them despite being similarly situated to companies on the list. The city maintained that the Plaintiffs had no legal claim (because creating the list was a discretionary decision that was not subject to a class-of-one equal protection claim) and that there was a sufficient rational basis.

On appeal, the City challenged the district court's order requiring it to include Plaintiffs on the City's non-consent tow list and to develop neutral criteria for that list. The Court has previously held that a class-of-one equal-protection claim is unavailable in a public employment context. The Court concluded that this conclusion logically applies as well to a local government's discretionary decision to include or not include a company on a non-consent tow list. In the alternative, the Court concluded that Integrity and Buentello's class-of-one equal-protection claim fails because they have not shown that the City had a discriminatory intent and because the City has a rational basis for excluding them. Accordingly, the Court reversed and rendered a judgment of dismissal for the City.

XIV. ADEA

***Nicholson v. Securitas Security,* –F.3d – No. 15-10582 (5th Cir., July 18, 2016)**

Plaintiff was employed by Securitas, a security staffing company, and was placed as a receptionist at a company called Fidelity. Plaintiff filed suit against Securitas and Fidelity, alleging that they terminated her due to her age - she was 83-years-old. Plaintiff also alleged that Securitas terminated her in violation of Section 623(a) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621−34, and sought liquidated damages, injunctive relief, and attorney's fees.

There was evidence that Nicholson was 'well-liked' at Fidelity. Even so, in March 2012, Fidelity asked Securitas to remove her. Fidelity told Securitas that Nicholson was unable to perform new technology-related tasks. Securitas removed Nicholson from Fidelity on July 20, 2012, at which time Nicholson was 83 years old. Nicholson's replacement was age 29. Securitas then terminated Nicholson ten days later after it determined there were no other positions Nicholson could fill. The district court granted summary judgment for Securitas, holding that Ms. Nicholson failed to prove it was her employer and, in the alternative, Ms. Nicholson could not meet her ultimate burden to show Securitas would not have terminated her but-for her age.

The Court concluded that the district court erred as to the identity of the employer where Securitas admitted that it was Plaintiff's employer. It further held that there was some evidence which created a genuine dispute of material fact as to whether Securitas should have known that the client asked it to reassign an employee for age-biased reasons and, therefore, the Court reversed the grant of summary

judgment as to this issue. The Court affirmed summary judgment on Plaintiff's termination claim, because it was uncontested that there were no other positions Ms. Nicholson was qualified to fill. Finally, depending on the outcome of the district court's re-evaluation of whether Securitas did enough once learning Fidelity wanted Plaintiff removed, the district court should also consider whether that re-evaluation affects its earlier analysis of Securitas's decision to terminate her. Accordingly, the court affirmed in part, reversed in part, and remanded.

XV. § 1981

Morris v. Town of Independence, **– F.3d – No. 15-30986(5th Cir., June 28, 2016)**

Plaintiff filed suit against the Town and Mayor Ragusa, alleging a claim of racial discrimination under 42 U.S.C. 1981. Morris, an African-American woman, was a part-time employee of the Town of Independence (the Town). Morris's exact role of employment with the town was seemingly undefined but it appears that she acted as a "water clerk" and was subordinate to the Assistant Town Clerk. Morris was discharged seven months after she was hired due to budget cuts, performance concerns (which were undocumented), and the Mayor's understanding that Morris was had another job opportunity. Morris argued that the proffered reasons for her termination were pretext for racial discrimination. She noted that a Caucasian, full-time, Assistant Town Clerk did not lose her job; a white male and white female were hired after her termination; and she never received any disciplinary complaints. The district court appeared inclined to agree that Morris had not established that similarly situated employees were treated more favorably than her under nearly identical circumstances. Regardless, it assumed without deciding that she had, and instead held that Morris failed to carry her burden to demonstrate that Defendants' proffered reasons for termination were pretext for racial discrimination. The district court granted summary judgment for Defendants.

The Court affirmed the judgment holding that Plaintiff failed to make a prima facie case of discrimination where she offered no evidence that the comparator, or any other employee, was retained despite performance concerns. To the extent that the Sixth Circuit's requirement that the differences between a Plaintiff and proffered comparators be relevant to the challenged employment action differs from the law in this circuit, about which the Court expressed no opinion, Plaintiff has not made the requisite showing. The Court also concluded that to the extent Plaintiff's claims are intended to support a failure-to-train or failure-to-promote cause of action, they are deemed abandoned. Plaintiff failed to identify any Town employees that received training or promotions while Plaintiff did not.